No. 20-20574

In the United States Court of Appeals
For the Fifth Circuit

Steven F. Hotze, M.D.; Wendell Champion; Honorable Steve Toth; Sharon Hemphill,

Plaintiffs - Appellants

v.

Chris Hollins, in his official capacity as Harris County Clerk,

Defendant - Appellee

Andrea Chilton Greer; Yekaterina Snezhkova; Joy Davis-Harasemay; Diana Untermeyer; Michelle Covard; Karen Vidor; Malkia Hutchinson-Arvizu; Anton Montano; Helen Shelton; Elizabeh Furler; Alan Mauk; Jenn Rainey; Brian Singh; Mary Bacon; Kimberly Phipps-Nichol; Nyguen Griggs; Nelson Vanegas; Jessica Goodspero; Amy Ashmore; Richard Frankel; Elaine Frankel; Ryan Frankel; Celia Veselka; Sergio Aldana; Russell "Rusty" Hardin; Douglas Moll; Carey Jordan; Christina Massara; Jerelyn M. Gooden; Stanley G. Schneider; Mary Currie; Carlton Currie, Jr.; Jekaya Simmons; Daniel Coleman; David Hobbs; Bettye Hobbs,

Intervenor Defendants - Appellees

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Appeal from the United States District Court for the
Southern District of Texas, Houston Division; No. 4:20-CV-3709

BRIEF OF DEFENDANT-APPELLEE CHRIS HOLLINS, IN HIS OFFICIAL CAPACITY AS HARRIS COUNTY CLERK

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CERTIFICATE OF INTERESTED PERSONS

***Hotze, et al. v. Hollins, et al.*; No. 20-20574**

Pursuant to 5TH CIR. R. 28.2.1, the undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Appellants: STEVEN HOTZE, M.D., WENDELL CHAMPION, HON. STEVE TOTH, AND SHARON HEMPHILL, using undersigned counsel Andrew L. Schlafly, 939 Old Chester Rd., Far Hills, NJ, and Jared Woodfill, Woodfill Law Firm, P.C., 3 Riverway, Suite 750, Houston, TX.

Appellee: CHRIS HOLLINS, in his official capacity as Harris County Clerk, represented by Richard Warren Mithoff, Jr., of Mithoff Law Firm, 500 Dallas St., Suite 3450, Houston, TX.

Intervenors and Movants to Intervene below: Texas Coalition of Black Democrats, represented by Carvana Yvonne Cloud of The Cloud Law Firm, 8226 Antoine Drive, Houston TX.

S. Shawn Stephens, Jaime Lyn and Michele Royer, Glenda Lee Greene, Jaime Lyn Watson, Jerelyn M Gooden, represented by Charles Stein Siegel of Waters & Kraus, LLP, 3141 Hood St., Suite 700, Dallas TX, and Kenneth Royce Barrett of KBR Law, 3740 Greenbriar, Houston, TX.

Elizabeth Hernandez for Congress represented by S Nasim Ahmad, The Ahmad Law Firm, The Woodlands, TX.

Texas State Conference of NAACP Branches, Common Cause Texas, Andrea Chilton Greer, Yekaterina Snezhkova, represented by Lindsey Beth Cohan, Dechert LLP, Austin, TX.

League of Women Voters of Texas, Joy Davis-Harasemay, Diana Untermeyer, Michelle Colvard, Keren Vidor, Malkia Hutchinson-Arvizu, Anton Montano,

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Helen Anice Shelton, Elizabeth Furler, represented by Andrew Ivan Segura, ACLU of Texas, Houston, TX.

David L. Hobbs and Bettye Hobbs, represented by David L. Hobbs of Fleming Nolen and Jez LLP, 2800 Post Oak Blvd., Ste 4000, Houston, TX.

MJ for Texas, DSCC, DCCC, Mary Currie, Carlton Currie,Jr., Jekaya Simmons, Daniel Coleman, represented by Daniel Osher, Marc Elias, and Skyler Michelle Howton, of Perkins Coie LLP in Washington, D.C., and Dallas TX.

Richard, Elaine, and Ryan Frankel, Celia Veselka, Sergio Aldana, Russell "Rusty" Hardin, Douglas Moll, Carey Jordan, Alan Mauk, Jenn Rainey, Brian Singh, Mary Bacon, Kimberly Phipps-Nichol, Nyguen Griggs, Nelson Vanegas, Jessica Goodspero, Amy Ashmore, Christina Massara, represented by Larry Richard Veselka of Smyser Kaplan et al, Houston TX.

Stanley G. Schneider, represented by himself of Schneider and McKinney P C, Houston, TX.

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Dated: March 12, 2021

/s/ Richard W. Mithoff
Richard W. Mithoff
Attorney of Record for
Defendant/Appellee, Chris Hollins

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unwarranted. This appeal is not even justiciable, much less deserving of relief on the merits.

First, the only relief requested—a future permanent injunction against "drive-through voting"—is unripe and speculative because nothing in this record establishes that Harris County will use this procedure again in future elections. Thus, the appeal should be dismissed on the summary calendar.

Second, the district court correctly ruled that the appellants lack standing to assert their claims. The applicable principles are firmly settled and oral argument would add nothing to this Court's deliberations.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over appeals from the denial of a motion for a preliminary injunction, 12 U.S.C. § 1292(a)(1), and appeals from a final judgment. 12 U.S.C. § 1291. The district court entered both orders.

But the complaints in this appeal are not justiciable because they are unripe, and because Appellants lack standing. This Court lacks subject-matter jurisdiction because there is no case or controversy as required by Article III. These barriers to federal judicial review are addressed in Parts I-II of this brief.

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STATEMENT OF THE ISSUES

1. Whether Appellants' request for a future injunction is unripe and whether they lack standing to request such an injunction at this premature stage because no future injury is imminent.

2. Whether Appellants lack standing to assert any federal claims because Elections Clause standing is limited to the legislative body, not individual citizens, while Equal Protection Clause standing cannot be based on generalized grievances such as those asserted in this case.

3. Whether Appellee had an obligation to cross-appeal from a judgment that was entirely in his favor and from which he needed no relief.

4. Whether Appellants' complaints, if cognizable, are baseless because (a) they do not rise to the level of federal constitutional violations and (b) they do not even establish a violation of state election law.

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STATEMENT OF THE CASE

In response to the challenges posed by conducting an election in a pandemic, the Harris County Commissioners Court voted to authorize "drive-through voting" (a procedure through which voting locations are situated inside garages and tents), allowing voters to cast their votes in the November 2020 election without leaving the security of their vehicles. ROA.20-20574.739. This procedure is manifestly not the same as "curbside voting," which is governed by its own special rules.

This proposal was not a partisan initiative. It was unanimously adopted by the Commissioners Court—with the support of both Democrats and Republicans. ROA.20-20574.739. It was approved by the Secretary of State's Elections Office. ROA.20-20574.727. And it was publicly lauded as a smart and successful solution to the challenges posed by the pandemic. ROA.20-20574.734–37.

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But polling during the early voting period revealed that Democratic voters were turning out more heavily than Republicans, at which point these Appellants (Republican voters, candidates, and officeholders) and their counsel (one of whom is the chair of the Harris County Republican Party) experienced an epiphany and began to criticize the practice. This litigation followed.

Appellants' request for injunctive relief was dismissed for a lack of standing. ROA.20-20574.1442. The district court did not adopt their incendiary allegations, and Appellants are not entitled to have them taken as true in this appeal.

Drive-Through Voting Is Adopted by a Bipartisan Commissioners Court, Months in Advance of the November 2020 Election

With hyper-partisan rhetoric, Appellants claim that drive-through voting was "set up by the Democratic election official Hollins almost entirely in Democratic-voting areas of Harris County." App. Br. at 22, 24, 31. Those allegations are false. Appellants are not entitled to have their fanciful version of the facts taken as true.

Plans for drive-through polling places were announced on June 15, 2020. ROA.20-20574.724. Throughout the summer, the Harris County Clerk—who was serving as the election official—held "stakeholder meetings" to discuss the issues related to the election. ROA.20-20574.727. These stakeholder meetings included representatives from the Harris County Republican Party, and the subjects included drive-through voting. *Id.* On July 10, the Clerk tested drive-through voting at one polling place during the primary run-off, and then issued a press release about it. ROA.20-20574.731. On July 29, the Harris County Attorney approved the legality of drive-through voting. ROA.20-20574.732–33.

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In an effort to assure that the drive-through voting initiative complied with the Texas Election Code, the County Clerk consulted with the Elections Division of the Texas Secretary of State—a Republican officeholder. ROA.20-20574.727. The Secretary of State's office approved of the practice and even offered guidance to make sure it complied with all applicable laws. ROA.20-20574.727.

In Harris County, the Clerk does not have unilateral control over election administration, election procedure, or polling locations. *See* ROA.20-20574.907–08. These decisions must be approved by the Harris County Commissioners Court, which is an elected body now composed of three Democrats and two Republicans. ROA.20-20574.907–08. On August 25, the Commissioners *unanimously* approved a plan to establish drive-through polling places for the November general election. ROA.20-20574.739. The Commissioners also *unanimously* approved the locations of the drive-through voting polling places. ROA.20-20574.739.

Appellants claim these polling places were all in "Democratic strongholds." App. Br. at 31. If that charge were true, one would justifiably expect that the two Republican commissioners would have objected and voted against the locations. Instead, they *unanimously* approved the locations. ROA.20-20574.739.

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A map of Harris County reveals that the drive-through polling places were scattered around the county in a logical manner:

- one location was in downtown Houston (Toyota Center);
- five locations were distributed in a circle around an interior highway known as Loop 610 (NRG Arena, Houston Community College West Loop South, Resurrection Metropolitan Church, Houston Food Bank, John Phelps Courthouse);
- four locations were distributed around an exterior highway known as Beltway 8 (Kingdom Builders Center, Houston Community College Alief Center, Fallbrook Church, Humble Civic Center).

ROA.20-20574.901.

Appellants' suggestion that NRG Arena (a multi-use facility that hosts the Houston Livestock Show and Rodeo, among other events) and the Toyota Center (home of the Houston Rockets) are "Democratic strongholds" is not well-founded. Those public event centers are well-known landmarks to Harris County residents. As for the other eight locations, two locations were located in each of the four County Commissioners' precincts with their input and approval—including that of the two Republican Commissioners. ROA.20-20574.907.

These voting locations involved tented structures "constructed of metal frames and durable tent covers covering a space of at least ten feet by twenty feet, with a ten-foot lane for a car to pass through." ROA.20-20574.728. Voters could drive into the enclosed structure, access a voting tablet identical in every way to the tablets used in all other Harris County polling places, and cast their votes from the security of their vehicles. ROA.20-20574.728–29.

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Appellants claim there were widespread irregularities in these polling places, but they presented no live testimony at the preliminary injunction hearing so their "witnesses" could not be cross-examined. The district court made no findings in support of their incendiary allegations, which cannot be taken as true here.

Importantly, one of the drive-through voting locations—Toyota Center—was located inside a permanent parking garage. ROA.20-20574.577. That fact has legal significance for this appeal, as we shall explain later in this brief.

On September 29, the Commissioners Court accepted a $9.6 million grant, designated in part to support drive-through voting locations. ROA.20-20574.821. The grant application was predicated on the unique challenges posed by the COVD-19 pandemic, ROA.20-20574.825, and the grant funds had to be used "exclusively for the public purpose of planning and operating a safe and secure November 3rd election in Harris County . . . ." ROA.20-20574.821; *see also* ROA.20-20574.822 ("The grant funds must be used exclusively for the public purpose of planning and operationalizing safe and secure election administration in Harris County in 2020."); ROA.20-20574.822 ("The Grantee shall expend the amount of this grant for the Purpose by December 31, 2020.").

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Appellants Initiate a Last-Minute Partisan Assault on Drive-Through Voting

As early voting polls began to reveal differences in voter turnout between Democratic and Republican voters—a fact widely reported in the national media—what had begun as a bipartisan exercise in "good government" and an initiative to protect public health became a political hot button. As the election was underway, a mandamus proceeding was filed in state court to enjoin drive-through voting. The state court of appeals dismissed the action for lack of standing, *In re Pichardo*, No. 14-20-00697-CV, 2020 WL 6051700, at *2 (Tex. App.—Houston [14th Dist.] Oct. 14, 2020, no pet.), and unjustified delay. *Id*. at *3. The Texas Supreme Court also denied mandamus relief. *In re Hotze*, 610 S.W.3d 909 (Tex. 2020).

Undeterred, on October 28, 2020—just two days before the conclusion of the early voting period and after more than 100,000 Texans had cast their ballots at drive-through polling places—Appellants filed suit in the U.S. District Court for the Southern District of Texas and requested both an injunction and invalidation of all early votes cast at the drive-through polling places. ROA.20-20574.018–35. Their extraordinary request sought to invalidate votes cast by 126,912 citizens—from both political parties—who already had voted at drive-through locations. ROA.20-20574.908.

The Clerk responded, with the support of numerous intervenors and amici, arguing that Appellants lacked standing, the district court should not intervene in an ongoing election, and the claims were flawed both as a matter of federal law and as a matter of statutory construction. ROA.20-20574.596–634. The Clerk pointed out that Appellants had filed a petition in the Texas Supreme Court alleging the same violations of the Election Code, asserting the same federal rights, and seeking the same relief. ROA.20-20574.638–72. That petition was denied. ROA.20-20574.635.

The district court held a hearing and heard both from the parties and from a number of intervenors—including individual citizens from both parties who had voted at the drive-through polling places. ROA.20-20574.1439–41.

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The District Court dismisses for lack of standing

At the end of the hearing, the district court ruled that Appellants lacked Article III standing and dismissed their case. ROA.20-20574.1442. Nevertheless, the judge offered his observations about the meaning of the Texas Election Code. ROA.20-20574.1442–1445. Coming from a judge without Article III jurisdiction, this was an advisory opinion. Still, the judge's comments were instructive.

With respect to early voting, the judge perceived no violation of Texas law. ROA.20-20574.1443. The relevant statute allows early-voting polling places in "structures" and all the drive-through voting locations satisfied that criterion. *Id.*

With respect to Election Day, the relevant statute allows polling places in "buildings" and the judge expressed his own opinion that tents are not "buildings." ROA.20-20574.1445.

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Later that day, the court entered a final judgment dismissing the case and issued a short opinion setting forth its reasoning. ROA.20-20574.1427–1435.

Although he was not bound to do so, the Clerk took the advisory portions of the district judge's comments seriously. The Clerk cancelled drive-through voting on Election Day at all locations except inside the Toyota Center parking garage—which undeniably qualified as a "building."[1]

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[1] https://www.texastribune.org/2020/11/02/harris-county-drive-thru-locations-closed/ (last visited March 10, 2021).

Appellants press on with their appeal

Appellants quickly noticed an appeal and requested emergency relief from this Court, which was denied. *Hotze v. Hollins*, No. 20-20574, 2020 WL 6440440 (5th Cir. Nov. 2, 2020).

Following the election, all votes were counted and the results were certified.[2] Accordingly, Appellee anticipated that this appeal would be dismissed. Instead, Appellants have elected to prosecute the appeal on the limited but quixotic basis of hoping to block drive-through voting in the future. *See* App. Br. at 34.

Meanwhile, life has moved on. A new County Clerk has now taken office.[3] The Harris County Commissioners Court has named an Elections Administrator, creating a new office to take over the responsibility previously held by the Clerk.[4] Nothing in this record reflects any actions by the new County Clerk or the new Elections Administrator with respect to drive-through voting. More important, nothing in this record indicates any official action by the Commissioners Court—the body with legal authority to approve polling places—with respect to the use of drive-through voting in any future elections.

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[2] https://results.texas-election.com/races (last visited March 10, 2021).

[3] https://www.cclerk.hctx.net/PressReleases/Teneshia%20Hudspeth%20Sworn%20in%20as%20Harris%20County%20Clerk.pdf (last visited March 10, 2021).

[4] https://www.chron.com/news/houston-texas/article/harris-county-elections-isabel-longoria-15776502.php (last visited March 10, 2021).

SUMMARY OF THE ARGUMENT

This appeal is not justiciable for (at least) two independent reasons. It is not meritorious in any event. And it is not worth this Court's time.

1. The only relief requested in this appeal is a permanent injunction against the use of drive-through voting in future elections. But this procedure was specially adopted for the November 2020 election due to COVID-19 and nothing in this record shows that the Harris County Commissioners Court has any plans—or sufficient funds—to repeat it in future elections. Hence Appellants' complaints are unripe and they lack standing because the injury they fear is not imminent.

2. In addition, the district court correctly ruled Appellants lack standing because they assert generalized grievances. With respect to the Elections Clause, standing resides only with the Legislature—not individual citizens. With respect to the Equal Protection Clause, Appellants offered no individualized grievance that differentiates them from all voters. Generalized grievances are not cognizable.

3. Appellants claim the Clerk is bound by the district court's comments that drive-through voting likely violates the Texas Election Code on Election Day (as opposed to during the early-voting period). But there was no adverse judgment so the Clerk was under no obligation to appeal from the district court's comments (which did not have legal force in any event, since the court lacked jurisdiction). The judgment was entirely in favor of Appellee.

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4. Finally, if it were necessary to reach the merits, this appeal is flawed. First, even if Appellants' complaints were valid, they would be nothing more than run-of-the-mill disputes about the meaning of the Texas Election Code; they do not rise to the level of a federal constitutional claim. As to the Elections Clause claim, drive-through voting does not represent a significant departure from the scheme adopted by the Texas Legislature; whether it is legal or not turns on whether locations used for drive-through polling places are "structures" or "buildings." Regardless of the answer, a good-faith interpretation of the meaning of those terms in the Texas Elections Code bears no resemblance to the dramatic departure from a state election scheme that caused concern in *Bush v. Gore*, 531 U.S. 98 (2000). The equal protection claim is even less forceful on the merits, as the County Clerk has jurisdiction only in Harris County and there is no dispute that he treated every Harris County voter in exactly the same way. Whether or not drive-through voting is valid under Texas law, it is not an equal protection issue.

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Second, under the Texas Election Code, Appellants' complaints are invalid. The district court correctly opined that drive-through voting is compatible with the statutes governing early voting because temporary drive-through polling places are "structures" within the ordinary meaning of that term, and for Election Day voting, at least some (if not all) drive-through polling places can be located in "buildings." Appellants base their arguments on a distinct and inapposite statutory scheme.

ARGUMENT

I. This Appeal Is Not Justiciable and Should Be Dismissed.

The district court correctly dismissed this case for lack of standing, and now, the justiciability problems are even more acute. Any complaint about the use of drive-through voting in the November 2020 election is moot, and under this record, a request for injunctive relief against the use of drive-through voting in the future is speculative and unripe. Appellants never had standing to litigate their claims, and now they double down on their defective standing by asking this Court for an advisory opinion—which they concede "Article III standing doctrine prohibits." App. Br. at 19. This appeal should be dismissed and the Court should not find it necessary to reach any other issue.

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A. Any complaint about drive-through voting in the November 2020 election is obviously moot.

We begin with a self-evident proposition that we believe is common ground: any complaint about drive-through voting in the November 2020 election is moot. We do not interpret Appellants' brief to seek any relief related to the last election (undoubtedly for this reason). Although Appellants complain about "illegal votes" in the November election, App. Br. at 12–13, 18–19, the brief requests no remedy. Rather, Appellants only ask this Court to hold they have Article III standing and "issue an order prohibiting use of drive-through voting in *future* elections in Texas under current law." *Id*. at 34 (emphasis added).

This limitation on the scope of the requested relief is unavoidable because all elections included on the November 2020 ballot have been certified. Therefore, any complaints about that election are moot. *See, e.g.*, *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010); *Harris v. City of Houston*, 151 F.3d 186, 189-91 (5th Cir. 1998) (dismissing as moot because appellants were seeking relief about an election that had already concluded); *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012) (request for an injunction is moot after the event to be enjoined has already occurred).

Thus, with respect to the November 2020 election, it makes no difference whether Appellants had standing when they filed suit. "[A] case or controversy must exist at all stages of the litigation, not just at the time the suit was filed." *Lopez*, 617 F.3d at 340; *Bayou Liberty Ass'n, Inc. v. US Army Corps of Engineers*, 217 F.3d 393, 396 (5th Cir. 2000). Complaints about the November 2020 election are moot and non-justiciable.

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B. A challenge to drive-through voting "in future elections in Texas" is unripe and no injury to Appellants' interests is imminent.

On the other hand, Appellants' challenge to the use of drive-through voting in future elections and desire for "an order prohibiting use of drive-through voting in future elections in Texas under current law," App. Br. at 34, is not yet ripe and Appellants cannot demonstrate an Article III injury-in-fact. The reason is simple: nothing in this record indicates that drive-through voting will recur in the future.

Appellants allege they suffered injuries-in-fact from drive-through voting in the November 2020 election, App. Br. at 12–13, but they do not establish that drive-through voting will be used again in any future elections in Harris County. They cannot, because nothing in this record would support that proposition.

As explained above, county officials do not unilaterally control elections; election locations must be approved by the Harris County Commissioners Court. *See* pp. 5-6, *supra*. The official action that authorized drive-through voting for the November 2020 election was a unanimous decision by the Commissioners Court. *See* ROA.20-20574.739; ROA.20-20574.907–08; *see also* p.5, *supra*. Crucially, for present purposes, this action was not a permanent decision; it applied only to "the November 3, 2020 General and Special Elections." ROA.20-20574.739.

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Furthermore, the drive-through voting initiative was supported by a grant of nearly $10 million that had to be used "exclusively for the public purpose of planning and operating a safe and secure November 3rd election in Harris County as detailed by the Safe Voting Plan submitted by our office." ROA.20-20574.821; *see also* ROA.20-20574.822 ("The grant funds must be used exclusively for the public purpose of planning and operationalizing safe and secure election administration in Harris County in 2020."); ROA.20-20574.822 ("The Grantee shall expend the amount of this grant for the Purpose by December 31, 2020.").

This grant application was specifically predicated on the unique challenges posed by the November 2020 election in the midst of the COVID-19 pandemic:

> Harris County faces significant challenges in executing the November 3, 2020 general election. Specifically, the global COVID-19 pandemic, an expected substantial increase in voter turnout, and the need to ensure voting is safe, secure, accessible, fair, and efficient culminate in the need for additional services not provided in past elections.

ROA.20-20574.825. Funding for drive-through voting was a prominent part of the grant application. ROA.20-20574.825–26.

The Commissioners Court voted to accept this grant, subject to all its terms. ROA.20-20574.821; ROA.20-20574.828. This was a one-time decision.

Nothing in this record indicates that the Commissioners Court will approve the use of drive-through voting in future elections. Indeed, given that this initiative was a direct response to the special challenges posed by the COVID-19 pandemic, nothing in this record indicates that any county official[5] will recommend the use of drive-through voting in future elections. Finally, nothing in this record indicates that grant funds would be available for drive-through voting in future elections—much less that the Commissioners Court would vote to accept such grant funds. On all these issues, the record is silent.

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[5] The Commissioners Court recently created a new position, the Harris County Elections Administrator, who took office after the 2020 election. See https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-appoints-Isabel-Longoria-as-first-15689377.php (last visited March 10, 2021).

In short, Appellants' request that this Court "issue an order prohibiting use of drive-through voting in future elections in Texas," App. Br. at 34, is premature. The Commissioners Court has not voted to approve drive-through voting in any future elections and there is no evidence that such an action is imminent. Indeed, given that the responsibility for election administration no longer rests with the County Clerk, but with the newly-created Harris County Election Administrator, *see* n.5, *supra*, an injunction directed at the County Clerk would have no effect. Finally, the Texas Legislature is in now session and legislation has been proposed regarding drive-through voting. *See*, e.g., Tex. H.B. 1573, 87th Leg., R.S. (2021); Tex. H.B. 3247, 87th Leg., R.S. (2021); Texas H.B. 3303, 87th Leg., R.S. (2021); Tex. S.B. 1215, 87th Leg., R.S. (2021). It is very likely that, by the time the issue becomes ripe for decision, Texas law will have changed.

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Given the silence of this record concerning the use of drive-through voting in future elections—and the uncertainty created by the current legislative session—this appeal is not justiciable for two closely related reasons: the question is unripe and Appellants cannot show any actual or imminent injury-in-fact. In sum, there is no case or controversy. "Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008) (quoting *Renne v. Geary*, 501 U.S. 312, 320 (1991)).

First, it is settled that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted). Election disputes are frequently dismissed on this basis. *See, e.g.*, *Renne v. Geary*, 501 U.S. 312, 321–22 (1991) (holding that challenge to statute that prohibited political parties from endorsing candidates from nonpartisan offices was not ripe, *inter alia*, because the plaintiff party had not shown an intent to endorse candidates in future elections); *Lopez*, 617 F.3d at 341–42 (holding that redistricting challenge was unripe because new census figures would be available before the next election, which would give the defendant an opportunity to redraw and rebalance districts); *Barbour*, 529 F.3d at 547 (holding that challenge to election statute was unripe until a party attempted to enforce or violate the statute).

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The ripeness doctrine is grounded in the "case or controversy" requirement of Article III and its prohibition against advisory opinions. Its "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ." *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012). The doctrine applies with full force in this case, as nothing in this record establishes that drive-through voting will be used in any future elections; this is a case about "contingent future events" that "may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300.

Appellants cannot avoid this conclusion in their reply brief by invoking the very narrow exception for acts that are "capable of repetition, yet evading review." Under this exception, the party seeking judicial intervention must demonstrate both that the challenged action was too short in duration to be fully litigated and also that there is a "reasonable expectation that the same complaining party would be subjected to the same action again." *Lopez*, 617 F.3d at 340. This latter element requires proof of a "demonstrated probability or reasonable expectation, not merely a theoretical possibility, that it will be subject to the same government action." *Id.* The exception is inapplicable where a government "has not formed a policy that it will follow in future similar circumstances that are likely to repeat." *Id.* As such, the absence of any official decision about drive-through voting in future elections (and the absence of evidence in the record to suggest such a decision is imminent) forecloses any resort to the exception. This appeal is unripe.

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Second, the same conclusion can be reached under the doctrine of standing, as the ripeness and standing doctrines have a "shared requirement that the injury be imminent rather than conjectural." *Barbour*, 529 F.3d at 545. Under Article III, every litigant seeking judicial relief must establish an injury-in-fact, which means "the actual or imminent invasion of a legally protected interest, which must be concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, no future invasion of Appellants' rights is "imminent."

As the Supreme Court has held, an "imminent" injury cannot be speculative; the injury must be "'*certainly* impending.'" *Id*. at 564 n.2 (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("A threatened injury must be "'certainly impending'" to constitute injury in fact.") (citations omitted). This test is not met when a litigant must speculate about a government's intentions. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409–14 (2013) (citing cases). This case falls squarely within the Court's "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Id*. at 414.

Recent Supreme Court decisions reflect a steadfast emphasis on standing, which the Court regards as the "fundamental limitation" on federal judicial power. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Strict fealty to the standing doctrine "confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). In short, it "serves to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper*, 568 U.S. at 408, and thus "ensur[es] that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). Appellants hope to drag this Court into a political debate, but Article III forbids it. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Id*.

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II. Appellants Lack Standing to Litigate Either of Their Claims.

Not only do Appellants lack standing to prosecute this appeal because they cannot demonstrate any "imminent" injury-in-fact with respect to future elections, but they *never* had standing to sue in the first place. Their claims are based on Article I, section IV, clause 1 of the U.S. Constitution (the "Elections Clause") and the Equal Protection Clause of the Fourteenth Amendment. ROA.20-20574.26. But the district court correctly held they lacked standing to assert either claim. ROA.20-20574.1442.

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A. Standing must be established for each claim independently.

Standing must exist for "each claim." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citing cases). Appellants improperly blur the claims when arguing about standing and the merits, but they must be analyzed separately.

B. Appellants lack standing to assert an Elections Clause claim.

First, the Elections Clause claim alleges the violation of a right that belongs to the Texas Legislature as an institution—not to any individual voter, candidate, or even individual legislator. None of the Appellants can establish any individual injury-in-fact that provides standing to litigate this claim. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007); *Bognet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d 336, 349 (3rd Cir. 2020). The U.S. Supreme Court's reasoning in *Lance* is directly applicable here:

> The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing. Because plaintiffs assert no particularized stake in the litigation, we hold that they lack standing to bring their Elections Clause claim.

Lance, 549 U.S. at 442 (distinguishing *Baker v. Carr*, 369 U.S. 186 (1962)).

This conclusion is not altered by the fact that one of the Appellants here, Representative Toth, is a member of the Texas Legislature. At least with respect to the Elections Clause claim, Representative Toth has suffered no individual injury; he alleges an "institutional injury" that is "wholly abstract and widely dispersed." *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

Importantly, this is not a case in which the entire Legislature is appearing as "an institutional plaintiff asserting an institutional injury" that has commenced suit "after authorizing votes in both of its chambers." *Arizona State Leg. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015). Representative Toth is acting alone, and he lacks standing in that capacity. *See Raines*, 521 U.S. at 830 (holding that six individual members of Congress lacked standing to challenge the Line Item Veto Act); *compare Coleman v. Miller*, 307 U.S. 433, 438 (1939) (holding that a group of twenty state senators had standing to challenge state ratification of federal constitutional amendment because their numbers were "sufficient to defeat the resolution").

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Because Representative Toth is not acting on behalf of the Texas Legislature he has no standing to assert the Elections Clause claim. *Raines*, 521 U.S. at 830; *Corman v. Torres*, 287 F. Supp.3d 558, 567–69 (M.D. Pa. 2018) (three-judge court applying this rule to state legislators alleging Elections Clause violations). Moreover, that Representative Toth and Mr. Champion were candidates for office during the 2020 election makes no difference as to their Elections Clause claim; the claim belongs to the Texas Legislature, not to candidates. *See Bognet*, 980 F.3d at 349.

C. Appellants lack standing to assert their Equal Protection claim.

Nor do Appellants have standing to assert the Equal Protection Clause claim. In theory, Appellants *might* have been able to formulate equal protection claims. Individual voters certainly can have standing to bring a claim for violation of the Equal Protection Clause—if they reside in a congressional district that has been racially gerrymandered, for instance. *See Bush v. Vera*, 517 U.S. 952, 958 (1996). But as their claim is formulated, none of the Appellants has demonstrated any individual and particularized injury that differentiates them from all other voters. Instead, their Equal Protection claim is premised on the idea that equal protection is violated because Harris County voters are being treated differently from voters in other Texas counties. *See* ROA.20-20574.28. That theory is not a cognizable equal protection claim.

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Appellants do not allege they are suffering any *individual* injury; instead, they complain that—*as a group*—they are treated differently than other groups. "[T]he fundamental problem" with this formulation of their equal protection claim is that "[i]t is a case about group political interests, not individual legal rights." *Gill v. Whitford*, 138 S. Ct. 1916, 1922 (2018).

Generalized grievances about local election practices do not afford standing to individual voters. Appellants may disagree with the use of drive-through voting, but the challenged practice applies in the same way to all voters in Harris County; "recognizing standing based on such an 'undifferentiated' injury is fundamentally 'inconsistent' with the exercise of the judicial power." *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 731 (7th Cir. 2020) (internal citation omitted). Courts around the country have routinely dismissed similar equal protection claims challenging election procedures in the aftermath of the 2020 election.[6] Here, too, none of the Appellants alleges a personal violation of the Equal Protection Clause. They have not, for instance, alleged that they were prevented from casting a vote or that another person's vote was given greater weight than their vote. Instead, they offer only a generalized grievance applicable to all voters in Harris County, which is not a cognizable equal protection claim. *See* ROA.20-20574.28.

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[6] *See, e.g.*, *Bognet*, 980 F.3d at 352–53; *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *5 (D. Ariz. Dec. 9, 2020); *Wood v. Raffensperger*, No. 1:20-CV-04651-SDG, 2020 WL 6817513, at *5 (N.D. Ga. Nov. 20, 2020), *aff'd*, 981 F.3d 1307 (11th Cir. 2020), *cert. denied*, 20-799, 2021 WL 666431 (U.S. Feb. 22, 2021).

D. Appellants' arguments do not solve their standing issue.

Appellants' arguments about standing are unsound. *See* App. Br. at 11–20. Tellingly, Appellants make no serious attempt to show that they have standing for each independent claim, as is required. *See Town of Chester*, 137 S. Ct. at 1650. Instead, they rely on abstract propositions that do not solve their standing problem.

First, Appellants assert they have standing because drive-through voting "might dilute their vote." App. Br. at 12–17. This "dilution" and "nullification" argument reveals a basic misunderstanding of cognizable vote dilution claims. Allegations of vote dilution can provide a basis for standing in an appropriate case. *See United States v. Hays*, 515 U.S. 737, 744 (1995) (racial gerrymandering case). But "vote dilution under the Equal Protection Clause is concerned with votes being weighed differently." *Bognet*, 980 F.3d at 360 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019)). "Vote dilution," in other words, "refers to the idea that each vote must carry equal weight." *Rucho*, 139 S. Ct. at 2501. This concern is not applicable to a complaint about election procedures that apply to all voters, which is "'a paradigmatic generalized grievance that cannot support standing.'" *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020), *cert. denied*, No. 20-799, 2021 WL 666431 (U.S. Feb. 22, 2021) (citing *Bognet*, 980 F.3d at 356); *see also Bowyer*, 2020 WL 7238261, at *5–6; *Moore v. Circosta*, No. 1:20CV911, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020).

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Appellants do not complain that their votes have been given less weight than any other voter in Harris County, so their reliance on racial gerrymandering cases and race-based vote dilution cases is misplaced. *See* App. Br. at 14, 15 (citing *Harding v. City of Dallas*, 948 F.3d 302, 307 (5th Cir. 2020); *LULAC v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011)).

Appellants' analogy to the Texas voter-ID litigation is similarly misplaced. *See* App. Br. at 14. Those litigants had standing because they alleged it would be difficult for them to obtain an ID, and as a result, they would lose the right to vote. *Veasey v. Abbott*, 830 F.3d 216, 227 n.8 (5th Cir. 2016). Appellants do not allege (nor could they) that drive-through voting prevents them from casting a ballot.

Finally, Appellants cannot distinguish *Lance*, which dooms their standing under the Elections Clause. *See* App. Br. at 15–16. Appellants argue that *Lance* does not apply because they lost a "preexisting right to vote for certain offices." *Id.* at 15. Again, drive-through voting does not stop anyone from casting a ballot; this argument makes no sense and it is no answer to *Lance*. Appellants also argue that *Lance* does not apply because there was prior state-court litigation in that case. *Id*. at 15–16. But the fact that the Colorado General Assembly had previously filed suit over the issues in *Lance* is precisely the point—the state legislature would have had standing to bring a claim under the Elections Clause. Individual voters, like Appellants in this case, do not. *Lance*, 549 U.S. at 442.

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III. There Was No Adverse Judgment to Cross-Appeal With Respect to Election Day Voting.

Appellants wrongly argue that by not filing a cross-appeal from a judgment in his favor, the Clerk somehow waived arguments regarding drive-through voting on Election Day. App. Br. at 20–22. This argument fundamentally misconceives basic principles of federal jurisdiction and appellate procedure.

The district court dismissed Appellants' case based on a lack of standing. ROA.20-20574.1427–30. Finding no Article III case or controversy to adjudicate, the district court was at the end of its inquiry. The rest of the judge's commentary regarding the merits of a preliminary injunction—while plainly well-intentioned—was an advisory opinion without any legal effect. ROA.20-20574.1430–35.

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A federal court may not reach the merits in the face of a jurisdictional defect. *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 93–102 (1998). This rule is the ultimate principle of judicial restraint. "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at 101–02. It has a venerable history in federal jurisprudence: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868).

Appellee does not mean to criticize the district judge, who conscientiously sought to give the parties guidance by offering his view that drive-through voting is legally permissible when used in early voting, ROA. 20-20574.1431, but not on Election Day. ROA. 20-20574.1433–34. But that opinion—which did not even address the elements of any federal claims that might permit a federal district court to interpret the Texas Election Code—was *not* a ruling on the merits and was *not* the basis for the decision below. Appellee had no obligation or reason to appeal it.

In the first place, given that these merits-based comments were "ultra vires," *Steel Co.*, 523 U.S at 101–02, they were a legal nullity. The Clerk had no duty to cross-appeal simply to disagree with a judge's advisory comments.

In addition, even if the district court had jurisdiction to offer any opinion about the legality of drive-through voting, the judgment was in favor of the Clerk and there was no adverse judgment to cross-appeal. Appellants cite authorities for the routine principle that in the absence of a cross-appeal, "an appellate court has no jurisdiction to *modify* a judgment so as to *enlarge* the rights of the appellee or diminish the rights of the appellant." *Art Midwest Inc. v. Atlantic Ltd. P'ship XII*, 742 F.3d 206, 211 (5th Cir. 2014) (emphasis added). But the Clerk has no need to "modify" a judgment entirely in his favor, and his rights could not be "enlarged" beyond the dismissal of the suit. *Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co.*, 876 F.3d 119, 126–27 (5th Cir. 2017) (distinguishing *Art Midwest*).

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Furthermore, in addition to the jurisdictional and procedural impediments to Appellants' argument, there is also a practical defect. In response to the judge's advisory opinion expressing his own view that "tents used for drive-thru voting are not 'buildings' within the meaning of the Election Code," ROA. 20-20574.1434, the Clerk voluntarily closed all drive-through locations using tents on Election Day except the Toyota Center location—located inside a permanent parking garage.[7] This action mooted any further debate about the legality of drive-through voting on Election Day, leaving nothing for the Clerk to appeal. Having voluntarily mooted the only observation in the advisory opinion that was potentially adverse to him, the Clerk had no reason (or right) to seek appellate review.

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For all these reasons, if this Court held that Appellants have standing to sue and their claims about drive-through voting on Election Day are ripe for decision, the only appropriate disposition would be to reinstate the case and remand it for further proceedings in the district court to address the numerous questions the district court did not reach—such whether the district court would adhere to its initial views regarding the meaning of the Texas Election Code, whether the alleged state law violations are substantial enough to give rise to federal claims, and whether the other elements for injunctive relief can be satisfied.

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[7] *See* Mitchell Ferman, *Harris County voters will only have one drive-thru polling site on Election Day*, The Texas Tribune, Nov. 2, 2020, https://www.texastribune.org/2020/11/02/harris-county-drive-thru-locations-closed/, (last accessed March 10, 2021).

IV. Appellants' Arguments on the Merits Are Unsound.

If it is necessary to reach the merits, the Court will find that Appellants' complaints about drive-through voting are insubstantial.

It is unclear whether Appellants persist in challenging drive-through voting for the early voting period. Their formulation of the issues presented suggests that their appeal is limited to "drive-through voting on Election Day." App. Br. at 1; *see also id*. 22 (suggesting that if the Court agrees that a cross-appeal was required, it is "unnecessary" to address the merits of Appellants' constitutional complaints). But other parts of the brief are less explicit, so Appellees will address the legality of drive-through voting in both the early voting and Election Day contexts.

A. Appellants' arguments about the Texas Election Code do not raise any federal question or invade any constitutional right.

Even if Plaintiffs could establish that drive-through voting is a violation of the Texas Election Code—which is not the case, as we will demonstrate shortly—that conclusion alone would be insufficient to state a federal constitutional claim. To secure an injunction, Appellants must establish the violation of a federal right. But at most, Appellants' complaints raise a question about the Texas Election Code that should be litigated in the Texas courts; no federal questions are implicated. Thus, if it reaches the merits, the Court should reject Appellants' federal claims as a matter of law without even considering the content of Texas election law.

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1. There is no Elections Clause violation.

There is no need to consider the merits of the Elections Clause claim since Appellants so obviously lack standing. But should the Court consider the merits, Appellants cannot prevail on that claim. The Elections Clause provides that the "Times, Places, and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1.

Appellants build their argument on the concurring opinion in *Bush v. Gore*, 531 U.S. 98 (2000), which posited that a "significant departure" from the scheme adopted by the state legislature would present "a federal constitutional question." *Id*. at 113 (Rehnquist, C.J., concurring). But contrary to Appellants' bald assertion, drive-through voting does not represent a "significant departure" from the scheme enacted by the Texas Legislature; this case poses only a run-of-the-mill question of statutory construction about the meaning of two terms ("structure" and "building") in the Texas Election Code. Not every dispute about state election law presents a constitutional question; only a "significant departure from the legislative scheme," *Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring), would constitute a violation of the Elections Clause. This case does not come close to meeting that test. Notably, Appellants cite no decision finding an Elections Clause violation based on such a mundane dispute. Contrary to their brief, *see* App. Br. at 27, *Richardson v. Hughs*, 978 F.3d 220 (5th Cir. 2020), did *not* involve an Elections Clause claim.

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As we shall explain, drive-through voting represents a reasoned application of the relevant provisions of the Texas Election Code. Far from being a departure from the legislative scheme, drive-through voting was approved in advance by the Elections Division of the Texas Secretary of State—the state official charged with maintaining uniformity in the application and interpretation of the Election Code. Tex. Elec. Code § 31.003; *see* p. 5, *supra*. Whether drive-through polling places are "structures" and "buildings" under the Texas Election Code is hardly the sort of "significant departure" from state law that Chief Justice Rehnquist had in mind.

Indeed, the *Gore* concurrence contended that "the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors *and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate*." *Id*. at 114 (emphasis added). Here, the Harris County Commissioners Court (which approves polling places and unanimously approved the drive-through voting polling places for the last election) *is* the governmental body "expressly empowered by the legislature to carry out its constitutional mandate." *Id*. This is not a case in which "[t]he general coherence of the legislative scheme" has been "altered" by a state court (or other state actor) "so as to wholly change the statutorily provided apportionment of responsibility" regarding election procedures. *Id*. In truth, the *Gore* concurrence indicates that this mundane dispute about state election law is not a federal constitutional issue.

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2. There is no equal protection violation.

Appellants' equal protection claim mistakenly alleges that Harris County is the only county in Texas that adopted drive-through voting for the 2020 election, "surrender[ing] the safeguards associated with curb-side voting while other counties maintain the integrity of the ballot box." App. Br. at 32. Factually, Appellants are mistaken.[8] Legally, Appellants' claim is insubstantial.

The Harris County Clerk has authority only over citizens in Harris County, and it is undisputed that he treated every Harris County voter identically. The fact that voters elsewhere are subject to different voting procedures does not mean the County Clerk's identical treatment of every Harris County voter was a violation of equal protection. *Citizen Ctr. v. Gessler*, 770 F.3d 900, 917–19 (10th Cir. 2014). With respect to a county official, the Equal Protection Clause "requires only that each county treat similarly situated voters the same." *Id*. at 917. "In the absence of an allegation that [the Clerk] treated voters in a single county differently, [Plaintiffs have] failed to state a valid equal protection claim." *Id*. at 919.

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[8] Contrary to Appellants' statements otherwise, Harris County was not the only Texas county to adopt drive-through voting. *See* D.D. Turner, *Early voting begins Oct. 13*, The Port Lavaca Wave, Oct. 6, 2020, http://www.portlavacawave.com/news/around_town/early-voting-begins-oct-13/article_7295c7d4-07df-11eb-8616-0f48840a9d25.html (last accessed March 10, 2021).

This rule forecloses the equal protection claim. Over the last few months, courts across the country have adhered to this principle: when a defendant has treated all voters under his or her authority equally, there is no violation of the Equal Protection Clause. *See, e.g.*, *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377, 388 (3rd Cir. 2020) (holding that there was no viable equal protection claim against a state election official when all campaigns were treated the same because a viable claim "requires unequal treatment of similarly situated parties"); *Wise v. Circosta*, 978 F.3d 93, 99–100 (4th Cir. 2020) (holding that there was no violation of the Equal Protection Clause when "no voter will be treated differently than any other voter" and "no one was hurt" by a decision to extend the absentee ballot deadline due to the COVID-19 pandemic); *Wood*, 2020 WL 6817513 at *9 (holding that the plaintiff could not demonstrate a likelihood of success on an equal protection claim because "no voter—including [the plaintiff]—was treated any differently than any other voter").

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Appellants rely on the per curiam majority opinion in *Gore*, App. Br. at 32, but the Supreme Court noted that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Gore*, 531 U.S. at 109. That question *is* presented here. *Gore* has nothing to do with the equal protection claim in this case.

Gore involved "a situation where a state court with the power to assure uniformity ha[d] ordered a statewide recount with minimal procedural safeguards." *Id*. at 109. Counties used "varying standards to determine what was a legal vote," *id*. at 107, which meant that ballots were being "valued" differently. *Id*. at 104–05. The Court held that this ad hoc scheme lacked "the rudimentary requirements of equal treatment and fundamental fairness." *Id*. at 109.

This case bears no resemblance to *Gore*. The drive-through voting program was made available to all Harris County voters on identical terms, and ballots cast in drive-through voting places were not valued differently than any other ballots. Such uniform treatment is not an equal protection violation. *Wise*, 978 F.3d at 100.

Moreover, unlike the ad hoc recount program in *Gore*, drive-through voting was carefully conceived, publicly vetted, and approved by state and local officials well in advance of the 2020 election. *See* pp. 4–6, *supra*. Appellants are free to fight over the meaning of the Texas Election Code in a state-court election contest, but they cannot credibly claim the program lacks "the rudimentary requirements of equal treatment and fundamental fairness." *Gore*, 531 U.S. at 109. This lawsuit, like so many others, "totally lacks the concern with arbitrary or disparate standards that motivated *Bush*." *Wise*, 978 F.3d at 100. Drive-through voting simply made it "easier for more people to vote." *Id.* There is no viable federal claim.

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B. Drive-through voting does not violate the Texas Election Code.

Finally, to the extent the Court moves beyond both the justiciability barriers and the lack of a colorable federal claim, Appellants' arguments about the legality of drive-through voting are both factually misleading and legally incorrect.

Factually, Appellants would have the Court believe the Harris County Clerk unilaterally implemented drive-through voting, but the use of drive-through voting and the location of the polling places were approved by the Commissioners Court in a unanimous, bipartisan vote. *See* ROA.20-20574.739; ROA.20-20574.907–08; Tex. Elec. Code § 85.062(a)(1).

Legally, Appellants attack a strawman. App. Br. at 2–6, 24, 27–28, 30–31. They evade the critical statutory language, touching it only elliptically at the end of their brief. *Id*. at 29. Their entire legal paradigm is profoundly misguided.

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To set the stage, it is useful to recall the district judge's observations about the merits (after announcing that he would dismiss the case for lack of standing). The judge explained that drive-through polling places are proper for early voting because they are located in "structures" within the meaning of the relevant statute, but he expressed concern that they are not located in "buildings" as required for Election Day. ROA.20-20574.1443–45. His concern was mistaken, but to be safe, the Clerk limited drive-through voting on Election Day to a parking garage in an athletic arena that is unquestionably a "building."

1. Drive-through voting complies with the Election Code.

The legality of drive-through voting turns on Tex. Elec. Code § 85.062(b) (early voting) and Tex. Elec. Code § 43.031(b) (Election Day). The former statute says that an early voting polling place may be located "in any stationary structure," including a "movable structure." Tex. Elec. Code § 85.062(b). The latter says that Election Day locations shall be "inside a building." Tex. Elec. Code § 43.031(b). Drive-through voting polling places comply with both statutes.

First, with respect to early voting, drive-through polling places are either "stationary structures" or "movable structures." Drive-through polling places are necessarily either "stationary" or "movable," so the only real question is whether they are "structures." That question is simple.

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The Legislature did not define "structure," so the ordinary meaning controls. "Structure" usually means "[a]ny construction, or any production or piece of work artificially built up or composed of parts joined together in some definite manner. That which is built up or constructed; an edifice or building of any kind." *Structure*, Black's Law Dictionary 1424 (6th ed. 1990).[9] As used in this statute, the word ordinarily means "[s]omething constructed, such as a building."[10]

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[9] The Election Code was enacted in 1985, so the 1990 edition of Black's Law Dictionary is the applicable edition. *Cadena Comercial USA Corp. v. TABC*, 518 S.W.3d 318, 327 (Tex. 2017).

[10] https://ahdictionary.com/word/search.html?q=structure (last visited March 10, 2021).

Under this definition, drive-through polling places qualify as "structures." Sturdy metal frames are constructed with canvas roofs and walls to form structures that cars drive through in distinct lines to pass through individual voting stations. "Each drive-thru location is constructed of metal frames and durable tent covers covering a space of at least ten feet by twenty feet, with a ten-foot lane for a car to pass through." ROA.20-20574.178. They are not a novelty; similar tent structures are used at walk-in voting centers. *See* ROA.20-20574.179.

Second, with respect to Election Day, drive-through polling places can exist "inside a building." Tex. Elec. Code § 43.031(b). Once again, the Legislature did not define "building," so the word is to be given its ordinary meaning. "Building" means a "[s]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof." *Building*, Black's Law Dictionary 194-95 (6th ed. 1990). The word ordinarily means "[s]omething that is built, as for human habitation; a structure."[11]

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Other Texas statutes similarly define "building" as "any enclosed structure" that is intended or designed "for use." *See, e.g.*, Tex. Local Gov't Code § 214.231; Tex. Local Gov't Code § 233.0615; Tex. Penal Code § 30.01.

[11] https://ahdictionary.com/word/search.html?q=building (last visited March 10, 2021).

Under this definition, drive-through polling places can exist in "buildings." The tented structures described above are enclosed "structures" that are intended, designed, and built for a designated "use," so they satisfy the ordinary definition. The fact that the walls and roof are canvas rather than wood, brick, or stone is not legally significant. *Myers v. State*, No. 05-92-00430-CR, 1992 WL 276459, at *2 (Tex. App.—Dallas 1992, no pet.) (holding a tent was a "building"). In any event, drive-through polling places can also be located inside more permanent structures, like parking garages, that are undeniably "buildings." The parking garages of large facilities like the Toyota Center, used in the 2020 election, *see* ROA.20-20574.178, prove the point. Thus, Appellants cannot possibly secure an injunction against *any* use of drive-through voting in future elections in Texas.

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Finally, the Texas Secretary of State—the State's chief election officer, responsible for uniformity in application and interpretation of the Election Code, Tex. Elec. Code § 31.003—agrees with this position. The County Clerk's Office "sought advice from the SOS [Secretary of State] related to drive-thru voting over the course of multiple conversations." ROA.20-20574.727. "The SOS approved of the idea and made suggestions to keep the project in compliance with the law…." ROA.20-20574.727. The Secretary of State's Director of Elections has testified that drive-through voting is "a creative approach that is probably okay legally." ROA.20-20574.283 (excerpt from other litigation); *see also* p. 4, *supra*.

Because the Secretary of State is the state officer whose official duty is to "obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code," Tex. Elec. Code § 31.003, approval from his Elections Office "'must be accorded some meaningful weight.'" *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (citation omitted); *see also R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011) (Texas courts "will generally uphold an agency's interpretation of a statute it is charged by the Legislature with enforcing" when it is reasonable and does not contradict the plain language). If it is necessary to reach the merits of the state-law questions, this Court should defer to this determination.

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In this respect, it is appropriate to recognize Appellants' reliance on a letter, issued by Attorney General Ken Paxton on his letterhead but neither filed in court as the State's official legal representative nor issued through the ordinary process for Attorney General opinion letters, declaring that drive-through voting is illegal. App. Br. at 30. That letter is entitled to no deference by this Court. Federal courts are not required to defer to a government actor's "'convenient litigating position.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citation omitted); *see also Khalil v. Hazuda*, 833 F.3d 463, 469 (5th Cir. 2016) (same). Here, the Attorney General is not even a litigant. His informal letter is irrelevant, and it is not entitled to any weight in this Court.

2. Arguments about "curbside voting" miss the point.

Rather than engage seriously with the plain meaning of the statutory terms, Appellants conflate drive-through polling places with so-called "curbside voting." But the two programs are very different. Curbside voting is a practice in which an election official brings a ballot to a voter at a location outside the polling station; drive-through voting is completely different.

The statutes governing "curbside voting" apply to *all* polling places and are designed to accommodate voters with special physical disabilities or health risks. If a voter is physically unable to enter a polling place without personal assistance or a likelihood of injuring the voter's health, at the voter's request, an election officer shall deliver a ballot to the voter at the polling place entrance or the curb. Tex. Elec. Code § 64.009(a). While this method of voting is colloquially known as "curbside voting," its actual application varies depending on the precise nature and physical layout of each polling location.

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This procedure must be available at *every* polling place; it has nothing to do with drive-through voting. In the last election, Harris County had approximately 800 polling locations and the physical layout and facilities in each varied widely—but "every single location offer[red] curbside voting as Texas law requires." ROA.20-20574.904.

Appellants recount the requirements for those special accommodations in detail, but drive-through polling places do not offer such special accommodations. Rather, they create temporary "structures" and "buildings" that allow any voter—not just those with a disability or health condition—to vote inside the polling place. "Drive-thru voting is a different physical layout of an in-person polling location, not a special accommodation for people with disabilities who cannot physically enter the polling places, where all election laws, including the accommodation of poll watchers, are in force." ROA.20-20574.904. Appellants' attempt to equate drive-through voting with curbside voting is just knocking down a strawman.

In short, drive-through polling places are just another form of polling place with a different layout and structure than traditional polling places; curbside voting is a method of voting that must be available at all polling places to accommodate voters with certain disabilities. Appellants' reliance on the curbside voting statute, Tex. Elec. Code § 64.009, is thus inapplicable.

Appellants also refer to Tex. Elec. Code § 82.002, but that statute refers to mail-in voting and involves different eligibility criteria; it is equally inapplicable. And their citation to Tex. Elec. Code § 104.001 is baffling; that provision allows a voter who cannot use a voting machine at his or her precinct on Election Day due to a health condition or physical disability to vote instead at the main early voting polling place. Once again, it is inapplicable here. *See* ROA.20-20574.905.

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CONCLUSION

The appeal should be dismissed. Alternatively, the judgment dismissing the underlying litigation should be affirmed or judgment should be entered denying Appellants' claims for relief as a matter of law.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE, CHRIS HOLLINS, IN HIS OFFICIAL CAPACITY AS HARRIS COUNTY CLERK

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, thereby providing service on all parties. I certify that all participants in the case are registered CM/ECF users.

/s/ *Richard W. Mithoff*
Richard W. Mithoff

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 9,792 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated: March 12, 2021.

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