No. 20-20574

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.

On Appeal from the United States District Court
for the Southern District of Texas
(No. 4:20-CV-3709)

BRIEF OF INTERVENOR DEFENDANTS-APPELLEES MARY CURRIE, CARLTON CURRIE, JR., JEKAYA SIMMONS, AND DANIEL COLEMAN

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CERTIFICATE OF INTERESTED PERSONS

Hotze v. Hollins, No. 20-20574

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

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary to decide this appeal. Controlling case law instructs that Plaintiffs lack standing to assert their claims. Even if Plaintiffs had standing, their claims lack merit, and they have forfeited their arguments as to three of the four elements they were required to prove to be entitled to the relief they seek. If the Court concludes that oral argument would assist in its resolution of this appeal, however, Intervenor Defendants Mary Currie, Carlton Currie, Jr., JeKaya Simmons, and Daniel Coleman respectfully request the opportunity to participate.

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INTRODUCTION

Just days before Election Day, Plaintiffs-Appellants asked a federal court to throw out over 120,000 ballots that had been cast by lawful Texas voters using Harris County's "drive-thru" voting program. This bald attempt to disenfranchise such an extraordinarily large number of voters was stunning in both its reach and lack of legal and evidentiary support. The district court nonetheless held a half-day hearing, in which it gave Plaintiffs a full opportunity to articulate their legal theories. In the end, the district court properly concluded Plaintiffs lacked standing because they failed to demonstrate that the drive-thru voting program injured them. It accordingly dismissed the case and denied Plaintiffs' request for preliminary injunctive relief. That dismissal marked the third time in three weeks that a court had rejected Plaintiffs' challenge to drive-thru voting, including two rebuffs by the Texas Supreme Court. Plaintiffs now ask this Court not only to reverse the district court's order dismissing the case, but to affirmatively order a preliminary injunction against future drive-thru voting.

The district court's order dismissing Plaintiffs' complaint should be affirmed, and Plaintiffs' request for a preliminary injunction against future drive-thru voting should be denied. Plaintiffs still have not identified how Harris County's drive-thru voting program caused (or will cause) them any particularized injury. Neither voters nor candidates have standing to challenge an election practice merely on the ground

that it is "illegal," without establishing a particularized injury. Plaintiffs' unlimited theory of standing, if accepted, would eliminate basic, time-honored limits on federal courts' jurisdiction. In addition, now that the November 2020 election is long over, Plaintiffs' claims have become hypothetical. Because nothing in the record indicates what sort of drive-thru voting procedures Harris County will use in future elections, there is no basis in the record to determine whether future drive-thru voting would be consistent with the Texas Election Code. Plaintiffs effectively seek an advisory opinion as to whether drive-thru voting as offered in 2020 complied with Texas election law.

Even if this Court took up Plaintiffs' request for an advisory opinion, it should reject Plaintiffs' legal theories. The Elections Clause does not transform every asserted violation of state election law into a cognizable claim under the federal constitution. Nor does the Equal Protection Clause require every county in Texas to administer their elections in an identical manner. Not only would such a requirement be entirely impractical, it would ignore that, within a state, each jurisdiction has different needs—informed by its unique features, including geography, population, and socio-economic makeup—that must be addressed to ensure its electorate has access to voting.

For these same reasons, Plaintiffs fail to show that they are likely to succeed on the merits, a fundamental requirement for obtaining a preliminary injunction. And

they do not even attempt to show how the other essential elements for an injunction are supposedly satisfied. The Court is left to speculate about whether Plaintiffs would be irreparably injured absent an injunction, whether any harm to Plaintiffs is outweighed by the harm to Harris County, and whether injunctive relief would advance or undermine the public interest. Plaintiffs' decision not to brief these essential issues on which their request for relief relies is a clear forfeiture and is an additional reason why the district court's rejection of relief should be affirmed.

The district court was correct to dismiss this case, and the passage of time has only rendered Plaintiffs' claims less fit for judicial review. Separately, Plaintiffs have not demonstrated an entitlement to preliminary relief. This Court should affirm.

STATEMENT OF JURISDICTION

Plaintiffs in this case lack standing to assert their claims. As a result, even though Plaintiffs' claims fell within the district court's jurisdiction under 28 U.S.C. § 1331, and their appeal of the final judgment in this case and denial of preliminary injunctive relief falls within this Court's statutory appellate jurisdiction, 28 U.S.C. §§ 1291, 1292(a)(1), Plaintiffs' lack of standing prevents federal courts from considering their claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

ISSUES PRESENTED

1. Whether the district court properly concluded Plaintiffs lack standing.

2. Whether Plaintiffs' challenge to future drive-thru voting is ripe for judicial consideration.

3. Whether Plaintiffs made a clear showing as to each of the four elements necessary to support a preliminary injunction.

STATEMENT OF THE CASE

I. Plaintiffs asked the district court to invalidate 126,912 votes in Harris County just days before Election Day.

Plaintiffs filed this suit to challenge Harris County's use of drive-thru voting in the November 2020 election—a voting method the County offered after months of stakeholder meetings and pilot testing during the July primary run-off election. *See* ROA.177-78, 907. The offering had unanimous and bipartisan support from the Harris County Commissioners Court and the idea was approved by the Texas Secretary of State. *See* ROA.176-180, 191-192. In developing their plans for drive-thru voting, Harris County officials followed the Secretary of State's "suggestions to keep the project in compliance with the law." ROA.177.

Consistent with these plans, county officials built the drive-thru voting structures to ensure compliance with the rules governing polling places. Each location was constructed by erecting structures with metal frames. ROA.178. The structures covered "a space of at least ten feet by twenty feet" and were encased by "durable tent covers" creating walls and a ceiling. ROA.178. These structures and the voting operations carried out in them were similar to brick-and-mortar polling

locations in all important respects. *See* ROA.179. Just as traditional polling places have an election judge and voting clerks, each drive-thru voting location had its own election judge and several election clerks who were responsible for checking in voters and confirming their eligibility to vote before providing them with a ballot. *See* ROA.178-179. When voters arrived at the structure, an election clerk instructed the voter to turn off their cell phone, checked the voter's identification, determined whether the voter was on the voter roll, asked the voter to sign the voting roster, and then handed the voter a voting code and a voting machine—all as if they were voting at any other polling location. *See* ROA.178-179. Each structure also had a designated area for poll watchers to monitor the process, just as with a traditional polling location. ROA.178.

Given Harris County's compliance with Texas law governing polling places, it is not surprising that between October and November 2020, the Texas Supreme Court rejected at least three different mandamus petitions challenging the drive-thru voting program. In one case, the relators—including two of the plaintiffs in this suit—argued that the program violated Texas' Election Code and asked the court to prohibit Harris County from providing it. *See* ROA.310-58. The Texas Supreme Court dismissed that petition. ROA.636-67.[1] Nevertheless, less than one week later,

[1] The same day, the court rejected a separate mandamus petition challenging Harris County's drive-thru voting program filed by other litigants. ROA.636 (denying mandamus petition in *In re Perez Pichardo*, No. 20-0815).

all four of the plaintiffs in this suit filed a new mandamus petition in the Texas Supreme Court, raising the same claims and seeking the same relief that they sought in this case. *See* ROA.363-401. The Texas Supreme Court again dismissed that petition, without dissent. ROA.550.

Notwithstanding these rulings by the Texas Supreme Court, Plaintiffs filed this suit on October 28, 15 days after early voting had started and just six days before Election Day. ROA.18-35. Their complaint alleged that Plaintiffs Hotze and Hemphill are registered Harris County voters (the "Voter Plaintiffs"), and that Plaintiffs Toth, Champion, and Hemphill were candidates who ran for office in the November 2020 election (the "Candidate Plaintiffs"). ROA.19.

By the end of the day on October 30, the date Plaintiffs moved for a preliminary injunction, 126,912 Harris County voters had voted at a drive-thru polling location. ROA.908. Seeking to disenfranchise every one of those voters, Plaintiffs asserted claims under the Elections Clause and Equal Protection Clause of the United States Constitution. *See* ROA.63-79. As part of their requested relief, Plaintiffs asked the court to "[r]eject any votes it finds were cast in violation of the Texas Election Code." ROA.64.

II. The district court concluded Plaintiffs lacked standing and dismissed the case.

The day before Election Day, the district court held a lengthy hearing and considered arguments from Plaintiffs, Harris County, and multiple parties seeking

to intervene as defendants.[2] Among the parties granted intervention were Mary Currie, Carlton Currie, Jr., JeKaya Simmons, and Daniel Coleman, all of whom cast their ballots at a drive-thru voting location before Election Day and sought to prevent their votes from being thrown out as a result of Plaintiffs' requested preliminary injunction. ROA.106-116, 1423-24.

After providing a short oral ruling from the bench, ROA.1442-1445, the district court issued a written order concluding Plaintiffs lacked standing to pursue their claims. ROA.1427-1435. The district court found that Plaintiffs failed to identify a particularized injury necessary for Article III standing:

> To summarize the Plaintiffs' primary argument, the alleged irreparable harm caused to Plaintiffs is that the Texas Election Code has been violated and that violation compromises the integrity of the voting process. This type of harm is a quintessential generalized grievance: the harm is to every citizen's interest in proper application of the law. . . . Plaintiffs have not argued that they have any specialized grievance beyond an interest in the integrity of the election process, which is "common to all members of the public."

ROA.1429-30 (quoting *United States v. Richardson*, 418 U.S. 166, 176-77 (1974)).

Because the district court concluded Plaintiffs lacked standing, it denied all relief, including the requests to enjoin drive-thru voting and throw out over 120,000 votes. To assist this Court in any future appeal, however, the district court offered an advisory discussion of "what its ruling would have been" if Plaintiffs had

[2] For purposes of brevity, this Brief refers to Defendant and Intervenor Defendants collectively as "Defendants."

standing. ROA.1428. The court began by rejecting two of Plaintiffs' foundational arguments. First, the court was "unpersuaded by Plaintiffs' argument that the voters' vehicles, and not the tents, are the polling places" at drive-thru voting locations. ROA.1431. Second, the court found "Plaintiffs [had] failed to demonstrate under the Texas Election Code that an otherwise legal vote, cast pursuant to the instructions of local voting officials, becomes uncountable if cast in a voting place that is subsequently found to be non-compliant." ROA.1431.

Addressing whether it would have granted any relief if Plaintiffs had standing, the district court explained that Plaintiffs' claims had to be analyzed separately for early voting and Election Day voting, because they are governed by different provisions of the Texas Election Code. *See* ROA.1431. The court stated it would have denied Plaintiffs any relief relating to early voting, explaining that the drive-thru voting program complied with the rules in the Texas Election Code governing early voting. *See* ROA.1431-33. The court observed further that Plaintiffs' significant delay in bringing the litigation—that is, their decision to wait until the last day of early voting to ask for preliminary injunctive relief—strongly counseled against relief. ROA.1432. The court also considered the "extraordinary significance" of the public interest in weighing Plaintiffs' request for relief, concluding that "disenfranchis[ing] over 120,000 voters who voted as instructed the day before the scheduled election does not serve the public interest." ROA.1433.

As for Election Day voting, the district court advised that "if the Plaintiffs had standing, the Court would have found that the continuation of drive-thru voting on Election Day violates the Texas Election Code" because it believed that the drive-thru voting structures did not satisfy the relevant requirements for polling places on Election Day. *See* ROA.1433-35. Because it found the other relevant factors favored an injunction as to Election Day voting, the court "would have granted the injunction prospectively and enjoined drive-thru voting on Election Day and denied all other relief." ROA.1435. Nonetheless, because the district court "found standing does not exist," it dismissed the case and denied all relief. ROA.1435. Plaintiffs appealed and sought an emergency injunction from this Court to ban drive-thru voting on Election Day, which a motions panel unanimously denied. ROA.1436.

SUMMARY OF ARGUMENT

There is no basis to reverse the district court's dismissal of this case or its denial of preliminary injunctive relief.

I. The district court correctly held that Plaintiffs lack standing to bring their claims. While Plaintiffs are required to articulate a particularized harm to establish standing, they presented nothing more than a generalized interest in Harris County's adherence to the Constitution and not counting alleged "illegal" votes—interests plainly insufficient to establish Article III standing. As federal courts have overwhelmingly held, Plaintiffs cannot transform these generalized interests into

particularized ones by asserting undifferentiated claims of so-called "vote dilution." Nor can the Candidate Plaintiffs, whose elections are long over, establish standing now by attempting to attribute their election losses to drive-thru voting. Finally, even if Plaintiffs could articulate a concrete and particularized injury from drive-thru voting, they cannot assert their Elections Clause claim because only the Texas Legislature has standing to do so, and Plaintiffs have no authority to sue in the Legislature's stead.

This Court also lacks jurisdiction because Plaintiffs' claims against future drive-thru voting are unripe. Despite that it is Plaintiffs' burden to prove ripeness, the record is devoid of any evidence about what drive-thru voting procedures Harris County will use in the future. Separately, the Candidate Plaintiffs cannot assert a future harm because nothing in the record indicates whether they intend to run in elections that would be affected by drive-thru voting. In other words, Plaintiffs are asking this Court to evaluate the legality of a hypothetical voting method. That is the definition of an advisory opinion.

II. Even if Plaintiffs could overcome these jurisdictional barriers, their claim that they are entitled to preliminary injunctive relief would still fail.

As a threshold matter, Plaintiffs cannot demonstrate a substantial likelihood of succeeding on the merits of either of their claims. This Court should decline to recognize Plaintiffs' Election Clause claim, which would transform every asserted

violation of state election law into a cognizable claim under the federal constitution, making federal courts the default venue for even the most minor state-law disputes. Even if Plaintiffs had a cogent means of using the Elections Clause to unlock the federal courthouse doors, they fail to satisfy the requirements of the very claim they present. Because the record does not indicate what drive-thru voting will look like in the future, Plaintiffs must rely on the evidence regarding how Harris County provided it in the November 2020 election. That evidence demonstrates that the County fully adhered to the requirements of the Texas Election Code. And even if it indicated otherwise, Plaintiffs did not show these procedures worked a *significant departure* from the legislative scheme, which their proposed claim required them to do.

Plaintiffs' equal protection claim likewise fails because it relies entirely on an inapposite case. In *Bush v. Gore*—the only authority Plaintiffs cite as support for their claim—the Court addressed a situation in which the state had created a serious risk that completed ballots would be counted in an arbitrary fashion. 531 U.S. 98, 105-06 (2000) (per curiam). Nothing in that opinion suggests that every voter within a state must have the exact same voting experience, as Plaintiffs contend. Indeed, courts throughout the country have rejected this rigid interpretation of the Equal Protection Clause, recognizing that election officials must have at least some discretion to adopt voting procedures tailored to the conditions and needs of their

jurisdiction.

There also is no merit to Plaintiffs' assertion that Defendants have "waived" their defense to the merits of Plaintiffs' claims by not appealing the district court's judgment. Defendants fully prevailed before the district court, obtaining a full dismissal of Plaintiffs' claims and a denial of all relief requested. Whatever discussion the district court offered regarding the merits of Plaintiffs' claims or the propriety of injunctive relief was entirely advisory and was not a part of the judgment. Once it found Plaintiffs lacked standing, the court had no power to consider those issues. In these circumstances, not only it would have been a waste of judicial resources for Defendants to have appealed, their appeal would have been dismissed for lack of appellate standing.

Finally, even if Plaintiffs had standing, had ripe claims, and had demonstrated a substantial likelihood of success on the merits, they still would not be entitled to a preliminary injunction. Plaintiffs' brief fails even to discuss any of the other three prerequisites for a preliminary injunction, each of which they have the burden of proving: that (1) an injunction would eliminate a substantial threat of irreparable injury; (2) the harm posed by that threat outweighs the harm an injunction would cause Harris County and its voters, many of whom were granted intervention in this case; and (3) an injunction would serve the public interest. By failing to address these essential elements in their opening brief, Plaintiffs have forfeited any argument

that they were met. In any event, each of these factors weighs against granting preliminary injunctive relief: rather than posing some form of irreparable harm to Plaintiffs, the drive-thru voting program Harris County used last November provided a safe and convenient form of voting that is in the interests of both Harris County and the public at large.

STANDARD OF REVIEW

This Court reviews the issue of Plaintiffs' standing *de novo*. *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 236 (2010). The district court's decision to deny a preliminary injunction is reviewed for abuse of discretion, its factual findings for clear error, and its legal determinations *de novo*. *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015).

ARGUMENT

I. This case does not satisfy the requirements of Article III.

A. Plaintiffs have not identified a concrete or particularized injury.

To establish the injury-in-fact necessary for Article III standing, Plaintiffs were required to put forward a harm that was "concrete and particularized"—that is, an injury that "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560, 561 n.1. As the district court correctly determined, Plaintiffs' suit suffered from an overarching and fatal flaw: they failed to allege any particularized injury arising from Harris County's drive-thru voting procedures.

1. Plaintiffs' claim that drive-thru voting violates the Texas Election Code and the U.S. Constitution alleges nothing more than a generalized grievance.

As the Supreme Court has repeatedly held, a federal court is not a forum to raise general grievances about government conduct or policy. *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598–99 (2007). No matter how strongly or sincerely a litigant may feel about government policy, "concerned bystanders" cannot use the federal courts as a vehicle to vindicate their values and interests. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64–65 (1997). For that reason, federal courts are required to "refrain[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quotation marks and citation omitted).

Consistent with this principle, private individuals cannot sue based on a mere allegation that a law has been violated. In *Lance v. Coffman*, for example, the Supreme Court held that voters could not challenge a redistricting plan on the basis that it violated their state legislature's authority under the Elections Clause. 549 U.S. 437, 441-2 (2007). The Court explained that such a claim fails to identify a particularized injury because it simply alleges "that the law—specifically the

Elections Clause—has not been followed." *Id*. at 442; *see also Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (explaining a party claiming "only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy" (quoting *Lujan*, 504 U.S. at 573-47)).

This is precisely the injury that Plaintiffs present: a concern that drive-thru voting violated Texas' election laws, and therefore the Constitution. As the district court explained, "Plaintiffs' counsel described their injuries as the concern for the voting law[s] to be accurately enforced and voting to be legal." ROA.1432; *see also* ROA.20 (Plaintiffs' Complaint asserting their injury as an "illegal vote scheme [that] results in votes being illegally cast"). And as the district court properly concluded, Plaintiffs' interest in ensuring the Texas Election Code is followed is not an injury-in-fact under basic standing principles. *See* ROA.1428-1429. The district court's decision is consistent with that of many other federal courts that found similar claims not cognizable during the 2020 election cycle. *See Bognet v. Sec'y of Commw. of Pa.*, 980 F.3d 336, 349-52 (3d Cir. 2020) ("[P]rivate plaintiffs lack standing to sue for alleged injuries attributable to a state government's violation of the Elections Clause."); *Wise v. Circosta*, 978 F.3d 93, 101 (4th Cir. 2020) (holding plaintiffs "lack standing to bring their Elections Clause claim"); *see also Bowyer v. Ducey*,

No. CV-20-02321, --- F.Supp.3d ---, 2020 WL 7238261, at *4 (D. Ariz. Dec. 9, 2020) (holding voter and candidate plaintiffs did not state an injury-in-fact simply by alleging Arizona's election policies were illegal and violated the Elections Clause and Equal Protection Clause).[3]

Supreme Court precedent also demonstrates that a member of the Texas Legislature, such as Plaintiff Toth, does not assert an injury-in-fact simply by alleging that a law passed by the Legislature has not been followed. In *Raines v. Byrd*, the Supreme Court held that an individual legislator does not typically have standing to challenge an action that they allege usurps their authority as a legislator. 521 U.S. 811, 821 (1997). Such an injury is an "institutional injury (the diminution of legislative power), which necessarily damages all [members of the legislature] equally." *Id.* This is precisely the theory Plaintiff Toth presents here. *See* ROA.20 (alleging Toth is harmed because "[a]s a member of the State Legislature, Hollins's [sic] is usurping his authority as a lawmaker by creating a voting scheme that was not adopted by the Texas Legislature"). Following *Raines*, federal courts have often concluded that individual legislators (even those in leadership positions) do not state

[3] To the extent the Eighth Circuit's decision in *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), indicates candidates can have standing under the Elections Clause, that decision has been called into question by multiple courts. *See Bognet*, 980 F.3d at 351 n.6 (rejecting *Carson*'s reasoning); *Bowyer*, 2020 WL 7238261, at *4 ("Other circuit courts to reach the issue have cited the *Carson* decision with disapproval, noting that there was no precedent for expanding standing in the way that it did.").

an injury-in-fact simply by alleging their power as a legislator has been violated. *See Wise*, 978 F.3d at 101 (holding leaders of both chambers of North Carolina General Assembly lacked standing to assert Elections Clause claim in the absence of express authorization to sue on the General Assembly's behalf); *Corman v. Torres*, 287 F. Supp. 3d 558, 567 (M.D. Pa. 2018) (per curiam) (holding individual legislators lacked standing to assert claims based "on the purported usurpation of the Pennsylvania General Assembly's exclusive rights under the Elections Clause").

In sum, the district court was right to conclude that Plaintiffs' claims present nothing more than a prototypical generalized grievance over which federal courts do not have jurisdiction. *See* ROA.1428-1429.

2. The Voter Plaintiffs' vote-dilution theory is neither concrete nor particularized.

Because Plaintiffs cannot sue based on a generalized concern that the law must be followed, they can proceed only if they have otherwise alleged a separate, particularized harm sufficient to state a cognizable injury-in-fact. They have not done so. The Voter Plaintiffs' other theory of injury—that their votes will be diluted by "illegal" drive-thru votes—has been overwhelmingly rejected by federal courts and is also premised on a misreading of Texas law.

First, as federal courts have now repeatedly found, a plaintiff's attempt to frame their concern about the illegality of an election procedure as an injury to their own voting power does not transform a generalized injury into a particularized one.

As the Eleventh Circuit recently held, a voter's attempt to ensure that only "lawful" ballots are counted is a generalized grievance—an interest that "[a]ll Americans, whether they voted in this election or whether they reside in [the state], could be said to share." *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (*Wood I*). The allegation that an unlawful vote will "dilute" the plaintiff's vote does not create a "distinct, personal injury" because "'no single voter is specifically disadvantaged'" if a vote is counted improperly; it is instead a "paradigmatic generalized grievance that cannot support standing." *Id.* at 1314-15 (quoting *Bognet*, 980 F.3d at 356). Plaintiffs' own brief acknowledges as much, conceding that their claimed injury could be said about "any voter" or "any candidate," and that "the casting and [] the counting of any ineligible or illegal curbside voting" harms "the integrity and the reported outcomes of the election for *all of the candidates* and *all of the voters* who voted." Appellants' Br. at 13 (emphases added).

Courts have agreed that a voter's concern that their vote will be "diluted" by illegal or fraudulent votes is not a particularized injury-in-fact. *See Bognet*, 980 F.3d at 356-57 (holding alleged injury that vote dilution will occur by counting illegal or fraudulent votes "is suffered equally by all voters and is not 'particularized' for standing purposes"); *Wood v. Raffensperger*, No. 1:20-CV-5155, 2020 WL 7706833, at *3 (N.D. Ga. Dec. 28, 2020) (*Wood II*) (explaining "[c]ourts have consistently found that a plaintiff lacks standing where he claims that his vote will

be diluted by unlawful or invalid ballots") (collecting cases), *appeal pending*, No. 20-14813 (11th Cir.); *Donald J. Trump for President, Inc. v. Cegavske*, No. 20-cv-144, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (rejecting these kinds of vote dilution claims as "[g]enerally available grievance[s] about the government" (quoting *Lujan*, 504 U.S. at 573-74)); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020) (concluding alleged vote dilution "due to ostensible election fraud" was not an injury-in-fact and explaining: "This is not a pioneering finding. Other courts have similarly found the absence of an injury-in-fact based on claimed vote dilution.") (citations omitted); *Martel v. Condos*, No. 5:20-CV-131, --- F.Supp.3d ---, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (holding voters who claimed new voting procedures would lead to the counting of illegal votes stated only a generalized injury).

Plaintiffs' invocation of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 561 (1964), for the proposition that the right to vote is "individual and personal in nature," Appellants' Br. at 13, does not transform their injury into a particularized one. *Baker* and *Reynolds* were both redistricting cases in which the Supreme Court held *certain* voters could challenge the configurations of their specific districts because they were harmed compared to other voters in "irrationally favored" districts, placing the voter plaintiffs in a "constitutionally unjustifiable" position. *Baker*, 369 U.S. at 207-08; *see also Reynolds*, 377 U.S. at

566. In those cases, the plaintiff voters were affected in a distinct and personal way as compared to other voters. On the other hand, the Supreme Court has explained that voters lack standing when they are not uniquely harmed as compared to other voters in the state. *See Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018). Here, similarly, "'no single voter is specifically disadvantaged' if a vote is counted improperly." *Wood I*, 981 F.3d at 1314 (quoting *Bognet*, 980 F.3d at 356).

Contrary to their arguments, Plaintiffs' standing in this case is simply not comparable to the theories that supported the voters' standing in *Veasey v. Abbott* or *LULAC v. City of Boerne.* In *Veasey*, plaintiffs challenged a voter identification requirement that made it more difficult for the voter-plaintiffs to cast their *own* ballots. *See Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). In *LULAC*, the plaintiff was "deprived of his pre-existing right to vote" after a consent decree eliminated his own ability to vote for certain local offices. *See League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 430 (5th Cir. 2011). Unlike in *Veasey* or *LULAC*, Plaintiffs are not challenging government action that makes it concretely more difficult for them to vote (*Veasey*) or impossible to vote for certain office holders (*LULAC*); if anything, Plaintiffs challenge a policy that makes it *easier* for them to vote. Because Plaintiffs have not alleged any particularized injury to them as individuals, they do not have standing.

Second, even if this Court concluded such a general theory of vote dilution

could support Article III standing, Plaintiffs' theory in this case fails because it improperly conflates an allegedly illegal voting *procedure* with allegedly fraudulent or illegal *ballots*. Ballots cast by legitimately registered voters (even if cast in a manner unauthorized by law) cannot not "dilute" another's vote. As the district court found, the record demonstrated that the "vast majority" of voters who voted at drive-thru voting locations were legal voters, "voting as instructed by their local voting officials and voting in an otherwise legal manner." ROA.1433. For that reason, drive-thru voting, even if it were contrary to Texas law, is not equivalent to "ballot-box stuffing." Appellants' Br. at 13.

Plaintiffs incorrectly insinuate that, if drive-thru voting violates the Election Code, the ballots cast through that procedure are "illegal." Appellant's Br. at 13. That assertion is wrong. As the district court correctly concluded, even if drive-thru voting did not comply with the Election Code, Texas law would require that ballots cast at drive-thru voting locations still be counted. *See* ROA.1431. Ballots cast under procedures that do not comply with the Election Code become uncountable only when the law expressly says so. *See Jones v. Morales*, 318 S.W.3d 419, 425-26 (Tex. App.—Amarillo 2010). In *Jones*, the court concluded that, though a voter's assistant failed to satisfy certain requirements under the Election Code, the voter's ballot still had to be counted because the Legislature had not stated that such circumstances render a ballot invalid. *Id.* at 425; *but see Tiller v. Martinez*, 974 S.W.2d 769, 775

(Tex. App.—San Antonio 1998). Because the Legislature "expressly has provided that *some* actions require a voter's ballot to be excluded," courts cannot "add to the legislature's expressed list" of such circumstances. *Jones*, 318 S.W.3d at 426 (emphasis added). Thus, when an Election Code provision does not expressly state "a legislative determination that [the] failure" to comply with a given procedure "requires rejection of the voter's ballot," that ballot remains valid. *Id.*; *see also Galvan v. Vera*, No. 04-18-00309-CV, 2018 WL 4096383, at *3 & n.2 (Tex. App.—San Antonio Aug. 29, 2018) (not designated for publication).

Here, nothing in the Texas Election Code indicates that ballots cast through an improper curbside-voting procedure—as Plaintiffs incorrectly characterize drive-thru voting—should be excluded or considered illegal. *See* Tex. Elec. Code § 64.009(a). Notably, a provision within the same chapter in which the curbside-voting provision is located sets out four definitions of "illegal voting," none of which includes improperly casting a ballot through curbside voting. *Id.* § 64.012(a) (defining "illegal voting" as (1) voting or attempting to vote "in an election in which the person knows the person is not eligible to vote," (2) voting or attempting to vote "more than once in an election," (3) voting or attempting to vote "a ballot belonging to another person, or by impersonating another person," or (4) marking or attempting to mark "any portion of another person's ballot without the consent of that person, or without specific direction from that person how to mark the ballot").

Thus, even if drive-thru voting was inconsistent with the Texas Election Code, votes cast at drive-thru voting locations are still valid votes that must be counted. *See* ROA.1431 (district court explaining that "the Plaintiffs failed to demonstrate under the Texas Election Code that an otherwise legal vote, cast pursuant to the instructions of local voting officials, becomes uncountable if cast in a voting place that is subsequently found to be non-compliant").

Because Texas would not consider ballots cast at drive-thru voting locations to be "illegal" (and in fact requires them to be counted) even if the procedures were deemed unlawful, these ballots are incapable of diluting anyone's vote. For all of these reasons, Plaintiffs have not alleged any coherent injury to their voting rights from the existence of drive-thru voting, much less a particularized and concrete injury establishing injury-in-fact under Article III.

3. The Candidate Plaintiffs' alleged injuries are generalized, speculative, and lack support in the record.

The injuries alleged by the Candidate Plaintiffs are similarly insufficient to carry this case. To be sure, candidates or political parties can challenge election procedures that cause them concrete harms. In *Texas Democratic Party v. Benkiser*, for example, this Court confirmed that concrete harm to one's election prospects is sufficient to establish injury-in-fact. 459 F.3d 582, 586 (5th Cir. 2006). Similarly, in *Zimmerman v. City of Austin*, this Court explained that a candidate has standing if she took efforts to change her "campaign plans or strategies. . . in response to a

reasonably certain injury imposed by the [] law." 881 F.3d 378, 390 (5th Cir. 2018) (emphasis added).

But the Candidate Plaintiffs here alleged neither concrete harm to their election prospects nor adjustments to their campaigns or strategies to combat the effects of drive-thru voting. Instead, they alleged only that "illegal" ballots would be cast in their races, ROA.20, a harm that would hurt the "integrity and the reported outcomes of the election for *all of the candidates* and all of the voters who voted," ROA.21 (emphasis added). As the district court summarized in its order, "Plaintiffs [did] not argue[] that they have any specialized grievance beyond an interest in the integrity of the election process." ROA 1429; *see also* ROA.1442-1443 ("When I asked the plaintiffs at the very start of the proceeding what the harm was, what the damage was, and basically what they told me was that they're not following the law. Well, to me, that's a generalized injury."). As explained, an alleged harm to the integrity of the electoral process is a generalized grievance that cannot confer Article III standing. *See supra* Section I.A.2.

Perhaps recognizing this essential flaw, Plaintiffs now vaguely suggest—for the first time on appeal—that drive-thru voting injured their electoral prospects. *See* Appellants' Br. at 18 (arguing "[l]osing an election due to illegal votes is an injury, obviously"). But Plaintiffs' new theory of electoral injury is both unripe and speculative. The only relevant standing allegation pertaining to the Candidate

Plaintiffs is that they appeared on the November 2020 ballot. ROA.19. Nothing in the record addresses whether the Candidate Plaintiffs will run for office in the future. While this Court has, in certain circumstances, relaxed the evidentiary requirements for standing when it is not clear whether a plaintiff candidate will run for office in the future, it has done so when the defendant has "made it plain that he intends to enforce the [challenged law] in future elections." *Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009). Here, because nothing in the record indicates how Harris County will operate its drive-thru voting in future elections (or even how long it intends to offer this program), relaxing Article III's requirements to allow such a case by a candidate would stretch this Court's jurisdictional limits beyond the breaking point.

Moreover, even if the record demonstrated both that the Plaintiffs were running for re-election and Harris County will continue to offer identical drive-thru voting procedures indefinitely, Plaintiffs would still fail to establish standing because they have alleged a "nonobvious harm," unsupported by any evidence. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016). In *Wittman*, the Supreme Court considered the standing of two candidates challenging a court-ordered redistricting plan they claimed would hurt their electoral prospects because it would lead to more "unfavorable [] voters" in their district. *Id.* Assuming "this kind of injury [wa]s legally cognizable," the Supreme Court held the candidates failed to establish standing because their harm was not supported by any evidence and was a

"nonobvious harm." *Id.* The same is true here. Plaintiffs have made no effort to explain or show how drive-thru voting concretely threatens their own electoral prospects. *See* Appellants' Br. at 18 (arguing, without explaining, that "illegal votes" cast at drive-thru voting locations could "potentially change the outcome of elections"). And as already explained, *see supra* Section I.A.2, Texas law would require counting ballots cast at drive-thru voting locations even if a court later finds that voting procedure to be unlawful.

Because the record contains no evidence that Harris County's drive-thru voting program harmed the Candidate Plaintiffs or will harm them in the future, and because the legality of drive-thru voting would not change the result of any election, Plaintiffs have not demonstrated a particularized injury sufficient to satisfy Article III.

4. The district court's opinion neither "expands" standing doctrine nor prevents private individuals from challenging election procedures.

Plaintiffs' claim that the district court "broadened" or "expand[ed]" standing doctrine, or somehow otherwise manipulated or "misuse[d]" the doctrine to favor the Democratic Party, is flatly wrong. *See* Appellants' Br. at 18. The district court applied uncontroversial and binding precedent to conclude that Plaintiffs had not established an injury-in-fact. ROA.1428-29. While Plaintiffs may disagree with this approach, federal courts have always been courts of limited jurisdiction, and

Plaintiffs are neither the first nor the last to find their claims barred by Article III's limitations.

Nor does the district court's decision prevent private plaintiffs from challenging election procedures. The judiciary's doors are open to voters who can present an undue burden on their own right to vote, an imposition on their speech, a violation of their due process rights, and so on. *E.g.*, *Veasey*, 830 F.3d at 216. And the judiciary's doors are also open to candidates and parties who can show that an election policy is causing harm to their election prospects or campaign strategy. *E.g.*, *Benkiser*, 459 F.3d at 586.

B. Plaintiffs cannot sue to protect the legal rights of the Texas Legislature.

Even if Plaintiffs could show that Harris County's drive-thru procedures somehow caused or will cause them a particularized and cognizable injury, they lack standing to assert this Elections Clause claim, which belongs exclusively to the Texas Legislature. "[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *United States v. Johnson*, 632 F.3d 912, 919–20 (5th Cir. 2011).

Because the Elections Clause grants powers to the "Legislature" of "each State," U.S. Const. art. I § 4, cl. 4, Plaintiffs' claim that those powers have been usurped necessarily belongs to the Texas Legislature, which is not a plaintiff in this suit. *See Corman*, 287 F. Supp. 3d at 573 (explaining plaintiffs' Elections Clause

claims "belong, if they belong to anyone, only to the Pennsylvania General Assembly"); *Bognet*, 980 F.3d at 349-50; *King v. Whitmer,* No. CV-20-13134, --- F.Supp.3d. ---, 2020 WL 7134198, at *10 (E.D. Mich. Dec. 7, 2020); *but see Carson*, 978 F.3d 1058-59.[4]

Because this claim necessarily "rest[s] . . . on the legal rights or interests of third parties," *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)), a plaintiff may bring an Elections Clause claim on behalf of the Texas Legislature only if: (1) the plaintiff suffered an injury-in-fact creating a "'sufficiently concrete interest' in the outcome of the dispute"; (2) the plaintiff has "a close relation to" the Texas Legislature; and (3) "there [is] some hindrance to the [Texas Legislature's] ability to protect [its] own interests." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

Putting aside Plaintiffs' inability to show an injury arising from Harris County's drive-thru voting procedures, they also have not shown a genuine hindrance to the Texas Legislature's ability to defend itself. Even if the Legislature is not in session during an election, *see* Appellants' Br. at 19, the Texas Legislature is now in session and is fully capable of authorizing a suit to bring the Elections

[4] While the Supreme Court's discussion in *Lexmark International, Inc. v. Static Control Components*, 572 U.S. 118 (2014), called into question the bounds of the prudential standing doctrine, it made clear that it was not considering "any issue of third-party standing." *Id.* at 127 n.3.

Clause claim that Plaintiffs assert here. Because Plaintiffs cannot show that the Texas Legislature is unable to defend itself, Plaintiffs cannot assert claims on the Legislature's behalf. *Powers*, 499 U.S. at 410-11.[5]

C. Plaintiffs' claims are unripe and speculative.

The November 2020 election has come and gone. The votes have been tallied and the winners certified, seated, and sworn in. No court can provide Plaintiffs with any meaningful relief as to the outcome of that election. Recognizing this fact, Plaintiffs no longer seek relief as to the November 2020 election. *See* Appellants' Br. 34 (concluding with a request only that this Court "issue an order prohibiting use of drive-thru voting in future elections").

The remaining aspect of Plaintiffs' claims, which pertain to future use of drive-thru voting, are unripe and speculative. Federal courts cannot adjudicate a claim until it is ripe, which occurs when "the harm asserted has matured sufficiently to warrant judicial intervention." *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 544-45 (5th Cir. 2008). "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) (quoting *Thomas v. Union*

[5] While an individual legislator, such as Plaintiff Toth, cannot unilaterally decide to represent the Legislature's interests, a legislature can authorize a member to sue on its behalf. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). No assertion has been made that the Texas Legislature authorized Plaintiff Toth to bring this suit on its behalf.

Carbide Agric. Prods. Co., 473 U.S. 568, 580-81 (1985)). In other words, a case is unripe "if further factual development is required." *Id.* at 547 (quoting *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003)). Similarly, a plaintiff lacks standing to seek prospective relief unless she identifies a "threatened injury" that is "certainly impending"—"'allegations of possible future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Here, Plaintiffs have not met their "burden of establishing standing and ripeness" as to their claims against future drive-through voting because they are built on "hypothetical" facts. *Miss. State Democratic Party*, 529 F.3d at 545. The record is silent about the future of drive-thru voting in Harris County. Even assuming the County offers drive-thru voting in the future, Plaintiffs offer nothing indicating what specific procedures the County will follow in doing so. They do not offer evidence indicating, for example, whether future drive-thru voting will involve the same structures as were used during the November 2020 election, whether it will involve the same security-related guidelines, or where in relation to brick-and-mortar buildings the structures will be located. Nor does Plaintiffs' evidence contend with the possibility that other counties will offer drive-thru voting in future elections. Plaintiffs' claims thus require this Court "to deliver an opinion 'advising what the law would be upon a hypothetical state of facts,'" which it cannot do. *Fed. Election*

Comm'n v. Lance, 635 F.2d 1132, 1139 (5th Cir. 1981) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

II. Plaintiffs did not prove they are entitled to a preliminary injunction.

Even if Plaintiffs had standing, they failed to show their entitlement to a preliminary injunction. "Plaintiffs seeking a preliminary injunction must show: (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiffs will suffer irreparable harm if the injunction is not granted, (3) that the threatened injury outweighs any damage that the injunction might cause the defendant, and (4) that the injunction will not disserve the public interest." *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). "A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements." *Id.* (internal quotation marks omitted).

Plaintiffs failed to satisfy any of these four prerequisites. In fact, Plaintiffs have forfeited their argument as to three of the prerequisites by offering *no argument* about them at all. *See* Appellants' Br. at 22-33. As a result, the Court can and should end its inquiry there. In any event, Plaintiffs did not establish, and have not established, that they are entitled to relief. In fact, they fall short on all four fronts: they are not likely to succeed on the merits, they will suffer no harm (much less irreparable harm) if an injunction does not issue, and both the equities and the public interest weigh strongly against granting the requested relief.

A. Plaintiffs did not prove their claims were substantially likely to succeed.

Plaintiffs are not entitled to a preliminary injunction because they failed to prove they were substantially likely to succeed on the merits of either of their claims. Nor could they. Their Elections Clause claim fails because Plaintiffs have not proven that drive-thru voting is inconsistent with the Texas Election Code, let alone that no reasonable person could conclude otherwise. And their equal protection claim fails because the sole case on which it relies has no application here, and Plaintiffs' theory that the Equal Protection Clause mandates a one-size-fits-all approach to elections administration is both unfounded and unwise.

1. Plaintiffs' are not likely to succeed on their Elections Clause claim.

a. The Court should decline to recognize this claim.

Plaintiffs' Election Clause claim relies on a concurrence in *Bush v. Gore*, a case the Supreme Court indicated should not be used as precedent. 531 U.S. at 109 (instructing that the Court's "consideration [was] limited to the present circumstances"); *see* Appellants' Br. 26 (citing *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring)).[6] In fact, this Court has expressed doubt about *Bush*'s precedential

[6] None of the other cases Plaintiffs support this claim. *See* Appellants' Br. 25-26. The closest is *Arizona State Legislature v. Arizona Independent Redistricting Commission*, in which the Court *rejected* a state legislature's challenge to an initiative vesting redistricting power in an independent commission. 576 U.S. 787,

value. *League of United Latin Am. Citizens v. Abbott*, 951 F.3d 311, 317 (5th Cir. 2020) (*Abbott*) (noting *Bush*'s "express pronouncement" disclaiming precedential value). The Court should not recognize this claim based on such a thin reed.

Recognizing the claim that Plaintiffs present would be unwise. It would transform federal courts into the default venue for even the most minor state-law disputes, and it would require federal courts to continuously police the often-ambiguous bounds of state election laws. But it is "state courts" that hold the "primary role" as "expositors of state law," *O'Hair v. White*, 675 F.2d 680, 693 (5th Cir. 1982), not federal courts. Recognizing Plaintiffs' Election Clause claim would turn this well-settled balance on its head.

b. Plaintiffs cannot satisfy the requirements of the claim they propose.

Even if this Court were to recognize the existence of the claim that Plaintiffs present, Plaintiffs failed to demonstrate they are substantially likely to satisfy the claim's requirements. According to the case law on which Plaintiffs rely, to assert an Elections Clause claim, Plaintiffs must identify not only a violation of the Texas Election Code, but a "*significant departure* from the legislative scheme." *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring) (emphasis added). Plaintiffs acknowledge

824 (2015). To the extent the Eighth Circuit recognized this claim in *Carson*, 978 F.3d at 1060, that decision is not controlling on this Court and should not be followed.

they must make this showing. Appellants' Br. 26 (asserting that Harris County's drive-thru voting program "significantly departed from the legislative scheme"). A significant departure is one that goes "beyond what a fair reading" of the statute allows or that "[n]o reasonable person" could agree is lawful. *Bush*, 531 U.S. at 115, 119 (Rehnquist, C.J., concurring). Thus, under Plaintiffs' Elections Clause theory, the question is not whether drive-thru voting is merely inconsistent with the Election Code, but instead whether it amounts to an objectively unreasonable application of the relevant statutory provisions.

Here, Plaintiffs cannot satisfy these requirements because drive-thru voting comports with Texas law. But even if it did not, the ambiguous nature of the relevant statutory provisions precludes any assertion that a contrary view is objectively unreasonable. As a result, Plaintiffs' Election Clause claim fails.

i. Drive-thru voting comports with Texas law.

Plaintiffs' assertion that Texas law prohibits drive-thru voting misreads the Election Code. As the district court explained, the "merits" of Plaintiffs' Elections Clause claim must "be analyzed separately by early voting and election day voting" because different statutory provisions govern those two phases of an election. ROA.1431. Neither of those provisions prohibits drive-thru voting.[7]

[7] As discussed, *supra* Section I.C, the record does not indicate what drive-thru voting will look like in future elections. Because the only relevant portion of the record is

The Texas Election Code does not prohibit drive-thru voting during the early voting period. During early voting, counties may set up "temporary branch polling places" comprised of "movable structure[s]." Tex. Elec. Code § 85.062(e). As the district court explained, ROA.1431, the facilities Harris County built during the November 2020 election to house drive-thru voting locations constituted "movable structures": they covered "a space of at least ten feet by twenty feet" and consisted of "metal frames" covered by "durable tent covers." ROA.728. Indeed, Harris County used the same structures to house in-person voting centers as well. ROA.729-30, 905.

In conducting voting within these structures, Harris County satisfied the various requirements regarding what must occur within a polling location. When a voter entered the structure, the procedures election officials and voters followed were no different than those that applied when a voter walked into a brick-and-mortar polling location: she had to provide identification and turn off her cell phone, and she could cast a vote only after her eligibility was confirmed. ROA.728-29.[8] Poll

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the description of drive-thru voting as it occurred during the November 2020 election, this Section explains why those procedures did not violate the Election Code. By offering this discussion, Intervenor Defendants do not concede their position that Plaintiffs' claims regarding future drive-thru voting are unripe and speculative.

[8] To the extent Plaintiffs assert that certain voters did not follow these instructions, Appellants' Br. 22-23, that says nothing about the legality of the drive-thru voting procedures themselves.

watchers were also able to observe the entire voting process. ROA.728; *see* Tex. Elec. Code § 33.056.

Nor did the drive-thru voting procedures conflict with Texas law governing Election Day voting. As an initial matter, Plaintiffs' brief offers no argument that drive-thru voting violated the provisions governing Election Day voting. *See* Appellants' Br. at 27-29. The statutory provision to which they point, Texas Election Code § 85.062(b), applies only to early voting, not Election Day voting. *See* Appellants' Br. at 27. Because "any issue not raised in an appellant's opening brief is forfeited," Plaintiffs have forfeited the issue of whether drive-thru voting complies with the Election Day provisions of the Election Code by failing to identify in their brief any basis upon which this Court could so find. *United States v. Bowen*, 818 F.3d 179, 192 n.8 (5th Cir. 2016).

In any event, Harris County's drive-thru procedures did comport with the provision governing Election Day voting. That provision requires that a polling place "be located inside a building." Tex. Elec. Code § 43.031(b). Section 43.031(b) does not define the term "building." But other provisions of Texas law indicate that the structures used by Harris County fall within the meaning of that term. For example, one provision characterizes a "building" merely as "any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use." Tex. Penal Code § 30.01(2). Another provision offers a similar

definition. *See* Tex. Local Gov't Code § 214.231(1) (defining building as an "enclosed structure designed for use as a habitation or for a commercial use"). These definitions by no means indicate that to constitute a "building," a structure must be made of brick and mortar. Interpreting the law otherwise in its advisory discussion, the district court failed to consider this necessary interpretive tool. While the court's discussion asserted that "tents used for drive-thru voting are not 'buildings' within the meaning of the Election Code," the only authority it cited for that proposition was Black's Law Dictionary, which defines building as a "structure with walls and a roof," but indicates it must be "a permanent structure." ROA.1433-34. But the court failed to consider other portions of Texas statutory law, which, as discussed, indicate that non-permanent structures can amount to "buildings." Tex. Local Gov't Code § 214.231(1); Tex. Penal Code § 30.01(2).

Plaintiffs' various arguments in support of their assertion that the Election Code otherwise prohibits drive-thru voting are misguided. Because the structures used for drive-thru voting were polling places inside which voters cast their ballots, Plaintiffs are incorrect to assert that drive-thru voting was somehow "curbside" voting. Appellants' Br. at 22-24, 27-29. The statute governing curbside voting permits certain voters to cast their ballots *outside* a polling place, during which the normal requirements for voting in a polling place may be relaxed. Tex. Elec. Code

§ 64.009(a), (b).[9] Because drive-thru voting occurs *inside* a polling place, section 64.009 is not relevant to this analysis. The only relevant questions are whether the structures used for drive-thru voting satisfy the statutory requirements for a polling place, and whether the voting procedures involved otherwise satisfy the Election Code's requirements. As just explained, they do.

Contrary to Plaintiffs' assertion, section 64.001(a)'s discussion of a "voting station" within a polling place does not change the conclusion that the structures used for drive-thru voting were polling places. Appellants' Br. 29. A voting "station" is simply the designated area in the polling place where the voter goes to complete her ballot. In the context of drive-thru voting, the voting station is the area within the structure, marked by lines, into which the voter pulls her car (or bicycle) and turns off her engine. *See* ROA.178-79. Just as a voter in a brick-and-mortar structure may not complete her ballot while standing at the check-in table, a drive-thru voter may not get out of the car and complete her ballot elsewhere in the drive-thru polling place.

As the district court suggested, *see* ROA.1431, Plaintiffs' theory that each voters' car is itself a "polling place," Appellants' Br. at 28, is incorrect. A voter

[9] Plaintiffs repeatedly cite Texas Election Code §§ 82.002 and 104.001-104.005 when referring to curbside voting, Appellants' Br. at 2-3, 23-24, 32, but those provisions are irrelevant. Section 82.002 governs voting by mail, and Chapter 104 relates to a voter's inability to use a voting machine.

cannot complete an in-person ballot while sitting inside a car unless (1) her car is located inside a drive-thru polling place, or (2) she requests a curbside ballot outside of a brick-and-mortar polling place. In other words, a voter may complete a ballot in a car only when the car is in a location where the Election Code allows voting within a car. The fact that a voter may be inside a car when voting, on its own, is legally irrelevant.

The views of the Texas Attorney General on the legality of drive-thru voting, Appellants' Br. at 30—let alone those of a lone state legislator, *id.* at 31—hold no weight before this Court. But if this Court did look to the views of state officials for guidance on the legality of election practices, it should look not to the Attorney General, but instead the Secretary of State, Texas' chief elections officer responsible for ensuring uniform "application, operation, and interpretation" of the Election Code, Tex. Elec. Code § 31.003. The Secretary's office approved Harris County's idea for drive-thru voting and even offered "suggestions to keep the project in compliance with the law." ROA.177.

Plaintiffs' assertion that the Texas Legislature "rejected" drive-thru voting is plainly untrue. Appellants' Br. at 30. The bill to which the Plaintiffs refer, HB 2898, proposed to expand eligibility for curbside voting to include voters with young children. ROA.1296. Regardless of the "justification" offered for HB 2898, Appellants' Br. at 31, the bill simply did not address the drive-thru voting procedures

Plaintiffs challenge here. But even if the Texas Legislature had failed to enact a bill that expressly allowed drive-thru voting, that would not support Plaintiffs' interpretation. A legislature's failure to enact legislation should not be viewed as disagreement with its substance. Such inaction "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted).

Finally, Plaintiffs' mention of the chosen locations of drive-thru voting centers in Harris County during the November 2020 election does not offer any reason to believe that the procedures somehow violated the Election Code. *See* Appellants' Br. at 31. They do not assert, for example, that Texas law prohibited Harris County from choosing those locations as opposed to others.[10]

In sum, the drive-thru procedures used by Harris County in the November 2020 election fit within the bounds of the Texas Election Code.

[10] To the extent Plaintiffs imply that political bias motivated the selection of drive-thru locations, the record demonstrates the opposite: the Harris County Commissioners Court, which included two Republican members, "unanimously approved all election details" for the November 2020 election, "including the number and site of every drive-thru voting location." ROA.908.

ii. Even if drive-thru voting exceeds the bounds of the Election Code, it does not amount to a "significant departure."

Even if this Court were to conclude that a better reading of the Election Code does not permit the drive-thru procedures used during the November 2020 election, that conclusion would not mean that drive-thru voting violates the United States Constitution. Plaintiffs have failed to explain why these procedures *significantly* depart from the Election Code. For the reasons just explained, it cannot be seriously argued that "[n]o reasonable person" could believe the drive-thru voting procedures just discussed fit within the Election Code's framework. *Bush*, 531 U.S. at 119 (Rehnquist, C.J., concurring). Harris County's reading of the Election Code is, in fact, the better one, but even if it were not, the reading is hardly unreasonable. Drive-thru voting was a good faith effort by Harris County officials—including both Republican members of the Commissioner's Court—to provide Texas voters with a safe, convenient, and secure voting procedure within the bounds of the Election Code. Even the Secretary of State, the state official responsible for ensuring uniform interpretation of the Election Code, approved of the idea. ROA.177. Thus, even if the drive-thru voting procedures used in November 2020 were not consistent with the Election Code, they would not give rise to a constitutional claim.

Because Plaintiffs' Elections Clause claim does not satisfy the theory on which it relies, and if adopted would result in a transformation of the role of federal

courts, this claim is not substantially likely to succeed.

c. Defendants have not "waived" their defense of this claim.

Plaintiffs erroneously argue that, by not "cross-appealing" the decision below, Defendants have somehow waived their ability to defend against Plaintiffs' Elections Clause claim. Appellants' Br. 20-22. Plaintiffs are wrong.

Defendants fully prevailed before the district court: they obtained full dismissal of Plaintiffs' claims and a denial of all relief requested. Defendants were under no obligation to appeal that judgment. In fact, any appeal by Defendants would have been a waste of judicial resources and would have been dismissed for lack of appellate standing.

Plaintiffs mischaracterize the court's order when they assert that the district court issued a "ruling" that "drive-thru voting is illegal on Election Day." Appellants' Br. at 8, 20. The district court did no such thing. The court indicated "what its ruling *would have been*" had it not concluded that Plaintiffs' lacked standing. ROA.1428 (emphasis added). This is not mere semantics. Because the district court concluded Plaintiffs had no standing, it had "no authority to consider the merits." *Cook v. Reno*, 74 F.3d 97, 99 (5th Cir. 1996). Indeed, "[w]ithout jurisdiction, the court cannot proceed *at all* in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (emphasis added). Having concluded Plaintiffs lacked standing, the district court had no authority to make any "ruling" on the

merits.[11]

Art Midwest Inc. v. Atlantic Limited Partnership XII, 742 F.3d 206 (5th Cir. 2014)—on which Plaintiffs primarily rely, Appellants' Br. 21—offers them no support. There, this Court held that the "cross-appeal rule" precluded a party who failed to cross-appeal a jury's *explicit rejection of one of its claims* from attempting to relitigate that claim after this Court vacated and remanded the jury's rejection of the opposing party's counterclaims. *Id*. at 209-10. By failing to appeal the jury's verdict, the party allowed that portion of the judgment to take full effect. *Id.* at 211-12. Here, by contrast, there was nothing in the district court's judgment on the merits to take effect.

Plaintiffs' reliance on the principle that a cross-appeal is necessary "to modify a judgment" or "to justify a remedy in favor of an appellee" similarly has no application here. Appellant's Br. at 20-21 (quoting *Art Midwest*, 742 F.3d at 211; *Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008)); *see also id.* at 22 (citing *Marts v. Hines*, 117 F.3d 1504, 1519 (5th Cir. 1997) (Garwood, J., dissenting)).

[11] Intervenor Defendants do not mean to suggest that the district court acted inappropriately. Intervenor Defendants appreciate that, given the extremely time-sensitive nature of these proceedings—the result of Plaintiffs' inexcusable delay in filing this suit—the district court offered its advisory discussion to be helpful to this Court in adjudicating Plaintiffs' then-impending emergency motion for injunction pending appeal. Nonetheless, blackletter law makes clear that, once the district court concluded Plaintiffs lacked standing, it had no power to evaluate the merits of the claims.

Defendants are not asking this Court to modify the district court's judgment or provide them with any remedy. They simply ask for affirmance of the judgment below, which dismissed the case and denied Plaintiffs relief.

Further demonstrating the error in Plaintiffs' position is the fact that Defendants could not have appealed the judgment below even if they wanted to. "It is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it." *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 603 (5th Cir. 2004). Defendants were not aggrieved by any portion of the judgment below, and therefore could not have appealed.

For all of these reasons, Defendants have not "waived" their ability to defend against Plaintiffs' claims.

2. Plaintiffs are not likely to succeed on their Equal Protection Clause claim.

Plaintiffs' assertion that the Equal Protection Clause prohibits Harris County from "implement[ing] a form of voting" that "differs" from other counties, Appellants' Br. 32, is wrong. The only case Plaintiffs cite for this claim, *Bush v. Gore*, provides them no help. As noted above, the Supreme Court indicated in *Bush* that its decision should not be used as precedent. In any event, its holding is in no way applicable to this case. *Bush* "involved a unique application of the one-person, one-vote rule" that had nothing to do with the *process* by which voters cast their votes. *Abbott*, 951 F.3d at 316. As this Court has explained, the Court in *Bush* held

that "recount procedures adopted by the Florida Supreme Court treated voters arbitrarily and disparately because the 'standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.'" *Id.* (quoting *Bush*, 531 U.S. at 106). Such different treatment of completed ballots, the Court held, failed to "satisfy the minimum requirement for nonarbitrary treatment of voters." *Bush*, 531 U.S. at 105.

The principle elucidated in *Bush*—that the Equal Protection Clause prevents states from creating situations in which completed ballots may be treated differently based on who counts them—provides no support for Plaintiffs' claim here. As one court recently explained in rejecting the same type of claim, *Bush* merely prohibits a state from taking "equivalent *votes* and, for no good reason, adopt[ing] procedures that greatly increase the risk that one of them will not be counted—or perhaps gives more weight to one over the other." *Donald J. Trump for President*, *Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *42 (W.D. Pa. Oct. 10, 2020). The fact that a voter outside Harris County does not have the option of casting her ballot while sitting inside a drive-thru structure says nothing about whether her *ballot* is being treated or weighed differently than ballots cast in Harris County.

Contrary to Plaintiffs' theory, nothing in *Bush* suggests that a voter in one county must have an identical voting experience as a voter in another county. Other courts have also rejected this theory. *See Donald J. Trump for President, Inc. v. Sec'y*

of Pa., 830 F. App'x 377, 388 (3d Cir. 2020) ("Even when boards of elections 'vary . . . considerably' in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection."); *Wise*, 978 F.3d at 100-01; *Wexler v. Anderson*, 452 F.3d 1226, 1231-32 (11th Cir. 2006).

This Court should decline Plaintiffs' invitation to break from this chorus. Interpreting the Equal Protection Clause to require that voters throughout a state have exactly the same voting experience would not only be an impossible task, it would lead to absurd results. Counties varying widely in geography, size, and population would be forced to adopt precisely identical processes and would be prohibited from experimenting with new approaches to elections administration to better serve their unique communities. The U.S. Constitution does not require such a result. In fact, the one-size-fits-all requirement Plaintiffs offer here could itself produce unconstitutional impediments to the fundamental right to vote.

Plaintiffs' equal protection claim presents an unsupported and unwise theory. It is not likely (let alone substantially likely) to succeed.

B. Plaintiffs do not even attempt to argue that they satisfied the remaining preliminary injunction elements.

As the parties seeking injunctive relief, Plaintiffs were not only required to prove a substantial likelihood of success, but also that they face a substantial threat of irreparable harm absent an injunction, that the balance of the equities favor injunctive relief, and that the requested relief would serve the public interest.

Nichols, 532 F.3d at 372. Plaintiffs' brief does not argue any of these issues. Appellants' Br. 22-33. By choosing not to include these issues in their "opening brief," Plaintiffs have "forfeited" them. *Bowen*, 818 F.3d at 192 n.8. It is neither Defendants' nor the Court's job to make arguments on Plaintiffs' behalf. Thus, even if Plaintiffs can satisfy Article III, they are not entitled to preliminary relief.

Even if Plaintiffs had offered arguments as to these issues, they would not have prevailed. Nothing in the record indicates Plaintiffs are "likely to suffer irreparable harm" unless they receive a preliminary injunction prohibiting the future use of drive-thru voting. *Daniel Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013). Plaintiffs did not offer evidence that drive-thru voting would impact them at all. And even if this Court adopted the Voters Plaintiffs' dubious "vote dilution" theory, there is no evidence that an injunction against drive-thru voting would prevent ineligible individuals from voting or unlawful ballots from being cast. The same applies to the Candidate Plaintiffs. There is no indication they intend to run for office again, and even if they did, nothing in the record suggests they would perform any better in a future election if drive-thru voting is not made available.

As for the balance of the equities, because Plaintiffs failed to prove any threat of irreparable harm, they cannot prove that such nonexistent harm outweighs the damage an injunction would cause Harris County. *Nichols*, 532 F.3d at 372. County

officials must be permitted to use their authority under the Election Code to promote participation in their elections. Limiting that authority harms the county's interest in maximizing voter participation. An injunction against drive-thru voting would also cause administrative burden, as it would force the county to find new ways of offering safe and convenient voting procedures for its residents.

Finally, a preliminary injunction against future drive-thru voting would not promote the public interest. There is no evidence that drive-thru voting permits (or even encourages) ineligible voters to try to participate in elections, so an injunction against that practice would serve no public benefit. Moreover, the public interest favors providing counties the flexibility necessary to run effective, convenient, and safe elections. An injunction would injure that interest.

Because Plaintiffs have forfeited the argument that they satisfied the remaining preliminary injunction elements, and because the record confirms that they in fact did not satisfy any of those requirements, Plaintiffs would not be entitled to any preliminary relief even if they had standing.

CONCLUSION

The Court should affirm the district court's dismissal of Plaintiffs' claims. In the event the Court concludes Plaintiffs have standing and this case is ripe, it should hold Plaintiffs are not entitled to preliminary relief.

Dated: March 12, 2021

Respectfully Submitted,

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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. I certify that counsel for the Plaintiff-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Daniel C. Osher
Daniel C. Osher

CERTIFICATE OF COMPLIANCE

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