No. 20-50407

In the United States Court of Appeals for the Fifth Circuit

TEXAS DEMOCRATIC PARTY, GILBERT HINOJOSA, CHAIR OF THE TEXAS DEMOCRATIC PARTY, JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, AND BRENDA LI GARCIA,

Plaintiffs-Appellees

v.

GREG ABBOTT, GOVERNOR OF TEXAS, RUTH HUGHS, TEXAS SECRETARY OF STATE, KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

EMERGENCY MOTION FOR STAY PENDING APPEAL AND TEMPORARY ADMINISTRATIVE STAY

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Kyle.Hawkins@oag.texas.gov

LANORA C. PETTIT
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Defendants-Appellants

Certificate of Interested Persons

No. 20-50407

Texas Democratic Party, Gilbert Hinojosa, Chair of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia,
Plaintiffs-Appellees

v.

Greg Abbott, Governor of Texas, Ruth Hughs, Texas Secretary of State, Ken Paxton, Attorney General of Texas,
Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Counsel of Record for
Defendants-Appellants

Introduction and Nature of Emergency

Yesterday evening, the district court below issued a preliminary injunction preventing Texas officials from enforcing critical anti-fraud provisions of the Texas Election Code mere weeks before an election and days before mail-in ballots are distributed to eligible voters. Exhibit A. The provisions at issue, Texas Election Code sections 82.001-004, provide exceptions to Texas's general requirement that all voters vote in person. Sections 82.001-004 allow voting by mail for voters physically absent from their county, or suffering from a "disability"—that is, "a sickness or physical condition"—or over 65, or incarcerated. The Texas Legislature believes mail-in balloting should be limited because in-person voting is the surest way to prevent voter fraud and guarantee that every voter is who he claims to be.

The district court below has now overridden that policy choice. Announcing that "the entire world is . . . fearfully disabled" due to its lack of immunity to the ongoing global pandemic, the district court declared that Texas's decision to limit voting-by-mail to only a small subset of voters violates the First, Fourteenth, and Twenty-Sixth Amendments. It ordered: "Any eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances." *Id.* at 9. And it enjoined the Texas Governor, Attorney General, and Secretary of State "from issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order." *Id.* at 9-10.

The district court manifestly erred. Indeed, later today, the Texas Supreme Court will hear oral argument on the proper interpretation of section 82.002. Exhibit

B. With the State's highest court on the verge of deciding a question of state law, the district court had a clear duty to abstain from weighing in—yet it went ahead anyway because "[ab]stention would take considerable time." Ex. A at 73. The district court also lacks jurisdiction, because the plaintiffs present political questions against the wrong defendants that are in any event barred by sovereign immunity. And they cannot succeed on the merits, since no provision of the Constitution allows a federal court to order a State to let everyone vote by mail.

This Court should enter a stay pending appeal, and it should immediately enter a temporary administrative stay while it considers this application. Over the past two months, this Court has entered multiple stays pending appeal and temporary administrative stays of "patently wrong," *In re Abbott*, 954 F.3d 772, 795 (5th Cir. 2020), district court orders like this one. *See id.*; *see also In re Abbott*, 800 F. App'x 293, 296 (5th Cir. 2020); *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020). It should do the same here.

Appellants have brought this motion directly to this Court under Federal Rule of Appellate Procedure 8(a)(2) because it is impracticable to seek relief before the district court. Election officials will begin distributing mail-in ballots next week; time is of the essence

BACKGROUND

I. Texas Law Requires In-Person Voting Except in Narrow Circumstances.

Most Texas voters vote in person. They may apply to vote by mail in only one of four instances—they: (1) anticipate being absent from their county of residence;

(2) have a disability that prevents them from appearing at the polling place; (3) are 65 or older; or (4) are confined in jail. Tex. Elec. Code §§ 82.001-.004. These rules are primarily enforced at the county level by early-voting clerks. *Id.* §§ 83.005, 86.001(a).

The Appellants are Texas Governor Gregg Abbott, Attorney General Ken Paxton, and Secretary of State Ruth Hughs. Neither Governor Abbott nor Secretary of State Hughs enforce the above provisions. *See id.* Attorney General Paxton carries broad authority to prosecute voter fraud. Tex. Elec. Code § 273.021.

II. Appellants' Are Working Diligently to Ensure the Safety of In-Person Voting.

On March 13, 2020, Governor Abbott declared a state of disaster in all of Texas's 254 counties. Tex. Gov. Proclamation (Mar. 13, 2020 11:20 a.m.). Almost immediately, he began adopting measures to protect the uniformity and integrity of elections. These actions include, for example, postponing a May 26, 2020 primary runoff to July 14, 2020. Tex. Gov. Proclamation (Mar. 20, 2020 6:35 p.m.).

Most recently, on May 12, the Governor issued a proclamation expanding early voting for the July 14 election. *See* Exhibit C. The proclamation doubled the time period allowed for "early voting by personal appearance," *id.* at 3, "to ensure that elections proceed efficiently and safely when Texans go to the polls to cast a vote in person during early voting or on election day," *id.* at 2 (providing election officials with sufficient time to "implement appropriate social distancing and safe hygiene practices").

The Secretary of State has also issued several advisories. For example, she quickly alerted election officials to the Governor's May 11 proclamation. Exhibit D. The advisory explained that, in very short order, the Secretary of State would provide "detailed recommendations for protecting the health and safety of voters and election workers at the polls" and work closely with election officials "to ensure that our elections are conducted with the utmost safety and security." *Id.* The Secretary had intended to send that guidance this morning, but now will delay her actions due to the uncertainty caused by the district court's injunction. Election officials may distribute mail-in ballots next week. *See* Tex. Elec. Code § 86.004(b)

III. Several Groups Sue in State Court to Compel Election Officials to Expand Voting by Mail.

In late March, several organizations and voters (including Appellees) filed a lawsuit against the Travis County Clerk, one of the local officials charged with enforcing the law, aimed at expanding voting by mail to all Texans. *See* Exhibit E. They asked the court to declare that "any eligible voter, regardless of age and physical condition," may vote by mail "if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease." *Id.* at 10. The clerk did not oppose the plaintiffs' request for a temporary injunction. The trial court obliged, prohibiting Appellants from "taking actions that during all elections affected by the COVID-19 pandemic, that would prohibit individuals from submitting mail ballots based on the disability category." Exhibit F at 5.

The State—which had intervened to protect the integrity of Texas law—immediately filed a notice of interlocutory appeal. Exhibit G. Under the Texas Rules of

Appellate Procedure, the trial court's temporary injunction was superseded and stayed upon the State's appeal. Tex. R. App. P. 29.1(b); *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 805 (Tex. 2014). Appellees, however, continued to act as if the state-court injunction was in effect.

In response to the "public confusion" caused by the Travis County lawsuit, the Attorney General provided guidance to county election officials on May 1, 2020. Exhibit H. "Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code," he explained. *Id.* at 1. And he further explained that the then-stayed state-court injunction "does not change or suspend these requirements." *Id.* at 2-3; *see also* Exhibit I.

In response, Appellees filed a motion to enforce the state-court injunction in Texas' Fourteenth Court of Appeals. That court confirmed that the injunction had been superseded but issued its own injunction to allow the trial-court order to go into effect. Exhibit J at 2-3. The Texas Supreme Court, however, quickly stayed that order. Exhibit B. The Fourteenth Court appeal remains pending and is scheduled to be submitted for decision by June 12.

Meanwhile, confusion continued to spread across the State. On May 13, the State petitioned the Texas Supreme Court for a writ of mandamus to compel five county clerks to abide by the language of the Election Code. Exhibit K. The Supreme Court is hearing argument today. Exhibit B.

IV. Appellees Bring This Duplicative Litigation in Federal Court.

Hedging against an unfavorable outcome in state court, Appellees—the Texas Democratic Party, its chair, and three individuals—filed this action on April 7. They argue that the State's articulation of the plain text of the Election Code (1) violates the Twenty-Sixth Amendment as-applied, (2) discriminates on the basis of age and race in violation of the Equal Protection Clause as-applied, (3) violates the First Amendment, and (4) is void for vagueness. Exhibit L. And they accuse the Texas Attorney General of voter intimidation. *Id.* at 19. But they seek relief indistinguishable from what Appellees sought—and preliminarily obtained—in state trial court. *Compare id.* at 20-21, *with* Exhibit F.

Following a hearing on May 15, the district court issued a 74-page opinion and order that provides essentially the same relief that is currently being requested in state court. *Compare* Exhibit A at 9-10, *with* Exhibit F at 4-6. In particular, it orders that "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances." Exhibit A at 9. Appellants are further enjoined from "issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order." *Id.* 10.

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

ARGUMENT

Appellants are entitled to a stay because: (1) they are likely to succeed on the merits; (2) they will suffer irreparable harm in the absence of a stay; (3) Appellees will not be substantially harmed by a stay; and (4) the public interest favors a stay. *See Nken v. Holder*, 556 U.S. 418, 426 (2009).

I. Appellants Are Likely to Succeed on Appeal.

Appellants are likely to succeed on appeal for at least three reasons: (1) the trial court should have abstained from ruling on the temporary injunction; (2) the court lacked jurisdiction; and (3) Appellees failed to meet their burden of proof to be entitled to such extraordinary relief.

A. The trial court should have abstained in light of the state-court proceedings.

Though Appellees brought federal claims, they cannot be resolved without answering the question the Texas Supreme Court is considering *today*: whether fear of contracting disease constitutes a "disability" under the Texas Election Code. As this Court has explained, there are "two prerequisites" for abstention under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941): "(1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980). Both are met here.

First, there is no doubt that Appellees have manufactured widespread confusion about eligibility to vote by mail. Indeed, the Texas Supreme Court has set that very

issue for oral argument on the strength of the State's mandamus petition alone, without first requesting merits briefing.

And the Texas Supreme Court's ruling would undoubtedly put Appellees' claims "in a different posture," if not moot them entirely. *Id.* If the Appellees' view prevails, all Texas voters could be eligible to vote by mail. In turn, Appellees' as-applied constitutional claims here, which are based on the alleged disparities between voters who can vote by mail and voters who cannot in the unique context of COVID-19, will be moot.

In the trial court, Appellees argued that abstention is inappropriate because this is a voting-rights case. But "traditional abstention principles apply to civil rights cases." *Romero v. Coldwell*, 455 F.2d 1163, 1167 (5th Cir. 1972) (abstaining in a one-man, one-vote case). And this Court has frequently abstained in cases involving challenges to election laws. *See, e.g.*, *Justice v. Hosemann*, 771 F.3d 285, 301 n.14 (5th Cir. 2014); *Moore v. Hosemann*, 591 F.3d 741, 745-46 (5th Cir. 2009); *see also Harris v. Samuels*, 440 F.2d 748, 752-53 (5th Cir. 1971).

Although Appellees asserted—and the district court apparently agreed—that the state-court proceedings are not moving quickly enough, Appellees are the masters of their litigation decisions. In state court, counsel for Appellees expressly disclaimed any argument that section 82.002(a) is unconstitutional on any of the theories they pursue here, though the court was competent to decide them. Exhibit M at 37. That is, Appellees chose to split their claims. The district court should not have rewarded that behavior by entering a temporary injunction, rather than applying

longstanding abstention doctrines—let alone affirmatively rule on the meaning of section 82.002 of the Texas Election Code. Exhibit A at 8.

B. The court lacked jurisdiction.

1. Political question doctrine

Appellants will likely show that this case should have been dismissed because it presents a political question into which "the judicial department has no business entertaining [a] claim of unlawfulness." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (citation omitted). Just last week, the Northern District of Georgia dismissed a similar case. *Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092, at *1, *3 (N.D. Ga. May 14, 2020) (citing *Rucho* and *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 2049076, at *18 (11th Cir. Apr. 29, 2020) (William Pryor, J., concurring)). The district court should have done the same here, where Appellees essentially ask the federal courts to determine whether the State's efforts to combat COVID-19 in the context of elections have been adequate.

2. Sovereign immunity

Appellants are also likely to show that the preliminary injunction is barred by sovereign immunity. "[T]he principle of state-sovereign immunity generally precludes actions against state officers in their official capacities, subject to an established exception: the *Ex parte Young* doctrine." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (citation omitted). *Ex parte Young* applies only when the defendant enforces the challenged statute in violation of federal law. The "general duty to see that the laws of the state are implemented" held by a statewide official (such as the Governor, Attorney General, or Secretary of State) is

insufficient. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quotation marks omitted). Instead, the named defendant must have "the particular duty to enforce the statute in question *and* a demonstrated willingness to exercise that duty." *Id.* (emphasis added). As this Court has recently emphasized, even when a government official "*has* the authority to enforce" a challenged statute, a plaintiff still must show the official "is likely to do [so] here." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019).

As an initial matter, a federal court lacks jurisdiction to order compliance with state law as the district court purported to do (Exhibit A at 8). *Valentine*, 956 F.3d at 802 (applying *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)).

Moreover, no Appellant has the "requisite connection" to the enjoined conduct to bring him or her within *Ex parte Young*'s ambit. The order states, among other things, that "[a]ny eligible Texas voter who seeks to vote by mail" may "cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances." Exhibit A at 9. It also requires the Secretary of State to use "power granted her under state law to ensure uniformity of election administration throughout the state . . . to ensure th[e] Order has statewide, uniform effect." *Id.* at 10. But the Secretary of State lacks authority to enforce the Order in the manner contemplated, and no Appellant enforces the mail-in ballot rules. Appellants are thus likely to show that the claim is barred by immunity.

The district court comes also purported to enjoin Appellants from prosecuting or threatening to prosecute individuals who apply to vote by mail based on COVID-19. *Id.* Unlike the Governor or Secretary of State, the Attorney General has

concurrent jurisdiction with local prosecutors to prosecute election fraud. But Appellees did not offer any evidence that he has either brought criminal enforcement proceedings for potential violations of the Election Code relating to COVID-19 or threatened to bring such criminal proceedings. At most, Appellees have demonstrated that he has stated that there are criminal consequences for encouraging individuals who are not eligible to vote by mail. Ex G at 2. That is just a correct statement of Texas law, Tex. Elec. Code §§ 84.0041, 276.013, not a threat of enforcement sufficient to invoke *Ex parte Young*. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014).

3. Standing

For several reasons, Appellants are also likely to show that Appellees lack standing to sue Appellants. Most prominently, their claims at the preliminary-injunction stage were based entirely on their desire to vote by mail.[1] Acceptance or rejection of an application to vote by mail falls to local, rather than state, officials. *See* Tex. Elec Code §§ 83.005, 86.001(a). Thus, Appellees' asserted injuries are not "fairly traceable to the challenged action of the defendant." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and alterations omitted). And the impact of the statutory scheme on a plaintiff is insufficient for standing purposes; the named defendants must enforce that scheme as to the plaintiff. *Paxton*, 943 F.3d at 1002. Thus, Appellees' purported injuries are not redressable.

[1] Appellees have expressly stated that they did not seek preliminary relief on their race-based claims. Exhibit N at 17-18.

C. Appellees failed to show a likelihood of success on the merits of their claims.

1. Twenty-Sixth Amendment or equal-protection claims

Appellants are also likely to show that Appellees failed to demonstrate a likelihood of success on the merits of the claim that Appellants have violated the Fourteenth and Twenty-Sixth Amendments by allowing individuals 65 and over to vote by mail without extending that ability to those under 65. The Supreme Court examines rules about the ability to vote by mail under rational-basis review. *McDonald v. Bd. of Elec. Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969) (distinguishing between right to vote and right to vote by mail). It currently evaluates Fourteenth Amendment challenges to state election laws under the "*Anderson-Burdick*" framework. *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The only circuit court to have ever considered the issue has also suggested that, when the right to *vote* is implicated, it would apply the same test to Twenty Sixty Amendment claims. *Cf. Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1366-67 (1st Cir. 1975). Under either test, the State is likely to prevail on appeal.

a. It is rational to distinguish between those aged 65 and over and those under 65 for purposes of voting by mail is rational. Even outside the context of COVID-19, individuals aged 65 and over (as a group) face unique challenges in attending the polls. For example, many live in nursing homes and have limited mobility.[2] The State's decision to allow older Texans to vote by mail without extending that ability

[2] *See* Long Term Care, Texas Health and Human Services, https://hhs.texas.gov/services/aging/long-term-care.

to everyone is a rational way to facilitate exercise of the franchise for Texans who are more likely to face everyday barriers to movement, outings, and activity than younger people. And even if it were not, the district court did not explain why the proper remedy, in light of Texas's presumption in favor of in-person voting, was to extend mail-in voting to those under 65, rather than requiring all to vote in person. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698-99 & nn.22-23 (2017)

b. If the stricter *Anderson-Burdick* standard applies, the result does not change. Under *Anderson-Burdick*, courts "must weigh 'the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). State rules that impose a "severe" burden on constitutional rights must be "narrowly drawn to advance a state interest of compelling importance." *Id.* "Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quotations and citations omitted).

Section 82.003 in no way hampers Appellees' fundamental right to vote. Rather, it provides an alternative avenue to cast a ballot for members of a community more likely to face special challenges. Therefore, Section 83.003 places no burden upon *Appellees'* ability to vote.

Instead, Appellees argue that because under-65 voters might contract COVID-19 while voting in person, they will face an unconstitutional burden on their exercise of the franchise if they cannot vote by mail. But the record demonstrates that policy-makers are taking appropriate steps to ensure that voters can safely vote at the polls. For example, a Collin County election official has testified that he has taken numerous steps to protect voters in his jurisdiction. Exhibit O ¶ 4. Even without additional guidance from the Secretary of State—now put on hold by the injunction—other counties intend to introduce similar protective measures. *Id.* ¶ 6. The district court barely referenced the significant evidence the State offered, instead relying on its own research and data that even Appellees had not submitted. *E.g.,* Exhibit A at 8 (citing data about an increase in COVID-19 the day *after* the preliminary injunction hearing). Appellants will likely be able to show that the district court's ruling is unsupported in light of the State's precautions.

The State's interest in the integrity of elections far outweighs the Appellees' interest. Indeed, the Supreme Court has stated that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," and that the need to ensure "orderly administration and accurate record-keeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008). "While the most effective method of preventing election fraud may well be debatable," the Court has said that "the propriety of doing so is perfectly clear." *Id.* Moreover, "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic

process." *Id.* at 197. Commanding election officials to hastily cobble together a universal vote-by-mail system in time for this year's elections without care and planning risks widespread chaos. Such an outcome will neither ensure the integrity of the election nor engender public confidence in the outcome. *Cf. Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam).

For similar reasons, Appellees' age-based equal-protection claims fail. The district court's jumbled analysis itself requires a stay pending further review. The opinion indicates that it may have concluded that section 82.002 violates strict scrutiny because it found "no rational basis" for distinctions between voters over 65 and under 65. Ex. A at 7. But these are, of course, different levels of review.[3] To the extent that the district court applied strict scrutiny, this was legal error because the Supreme Court has squarely held that age classification is subject to rational-basis review under the Fourteenth Amendment. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000). And, for the reasons discussed above, Appellants are likely to show on appeal that section 82.003 satisfies rational basis review.

2. Vagueness

Equally without basis is the district court's conclusion that Appellees will likely succeed on their void-for-vagueness claim. As this Court has explained, the "void-for-vagueness doctrine has been primarily employed to strike down criminal

[3] Compounding this error, Appellees expressly deferred their facial challenges to section 82.003 of the Texas Election Code to "a final trial on the merits," Exhibit P at 14 n.8, yet the district court appears to have found the statute facially unconstitutional, *see* Exhibit A at 10.

laws"; in civil contexts, "the statute must be 'so vague and indefinite as really to be no rule at all." *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir.2000) (quotation marks omitted). This court has emphasized that a "statute is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case." *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001); *see also Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. 1980). But Appellants have never claimed that Section 82.002(a)'s definition of "disability" is "vague and indefinite," and the district court did not so find.

Instead, the district court announced without citation or further explanation that "a more stringent vagueness test applies here as the statute infringes upon basic First Amendment freedoms and voters are threatened with prosecution." Exhibit A at 62. As discussed above, this case does *not* implicate the fundamental right to vote. And the Attorney General's letter that formed the basis of this claim did not threatened to prosecute anyone.

Moreover, Appellees' "as-applied" void-for-vagueness claim will be resolved as a matter of course when the Texas Supreme Court rules on the meaning of the statute.

3. Voter intimidation.

Resolution of the state litigation is also necessary to determine Appellees' voter-intimidation claims. With essentially no analysis, the trial court accepted wholesale the Appellees' theory that that the Attorney General conspired *with members of his own staff* to intimidate voters. Exhibit A at 64-65 (citing 42 U.S.C.

§ 1985(3)). But his behavior was not voter intimidation. It was a correct statement of law. Moreover, the very case upon which the district court relied demonstrates why Appellees have no claim because—among other reasons—"[i]t is a long-standing rule in this circuit that a 'corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.'" *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994).

4. First Amendment

Finally, the trial court found that Appellees were likely to demonstrate that the Attorney General threatened their free-speech rights. Ex. A at 59-61. This claim fails for at least two reasons.

First, the First Amendment does not protect Appellees' asserted right to encourage otherwise healthy individuals to vote by mail if doing so promotes or incites illegal activity. *E.g.*, *United States v. Williams*, 553 U.S. 285, 298 (2008). Under Texas law, it is a crime for voters to submit knowingly false applications to vote by mail, or for third parties to encourage voters to do so. *See* Tex. Elec. Code §§ 84.0041, 276.013. As such, unless the Texas Supreme Court agrees with Appellees' reading of section 82.002, Appellees' First Amendment rights are not implicated by the Attorney General's letter.

Second, the relief the court ordered—an injunction prohibiting Appellants from "issuing any guidance, pronouncements, threats of criminal prosecution or orders," Ex. A at 10—threatens *Appellants'* rights to comment on matters of public

concern.[4] The freedom of speech safeguards the right of individuals to "speak as they think on matters vital to them." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). The Supreme Court has provided the same robust and strenuous protection to elected officials' speech as to citizens' speech in general. *E.g.*, *Bond v. Floyd*, 385 U.S. 116, 133-35 (1966). General Paxton exercised that right when he spoke on an issue of public concern at a time when there was no effective court order preventing him from doing so. Tex. R. App. P. 29.1(b).

II. Appellants Will Be Irreparably Harmed Absent a Stay.

The district court's preliminary injunction threatens irreparable injury by injecting substantial confusion into the Texas voting process mere days before ballots are distributed and weeks before runoff elections. Moreover, the injunction inflicts an "institutional injury" from the "inversion of . . . federalism principles." *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016). Federalism principles recognize that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (alterations omitted) (Roberts, C.J. in chambers). And that right is not protected for the sake of the Appellants as state officials. Instead, the "ultimate purpose" of the structural provisions of the Constitution and of guarding state sovereignty, "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

[4] Appellees' voter-intimidation claim was limited to the Attorney General; the district court's order was not.

Those concerns are particularly important here. "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick*, 504 U.S. at 433. And it is one of the most fundamental obligations of the State to enact clear and uniform laws for voting to ensure "fair and honest" elections, to bring "order, rather than chaos, [to] the democratic process[]," and ultimately to allow the vote to be fully realized. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

III. The Remaining Factors Favor a Stay.

A. A stay merely maintains the status quo and will not harm Appellees.

A stay pending appeal will not threaten Appellees with irreparable harm because it maintains the status quo, and Appellees have alleged only a speculative threat of harm from the absence of a preliminary injunction. A preliminary injunction requires a showing of "irreparable harm" that is *likely*, not merely possible. *See, e.g.*, *Winter v. NRDC*, 555 U.S. 7, 22 (2008). And the threatened harm must be "imminent." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). Appellees have not shown that existing measures to protect voters are so deficient that the absence of additional federal-court-ordered measures threatens them with imminent harm. Moreover, in light of the impending rule by the Supreme Court of Texas, the injunction may be rendered moot in a matter of days.

B. The public interest strongly favors a stay.

"Because the State is the appealing party, its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). For the reasons set out in Part I.C.1, *supra*, the public interest strongly favors a stay.

IV. The Court Should Enter an Immediate Temporary Administrative Stay While It Considers this Motion.

For the reasons set out above, Appellants are entitled to a stay pending appeal, and they ask the Court to enter one forthwith. In the alternative, Appellants ask the Court to enter an immediate administrative stay today while the Court considers this filing. Such administrative stays are routine. *E.g.*, *In re Abbott*, 800 F. App'x 293, 296 (5th Cir. 2020); *M.D. ex rel. Stukenberg v. Abbott*, No. 18-40057, ECF 12 (5th Cir. Jan. 19, 2018).

Conclusion

The Court should immediately enter a temporary administrative stay while it considers this motion, then stay the district court's injunction pending appeal.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant
Attorney General

/s/ Kyle D. Hawkins
KYLE D. HAWKINS
Solicitor General

LANORA C. PETTIT
Assistant Solicitor General
Lanora.pettit@oag.texas.gov

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Appellants

Certificate of Service

On May 21, 2020, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5180 words, excluding the parts of the motion exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Exhibit List

A. Order Regarding Plaintiffs' Motion for Preliminary Injunction (W.D. Tex.)
B. Orders on Case Granted (20-0394 and 20-0401) (Tex.)
C. Tex. Gov. Proclamation (May 11, 2020)
D. MASS EMAIL (CC/EA/VR - 910) - Proclamation regarding early voting for July 14, 2020 Elections (May 11, 2020)
E. Plaintiffs' Original Petition and Application for Temporary Injunction, Permanent Injunction and Declaratory Judgment (Tex. Dist. Ct. – Travis County)
F. Order on Application for Temporary Injunctions and Plea to the Jurisdiction (Tex. Dist. Ct. – Travis County)
G. Notice of Appeal (Tex. Dist. Ct. – Travis County)
H. Letter from Ken Paxton, Attorney General of Texas, to County Judges and County Election Officials (May 1, 2020)
I. Letter from Ken Paxton, Attorney General of Texas, to Hon. Stephanie Klick (Apr. 14, 2020)
J. Order (Tex. App.—Houston [14th Dist.])
K. Petition for Writ of Mandamus (Tex.)
L. Plaintiffs' First Amended Complaint (W.D. Tex.)
M. Transcript of April 15, 2020 Hearing (Tex. Dist. Ct. – Travis County)
N. Transcript of May 15, 2020 Hearing (W.D. Tex.)
O. Declaration of Bruce Sherbet
P. Plaintiffs' Motion for Preliminary Injunction (W.D. Tex.)