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,

Defendant-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
No. 5:20-cv-00438-FB

OPPOSITION TO DEFENDANT-APPELLANTS' MOTION FOR EMERGENCY STAY OF PRELIMINARY INJUNCTION PENDING APPEAL AND MOTION TO EXPEDITE APPEAL

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Chad W. Dunn
K. Scott Brazil
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

K. Scott Brazil
Brazil & Dunn, LLP
13231 Champion Forest Drive
Suite 406
Houston, Texas 77069
Telephone: (281) 580-6310
Facsimile: (281) 580-6362
scott@brazilanddunn.com

Dicky Grigg
Law Office of Dicky Grigg, P.C.
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: 512-474-6061
Facsimile: 512-582-8560
dicky@grigg-law.com

Martin Golando
The Law Office of Martin
Golando, PLLC
N. Saint Mary's, Ste. 700
San Antonio, Texas 78205
(210) 892-8543
martin.golando@gmail.com

Counsel for Appellees

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CERTIFICATE OF INTERESTED PERSONS

1. No. 20-50407; *Texas Democratic Party, Gilbert Hinojosa, Chair of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia v. Greg Abbott, Governor Of Texas, Ruth Hughs, Texas Secretary Of State, Ken Paxton, Attorney General Of Texas.*

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2 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.

Defendants-Appellants	**Counsel**
Greg Abbott, Gov. of Texas	Ken Paxton
Ruth Hughs, Texas Sec'y of State	Jeffrey C. Mateer
Ken Paxton, Atty. Gen. of Texas	Ryan L. Bangert
	Kyle D. Hawkins
	Lanora C. Pettit

Plaintiffs-Appellees	**Counsel**
	Chad W. Dunn
	K. Scott Brazil
	Dicky Grigg
	Martin Golando

/s/ Chad W. Dunn
Counsel of Record for
Plaintiffs-Appellees

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CORE POLITICAL ACTIVITY IS BEING IRREPARABLY HARMED

COVID-19 has infected more than 1.5 million Americans, and despite an unprecedented effort to shut down commerce in order to fight the disease, it has so far claimed the lives of more 93,000 people. This new coronavirus is not the average flu or measles. There are no proven therapeutics and there is no vaccine. Anyone can contract, spread, and die from COVID-19.

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TDP has sought to determine how the state would purport to regulate its runoff nominations. TDP has endured numerous open threats of criminal prosecution and legal machinations that will either (1) prevent TDP from receiving a timely judicial resolution, or (2) enable the state executive branch to impose an as yet-undefined morass of government regulations about which pre-existing medical conditions warrant a mail-in ballot.

TDP has sought legal clarity since March, including through outreach to the Secretary of State's office, the Republican Party, and the Governor's office. ROA.185-205. TDP participated in conference calls where local election officials requested direction from SOS staff on handling mail ballot applications. *Id.* Dozens of civil rights groups argued

publicly that existing state law allowed all those without COVID-19 immunity to vote by mail. *See* https://tinyurl.com/vzyw6fn. Only silence emanated from the state executives.

Therefore, a day after a state of public health disaster was declared, Plaintiffs filed suit in Texas state court seeking injunctive declaratory judgment relief that Tex. Elec. Code § 82.002 allows any eligible voter without immunity from COVID-19 to vote by mail during these elections. The state initially argued the matter was up to individual counties but still did not offer its own workable interpretation of the disability provision. ROA.40-41. On April 15, the state court granted the temporary injunction, finding that the risk of transmission of COVID-19 during in-person voting is high. ROA.688.

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In the nearly five weeks since that state court issued its injunction, the State Defendants have steadfastly opposed it without providing any guidance as to how their interpretation would work. It is the State Defendants who are attempting to enlist this Court in prolonging the "confusion" and "chaos" (Motion at 5, 15) which they created and about which they now complain.

Tellingly, no county has sought to stay either the state or federal court order, which brought much-needed clarity. The State Defendants themselves assert that "[a]cceptance or rejection of an application to vote by mail falls to *local*, rather than state, officials." Motion at 11 (emphasis added). And these local officials are ready and able to handle the increased number of vote by mail ballots, as evidenced by the fact that they are already doing so. ROA.100;805.

While local officials have followed the state court injunction, the State Defendants have threatened TDP, voters, and local officials with criminal sanction. As the state court judge orally announced his order on April 15, and again after the state court issued its written injunction on April 17, Defendant Paxton issued conflicting written opinions threatening criminal prosecution. ROA.334-36;857-59. These were not isolated errors in judgment. Last Friday, when the state supreme court definitively stayed the state court injunction, the attorney general then proclaimed, "I am pleased that today the Texas Supreme Court confirmed that my office may continue to prosecute voter fraud…"

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Press Release, Texas Attorney General, May 15, 2020, available at https://www.texasattorneygeneral.gov/news/releases/ag-paxton-commends-texas-supreme-court-staying-mail-ballot-ruling-and-allowing-continued-prosecution.

The State Defendants are themselves the agents of would-be chaos that will permanently befall should this Court grant a stay.

LEGAL STANDARD

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Stay pending appeal is an "extraordinary remedy." *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968) (denying stay pending appeal). To prevail on her motion, an appellant must show: (1) a likelihood of success on the merits; (2) that she will suffer irreparable injury absent a stay; (3) that Plaintiffs will not be substantially harmed; and (4) that the stay will serve the public interest. *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992). "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). "As the movant for a stay pending appeal, the State

carries the burden to satisfy the four factors." *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir.1982).

ARGUMENT

I. Granting a Stay is Contrary to the Public Interest

The parties agree that clarity and stability is needed for the rules governing vote by mail. The district court order provided that clarity to everyone except the state attorney general. The *only* way this Court can ensure that clarity and stability will prevail is to deny the State's request for yet another election eve stay of the latest court decision holding that Texas voters that are not immune to COVID have the legal right—under both state law and the U.S. Constitution—to cast their ballot by mail.

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This Court has stressed that "given the special importance of preserving orderly elections," in deciding whether to grant or deny requested relief, courts "*should* consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Veasey v. Perry*, 769 F.3d 890, 893, 895 (5th Cir. 2014) (quoting *Reynolds v. Sims*, 377 U.S. 533 (1964)). This principle has been applied to both uphold and stay district court injunctions of electoral practices depending on the equities.

Id. The equities in election-eve disputes can be the dispositive factor in stay proceedings before this Court. *Id.* (granting stay despite not finding any likelihood of success on the ultimate merits questions).

With many thousands of absentee ballot applications already submitted during the pendency of the pandemic and *no* mechanism to disaggregate those the State contends are "illegal," a stay would engender substantial confusion and chaos, create arbitrary results, encourage rampant election disputes, and put innocent voters at risk of harassing prosecution. This Court can avoid this morass by denying the State's request for extraordinary relief, allowing the district court's injunction to remain in place for this upcoming election, and resolving this appeal in sufficient time to provide additional clarity for the general election.

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Granting a stay would disrupt the status quo *during* an election. Voters have been submitting applications over the past several months. ROA.809. In Harris County, for example, as of May 9, there were already 78,616 absentee applications. *Id.* Of the 11,172 *new* requests since the March 2 primary, about 3 percent of those applications were from the "disability" category—over three times the percentage in the March 2

primary. *Id.* Other counties are similarly receiving thousands of absentee applications, including an uptick compared to past elections.

Texas's absentee voting system relies upon a voter's self-certification that they meet one of the eligibility criteria. *See* Tex. Elec. Code 84.002, 84.011. The "disability" eligibility criterion is defined by statute to include a "physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of injuring the person's health." Tex. Elec. Code § 82.002. On March 17, 2020 in a widely circulated letter, over two dozen civil rights organizations argued publicly that this disability provision allows Texas citizens regardless of age to vote by mail during the pandemic. ROA. 1465-69. On March 19, the Texas Commissioner of the Department of State Health Services declared a public health disaster and directed Texans not to gather in groups larger than 10 members and to maintain social distance. ROA.1000-01. On April 2, the Secretary of State issued a memorandum to all election officials advising them on how to prepare for upcoming elections in light of the COVID-19 crisis and it did not contradict the interpretation of the civil rights groups. ROA.979-87. The advisory outlined the legal criteria for vote by mail—including the

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definition for disability above—without any further guidance on how it should be interpreted given the global pandemic. *Id.* Indeed, until the April 15 state court hearing, no official government guidance in opposite to the civil rights' groups interpretation had been issued. On April 15, and again on May 14, state courts issued injunctions requiring compliance with TDP and the civil rights organizations' interpretation of state law. Throughout all this time, many voters and election officials interpreted the disability criteria as the state courts have thus far done.

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The import of the foregoing is not to determine the answer to the state law question of the scope of the "disability" criteria but rather to understand the information available to voters and election officials during the past *two months* when voters have been submitting absentee ballot applications for the now July 14 runoff elections. In Harris County alone, the ratio of "disability" absentee applications to other absentee applications after the state court ruling increased over *ten-fold* from the March 2 primary. ROA.810.

Thousands of Texans have submitted applications for absentee ballots based upon their good-faith belief that they meet the disability criteria because they lack immunity to COVID. And regardless of how

this Court rules on the stay application, not every Texan voter tracks legal proceedings daily. Therefore, Texans will continue to submit applications based on their good-faith belief that they qualify. Nothing in the application materials would suggest otherwise.

Furthermore, under Texas law, there is *no mechanism* to disaggregate these applications from ones that Texas believes are valid. ROA.2020. The parties agree on this crucial point. All four of the counties involved in the Texas Supreme Court proceeding have affirmed that they have *no authority whatsoever* to look behind a facially valid application that checks the "disability" box to interrogate whether the voter really meets that criterion, and the application itself does not ask the voter to specify the basis of their selection of the "disability" box. ROA.1881. The Secretary of State has specifically advised county election officials that they do not have any authority to police absentee ballot applications that select the disability criterion. ROA.803-04.

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Given these circumstances, the State's request to upset the status quo of the past two months—wherein many voters and election officials have in good faith relied on their belief that the disability criterion

applies broadly given the unprecedented circumstances—while the election machinery is already underway must be denied.

In contrast, if this Court granted a stay, the following consequences are sure to ensue:

First, thousands of voters that applied relying on their understanding of their eligibility in light of the pandemic ***will*** receive their ballots. Some of those voters may become aware of this Court's stay and choose not to vote absentee and be forced to either not vote or hazard the risk to vote in person and do so provisionally, subject to high rates of provisional ballot rejections. Others will not be aware of this Court's stay or its import and the state attorney general's promises of prosecution. A stay would generate mass confusion and arbitrary access to vote by mail depending on when a voter applied absentee and what legal news the voter has consumed.

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Second, for those voters aware of the Court's stay that have not yet applied to vote absentee, those voters will be no less confused. While Texas objects to the definition of "disability" provided by county election officials and a state court judge, Texas has been unable or unwilling to explain how it believes COVID-19 might affect who is eligible under the

disability criteria. Meanwhile, Defendant Paxton has made clear that he will consider prosecuting anyone he believes has voted absentee outside the parameters of his (secret) reading of the law. ROA.334-36;857-59.

Third, all of this uncertainty in the eligibility of voters to cast absentee ballots is likely to encourage rampant challenges to voter eligibility if an election appears close. Since there is no means of disentangling valid and "invalid" applications, any such disentangling would have to be done through the voter challenge process. The possibility of thousands of voter challenges is precisely the type of chaos the *Purcell* doctrine is designed to avoid.

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Fourth, county election officials will be unable to cope with a level of in-person voting that they submit is not only unsafe but infeasible on such short notice. For the past two months, many election officials have relied on their belief that more voters would be eligible to vote by mail. And without a dramatic rise in absentee voting, Harris County submits that it cannot run a safe election. ROA.797. Asking election officials to juggle another change in the electoral landscape midstream is certainly against the public interest.

"This is not a run-of-the-mill case; instead, it is a voting case decided on the eve of the election." *Veasey*, 769 F.3d at 892. Because the relief the State seeks would "substantially disturb[] the election process of the State of Texas" not to mention TDP's nomination process, the stay should be denied. *Id.* At the very least, TDP should be allowed to communicate with and encourage its members (of any age) to vote by mail during its runoff elections.

II. <u>Appellants Are Not Likely to Succeed on the Merits</u>

A. Appellees Are Likely to Succeed on their Twenty-Sixth and Fourteenth Amendment Claims

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In the context of the ongoing pandemic, the Texas absentee voting scheme—which undisputedly allocates the right to vote in the safest manner on the basis of age—violates the Twenty-Sixth Amendment. The parties diverge on the precise standard of review for the Twenty-Sixth Amendment claim, but whether this Court applies strict scrutiny or an *Anderson-Burdick* framework—as Defendants suggest is proper under the Twenty-Sixth Amendment when the right to vote is implicated, Motion at 12— the result is the same: the severe burdens imposed by this age-based restriction in the current public health conditions cannot stand.

Rational basis is not the appropriate framework. The Twenty-Sixth Amendment explicitly protects against age-based infringements on the right to vote: "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on the account of age." U.S. Const. amend. XXVI. Texas's absentee ballot scheme undeniably facially classifies on the basis of age and allocates an important voting option on the basis of that classification. Indeed, this Court has recognized that mail-in voting is "an important bridge for many who would otherwise have difficulty appearing in person." *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016) (en banc). To suggest that such a facial classification that allots differential access to the ballot on the basis of a protected class for the purposes of voting gets only rational basis flies in the face of the most basic constitutional principles.

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To argue otherwise, the State merely relies on a 1973 vote by mail case that did not involve an unlawful classification, *McDonald v. Bd of Elec. Comm'rs of Chi.,* 394 U.S. 802 (1969), and its bald assertion that the absentee voting scheme "in no way hampers Appellees' fundamental right to vote." Motion at 13.

Defendants' claim is "demonstrably false." *Veasey*, 830 F.3d at 252 n. 49. Record evidence establishes that voters are at substantial risk if they vote in person and voters are unsure if they will vote if the only option available to them requires them to put their health in jeopardy.

Second, this Court has already rejected Texas's argument that the provision of one form of voting justifies deprivation of another form of voting, here, mail-in voting. *Veasey,* 830 F.3d at 255-56. In contrast to *Veasey*, where it was new mail-in voting that posed additional barriers, here, in these as-applied circumstances, it is *in-person voting* that poses the greatest obstacles for many voters.

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Third, Defendants' reliance on *McDonald*—which predates most of the Supreme Court's modern voting rights jurisprudence—is entirely inapposite. In *McDonald*, the Supreme Court explicitly premised its application of rational basis on two premises: (1) the lack of a discriminatory classification; and (2) the lack of record evidence that the right to vote was in fact burdened. 394 U.S. 802, 807 (1969) ("Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Second, there is

nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote."). Neither premise applies here.

Courts have repeatedly explained that discriminatory burdens on the right to vote are subject to higher scrutiny even if the method of voting access challenged is not constitutionally required. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Obama for America v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) (striking down a restriction on access to early voting options because "the State has offered no justification for not providing similarly situated voters those same opportunities"). Regardless, even if the State was not required to provide a mail-in voting option generally, the discriminatory allocation of that right by age, when combined with the burdens of in-person voting during the pandemic, are a violation of the Twenty-Sixth Amendment.

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Having established that rational basis cannot be the standard of review, the Twenty-Sixth Amendment challenge plainly succeeds regardless of whether strict scrutiny applies or, as Defendants suggest,

an *Anderson-Burdick* framework applies. Motion at 14. Under *Anderson-Burdick*, the level of scrutiny ratchets up when the burdens are discriminatory or severe. *Burdick v. Takushi,* 504 U.S. 428, 434 (1992). Plainly, if the *Anderson-Burdick* framework applies to the Twenty-Sixth Amendment—which protects the right to vote from abridgment on the basis of age—a facial age classification would trigger closer scrutiny. Otherwise, the Twenty-Sixth Amendment would be surplusage. *See League of Women Voters of Fla.*, 314 F.Supp.3d at 1222(finding the Twenty-Sixth Amendment provides "added protection to that already offered by the Fourteenth Amendment"); *Walgren v. Bd. of Selectman of Town of Amherst,* 519 F.2d 1364 (1st Cir. 1974). Indeed, courts have held that the protections of the Twenty-Sixth Amendment can be triggered even when the classification is not directly based upon age but rather upon student status, which highly correlates with age. *See, e.g., United States v. Texas.,* 445 F. Supp. 1245,126 (S.D. Tex. 1978), *affd. sub nom. Symm v. United States*, 439 U.S. 1105 (1979); *Nashville Student Organizing Comm. v. Hargett*, 155 F.Supp.3d 749, 757 (M.D. Tenn. 2015).

Defendants cite the test established by the First Circuit in *Walgren,* as the appropriate standard for Twenty-Sixth Amendment claims that

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implicate the right to vote. Motion at 12. Plaintiffs take no issue with the *Walgren* formulation, which states: "[I]t seems only sensible that if a condition, not insignificant, disproportionately affects the voting rights of citizens specially protected by a constitutional amendment, the burden must shift to the governmental unit to show how the statutory scheme effectuates, in the least drastic way, some compelling governmental objective." 519 F.2d at 1367.

But whatever level of scrutiny applies, Plaintiffs have met their burden here. Each of the individual Plaintiffs provided testimony about their particular circumstances and their reasonable fear of voting in person. The state has provided them no meaningful guidance. Forcing voters to cast their ballots in person during a global pandemic that has shut down most in-person interactions across the globe is a significant burden. And those burdens are not relevant solely to the over 65 population. The state has failed to prove that, for example, citizens age 60-64.99 face meaningfully lower fatality odds than those age 65-70. As the record shows, Texans younger than 65 have so far contracted COVID-19 at a higher rate than older Texans, and, even if they are less likely to die from it, they still suffering from it and risk infecting anyone who they

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live with, work with, or otherwise come in contact with, including those over age 65.

Regardless, has access to the ballot really come down to Russian roulette where voters with three shells in the revolver may vote without playing while those with only one shell must take the chance? There are certainly voting burdens balanced with would-be government regulations upon which reasonable people can disagree but the real risk of suffering, isolated and alone, with the real possibility of death, cannot be one.

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The State Defendants' purported basis, that their interpretation "facilitate[s] exercise of the franchise for Texans who are more likely to face everyday barriers to movement, outings, and activity than younger people" (Motion at 13), cannot meet even rational basis review in light of COVID-19 and the actions of the State Defendants, particularly Defendant Abbott, in response to it. *See, e.g.,* Motion at 3 (noting that Defendant Abbott declared a state of emergency in all of Texas's 254 counties).

Even were this purported state interest sufficient it does not excuse providing direction for what preexisting medical conditions that could exacerbate COVID-19 are covered under the state disability provision.

For example, at oral hearing the state could not say whether Plaintiffs who have asthma or live with asthmatics, could vote by mail. The imposition of such significant burdens solely on the basis of age cannot withstand any meaningful judicial scrutiny. *See, e.g., Ownby v. Dies*, 337 F. Supp. 38 (E.D. Tex. 1971).

State Defendants advance arguments designed to prevent federal court from ever vindicating federal rights with respect to voting and they rehash evidentiary allegations already rejected by the district court. The District Court was not clearly erroneous in rejecting the unfounded invocation of the specter of voter fraud, which Defendants, as always, seek to use a talisman to wave before the courts and escape even rational review (much less the heightened scrutiny at issue here) of their conduct. ROA.2063 (finding "little or no evidence" of fraud in states with vote by mail programs, noting that "[i]n a previous case, the evidence has shown that there is no widespread voter fraud," and finding that "election administrators and law enforcement [will be able] to prevent or prosecute, with evidence and probable cause, the infinitesimal events of voter fraud, none of which are likely to affect election outcomes"). Finally, even if the fraud risk was real the state's interest is much lower

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in *TDP's* election. However the balance is struck, TDP is likely to succeed.

B. Appellees Are Likely to Succeed on their First Amendment Claim

Defendants concede that First Amendment speech is implicated, but argue that TDP does not have a First Amendment claim because encouraging individuals to vote by mail when State Defendants' interpretation of Section 82.002 would render them ineligible "promotes or incites illegal activity." Motion at 17. There are myriad problems with the state's position. First, it ignores the evidence relied on by the district court that Texas has allowed at least on high profile Republican campaign to direct mail pre-filled disability mail applications to voters at large without consequence while threatening TDP and its members with prosecution for their similar efforts. Second, State Defendants have not only prohibited TDP from advocating mail balloting, but denied TDP the clarity necessary for the party to communicate with its *own* members about its *own election*. Third, the district court relied on uncontested evidence that TDP has been unable, for weeks, to undertake millions of dollars of political speech because (1) it cannot obtain legal clarity on Texas's would-be election regulations and (2) it has been openly

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threatened with criminal investigation if guesses wrong about what would be allowed. Fourth, every day that goes by where TDP's political speech is stifled, voters lose a day to successfully obtain, vote and return a mail ballot, rendering TDP's future communications less effective. Therefore TDP and its members are irreparably harmed. Fifth, if it is true that the state can constitutionally dictate how TDP settles its runoff nomination elections, it must also be true that it must do so timely and clearly. Regulating of political party's affairs is itself fraught with First Amendment concerns (*c.f. LaRouche v. Fowler*, 77 F. Supp. 2d 80 (D.D.C. 1999) (three-judge court)), but threatening the party and its members with criminal sanction and effectively holding up millions of dollars of political speech with its members is beyond the pale. The District Court was right to put an immediate stop to it.

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Also, the State Defendants' political speech does not outweigh TDP's as they argued because "speech made pursuant to the employee's official duties" is not subject to protection. *See Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006). The State Defendants concede that the Attorney General's letter "was responding to an inquiry about the statute's construction" (ROA.550), and thus as part of his official duties. The cases

the State Defendants cite (Motion at 17-18) are not to the contrary; they involved political speech by non-executive officials.

C. Appellees Are Likely to Succeed on their Voter Intimidation Claim

Appellees likely to succeed on their voter intimidation claim. Defendant Paxton's statement was not merely a harmless "correct statement of law," as Appellants content. Motion at 11. Instead, as Judge Biery found, Appellants "threaten[ed] criminal prosecution . . . to deprive access to the franchise from legal, rightful voters." Motion at 65. Moreover, the State Defendants' new claim that the May 1 Letter is not a threat of enforcement should be given little weight by this Court, because "[m]id-litigation assurances are all too easy to make and all too hard to enforce, which probably explains why the Supreme Court has refused to accept them." *Robinson v. Attorney Gen.*, 957 F.3d 1171 (11th Cir. 2020). By repeatedly threatening prosecute TDP, political speakers and county election officials for complying with the state district court interpretation Defendant Paxton's May 1 Letter violates 18 U.S.C § 594, which precludes intimidating, threatening, coercing, or attempting to do the same for the purpose of interfering with an individual's right to vote.

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III. The Discretionary Invocation of Abstention Is Inappropriate in this Case

As this Court explained in *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982), because "abstention involves a discretionary exercise of a court's equity powers, it should be applied only in the most extraordinary circumstances when fundamental rights such as voting rights are involved." *Id*. at 694; *see also Siegel v. LePore,* 234 F.3d 1163, 1174 (11th Cir. 2000) ("Our cases have held that voting rights cases are particularly inappropriate for abstention."); *Chisom v. Jindal*, 890 F. Supp. 2d 696, 723 (E.D. La. 2012) ("The Fifth Circuit has recognized that the extraordinary decision to stay federal adjudication . . . requires a broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication."); *League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1284 (N.D. Fla. 2018) ("*Pullman* abstention is inappropriate when voting rights are alleged to be infringed."). Also, the state's decision to exclude TDP from the case just argued to the Texas Supreme Court also means abstention is inappropriate.

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IV. The Political Question Doctrine, which Appellees Raise for the First Time on Appeal, Does Not Apply Here

This Court should reject the state's argument that federal courts should be powerless to redress federal constitutional violations made under well-established claims. "The dominant consideration in any political question inquiry is whether there is . . . a situation where [the court] will lack judicially discoverable and manageable standards for resolving" the case. *Saldano v. O'Connell*, 322 F.3d 365, 369 (5th Cir. 2003) (finding that political question doctrine inapplicable); *see also Elrod v. Burns*, 427 U.S. 347, 351 (1976) ("That matters related to a State's, or even the Federal Government's, elective process are implicated by this Court's resolution of a question is not sufficient to justify our withholding decision of the question.").

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Regardless, Appellants raise this argument for the first time on appeal and therefor this Court should reject it. "As a general rule, appellate courts refuse to consider an issue raised for the first time on appeal." *Matter of Novack*, 639 F.2d 1274, 1276 (5th Cir. 1981).

V. Appellants Do Not Have Sovereign Immunity because *Ex Parte Young* Applies

Ex Parte Young applies. As explained in the District Court, the Fifth Circuit has already held that "invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state." *OCA-Greater Houston v. Texas*, 867 F. 3d 604, 613 (5th Cir. 2017). The secretary of state is required by state to law ensure uniformity in election administration. Tex. Elec. Code § 31.003&5.

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As to Defendant Paxton, "the State [has] concede[d] that the attorney general has the duty to enforce and uphold the laws of Texas," *City of Austin v. Abbott*, 385 F. Supp. 3d 537, 545 (W.D. Tex. 2019) Further, Defendant Paxton's threat to prosecute individuals for violation of specific statute at issue clearly constitutes the necessary "scintilla of enforcement by the relevant state official with respect to the challenged law" that *Ex Parte Young* requires. *See City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019).

Finally, the State Defendants themselves detailed to the District Court the numerous ways in which the Governor has and does enforce the Texas Election Code. *See* ROA.529; *see also* ROA.958 (summarizing

Governor Abbot's more than extensive enforcement with respect to state elections).

Thus, based on clear precedent and the State Defendants' factual own admissions, *Ex Young Young* applies to them and their claim of sovereign immunity fails.

VI. Appellants Have Standing to Sue the State Defendants

The State Defendants attack on Appellees' standing fails. State Defendants apparently abandon their challenges to Appellee TDP's organizational and associational standing, which was foreclosed by this Court's decision in *Tex. Dem. Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006).

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VII. Appellants Will Not Be Injured, Irreparably or Otherwise, if a Stay Does Not Issue

The State Defendants themselves contend that county election officials run the election and they have not appealed the District Court's ruling (much less argued that they will suffer irreparably injury). There is no evidence in the record to suggest that in the absence of a stay that the election will descend into "chaos" and indeed the District Court rejected this view on the evidence. ROA.526;2126-29. Indeed, as stated above, a stay will only create chaos and confusion—not prevent it.

VIII. Appellees, and All Other Texans, Will Be Substantially Harmed if a Stay Is Issued

"It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Here, Appellees' First, Fourteenth, and Twenty-Sixth Amendment rights will be irreparably harmed by a stay, as the District Court made clear in its not clearly erroneous factual findings.

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CONCLUSION

The stay should be denied.

May 21, 2020

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

By: /s/ Chad W. Dunn

Chad W. Dunn
General Counsel
State Bar No. 24036507
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

K. Scott Brazil
State Bar No. 02934050
Brazil & Dunn, LLP
13231 Champion Forest Drive, Suite 406
Houston, Texas 77069
Telephone: (281) 580-6310
Facsimile: (281) 580-6362
scott@brazilanddunn.com

Dicky Grigg
State Bar No. 08487500
Law Office of Dicky Grigg, P.C.
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: 512-474-6061
Facsimile: 512-582-8560
dicky@grigg-law.com

Martin Golando
The Law Office of Martin Golando, PLLC
SBN #: 24059153
N. Saint Mary's, Ste. 700
San Antonio, Texas 78205
(210) 892-8543
martin.golando@gmail.com

Counsel for Plaintiffs-Appellees

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

/s/ Chad W. Dunn
Chad W. Dunn

Counsel for Appellees

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/s/ Chad W. Dunn
Chad W. Dunn

Counsel for Appellees

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 5,179 words, excluding the parts 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 Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

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/s/ Chad W. Dunn
Chad W. Dunn

Counsel for Appellees