No. 22-50692

In the United States Court of Appeals for the Fifth Circuit

CAMPAIGN LEGAL CENTER; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; DEMOS A NETWORK FOR IDEAS AND ACTION, LTD.,

Plaintiffs-Appellees

v.

JOHN B. SCOTT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE STATE OF TEXAS,

Defendant-Appellant

On Appeal from the United States District Court for the Western District of Texas, Austin Division, No. 1:22-cv-00092-LY

DEFENDANT-APPELLANT'S OPPOSED EMERGENCY MOTION FOR A STAY PENDING APPEAL AND FOR AN ADMINISTRATIVE STAY

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Certificate of Interested Persons

No. 22-50692

Campaign Legal Center; American Civil Liberties Union Foundation of Texas; Mexican American Legal Defense and Educational Fund, Inc.; Lawyers' Committee for Civil Rights Under Law; Demos A Network for Ideas and Action, Ltd.,

Plaintiffs-Appellees

v.

John B. Scott, in his official capacity as Secretary of the State of Texas,

Defendant-Appellant

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

/s/ Ari Cuenin
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Introduction and Nature of Emergency

The National Voter Registration Act of 1993 (NVRA) allows persons nationwide to register to vote in federal elections when they apply for a state driver's license. To ensure the integrity of elections, the NVRA also requires States to crosscheck voter registrations against other State databases to ensure that only eligible voters remain on voting rolls. Like other States, Texas identifies potentially ineligible voters who also possess a state driver's license and then gives those identified persons an opportunity to confirm that they are indeed eligible to vote. Texas, which has processed significant numbers of voter registrations in recent years, is cautious about flagging registrants as potentially ineligible. Yet in their complaint below, Plaintiffs broadly alleged, without offering any evidence, that Texas's methods of complying with the NVRA's mandate to disenroll ineligible voters was discriminatory. Exh. A, ECF 1 ¶¶ 26-27.

In the hope of finding facts to support their allegations of discrimination, Plaintiffs wrote to Texas Secretary of State John Scott, the Defendant-Appellant in this case, demanding that he disclose to them privileged information about a subset of individuals registered to vote in Texas. The Texas Public Information Act (PIA), the Texas Election Code, and the federal Driver's Privacy Protection Act (DPPA) precluded the Secretary from divulging that sensitive information, which can be used to harass the identified registrants in ways that both the Supreme Court and this Court repeatedly have found to be unlawful. Nothing in the text, context, structure, or history of the NVRA hints that it either preempts nondisclosure requirements of Texas law, such as the PIA and state-law investigative privileges, or the DPPA. And

reading the NVRA to require the disclosure Plaintiffs seek would require determining the NVRA unconstitutionally violates the anticommandeering doctrine.

The district court held a bench trial on May 9, 2022. Exh. B, Tr. At trial, Secretary Scott objected that Plaintiffs had not offered any evidence that they have standing to bring their claims. Exh. B, Tr. 25-27. The district court nevertheless granted Plaintiffs injunctive relief and, on August 2, 2022, entered findings of fact and conclusions of law (Exh. C, ECF 55) and issued a final judgment against Secretary Scott (Exh. D, ECF 56). The Secretary filed a notice of appeal on August 5, 2022. Exh. E, ECF 57.

The district court order should be stayed pending this Court's decision on appeal. *See* Fed. R. App. P. 8(a). The district court's order relied on a misunderstanding of standing based on informational injury and the Plaintiff's burden to prove standing by a preponderance of the evidence. This Court is likely to uphold its existing precedent by reversing the district court's order on appeal, and this Court frequently stays such district court decisions. *E.g.*, *Vote.Org v. Callanen*, 39 F.4th 297, 309 (5th Cir. 2022). That is enough for a stay, but even if it were not, the equities overwhelmingly favor a stay pending appeal. The district court ordered the Secretary of State to disclose voter information by August 16, 2022. If the Secretary is forced to disclose confidential information—information he believes may well lead to voters being harassed—on August 16, then even an eventual victory on appeal would not "unring" that bell. Thus, absent a stay, Secretary Scott effectively will be deprived of his right to appeal. Worse, disclosure threatens to harm identified registrants and may interfere with Texas's ability to meet its obligations to

investigate and maintain the integrity of its voter rolls. Plaintiffs have failed to identify *any* injury that might counterbalance these harms.

Consistent with Rule 8(a)(1) of the Federal Rules of Appellate Procedure, Secretary Scott initially sought a stay in district court before seeking relief from this Court. At trial, the Secretary orally requested a stay of any injunction the Court decided to issue. Exh. B, Tr. 44-46. The Court acknowledged that the stay issue was before it, *id.* at 46, but it did not grant a stay of its injunction. Secretary Scott interpreted the Court's ruling as an implicit denial of the oral motion for a stay. *See* Fed. R. App. P. 8(a)(2)(ii). But because the Court's injunction did not expressly address the stay issue, the Secretary submitted a written motion on August 5, 2022, to err on the side of caution. *See id.* R. 8(a). The Secretary informed the district court that he intended to seek emergency relief from this Court by 2:00 p.m. on Monday, August 8, 2022. Exh. F, ECF 58. The Secretary filed this Motion the next business day. As of the filing of this Motion, the district court has failed to afford the relief requested. *See* Fed. R. App. P. 8(a)(2)(ii).

The Secretary respectfully requests that this Court grant a stay by **August 15, 2022, at 12:00 p.m.** Emergency consideration is required under Fifth Circuit Rule 27.3 because the district court's August 2 order requires Secretary Scott to produce confidential voter information by August 16, which is within fourteen days of this Motion. In addition, or in the alternative, the Secretary requests an administrative stay by that same date pending resolution of this motion. *E.g.*, *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL 5166656, at *1 (5th Cir. Nov. 6, 2021) (per curiam).

BACKGROUND

1. Under federal law, Texans may register to vote at the same time they apply for a driver's license or a renewal of their existing Texas driver's license. Texas crosschecks those registrations against other State databases to ensure that it keeps only eligible voters on voting rolls in conformity with the NVRA. Like other States, Texas identifies potentially ineligible voters who also possess a state driver's license and then gives those identified persons an opportunity to confirm that they are indeed eligible to vote.

Defendant-Appellant John Scott, in his role as Texas Secretary of State, compiles this list of potentially ineligible voters as part of a statutory investigative process. That process begins with a periodic comparison of motor-vehicle registration data held by the Texas Department of Public Safety (TDPS) against a state voter-registration list mandated under the NVRA and the Help America Vote Act of 2002. Tex. Elec. Code § 216.0332(a-1); *see* Exh. G, ECF No. 27-1, ¶ 3. The Secretary of State's office sends to local voter registrars the name of each registrant whose driver's license application suggests he or she may be ineligible to vote in the precinct where currently registered. Each local registrar then reviews the records provided by the Secretary of State and, if the registrar determines that the voter may be ineligible for registration, delivers the registrant a written notice that requires him or her to confirm eligibility to vote. Tex. Elec. Code §§ 16.033(a), .0332(a); *see* Exh. G, ECF No. 27-1, ¶¶ 3-5. It is the responsibility of each county election official to review records sent to him or her through the revised process and to determine whether an individual identified as a potential non-United States citizen is currently

eligible for registration in the official's county. *See, e.g.*, Tex. Elec. Code §§ 16.033, .0332(c); Exh. G, ECF No. 27-1, ¶ 6. The Secretary may thus "receiv[e] or discover[] information indicating that criminal conduct in connection with an election has occurred." Tex. Elec. Code § 31.006(a). Texas law treats that information as confidential so long as an investigation is pending. *See id.* § 31.006(b).

2. Plaintiffs are nonprofit organizations that litigate voting rights cases or advocate in the broader space of equity and inclusion. Exh. A, ECF 1 ¶¶ 13-17. Pursuant to a 2019 settlement agreement unrelated to this case, the Secretary of State was to notify some of Plaintiffs' attorneys by way of the Texas Attorney General's Office before sending to a local registrar the name of registrants flagged as potentially ineligible to vote on the basis of lack of United States citizenship. Exh. C, ECF No. 55, at 3.

Secretary Scott duly sent such notice to counsel in August and September 2021. *Id.* at 3-4. Plaintiffs made requests, and then demands under threat of litigation, for additional confidential information about each flagged registrant—beyond what the 2019 settlement agreement required. *Id.* at 4. Consistent with information-privacy protections, Secretary Scott denied Plaintiffs' invasive information requests. *Id.*

Plaintiffs followed through with their threats to file suit. They broadly alleged, without offering any factual support, that Secretary Scott added the noticed names to the list of potentially ineligible voters to discriminate based on national origin. Exh. A, ECF 1 ¶¶ 26-27. They asserted that Secretary Scott's decision not to disclose the requested information violates the NVRA. *Id.* ¶¶ 58-60.

Apparently hoping to find facts to support their conclusion, Plaintiffs asked the district court to order the Secretary of State to disclose extensive confidential information about each named registrant. *Id.* at 15. Further, they asked the district court to invent a new method of required disclosure not found in the NVRA: emailing confidential information instead of allowing disclosure only under the safer methods of in camera inspection and photocopying that the NVRA allows. *Id.* Plaintiffs also asked the district court to enter judgment in their favor. *Id.*

Plaintiffs then filed a motion for a preliminary injunction consolidated with trial on the merits (PI Motion). Exh. H, ECF 20. Plaintiffs asserted the district court should order Secretary Scott to provide the requested records so they could check whether he is using stale data to discriminate against newly naturalized citizens. *Id.* at 8-10. They asserted an injunction was merited because, in their view, the NVRA requires disclosure and conflict preempts contrary state laws. *Id.* at 11-16. Plaintiffs argued that they suffer irreparable injury without access to the welter of confidential personal information. *Id.* at 17-18.

Secretary Scott responded that Plaintiffs' argument failed for at least three reasons. Exh. G, ECF 27. *First*, the NVRA in fact does not require public disclosure of the records Plaintiffs seek because those records are part of an ongoing criminal investigation into whether the flagged registrants committed voter fraud. *Id.* at 9-14. *Second*, the NVRA never so much as mentions disclosing confidential registration records over unsecure electronic mail in the way Plaintiffs demand. *Id.* at 14-15. *Third*, if the NVRA counterfactually were to impose such a disclosure duty on the

Secretary of State, that provision would be unconstitutional under the anticommandeering doctrine. *Id.* at 15-18.

On May 9, 2022, the district court held a bench trial combining Plaintiffs' requests for an injunction and for a merits ruling. At trial, Plaintiffs made no effort to offer any evidence to support their allegation that the Secretary of State was engaged in discrimination. *See* Exh. B, Tr. at 9. Plaintiffs instead argued that contrary state-law protections were preempted. *Id.* at 10-11. And they sought to overcome the anticommandeering doctrine by invoking moribund precedent concerning the Elections Clause of the U.S. Constitution. *Id.* at 19-23.

Secretary Scott, in turn, alerted the district court to Plaintiffs' lack of standing. *Id.* at 25. He noted that the Supreme Court recently held that plaintiffs must offer record evidence of "downstream consequences" caused by alleged lack of access to requested information. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021). Not only had Plaintiffs failed to offer evidence of such downstream consequences, they had disclaimed wanting to introduce additional evidence . Exh. B, Tr. at 26-27.

Substantively, Secretary Scott reiterated the importance that Texas places on privacy rights during an ongoing investigation into whether individuals committed a crime by registering to vote, and affirming under perjury their eligibility to vote, despite in fact being ineligible. *Id.* at 27-28. These privacy concerns derive in part from investigative privilege and in part from the Secretary of State's obligation under the federal Driver's Privacy Protection Act to prevent disclosure of personally identifying information obtained in connection with a motor-vehicle record. *Id.* at 30.

Secretary Scott also reiterated that Plaintiffs' position, if accepted, would violate anticommandeering principles. *Id.* at 38-42. Plaintiffs relied on cases predating the Supreme Court's seminal anticommandeering case, *Printz v. United States*, 521 U.S. 898, 935 (1997), and ignored a long line of cases that have since clarified the contours and scope of that doctrine, Exh. B, Tr. at 39-40. Moreover, Plaintiffs' precedents were inapplicable because (1) they deal with NVRA provisions not at issue in this case and (2) voting-list maintenance is not regulation of voter registration. *Id.* at 40.

Lastly, Secretary Scott asked the district court to stay any injunction it might issue. *Id.* at 45-46.

3. After trial, the court entered findings of fact and conclusions of law. Exh. C, ECF 55. The district court concluded that it "agree[d] with Plaintiffs that the evidence demonstrates a concrete 'informational injury' with 'downstream consequences.'" *Id.* at 7. But the court did not identify any record evidence for these bare conclusions.

In its merits discussion, the court concluded that the State could not withhold voter data based on investigative privilege or confidentiality concerns because the court reasoned that there was no ongoing criminal investigation. *Id.* at 8-9. The court interpreted the NVRA's provisions for inspection and photocopying of records to require transmission of sensitive information to Plaintiffs by email. *Id.* at 12-13. And the court rejected the Secretary's anticommandeering-doctrine argument because Article I, section 4 of the Constitution allows Congress to commandeer state officials for tasks related to the times, places, and manner of elections. *Id.* at 13-14.

The district court then concluded that the equities merited injunctive relief. *Id.* at 15-17. The court therefore awarded Plaintiffs an injunction and ordered the Secretary to release to Plaintiffs all the following categories of flagged registrants' private information: (1) full name; (2) voter identification number; (3) date of voter registration application; (4) effective date of voter registration; (5) status of voter registration; (6) any prior voter-registration statuses and dates of changes in those statuses; (7) all voting history; (8) issuance date of current driver's license, personal identification, or election identification certificate; and (9) date on which each flagged registrant provided TDPS with documentation. *Id.* at 17.

By separate order, on August 2, the district court entered a Mandatory Injunction and Final Judgment in Plaintiffs' favor and ordered Secretary Scott by August 16 to compile and transmit to Plaintiffs all the above categories of information for 11,246 registered voters. Exh. D, ECF 56, at 1-2.

Statement of Jurisdiction

This Court has jurisdiction over the district court's Mandatory Injunction and Final Judgment under 28 U.S.C. § 1291.

Argument

"An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as 'inherent[.]'" *Nken v. Holder*, 556 U.S. 418, 426 (2009). All four stay factors are met here: (1) the Secretary of State is likely to succeed on the merits; (2) he will suffer irreparable harm in the absence of a stay; (3) Plaintiffs will not be substantially harmed by a stay; and (4) the public interest

favors a stay. *Texas v. United States*, 40 F.4th 205, 215 (5th Cir. 2022) (per curiam). But where the "balance of the equities weighs *heavily* in favor of granting the stay," only a "*serious legal question*" is required. *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020). Secretary Scott meets either test.

There is little doubt that the equities overwhelmingly favor a stay. The State will experience irreparable harm unless a stay is granted. Once the Secretary of State produces the records as ordered, the harm is done and Secretary Scott will effectively lose his right of appeal. The district court was also wrong on the merits, and this case at a minimum presents serious legal questions with "a broad impact on relations between the states and the federal government." *Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 910 n.9 (5th Cir. 2011).

I. The Equities Heavily Favor a Stay.

The equitable factors heavily favor a stay. The Secretary of State will be irreparably harmed absent a stay, Plaintiffs will experience no comparable harm from a stay pending appeal, and the public interest favors a stay. *Nken*, 556 U.S. at 426.

A. The Secretary will face irreparable harm absent a stay. This Court generally considers a State enjoined from giving effect to its statutes to automatically suffer a form of irreparable injury. *E.g.*, *Vote.Org*, 39 F.4th at 308. Here, the district court entered a mandatory injunction requiring the Texas Secretary of State to take a discrete act: disclose confidential information. *See* Exh. D, ECF 56, at 1. Those records are part of the Secretary of State's ongoing review into whether to refer matters to the Texas Attorney General, and Texas law treats that information as confidential so long as an investigation is pending. *See* Tex. Elec. Code § 31.006(a)-

(b); Exh. G, ECF 27-1 ¶ 12; *see also Hobson v. Moore*, 734 S.W.2d 340, 340-41 (Tex. 1987) (Texas courts "recognize [a] privilege in civil litigation for law enforcement investigation"). Nothing in this case points to a reason for the Court to break from the presumption of irreparable injury.

Moreover, the Secretary of State has repeatedly voiced his concerns throughout this litigation about the risks to flagged registrants' privacy that such disclosure would raise. *E.g.*, Exh. G, ECF 27-1 ¶ 15. Releasing the disputed information could inhibit the Texas Secretary of State's ability to fairly and without public pressure evaluate whether the flagged registrants broke election law. *Id.* ¶ 14. Plaintiffs did not seek to cross-examine the declarant who presented these concerns, nor did they present evidence that the concerns were unfounded. A stay is appropriate in the light of privilege and confidentiality concerns. *See, e.g.*, *LULAC v. Patrick*, No. 22-50662 (5th Cir. July 27, 2022).

These concerns justify a stay pending appeal because, once all the information has "been released," "the cat is out of the bag." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.). Absent a stay, an eventual victory on appeal would come too late to prevent harm. If the district court's order is not stayed, the Secretary of State must produce the disputed records by August 16. That leaves no time for appellate review of the Secretary of State's challenge to the disclosure purportedly required by the NVRA unless the district court's order is stayed. Courts, including this one, have held in the analogous context of privilege objections to disclosure orders that there "is no adequate remedy on appeal for the revelation of this information." *In re E.E.O.C.*, 207 F. App'x 426, 430 (5th Cir. 2006) (per

curiam); *see also In re City of N.Y.*, 607 F.3d 923, 935 (2d Cir. 2010); *In re Profl's Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009).

B. Conversely, Plaintiffs face no harm from a stay pending appeal, and the public interest favors a stay. As discussed above, Plaintiffs presented no evidence of any injury at all, much less substantial injury that would result from a stay. The public interest favors protecting the investigative process and the privacy rights of individuals subject to investigation. *See* Exh. G, ECF 27, at 3-14. Moreover, "[b]ecause 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). Thus, this factor also supports granting a stay.

II. The Texas Secretary of State Is Likely to Succeed on Appeal.

A. Secretary Scott is likely to succeed on appeal because Plaintiffs lack standing. As the district court noted in its findings of fact and conclusions of law, Plaintiffs bore the burden to demonstrate their standing to bring this case. Exh. C, ECF 55, at 6. Plaintiffs bore the burden of establishing the constitutional minimum of standing: injury in fact, traceability, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). That burden is particularly heavy here: this case proceeded to a bench trial, so Plaintiffs needed to adduce evidence actually proving standing by a preponderance of the evidence. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020). Without standing, the district court was without jurisdiction to consider Plaintiffs' claim. *See id.* That error alone is reason to grant a stay.

The record demonstrates that Plaintiffs failed to shoulder their burden. Plaintiffs invoked the prospect of alleging informational injury as a legal theory. But that bare legal theory is insufficient for establishing Article III jurisdiction. To show a viable informational injury, a plaintiff must show that he or she suffers adverse "downstream consequences" from the alleged lack of information. *TransUnion*, 141 S. Ct. at 2214. As noted above, the district court recognized that this requirement exists. *See* Exh. C, ECF 55 at 7. It concluded that the "evidence" demonstrates that such downstream consequences exist here. *Id.* But the district court identified no evidence backing its bare legal conclusion and thus erred as a matter of law. And even if Plaintiffs could frame that legal conclusion as a finding, "the 'clearly erroneous' standard of review does not insulate factual findings premised upon an erroneous view of controlling legal principles." *Johnson v. Hosp. Corp. of Am.*, 95 F.3d 383, 395 (5th Cir. 1996). Plus, the ruling lacks "substantial evidence to support it." *Bd. of Trs. New Orleans Emp'rs Int'l Longshoremen's Ass'n v. Gabriel, Roeder, Smith & Co.*, 529 F.3d 506, 509 (5th Cir. 2008). Likewise, findings are clearly erroneous when, as here, "the court misinterpreted the effect of the evidence." *Id.*

At the pleading stage, Plaintiffs merely had to "allege facts demonstrating" each element of standing. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Given the liberality accorded to complaint allegations, a plaintiff may face a lower burden in alleging facts that, when taken as true, would satisfy constitutional standing. But once Plaintiffs proceeded to trial, they needed to *prove* that they satisfied the critical jurisdictional elements by a preponderance of the evidence. *See, e.g.*, *Env't Tex. Citizen Lobby, Inc.*, 968 F.3d at 367 (citing *Lujan*, 504 U.S. at 561); *Felch v. Transportes Lar-Mex SA de*

CV, 92 F.3d 320, 326 (5th Cir. 1996); 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3531.15 (3d ed. 2022).

Here, Plaintiffs never presented any evidence of downstream consequences necessary to demonstrate standing. Not only did they fail to call any witnesses at trial, Plaintiffs also declined to adduce additional exhibits. *See* Exh. B, Tr. at 26-27. The trial evidence therefore was limited to exhibits attached to Plaintiffs' preliminary-injunction briefing, which did not include declarations from any Plaintiff, much less a declaration establishing any downstream consequence that could show an injury-in-fact.

Plaintiffs tried to establish standing at trial by asserting three theories about informational injuries. *First*, they argued that they have a right to the registrant records they requested. *Id.* at 46. *Second*, they contended that a downstream injury exists simply by virtue of the fact that the general public allegedly does not have visibility into how Texas maintains its voter lists. *Id. Third*, they hypothesized that a downstream injury exists "with respect to the public not having visibility" into "properly registered Texans being discriminated against and burdened in their right to vote." *Id.* None of these three theories withstands scrutiny.

1. As to the first argument, even if Plaintiffs had a right to the registrant information that they seek (they do not), such a statutory right to information does not itself create standing. Plaintiffs' confusion appears to be rooted in a failure to recognize an important difference between a plaintiff's statutory cause of action to sue a defendant and a plaintiff's concrete harm. *TransUnion*, 141 S. Ct. at 2205. As the Supreme Court recently illustrated in *TransUnion*, demonstrating an alleged

violation of law is not sufficient to create standing because "an injury in law is not an injury in fact." *Id.* That is why *TransUnion* held that plaintiffs claiming informational injury must actually demonstrate "'downstream consequences' from failing to receive the required information." *Id.* at 2214. Plaintiffs failed to do so here.

2. As to the second argument, Plaintiffs put no evidence in the record that *anyone* lacks visibility into how Texas maintains the relevant voter lists. Texas submits detailed person-level information about its voter list—and additions and deletions therefrom—to the federal Election Assistance Commission, and that macro-level data is made public record every two years. *See, e.g.*, United States Election Assistance Commission, *Election Administration and Voting Survey 2020 Comprehensive Report* 138-70 tbls.1-5 (2021). At the micro level, Plaintiffs already have access to at least some of the information they are seeking. *See* Exh. C, ECF 55 at 10 (noting Plaintiff obtained some information from county sources); *id.* at 6 n.3 (noting Secretary Scott provided some information under reservation of challenge to Plaintiffs' claim). Plaintiffs failed to adduce evidence demonstrating that they lack visibility into data that they already have in their possession.

In any event, lacking "visibility" into another's confidential and sensitive information is not an injury-in-fact that either the Supreme Court or this Court ever expressly has recognized. Alleged injuries that do not "inva[de] . . . a legally protected interest" cannot support standing. *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017). Even if Plaintiffs had identified such an interest, they still failed to demonstrate concrete "downstream consequences" based on visibility. *TransUnion*, 141 S. Ct. at 2214. The most that a lack of data visibility to the *general public* would

demonstrate is a *generalized injury*, but generalized grievances are insufficient to establish standing. *E.g.*, *Stringer v. Whitley*, 942 F.3d 715, 722 & n.24 (5th Cir. 2019). Nor could Plaintiffs sue on behalf of third parties: they do not claim to satisfy the third-party-standing test, *see Vote.Org*, 39 F.4th at 303-04, and the NVRA does not authorize third-party suits in any event, 52 U.S.C. § 20510(b)(2) (authorizing "the aggrieved person," not third parties, to "bring a civil action").

3. Plaintiffs have adduced no record evidence that any Texas registered voter is being discriminated against or burdened by the commonplace and cautious methods that the Secretary of State employs to ensure Texas voter rolls' integrity. No one testified about any such injuries, much less that such injuries were "downstream consequences" of an alleged violation of the NVRA's public-disclosure provision. Even if there were such evidence, it would raise the same problems discussed above: lacking "visibility" is not a concrete injury, and Plaintiffs cannot sue over third-parties' voting rights.

In short, Plaintiffs never affirmatively addressed standing, even though they bore the burden on that point. It is now too late for them to identify new evidence or new standing theories. As the party invoking federal jurisdiction, Plaintiffs bore the burden of establishing each element of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs forfeited their standing arguments by inadequately developing the facts: "[a]rguments in favor of standing, like all arguments in favor of jurisdiction, can be forfeited or waived." *Ctr. for Biological Diversity v. U.S. EPA*, 937 F.3d 533, 542 (5th Cir. 2019). "Without the requisite specifics, this [C]ourt would

be speculating upon the facts. This is something [it] cannot do." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 499 (5th Cir. 2007) (en banc).

B. There is also a "serious legal question" about the Secretary's obligations under the NVRA, which the district court likely erred in construing. *Tex. Dem. Party*, 961 F.3d at 397 (emphasis omitted). In its merits discussion, the district court conceded that the NVRA's text does not discuss whether a State may withhold voter data based on investigative privilege or privacy concerns. Exh. C, ECF 55 at 8. Yet it concluded that no such concerns were implicated based on an assumption that the Secretary's referral process was insufficiently connected to ongoing criminal investigations. *Id.* at 8-9. The court reasoned further that no privacy interests were at stake because some counties have released some registrant records to the Plaintiffs and, in the district court's view, Plaintiffs' record request was made in an investigation in anticipation of litigation. *Id.* at 10-12. At a minimum, the court's atextual reading of the NVRA as trumping investigative privilege raises serious legal questions. As the Fourth Circuit recently explained, the NVRA does not "require automatic disclosure of all categories of documents," given the risk of "subjecting [identified individuals] to potential embarrassment or harassment." *Pub. Int. Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 266-67 (4th Cir. 2021). Because Plaintiffs seek similar information in the context of similar state-law requirements as were at issue in *N.C. Board of Elections*, a stay is warranted to preserve the status quo while this Court analyzes its sister circuit's approach.

The court also rejected the Secretary's textual reading of the NVRA not to require electronic transmission of registrants' sensitive information. Exh. C, ECF 55

at 12. The NVRA requires that certain records be "ma[d]e available for public inspection and, where available, photocopying at a reasonable cost." 52 U.S.C. § 20507(i)(1).The district court read the words "inspect" and "photocopy" in the NVRA to also mean sending by "email." Exh. C, ECF 55 at 12-13. But Plaintiffs never requested to inspect or photocopy records: they insisted that the Secretary transmit sensitive information by unsecured email or FTP. Once again, the district court's order raises serious legal questions about the NVRA.

The district court also erroneously rejected the Secretary's anticommandeering doctrine argument. The anticommandeering doctrine "is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). That general rule includes a specific prohibition on Congress "conscripting [a] State's officers." *Printz*, 521 U.S. at 935. The district court invoked caselaw from other circuits largely predating the Supreme Court's modern line of anticommandeering cases starting with *Printz*. Exh. C, ECF 55 at 13-14. In the court's view, the Elections Clause permitted Congress to commandeer state officials for tasks related not only to the times, places, and manner of elections, but also to the maintenance of accurate voter rolls. *Id.* at 14; *see* U.S. Const. art. I, § 4, cl. 1. But here, commandeering is accomplished not by the Constitution, but by the NVRA's public-disclosure provision, a "mere statutory requirement." *Branch v. Smith*, 538 U.S. 254, 280 (2003) (plurality op.). Indeed, the *en banc* Fifth Circuit recently held that similar "recordkeeping requirements" in the Indian Child Welfare Act ("ICWA") "unconstitutionally commandeer state

actors." *Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021) (per curiam), *cert. granted*, 142 S. Ct. 1205 (2022). This Court should grant a stay while it considers these important issues.

III. Additionally, or Alternatively, This Court Should Enter a Temporary Administrative Stay.

For the reasons above, the Secretary is entitled to a stay pending appeal. The Secretary further requests that the Court immediately enter an administrative stay while the Court considers this motion. Such administrative stays are routine. *E.g.*, *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 227-28 (5th Cir. 2020). A temporary administrative stay will prevent irreparable harm while the Court considers the motion for a stay pending appeal.

Conclusion

The Court should stay the district court's injunction pending appeal. In addition, or alternatively, the Court should immediately enter a temporary administrative stay.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH RULE 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this Motion, counsel for Appellant contacted the clerk's office and opposing counsel to advise them of Appellant's intent to file this motion. Counsel for Appellant also made telephone calls to the offices of opposing counsel before filing this Motion.

- The facts stated herein supporting emergency consideration of this motion are true and complete.

- The Court's review of this motion is requested as soon as possible, but no later than August 15, 2022. In addition, or alternatively, Appellant respectfully requests an immediate administrative stay while the Court considers this motion.

- True and correct copies of relevant orders and other documents are attached as exhibits to this motion.

- This motion is being served at the same time it is being filed.

- The names of counsel representing the parties, including contact information of all counsel, are as follows:

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/s/ Ari Cuenin
ARI CUENIN

CERTIFICATE OF CONFERENCE

On August 7 and 8, 2022, counsel for Appellant conferred with counsel for Appellees, who stated that Appellees oppose the relief requested in this motion and will file a response in opposition to the motion. The filing of this motion was also preceded by telephone calls to the clerk's office and to the offices of opposing counsel on August 8, 2022, advising of the intent to file the emergency motion.

/s/ Ari Cuenin
ARI CUENIN

Certificate of Service

On August 8, 2022, this document was transmitted to the Clerk of the Court and served via CM/ECF on all registered counsel, and served via email on:

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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/ Ari Cuenin
ARI CUENIN

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 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/ Ari Cuenin
Ari Cuenin