No. 20-50867

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS; NATIONAL LEAGUE OF UNITED LATIN AMERICAN CITIZENS; LEAGUE OF WOMEN VOTERS OF TEXAS; RALPH EDELBACH; BARBARA MASON; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES; TEXAS LEGISLATIVE BLACK CAUCUS,

Plaintiffs-Appellees,

v.

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Defendant-Appellant.

LAURIE-JO STRATY; TEXAS ALLIANCE FOR RETIRED AMERICANS; BIGTENT CREATIVE,

Plaintiffs-Appellees,

v.

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE

Defendant-Appellant.

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

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the other briefs filed in this case.

Dated: October 12, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Members of Congress who have a strong interest in enforcement of the constitutional principles that govern the electoral process. As members of Congress who must stand for reelection every two years to continue serving in office, *amici* appreciate the importance of the right to vote, which is why Congress recently appropriated money under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), to help with the administration of this year's election. *Amici* therefore have a strong interest in ensuring that elections are administered in a manner that ensures that all citizens have an opportunity to safely exercise the fundamental right to vote.

INTRODUCTION AND SUMMARY OF ARGUMENT

The COVID-19 virus has already killed hundreds of thousands of people in the United States. Currently, it is spreading aggressively throughout the state of Texas and elsewhere. *See Texas Among 21 States Reporting Increased COVID-19 Cases As Experts Warn of a Fall Surge*, CBS DFW (Sept. 28, 2020), https://dfw.cbslocal.com/2020/09/28/texas-coronavirus-increased-covid-19-cases-fall-surge/. In the midst of this pandemic, plaintiffs—including elderly voters and voters with disabilities—seek nothing more than to cast absentee ballots so that they

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

can exercise their constitutional right to vote without risking their health, as they have a right to do under Texas law. *See* Tex. Elec. Code § 82.001-03.

For plaintiffs and other Texas voters, the most effective way to cast an absentee ballot is to deposit it at a ballot return center. While voters can also mail their ballot, the USPS has advised that it is unable to ensure that absentee ballots will be returned to election officials on a timely basis. *See* Alexa Ura, *In Texas, USPS Woes and State Deadlines Could Leave Voters Without Enough Time to Return Mail-in Ballots*, Texas Trib. (Aug. 20, 2020), https://www.texastribune.org/2020/08/20/Texas-election-mail-ballots/. As a result, for voters who face a high possibility of death or other long-term consequences from contracting COVID-19, use of a ballot return center may be the only way to ensure that they can safely exercise their fundamental right to vote, a right that has long been recognized as "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886).

Recognizing that some counties in Texas need multiple polling centers to meet the needs of their citizens, Governor Greg Abbott on July 27, 2020 signed a proclamation that allowed county election officials to choose to operate additional polling centers to meet the needs of their county's voters. On October 1, 2020, after voters began delivering their absentee ballots to polling centers, Abbott engaged in a stunning about-face, announcing a last-minute reversal of policy that threatens the

right of many elderly and disabled voters to cast their absentee ballots. Under Abbott's new proclamation, each county—no matter whether it has a hundred registered voters, or many millions—may only provide voters with one ballot return center. The Governor's last-minute reversal forced election officials in populous counties to shutter immediately numerous polling centers, thereby throwing the voting process into disarray and subjecting voters in those counties to an arbitrary and discriminatory barrier to casting their absentee ballots.

The district court enjoined implementation of that proclamation. In a well-reasoned opinion, the district court recognized the court's obligation to protect the right to vote and to ensure that elderly and disabled voters do not have to risk their health in order to exercise their right to vote. Texas now moves for a stay of the injunction. The stay should be denied for two reasons.

First, the Fourteenth Amendment guarantees that "every voter is equal to every other voter in his State." *Gray v. Sanders,* 372 U.S. 368, 380 (1963). But Governor Abbott's one-polling-center-per-county rule imposes a "rigid, arbitrary formula to sparsely settled counties and populous counties alike." *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969). It thereby forces elderly and disabled citizens in more populous counties, such as Harris County, which has more than two million registered voters spread over 1,800 miles, to endure long drives and long lines at the polls in order to ensure their absentee ballot is cast and counted, while voters in

smaller, less populous counties face none of these barriers. These burdens will fall heaviest on communities of color, which are concentrated in Texas's most populous counties, have been ravaged by COVID-19, and continue to bear the brunt of a long-history of state-sponsored discrimination. *See* Letter from Members of Congress, to Attorney General William Barr 2 (Oct. 7, 2020), https://twitter.com/JacksonLeeTX18/status/1314737473503854594/photo/1 (arguing that the last-minute closing of polling places in Harris County, one of the "most diverse" counties in the United States, will "impact disproportionately African American and Hispanic voters whom the Voting Rights Act was intended to protect"). The order cannot be squared with the Constitution's guarantee of "equality among citizens in the exercise of their political rights." *Moore*, 394 U.S. at 819.

The State's submission to this Court insists that there is no right to vote by absentee ballot or to access a dropbox. *See* Emergency Motion for Stay Pending Appeal 12. That is true, but irrelevant. "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." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). That is precisely what Governor Abbott has done here.

Second, it is the responsibility of the courts to protect the right to vote. And that is particularly true given the extraordinary circumstances of this case in which

the Governor took last-minute action that upended the electoral process by shuttering polling places in the state's most populous counties. To be sure, "courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). But that rule is not ironclad. *See, e.g.*, *Frank v. Walker*, 574 U.S. 929 (2014) (vacating stay of district court injunction). Here, the Governor's last-minute reversal has imposed a substantial and discriminatory burden on elderly and disabled voters in the state's most populous counties and undermined the orderly administration of democracy in Texas. The preliminary injunction restored the status quo that the Governor's unconstitutional policy disrupted. Texas's request for a stay should be denied.

ARGUMENT

I. Governor Abbott's Last-Minute Closure of Polling Centers in Populous Counties Violates the Fourteenth Amendment's Command of Equality.

There is no right protected by more parts of the Constitution than the right to vote. For that reason, the Supreme Court has long held that "voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. . . . [E]very voter is equal to every other voter in his State." *Gray*, 372 U.S. at 379-80. Under the Supreme Court's precedents, "[t]he right to vote is protected in more than the initial allocation of the

franchise. Equal protection applies as well to the manner of its exercise. 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." *Bush*, 531 U.S. at 104-05; *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). This principle applies equally to state-mandated discrimination against voters wishing to cast an absentee ballot. *See American Party of Texas v. White*, 415 U.S. 767, 795 (1974); *O'Brien v. Skinner*, 414 U.S. 524, 529-31 (1974). Thus, while "the State's important regulatory interests" in regulating the electoral process "are generally sufficient to justify reasonable, nondiscriminatory restrictions," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), a more searching analysis is necessary where, as here, the state discriminates against a group of voters.

The district court correctly held that "disparate treatment of voters based on county of residence violates the Equal Protection Clause of the Fourteenth Amendment." Slip Op. 40. Numerous Supreme Court decisions vindicate this principle. In *Gray*, the Supreme Court struck down Georgia's county unit system, which gave residents of populous counties less representation than those living in counties with

fewer residents. 372 U.S. at 379. As the Court explained, "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.*; *see id.* ("How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?"). The Court held that "there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State." *Id.* at 380.

In *Moore*, the Supreme Court struck down a ballot access restriction that required independent candidates to collect signatures from voters living in fifty separate counties, even though 93.4% of the state's population resided in forty-nine counties. The Court held that the law "discriminates against the residents of the populous counties of the State in favor of rural sections" and "lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment." 394 U.S. at 819. It "applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights." *Id.* at 818-19.

Governor Abbott's one-polling-center-per county rule cannot be squared with these precedents. It allocates voting opportunities in a manner that discriminates against voters based on where they live and thus violates the constitutional command that "all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit." *Gray*, 372 U.S. at 379. As in *Moore*, it "applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights." *Moore*, 394 U.S. at 818-19. As a result of Governor Abbott's last-minute order, elderly and disabled voters living in more populous counties must travel farther to reach the sole available polling center, must brave long lines, and face increased risk of catching a potentially deadly virus simply because of where they live. These burdens fall hardest on communities of color, which are concentrated in the state's most populous counties, have been disproportionately harmed by COVID-19, and continue to feel the effects of "Texas' legacy of state-sponsored discrimination." *Veasey v. Abbott,* 830 F.3d 216, 264 (5th Cir. 2016) (en banc). Meanwhile, voters elsewhere in the state need not bear any of these burdens. This rank discrimination violates the government's constitutional "obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Bush*, 531 U.S. at 105.

No legitimate—let alone compelling—governmental interest justifies Governor Abbott's one-polling-center-per county rule. Texas has argued that this rule was necessary to protect ballot security. But as the district court concluded, this argument has no merit. The state permits counties to have multiple ballot centers on Election Day. What then is the problem with additional ballot centers before Election Day, when elderly and disabled voters, in the midst of a pandemic, are seeking to effectuate their right to vote by casting an absentee ballot? The state has no answer. As the district court observed, "[i]t is perplexing . . . that the State would simultaneously assert that satellite ballot return centers do not present a risk to election integrity on Election Day but somehow do present such a risk in the weeks leading up to November 3, 2020. The State's own approval of counties using satellite ballot return centers on Election Day belies their assertion that those same ballot return centers present ballot security concerns." Slip Op. 14. In short, the State's arguments are pure pretext, designed to hide the State's effort to make it harder for elderly and disabled voters in Texas's most populous counties to exercise their fundamental right to vote.

II. The District Court's Grant of Injunctive Relief Preserved the Status Quo and Prevented Havoc.

"[C]ourts should ordinarily not alter the election rules on the eve of an election," in a manner that "fundamentally alters the nature of the election" and sows "judicially created confusion." *Republican Nat'l Comm.*, 140 S. Ct. at 1207. This

general rule reflects that, in the usual case, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). But this rule is not ironclad. *See, e.g.*, *Frank v. Walker*, 574 U.S. 929 (2014) (vacating stay of district court injunction). Otherwise, state officials would have a green light to intervene at the last minute to manipulate the electoral process. *See McCarthy v. Briscoe*, 429 U.S. 1317, 1322 (1976) (refusing to permit the "violation of the applicants' constitutional rights [to] go unremedied"). In the extraordinary circumstances of the case, in which the Governor made a list-minute change to the electoral rules that threatened the ability of elderly citizens and citizens with disabilities to cast absentee ballots, the district court acted within its discretion in concluding that equitable principles justified injunctive relief to vindicate the right to vote and preserve the status quo.

Purcell teaches that courts must "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Purcell,* 549 U.S. at 4; *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The district court complied with these instructions, insisting that injunctive relief was necessary because the Governor's last-minute change to the election rules had jeopardized the right to vote, confused voters, and upended the orderly administration of elections. The Court's order was designed to

preserve the status quo and protect the right to vote in the face of the Governor's order that threw absentee balloting into a state of chaos. The grant of injunctive relief here prevents the very havoc and confusion *Purcell* sought to forestall.

As *Republican National Committee* makes clear, its rule applies in the mine run of cases, but it does not strip courts of their equitable power to preserve the status quo and protect the right to vote from late-breaking changes that would wreak havoc with the orderly administration of elections. All the district court did here was preserve the status quo in the face of Governor Abbott's last-minute reversal in policy that would have threatened the ability of many Texas citizens to safely exercise their right to vote. Its order should not be stayed.

CONCLUSION

For the foregoing reasons, Appellant's stay motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on October 12, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 12th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 2,583 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amici* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Executed this 12th day of October, 2020.

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