Case No. 20-20574

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STEVEN HOTZE, M.D., WENDELL CHAMPION, HON. STEVE TOTH, AND SHARON HEMPHILL,

Appellants-Plaintiffs

v.

CHRIS HOLLINS, in his official capacity as Harris County Clerk,

Appellees-Defendants

From the United States District Court
for the Southern District of Texas, Houston Division
(No. 4:20-cv-03709-ASH)

EMERGENCY MOTION FOR INJUNCTIVE RELIEF BY APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to 5TH CIR. R. 28.2.1, the undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Appellants: STEVEN HOTZE, M.D., WENDELL CHAMPION, HON. STEVE TOTH, AND SHARON HEMPHILL, using undersigned counsel Andrew L. Schlafly and Jared Woodfill, Woodfill Law Firm, P.C., 3 Riverway, Suite 750, Houston, Texas.

Appellee: CHRIS HOLLINS, in his official capacity as Harris County Clerk, represented by Richard Warren Mithoff, Jr., of Mithoff Law Firm, 500 Dallas St., Suite 3450, Houston, TX.

Intervenors: Texas Coalition of Black Democrats, represented by Carvana Yvonne Cloud of The Cloud Law Firm, 8226 Antoine Drive, Houston TX.

S. Shawn Stephens, Jaime Lyn and Michele Royer, Glenda Lee Greene, Jaime Lyn Watson, represented by Charles Stein Siegel of Waters & Kraus, LLP, 3141 Hood St., Suite 700, Dallas TX, and Kenneth Royce Barrett of KBR Law, 3740 Greenbriar, Houston, TX.

Elizabeth Hernandez for Congress represented by S Nasim Ahmad, The Ahmad Law Firm, The Woodlands, TX.

Texas State Conference of NAACP Branches, Common Cause Texas, Andrea Chilton Greer, Yekaterina Snezhkova, represented by Lindsey Beth Cohan, Dechert LLP, Austin, TX.

League of Women Voters of Texas, Joy Davis-Harasemay, Diana Untermeyer, Michelle Colvard, Keren Vidor, Malkia Hutchinson-Arvizu, Anton Montano,

Helen Anice Shelton, Elizabeth Furler, represented by Andrew Ivan Segura, ACLU of Texas, Houston, TX.

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MJ for Texas, DSCC, DCCC, Mary Currie, Carlton Currie,Jr., Jekaya Simmons, Daniel Coleman, rpresented by Daniel Osher, Marc Elias, and Skyler Michelle Howton, of Perkins Coie LLP in Washington, D.C., and Dallas TX.

Richard, Elaine, and Ryan Frankel, Celia Veselka, Sergio Aldana, Russell "Rusty" Hardin, Douglas Moll, Carey Jordan, Alan Mauk, Jenn Rainey, Brian Singh, Mary Bacon, Kimberly Phipps-Nichol, Nyguen Griggs, Nelson Vanegas, Jessica Goodspero, Amy Ashmore, represented by Larry Richard Veselka of Smyser Kaplan et al, Houston TX.

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The undersigned counsel hereby certifies, pursuant to 5TH CIR. R. 27.3, that this motion is an emergency concerning a challenge to an unusual election procedure ("drive-thru voting") to be used in Harris County, Texas, on Election Day, November 3, 2020. A ruling on this motion is respectfully sought this evening of November 2 in order to enjoin election violations which would otherwise occur. Plaintiffs, including voters and candidates for state and federal office, would suffer irreparable harm if their request for emergency relief is not granted, which would occur if a voting procedure already found by the district court to be unlawful were allowed to proceed. (Exh A, Order at 9)

The district court indicated that the drive-thru procedure is illegal on Election Day but found a lack of standing by the Appellants-Plaintiffs Steven Hotze, M.D., Wendell Champion, Hon. Steve Toth, and Sharon Hemphill to compel Appellee-Defendant Chris Hollins, in his official capacity as Harris County Clerk, to obey the Texas Election Law and not allow "drive-thru" voting on Election Day, November 3.

Background

At the only hearing below on November 2, 2020, Judge Andrew S. Hanen of the district court agreed with Plaintiffs that "drive-thru" voting in Harris County – which none of the other 253 counties in Texas allows – is contrary to Texas election law and thus improper. But he dismissed this lawsuit to enjoin drive-thru

voting based on a finding of lack of standing by Plaintiffs. Instead, he felt that only the Texas legislature had standing to sue, as this was a violation of U.S. CONST. ART. I, § 4, Cl. 1, and the Fourteenth Amendment. This was a reversible error of law, and the district court welcomed immediately appellate review of this standing issue.

"Drive-thru" voting, also known as "curbside" voting, consists of casting ballots from one's car, without any disability to justify it. Drive-thru voting was set up by the Democratic election official Hollins almost entirely in Democratic-voting areas of Harris County, and is illegal and unconstitutional for several reasons. Drive-thru voting compromises the integrity of the ballot in terms of who voted, akin to allowing multiple people into a polling booth at the same time despite a lack of any disability. Drive-thru voting also compromises the secret ballot, as when car pools of workers or families vote in that manner. The Texas legislature has already decided, in its wisdom, not to allow drive-thru voting except for the disabled, and Judge Hanen recognized as much below. Drive-thru voting allows people to be influenced while they are voting, such as by smart phones or the radio, contrary to rules against politicking in proximity to a polling booth. More generally, drive-thru voting cheapens the election process to the detriment of in-person voting, thereby detracting from the traditional respect for Election Day.

Drive-thru justice would be unthinkable, and voting requires adhering to standards of integrity too.

Drive-thru voting further interferes with the essential role of a "election watcher," who is "a person appointed ... to observe the conduct of an election on behalf of a candidate, a political party, or the proponents or opponents of a measure." Tex. Elec. Code § 33.001. Under chapter 33 of the Texas election code, a watcher is entitled to:

- "observe any activity conducted at the location at which the watcher is serving," *id.* § 33.056(a);
- "sit or stand conveniently near the election officers conducting the observed activity," *id.*;
- "sit or stand near enough to the member of a counting team who is announcing the votes to verify that the ballots are read correctly or to a member who is tallying the votes to verify that they are tallied correctly," *id.* § 33.056(b);
- accompany the officer in making the delivery of election records, *id.* § 33.060.

Chapter 33 sets forth criminal penalties for someone who violates a watcher's ability to complete his or her duties, and violations are Class A misdemeanors. *Id.* § 33.061. But drive-thru voting impedes this important function of election watchers, which is necessary to maintain the integrity of the election process for voters and candidates alike.

On May 15, 2020, the Texas Supreme Court rejected Hollins' contention that a voter's lack of immunity from COVID-19 and concern about contracting it at

a polling place constitutes a "disability" within the meaning of the statute permitting a voter to cast a ballot by mail. *In re State*, 602 S.W.3d 549, 550 (Tex. 2020). Yet Hollins' drive-thru voting scheme allows any and all Harris County registered voters – regardless of whether they are permitted to do so under the Texas Election Code – to engage in early and election day drive-thru voting. Hollins who is a Democrat and currently serves as Deputy Vice-Chair of Finance for the Democratic Party of Texas, has identified ten (10) drive-thru voting locations and placed nine (9) of the locations in heavily Democratic areas.

The Legislature restricted curbside voting to three distinct categories: (i) presents sick at the time of the vote; (ii) a voter has a physical condition requiring personal assistance (e.g., is physically handicapped); or (iii) voting inside the polling location would create a likelihood of injuring the voter's health. *See generally* Tex. Elect. Code §§64.009, 82.02, and 104.001- 104.005. Additionally, if a voter qualifies as disabled under Texas Election Code § 82.002 the voter is eligible to vote by mail.

By indiscriminately encouraging and allowing any and all Harris County registered voters to cast their ballots curbside on this invalid basis, Defendant's ultra vires act regarding drive-thru voting is a violation of federal law and must be stopped. By circumventing the Texas Legislature and implementing a manner of voting not recognized in the Texas Election Code, Defendant is violating Art. I, §4,

Cl. 1 of the United States Constitution. Additionally, by adopting a manner of voting that is inconsistent with the Texas Election Code and not adopted by any other county in Texas, Defendant is violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, Plaintiffs seek an injunction against drive-thru voting and only allow curbside voting for those Harris County registered voters who have submitted sworn applications which facially satisfy at least one of the specific categories permitting curbside voting under the Texas Election Code. All the drive-through locations are adjacent to a polling location, and this injunction would not prevent anyone from voting in-person at the same location where they would have voted in a drive-thru manner.

Plaintiffs, who include registered voters, a current member of the Texas legislature, and state and federal candidates in Harris County, have standing to challenge this illegal procedure of unauthorized drive-thru voting. Specifically, Plaintiffs consist of multiple registered voters in Harris County (Hotze, Champion, and Hemphill), the Republican nominee for the 18th Congressional district in Texas (Champion), and a member of the Texas House of Representatives, District 15 (Toth). Three of these Plaintiffs (Champion, Toth, and Hemphill) are on the ballot this election. Moreover, clear Supreme Court precedent recognizes standing by registered voters to challenge improper election procedures which might dilute their vote. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018). Allowing

illegal voting in Harris County does precisely that, and must be enjoined. Plaintiffs have standing to seek that.

Ruling Below

At a hearing on November 2, 2020, the district court ruled that drive-thru was lawful as a form of early voting, but is illegal for voting on Election Day itself because the tents used for drive-thru voting do not qualify as buildings as required for Election Day. (The Order is attached as Exhibit A hereto) But the district court denied Plaintiffs' motion for a preliminary injunction by finding that Plaintiffs lacked standing. Instead, the district court stated that only the Texas legislature would have standing to object to the unlawfulness of drive-thru voting:

> only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause.

(Exh. A, Order at 3). ***But the Texas legislature is not in session at any time this year; it meets in the first part of only every other year***. Under the district court's holding, no one could challenge illegality under the Election Clause by a county clerk in conducting an election, as the Texas legislature is never in session during a General Election.[1]

[1] On November 1, 2020, the Texas Supreme Court declined to rule substantively on this issue (*In re: Hotze*, Cause No. 20-0863), and the district court properly rejected arguments by Hollins that federal court should abstain and defer to the state court.

The district court rejected Hollins' argument to apply *Purcell* principle to this case, because the state authorities have not taken action but rather the Harris County Clerk has acted contrary to state law and the Constitution in administering the election. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). The district court rejected a timeliness objection as to Election Day because it has not yet occurred.

The district court relied heavily on a terse decision by the Supreme Court which has not been construed as broadly by this Fifth Circuit. (Exh A., Order at 2-3, citing *Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam)). The Supreme Court in *Lance* rejected a generalized lawsuit by four citizens of Colorado against redistricting after the issue had already been fully litigated by state authorities. But here, Plaintiffs include voters, candidates, a congressional candidate, and a state legislator in a particularized grievance against a county clerk on an issue that has not been resolved in other litigation. This Fifth Circuit has already rejected another attempt to invoke *Lance* to deny standing to a voter under the Voting Rights Act. *LULAC v. City of Boerne*, 659 F.3d 421, 430-31 (5th Cir. 2011). Accordingly, *Lance* has no application to the standing issue here.

The district court then held that:

> this Court, had it found that standing existed, ***would have granted the injunction prospectively and enjoined drive-thru voting on Election Day*** and denied all other relief.

(Exh. A, Order at 9, emphasis added) Based on that ruling people should vote in person and not use drive-thru voting on Election Day in the event that this Fifth Circuit ultimately reverses the district court decision on standing. Hollins himself should close the drive-thru voting on Election Day and all voters at those locations should be directed to vote in-person at that same location, and this Fifth Circuit should order him to do so.

Argument

I. Standard of Review

Review is *de novo* here on the rulings of law by the court below in dismissing this case on standing grounds.

As to a preliminary injunction, which the district court indicated it was inclined to grant if standing were found to exist, "the moving party must establish four factors: (1) a substantial likelihood of success on the merits, (2) a substantial threat that failure to grant the injunction will result in irreparable injury, (3) the threatened injury outweighs any damage that the injunction may cause the opposing party, and (4) the injunction will not disserve the public interest." *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991) (citing *Allied Marketing Group, Inc. v. CDL Marketing, Inc.*, 878 F.2d 806, 809 (5th Cir. 1989)). *See also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

II. Plaintiffs Have Standing as Voters and Candidates to Object to Dilution of Their Votes by Illegal Votes.

As expressly set forth in the Complaint below, Hollins' violation of the law is significantly harming the interests of Plaintiffs, and absent relief Plaintiffs will imminently suffer specific and substantial injuries in fact to a legally protected interest; such injuries are directly traceable to the defendant's challenged action herein; and a favorable judgment by this Court will likely redress such injuries. (Dist. Ct. Dkt. 1, Compl. ¶ 10) Plaintiff Hotze has standing because he is threatened with a violation of his right to vote, and allowing an illegal voting scheme that invites corruption and fraud dilutes and suppresses his vote because his legal vote will be nullified by illegal votes. (*Id.* ¶ 11) Plaintiff Champion is the Republican nominee for the 18th District, Harris County, Texas, and Hollins's illegal vote scheme results in votes being illegally cast against him in his race for the United States Congress. Plaintiff Hemphill is also on the November 3, 2020 general election ballot in Harris County, Texas, and Hollins' illegal vote scheme results in votes being illegally cast in her race for the 80th Judicial District Court. (*Id.* ¶ 12) Representative Steve Toth is a member of the Texas legislature and is also on the November 3, 2020 general election ballot, and his authority is usurped as a lawmaker by creating a voting scheme that was not adopted by the Texas legislature. (*Id.* ¶ 13)

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). This right "can neither be denied outright. . . nor destroyed by alteration of ballots. . . nor diluted by ballot-box stuffing." *Id*. "The right to vote is 'individual and personal in nature,' and 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018) (quoting *Reynolds*, 377 U.S. at 561 and *Baker v. Carr*, 369 U.S. 186, 206 (1962)). Plaintiffs object to the casting and to the counting of any ineligible or illegal curbside voting as the consequence of permitting such activity harms not only the integrity and the reported outcomes of the election for all of the candidates and all of the voters who voted, but it could also dilute or otherwise diminish and cancel Plaintiffs' casting of a legal vote for the candidates of their choice in the General Election.

As this Fifth Circuit has held:

> Standing is not a pop quiz administered by able defense attorneys to unsophisticated plaintiffs. It is conceded that each voter resides in a district where their vote has been cracked or packed. That is enough. And the contention that the Plaintiffs' injury cannot be redressed here collapses standing and merit resolution.

Harding v. Cty. of Dall., 948 F.3d 302, 307 (5th Cir. 2020).

When votes are cast illegally, in this case in overwhelmingly Democratic precincts, then the votes by other Harris County residents are improperly diluted

and those law-abiding voters have standing to challenge the illegality. The voter ID requirement, for example, sparked intense disagreement but standing to challenge the law was not in doubt. *See Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). There is clearly standing by voters to object to voter ID, and there is clearly standing by voters to object to the dilution of their votes by unlawful ones.

The Texas legislature is not in session to authorize a lawsuit about this. Plaintiffs are the ones who have standing at this time to challenge the unlawfulness by the county clerk.

III. Hollins' Drive-Thru Voting Violates the United States Constitution.

Hollins' drive-thru voting scheme violates Article I, Section IV, Clause 1 of the United States Constitution in that Hollins redefines the manner of conducting elections in Harris County contrary to the Texas Election Code. Additionally, Hollins violates the Fourteenth Amendment's Equal Protection Clause by adopting a manner of voting in Harris County that has not been adopted by other Texas counties.

Plaintiffs have standing to assert this violation of the U.S. Constitution, and need not suffer from constitutional violations because the Texas legislature is not in session and has not filed suit itself. Indeed, lawsuits by the Texas legislature are rare and it constituted reversible error for the district court to deny standing to

Plaintiffs and instead hold that only the Texas legislature could sue to vindicate Plaintiffs' rights.

A. The Election Clause Requires this Court to Uphold the Manner of Voting Defined by the Legislature in the Texas Election Code.

The Constitution's Elections Clause directs that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," subject to the directives of Congress. U.S. Const. Art. I, § 4, Cl. 1. Because federal offices "arise from the Constitution itself," any "state authority to regulate election to those offices . . . had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001). The Constitution effected such delegations to State Legislatures through the Electors and Elections Clauses. See U.S. Const. Art. II, § 1, Cl. 2; id. Art. I, § 4, Cl. 1. The Elections Clause vests State Legislatures, subject to Congress' enactments, with authority "to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 826 (2015) (Roberts, C.J., dissenting) (noting that the Elections Clause "imposes a duty on States and assigns that duty to a particular state actor"). This "broad power to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Granlike*, 531 U.S. 510, 523 (2001) (internal quotation marks omitted), includes authority to enact "the numerous requirements as to the procedure and safeguards

which experience shows are necessary in order to enforce the fundamental right involved," *Smiley*, 285 U.S. at 366; *Cook,* 531 U.S. at 523–24; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) (stating that state legislatures may enact election laws in order to ensure that elections are "fair and honest" and that "some sort of order, rather than chaos, is to accompany the democratic process"). This sweeping grant of authority means that "the text of [state] election law itself, and not just its interpretation by the courts of the States, takes on independent significance," *Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring), and the federal Constitution "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the [delegated] legislative power," *Palm Beach Cnty*., 531 U.S. at 76; *McPherson*, 146 U.S. at 25. The United States Supreme Court has made it clear that "[a] significant departure from the legislative scheme for electing U.S. Representatives—including when such departure is carried out by the state judiciary—thus presents a federal constitutional question." *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring); *see also Palm Beach Cnty*., 531 U.S. at 76; *McPherson*, 146 U.S. at 25.

Here, the Texas legislature has created a detailed statutory scheme related to curbside voting to govern the conduct of federal elections. Hollins has significantly departed from the legislative scheme regarding curbside voting. By allowing Hollins to significantly alter the manner of voting that has not been prescribed by

the Legislature, Hollins' drive-thru voting scheme violates the United States Constitution Art. I, § 4, Cl. 1.

1. <u>The Texas Election Code Should Be Strictly Construed.</u>

Courts have "stated in no uncertain terms that county election officials possess only those powers 'granted in express words' or 'necessarily or fairly implied in an express grant.'" *In re Hotze*, No. 20-0819 (October 22, 2020) (Devine, J., dissenting) (quoting *State v. Hollins,* No. 20-0729, 2020 WL 5919729, at *4 (Tex. 15 Oct. 7, 2020) (per curiam) (internal quotations omitted)). As Justice Devine writes in his dissent in *In re Hotze*, "These implied powers are themselves narrow—they must be 'indispensable,' 'not simply convenient.'" *Id.* The powers are governed by a "lengthy, detailed, and comprehensive Election Code." *Id.* at *2. Hollins' acts are outside the scope of the Election Code and constitute ultra vires conduct that undermine the integrity of the election process. See *Richardson v. Hughs*, No. 20- 50774, 2020 WL 6127721, at *1–2 (5th Cir. Oct. 19, 2020). "Though certain enumerated powers may create a narrow range of implied powers, the Legislature's silence on an issue raises the presumption that it has not granted that power." *In re Hotze*, No. 20-0819 (October 22, 2020) (Devine, J., dissenting). Nothing in the Texas Election Code allows for Hollins' drive-thru voting.

2. Hollins' Attempts to Redefine Polling Location.

Under Hollins' drive-thru voting scheme, a car is turned into a polling location. Specifically, to drive-thru vote, the voter never exits the vehicle. (Dist. Ct. Dkt. 39-1, Exhibit "A") Instead, the voter sits in their car as the e-slate is hand delivered to the voter who then casts their vote within the confines of their vehicle. (*Id.*) It should be noted that many times these votes are cast by numerous people in one car, eliminating the confidentiality surrounding one's vote. (*Id.*) The garages, tents, canopies, and other "coverings" the car drives into are not the actual polling location - the polling place is the car. The e-slate is physically placed in the car, the vote is cast in the car, and the voter remains in the car. (*Id.*).

A car is not a polling place. If a car is a polling place, Harris County now has millions of voting locations around the county that change locations throughout the day. Attached as Exhibit "B" are photos of Harris County voters utilizing "drive-thru" voting. The Election Code mandates that a registered voter cast a ballot in a "voting station" at a "polling place." See TEX. ELEC. CODE §§ 64.001, 64.009(a).

Qualified individuals may request their ballot curbside in a vehicle on election day and throughout the early voting period. *Id*. § 64.009(a). This exception applies only to those physically unable to enter the polling place without assistance or for whom a likelihood of injury exists. *Id.*; *see also In re State*, 602 S.W.3d 549,

550 (Tex. 2020) (a voter's general fear or lack of immunity from COVID-19 is not a "disability" as defined by the Election Code). Otherwise, voting is to take place in a "polling place." TEX. ELEC. CODE § 64.009(a). Defendant assumes that rows of semi-permanent tents where election officers stand awaiting dozens of cars, inside of which any voter may cast a ballot, qualify as a "polling place." In his dissent in *In re Hotze*, which only raised state law issues, Justice Devine rejects Hollins' definition, stating, "I struggle to see how the Election Code contemplates such a novel concoction. Hollins stretches the text of the Code beyond its historical and common-sense understanding." *In re Hotze*, No. 20-0819 (October 22, 2020) (Devine, J., dissenting).

The Texas Election Code states that polling locations "may be located in any stationary structure," including a "movable structure." *Id*. § 85.062(b). Hollins has previously argued that these "tents" satisfy the requirements of movable structure. However, as Justice Devine has stated, "[T]he Texas Election Code likely contemplates that 'structure' is a place one enters to get to the polling place; the structure itself is not the polling place." *In re Hotze*, No. 20-0819 (October 22, 2020) (Devine, J. dissenting). The Texas Election Code prohibits electioneering "within 100 feet of an outside door through which a voter may enter the building or structure in which the early voting polling place is located." Texas Elec. Code § 85.036(a) (emphasis added). As Justice Devine concluded, "The prepositional

phrase 'in which' indicates that the polling place is to be inside of a building or structure. The structure itself cannot be the polling place and the voting station rolled into one. Even harder to understand is how one's vehicle could qualify as a 'polling place,' as it is not a 'structure' as commonly understood. Nor can one's vehicle be a 'voting station,' which is a specific location designated for voters to cast a ballot. Station, WEBSTER'S NEW COLLEGIATE DICTIONARY (1975) ("[A] place established to provide a public service." (emphasis added))." *Id*. Hollins' expansion of the statute manifests itself in the absurd result that every voter's vehicle is a "polling place" or "voting station." *Id*.

3. Texas Attorney General Recently Addressed Drive-Thru Voting.

On October 16, 2020, Attorney General Ken Paxton addressed the issue of "drive-thru" voting. (Dist. Ct. Dkt. 39-3, Exhibit "C") In his letter General Paxton states, among other things, that Texas Election Code "makes no provision for 'drive-thru' voting centers at which any voter may cast a ballot from his or her vehicle." (Exhibit "C")

4. The Texas Legislature has Rejected "Drive-Thru" Voting.

Legislators have previously attempted to amend the Texas Election Code to allow a form of Respondent Hollins' "drive-thru" voting scheme. During the 2019 legislative session, legislation was proposed to allow polling places to accommodate parents with young children, HB 2898. (Dist. Ct. Dkt. 39-4, Exhibit

"D") Because Texas law required curbside voting for people with disabilities, HB 2898 left it up to local election officials to decide whether to offer curbside voting for parents with young children. (Dist. Ct. Dkt. 39-4, Exhibit "D") The bill also created a study to be performed by the Texas Secretary of State's office that would evaluate the best practices for curbside voting for people with children and report it to the legislature by December 2020. (Dist. Ct. Dkt. 39-4, Exhibit "D") The Texas House approved the bill that supporters believed would increase voter turnout by allowing parents with children younger than five (5) years old to participate in curbside voting. (Dist. Ct. Dkt. 39-4, Exhibit "D")

The argument for the bill was similar to that made by Hollins as a justification for his drive-thru voting scheme. On May 8, 2019, the House gave the bill final approval in a 90-52 vote. However, the Texas Senate did not pass the bill.

Here, Hollins is implementing a form of "drive-thru" or curbside voting that is much broader than the one previously rejected by the Legislature. A pandemic should not be a license for a county clerk to turn into a super-legislature. If the Texas legislature has effectively rejected Hollins' scheme, so too should this Court.

5. <u>Drive-Thru Voting Locations Placed in Democratic Strongholds.</u>

Nine of the ten "drive-thru" voting locations in Harris County are placed in areas that vote heavily Democratic. (Dist. Ct. Dkt. 39-1, Exhibit "A" to Plaintiffs' Brief for a Preliminary Injunction) State Sen. Paul Bettencourt (R-Houston)

recently noted nine of the 10 drive-thru voting locations are in Democrat areas of the county, adding that "nothing in the Texas election code allows Mr. Hollins to do this setup." Erin Anderson, Texas AG: Legal Action for Unlawful Drive-Thru Voting, Texas Scorecard, October 20, 2020.

B. Hollins' Drive-Thru Voting Scheme Violates the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution provides, "No State shall ... deny to any person ... the equal protection of the laws." U.S. Const. amend. XIV, § 1. Harris County is the only Texas County that has adopted drive-thru voting. (Dist. Ct. Dkt. 39-1, Exhibit "A" to Plaintiffs' Brief for a Preliminary Injunction below) By using different criteria for voting and allowing a new form of voting to occur only in Harris County, Hollins is violating the Equal Protection Clause. *Bush v. Gore*, 531 U.S. 98 (2000).

Hollins violates the Equal Protection Clause, in that Harris County, unlike other counties, surrenders the safeguards associated with curbside voting while other counties maintain the integrity of the ballot box by complying with the strict requirements imposed by the Texas Legislature in §§ 64.009, 82.02, and 104.001-104.005 of the Texas Election Code. The Unites States Supreme Court's per curiam majority opinion in *Bush v. Gore* eviscerated the distinction between nuts-and-bolts questions and big picture questions by holding that Florida law, at least as construed by the Florida Supreme Court, violated the Equal Protection Clause of

the Fourteenth Amendment. 531 U.S. 98 (2000). The Court held that a state violates equal protection when it fails to have uniform standards for the recounting of votes during a statewide election contest. *Id.* at 109. The opinion makes it clear that disparity regarding the means of voting is a justiciable question. Here, Hollins has implemented a form of voting that is unique to Harris County and differs from the remaining 253 counties in the state of Texas. (Dist. Ct. Dkt. 39-1, Exhibit "A")

IV. All Four Factors for Injunctive Relief Favor Granting It.

All four factors for a preliminary injunction support granting the requested injunction. First, Plaintiffs has a strong likelihood to prevail on the merits because the district court found that drive-thru voting is improper on Election Day. Second, the irreparable harm caused by dilution of a lawful vote by an illegal one is obvious. Third, there would be no harm from a grant of the injunctive relief, as Hollins is already on notice by the district court that drive-thru voting is improper on Election Day and Hollins himself should cancel drive-thru voting in light of this. This requested injunctive relief would actually enhance the guarantee to voters that their votes will be counted. In the absence of this injunction, voters who use the improper drive-thru method will have their votes in jeopardy of being disqualified. Finally, the public interest, is heavily in favor of prohibiting an unlawful form of voting on Election Day in order to avert the misleading of the public and the possibility of unlawful votes cancelling lawful ones.

CONCLUSION

Plaintiffs respectfully requests that this Court reverse the order below which found a lack of standing by Plaintiffs to challenge drive-thru voting on Election Day, and to issue a preliminary injunction banning drive-thru voting on Election Day, November 3, 2020.

Dated: November 2, 2020 Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Pursuant to 5TH CIR. R. 27.3, the undersigned counsel confirms that he called opposing counsel for Appellee-Defendant Hollins and spoke with his office about the imminent filing of this motion, and also sent notice to the email service list.

Dated: November 2, 2020

s/ Andrew L. Schlafly
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements pursuant to Fed. R. App. P. 32(a):

1. This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: November 2, 2020

s/ Andrew L. Schlafly
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, thereby providing service on all parties. I certify that all participants in the case are registered CM/ECF users.

s/ Andrew L. Schlafly
Attorney for Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEVEN HOTZE, M.D., WENDELL CHAMPION, HON. STEVE TOTH, and SHARON HEMPHILL,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 4:20-CV-03079
CHRIS HOLLINS, *in his official capacity as Harris County Clerk*,	§	
Defendant.	§	

ORDER

The Court has before it the Motion for Preliminary Injunction (Doc. No. 3) filed by Plaintiffs Steven Hotze, M.D., Wendell Champion, Hon. Steve Toth, and Sharon Hemphill (collectively, "Plaintiffs"), the Response in Opposition (Doc. No. 22) filed by Defendant Chris Hollins in his official capacity as Harris County Clerk (hereinafter, "Defendant"), and various Motions to Intervene filed on behalf of forty-eight individuals and/or entities. The Court also has before it *amicus curiae* briefs filed by the Texas Coalition of Black Democrats, The Lincoln Project, the Libertarian Party of Texas, Joseph R. Straus, III, and election law professor, Benjamin L. Ginsberg.

I.

Due to the time constraints given the issue involved, this Court cannot issue the formal opinion that this matter deserves. Consequently, given those confines, this Order must suffice. The Court first notes that it appreciates the participation of all counsel involved and the attention each gave to this important topic on such short notice.

This Court's overall ruling is that the Plaintiffs do not have standing (as explained below).

While this ruling is supported by general Equal Protection and Election Clause cases, it is somewhat without precedent with regard to the Plaintiffs (or Intervenors) who are actual candidates for elected office. Therefore, the Court, in anticipation of an appeal or petition for writ of mandamus and knowing that the appellate court could draw a distinction in that regard and hold that standing exists, has gone further to indicate what its ruling would have been in that case.

II.

The Court finds that Plaintiffs lack standing to sue. Federal courts must determine whether they have jurisdiction before proceeding to the merits. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94–95 (1998). Article III of the Constitution limits federal jurisdiction to "Cases" and "Controversies." One component of the case or controversy requirement is standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The Supreme Court has repeatedly held that an individual plaintiff raising only a generalized grievance about government does not meet the Article III requirement of a case or controversy. *Id.* at 573–74. This Court finds that the Plaintiffs here allege only a "generalized grievance about the conduct of government." *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

The Plaintiffs' lack of a particularized grievance is fatal to their claim under the Equal Protection Clause. "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *U.S. v. Hays*, 515 U.S. 737, 743 (1995). Plaintiffs' general claim that Harris County's election is being administered differently than Texas's other counties does not rise to the level of the sort of particularized injury that the Supreme Court has required for constitutional standing in elections cases. *See id.*; *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (no standing in equal protection case when alleged injury involved "group political interests" and not "individual legal rights").

Further, it is unclear that individual plaintiffs have standing to assert claims under the

Elections Clause at all. The Supreme Court has held that individual plaintiffs, like those here, whose only asserted injury was that the Elections Clause had not been followed, did not have standing to assert such a claim. *See Lance*, 549 U.S. at 442. Conversely, the Court has held that the Arizona Legislature did have standing to allege a violation of the Elections Clause as it was "an institutional plaintiff asserting an institutional injury." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015). In addition, the Supreme Court has also held plaintiffs had such standing when they were state senators whose "votes had been completely nullified" by executive action. *Id.* at 803 (citing *Raines v. Byrd*, 521 U.S. 811, 822–23 (1997)). These cases appear to stand for the proposition that only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause.

The Court finds that the Plaintiffs here are akin to those in *Lance v. Coffman*, in which the Supreme Court held that private citizens, whose primary alleged injury was that the Elections Clause was not followed, lacked standing to bring a claim under the Elections Clause. 549 U.S. at 442. To summarize the Plaintiffs' primary argument, the alleged irreparable harm caused to Plaintiffs is that the Texas Election Code has been violated and that violation compromises the integrity of the voting process. This type of harm is a quintessential generalized grievance: the harm is to every citizen's interest in proper application of the law. *Lujan*, 504 U.S. at 573–74; *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (holding that the right, possessed by every citizen, to require that the Government be administered according to the law does not entitle a private citizen to institute a lawsuit in federal court). Every citizen, including the Plaintiff who is a candidate for federal office, has an interest in proper execution of voting procedure. Plaintiffs have not argued that they have any specialized grievance beyond an interest in the integrity of the election process, which is "common to all members of the public." *United States v. Richardson*,

418 U.S. 166, 176–77. [1]

III.

If the Court had plaintiffs with standing, it would have denied in part and granted in part the motion for preliminary injunction.[2] A preliminary injunction is an "extraordinary remedy" that should only be granted if the movant has "clearly carried the burden of persuasion" on all four factors. *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003). The movant, however, "need not prove his case." *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 (5th Cir. 1991) (citing *H & W Indus. v. Formosa Plastics Corp.*, 860 F.2d 172, 179 (5th Cir. 1988)). Before a court will grant a preliminary injunction, the movants must clearly show "(1) a substantial likelihood that they will prevail on the merits, (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted, (3) that their substantial injury outweighs the threatened harm to the party whom they seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018) (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012)); *see also Winter v. NRDC*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer

[1] This Court finds the answer to this question to be particularly thorny, given that some of the Plaintiffs are actual candidates who have put in time, effort, and money into campaigning, to say nothing of the blood, sweat, and tears that a modern campaign for public office entails. This Court would readily understand if some appellate court finds that these Plaintiffs have standing despite the fact they cannot individualize their damage beyond their rightful feeling that an election should be conducted lawfully. Neither this Court's research nor the briefing of the parties have brought forth any precedent to support this concept under either of the two pleaded causes of action based upon claimed violations of Equal Protection or the "Elections Clause." Given the timing of this case and the impact that such a ruling might have, this Court finds it prudent to follow the existing precedent.

[2] The Defendant and Intervenors suggested both in oral argument and in their written presentations that the Court should abstain under either *Pullman*, *Colorado River*, or *Rooker-Feldman* doctrine. Since standing is jurisdictional and since this Court is dismissing this action, it need not analyze these arguments. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). "The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

This Court finds that there is a difference between the voting periods presented to it. The merits need to be analyzed separately by early voting and election day voting. With respect to the likelihood of success, the Court would find that the Plaintiffs do not prevail on the element of likelihood of success with respect to early voting. First, § 85.062 of the Texas Election Code provides for "temporary branch polling places" during early voting. Tex. Elec. Code. § 85.062. The statute authorizes county election officials to use "movable structure[s]" as polling places. *Id.* § 85.062(b). The Code does not define "structure," but Black's Law Dictionary defines the term as: "Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together." Black's Law Dictionary (11th ed. 2019). The Court finds, after reviewing the record, the briefing, and considering the arguments of counsel, that the tents used for drive-thru voting qualify as "movable structures" for purposes of the Election Code. The Court is unpersuaded by Plaintiffs' argument that the voters' vehicles, and not the tents, are the polling places under the drive-thru voting scheme. Consequently, the Court finds that drive-thru voting was permissible during early voting. Moreover, the Plaintiffs failed to demonstrate under the Texas Election Code that an otherwise legal vote, cast pursuant to the instructions of local voting officials, becomes uncountable if cast in a voting place that is subsequently found to be non-compliant.

Additionally, the promptness with which one brings an injunction action colors both the elements of likelihood of success on the merits and irreparable harm. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685 (2014) ("In extraordinary circumstances, however, the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very

outset of the litigation, curtailment of the relief equitably awardable."); *Environmental Defense Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (1980) ("equitable remedies are not available if granting the remedy would be inequitable to the defendant because of the plaintiff's long delay."). Here, the Court finds that the Plaintiffs did not act with alacrity. There has been an increasing amount of conversation and action around the subject of implementing drive-thru voting since earlier this summer. The Defendant has argued, and no one has refuted, that discussions were held with leaders of both major political parties, and, using that input, a drive-thru voting plan was developed. The Harris County Commissioners Court approved a budget for drive-thru voting in late September. Finally, actual drive-thru voting began October 13, 2020. At virtually any point, but certainly by October 12, 2020, Plaintiffs could have filed this action. Instead, they waited until October 28, 2020 at 9:08 p.m. to file their complaint and did not file their actual motion for temporary relief until mid-day on October 30, 2020—the last day of early voting. The Court finds this delay is critical. It is especially important in this compact early voting timeframe, in a particularly tense election, where each day's voting tally functionally equated to many days or even weeks of early voting in different situations.

Therefore, this Court finds the Plaintiffs do not prevail on the first element.

With regard to the second element, "irreparable injury," this point is covered more thoroughly in the standing discussion, but suffice it to say, in response to the Court's question during oral argument, Plaintiff's counsel described their injuries as the concern for the voting law to be accurately enforced and voting to be legal. In response to the Court's questions, Plaintiffs' Counsel said their irreparable injury was that the election process was being compromised, and that it prevents there being uniformity in the manner of voting throughout Texas. While certainly valid concerns, those are not the kind of injuries that separate Plaintiffs from other concerned citizens. Plaintiffs have no evidence of individualized irreparable injuries.

The one element that the Court finds the Plaintiffs have prevailed on is the harm to the party defendant. The Court finds that there would be no harm to Harris County. The only suggested harm is that the County has spent millions of dollars to implement drive-thru voting. While these funds may have been better spent, their loss does not prevail over tens of thousands of potentially illegal votes. Further, if granted, the injunction would only require the Defendant to conduct elections as Harris County has conducted them in the past without drive-thru voting.

The last element must, like the first, take on extraordinary significance in this context. That element concerns the public interest. Plaintiffs argue, correctly, that the public has an interest in seeing that elections are carried out pursuant to the Election Code. This is no doubt true; however, this generalized interest is offset by two somewhat stronger factors. First, the drive-thru early voting as designed and implemented is, to this Court's reading, legal as described above. Second, there have been over 120,000 citizens who have legally voted utilizing this process. While Plaintiffs have complained about anecdotal reports of irregularities, the record reflects that the vast majority were legal voters, voting as instructed by their local voting officials and voting in an otherwise legal manner. The only claimed widespread illegality is the place of voting—a tent outside the polling place instead of inside the actual building. To disenfranchise over 120,000 voters who voted as instructed the day before the scheduled election does not serve the public interest.

Therefore, if the Court had found standing existed, it would have denied an injunction as to the drive-thru early voting.

The Court finds the issue as to Election Day to cut the opposite direction. On Election Day, as opposed to early voting, there is no legislative authorization for movable structures as polling places. The Election Code makes clear that, on Election Day, "[e]ach polling place shall be located inside a building." Tex. Elec. Code § 43.031(b). The term "building" is not defined in the Code.

Nevertheless, Black's Law Dictionary defines "building" as: "A structure with walls and a roof, esp. a permanent structure." Black's Law Dictionary (11th ed. 2019). The Court finds, after reviewing the record and arguments of counsel, that the tents used for drive-thru voting are not "buildings" within the meaning of the Election Code. Further, they are not inside, they are clearly outside. Accordingly, if the Plaintiffs had standing, the Court would have found that the continuation of drive-thru voting on Election Day violates the Texas Election Code.

It also finds that, unlike in early voting, the Plaintiffs prevail when one weighs the various elements that underlie the issuance of an injunction. First, as stated above, the Court does not find a tent to be a building. Therefore, under the Election Code it is not a legal voting location. Second, the Plaintiffs' request for injunctive relief is timely. While it could and should have been made earlier, it was made days before the election. The Court would have found that the Plaintiffs had a likelihood of success. The analysis of the second element remains the same. With regard to the loss that the Defendant might suffer, the Court finds this to be minimal. While it apparently spent millions in implementing the drive-thru voting system, it had over 120,000 voters use it—so it is money well-spent. The fact it would not be used on Election Day does not diminish its benefit. The analysis of the last element, public interest, swings in favor of the Plaintiffs. No one should want votes to be cast illegally or at an illegal polling place. No one has voted yet—so no one is being disenfranchised. Moreover, for those who are injured or worried that their health would be compromised should they be compelled to enter the building to vote, curbside voting is available under § 64.009 of the Texas Election Code.[3] Lastly, there are very few citizens who would want their vote to be in jeopardy, so it is incumbent on election officials to conduct voting in a proper location—not one which the Attorney General has already said was inappropriate. Consequently,

[3] This Court is quite cognizant of the Texas Supreme Court ruling (in a slightly different context) that fear of contracting COVID-19 does not establish an exception. *In re State*, 602 S.W.3d 549 (Tex. 2020).

this Court, had it found that standing existed, would have granted the injunction prospectively and enjoined drive-thru voting on Election Day and denied all other relief.

Nevertheless, since it found standing does not exist, this action is hereby dismissed.

Signed this 2nd day of November, 2020.

Andrew S. Hanen
United States District Judge