No. 20-20574

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs–Appellants

v.

CHRIS HOLLINS, in his official capacity as
Harris County Clerk

Defendant–Appellee

Appeal from the United States District Court for the
Southern District of Texas, Houston Division; No. 4:20-CV-3709

APPELLEE'S OPPOSITION TO MOTION FOR TEMPORARY RELIEF

TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT:

This Court should deny the request for emergency relief. This afternoon, November 2, 2020, following a lengthy hearing involving the Appellants, Appellee, and numerous other interested parties, the district court denied Appellants' motion for a preliminary injunction that would disrupt the election in Harris County, Texas. The court found that Appellants lack standing, and in the alternative, also stated that it would deny injunctive relief on the merits with respect to more than 125,000 votes that were cast during the early-voting period. Election Day voting is still at issue.

Appellants seek temporary relief, asking this Court to take the highly irregular and controversial step of "staying" an order finding the lack of Article III standing and then imposing its own preliminary injunction—just hours before Election Day. Ever since *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the Supreme Court "has repeatedly emphasized that lower federal 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). That principle controls this case.

This Court has faithfully adhered to the Supreme Court's guidance and should continue to do so. *See, e.g.*, *Texas Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020); *Texas Alliance for Retired Americans v. Hughs*, 976 F.3d 564, 567 (5th Cir. 2020); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014). Any court order enjoining the Harris County drive-through voting program, which was unanimously approved several months ago by the bipartisan Harris County Commissioners Court, would be a profound departure from the *Purcell* principle. This consideration alone is sufficient reason to deny the motion for temporary relief.

In addition, Appellants cannot establish that they have a meritorious case for temporary relief. For the Court's convenience, Appellee attaches his response filed with the district court along with all the exhibits. *See* Ex. A. That response covers the *Purcell* principle, *id*. at 6-8, confirms the district court's decision on standing, *id*. at 4-6, and provides several other barriers to the requested preliminary injunction. *Id*. at 9-30. Appellee also attaches the district court's written order. *See* Ex. B.

The district court correctly held that Appellants lack standing. Ex. A at 4-6. With respect to their Article I, section IV, clause 1 (the "Elections Clause") claim, Appellants lack standing to litigate an "institutional injury" claim that belongs to the Texas Legislature. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007).

This conclusion is not altered by the fact that one of the Appellants here, Representative Toth, is a member of the Texas Legislature. At least with respect to the Elections Clause claim, Representative Toth has suffered no individual injury, but alleges an "institutional injury" that is "wholly abstract and widely dispersed." *Raines v. Byrd*, 521 U.S. 811, 829 (1997). This is not a case in which the entire Legislature is appearing as "an institutional plaintiff asserting an institutional injury" that has "commenced this action after authorizing votes in both of its chambers." *Arizona State Leg. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015). Accordingly, Representative Toth has no standing to assert the claim either. *Corman v. Torres*, 287 F. Supp. 3d 558, 567-69 (M.D. Pa. 2018) (three-judge court applying this principle to state legislators alleging Elections Clause violations).

With respect to their equal protection claim, Appellants cannot demonstrate an individual and particularized injury; the record they presented to the district court consisted solely of generalized grievances about the drive-through voting process. *See Gill v. Whitford*, 138 S. Ct. 1916, 1922 (2018). Absent any evidence of some concrete and particularized injury that differentiates Appellants from all other voters, there is no justiciable equal protection claim.

In addition, the district court made clear that even if Appellants had standing, the court would deny injunctive relief with respect to ballots cast during early voting. Its reasoning would apply with equal force to Election Day voting:

- Appellants failed to show a reasonable likelihood of success on the merits. Ex. A at 13-27. Drive-through voting satisfies the laws governing voting on Election Day just as it does for early voting, *id*. at 13-19, but even if it did not, votes cast under that procedure would still be counted under both Texas law and recent U.S. Supreme Court authority. *Id.* at 20-23 (collecting cases).

- The laches principle applies. *Williams v. Rhodes*, 393 U.S. 23, 34–35 (1968) (election case). Drive-through voting *on Election Day* was approved by the Elections Division of the Texas Secretary of State, the official responsible for maintaining uniformity in application and interpretation of the Election Code. Tex. Elec. Code § 31.003; Ex. A-6 at ¶ 5; Ex. A-14 at 108-09. It was used without legal incident in a primary run-off and it has been widely publicized (including thorough discussions with stakeholders from both political parties). Ex. A at 9-12. Yet Appellants did not file their complaint until October 28—just two days before the conclusion of early voting and after more than 100,000 Texans had voted at drive-through polling places in reliance on the justifiable expectation that their votes would be counted. *Id.*

- Granting an injunction at this late hour would raise doubts about the validity of 126,912 early votes and would cause confusion among Election Day voters, tipping the balance of the equities and the public interest powerfully against the injunctive relief requested by Appellants. Ex. A at 27-30.

The district court expressed some doubt about the use of drive-through voting on Election Day due to a textual difference in the statute that governs Election Day. But it is notable that the Texas Supreme Court has had two opportunities to consider these precise arguments about the meaning of the Texas Election Code. Both times, that court declined to enjoin the drive-through voting program. Exs. A-1, A-2. Federal courts should not step in at the last minute where the state courts did not.

Moreover, the district court's dismissal of the case on the basis of standing meant that it did not grapple with the other reasons to deny injunctive relief with respect to Election Day voting. Chief among these reasons is the *Purcell* principle, which would counsel against any federal interference with Election Day procedures. This Court has held that avoiding voter confusion and disruption of election practices is "within the public interest given the extremely fast-approaching election date." *Texas Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020). In this case, we are literally on the eve of Election Day. The public interest would be disserved by an injunction at the last minute—especially since Appellants slept on their rights for months before filing a lawsuit after the election was already underway. Notably, the court's discussion of Election Day voting does not address the *Purcell* principle.

In addition, even if the district court's stated concerns were valid, they would amount to nothing more than a run-of-the-mill question about state election laws. They do not state a colorable equal protection claim because the Harris County Clerk has authority only over elections in Harris County, and every voter in Harris County is being treated identically. The fact that voters elsewhere are subject to different voting procedures does not mean the Harris County Clerk's identical treatment of every Harris County voter is a violation of equal protection. *Citizen Ctr. v. Gessler*, 770 F.3d 900, 917–19 (10th Cir. 2014). This case bears no similarity to the facts of *Bush v. Gore*, 531 U.S. 98 (2000). *See* Ex. A at 26-27. It is a routine dispute about the meaning of one word in a state election law—nothing more.

Nor do Appellants state a colorable claim under the Elections Clause (even if they had standing to invoke it). Their claim depends on Chief Justice Rehnquist's concurring opinion suggesting a "significant departure" from the statutory scheme prescribed by a state legislature would raise "a federal constitutional question." *Gore*, 531 U.S. at 113 (Rehnquist, C.J., concurring). The facts of this case represent, at most, a debate over two arguable readings of the word "building" in Texas law. The Clerk's reading of the word "building" was approved by the Elections Division of the Secretary of State for Election Day voting, and the drive-through voting plan was unanimously approved by a bipartisan Commissioners Court. This situation is hardly the sort of "significant departure from the legislative scheme" that would rise to a constitutional violation. Obviously, it cannot be the law that every dispute about state election law presents a federal constitutional question. Ex. A at 24-25.

Notably, the court's discussion of Election Day voting does not address either of the alleged federal claims, much less find a "substantial likelihood of success." That discussion confirms this is a routine state-law dispute—and nothing more.

Election Day is tomorrow. There is no basis for this eleventh-hour attempt to disrupt the election by seeking to enjoin a voting procedure that was announced publicly months ago, approved by the Elections Division of the Secretary of State for Election Day voting, used successfully in a primary election without challenge, and relied on by more than 125,000 Texas voters. The Texas Supreme Court denied emergency relief based on these arguments, and this Court should do the same.

CONCLUSION

This Court should deny Appellants' motion for emergency relief.

Respectfully submitted,

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