No. 20-50407

In the United States Court of Appeals for the Fifth Circuit

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA;
JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING;
BRENDA LI GARCIA,

Plaintiffs-Appellees,

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS;
RUTH HUGHS, TEXAS SECRETARY OF STATE;
KEN PAXTON, TEXAS ATTORNEY GENERAL,

Defendants- Appellants.

**Appeal from the United States District Court
for the Western District of Texas**

BRIEF OF *AMICI CURIAE* THE STATES OF LOUISIANA AND MISSISSIPPI IN SUPPORT OF THE STATE OF TEXAS

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the States of Louisiana and Mississippi.[1] *Amici* are responsible, through their legislatures and election officials, for the administration of state and federal elections in a manner consistent with state and federal law. Because Louisiana, Mississippi, and their officials have the primary duty to enact time, place, and manner regulations in state and federal elections, *Amici* have a strong interest in the proper application of the U.S. Constitution to questions of election regulations. And because federal court orders modifying election practices impose a heavy cost on states, state officials, and voters, *Amici* have an equally strong interest in the enforcement of limits on claims challenging state election laws.

Amici curiae, the State of Louisiana and the State of Mississippi, submit this brief supporting the granting of a stay and the reversal and vacatur of the District Court's judgment because the District Court lacked subject matter jurisdiction pursuant to the political question doctrine and Article I, Section IV of the U.S. Constitution.

[1] Louisiana and Mississippi are authorized to file this brief by Fed. R. App. P. 29(a)(2) and this Court's order of May 22, 2020. *See* Order, *Texas Democratic Party v. Abbott*, No. 20-5047 (5th Cir. May 22, 2020). Counsel for *Amici* authored this brief in whole. No party or any party's counsel authored any part of this brief, and no person or entity, other than the State of Louisiana and the State of Mississippi, made a monetary contribution for the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

Federal courts do not wield limitless power. *See Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004) (plurality op.) ("The judicial power created by Article III, § 1, of the Constitution is not *whatever* judges choose to do . . . .") (emphasis in original); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Among the limits of federal court jurisdiction are so-called political questions which proscribe certain types of "cases" or "controversies" where the federal courts have no competence to decide. *See Baker v. Carr,* 369 U.S. 186, 198 (1962); *Spectrum Stores, Inc. v. Citgo Petroleum Corp.,* 632 F.3d 938, 948-49 (5th Cir. 2011). The history and traditions of the United States, from its founding through the enactment of the Constitution, and up to and including modern Supreme Court precedent, make the extent of the judicial power clear. The existence of a pandemic neither enhances nor diminishes the power of the federal judiciary or the power of the State through its prescriptions for lawmaking. Regardless of the circumstances of the world, or sometimes because of them, every federal court at every stage of a proceeding has the authority, duty, and obligation to assure itself that it has jurisdiction. *See Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514 (2006).

The political question doctrine dictates that the District Court was without jurisdiction to decide issues of state policy in responding to a worldwide pandemic.

The judiciary simply does not have the competence to make the policy determinations required by the present circumstances or to determine what voting accommodations are in the best interest of the citizens of Texas.

Undeterred, the United States District Court for the Western District of Texas forged ahead—with a certain untoward zeal—granting a preliminary injunction that not only rewrote Texas law but, for good measure, eviscerated the separation of powers and any semblance of respect for federalism. A federal court appointing itself as an ersatz legislature is something neither permitted nor condoned by the U.S. Constitution or Supreme Court precedent. *See Thompson v. DeWine*, 2020 U.S. App. LEXIS 16650, *16 (6th Cir. 2020) (per curiam) (district courts "cannot usurp a State's legislative authority by rewriting its statutes to create new law." (internal alterations omitted)); *United States v. Sineneng-Smith*, 206 L. Ed. 2d 866, 871 (2020) (unanimous op.) ("Courts are essentially passive instruments of government."). Judicial decisions should not, and in fact cannot, "ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role." *Rucho*, 139 S. Ct. at 2507.

As such, this Court should grant the stay requested by the State of Texas and, in due course, reverse and vacate the District Court's preliminary injunction as there is no likelihood of success on the merits of Plaintiffs-Appellees' claims.

ARGUMENT

Those self-evident truths that the District Court invoked in its introductory statements,[2] are secured by "Governments [that] are instituted among Men, deriving their just powers from the consent of the governed . . . ." Declaration of Independence para. 2 (U.S. 1776). One must not then forget that the majesty of the opening phrases of the Declaration would not be needed without the list of "repeated injuries and usurpations" brought upon the colonies by the King of England. *Id*. As the foundation of our form of government, as well as its application to the circumstances of this case, the "[f]acts [we] submitted to a candid world" as reasons for our departure from old-England take on special import. *Id*. Part of the reason the Founders set in place a system of separated powers was because the King "refused his Assent to Laws, the most wholesome and necessary for the public good" and he "for[bade] his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained . . . ."[3] *Id*.

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[2] Order, *Tex. Democratic Party v. Abbott*, No. 20-ca-438, 1-2 (W.D. Tex. May 19, 2020) (ECF No. 90) [hereinafter "Appellants' Ex. A."].

[3] One of the great ironies of both this lawsuit and the District Court's opinion is that they diminish the right to vote to a far greater degree than the accusations leveled at Texas. What is the purpose of voting to elect representatives when a political party and four individuals can use a willing court to invoke their agenda without bothering to gain public support or duly adopt

Therefore, as the Framers intended, the Constitution rejected the tyranny of unitary rule and instead implemented a government of separated powers "of the people, by the people, and for the people." Abraham Lincoln, Gettysburg Address, para. 3 (November 19, 1863); *compare* U.S. Const. art. I *with* U.S. Const. art. II *and* U.S. Const. art. III. The separation of powers not only separates the federal system into co-equal branches of government, but also designates certain powers to the States. Most pertinent here is Article I, Section IV, clause 1 (the "Elections Clause"),[4] which dictates that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." U.S. Const. art. I, § IV, cl. 1.

Here, the State of Texas[5] seeks to enforce an uncontroversial provision of state law which dictates who is eligible for an absentee ballot. This measure was no

legislation? Judicial "legislation" does more lasting damage to the will of the people than any of Plaintiffs' alleged harms. The political question doctrine exists to prevent such abuses.

[4] As there is a presidential election this year, legislative election powers are at their zenith. *See Bush v. Gore*, 531 U.S. 98, 104 (2000). The Elector's Clause mandates that "[e]ach State shall appoint, in such a Manner as the Legislature thereof may direct, a Number of Electors . . . ." U.S. Const. art. II, § 1, cl. 2. Texas, through its legislature, has designated that its electors be given to the candidate who receives the most votes in an election held for state and county officers in a presidential election year. Tex. Elec. Code § 192 *et seq*.

[5] That the Governor of Texas used his executive powers granted him by both the Texas Constitution and the Texas Legislature in pursuing the methods of coping with the current COVID-19 pandemic is of no moment under the Elections Clause. The Governor's authority is as acceptable a use of authority under established Supreme Court precedent as if it were implemented by the Texas Legislature itself. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015); *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1094 (2004) (Rehnquist, C.J., Scalia, J., and Thomas, J. dissenting from denial of cert.).

more or less in contravention of the law before the emergency of COVID-19 than it is after it. The reason is simple: a worldwide pandemic *is not state action*. *See Thompson,* 2020 U.S. App. LEXIS 16650 at *12 ("[W]e must remember, First Amendment violations require state action. So[,] we cannot hold private citizens' decisions to stay home for their own safety against the State." (internal citations omitted)); *Coalition v. Raffensperger*, 2020 U.S. Dist. LEXIS 86996, *9 n.2 (N.D. Ga May 14, 2020). As such, the federal courts have no more cause to interfere with the administration of elections now than they did before.

I. PLAINTIFFS-APPELLEES' CLAIMS PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS.

As it pertains to federal elections, the "discretionary power" of election regulations exist primarily in the state legislature and "ultimately" in Congress. The Federalist No. 59, at 290 (Alexander Hamilton) (Dover Thrift ed., 2014). Among the Framers, "[a]t no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing." *Rucho*, 139 S. Ct. at 2496; *see also Coalition*, 2020 U.S. Dist. LEXIS 86996 at *9.

The Supreme Court has found at least six areas where courts are not competent to render a decision, any one of which causes the case to present a non-justiciable political question outside the judicial expertise:

[1] a textually demonstrable constitutional commitment of the issue to

> a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 210. Of specific import here are at least three of these: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" and (3) "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion." *Id.* Therefore, "[a]bsent pellucid proof provided by plaintiffs that a political question is not at issue, courts should not substitute their own judgments for state election codes." *Coalition*, 2020 U.S. Dist. LEXIS 86996 at *9. Nothing approaching that level of proof was produced in this case.

A. The District Court Lacked Jurisdiction Because Election Regulations are Committed to Texas and not the Federal Courts.

The first *Baker* factor is "a textually demonstrable commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 210. The regulation of congressional elections is conferred by the federal constitution to the States via the Elections Clause. *See* U.S. Const. art. I, § IV, cl. 1; *see also* U.S. Const. art. II, § 1 (granting to the state legislatures the power to appoint electors for presidential

elections). Relatedly, the regulation of state elections is part of the plenary power of the States. *See Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) ("[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election process for state offices." (internal citation omitted)).

In either event, the power to regulate and administer elections is committed to "Congress and state legislatures—not courts." *See Coalition*, 2020 U.S. Dist. LEXIS 86996 at *8-9; *cf.*); *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J. dissenting from denial of cert.) (noting that the Elections Clause operates as a limitation on "a State's ability to define lawmaking by excluding the legislature itself in favor of the courts."); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."). Because the power to regulate elections is granted by the federal constitution, the courts ought not "lightly tamper with election regulations." *Thompson*, 2020 U.S. App. LEXIS 16650 at *16. "These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into uncharted waters." *Id*. at *16-17. By rewriting Texas law, the District Court usurped the power to regulate elections.

B. There Are No Judicially Manageable Standards to Determine COVID-19 Policy.

The first *Baker* factor leads inexorably to the second, which is "a lack of judicially discoverable and manageable standards for resolving" the question at issue. *Baker*, 369 U.S. at 210. As an initial matter it is important to note that all of the hallmarks of infringement on the right to vote that have been articulated by the courts are non-existent here. Before a court engages in an analysis of the burden on the right to vote, it must "identify the burden before [it] can weigh it." *Jacobson v. Fla. Sec'y*, 2020 U.S. App. LEXIS 13714, *54-55 (11th Cir. 2020) (Pryor, W. J. concurring) (quoting *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 205 (2008) (Scalia, J. concurring in judgment)). It also must be understood that there exists no right to vote absentee. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 810 (1969) (in the context of inmate voting the Court stated "[c]onstitutional safeguards are not thereby offended simply because some prisoners, as a result, find voting more convenient than [others]."). The regulation at issue here:

> [d]oes not make it more difficult for individuals to vote, or to choose the candidate of their choice. It does not limit any political party's or candidate's access to the ballot, which would interfere with voters' ability to vote for and support that party or candidate. Nor does it burden the associational rights of political parties by interfering with their ability to freely associate with voters and candidates of their choosing.

Jacobson, 2020 U.S. App. LEXIS 13714 at *54-55 (internal citations omitted); *see*

also id. (collecting cases); *see also Thompson*, 2020 U.S. App. LEXIS 16650 at *12.

Here, the precipitating cause of any infringement is not the action of the government but rather is an invisible viral menace which, unfortunately, is not bound by any law other than nature's. Because of this reality, the question turns to the simple fact that there are no discernable and manageable standards to decide issues, such as how many safety measures are enough and what the proper balance between absentee and in-person voting should be in response to a pandemic. *See Coalition*, 2020 U.S. Dist. LEXIS 86996 at 10; *see also Order denying Mot. for Reconsideration, Coalition v. Raffensperger*, No. 1:20-cv-1677 (N.D. Ga. May 26, 2020).

When looking at the question of "judicially discernable and manageable" standards, the Supreme Court articulated that questions of "fairness" are outside the judicial competence. As the *Rucho* Court articulated in the partisan gerrymandering context, "[t]here are no legal standards discernable in the Constitution for making such judgments, let alone precise standards that are clear [and] manageable . . . ." *Rucho*, 139 S. Ct. at 2500. When courts seek to invoke concepts of fairness into a judicially manageable standard, the result is "an unmoored determination of the sort characteristic of a political question beyond the competence of the federal courts." *Id*. Political questions exist in other contexts

similar to the pandemic before us. *See, e.g., Juliana v. United States*, 947 F.3d 1159, 1173 (9th Cir. 2020) (applying the political question doctrine to the threat of global warming).

"[F]ederal courts can address only questions 'historically viewed as capable of resolution through the judicial process.'" *Rucho*, 139 S. Ct. at 2493-94 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). The *Rucho* Court thus reaffirmed that the courts are only to decide "cases" or "controversies" that are "of a Judiciary Nature." *Id.* at 2494 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)); *see also Marbury v. Madison*, 5 U.S. 137, 177-178 (1803). "Because 'it is axiomatic that the Constitution contemplates that democracy is the appropriate process for change', some questions—even those existential in nature—are the province of the political branches." *Juliana*, 947 F.3d at 1173 (internal citations and some quotations omitted). The questions before the District Court were questions of the application of neutral state policy that lacked any judicially manageable standards for the court to apply.

C. Any Decision by the District Court Was Impossible Without Making a Non-Judicial Initial Policy Determination.

The third *Baker* factor relates to "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 210. "A political question under the third factor exists when, to resolve a dispute, the court must make an initial policy judgment of a legislative nature,

rather than resolving the dispute through legal and factual analysis." *Gross v. German Found. Indus. Initiative,* 456 F.3d 363, 388 (3d Cir. 2006) (internal quotations omitted); *see also Norwood v. Raytheon Co.*, 455 F. Supp. 2d 597, 606 (W.D. Tex. 2006). The key feature of the third *Baker* factor is not the impact the decision will have on policy "but rather whether it will impermissibly intrude" on the State's role in formulating policy. *See Gross,* 456 F.3d at 389. The District Court's opinion went further than merely intruding on state policy—it effectively adopted its own policy to respond to the current pandemic.

The District Court's order is wholly and entirely dependent on "the pendency of pandemic circumstances." *See* Appellants' Ex. A at 10).[6] Nothing in Article III permits the judiciary to usurp the State's absentee voter policy in response to a worldwide pandemic, but that is exactly what the District Court did. Texas, and indeed every state, has a valid interest in the integrity of the voting process, which includes preventing voter fraud. *See Crawford,* 553 U.S. at 191; *Voting for Am., Inc. v. Andrade*, 488 Fed. Appx. 890, 901 (5th Cir. 2012) ("Texas has a legitimate interest in protecting against voter fraud."). It bears repeating that it is the State, through its legislature, that is empowered with enacting election regulations. *See, e.g.,* U.S. Const. art. I, § IV, cl. 1. Despite those clear facts, the

[6] This is further evidenced by the fact that the order "shall remain in full force and effect . . . until such time as the pandemic circumstances giving rise to this Order subside." Appellants' Ex. A at 12.

District Court cast aside Texas' significant interest in protecting the integrity of its elections and ordered that every member of the public be allowed an absentee ballot in direct contravention of clear state policy to limit absentee ballots to early voting amongst certain individuals. Appellants' Ex. A at 7, 10-11.

The District Court goes further still by fully usurping the State's police power—a power not enjoyed by *any* branch of the federal government, *see United States v. Morrison,* 529 U.S. 598, 618-19 (2000); *United States v. Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J. concurring in judgment)—by refusing to allow the Attorney General to enforce state policy respecting criminal voter fraud.[7] Appellants' Ex. A at 7. Finally, the District Court ordered that its decree be published on a State website, thereby co-opting state resources for itself. In so far as the District Court had any authority to hear this case in the first instance, it certainly did not have the authority to make the State of Texas its vassal.

The question posed to the District Court was one that was "impossibil[e] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion." *See Baker,* 369 U.S. at 210. The District Court's own Order clearly

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[7] The District Court was certainly incorrect as a matter of law when it wholly disregarded the State's interest in combating voter fraud. *See Crawford,* 553 U.S. at 191; *Miracle v. Hobbs*, 2020 U.S. App. LEXIS 14031, *4 (9th Cir. 2020) ("[T]he public … wants guarantees of fair and fraud-free elections, and a state 'indisputably has a compelling interest in preserving the integrity of its election process.'" (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989)); *Democratic Nat'l Comm. v. Bostelmann,* No. 20-1538 (7th Cir. 2020) (noting that the district court did not adequately consider the State's interest in preventing voter fraud).

evidences this fact by making sweeping changes to Texas' election laws in response to a pandemic.

CONCLUSION

"It is especially important during crises such as the present one involving a medical pandemic that the Court hew closely to the Constitution's original imperatives. This starts with the Elections Clause, which commits the administration of elections to Congress and state legislatures—not courts." *See Coalition*, 2020 U.S. Dist. LEXIS 86996 at 8-9. The District Court, ignoring the limits of judicial power, forged ahead and substituted its preferred policy for that of the State. Such a result is not permitted nor condoned by the Constitution or judicial precedent. Therefore, this Court should grant the State of Texas' Motion for Stay and ultimately reverse and vacate the District Court's decision.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC COMPLIANCE

I certify that (1) the required privacy redactions have been made, 5th. Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses. I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ Elizabeth Murrill

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing BRIEF OF *AMICI CURIAE* THE STATES OF LOUISIANA AND MISSISSIPPI IN SUPPORT OF THE STATE OF TEXAS:

(1) Complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3,879 words; and

(2) Complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

/s/ Elizabeth Murrill

CERTIFICATE OF SERVICE

I hereby certify that today, May 27, 2020, a copy of this BRIEF OF *AMICI CURIAE* THE STATES OF LOUISIANA AND MISSISSIPPI IN SUPPORT OF THE STATE OF TEXAS was served upon all counsel of record via ECF.

/s/ Elizabeth Murrill