

No. 20-50407

**In the United States Court of Appeals
for the Fifth Circuit**

TEXAS DEMOCRATIC PARTY, GILBERT HINOJOSA, CHAIR OF THE
TEXAS DEMOCRATIC PARTY, JOSEPH DANIEL CASCINO, SHANDA
MARIE SANSING, BRENDA LI GARCIA,
Plaintiffs-Appellees

v.

GREG ABBOTT, GOVERNOR OF TEXAS, RUTH
HUGHS, TEXAS SECRETARY OF STATE, KEN
PAXTON, ATTORNEY GENERAL OF TEXAS
Defendants-Appellants

On Appeal from the U.S. District Court for the
Western District of Texas, San Antonio Division

**UNOPPOSED MOTION FOR NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., TO FILE BRIEF AS AMICUS CURIAE IN
SUPPORT OF PLAINTIFFS-APPELLEES**

MAHOGANED. REED*
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
700 14th Street N.W.Ste.600
Washington, DC 20005
(202) 682-1300

**Counsel of Record*
†Application for admission
forthcoming

SHERRILYN A. IFILL
JANAI S. NELSON
SAMUEL SPITAL
LEAH C. ADEN
NATASHA MERLE†
DEUEL ROSS
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

Counsel for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 29, Fifth Circuit Rule 29, and this Court's inherent authority, amicus curiae NAACP Legal Defense and Educational Fund, Inc. ("LDF"), respectfully moves this Court for leave to file the attached brief in opposition to Defendants-Appellants' Emergency Motion for Stay Pending Appeal and Temporary Administrative Stay filed May 20, 2020. Amicus has requested the consent of all parties. Plaintiffs-Appellees granted consent, and Defendants-Appellants do not oppose amicus' filing.

Interests of Amicus Curiae

The NAACP Legal Defense and Educational Fund, Inc ("LDF") is a non-profit, non-partisan law organization established under the laws of New York to assist Black people and other people of color in the full, fair, and free exercise of their constitutional and statutory rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in economic justice, education, criminal justice, and political participation. LDF has been involved in numerous cases relating to voting rights before state and federal courts and is currently litigating voting rights cases related to the impact of COVID-19 in Alabama, Louisiana, and South Carolina. *See Mary T. Thomas, et al. v. Marci Andino, et al.*, No. 3:20-cv-01522-JMC (Dkt. 1 April 22, 2020); *People First of Alabama, et al. v. John Merrill, et al.*, No. 20-cv-00619-AKK (Dkt. 1 May 1, 2020);

Power Coalition for Equity and Justice, et al. v. John Bel Edwards, et al., No. 3:20-cv-00283-BAJ-EWD (Dkt. 1 May 7, 2020).

Relevance of Amicus Curiae Brief

This appeal raises the issue of Texas voters' right to vote by mail amid the COVID-19 pandemic. Appellants interpret Texas law to prohibit mail-in voting by voters who seek to avoid the risk of contracting COVID through in-person voting. LDF's brief will explain that the First and Fourteenth Amendments do not permit Appellants to require voters to choose between risking their personal safety and the public health, or forfeiting their right to vote to avoid exposure to COVID-19. This brief will also argue that Appellant's restrictive interpretation of Texas's absentee-voting law imposes a severe burden on the right to vote and cannot satisfy the standards set by *Anderson v. Celebrezze*, *Burdick v. Takushi*, and their progeny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

The Federal Rules of Appellate Procedure and the Fifth Circuit's Rules and I.O.P.s do not expressly address the submission of an amicus curiae brief with respect to motions. However, consistent with their inherent authority, both the Fifth Circuit and other circuit courts have routinely accepted amicus briefs filed in support of or in opposition to a party's stay request or in connection with similar motions. *See, e.g., In re Abbott*, 800 F. App'x 296 (5th Cir. 2020) (reflecting filing of an

amicus brief in connection with a mandamus petition and temporary stay request); *Brooks v. Estelle*, 697 F.2d 586, 588 (5th Cir. 1982) (reflecting that amicus filed a brief and presented argument in connection with an application filed in the Fifth Circuit for a stay of execution); *Fed. Trade Comm. v. Qualcomm Inc.*, Nos. 19-15159, 19-16122, Dkt. 43 (9th Cir. July 23, 2020) (accepting amicus curiae briefs submitted in support of or opposing the appellant’s motion for partial stay of a preliminary injunction pending appeal); *Washington, et al. v. Donald J. Trump, et al.*, No. 17-35105, Dkt. 77 (9th Cir. Feb. 6, 2017) (accepting amicus briefs concerning defendant’s motion to stay district court order); *David Floyd, et al. v. City of New York*, No. 13-3088, Dkt. 159, 160 (2d Cir. Oct. 10, 2013) (granting non-parties’ motion to file amicus brief opposing motion to stay pending appeal); *Selfridge v. Carey*, 660 F.2d 516, 516 (2d Cir. 1981) (“Upon consideration of the briefs submitted by counsel and by amici curiae and after hearing oral argument, the motion of defendants-appellants for a stay of the preliminary injunction entered by the District Court is denied.”). Moreover, LDF is submitting its amicus brief within the timeframe set in the Federal Appellate rules, the Fifth Circuit’s rules, and the Court’s May 20, 2020 Order.

Accordingly, LDF respectfully requests that this Court grant leave to file the accompanying amicus curiae brief.

Dated: May 21, 2020

Respectfully submitted,

/s/ Mahogane D. Reed

Sherrilyn A. Ifill

President & Director-Counsel

Janai S. Nelson

Samuel Spital

Leah Aden

Natasha Merle

Deuel Ross

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

40 Rector Street, 5th Floor

New York, NY 10006

T: (212) 965-2200

F: (212) 226-7529

Mahogane D. Reed

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

700 14th Street NW, Ste. 600

Washington, DC 20005

T: (202) 682-1300

F: (202) 682-1312

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Motion for Leave:

- (1) Complies with Federal Rules of Appellate Procedure 27(d)(2)(A) because it contains 688 words; and
- (2) Complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5) and 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/ Mahogane D. Reed
Mahogane D. Reed

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2020, I electronically filed the Motion for Leave with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF filing system. I further certify that all participants in this case are registered CM/ECF users and that all service will be accomplished by the appellate CM/ECF system.

/s/ Mahogane D. Reed

Mahogane D. Reed

Counsel for Amicus Curiae

No. 20-50407

**In the United States Court of Appeals
for the Fifth Circuit**

TEXAS DEMOCRATIC PARTY, GILBERT HINOJOSA, CHAIR OF THE
TEXAS DEMOCRATIC PARTY, JOSEPH DANIEL CASCINO, SHANDA
MARIE SANSING, BRENDA LI GARCIA,
Plaintiffs-Appellees

v.

GREG ABBOTT, GOVERNOR OF TEXAS, RUTH
HUGHS, TEXAS SECRETARY OF STATE, KEN
PAXTON, ATTORNEY GENERAL OF TEXAS
Defendants-Appellants

On Appeal from the U.S. District Court for the
Western District of Texas, San Antonio Division

**BRIEF FOR *AMICUS CURIAE*, NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., IN SUPPORT OF PLAINTIFFS-
APPELLEES**

MAHOGANED. REED*
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300

**Counsel of Record*
†Application for admission
forthcoming

SHERRILYN A. IFILL
JANAI S. NELSON
SAMUEL SPITAL
LEAH C. ADEN
NATASHA C. MERLE †
DEUEL ROSS
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

Counsel for Amicus Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, *amicus curiae* the NAACP Legal Defense and Educational Fund, Inc. (“LDF”), provides this supplemental statement of interested persons in order to fully disclose all the persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 that have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. LDF certifies that it is a 501(c)(3) non-profit corporation and does not have a corporate parent nor is owned in whole or in part by any publicly held corporation.

Counsel for Plaintiffs-Appellees

Scott Brazil
Chad Dunn

Counsel for Defendants-Appellants

Michael Abrams
Ryan L. Bangert
Kyle D. Hawkins
Jeffrey C. Mateer
Ken Paxton
Lanora C. Pettit

Counsel for Amicus NAACP LDF

Leah Aden
Sherrilyn Ifill
Natasha Merle
Janai Nelson
Mahogane D. Reed
Deuel Ross
Samuel Spital

Statement of Interest

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”), is a non-profit, non-partisan law organization established under the laws of New York to assist Black people and other people of color in the full, fair, and free exercise of their constitutional and statutory rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in numerous cases relating to voting rights before state and federal courts. *See, e.g., Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers’ Ass’n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Veasey v. Abbott*, 830 F. 3d

216 (5th Cir. 2016) (en banc); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977) (en banc); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). LDF is currently litigating voting rights cases related to the dangers posted by COVID-19 transmission in Louisiana, Alabama, and South Carolina. *See Power Coalition for Equity and Justice, et al. v. John Bel Edwards, et al.*, No. 3:20-cv-00283-BAJ-EWD (Dkt. 1 May 7, 2020); *People First of Alabama, et al. v. John Merrill, et al.*, No. 20-cv-00619-AKK (Dkt. 1 May 1, 2020); *Mary T. Thomas, et al. v. Marci Andino, et al.*, No. 3:20-cv-01522-JMC (Dkt. 1 April 22, 2020).

Introduction and Summary of the Argument

COVID-19 is a global public health emergency that has led to unprecedented crises and loss throughout the country. To date, the virus has infected more than 1.5 million people in the United States. Texas has been hit hard, having reported more than 51,000 cases and 1,419 fatalities since March 2020.¹ On May 16, 2020, COVID-19 cases in Texas reached a single-day high of approximately 1,450 as the State progressively lifts stay-at-home restrictions.²

Notwithstanding this ongoing public health emergency and the national trend toward expanding access to absentee voting, Appellants refuse to accommodate—

¹Texas Dep't of State Health Serv., Texas Case Counts, COVID-19, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited May 21, 2020).

² Jacob Pramuk and John W. Schoen, *Texas coronavirus cases tick higher as state forges ahead with reopening*, May 16, 2020, <https://www.cnbc.com/2020/05/16/texas-coronavirus-updates-cases-rise-as-state-economy-reopens.html>.

indeed, threaten to prosecute—eligible voters who request or attempt to vote absentee to avoid the COVID-19 related health risks of in-person voting. Appellants’ interpretation of the Texas law will force thousands of Texans to either exercise their right to vote at great risk to their personal safety and the public health, or to forfeit their right to vote to avoid exposure to COVID-19. The First and Fourteenth Amendments do not permit the State to require voters to make such a choice.

As the Supreme Court has explained in *Anderson v. Celebrezze*, *Burdick v. Takushi*, and their progeny, severe burdens on the right to vote can be justified only if they are narrowly tailored to a compelling state interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008). Appellants’ restrictive interpretation of Texas’s absentee-voting law cannot satisfy this standard. Indeed, it cannot satisfy any level of *Anderson-Burdick* scrutiny. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318–19 (11th Cir. 2019) (recognizing that, under *Anderson-Burdick*, the “more a challenged law burdens the right to vote, the stricter the scrutiny to which we subject the law,” and even “when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden”).

Appellants’ stated justification for their restrictive interpretation of Texas’s absentee voting law—a concern about voter fraud—pales when compared to the

substantial health risks and constitutional injury faced by Texas’s voters in the context of the COVID-19 pandemic. The State has many other mechanisms to address the (exceedingly rare) problem of voter fraud, including Texas laws that require voters to certify their absentee ballot applications, *see* Tex. Elec. Code § 84.011, and subject voters to criminal penalties for false certifications, *see id.* § 84.0041. The State trusts those mechanisms to preserve the integrity of its elections, as it permits multiple categories of voters to vote by mail in every election. Appellants do not even argue (much less present evidence) that those mechanisms are sufficient to prevent voter fraud by other categories of voters but not sufficient for voters seeking to avoid COVID-19 transmission.

Lacking any such argument, Appellants point to the legislature’s “policy choice” to limit mail-in voting as a basis for imposing severe burdens on the right to vote. *See* Appellants’ Stay Mot. at 1. But the legislature was not contemplating the risks posed by a pandemic when it made that policy choice. In any event, under *Anderson-Burdick*, any such policy choice must be weighed against the burdens imposed on voters’ exercise of their constitutional rights. Appellants’ interpretation of Texas law, as applied in the context of the COVID-19 pandemic, cannot survive *Anderson-Burdick* scrutiny. The District Court therefore did not abuse its discretion in concluding that Appellants should be preliminarily enjoined from preventing

“eligible Texas voter[s] who seek[] to vote by mail in order to avoid transmission of COVID-19” from casting absentee ballots. ECF No. 90 at 9.

Appellants raise various arguments in support of their motion to stay. Yet, they nowhere acknowledge the governing standard: Appellants must show, among other things, that the District Court likely abused its discretion in entering this preliminary injunction. *See, e.g., M. D. by next friend Stukenberg v. Abbott*, 276, 288 & n.25 (5th Cir. 2019). In this amicus filing, LDF addresses only the *Anderson-Burdick* issue, and it does so only based on the burdens that Appellants’ interpretation of Texas law imposes on individual voters—including but not limited to Plaintiffs Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia (the “voter-Plaintiffs”)—who wish to vote by mail because of the risk of COVID-19 transmission from in-person voting. *See* ECF 90 at 45 ¶ 83, 46 ¶¶ 89, 95.

Argument

The First and Fourteenth Amendments do not allow a state to make voters choose between protecting their health and forfeiting their fundamental rights. Yet, Appellants urge an interpretation of Texas law that would create precisely such a constitutionally intolerable dilemma for the voter-Plaintiffs and thousands of other Texans.

As Appellants acknowledge, under *Anderson-Burdick*, courts must weigh the burdens imposed on plaintiffs’ right to vote “against ‘the precise interests put

forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).³ See Appellants’ Stay Mot. at 13. This standard is “stricter” than rational basis review. *Id.* Indeed, in Appellants’ words: “State rules that impose a ‘severe’ burden on constitutional rights must be ‘narrowly drawn to advance a state interest of compelling importance.’” Appellants’ Stay Mot. at 13 (quoting *Burdick*, 504 U.S. at 434).

Courts have applied the *Anderson-Burdick* framework to enjoin absentee voting rules that burden the right to vote. See, e.g., *Lee*, 915 F.3d at 1318–19; *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262 (11th Cir. 2019) (mem); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016); *Obama for Am. v. Husted*, 697 F.3d 423 at 431; *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101 (2d Cir. 2008). And courts have recognized that election laws that threaten the safety of

³ Appellants also cite *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), which applied rational basis review in an equal protection challenge to a law burdening the right to vote by mail. However, the Supreme Court has since clarified that heightened scrutiny is required when mail-in voting is voters’ only option to exercise the franchise. See *O’Brien v. Skinner*, 414 U.S. 524 (1974) (requiring the state to provide absentee ballots to eligible voters in jail). Here, for voters who wish to avoid the risk of COVID 19 transmission from in person voting, mail-in voting is the only option. *Obama for America v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (recognizing that *McDonald* is inapplicable, and heightened scrutiny applies, to absentee voting restrictions even when the burdened voters were not “legally prohibited from voting” but had “few alternate means of access to the ballot”). In any event, *McDonald* and *O’Brien* were both decided pre-*Anderson*. As Appellants acknowledge, the Supreme Court “currently evaluates Fourteenth Amendment challenges to state election laws under the ‘*Anderson-Burdick*’ framework.” Appellants’ Stay Mot. at 12.

individuals amid the COVID-19 crisis demand strict scrutiny under *Anderson-Burdick*. See, e.g., *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020) (holding that the enforcement of a ballot access law during the COVID-19 pandemic warranted strict scrutiny); *League of Women Voters of Va. v. Va. State Bd. of Elec.*, No. 20-cv-00024, 2020 WL 2158249, at *7-*8 (W.D. Va. May 5, 2020) (absentee voting requirement warranted strict scrutiny during the COVID-19 pandemic).

A. Appellants' Interpretation of Texas Law as Restricting Absentee Voting During the COVID-19 Pandemic Severely Burdens the Right to Vote.

The burden on Texas voters who reasonably fear contracting COVID-19 through in-person voting, including the three voter-Plaintiffs in this case, would be severe if they are not permitted to vote absentee.

As the District Court found, COVID-19 is highly infectious and leads to serious and potentially deadly complications. As of May 19, 2020, the Centers for Disease Control and Prevention (the "CDC") estimate that there are 1,528,235 total cases of COVID-19 in the United States, resulting in more than 91,000 confirmed deaths.⁴ According to experts, even this figure substantially undercounts the virus's actual reach.⁵ There is no vaccine, and no certainty of when one will be available.

⁴ See Coronavirus Disease 2019 (COVID-19): *Cases in the U.S.*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>, (last visited May 20, 2020).

⁵ Emma Brown et al., *U.S. Deaths Soared in Early Weeks of Pandemic, Far Exceeding Number Attributed to COVID-19*, Wash. Post (Apr. 27, 2020),

COVID-19 is extremely contagious; it spreads from person to person through respiratory droplets via talking, coughing, sneezing, close personal contact, and contact with contaminated surfaces and objects.⁶ ECF 90 at 36 ¶¶ 1–3. The coronavirus can lead to dangerous symptoms and complications, including “muscle aches, headaches, chest pain, diarrhea, coughing up blood, sputum production, runny nose, nausea, vomiting, sore throat, confusion, loss of senses of taste and smell, and anorexia.” *Id.* ¶ 5. The virus can cause severe damage to the lungs and other vital organs and can sometimes lead to permanent loss of respiratory capacity. *Id.* Persons of any age are at risk of developing severe and life-threatening complications. *Id.* ¶¶ 6, 8. And, even voters who do not themselves suffer from any underlying health condition that makes them particularly vulnerable to COVID-19 may care of, or share a household with, a voter who does—such as the hundreds of thousands of Texans who are living with or recovering from cancer.⁷

Due to historical and persisting discrimination, the COVID-19 pandemic has had a devastating and disproportionate impact on Black people throughout the

<https://www.washingtonpost.com/investigations/2020/04/27/covid-19-death-toll-undercounted/?arc404=true>.

⁶ Knuvel Sheikh, *Talking Can Generate Coronavirus Droplets That Linger Up to 14 Minutes*, May 14, 2020, <https://www.nytimes.com/2020/05/14/health/coronavirus-infections.html>; see also CDC, *Coronavirus Disease 2019 (COVID-19): How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>, (last visited May 21, 2020).

⁷ See <https://www.dshs.texas.gov/tcr/data/prevalence.aspx> (documenting the prevalence of cancer in Texas).

country.⁸ As of May 20, demographic data reported by the CDC on the number of COVID-19 cases for which race was available nationwide (42.1% of the 671,485 cases analyzed) showed that Black people make up 27% of the reported COVID-19 cases although they only make up 13% of the total U.S. population.⁹ As the District Court found, Latino people are also “particularly vulnerable to infection, hospitalization, and death resulting from COVID-19, due to a high prevalence of underlying medical conditions and socioeconomic conditions that make contracting the disease more likely.” ECF 90 at 36 ¶ 9.

Polling places have already been sources for exposure to COVID-19. In Chicago, Revall Burke, a Marine and father of six, died of COVID-19 after volunteering as a poll worker on March 17.¹⁰ Other poll workers and in-person voters who were asymptomatic on Election Day later became ill and tested positive for COVID-19.¹¹ Just weeks later, in-person voting proceeded in Wisconsin with large

⁸ Reis Thebault, et al., *The coronavirus is infecting and killing black Americans at an alarmingly high rate*, Washington Post (Apr. 7, 2020), https://www.washingtonpost.com/nation/2020/04/07/coronavirus-is-infecting-killing-black-americans-an-alarmingly-high-rate-post-analysis-shows/?arc404=true&itid=lk_inline_manual_3

⁹ CDC, Coronavirus Disease 2019 (COVID-19): *Cases, Data, & Surveillance, Demographic characteristics of COVID-19 cases in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited May 5, 2020).

¹⁰ See Mary Ann Ahern, *Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, NBC Chicago (Apr. 13, 2020), <https://www.nbcchicago.com/news/local/chicago-politics/poll-worker-at-chicago-voting-site-dies-of-coronavirus-election-officials-say/2255072/>.

¹¹ *Id.* [See Mary Ann Ahern, *Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, NBC Chicago (Apr. 13, 2020), <https://www.nbcchicago.com/news/local/chicago-politics/poll-worker-at-chicago-voting-site-dies-of-coronavirus-election-officials-say/2255072/>]; see also Cate Cauquiran, *Chicago Election Worker Who Staffed March Primary Dies After*

crowds and long lines.¹² Following that election, health officials identified at least 52 individuals who tested positive for COVID-19 after either voting in person or working at a polling site.¹³ This does not include individuals who may have contracted the virus but were not tested, or those who may have unknowingly contracted the virus and become asymptomatic carriers.

Notwithstanding the significant dangers associated with COVID-19, and the risk of contracting the virus from in-person voting, Appellants insist that Texas Election Code § 82.003 “places no burden upon *Appellees*’ ability to vote” because it simply “provides an alternative avenue to cast a ballot for members of a community more likely to face special challenges.” Appellants’ Stay Mot. at 13 In so arguing, Appellants simply fail to acknowledge the fundamental constitutional problem caused by their interpretation of Texas law as applied to the COVID-19 pandemic. If Texas prohibits individuals who risk contracting COVID-19 at the polls

Contracting COVID-19, ABC (April 13, 2020), <https://abc7chicago.com/coronavirus-deaths-fatalities-polling-worker-illinois-chicago/6100339/>.

¹² Devi Shastri, *In-Person Voting Was Likely a “Disaster” for Wisconsin’s Efforts to Flatten Coronavirus Curve*, National Experts Say, Milwaukee J. Sentinel (Apr. 8, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/08/coronavirus-wisconsin-election-likely-hurt-effort-flatten-curve/2961718001/> (quoting Wisconsin Department of Health Services Secretary Andrea Palm); The New York Times, *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, NY Times (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html>.

¹³ Nolan D. McCaskill, *Wisconsin Health Dept.: 36 People Positive for Coronavirus After Primary Vote*, Politico (Apr. 27, 2020), <https://www.politico.com/news/2020/04/27/wisconsin-tested-positive-coronavirus-election-211495>; see also *The Latest: 52 Positive Cases Tied to Wisconsin Election*, The Associated Press (Apr. 28, 2020), <https://apnews.com/b1503b5591c682530d1005e58ec8c267>.

from voting by mail (as Appellants claim), the State severely burdens their fundamental right to vote because it forces them to risk their health in order to exercise their fundamental constitutional rights. Such a severe burden requires strict scrutiny under *Anderson-Burdick*. See *Burdick*, 504 U.S. at 434; see also *Lee*, 915 F.3d at 1318–19 (under *Anderson-Burdick*, the “more a challenged law burdens the right to vote, the stricter the scrutiny to which we subject the law”).

B. Appellants’ Unsupported Assertions About Voter Fraud Are Insufficient Under Any Standard of *Anderson-Burdick* Review.

Appellants’ abstract concerns about voter fraud are not sufficient to overcome substantial burdens on the right to vote. Under *Anderson-Burdick*, “some level of specificity is necessary to convert that abstraction into a definite interest for a court to weigh.” *Ne. Ohio Coal.*, 837 F.3d at 632. But Appellants offer no specific evidence or persuasive argument as to why their stated concerns about voter fraud “make it necessary to burden the [voter] plaintiff[s]’ rights” during the COVID-19 pandemic. *Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 789). Therefore, Appellants’ interpretation of Texas law cannot satisfy the heightened scrutiny required by *Anderson-Burdick*.

As the District Court recognized, the risks to voters far outweigh any notional benefits from Appellants’ restrictive interpretation of Texas law. See ECF 90 at 6, 67. This is true for three reasons.

First, statistics show that voter fraud—including mail-in voter fraud—is exceedingly rare.¹⁴ Between 2000 and 2012, an exhaustive investigative journalism analysis found only 491 cases of absentee ballot fraud *throughout the country*.¹⁵ Appellants have relied on two news articles to support their concerns about voter fraud. Appellants’ Stay Mot. Exh. K at 157 n.1, 2. However, neither article demonstrated that voter fraud is common. One article reports that Texas prosecuted 91 election fraud cases between approximately 2008 and 2018, without specifying whether convictions were obtained in each prosecution. It further notes that of Texas’ 91 cases, “most” involved mail-in ballots and voter assistance. In a state where millions of ballots in many elections, these statistics simply confirm that voter fraud is exceedingly rare.¹⁶

Second, Texas has ample mechanisms in place to protect its interest in election integrity. To obtain a ballot in the first place, voters must provide their name, address as shown on their voter registration certificate, and their date of birth, Tex. Elec. Code §§ 84.002, 84.011, and must certify that the information on their application is

¹⁴ The Heritage Foundation—which is committed to “[p]reventing, deterring, and prosecuting election fraud”—identifies about approximately 35 cases of “Fraudulent Use of Absentee Ballots” in Texas in the past 20 years. The Heritage Foundation, *Election Fraud Cases*, https://www.heritage.org/voterfraud/search?combine=&state=TX&year=&case_type=All&fraud_type=24489&page=2.

¹⁵ The Brennan Center, *The False Narrative of Vote-by-Mail Fraud*, <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>.

¹⁶ Elizabeth Findell, *In election season in the Rio Grande Valley, watchful eyes at the polls* (Austin American Statesman June 11, 2018), <https://www.statesman.com/news/20180611/in-election-season-in-rio-grande-valley-watchful-eyes-at-polls>.

true and that the voter understands giving false information is a crime, Tex. Elec. Code § 84.011. Early voting clerks review each application to determine the applicant's eligibility to vote, including by confirming the applicant's correct voter registration number. Tex. Elec. Code § 86.001. These provisions ensure that absentee ballots are requested by, sent to, and returned by, the proper voters. And, in federal and state law, there is a "long practice of relying on the threat of penalty of perjury to guard against dishonesty and fraud." *Lee*, 915 F.3d at 1323.

Texas also has a variety of criminal penalties to prevent any misuse of absentee ballots. Tex. Elec. Code § 84.0041 (providing that a person commits an offense if the person "intentionally causes false information to be provided on an application for ballot by mail"); *id.* § 276.013 (a person commits election fraud if the person knowingly or intentionally causes a ballot to be obtained under false pretenses, or a misleading statement to be provided on an application for ballot by mail). In sum, as the District Court recognized, "mail-in ballots have built-in protections to ensure their security, including many criminal penalties for their misuse[.]" ECF 90 at 68.

Given these methods of protecting the integrity of mail-in voting, Appellants' restrictive interpretation of Texas law to prohibit mail-in voting by the voter-Plaintiffs and other voters who fear COVID-19 transmission imposes a severe burden without any corresponding benefit to the State. Indeed, 34 states and the

District of Columbia now permit no-excuse mail-in voting for all voters,¹⁷ and in five of those states—Colorado, Hawaii, Oregon, Utah, and Washington—every registered voter receives a ballot by mail. None of these states have experienced widespread fraud as a result of mail-in voting.¹⁸ Similarly, in response to COVID-19, state officials in Alabama, Arkansas, Delaware, Kentucky, New Hampshire, Virginia, and West Virginia have interpreted their absentee voting laws to permit all eligible voters to cast absentee ballots under certain “illness” or “disability” related excuses.¹⁹ *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (finding it relevant that “[m]any other states” had voluntarily undertaken the requested remedial action).

¹⁷ National Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

¹⁸ *See* The Brennan Center, *The False Narrative of Vote-by-Mail Fraud*, <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>.

¹⁹ Ala. Leg. Servs. Agency, *Absentee Voting During State of Emergency*, 17-11-3(e) (Mar. 18, 2020), <https://www.sos.alabama.gov/sites/default/files/SOS%20Emergency%20Rule%20820-2-3-.06-.01ER.pdf>; Ark. Exec. Order No. 20-08 (Mar. 20, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-08_.pdf; Governor of Delaware, Exec. Dep’t, *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (Mar. 24, 2020), <https://governor.delaware.gov/wpcontent/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf>; Letter of Michael G. Adams, Sec’y of State, to Andy Beshear, Governor (Apr. 23, 2020), https://governor.ky.gov/attachments/20200423_Ltr-from-Sec-of-State-Adams.pdf; Memorandum from the Sec’y of State and Att’y General to New Hampshire Election Officials re: *Elections Operations During the State of Emergency 2* (Apr. 10, 2020), <https://www.governor.nh.gov/news-media/press-2020/documents/20200410-absentee-voting.pdf>; Va. Dep’t of Elections, *Absentee Voting*, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/>; W. Va. Sec’y of State Mac Warner, Admin. Law Div., *Notice Of An Emergency Rule* (Mar. 20, 2020), <http://apps.sos.wv.gov/adlaw/csr/readfile.aspx?DocId=53039&Format=PDF>.

Third, because it already has mechanisms in place to ensure the integrity of absentee ballots, Texas permits multiple categories of persons to vote absentee even outside the context of a pandemic. This includes all voters over 65 and all voters confined in jail. *See* Tex. Elec. Code §§ 82.001–82.004. Appellants do not even attempt to argue that the mechanisms of Texas law that protect the integrity of mail-in voting are sufficient for voters over 65 and voters confined in jail but insufficient for voters at risk of contracting COVID-19. That means Texas law, as interpreted by Appellants, is either substantially overinclusive (because it prohibits mail-in voting to avoid contracting COVID-19 even when effective mechanisms are already in place to prohibit voter fraud), or substantially underinclusive (because it permits mail-in voting by many other categories of voters). Either way, Texas law is not “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434.

Indeed, even if the State’s restriction on voter access to absentee ballots during the COVID-19 pandemic imposed only a slight burden on the right to vote—Amicus submits it does not—Appellants must satisfy an intermediate level of scrutiny, which requires them to offer “relevant and legitimate interests of sufficient weight [to] justify that burden.” *Lee*, 915 F.3d at 1318–19; *see* *Esshaki*, 2020 WL 2185553, at *1 (recognizing that the “*Anderson-Burdick* test . . . applies strict scrutiny to a State’s law that severely burdens ballot access and intermediate scrutiny to a law that

imposes lesser burdens”). Appellants lack any “relevant and legitimate interest[] of sufficient weight” in forcing voters to risk their health to vote in person, especially given the dearth of evidence of voter fraud and the State’s multiple other options for maintaining election integrity. The State cannot meet even the lower level of *Anderson-Burden* scrutiny.

Conclusion

For these reasons, the district court did not abuse its discretion in concluding that the voter-Plaintiffs are likely to succeed on their *Anderson-Burdick* claim.

Respectfully submitted,
May 21, 2020

/s/ Mahogane D. Reed

Sherrilyn A. Ifill

President & Director-Counsel

Janai S. Nelson

Samuel Spital

Leah Aden

Natasha Merle†

Deuel Ross

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

40 Rector Street, 5th Floor

New York, NY 10006

T: (212) 965-2200

F: (212) 226-7529

Mahogane D. Reed*

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

700 14th Street NW, Ste. 600

Washington, DC 20005

T: (202) 682-1300

F: (202) 682-1312

Counsel for Amicus Curiae

**Counsel of Record*

*†Application for admission
forthcoming*

Certificate of Compliance

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief of NAACP Legal Defense and Educational Fund, Inc., As Amicus Curiae in Support of Plaintiffs-Appellees:

- (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/ Mahogane D. Reed

Mahogane D. Reed

Counsel for Amicus Curiae

Certificate of Service

I hereby certify that on May 21, 2020, I electronically filed the Brief of NAACP Legal Defense and Educational Fund, Inc., As Amicus Curiae in Support of Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF filing system. I further certify that all participants in this case are registered CM/ECF users and that all service will be accomplished by the appellate CM/ECF system.

/s/ Mahogane D. Reed

Mahogane D. reed

Counsel for Amicus Curiae