Case No. 20-20574

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Steven F. Hotze, M.D.; Wendell Champion; Honorable Steve Toth; Sharon Hemphill,
Plaintiffs-Appellants

v.

Chris Hollins, in his official capacity as Harris County clerk,
Defendant-Appellee

Andrea Chilton Greer; Yekaterina Snezhkova; Joy Davis-Harasemay; Diana Untermeyer; Michelle Covard; Karen Vidor; Malkia Hutchinson-Arvizu; Anton Montano; Helen Shelton; Elizabeth Furler; Alan Mauk; Jenn Rainey; Brian Singh; Mary Bacon; Kimberly Phipps-Nichol; Nyguen Griggs; Nelson Vanegas; Jessica Goodspero; Amy Ashmore; Richard Frankel; Elaine Frankel; Ryan Frankel; Celia Veselka; Sergio Aldana; Russell "Rusty" Hardin; Douglas Moll; Carey Jordan; Christina Massara; Jerelyn M. Gooden; Stanley G. Schneider; Mary Currie; Carlton Currie, Jr.; Jekaya Simmons; Daniel Coleman; David Hobbs; Bettye Hobbs,
Intervenor Defendants-Appellees

Appeal from the U.S. District Court for the
Southern District of Texas, Houston Division (No. 4:20-CV-3709)

REPLY BRIEF OF APPELLANTS

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SUMMARY OF REPLY ARGUMENT

Unlawful ballots disenfranchise lawful voters. This simple truth is not refuted or even addressed by Appellees' voluminous briefs. Law-abiding voters – namely Appellants, who include candidates for office and a member of the Texas legislature (ROA.20, Compl. ¶¶ 11-14) – have as much right to challenge the allowance of unlawful ballots as if Appellants themselves were prohibited from casting their own ballots lawfully. The effect on the election outcome is the same, and judicial review is equally warranted.

The "heads we win, tails you lose" approach to standing in election cases should end, whereby groups that demand lax procedures to cast ballots are perceived to have standing, while law-abiding citizens somehow lack standing to object to the cancellation of their legitimate votes by illegitimate ones. The arguments by Appellees against standing by Appellants amount to a never-ending erosion of election integrity while locking legitimate voters out of court.

The paramount goal of elections, like jury trials, is integrity rather than easy or unlimited participation. Yet the word "integrity" never appears in Appellees' 192 pages of briefing except in reference to the use of the term by Appellants and the district court. Drive-thru voting would not be allowed by jurors, and election outcomes are no less important than jury verdicts. Drive-thru voting is a denigration of election integrity which undermines essential ballot secrecy and

impedes security by preventing poll watching. Numerous safeguards which have developed over decades to protect election integrity, including prohibiting politicking near a polling booth, go out the window in drive-thru voting. Casting a ballot should never be akin to ordering a Big Mac at McDonald's, and the Texas legislature never authorized such a willy-nilly election process.

Under Appellees' view and that of the court below, only the Texas legislature – which is not in regular session at any time during an election year – would have standing to challenge voting procedures that violate Texas statutes. Adopting this view would open the floodgates to even more violations without judicial review on the merits. The term "particularized" is mentioned 39 times in Appellees' briefs, but the notion that legitimate voters lack standing to complain about unlawful voting has no basis in any underlying principle of standing doctrine.

This issue will foreseeably occur again in future elections in Texas, and Appellees' attempt to argue against the facts about where the Democratic Harris County Clerk placed the drive-thru voting locations is misplaced. Ripeness and mootness doctrines do not prevent this Court from reviewing the merits of this dispute. Drive-thru voting was not authorized by the Texas legislature and is illegal under current law. The lower court so held on the merits, and this Court should hold likewise.

REPLY ARGUMENT

Drive-thru voting is a sham that violates at least two fundamental principles of election integrity: ballot secrecy, and poll watching to verify authenticity. While dodging this central issue, Appellees' briefs resort to a variety of desperate factual and procedural arguments which are summarized and then rebutted as follows.

As to the facts, Appellees insist (i) that an election commission was bipartisan such that (a few) Republicans agreed to election procedure changes, (ii) that contrary to the allegations in the complaint (which must be taken as true) the Democratic county clerk did not really place the drive-thru voting places in predominantly Democratic areas, and (iii) that no one can predict what a future Democratic county clerk will do with respect to this issue next time. None of these arguments by Appellees is relevant to the issue at hand. Drive-thru voting is illegal, it disenfranchises lawful voters who thereby have standing to challenge it, and future elections must not allow it. The notion that only the Texas legislature, which is not even in session in an election year, has standing to challenge such illegality in election procedures should be flatly rejected.

Appellees' legal arguments are mostly procedural. Defendant-Appellee Hollins ("Hollins") insists that this appeal is somehow non-justiciable, that Appellants lack standing, and that it was unnecessary for Appellees to cross-appeal

from the substantive ruling below. Intervenors Defendants-Appellees Joy Davis-Harasemay, *et al.* ("ACLU Intervenors") argue that Appellants lack standing, that they failed to state a cause of action, and that a cross-appeal was unnecessary. Intervenor Defendant-Appellee Stanley G. Schneider ("Schneider Appellee") argues for mootness because "[t]he election is over." (Schneider Br. 2). Intervenor Defendants-Appellees Mary Currie, *et al.* ("Currie Appellees") argue that this case does not satisfy Article III requirements, and that Appellants failed to prove the basis for a preliminary injunction. Other Additional Intervenor Defendants-Appellees filed letters joining the foregoing briefs.

Proverbial eggs cannot be unscrambled but they can be recognized as rotten, with steps taken to prevent recurrence of the spoilage. Drive-thru voting disenfranchised law-abiding voters and undermined the integrity of the last election in Harris County, which is the largest county in Texas. Drive-thru voting will foreseeably happen again in violation of Texas law if this Court kicks this can down the road. As Justice Thomas recently wrote for a third of the U.S. Supreme Court in dissenting from the denial of a petition for certiorari in another recent election case, "[t]hese cases provide us with an ideal opportunity to address just what authority nonlegislative officials have to set election rules, and to do so well before the next election cycle. ***The refusal to do so is inexplicable.***" *Republican*

Party of Pa. v. Degraffenreid, 2021 U.S. LEXIS 1197, *2 (2021) (Thomas, J., dissenting, emphasis added).

A simple hypothetical illustrates the standing of voters and candidates, who are both included as plaintiffs here. If Plaintiff-Appellant Hotze had showed up at an election booth on Election Day and been denied the opportunity to vote, then he would have standing to challenge that. If, instead, poll workers allowed Plaintiff Hotze to vote but simultaneously allowed an illegal vote – or ten illegal votes – to offset that of Plaintiff Hotze, he should also have standing to object. His vote would have thereby been unlawfully deprived of its significance. Similarly, if a candidate sees that a carload of illegal voters is allowed to cast ballots in his election in drive-thru voting, then he has standing to object.

As explained below, none of Appellees' arguments, which are primarily procedural, have any merit.[1]

I. This Appeal is Justiciable.

The primary argument by Appellee Hollins is that this is appeal is somehow not justiciable at this point. (Hollins Br. 13-20) But it is well-established, familiar doctrine that issues which are likely to recur but difficult to timely litigate are fully

[1] In response to Appellees' arguments about the use of drive-thru voting in connection with early voting (Hollins Br. 30), drive-thru voting is such a radical departure from the principles of ballot secrecy and poll watching that express legislative authorization, of which there is none for early or Election Day voting, should exist before allowing no-excuse drive-thru voting at any time.

justiciable and should be reviewed by courts without delay. The Supreme Court has described the two elements of this test to be that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). *See also Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010); *Davis v. FEC*, 554 U.S. 724, 735 (2008).

Both prongs are plainly satisfied here. Under the challenged process, the Harris County Clerk made and will continue to make decisions where to allow drive-thru voting, with too little time to allow federal litigation including full, timely appellate review. There is little doubt that the predictably Democratic holder of that office will allow drive-thru voting in the next election if this Court does not rule on the substance of the issue in this case.

In just the past year the Supreme Court itself granted *certiorari* and ruled on a presidential election issue concerning the Electoral College even though the 2016 election was in the distant past and the 2020 election had not yet occurred. "Today, we consider whether a State may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote. We hold that a State may do so." *Chiafalo v. Washington*,

140 S. Ct. 2316, 2320 (2020). That case was no more justiciable and no less moot than the case here before this Court.

By the time *Chiafalo* and its companion case reached the U.S. Supreme Court, the 2016 election was ancient history, yet the Court ***unanimously*** decided that issue for the benefit of future elections. Under Hollins' argument, the Supreme Court should have refrained from deciding the legality of faithless electors and instead waited until a crisis unfolded and then tried to act in a very narrow window of time. Fortunately, the Supreme Court did not take that irresponsible approach with respect to the Electoral College issue, and the Fifth Circuit should not dodge at this time the illegality of drive-thru voting.

All Appellees ignored the significance of the recent Supreme Court decision in *Chiafalo*, and indeed did not mention that recent unanimous decision at all. Instead, Appellee Hollins relies on three easily distinguishable rulings by this Court. *See, e.g.*, *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010); *Harris v. City of Houston*, 151 F.3d 186, 189-91 (5th Cir. 1998); *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012). *Lopez* concerned the decennial census, and this Court found that "new census figures will be available prior to the next election," thereby changing or eliminating the dispute. 617 F.3d at 342. In *Harris*, unlike this case, the appeal was taken ***after*** the mooting of the case. Moreover, Judge DeMoss wrote in a compelling dissent in *Harris* as follows:

> I am also disappointed that my colleagues now think that this case is moot. Of course we are unable to provide the prospective injunctive relief that the plaintiffs originally sought. But the plaintiffs asked for other relief which the courts can provide, and the serious constitutional violations asserted in this case demand consideration.

Harris v. City of Hous., 151 F.3d 186 (5th Cir. 1998) (DeMoss, J., dissenting).

The reliance by Appellees on *Wilson v. Birnberg* is surprising because that decision reversed and remanded on the equal protection claim, and explained the following which is helpful to Appellants here:

> It is certainly true, as we noted in *Kucinich*, that the Supreme Court mentioned in two recent election-law cases that the "plaintiff had specifically alleged a likelihood that he would again be adversely affected." *Kucinich*, 563 F.3d at 164 (citing *Davis v. FEC*, 554 U.S. 724, 736, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (candidate stated intent to run again); and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462-63, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (similar)); *accord Moore v. Hosemann*, 591 F.3d 741, 744-45 (5th Cir. 2009). The First Circuit concluded from those recent opinions that mootness can be avoided only if the same complaining party will be affected in the future. *Barr v. Galvin*, 626 F.3d 99, 105-06 (1st Cir. 2010). Though we disagree the Supreme Court created such a rule, we do agree that "not every election case fits within [the] four corners" of the capable-of-repetition but evading-review exception. *Id.* at 105. ***We were unwilling to dismiss Kucinich's case as moot because the same controversy was likely to recur***. *Kucinich*, 563 F.3d at 165 (citing *Storer v. Brown*, 415 U.S. 724, 737 n.8, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)). Earlier, we held that an election case is not moot when "other individuals certainly will be affected" by the complained-of injury. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006).

Wilson v. Birnberg, 667 F.3d 591, 596 (5th Cir. 2012) (emphasis added).

Despite this, Appellees argue extensively that drive-thru voting was merely a temporary change implemented in response to COVID-19, and that there is

somehow no way to foresee future use of drive-thru voting. (Hollins Br. ii, 10, 11) Hardly. While there may be many uncertainties about the future, this is not one of them. Those who implemented, promoted, advocated for, and used drive-thru voting will seek more of it in future elections. The advocacy in Appellees' briefs is primarily for convenience and ease of voting, rather than for election integrity, and that advocacy will foreseeably continue. Moreover, despite how it is more than a year after the COVID-19 pandemic began, societal changes persist purportedly based on it.

As discussed further in Point III below, Appellees did not cross-appeal the ruling against them on the substantive issue of whether drive-thru voting is illegal, which makes it straightforward to simply reverse the standing ruling below and remand for an entry of an appropriate order. It is certainly justiciable to do that.

II. Appellants Have Standing.

As to standing, it is worth observing at the outset that Appellees' reliance on standing doctrine is as ironic as it is unjustified. Appellees' political allies aggressively and repeatedly challenge properly enacted election legislation, including cases awaiting decision by the U.S. Supreme Court now. *See Brnovich v. Democratic National Committee*, 141 S. Ct. 222 (2020), and *Arizona Republican Party v. Democratic National Committee*, *cert. granted*, 141 S. Ct. 221 (2020) (argued Mar. 2, 2021). *See also* Hannah Bleau, "Leftist Groups File Lawsuit

Against Georgia Election Integrity Law," *Breitbart* (Mar. 26, 2021) (linking to the new federal lawsuit which was filed the very same day that recent Georgia election legislation was signed into law).[2] But when unauthorized changes are made in election procedures that favor Democrats, suddenly standing doctrine becomes a sacred, insurmountable wall blocking substantive judicial review. Judicial review of election changes not authorized by the legislature must surely exist, for otherwise any official would then have free rein to alter election rules with impunity from judicial review.

Appellees repetitively argue that a "particularized" showing must be made to support standing, but do not properly apply that malleable principle, as enunciated in environmentalist cases, to the disenfranchisement of lawful votes by illegal ones in an election case. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (cited by Hollins Br. 19, 20; ACLU Br. 16; Currie Br. 3, 13). The requirement of a particularized showing is a shorthand way to require a bona fide Article III "case" or "controversy" in an environmentalist lawsuit or similar request for legislation from the bench. A heightened showing of particularized harm is unnecessary in a lawsuit against an illegal voting procedure that harms legitimate voters. Illegal votes cancel lawful ones, and no greater showing of particularized harm is necessary to establish a "case" or "controversy". Appellees' reliance on a class

[2] https://www.breitbart.com/politics/2021/03/26/leftist-groups-file-lawsuit-georgia-election-integrity-law/ (viewed Mar. 27, 2021).

action about credit reporting case does not justify denying standing to disenfranchised, law-abiding voters who object to an unlawful voting scheme. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (cited by Hollins Br. 20).

Standing doctrine should not be applied in a vacuum, removed from the compelling factual injustice and the lack of any other viable plaintiff to challenge lawlessness. Drive-thru voting undermines fundamental aspects of election integrity, such as the secrecy of the ballot (Appellants' Brief ("Hotze Br.") 22, 28), and no one other than Appellants are available to timely challenge it. It is a misuse of standing doctrine to argue that it should preclude judicial review of unlawful conduct which disenfranchises law-abiding plaintiffs, such as Appellants. Simply put, voters who face the cancellation of their own lawful votes by the inclusion of illegal ones have standing to object to such a cancellation of their own votes. Likewise, candidates affected by the inclusion of illegal votes are injured by it, and have clear standing to challenge such inclusion. Appellants thereby have standing.

III. Appellees Waived on the Merits by Not Cross-Appealing.

As explained by Appellants in their opening brief, Appellees failed to cross-appeal the substantive ruling below. (Hotze Br. 20-22) Without providing good cause for their failure to cross-appeal, Appellees try to justify their waiver by criticizing the district court and falsely accusing it of issuing a merely advisory

opinion. (Hollins Br. 9, 27, 28, 29; Currie Br. 7-8, 12, 37, 43 n.11) To the contrary, the substantive ruling below against drive-thru voting was proper and not advisory; it was conclusively adverse to Appellees if jurisdiction existed below, as should be found by this Court. Conditional appeals are required and Appellees simply failed to do so with a cross-appeal here. *See, e.g.*, *ART Midwest Inc. v. Atlantic Ltd. P'ship XII*, 742 F.3d 206, 211 (5th Cir. 2014) (A "party who prevails in the district court is permitted to conditionally raise issues in a cross-appeal because if the appellate court decides to vacate or modify the trial court's judgment, the judgment may become adverse to the cross-appellant's interest."); *Lindquist v. City of Pasadena*, 669 F.3d 225, 239 (5th Cir. 2012) ("The waiver doctrine holds that an issue that could have been but was not raised on ***appeal is forfeited and may not be revisited by the district court on remand***.") (emphasis added).

The existence of a dispute about jurisdiction in this case does not change the analysis. "'Where the jurisdictional issue ... can not be decided without the ruling constituting at the same time a ruling on the merits of the case, the case should be heard and determined on its merits through regular trial procedure.'" *McBeath v. Inter-American Citizens for Decency Comm.*, 374 F.2d 359, 363 (5th Cir. 1967) (quoting *Fireman's Fund Ins. Co. v. Railway Express Agency*, 253 F.2d 780, 784 (1958)). Here, the exigency of time and the likelihood of a reversal of the ruling

against standing below made it appropriate for the district court to rule conditionally on the merits in addition to ruling on jurisdiction. Appellees agreed with the jurisdictional decision but disagreed with the merits decision. Once Appellants filed an appeal on the jurisdictional issue, then it became obvious that, if Appellants prevail, then the conditional substantive ruling would go into effect. Appellees' recourse was to cross-appeal the merits decision, rather than pretend later that court should not have rendered it or that it was somehow merely advisory. That is what cross-appeals are for – to challenge rulings below, including conditional ones – and yet Appellees did not file a cross-appeal here.

Undeterred, Appellee Hollins devotes more than a third of his argument to contesting a holding that he failed to cross-appeal. (Hollins 30-42) But if this Court rules in favor of Appellants on the standing issue, then this Court should simply affirm the substantive ruling below without further ado, in light of the lack of a cross-appeal by Appellees. The Court and parties benefit from a Notice of Cross-Appeal, and Appellees' arguments should not be allowed in circumvention of compliance with the cross-appeal requirements of notice and a filing fee.

If this Court finds that jurisdiction exists, then the lower court's ruling on the merits was not advisory or merely hypothetical, because it was supported by federal court jurisdiction about which the lower court was in error. It is only if this Court finds a lack of jurisdiction – and thus a lack of any law-abiding voter and

candidate being able to challenge the allowance of illegal votes – that the decision below on the merits might thereby become merely advisory. Given the lower court's uncertainty about whether its ruling against jurisdiction was correct, it was entirely proper for it to reach the merits. *See, e.g.*, *Hirota v. MacArthur*, 335 U.S. 876, 880 (1948) (Jackson, J., concurring in a grant of *certiorari* amid doubtful jurisdiction) ("But here I feel that a tentative assertion of jurisdiction, which four members of the Court believe does not exist, will not be irreparable if they ultimately are right.").

Appellees cite two familiar decisions about jurisdiction, but neither are germane here. (Hollins Br. 28-28, citing *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83 (1998), and *Ex parte McCardle*, 74 U.S. 506, 514 (1868)). In *Steel*, the Supreme Court held that for most (but not all) situations, jurisdiction has been treated by the High Court as a strict threshold issue. *Steel*, 523 U.S. at 98-101. Below the district court was unsure if it had jurisdiction, and if this Court finds that it did have jurisdiction then it does not matter that the district court erroneously thought otherwise. The issue is not whether the district judge ***thought*** there was federal jurisdiction, but whether ***in fact there was federal jurisdiction***, which this appeal will decide. *See Ex parte McCardle*, 74 U.S. at 514. ("Without jurisdiction [not "without a finding of jurisdiction"] the court cannot proceed at all in any cause."). The court below was unsure of whether it had jurisdiction, and it was

necessary to proceed to the merits in the event that this Court ultimately found that jurisdiction did in fact exist.

The Joy Davis-Harasemay, *et al.* Intervenors Appellees ("ACLU Intervenors") overlook that the district court rendered its substantive ruling because it was unsure about the validity of its finding of a lack of jurisdiction. (ACLU Br. 39-40) Federal courts can no more refuse to decide a case in which jurisdiction exists, then they could decide a case in which jurisdiction does not exist. "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Marshall v. Marshall*, 547 U.S. 293, 298-99 (2006) (inner quotations omitted). The substantive ruling below was based on the likelihood that the court had jurisdiction to render it, which this Court should confirm in this appeal. It is not necessary for the district court to entertain relitigation of the merits of this case if this Court decides that there was jurisdiction for the substantive ruling below. Appellees are simply incorrect in arguing for the needless delays and senseless waste of judicial resources which would result from a remand for duplicative new litigation on the illegality of drive-thru voting, given that the district court already heard and decided that issue. (ACLU Br. 40)

Appellees were on full notice that the substantive ruling would take effect if this Court found that jurisdiction existed below, and to the extent Appellees disagree with that substantive ruling they should have cross-appealed.

IV. This Appeal Is Not Moot.

The Schneider Appellee argues that this appeal is moot because the election is over. (Schneider Br. 3-5) But the use of drive-thru voting is far from over, and will predictably recur if it evades judicial review here as Appellees seek. This case easily qualifies for the exception to mootness doctrine. "An important exception to the mootness doctrine, however, is 'attacks on practices that no longer directly affect the attacking party, but are 'capable of repetition' while 'evading review.'" *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) (citing *Alvarez v. Smith*, 558 U.S. 87, 93 (2009) (citing *FEC v. Wis. Right to Life, Inc.*., 551 U.S. 449, 462 (2007); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

Drive-thru voting is capable of repetition while evading review, and thus this case is not moot.

V. This Case Satisfies Article III Requirements.

The Currie *et al.* Intervenors Appellees lead off their brief with an argument that there is somehow not an Article III controversy here. (Currie Br. 13-31) Euphemistically characterizing Appellants' grievance as vote "dilution" rather than the disenfranchisement of lawful votes with illegal ones, the Currie Intervenors assert that the claim is not concrete or particularized, that it is unripe and speculative, and that "Plaintiffs cannot assert claims on the [Texas] Legislature's behalf." (Currie Br. 29) The Currie Intervenors admit that one of the Plaintiffs is a

member of the Texas legislature, but argue that the Texas legislature did not authorize him to sue and thus he must somehow lack standing also. (*Id.* at 27-29) Under Appellees' view, if the Texas legislature does not itself sue (and it never is in regular session during an election year in order to sue), then illegal voting must be allowed to run rampant because neither Plaintiffs nor any other voters or candidates have standing to sue to stop it.

If adopted, Appellees' position would be a spectacular triumph for illegal voting. The practical effect would be to deny legal recourse to anyone who has his legitimate vote canceled by an unlawful vote. Local officials could invent new ways to allow invalid voting with every new election cycle, and no timely judicial review of the illegal processes would be possible. But rather than couch their argument based on dissimilar cases unrelated to cancelling lawful votes with unlawful ones, Appellees should simply argue that no legal recourse should be available to a lawful voter whose ballot is cancelled by a local official allowing an offsetting invalid ballot. Of course this Court should reject that view.

A "case" or "controversy" to satisfy Article III exists for a lawful voter to challenge the cancellation of his vote by unlawful ballots.

VI. As the District Court Found, Plaintiffs Demonstrated that They Are Entitled to Relief on the Merits.

Without appealing the ruling by the lower court in favor of Plaintiffs on the merits, the Currie Appellees attempt to reargue its holding and also assert that

Appellants somehow waived defense of it. (Currie Br. 31-48) Particularly remarkable is how Currie Appellees argue against Plaintiffs by saying, amid endless federal lawsuits by their political side to enjoin legislation which enhances election integrity, that allowing Plaintiffs' claim "would transform federal courts into the default venue for even the most minor state-law disputes, and it would require federal courts to continuously police the often ambiguous bounds of state election laws." (Currie Br. 33) Drive-thru voting is, in fact, a radical departure from state law and none of the Appellees can cite to any overflow of federal lawsuits seeking compliance with state law in elections of federal officials. Federal courtrooms can and should be open for such lawsuits.

The ACLU Appellees argue at length on appeal that Plaintiffs somehow failed to state a cause of action. (ACLU Br. 31-39) But the choosing of presidential electors for the Electoral College is at stake in these quadrennial elections, and ACLU begins its section by citing opinions of Supreme Court Justices emphasizing the importance of judicial review of election integrity. (ACLU Br. 32, 33 n.5) Despite this, ACLU builds to dire warning that "federal courts would become inundated with mundane and petty election-administration disputes that belong in state courts." (ACLU Br. 35)

Hearing the ACLU complain about the possibility of federal courts being inundated with claims that belong in state courts is ironic, given how on March 30

the ACLU itself filed a new federal lawsuit against a Georgia election integrity law. The ACLU does not provide any citations to support its cataclysmic prophecy. One reason may be that, in fact, there are relatively few lawsuits filed challenging the disenfranchisement of Republican voters, while there are many filed by the ACLU and others challenging the alleged disenfranchisement of Democratic voters.[3] The notion that standing and valid causes of action exists for the latter but not the former is untenable. The ACLU is not arguing that the federal lawsuits from the left side of the political spectrum should be dismissed for lack of standing, and its argument against allowing this lawsuit fails.

The ACLU and other Appellees strive mightily to downplay *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), which found standing and a valid cause of action against allowing illegal votes, and ordered the district court to enter a specific, expressly worded injunction against commingling potentially invalid votes with valid ones. *See id.* at 1054. The Eighth Circuit properly rejected the same arguments used by Appellees here to limit standing to the state legislature. *See id.* at 1058-59.

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[3] Within days of the enactment of the recent Georgia statute for election integrity, three massive federal lawsuits were filed by groups on the Left side of the political spectrum, including one by the ACLU itself. *See* https://www.aclu.org/press-releases/civil-rights-groups-sue-georgia-over-new-sweeping-voter-suppression-law *See also* Pamela Kirkland, "Georgia voting law: Civil rights groups file third federal challenge," CNN (Mar. 30, 2021). https://www.msn.com/en-us/news/politics/georgia-voting-law-civil-rights-groups-file-third-federal-challenge/ar-BB1f7Q1i (viewed Apr. 2, 2021).

The contrary ruling by the Third Circuit, which denied judicial review of the allowance of invalid ballots despite being in violation of the Pennsylvania election statute, such that invalid ballots canceled lawful ballots, is unpersuasive and should not be followed by this Circuit. *See Bognet v. Sec'y Pa.*, 980 F.3d 336 (3d Cir. 2020) (cited by Hollins Br. 21, 23, 24, 25; ACLU Br. *passim*; Currie Br. 15, 16, 18, 20, 28). The *Bognet* decision erroneously focused on the overused mantra that "the lawfully cast vote of every citizen must count," without likewise emphasizing that all votes contrary to state law must be disqualified lest they cancel the lawful votes. *Id.* at 342. The mantra "count every vote" requires ***not counting*** improper votes, because counting such votes disenfranchises the lawful voters.

Other than a solitary reference in an imbedded quotation of another case, the *Bognet* decision did not mention election "integrity" once in its entire 55-page opinion. The denial of judicial review does not safeguard election integrity, or enhance public confidence in elections. *Bognet* and similar extra-circuit decisions that downplay the effect of cancelling lawful ballots with unlawful ones are neither controlling nor persuasive here.

VII. Appeals to "Bipartisanship" Are Misplaced when Acting Contrary to Election Law Statutes.

Appellee Hollins' brief repeatedly mentions "bipartisan" or variations on that theme, as though "bipartisan" support for an unlawful election procedure would justify adopting a lax election procedure contrary to what the Texas

legislature enacted. (Hollins Br. 4, 7, 36) The Currie Appellees argue likewise. (Curie Br. 40 n.10) A "bipartisan" illegal act is still illegal, and it is not magically made legal just because a Republican (or Democrat) may have supported it. A few Senate Republicans voted in favor of an unconstitutional conviction of Donald Trump after he had left the office of president, but such bipartisan votes do not mystically bestow validity to an improper procedure. The authority to establish election law resides in the Texas legislature, not in a bipartisan commission or in a partisan county clerk.

While pretending to be on the "bipartisan" side of this issue, as if that had any significance, Appellee Hollins then accuses Appellants of using "hyper-partisan rhetoric" in criticizing drive-thru voting. (*Id.* 4) In fact, it cannot credibly be doubted that unlawful, lax schemes for voting have a highly partisan effect on the outcome. Judges should not be expected to ignore the obvious: Democratic officials can be expected to try to make voting more convenient in Democratic areas. If the Texas legislature had authorized this, then Appellants would not have filed this lawsuit. But the Texas legislature did not authorize this, and the district court agreed with Plaintiffs on the merits. This Court should find that jurisdiction existed for the substantive ruling below invalidating drive-thru voting.

CONCLUSION

Plaintiffs-Appellants respectfully request that this Court reverse the order below which found a lack of standing by Plaintiffs to challenge drive-thru voting, and issue an order prohibiting use of drive-thru voting in future Texas elections.

Dated: April 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2021, 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 Appellants

CERTIFICATE OF COMPLIANCE

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

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Dated: April 2, 2021

s/ Andrew L. Schlafly
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