IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARK MILLER, MICHELLE GANGES, SCOTT COPELAND, LAURA PALMER, TOM KLEVEN, ANDY PRIOR, AMERICA'S PARTY OF TEXAS, CONSTITUTION PARTY OF TEXAS, GREEN PARTY OF TEXAS, and LIBERTARIAN PARTY OF TEXAS, *Plaintiffs*,	§	
v.	§	No. 1:19-cv-00700-RP
RUTH R. HUGHS, in her official capacity as the Secretary of State of Texas, and JOSE A. "JOE" ESPARZA, in his official capacity as the Deputy Secretary of State of the State of Texas, *Defendants*.	§	

DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs are voters, political parties and party officials, and political candidates who identify as third party or independent. They challenge Texas's general election ballot access requirements as applied to them and seek a permanent injunction against enforcement of the same. Their Motion for Preliminary Injunction, Dkt. 23, seeks to enjoin Defendants "from enforcing TEX. ELEC. CODE § 141.041 as applied to Plaintiffs in the 2020 election cycle." Dkt. 23 at 1. Defendants Ruth R. Hughs in her official capacity as Secretary of State of Texas and Jose A. "Joe" Esparza in his official capacity as Deputy Secretary of State of Texas hereby respectfully respond in opposition to that motion.

LEGAL & FACTUAL BACKGROUND

Section 141.041 is a provision of HB 2504, legislation relating to the nomination of political candidates that was signed into law in June 2019 and took effect September 1, 2019.[1] As relevant to the preliminary injunction motion, Texas provides two processes for political parties to guarantee

[1] Candidates Nominated by Convention, 86th Leg., R.S., ch. 822, §1, sec. 141.041, 2019 Tex. Sess. Law Serv. 822 (codified at TEX. ELEC. CODE § 141.041).

general election ballot access for their nominees for county and state office and US Congress.[2] The process a party utilizes depends upon the level of support for the party's nominee for governor in the most recent gubernatorial general election. If the party's nominee received 20 percent or more of the total votes cast for governor in the most recent gubernatorial election, the party must nominate by primary election. TEX. ELEC. CODE § 172.001. If the party's nominee received at least two percent but less than 20 percent of the total votes cast for governor, the party may nominate by primary election, *id.* § 172.002(a), or by convention, *id.* § 181.002. If the party did not have a nominee receive at least two percent of the votes cast for governor, then the party must nominate by convention. *Id.* § 181.003.

While a party nominating by primary election will have shown popular support through its gubernatorial candidate, a party nominating by convention must demonstrate popular support another way to guarantee its nominees ballot access. A party has three options to make this showing, but only one—past candidate performance—[3]is relevant to the preliminary injunction motion. Prior to HB 2504, the 2019 legislation that created § 141.041, a party's nominees were

> guaranteed a place on the general election ballot if, in the most recent general election, the party's nominee for a statewide office received at least five percent of the votes cast for that office. HB 2504 revised [§] 181.005 to lower the minimum threshold that is required for a party nominating by convention to guarantee its candidates a place on the general election ballot. As amended by HB 2504, [§] 181.005 now provides that a party is entitled to have its nominees placed on the general election ballot automatically, if the party had a nominee for a statewide office receive a number of votes equal to at least two percent of the total number of votes for all candidates for that office *at least once in the five previous general elections.*[4]

The requirements for individual candidates seeking nomination by primary or convention are similar. A primary candidate must submit an application to a designated party official and either pay a filing fee or submit a petition in lieu of filing fee. TEX. ELEC. CODE §§ 172.021 (application required),

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[2] The avenues for ballot access are set forth in more detail at Dkt. 16 at 1-3.

[3] A party also qualifies if its precinct convention participants total at least 1% of the votes cast in Texas's most recent gubernatorial general election. TEX. ELEC. CODE § 181.005(a). A party that does not qualify under § 181.005(a) may submit more signatures which, when added to the convention participants, meet the 1% requirement. *Id.* § 181.006.

[4] Texas Secretary of State, *Election Advisory. No. 2019-13—New Rules for Parties Nominating by Convention Process*, *available at* https://www.sos.state.tx.us/elections/laws/advisory2019-13.shtml (emphasis added); TEX. ELEC. CODE § 181.005(c).

.024 (filing fees), .025 (petition signatures required). A candidate for nomination by convention must also submit an application to a designated party official "not later than the regular deadline for candidates to file applications for a place on the general primary ballot." *Id.* §§ 181.032, .033. Section 141.041 also requires such applicants to submit a filing fee or petition in lieu of filing fee. *Id.* § 141.041(a). The filing fee "is the amount prescribed by [§] 172.024 for a candidate for nomination for the same office in a general primary election." *Id.* § 141.041(b). Similarly, "[t]he minimum number of signatures that must appear on [a] petition is the number prescribed by [§] 172.025 to appear on a petition of a candidate for nomination for the same office in a general primary election." *Id.* § 141.041(e). The first day candidates for nomination by convention may submit a filing fee or petition is November 9, 2019 (the same day as primary candidates).[5] Since August 2019, the Secretary has advised that candidates "may begin collecting petition signatures immediately."[6]

Plaintiffs argue that § 141.041 "imposes substantial new requirements" on candidates seeking nomination by party convention "which few candidates, if any, will be able to meet, much less by December 9, 2019," and contend that this will limit or bar their participation in the 2020 general election. Dkt. 23 at 2. Plaintiffs urge that candidates nominated by convention should not have to submit a filing fee or petition until they have secured their party's nomination. *See* Dkt. 23 at 3-4.

ARGUMENT & AUTHORITY

I. The Legal Standard

To obtain preliminary injunctive relief, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party

[5] Texas Secretary of State, *Nominee of Libertarian or Green Party in 2020*, https://sos.state.tx.us/elections/candidates/guide/2020/lib-green-nom2020.shtml (accessed 17 Oct. 2019).
[6] *Id.*; *see also* Dkt. 23 at 3-4. Even before the Secretary's August 2019 advisory, the public was on notice that HB 2504 had become law when the Governor signed it in June 2019. *See*, *e.g.*,, *id.* at 2 n.3; *surpa* n.1.

whom he seeks to enjoin, and (4) that granting the relief will serve the public interest. *Planned Parenthood of Houston & Southeast Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005). Courts do not grant such relief "unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *PCI Transp. Inc. v. Ft. Worth & Wstrn. R.R. Co.,* 418 F.3d 535, 545 (5th Cir. 2005). The decision rests with the trial court, and judges grant such requests only under exceptional circumstances. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

II. Plaintiffs have not shown likely success on the merits of their challenge to § 141.041.

Plaintiffs argue three bases for success on the merits. First, they claim that Defendants misconstrue § 141.041. Dkt. 23 at 4. Second, they contend that enforcement of § 141.041 in the 2020 election cycle violates due process. Dkt. 23 at 4. Third, they urge that § 141.041 "is unconstitutionally burdensome under [] *Anderson/Burdick*" as applied to them in the 2020 election cycle. Dkt. 23 at 4.

a. The CPTX, APTX, and individual plaintiffs lack standing.

At the outset, Defendants re-urge and incorporate by reference their arguments that Plaintiffs lack standing to challenge laws inapplicable to them, Dkts. 16 at 8-10, 18 at 1-2, as if fully set forth herein.[7] On the pleadings, only the LPTX and GPTX even arguably have standing to seek an injunction as to § 141.041, because they are the only parties to this litigation to whom it will apply. *See* Dkt. 23. Indeed, Plaintiffs plead no facts to support the conclusion that § 141.041 will apply to CPTX or APTX, and no individual Plaintiff claims a desire to vote any particular candidate planning to seek nomination at the GPTX or LPTX convention. *See, e.g.*, *Kennedy v. Pablos*, No. 1:16-CV-1047-RP, 2017 WL 2223056, at *7 (W.D. Tex. May 18, 2017) (holding that plaintiff who "has not committed to any particular course of conduct with respect to his candidacy, alleging only that he 'might' seek the

[7] These filings focused on Plaintiffs' lack of standing to challenge requirements applicable to independent candidates, which are not at issue in the preliminary injunction motion. But the authorities therein explain the necessity to allege concrete, particularized, and certainly impending injury in order to establish standing. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014); *Texas Supporters of Workers World Party Presidential Candidates v. Strake*, 511 F. Supp. 149, 153 (S.D. Tex. 1981). APTX, CPTX, and the individual plaintiffs have not done so here.

Democratic Party's nomination" lacked standing to challenge ballot-access laws because such an allegation "render[s] the probability of injury speculative") (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions—without any description of concrete plans . . . do not support a finding of the 'actual or imminent' injury that our cases require.")). The preliminary injunction motion should be denied as to all Plaintiffs except LPTX and GPTX for lack of standing.[8]

b. Plaintiffs cannot recover based on the theory that § 141.041's implementing rule is inconsistent with the statute's text.

Plaintiffs' argument that the Secretary's rule implementing § 141.041 is inconsistent with the statute's text fails for at least two reasons. First, the rule *is* consistent with the statute, which provides

> …to be eligible to be placed on the ballot for the general election for state and county officers, a candidate who is nominated by convention under Chapter 181 or 182 must: (1) pay a filing fee to the secretary of state for a statewide or district office or the county judge for a county or precinct office; or (2) submit…a petition in lieu of a filing fee…."

TEX. ELEC. CODE § 141.041(a). Nothing in that text is inconsistent with requiring submission of the filing fee or petition by 6 PM on December 9, 2019. It says nothing about *when* a candidate must satisfy these statutory eligibility requirements. In fact, it expressly delegates authority to the Secretary to determine such matters, providing that she "*shall* adopt rules as necessary to implement this section." *Id.* § 141.041(f) (emphasis added). And in any event, the Secretary's construction of § 141.041 is entirely consistent with the existing filing fee/petition process for primary candidates.

Second, even if there were any inconsistency (there is not), it would not establish a likelihood of success on the merits of any claim here. Plaintiffs seek declaratory and injunctive relief under the United States Constitution. Dkt. 1 at 2, ¶ 2 (asserting jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331). They cite no authority for the proposition that the United States Constitution entitles them to an injunction absent a showing of constitutional harm. Tellingly, the only authority Plaintiffs invoke for their statutory construction argument arose under the Texas Administrative Procedure Act—a

[8] Defendants reserve the right to further argue that the LPTX and GPTX lack standing as the factual record develops.

state law governing judicial review of state agency actions. *See* Dkt. 23 (citing *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017)); *see also* TEX. GOV'T. CODE § 2001.001 *et seq.*. That case is unhelpful because Plaintiffs have not sued under the Texas APA. Without a showing of constitutional harm, Plaintiffs cannot be entitled to relief.

c. Plaintiffs have not established that due process entitles them to flout § 141.041 during the 2020 election cycle.

Despite not pleading it in their complaint, *see* Dkt. 1,[9] Plaintiffs raise the Due Process Clause for the first time in their preliminary injunction motion. But the Fifth Circuit has held that the Due Process Clause does not guarantee a right to political candidacy or ballot access. For example, in *Wilson v. Birnberg*, the Court of Appeals noted that, "[i]n order for a person to have a procedural due process claim that damages or other relief can remedy, he must have been denied life, liberty, or property protected by the Fourteenth Amendment." 667 F.3d 591, 597-98 (5th Cir. 2012), *cert. denied*, 567 U.S. 936 (2012) (citing *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010)). *Wilson* reiterated the Supreme Court's holdings that "public offices are mere agencies or trusts, and not property as such" and that "the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." *Id.* (quoting *Taylor and Marshall v. Beckham*, 178 U.S. 548, 577 (1900); citing *Snowden v. Hughes*, 321 U.S. 1, 7 (1944)) (quotation marks omitted).

Wilson also emphasized the Fifth Circuit's holding that "'there is no constitutional right to run for state office protected by the Fourteenth Amendment.'" *Id.* at 598 (quoting *Williams v. Bd. of Regents of Univ. Sys. of Ga.,* 629 F.2d 993, 998 n. 9 (5th Cir. 1980)).[10] Lower courts have consistently applied these precedents to find that there is no due process right to candidacy or ballot access. *E.g., Barnes v.*

[9] In extreme cases, this can deprive courts of jurisdiction to enter preliminary injunctive relief. *See Bucklew v. St. Clair*, No. 3:18-CV-2117-N (BH), 2019 WL 2251109, at *2 & n.5 (N.D. Tex. May 15, 2019) (collecting cases).

[10] To the extent Plaintiffs assert a substantive due process claim it also fails under *Wilson*, 667 F.3d at 599 (Noting that "where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process;" holding that where "claims are rooted in procedural due process, the Equal Protection Clause, and the First Amendment[,] [t]hose provisions are our exclusive guideposts.")

Texas Ethics Comm'n, No. A-13-CA-916 LY, 2015 WL 3409195, at *6 (W.D. Tex. May 18, 2015); *Crenshaw v. Ewing*, No. 3:14-CV-872-K, 2014 WL 3500132, at *2 (N.D. Tex. July 14, 2014).

The (non-controlling) cases Plaintiffs cite do not support a different result, since each involved an eleventh-hour election law that retroactively *disqualified* candidates who had *already qualified* for ballot access. This is distinct from the case here: where, months in advance of third-party nominating conventions, an existing ballot access requirement is expanded to apply to third-party candidates, given a corresponding relaxation of the standard for third-party ballot access. *See supra*, n.4.

Hudler v. Austin considered "Act 94"—a Michigan law enacted in April 1976 that required "new" political parties to satisfy a performance threshold in the August 3, 1976 primary election in order to obtain ballot access. 419 F. Supp. 1002, 1013-14 (E.D. Mich. 1976), *aff'd sub nom.*, *Allen v. Austin*, 430 U.S. 924 (1977). Michigan already required new parties to petition for ballot access—a process many had completed or nearly completed when Act 94 was passed. *Id.* at 1005. *Hudler* found the additional primary performance requirement constitutional but concluded that it violated due process as applied to the August 3 primary because new parties did not have "adequate time and notice" to comply, even if they made "reasonably diligent efforts." *Id.* at 1014. This was because "petition gathering had all but drawn to a close when plaintiffs were first apprised of the primary performance requirement." *Id.* Thus, the district court concluded that "[t]he short time limits, extra expense and duplicative effort required to regenerate the support of plaintiffs' constituencies," would violate due process violation if applied in the 1976 primary. *Id.*

Similarly, in *Poindexter v. Strach*, a North Carolina district court enjoined enforcement of a law "enacted during an election cycle" that "disqualif[ed] previously qualifying candidates from appearing on a ballot." 324 F.Supp.3d 625, 632 (E.D.N.C. 2018). *Poindexter* found that retroactive application of that law was "a severe burden on plaintiffs' constitutional rights" because prior its enactment, "plaintiffs were accepted to appear on the ballot, and no process was afforded plaintiffs whereby they

could challenge their decertification." *Id.* at 631-32. And, in *Libertarian Party of Ohio v. Husted*, an Ohio court enjoined a law under which "nominating petitions already filed by minor party candidates to appear on the 2014 primary election ballot in reliance on [an Ohio SOS Directive] would be nullified, [] the time and resources expended on those petitions will have been wasted," and plaintiffs would "have to incur the additional expenditure of time and money to qualify for the 2014 general election under the new law." No. 2:13-cv-00953, 2014 WL 11515569, at *2, *8 (S.D. Ohio Jan. 7, 2014).

Here, by contrast, candidates seeking nomination by convention need only comply with the same filing fee or petition requirement applicable to primary election candidates. TEX. ELEC. CODE § 141.041(e). Plaintiffs do not allege that they have "already expended significant time and resources collecting signatures on nominating petitions," or that "several candidates have already filed the required paperwork and paid fees to participate in [the] primary in accordance with the Secretary's prior directives." *Cf. Libertarian Party of Ohio*, 2014 WL 11515569, at *4. Nor have "previously qualifying candidates" been "decertified" from a ballot. *Poindexter*, 324 F. Supp. 3d at 632. Plaintiffs need not incur "extra expense and duplicative effort . . . to regenerate the support of [their] constituencies." *Hudler*, 419 F. Supp. at 1014. Instead, Plaintiffs have been on notice of the new, non-retroactive law (and its effective date) since at least June 2019, when the Governor signed it.

LPTX's assertion that it was, "until just weeks ago, entitled to place its nominees on Texas's 2020 general election ballot after selecting them at LPTX's self-funded conventions in March and April," Dkt. 23 at 6, does not revive a due process claim, because they have not yet held such conventions. In fact, under other provisions of HB 2504, the threshold for ballot access is *lower* for the LPTX and GPTX than it has been in the past.[11] As discussed below, since Texas lowered the

[11] Texas Secretary of State, *Election Advisory. No. 2019-13—New Rules for Parties Nominating by Convention Process*, *available at* https://www.sos.state.tx.us/elections/laws/advisory2019-13.shtml; TEX. ELEC. CODE § 181.005(c).

showing of party support required to guarantee ballot access, it may require an additional showing of candidate support.

d. Section 141.041 satisfies *Anderson/Burdick*.

Under the *Anderson/Burdick* test discussed in Dkt. 16 at 6-8, "the State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support." *Am. Party of Tex. v. White*, 415 U.S. 767, 782-83 (1974) (quoting *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)). Plaintiffs' conclusory argument to the contrary ignores binding precedent. *See, e.g.*, *id.*; *Jenness*, 403 U.S. at 439 (noting the "important state interest in requiring some preliminary showing of a significant modicum of support" for those on the ballot and "in avoiding confusion, deception, and even frustration of the democratic process at the general election"); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) ("States have an undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.") (cleaned up); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (noting the state's "important regulatory interests" in streamlining the ballot, avoiding ballot overcrowding, and reducing voter confusion). *See also* Dkts. 16 at 16-20, 18 at 5-8.

Section 141.041 is appropriately tailored to these interests. Given the reduced threshold for ballot access, additional parties will qualify. It makes good sense, then, that candidates of such parties qualify for ballot access by showing a modicum of support. And it is sensible to require this at the same time it is required of primary election candidates so the Secretary can efficiently complete the certification process after the nominating conventions. *See, e.g.,* TEX. ELEC. CODE §§ 181.068, 181.007. Moreover, the filing fee or signatures required increases in proportion to the support required to win the office for which the candidate wants to run. This is the very definition of tailoring. *See, e.g.*, *Jenness*, 403 U.S. at 442; *Storer v. Brown*, 415 U.S. 724, 740 (1974); *De La Fuente v. Padilla*, 930 F.3d 1101, 1106-07 (9th Cir. 2019); *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010).

III. Plaintiffs have not shown likelihood of irreparable injury absent an injunction.

Plaintiffs summarily assert that, if the Court does not enjoin § 141.041, "Plaintiffs will be severely restricted, or barred, from running candidates in Texas's 2020 general election," causing "irreparable harm to Plaintiffs' voting, speech, and associational rights." Dkt. 23 at 10. This does not carry Plaintiffs' burden, for at least two reasons. First, Plaintiffs have not shown that they have a constitutional right to appear on the ballot or to have a candidate they support appear on the ballot. *Accord Lubin v. Panish*, 415 U.S. 709, 717 (1974) (noting that the constitution's protections "do[] not mean every voter can be assured that a candidate to his liking will be on the ballot."); *Munro*, 479 U.S. at 199 ("*Jenness* and *American Party* rejected challenges to ballot access restrictions that were based on a candidate's showing of voter support, notwithstanding the fact that the systems operated to foreclose a candidate's access to any statewide ballot.") (citing *Jenness*, 403 U.S. 431; *Am. Party*, 415 U.S. 767)).

IV. The State's interests outweigh any injury Plaintiffs allege.

Plaintiffs claim that the harm that will result from their potential "exclusion from the 2020 general election constitutes irreparable harm that outweighs any conceivable injury to legitimate state objectives." Dkt. 23 at 2. This ignores the State's weighty and indisputable interests at issue in this case. *See supra*, Part II(d). In addition to recognizing these election-related interests, the Supreme Court has also stated that the "inability [for a State] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Plaintiffs' asserted interest in making it less burdensome for individual candidates to seek nomination by convention does not outweigh Texas's interests in administering elections and applying duly enacted laws.

V. The requested injunction does not further the public's interest.

Plaintiffs' one-paragraph argument regarding the public's interest focuses on what filing fees might be used for. *See* Dkt. 23 at 10. This misunderstands the public interest factor, which does not turn on election-related fees and costs, but instead focuses upon the public's interest in enforcement

of the laws duly enacted by their elected representatives. *See, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (recognizing that, when a duly enacted law cannot be enforced, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws"). Plaintiff's argument that an "injunction will serve the public interest by protecting the right of all Texans to cast their votes effectively this cycle," Dkt. 23 at 2, also misunderstands this factor, as the public does not have an interest in allowing unfettered access to the ballot. *E.g.*, *Lubin*, 415 U.S. at 717 (noting that the constitution's protections "do[] not mean every voter can be assured that a candidate to his liking will be on the ballot.")

CONCLUSION

Plaintiffs have not carried their burden to establish entitlement to the extraordinary remedy of a preliminary injunction. Their motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that that on October 17, 2019, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Anne Marie Mackin
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