**No. 22-50775**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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LA UNION DEL PUEBLO ENTERO; FRIENDSHIP-WEST BAPTIST CHURCH; ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST, AND TEXOMA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; TEXAS IMPACT; MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS; TEXAS HISPANICS ORGANIZED FOR POLITICAL EDUCATION; JOLT ACTION; WILLIAM C. VELAZQUEZ INSTITUTE; JAMES LEWIN; FIEL HOUSTON, INCORPORATED,
*Plaintiffs-Appellees*

V.

JANE NELSON, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; WARREN K. PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; STATE OF TEXAS,
*Defendants-Appellants*

---

**Consolidated with**
**No.: 22-50777**

---

MI FAMILIA VOTA; MARLA LOPEZ; MARLON LOPEZ; PAUL RUTLEDGE,,
*Plaintiffs-Appellees*

V.

GREGORY W. ABBOTT, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF TEXAS; JANE NELSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF TEXAS; WARREN K. PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,
*Defendants-Appellants*

DELTA SIGMA THETA SORORITY, INCORPORATED; HOUSTON AREA URBAN LEAGUE, THE ARC OF TEXAS; JEFFREY LAMAR CLEMMONS,
*Plaintiffs-Appellees*,

v.

GREGORY WAYNE ABBOTT, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF TEXAS, WARREN KENNETH PAXTON, JR., IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF TEXAS,
*Defendants-Appellants*

MI FAMILIA VOTA; MARLA LOPEZ; MARLON LOPEZ; PAUL RUTLEDGE,
*Plaintiffs-Appellees*

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; JANE NELSON, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; WARREN KENNETH PAXTON, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,
*Defendants-Appellants*

**Consolidated with**
**No.: 22-50778**

LA UNION DEL PUEBLO ENTERO; ET AL,
*Plaintiffs*

v.

GREGORY W. ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; ET AL,
*Defendants*,

OCA-GREATER HOUSTON; LEAGUE OF WOMEN VOTERS OF TEXAS; REVUP-TEXAS; WORKERS DEFENSE ACTION FUND,
*Plaintiffs-Appellees*

v.

JANE NELSON, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE; KEN PAXTON, TEXAS ATTORNEY GENERAL
*Defendants-Appellants*

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

# BRIEF OF APPELLEES

Houston Area Urban League, Delta Sigma Theta Sorority, Inc., The Arc of Texas, and Jeffrey Clemmons ("HAUL Plaintiffs")

Mi Familia Vota, Marla López, Marlon López, and Paul Rutledge ("MFV Plaintiffs")

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February 8, 2023

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

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Dated: February 8, 2023

*/s/ J. Michael Showalter*
J. Michael Showalter
*Counsel of Record for Plaintiffs-Appellees Houston Area Urban League, Delta Sigma Theta Sorority, Inc., The Arc of Texas, and Jeffrey Clemmons ("HAUL Plaintiffs")*[1]

[1] This brief is filed on behalf of HAUL Plaintiffs and Plaintiffs-Appellees Mi Familia Vota, Marla López, Marlon López, and Paul Rutledge ("MFV Plaintiffs").

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees do not believe oral argument is necessary to resolve this appeal, which turns on a straightforward jurisdictional issue. Supreme Court and Circuit precedents dictate that this Court lacks jurisdiction to hear this appeal because Defendants-Appellants do not appeal a final order and no other basis for jurisdiction applies. Consequently, the Court need not reach the remaining issues or consider the complex factual record in this case.

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## INTRODUCTION

In November 2020, Texas held an election that the Texas Secretary of State's office touted as "smooth and secure" and in which record numbers of voters turned out across the state. Despite this success, during the following legislative session, the Texas Legislature enacted the Texas Election Integrity Act of 2021 ("S.B. 1"), a law that creates and reinforces a plethora of regulations that make it harder to vote, particularly for Black and Latino voters and voters with disabilities.

This interlocutory appeal arises from lawsuits brought by civil rights and disability rights organizations, individual voters, volunteer election officials, and the United States that are consolidated before the District Court. In one of those actions, the HAUL and MFV Plaintiffs[2] ("Plaintiffs-Appellees" or "Plaintiffs") allege provisions of S.B. 1 violate the U.S. Constitution, the Voting Rights Act, the Americans with Disabilities Act, and the Rehabilitation Act. Plaintiffs named the Governor of Texas, the Texas Secretary of State, the Attorney General or Texas, and three local District Attorneys as Defendants.

The Governor, Secretary of State, and Attorney General ("Defendants-

[2] The HAUL Plaintiffs include the Houston Area Urban League, Delta Sigma Theta Sorority, Inc., The Arc of Texas, and Jeffrey Clemmons. The MFV Plaintiffs include Mi Familia Vota, Marla López, Marlon López, and Paul Rutledge. Although the HAUL Plaintiffs and MFV Plaintiffs initially brought separate lawsuits challenging S.B. 1, they filed a joint Second Amended Complaint. Three other groups of plaintiffs and the United States also sued to challenge provisions of S.B. 1. All these actions have been consolidated before the District Court.

Appellants" or "State Defendants") moved to dismiss all claims in each of the consolidated lawsuits on the grounds of sovereign immunity and standing. As to the HAUL and MFV Plaintiffs' case, the District Court largely denied the motion, holding that nearly all claims could go forward against the Secretary of State and the Attorney General. The District Court ruled similarly in the other consolidated lawsuits. State Defendants took an interlocutory appeal in three cases, which have been consolidated before this panel.

This Court should dismiss the appeal for lack of jurisdiction. It is blackletter law that, with limited exceptions, litigants are not entitled to appeal until after final judgment. State Defendants appeal the District Court's denial of a motion to dismiss, a non-final order. This fundamental flaw renders this appeal premature.

Nor does the collateral order doctrine supply jurisdiction over this appeal. That narrow exception to the ordinary rule permitting appeals only from final judgments applies only to district court rulings that are "conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). These conditions do not apply here because Plaintiffs' statutory claims are not barred by sovereign immunity, a fact not disputed by State Defendants. Thus, even if State Defendants succeed on their sovereign immunity defense as to Plaintiff's constitutional claims, litigation on the statutory claims would continue,

vitiating any basis for the collateral order doctrine. There is also no jurisdiction to hear State Defendants' standing arguments, which are related to the merits and reviewable on final appeal.

Even if this Court did have jurisdiction to consider the merits of this appeal, it should affirm. The District Court correctly held that State Defendants have a specific duty to enforce the challenged provisions of S.B. 1, and this connection to enforcement was sufficient for the *Ex parte Young*, 209 U.S. 123 (1908), exception to sovereign immunity to apply to Plaintiffs' constitutional claims. Relatedly, due to this enforcement authority, injuries caused by the challenged provisions of S.B. 1 are fairly traceable to and redressable by the Secretary of State and the Attorney General, as Plaintiffs have sufficiently alleged in their Second Amended Complaint. Thus, State Defendants' arguments regarding standing also fail.

**COUNTERSTATEMENT OF JURISDICTION**The Court lacks jurisdiction over this appeal since it is not an appeal from final judgment and the issues presented do not fall within the collateral order doctrine.

## ISSUES PRESENTED

1. Does this Court have collateral order jurisdiction over an appeal from a non-final order denying in part a motion to dismiss, where Circuit precedent is clear that at least some of Plaintiffs' claims are not barred by sovereign immunity and where the only other alleged basis for appeal rests on standing grounds?

2. Can Defendants, all state officials tasked with enforcing various provisions of S.B. 1, immunize themselves from suit based on *Ex parte Young* and clear statutory abrogation and waiver of sovereign immunity?

3. Have Plaintiffs alleged traceability sufficient to meet the Article Three standing requirements where Plaintiffs allege that the Secretary of State and Attorney General are statutorily tasked with enforcing provisions of S.B. 1?

## STATEMENT OF THE CASE

### I. Plaintiffs Challenge S.B. 1, which the Texas Legislature Tasked the Secretary of State and Attorney General with Enforcing.

The 2020 general election saw record high voter turnout across Texas, a state with historically low voter turnout, and was heralded by the Texas Secretary of State's office as "smooth and secure." Yet, in response, the Texas Legislature passed the Election Protection and Integrity Act of 2021 ("S.B. 1"). S.B. 1, 87th Leg. 2d C.S. (2021); ROA.6135 ¶ 23; ROA.6175 ¶¶ 123-25; *see also, e.g.*, ROA.3982-4128. Enacted in September 2021, S.B. 1 made sweeping changes to the Texas Election Code under the auspices of reducing the likelihood of fraud. S.B. 1, art. 1, § 1.04 (codified at Tex. Elec. Code § 1.0015). Plaintiffs allege, however, that true aim and impact of S.B. 1 is to fortify Texas' historical exclusion of Black and Latinos voters and individuals with disabilities from the ballot box by denying equal access to voting. ROA.6127-6135 ¶¶ 3-24. The Texas Legislature charged, among others, the Texas Secretary of State—"chief election officer of the state"—and the Attorney

General with enforcing S.B. 1. ROA.6135 ¶ 22; ROA.6155 ¶ 73; ROA.6157 ¶ 80.

Plaintiffs sued the Secretary of State, Attorney General, and the Governor, among other Texas state officials, alleging that S.B. 1 unlawfully discriminates against voters of color and burdens voters with disabilities, in violation of the First, Fourteenth, and Fifteenth Amendments of the United States Constitution, sections 2 and 208 of the Voting Rights Act of 1965 ("VRA"), Title II of the Americans with Disabilities Act of 1990 ("ADA"), and Section 504 of the Rehabilitation Act of 1973. ROA.6137-6138 ¶ 27. Specifically, Plaintiffs challenge 32 provisions of S.B. 1 that illegally infringe on the right to vote. ROA.6199-6217 ¶¶ 196-251.

Article Two of S.B. 1 ("Registration of Voters") mandates monthly purges of the voter rolls, ostensibly to identify noncitizens, and requires additional proof of citizenship for voters to retain their registration. Tex. Elec. Code §§ 16.0332, 18.065, 18.068; ROA.6198 ¶ 196. Such purges burden naturalized and lawfully registered individuals, requiring them to provide costly proof of citizenship or be subject to presumptive voter registration cancellation after 30 days. ROA.6198 ¶ 197. The Secretary of State is statutorily tasked with prescribing rules for the administration of Sections 2.05, 2.06, and 2.07. Tex. Elec. Code §§ 16.0332(d), 18.065(i). And the Attorney General is tasked with civil prosecution of any election official that violates these provisions. *Id*. § 31.129.

Article Three of S.B. 1 ("Conduct and Security of Elections") constrains

Texas counties from offering methods of voting that expand access to the franchise for voters within their communities. ROA.6199 ¶¶ 200–212. Sections 3.04, 3.12, and 3.13 limit curbside voting and eliminate drive-through voting, Tex. Elec. Code §§ 43.031, 85.061(a), 85.062; Sections 3.09 and 3.10 limit the hours of voting, *id*. §§ 85.005, 85.006(b); and Section 3.15 eliminates straight-party voting, *id*. § 124.002(c). Plaintiffs allege that these restrictions unduly burden Black, Latino, and disabled voters and discourage future voting by creating longer lines at polling places. ROA.6201 ¶ 205. These measures were enacted despite an absence of any evidence that these methods of voting had resulted in any fraud. ROA.6204 ¶ 212. The Secretary of State is statutorily tasked with enforcing these measures. Tex. Elec. Code §§ 31.012(d), 66.004. Again, the Attorney General is tasked with civil prosecution of any election official that violates these provisions. *Id*. § 31.129.

Article Four of S.B. 1 ("Election Officers and Observers") strengthens the power of poll watchers to intimidate voters and undermine the secrecy of the ballot and hamstrings election officials' ability to protect voters and volunteers. ROA.6209-6210 ¶¶ 227-28. Section 4.07 gives poll watchers near free rein in polling places, Tex. Elec. Code § 33.056; Section 4.01 limits an election judge's ability to remove a poll watcher, *id*. § 32.075(g); and Sections 4.06 and 4.09 impose criminal liability on election officials for restricting poll watchers, *id*. §§ 33.051(g), 33.061. The Secretary of State is statutorily obligated to enforce these provisions by

reporting suspected offenses to the Attorney General. *Id*. § 31.006(a). The Attorney General is tasked with criminal investigation and prosecution for violations of the Election Code, such as Sections 4.06 and 4.09, *id*. § 273.021, and civil prosecution of any election official that violates other provisions of Article Four, *id*. § 31.129.

Article Five of S.B. 1 ("Voting By Mail") creates byzantine identification requirements for voting by mail, which burden access for voters with disabilities and limit organizational Plaintiffs' ability to assist voters with applying to vote by mail. Tex. Elec. Code §§ 84.002, 84.011(a), 84.035, 86.001, 86.015(c); ROA.6206 ¶ 217. Further, Section 4.12 limits voters' ability to drop off mail-in ballots at a polling place, making it subject to identification requirements and staffing at the polling place. Tex. Elec. Code § 86.006; ROA.6207 ¶ 219. The Secretary of State has the statutory obligation to enforce these provisions because she must prescribe the design and content of "the forms necessary for the administration" of the Election Code, including how such forms are to incorporate these excessive identification requirements. Tex. Elec. Code § 31.002. Again, the Attorney General is tasked with civil prosecution of any election official that violates these provisions. *Id*. § 31.129.

Article Six of S.B. 1 ("Assistance of Voters") significantly increases the burden for those who assist voters and denies voters who need assistance access to their chosen assistor. ROA.6211 ¶¶ 233-37. Anyone who assists a voter must provide significant personal background information, such as ties to political parties, fill out

a separate form for every person he or she assists, and take an oath under penalty of perjury, which subjects the assistor to criminal liability for an incorrect form. Tex. Elec. Code §§ 63.034, 64.0322. The same holds true for anyone who assists a voter with a mail-in ballot. *Id*. §§ 86.010, 86.013. Further, poll watchers are given complete oversight of all assistors. *Id*. § 64.009(e). If the assistor refuses to complete the forms, does not want to run the risk of criminal punishment for a clerical mistake, or declines to face the intimidating gaze of poll watchers, then the disabled voter is denied his or her chosen assistor. Again, the Secretary of State has the statutory obligation to prescribe the forms and thus enforce these provisions. *Id*. § 64.0322(b). Likewise, the Attorney General is tasked with criminal investigation and prosecution for violations of the Election Code, *id*. § 273.021, and civil prosecution of any election official that violates other provisions of Article Four, *id*. § 31.129.

Article Seven of S.B. 1 ("Fraud and Other Unlawful Practices") creates a litany of new criminal offenses while making it more difficult for lawfully registered voters to vote. ROA.6213-14 ¶¶ 239-244. Section 7.02 makes clear an employer need not give an employee time off from work to vote during early voting where polls are open for two hours outside of the employee's working hours. Tex. Elec. Code § 276.004(b). In conjunction with fewer voting locations, the need to rely on public transportation, and the other restrictions of S.B. 1, Plaintiffs allege that this provision ensures certain voters will not make it to the polling place. ROA.6213

¶ 240. Further, Section 7.04 prohibits election officials from making any change to the Election Code, even in the event of unforeseen and unprecedented events such as a global pandemic. Tex. Elec. Code § 276.019. As with the other provisions, the Secretary of State is obligated to report suspected violations to the Attorney General and thus is tasked with implementing these provisions. *Id*. § 31.006(a). Again, the Attorney General is tasked with criminal investigation and prosecution for violations of the Election Code, *id*. § 273.021, and civil prosecution of any election official that violates other provisions of Article Four, *id*. §31.129.

## II. The District Court Largely Denies State Defendants' Motion to Dismiss, Finding Plaintiffs Alleged a Requisite Connection to Enforcement for the Secretary of State and Attorney General.

State Defendants moved to dismiss all Plaintiffs' challenges to S.B. 1 based on sovereign immunity. ROA.7204-7220. The District Court largely denied State Defendants' motion, holding: (1) the *Ex parte Young* exception to state sovereign immunity permitted Plaintiffs to sue the Secretary of State as to all of the challenged provisions of S.B. 1; (2) the *Ex parte Young* exception to state sovereign immunity permitted Plaintiffs to sue the Attorney General as to all but four of the challenged provisions; (3) Congress abrogated sovereign immunity for the Secretary of State under the Title II of the ADA; (4) Congress abrogated sovereign immunity for the Governor, the Secretary of State, and the Attorney General under Sections 2 and 208 of the VRA; and (5) Texas waived sovereign immunity for the Secretary of State

and Attorney General under Section 504 of the Rehabilitation Act. The District Court dismissed portions of Plaintiffs' Second Amended Complaint: the constitutional challenges to four sections of S.B. 1 against the Attorney General, the ADA claim against the Attorney General, and the VRA claim against the Governor. ROA.10661.

Finding Plaintiffs alleged a plausible set of facts establishing that the Secretary of State has a sufficient connection to enforcement of S.B. 1, the District Court laid out the connection to each constitutionally challenged provision.

- Sections 2.05, 2.06, and 2.07, which relate to the purging of voter rolls, make clear that "the Secretary shall prescribe rules for the administration of this section[,]" Tex. Elec. Code § 16.0332(d), and require the Secretary of State to "provide a report to the legislature of the number of voter registrations canceled under this section during the calendar year." *Id.* §16.0332(e). Further, "the Secretary is statutorily responsible for ensuring that voter registrars substantially comply with his rules and requirements implementing the statewide computerized voter registration list." *Id.* § 18.065(a); *see* ROA.10599-10600.
- "Sections 3.04, 3.12, and 3.13 generally prohibit most voters from voting inside a motor vehicle and require that polling places be located inside a building . . . Sections 3.09 and 3.10 generally limit early voting hour"; Section

4.01 restricts a presiding judge's ability to remove a poll watcher. ROA.10609-10610. "The Election Code states that the Secretary 'shall adopt rules . . . to assist the presiding judge of a polling place in processing forms and conducting procedures required by [the Election Code] at the opening and closing of the polling place.' The rules that the Secretary must adopt necessarily include rules pertaining to voting inside a motor vehicle, outdoor polling places, early voting hours, and poll watchers." ROA.10609-10610; *see* Tex. Elec. Code § 66.004.

- Section 3.15, which eliminates straight-party voting, is the direct responsibility of the Secretary of State; "[t]he Election Code, therefore, makes plain that the Secretary has a clear and immediate duty—not mere discretion—to enforce section 3.15 and ensure the elimination of straight-party voting." ROA.10607.
- Sections 4.06, 4.09, 6.04[3], 6.05, 7.02, and 7.04 create criminal offenses for violations of provisions of S.B. 1 related to poll watchers, voter assistance, mail-in ballots, and voter registration; exempt employers from providing

[3] The District Court held that a modified injunction in a different case, *OCA-Greater Houston v. Texas*, 2022 WL 2019295 (W.D. Tex. June 6, 2022), mooted Plaintiffs' challenge to the portions of Section 6.04 that require an assistor to swear under penalty of perjury that they would limit their assistance to reading the ballot to the voter, directing the voter to read the ballot, marking the voter's ballot, or directing the voter to mark the ballot. ROA.10611.

employees with leave to vote in certain circumstances; and prohibit public or election officials from modifying the Election Code except as expressly authorized. ROA.10610-10613. "The Election Code now authorizes the Secretary to 'refer a reported violation of law for appropriate action to the attorney general . . . or to a prosecuting attorney having jurisdiction.' It also *requires* the Secretary to report suspected election law offenses to the Attorney General." ROA.10613-10614 (quoting Tex. Elec. Code § 34.005(a) and citing *id.* § 31.006(a) (citations omitted)).

- Sections 4.07 and 6.01 allow poll watchers greater movement within a poll location. ROA.10608. The Secretary of State is required to "develop and maintain a training program for watchers," *id*. (quoting Tex. Elec. Code § 33.008), and "[b]ecause it is the Secretary who bears the responsibility to ensure that poll watchers comply with the Election Code, the information that he disseminates through the training program is not merely advice, guidance, or interpretive assistance," ROA.10609.
- Sections 4.12, 6.01, and 6.03, which relate to voter assistance, "can only be enforced if and when the Secretary prescribes the roster and forms." ROA.10606.
- Sections 5.01, 5.02, 5.03, 5.07, 5.08, 5.12, 5.13, 5.14, and 6.07 establish new requirements for vote-by mail applications and thus require the Secretary of

State "to modify vote-by-mail applications" under the Secretary's statutorily required obligation "to prescribe the design and content of 'the forms necessary for the administration of the Election Code.'" ROA.10602 (quoting Tex. Elec. Code § 31.002(a)). Indeed, Section 5.12 authorizes the Secretary of State to "prescribe any procedures necessary to implement this section." ROA.10603 (quoting Tex. Elec. Code § 87.0271(f)).

- Sections 5.04 and 5.11 prohibit state and political subdivision employees and early voting clerks from taking certain actions. ROA.10614. If they "fail to comply with their statutory duties, then the Secretary could report their conduct to the Attorney General. These local officials would then be subject to civil prosecution. This credible threat of prosecution is, again, a consequence of the Secretary's authority to compel or constrain." ROA.10614-10615.

In addition to finding an adequate connection to enforcement, the District Court concluded Plaintiffs plausibly alleged the Secretary of State would enforce all the provisions of S.B. 1 because the Election Code now mandates the Secretary of State "report his suspicions of criminal conduct under any provision of the Election Code to the Attorney General." ROA.10618-10619 (citing Tex. Elec. Code § 31.006(a).

Likewise, with the exception of Sections 5.02, 5.03, 5.08, and 6.07, the

District Court held Plaintiffs plausibly alleged that the Attorney General can enforce all of the constitutionally challenged provisions of S.B. 1 and would do so. ROA.10620-10628. In particular, the District Court noted the Attorney General "investigate[s] and prosecute[s] alleged violations of the Election Code, including those provisions introduced in SB 1[,]" and authorizes the Attorney General to civilly prosecute an election official that violates the challenged provisions. ROA.10620. Moreover, "the Attorney General touts his office's eagerness to prosecute entities and individuals, like Plaintiffs and their members, for criminal offenses under the Election Code." ROA.10626.

As to Plaintiffs' claims under the ADA, VRA, and the Restoration Act, the District Court found the ADA claim failed to state a claim against the Attorney General and the VRA claim against the Governor failed for want of standing. ROA.10661. However, the District Court otherwise found sovereign immunity had either been abrogated or waived and "presents no obstacle" or "does not bar" Plaintiffs' claims. ROA.10646.

State Defendants noticed an interlocutory appeal on the District Court's Order for the HAUL and MFV Plaintiffs, as well as two other Plaintiffs' groups that had received similar rulings. ROA.10857-10862. Upon motion, this Court consolidated the appeals.

## SUMMARY OF THE ARGUMENT

As a threshold matter, the Court should dismiss this appeal for lack of jurisdiction because the District Court's order denying State Defendants' motion to dismiss is not a "final decision" within the meaning of 28 U.S.C. § 1291. Nor does the District Court's order fall within the "small class" of collateral rulings that are appropriately deemed final for purposes of interlocutory appeal. *Mohawk*, 558 U.S. at 106. As State Defendants recognize, the VRA, ADA, and Rehabilitation Act validly abrogate sovereign immunity. Accordingly, sovereign immunity cannot operate as an immunity from this suit. Because State Defendants will continue to be subject to this litigation irrespective of any sovereign immunity decision, the Court should not exercise jurisdiction here.

Similarly, the Court should decline to address State Defendants' standing arguments for lack of jurisdiction. This Court has recognized that the issue of standing is distinct from any sovereign immunity inquiry, reviewable on appeal from a final decision, and often shades into questions of the merits. Therefore, the District Court's order on standing is not a collateral order subject to interlocutory review. Moreover, this Court and others have cautioned that litigants may not bootstrap non-reviewable issues like standing into the narrow appeals authorized by the collateral order doctrine. Thus, the Court should reject State Defendants' invitation to conduct a wholesale review of this case on an interlocutory basis.

Even if this case were properly before the Court, Plaintiffs plausibly alleged

that the Secretary of State and the Attorney General have an "enforcement connection" with S.B. 1. As the chief election officer of the state, the Secretary's statutory duties include prescribing rules and procedures for administering the purging of voter rolls, maintain a training program for poll watchers, creating rosters and forms for voter assistance, and articulating procedures for voting by mail. The Attorney General, for his part, has a statutory duty to prosecute criminal offenses prescribed by the Election Code. Thus, both State Defendants are statutorily tasked with enforcing the provisions of S.B. 1 that most acutely harm Plaintiffs. This renders them proper defendants for Plaintiffs' constitutional claims under *Ex parte Young* and makes the harm to Plaintiffs fairly traceable to their conduct, satisfying this requirement of standing.

## STANDARD OF REVIEW

When a case is properly before this Court, the Court reviews questions of "sovereign immunity and standing *de novo*." *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 671 (5th Cir. 2022) (*TARA*). In considering an appeal raising an issue of subject matter jurisdiction, the Court "must accept all factual allegations in the [Plaintiffs'] complaint[s] as true." *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001); *see also Wooten v. Roach*, 964 F.3d 395, 399 (5th Cir. 2020) (explaining the court must "accept as true" the allegations in operative complaint in Rule 12(b)(1) appeal); *Loupe v. O'Bannon*, 824 F.3d 534,

536 (5th Cir. 2016) ("In determining immunity, we accept the allegations of [the plaintiff's] complaint as true.").

## ARGUMENT

### I. This Court Should Dismiss This Appeal For Lack Of Jurisdiction.

This Court lacks jurisdiction to hear State Defendants' appeal because the order below is not a final decision and the collateral order doctrine does not apply. "By statute, Courts of Appeals 'have jurisdiction of appeals from all final decisions of the district courts of the United States.'" *Mohawk*, 558 U.S. at 106 (quoting 28 U.S.C. § 1291). But because the District Court's order did not "end[] the litigation on the merits," and in fact leaves the court with significant proceedings to complete before "execut[ing] the judgment," *Hall v. Hall*, 138 S. Ct. 1118, 1124 (2018), the order appealed by State Defendants is *not* a "final decision[] of the district court[]." 28 U.S.C. § 1291. As a result, this Court does not have jurisdiction to entertain State Defendants' appeal at this stage.

State Defendants attempt to avoid this jurisdictional deficiency by invoking the collateral order doctrine, but they do not meet the requirements necessary to rely on this doctrine. This doctrine permits immediate appeal of "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final[,]'" *Mohawk*, 558 U.S. at 106 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-56 (1949)), because they meet three requirements.

This "small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk*, 558 U.S. at 106 (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)). The collateral order doctrine "must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Mohawk*, 558 U.S. at 106 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)). Thus, the Supreme Court has made clear that "the conditions for appeal under the collateral order doctrine are 'stringent.'" *In re Deepwater Horizon*, 793 F.3d 479, 484 (5th Cir. 2015) (quoting *Digital Equip. Corp.*, 511 U.S. at 868). As discussed below, those conditions are not met here because State Defendants are not entitled to sovereign immunity for at least some of Plaintiffs' claims.

### A. This Court Lacks Jurisdiction Because State Defendants' Sovereign Immunity Defense Cannot Apply to Plaintiffs' Statutory Claims.

The collateral order doctrine cannot supply jurisdiction over this interlocutory appeal. "Jurisdiction over [an] interlocutory appeal" from the denial of a motion to dismiss exists when "a proper application of sovereign immunity would remove [a party] from [] litigation and require dismissal of *all claims*." *Planned Parenthood Gulf Coast, Inc. v. Phillips*, 24 F.4th 442, 450 (5th Cir. 2022). Here, State Defendants

do not dispute that Congress has validly abrogated State sovereign immunity as to Plaintiff's statutory claims. *See* Br. at 50; *infra* Section VII.B.1. Thus, even if State sovereign immunity could extinguish Plaintiffs' constitutional claims, this appeal would not end the litigation. For this reason, the panel lacks jurisdiction to entertain State Defendants' interlocutory appeal here.

This conclusion is consistent with the Supreme Court's decision in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), in which the Puerto Rico Aqueduct and Sewer Authority's (PRASA) state sovereign immunity defense applied to all claims and thus could have shielded the agency from being a party to the litigation. There, PRASA moved to dismiss based on its sovereign immunity as an "arm of the state." *Id.* at 141. The district court denied the motion, PRASA appealed, the First Circuit dismissed the appeal for lack of jurisdiction, and the Supreme Court reversed that determination. *Id.* at 147. Central to the Supreme Court's ruling was its reasoning that the Eleventh Amendment's guarantee that "*[a]bsent waiver*, neither a state nor agencies acting under its control may 'be subject to suit in federal court'" would be lost were PRASA forced to defend the suit through trial, *id.* at 145 (emphasis added), making a rejection of PRASA's sovereign immunity defense "effectively unreviewable on appeal from [a] final judgment," *Mohawk*, 558 U.S. at 106. In other words, "the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds

past motion practice." *Id.*; *see also Ex parte New York*, 256 U.S. 490 (1921) (finding jurisdiction over motion to dismiss *in rem* libel action in full). The core justification for exercising jurisdiction in *Metcalf & Eddy* was that the sovereign would be shielded from litigation entirely in the event of a successful sovereign immunity defense. *See Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994) ("The foundation for the interlocutory appeal authorized by [*Metcalf & Eddy*] is *the existence of a right not to be a litigant*." (emphasis added)); *Espinal-Dominguez v. Commonwealth of Puerto Rico*, 352 F.3d 490, 496-97 (1st Cir. 2003) (noting that the question presented in *Metcalf & Eddy* was "whether a district court order denying a claim by a State or a state entity to Eleventh Amendment immunity *from suit* in federal court may be appealed under the collateral order doctrine"); *Burns-Vidlak ex rel. Burns v. Chandler*, 165 F.3d 1257, 1260-61 (9th Cir. 1999).

Here, because all parties agree that the Eleventh Amendment does not shield State Defendants from Plaintiffs' statutory claims, *Metcalf & Eddy* does not serve as a basis for the panel to exercise collateral order jurisdiction over this interlocutory appeal. Even if State Defendants are entitled to sovereign immunity as to some claims, they are nevertheless subject to suit in federal court on Plaintiffs' VRA, ADA, and Rehabilitation Act claims. This appeal thus does not implicate the right not to be a party to this litigation because State Defendants would remain "subject to [this] suit in federal court." *Metcalf & Eddy*, 506 U.S. at 144. Accordingly,

because the collateral order doctrine does not apply here, the panel should not exercise jurisdiction over State Defendants' premature appeal.

To be sure, this Court has, at times, exercised jurisdiction under the collateral order doctrine over interlocutory appeals in which the litigation would continue even if absolute immunity were granted as to some, but not all, claims. *See, e.g.*, *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 397-98 (5th Cir. 2017). In *BancPass*, the defendant appealed the district court's denial of its summary judgment motion based partially on Texas's judicial proceedings privilege. *Id.* at 394-97. Because Texas's judicial proceedings privilege is, like sovereign immunity, a complete immunity from suit, the Court exercised jurisdiction on the grounds that it "has jurisdiction over interlocutory appeals of denials of summary judgment based on claims of absolute immunity." *Id.* at 397. Central to this rule is the understanding that a "immunity from suit is not only a means of prevailing on the merits, but an 'entitlement not to stand trial or face the other burdens of litigation.'" *Id.* (quoting *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 991 (5th Cir. 1999)). This reasoning does not apply here for at least two reasons. First, as discussed above, State Defendants' sovereign immunity claims, even if successful, *will not* provide a complete immunity from this lawsuit. The VRA, ADA, and Rehabilitation Act all validly abrogate sovereign immunity, and therefore sovereign immunity provides no "entitlement not to stand trial or face the other burdens of litigation." *BancPass*, 863 F.3d at 397.

Second, State Defendants here appeal from an order denying their motion to dismiss, not a summary judgment motion. Thus, State Defendants' sovereign immunity claim is eminently reviewable by the District Court (and this Court) at summary judgment. *Id.* (noting that a "claim of immunity from suit is 'effectively unreviewable' *once the defendant is forced to go to trial*" (emphasis added)).

These two points further serve to distinguish the rare cases in which this Court has exercised jurisdiction over interlocutory appeals from a district court's denial of a motion to dismiss. For example, in *Planned Parenthood Gulf Coast, Inc. v. Phillips*, the court exercised jurisdiction pursuant to the collateral order doctrine over an appeal from the district court's order denying the defendant's motion to dismiss. 24 F.4th at 448-50. In rejecting an "overly technical" analysis of whether to exercise jurisdiction, the Court asked a "straightforward" question: "Did the state assert sovereign immunity from suit?" *Id.* at 449. Answering in the affirmative, the Court exercised jurisdiction "because the [defendant] asserted sovereign immunity *from this entire lawsuit*. Simply put, the [defendant] has always argued that a proper application of sovereign immunity would remove it from this litigation and require dismissal of *all claims*." *Id.* at 450 (emphasis added). This ruling, too, is plainly inapplicable to this case, where State Defendants admit that sovereign immunity has been abrogated as to Plaintiffs' VRA, ADA, and Rehabilitation Act claims. Thus, because the answer here to the question "Did the state assert sovereign immunity

from suit?" is "no," the Court should not exercise jurisdiction over State Defendants' premature appeal of the District Court's order denying their motion to dismiss.

### B. State Defendants' Standing Arguments Are Not Reviewable Under the Collateral Order Doctrine.

It is black-letter law that "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945). Indeed, State Defendants' interlocutory appeal of the District Court's decision on standing fails at least two of the collateral order doctrine's requirements. *See Mohawk*, 558 U.S. at 106 (collateral order doctrine applies only to "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment"). First, this Court has "reject[ed] out of hand" the argument that standing presents an issue separate from the merits because "case or controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.'' *Shanks v. City of Dallas, Tex.*, 752 F.2d 1092, 1098 n.9 (5th Cir. 1985) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)). Thus, [a]ny examination of [] standing" would "quite clearly involve considerations that are enmeshed in the legal issues surrounding [Plaintiffs'] cause[s] of action." *Shanks v. City of Dallas*, 752 F.2d at 1098 n.9. Accordingly, because review of State Defendants' standing arguments would not "resolve important questions *separate from the merits*," *Mohawk*, 558 U.S. at 106, the

collateral order doctrine does not provide the panel with jurisdiction.

Second, "[t]he question of subject matter jurisdiction is far from unreviewable on appeal from a final judgment." *Matter of Green Cnty. Hosp.*, 835 F.2d 589, 596 (5th Cir. 1988). As a result, the "question of standing does not fit within the collateral order doctrine." *Freyre v. Chronister*, 910 F.3d 1371, 1378 (11th Cir. 2018) (quoting *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999)). Therefore, the standing issue, having failed two of the three requirements for the panel to apply the collateral order doctrine, should not be considered here. State Defendants can raise these arguments on appeal from a final judgment.

Moreover, State Defendants should not be permitted to seek immediate review of their standing arguments by bootstrapping them into their sovereign immunity defense. Even if the collateral order doctrine did apply to State Defendants' assertion of sovereign immunity, there would be no basis to extend jurisdiction to their standing arguments. The panel "must take great care to avoid 'indiscriminate appellate review of interlocutory orders.'" *Pickett v. Tex. Tech Univ. Health. Scis. Ctr.*, 37 F.4th 1013, 1019 (5th Cir. 2022) (quoting *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017)). And the panel "should be especially wary of . . . allowing parties to 'parlay . . . collateral orders into multi-issue interlocutory appeal tickets.'" *Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462, 468 (5th Cir. 2014) (quoting *Swint*, 514 U.S. at 49-50).

The Court should exercise such restraint here particularly because State Defendants' standing arguments relate in part to Plaintiffs' statutory claims—claims that are wholly unaffected by State Defendants' assertion of sovereign immunity. To entertain State Defendants' standing arguments in this interlocutory appeal would permit a wholesale appeal from the District Court's denial of their motion to dismiss, which plainly is not a "final decision." 28 U.S.C. § 1291.

The Supreme Court has cautioned appellate courts not to "extend their [collateral order] jurisdiction to rulings that would not otherwise qualify for expedited consideration," unless "*essential to the resolution of the properly appealed collateral order[]*." *Swint*, 514 U.S. at 51 (quoting Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L.J. 511, 530 (1990)) (emphasis added). Here, State Defendants' standing arguments are not essential to the resolution of the sovereign immunity question, which would be the only possible basis for this Court's exercise of collateral order jurisdiction.

State Defendants do not argue that their standing arguments are essential to their claims of sovereign immunity, and for good reason. Courts routinely decline to address standing arguments in the context of sovereign immunity appeals because courts are more than capable of "resolv[ing] the Eleventh Amendment immunity issue [] without reaching the merits of standing." *Summit Med. Assocs.*, 180 F.3d at 1335; *cf. Cooper v. Brown*, 844 F.3d 517, 526 n.12 (5th Cir. 2016) (noting that this

court "ha[s] resisted efforts to bootstrap non-final claims into [qualified immunity] appeals" unless "'rare and unique' circumstances" apply to make "the non-final claim [] 'inextricably intertwined' with the [qualified immunity] inquiry" (quoting *Gross v. City of Grand Prairie*, 209 F.3d 431, 436-37 (5th Cir. 2000))); *Antrican v. Odom*, 290 F.3d 178, 191 (4th Cir. 2002) (declining to address jurisdictional arguments aside from sovereign immunity because they are not "inextricably intertwined with North Carolina's Eleventh Amendment immunity claim, nor is consideration of these issues 'necessary to ensure meaningful review of the . . . immunity question'" (quoting *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996)). Accordingly, because standing is neither "inextricably intertwined" with, nor "essential to the resolution of" State Defendants' sovereign immunity defense, *Swint*, 514 U.S. at 51, the panel should decline to consider their standing arguments.

## II. State Defendants are Not Entitled to Sovereign Immunity.

Even if this Court did have jurisdiction over State Defendants' appeal, State Defendants are not entitled to sovereign immunity from any of Plaintiffs' claims.

### A. Congress Unequivocally Abrogated State Sovereign Immunity as to All of Plaintiffs' Statutory Claims.

Binding authority establishes that Congress has abrogated sovereign immunity as to all of Appellees' claims brought under the ADA, the Rehabilitation Act, and the VRA. Accordingly, the District Court correctly decided that state sovereign immunity does not bar any of Plaintiffs' statutory claims. ROA.10647.

State Defendants completely ignore the District Court's holding that sovereign immunity does not bar Plaintiff's ADA and Rehabilitation Act claims, thereby conceding the argument. ROA.10646-10647. The District Court correctly held that Congress validly abrogated state sovereign immunity under the ADA. *See Tennessee v. Lane*, 541 U.S. 509, 517 (2004) (holding that Congress validly abrogated state sovereign immunity under ADA's Title II). Likewise, State Defendants have waived sovereign immunity from claims under Section 504 of the Rehabilitation Act by accepting federal funding. *See Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (en banc) (holding the same for Louisiana education agencies). Thus, State Defendants are not immune from suit under Plaintiffs' ADA and Rehabilitation Act claims, a conclusion they do not dispute.

As for Plaintiffs' VRA claims, State Defendants acknowledge that sovereign immunity is also unavailable under binding Fifth Circuit precedent, but nevertheless press their argument for reconsideration of these well-established authorities by the *en banc* Court. Br. at 50. State Defendants' arguments have been soundly and repeatedly rejected by this Court and its sister circuits. Further attempts to relitigate the VRA's abrogation of sovereign immunity should also be rejected.

At least three times, this Court has considered whether the VRA abrogates state sovereign immunity and answered decisively in the affirmative. *See Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020); *Fusilier v. Landry*, 963 F.3d 447,

455 (5th Cir. 2020); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017). State Defendants' claim that the Court only reached this conclusion in one sentence, within one opinion, is simply wrong. Br. at 50. Further, two other federal appellate courts have examined the same question and likewise agreed that "any reasonable interpretation" of the VRA abrogates state sovereign immunity. *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020), judgment vacated on other grounds sub nom. *Alabama v. Ala. State Conf. of NAACP*, 141 S. Ct. 2618 (2021); *Mixon v. State of Ohio*, 193 F.3d 389, 399 (6th Cir. 1999). Against these overwhelming authorities, State Defendants' only pertinent citation is to an out-of-circuit dissenting opinion. Br. at 50.

Accepting State Defendants' sovereign immunity arguments requires willful ignorance of VRA's plain text authorizing private suits against state entities. *See Mi Familia Vota*, 977 F.3d at 469; *Fusilier*, 963 F.3d at 455 (5th Cir. 2020); *OCA-Greater Hous.*, 867 F.3d at 614. Unwilling to take on this circuit's binding precedents, State Defendants point to Sections 2 and 208 of the VRA as proof that Congress only abrogated sovereign immunity as to suits initiated by the U.S. Attorney General. Br. at 50. However, Section 3 of the VRA repeatedly describes lawsuits initiated by "the Attorney General or an *aggrieved person* under [the VRA or] any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. §§ 10302(a)-(c) (emphasis added). Accordingly, the right

of private citizens to sue in response to state encroachments upon federal statutory voting guarantees "has been clearly intended by Congress since 1965." *See Morse v. Republican Party*, 517 U.S. 186, 232 (1996). To hold otherwise is to read the words "aggrieved person" out of Section 3 for no reason at all and sharply limit the intended function of Sections 2 and 208. *See Ala. State Conf. of NAACP*, 949 F.3d at 652. State Defendants' invitation to twist Congress' meaning, overturn this Court's precedent, and gut the VRA should be declined.

### B. Recent Supreme Court Precedent Confirms that *Ex parte Young*'s Exception to Sovereign Immunity Applies to Plaintiffs' Constitutional Claims.

Plaintiffs easily satisfy the standard for the application of *Ex parte Young*'s exception to sovereign immunity with respect to Plaintiffs' constitutional claims. In *Whole Women's Health,* the Supreme Court clarified that "official[s] who *may or* must take enforcement actions against" individuals allegedly violating state law "fall within the scope of *Ex parte Young's* historic exception to state sovereign immunity." *Whole Women's Health v. Jackson,* 142 S. Ct. 522, 535 (2021) (emphasis added). This Court defines "enforcement" as "typically [involving] compulsion or constraint." *Texas Democratic Party v. Abbott,* 978 F.3d 168, 179 (5th Cir. 2020) (*TDP II*) (quoting *K.P. v. LeBlanc,* 627 F.3d 115, 124 (5th Cir. 2010)). For the purposes of clearing the *Ex parte Young* bar, even "[a] scintilla of 'enforcement' . . . will do." *Id.* (quoting *City of Austin v. Paxton*, 943 F.3d 993, 1002

(5th Cir. 2019)). As the District Court noted, "if an 'official *can* act, and there's a significant possibility that he or she *will* . . . , the official has engaged in enough compulsion or constraint to apply the *Young* exception.'" ROA.10596.

As in *Whole Women's Health*, Plaintiffs bring a pre-enforcement challenge against State Defendants, who are state officials with either the discretion or legal duty to constrain a range of voting activities under S.B. 1. The District Court found more than a "significant possibility" that State Defendants will act. ROA.10618-10619. Thus, even without Plaintiffs' statutory claims, "sovereign immunity does not bar [plaintiffs'] suit against these named defendants at the motion to dismiss stage." *Whole Women's Health*, 142 S. Ct. at 535-36.

State Defendants' heavy focus on the duties of local officials is also for naught. That local officials share enforcement responsibility for S.B. 1 does not mitigate the enforcement power State Defendants concurrently possess and therefore does not immunize State Defendants from suit. Even where "there is a division of [enforcement] responsibilities," any official with identifiable "specific duties" to enforce presents a court with "enough . . . to conclude that . . . sovereign immunity does not bar suit." *TDP II*, 978 F.3d at 180. Were this Court to adopt the sovereign immunity standard that State Defendants advocate, it would ignore *Whole Women's Health*'s "may or must" language and allow State Defendants to shield themselves from suit so long as they could point to parallel enforcement actions that fall within

the purview of their local counterparts. Because both State Defendants are statutorily tasked with taking enforcement actions relating to S.B. 1, as discussed below, they are not entitled to sovereign immunity.

**1. The District Court correctly found that State Defendants have more than the requisite enforcement responsibility needed to apply the *Ex parte Young* exception.**

As officers legally required to enforce the Texas Election Code, the Texas Secretary of State and Texas Attorney General have far more than a "scintilla" of a responsibility to enforce S.B. 1 and are not protected by sovereign immunity. Whereas a general duty to enforce the state's laws does not extinguish an officials' sovereign immunity, any official with discretion to enforce the law at issue may be sued. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014); *see Whole Women's Health*, 152 S. Ct. at 535. Importantly, in analyzing an official's duty to act, the required enforcement action need not be directly cited in the challenged provision. An official whose directive to implement one statute is found elsewhere in a state's code remains a proper *Ex parte Young* defendant. *TDP II*, 978 F.3d at 180. The Supreme Court held the named licensing officials in *Whole Women's Health* to be proper pre-enforcement defendants by locating their enforcement authority in a separate provision of the Texas Code than S.B. 8, the one plaintiffs challenged. Those officials, under state law, are "charged with enforcing 'other laws that regulate . . . abortion.'" *Whole Women's Health*, 142 S. Ct. at 536 (internal

citations omitted). This expressly gave these individuals the duty to "take an appropriate disciplinary action against a physician who violates" portions of the Texas Health and Safety Code "that *includes* S.B. 8." *Id.* (emphases in original). Thus, the statute relied on an enforcement chain involving multiple provisions of law and enforcement by numerous individuals. The Supreme Court overwhelmingly held that *Ex parte Young* catches any such individual within it sweep.

Also instructive is this Court's analysis in *Texas Democratic Party v. Abbott (TDP II)*, which found that Texas's Secretary of State had the requisite enforcement responsibility under *Ex parte Young* by virtue of the Secretary's obligation to design and furnish mail-in and absentee ballot application forms. *TDP II*, 978 F.3d at 179-80. At issue was Texas Election Code § 82.003, permitting early vote by mail only for voters of a certain age amidst the COVID-19 pandemic. Under a preexisting, unchallenged provision of the Election Code, the Secretary was required to design the vote-by-mail application form and furnish it to local officials, who were, in turn, required to use the form. *Id.* at 180.

Thus, although the Secretary herself made no decisions as to any individual's right to vote by mail, her statutorily defined role in the application form design process—a form that included an age-limit attestation—gave her the "authority to compel or constrain local officials," who in turn could deny someone a vote-by-mail opportunity. *Id.* Reasoning that "it is permissible under *Ex parte Young* for a court

to 'command a state official to do nothing more than refrain from violating federal law[,]'" this Court held her application form design responsibilities implicated her in potentially unconstitutional action, and might be enjoined under a ruling for the plaintiff. *Id.* (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). Thus, the Secretary's specific duty related to the application form provided the required nexus to name her as a proper defendant. *Id.* That the particular statute at the center of the dispute did not name the Secretary directly was of no consequence; this Court ultimately "located the Secretary's duties to enforce the provision in another section of the Election Code." ROA.10732.

By contrast, other state officials whose responsibilities were wholly unconnected to the challenged vote-by-mail provision were held to be improper defendants. In its *Ex parte Young* analysis, this Court distinguished between the general enforcement authority of the Governor and Attorney General as compared to the Secretary. *Id.* at 180-81. Reasoning that any relevant actions undertaken by the Governor "were exercises of [his] emergency powers unrelated to the Election Code," the Court held the Governor had no connection to the challenged law. *Id.* at 180. Nor was the Attorney General's "general duty to enforce the law" sufficient to trigger the *Ex parte Young* exception. *Id.* at 181.

**a. The Attorney General**

Here, as the District Court correctly held, the "Election Code . . . envision[s], and likely require[s], the Attorney General's participation in enforcement activities" for S.B. 1. ROA.10623. The Attorney General has various statutory duties that form part of S.B. 1's enforcement scheme. Sections 4.06, 4.09, 6.04, 6.05, 6.06, and 7.04, which Plaintiffs challenge, all add new election-related offenses to the Election Code. ROA.10610-10612. Because the Secretary of State is required under the law to report suspicions of these offenses to the Attorney General, Tex. Elec. Code § 31.006(a), the Attorney General plays a role in their enforcement. At the very least, the scope of the Attorney General's investigation and the content of the information reported regarding suspected violations can constrain or influence local officials' prosecution of these offenses. Section 8.01 also authorizes the Attorney General to assess civil penalties on local officials who violate the law by failing to enforce certain provisions of S.B. 1, including provisions that Plaintiffs' challenge. Tex. Elec. Code § 31.129(b). Thus, section 8.01 translates the Attorney General's enforcement authority onto a whole host of other S.B. 1 provisions, by granting him the power to assess civil penalties that "compel or constrain" local officials who implement those provisions. As the District Court concluded, the "Attorney General is now expressly tasked with compelling or constraining under section 8.01," authority that extends to "compel[ling] and constrain[ing] any and all election officials who are subject to civil prosecution for violations of sections 2.05, 2.06,

2.07, 3.04, 3.09, 3.10, 3.12, 3.13, 3.15, 4.01, 4.06, 4.07, 4.12, 5.01, 5.04, 5.07, 5.11, 5.12, 5.13, 5.14, 6.01, and 6.03—all of which establish requirements for election officials as defined under the Election Code." ROA.10620-10621 (internal citations omitted). Plaintiffs challenge all of these provisions.

Furthermore, the law permits and, in some cases, mandates the Attorney General to assist any local District Attorney in enforcing S.B. 1. ROA.10685-10686.[4] For the purposes of this case, therefore, the Attorney General is similar to the Secretary in *TDP II*: Like the Secretary's application form design responsibilities in that case, the Attorney General is here legally required to engage in actions that are critical components of S.B. 1's enforcement matrix.

That the Attorney General retains prosecutorial discretion and must cooperate with local officials to carry out S.B. 1 does not diminish his enforcement responsibility. State Defendants' assertion that the Attorney General "does not have the authority . . . to enforce" S.B. 1 is both legally irrelevant and factually incorrect. *Whole Women's Health* clarified that even officials who *may* take enforcement actions, without a legal obligation to do so, are proper *Ex parte Young* defendants. *Whole Women's Health,* 142 S. Ct. at 535-36. At a minimum, S.B. 1's avenues

[4] Contrary to State Defendants' assertion, *State v. Stephens* did not "foreclose the Attorney General's authority to prosecute election law offenses." ROA.10623-10624. It merely decided this authority was not unilateral. *State v. Stephens*, 2021 WL 5917198 at *8 (Tex. Crim. App. Dec. 15, 2021).

through which the Attorney General can provide assistance to local District Attorneys create such possibilities for shared criminal enforcement. As the District Court noted, Section 8.01 alone casts a wide net that catches a whole host of other provisions in its grasp. ROA.10626. Thus, the Attorney General's obvious ability to play a role in S.B. 1's enforcement is legally sufficient for *Ex parte Young*'s exception to sovereign immunity to apply.

In sum, Plaintiffs have amply alleged that the Attorney General is empowered, and indeed required to, enforce several provisions of S.B. 1, by:

- Collecting fines from counties (Section 2.06) or local election officials (Section 8.01) who fail to comply with S.B. 1;
- Taking "appropriate action" to correct a "reported violation of" S.B. 1 upon referral from the Secretary of State (Section 4.11), thereby granting the Attorney General the authority to enforce all other challenged provisions;
- Acting upon information shared with him about individual voters whose mail-in ballots are rejected (Section 5.15) or who are suspected of voting illegally (Section 2.04);
- Accessing voter assistance forms which the Secretary is required to maintain in order to determine if such assistance was illegal and requires criminal prosecution (Section 6.01); and

- Prosecuting criminal violations of S.B. 1 under his enforcement authority pursuant to Texas Election Code sections 273.001 and 273.021 (including, but not limited to, violations by: election judges of the poll watchers provisions in Sections 4.06 and 4.09, by assistors of the voting assistance provisions in Sections 6.04-6.05, by local officials who illegally rely on third party assistance for vote by mail application distribution in Section 5.04, by individuals who engage in vote harvesting under Section 7.04, and by county officials who implement a curbside voting scheme that contravenes Sections 3.04, 3.09, 3.10, 3.12, and 3.13).

**b. The Secretary of State**

So, too, with the Secretary of State, whose responsibilities here mirror, and exceed, those the Fifth Circuit found had a sufficient enforcement connection in *TDP II*. Article Two of S.B. 1 mandates in no uncertain terms that the Secretary engage in information sharing, voter roll supervision, and reporting of election-related offenses, all of which clearly have the capability to "compel or constrain" local officials in carrying out the challenged provisions. ROA.10598-10600. Article Three requires the Secretary to adopt rules implementing restrictions on voting from vehicles and early voting hours, restrictions that Plaintiffs challenge. ROA.10609-10610. As the District Court found, an injunction directing the Secretary not to adopt

such rules "would compel or constrain local officials . . . who, in turn, must abide by the Secretary's rules." ROA.10610. Furthermore, S.B. 1 *requires* the Secretary to report any of the numerous new election-related offenses created by Section 4.06, 4.09, 6.04, 6.05, and 7.04 to the Attorney General. Plaintiffs challenge each of these provisions. And under Sections 5.02, 5.03, 5.07, and 5.12 the Secretary has ballot, envelope, and online tool design responsibilities directly analogous to those the Fifth Circuit held defeated sovereign immunity at this stage of the litigation in *TDP II*. Plaintiffs challenge each of these as well.[5]

The Secretary's duties do not fall out of the realm of "enforcement" just because they are different than the role of prosecutor or law enforcement officer. State Defendants, for example, argue that sharing information on suspected Election Code violations is insufficient under *Ex parte Young*. This ignores recent precedent. First, in *TARA*, the Fifth Circuit explained that where local officials are required to make use of the Secretary's work product, the Secretary could be said to compel or constrain. 28 F.4th at 673. Here, local officials do not have the option of opting out of compliance with the ballot, envelope, or online tools designed by the Secretary. *See, e.g.*, Tex. Elec. Code § 87.041 (listing criteria all early vote by mail ballots and

[5] Plaintiffs challenge Sections 5.06 and 5.10 under Title II of the ADA and Section 504 of the Rehabilitation Act. The District Court noted that Plaintiffs therefore "may, but need not, rely on the *Ex parte Young* exception to state sovereign immunity to assert claims challenging" these provisions. ROA.10598.

envelopes must meet in order to be accepted by local voting ballot boards). Nor can they simply ignore the Secretary's Article Three early voting and vehicle voting regulations. Second, *TDP II* clarified that behavior that "intimat[es] that formal enforcement [is] on the horizon" is enforcement action. 978 F.3d at 181 (internal cites omitted). Under S.B. 1, when the Secretary shares information on suspected violations with state and local officials, she all but guarantees that enforcement will follow. Since local officials now face penalties of "termination . . . and loss of . . . employment benefits" for failing to adhere to S.B. 1's requirements, the Secretary's unequivocal obligation to report such failures to criminal prosecution undoubtedly "compels or constrains" their behavior. Tex. Elec. Code §§ 31.006, 31.129(c). The District Court noted that such criminal referrals cause local officials to "credibly fear civil prosecution." ROA.10747.[6] And a court order preventing such information sharing would surely constrain the recipients of that information from enforcing provisions of S.B. 1 that Plaintiffs allege are unconstitutional. Thus, while State Defendants are correct that the Secretary is not the only official with the discretion and obligation to enforce S.B. 1, she undoubtedly has the statutory obligation to take enforcement actions in this context.

[6] That such referrals "intimate[] that formal enforcement is on the horizon" is further bolstered by the Attorney General's public commitments to forcefully prosecute violations of S.B. 1. *See supra*, Section II.B.2.

### 2. Defendants have already relayed the demonstrated willingness to enforce S.B. 1 necessary for *Ex parte Young* to apply.

Plaintiffs have successfully shown that State Defendants are willing, and indeed eager, to enforce the challenged provisions. First, in the context of a pre-enforcement challenge to a statute on First Amendment Grounds, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Speech First, Inc. v. Fenves,* 979 F.3d 319, 335 (5th Cir. 2020).[7] Having presented no such compelling evidence to the contrary, State Defendants fail to overcome the presumption of prosecution in this case.

Plaintiffs have presented not only well-pleaded allegations, but also specific evidence from publicly available sources to demonstrate such a threat. Where a public official with enforcement powers sends targeted messaging that specific enforcement actions are "on the horizon," as in this case, a threat of prosecution can be assumed. *TDP II*, 978 F.3d at 181. Whereas "an official's public statement alone" does not establish a likelihood of enforcement, actions which "make a specific threat or indicate that enforcement [is] forthcoming" do. *Id.* (quoting *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020)). In *NiGen Biotech, L.L.C. v. Paxton*, the Attorney General sent "threatening letters" to individual companies he felt were violating the law

[7] Plaintiffs allege that all provisions they challenge other than sections 3.15, 4.06, 4.09, and 6.04 violate the First and Fourteenth Amendments.

which implied legal action was forthcoming, so the plaintiffs had alleged a credible threat of enforcement. 804 F.3d 389, 397 (5th Cir. 2015). In sum, a duty to enforce the law combined with "a demonstrated willingness to exercise that duty" will supply the required connection to overcome a sovereign immunity defense. *Id.* (quoting *Morris*, 739 F.3d at 746).

The actions of the Attorney General and Secretary of State here resemble the "demonstrated willingness" to prosecute seen in *NiGen*. The District Court's opinion meticulously details the Attorney General's own statements and actions demonstrating his intent to prosecute offenses under S.B. 1. ROA.10622-10623. The Attorney General claims to be a "national leader in election integrity" and formed a special "2021 Texas Election Integrity Unit" designed to be a "concentrated effort to" enforce *all* aspects of the Election Code, ROA.10755; he "publicly maintains that one of his key priorities is to investigate and prosecute allegations of voter fraud," and has "publicly stated that 510 election offenses against 43 defendants remain pending and that 386 active election fraud investigations currently exist." ROA.10627-10628. Plaintiffs therefore face direct threat of enforcement.[8] *See TDP*

[8] State Defendants complain that public statements alone cannot support an inference that prosecution is imminent. Br. at 47. Plaintiffs have provided much more than a handful of "public statements" to support the proposition. *See* ROA.6159. Defendants also claim that the Attorney General's prior assistance "prosecuting different defendants under '*different statutes* under *different* circumstances does not show that he is likely to do the same here.'" Br. at 47 (quoting *City of Austin*, 943 F.3d at 1002). Plaintiffs disagree that the Attorney General's prior eagerness to

*II*, 978 F.3d at 181.[9] So, too, with the Secretary of State, who is affirmatively required under the law to take enforcement actions, and to whom the Governor recently transferred $4 million in state funds for the purpose of conducting audits related to state election security. ROA.10751. In addition, the Secretary of State oversees training for poll watchers and issues a certificate of appointment required for poll watchers to assume their posts.[10] The Secretary of State also designed the vote-by-mail application requiring voters to list certain ID information.[11] And the Secretary of State has issued formal Election Advisories to election officials concerning multiple provisions of SB 1 that Plaintiffs challenge, including provisions concerning the new ID requirements for vote-by-mail applications and

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enforce the election code does not show a "demonstrated willingness" to enforce S.B. 1. In any event, Plaintiffs have put forth evidence of a demonstrated willingness to enforce this specific statute. Just six weeks after S.B. 1 was enacted, the Attorney General formed an "Election Integrity Unit," which he described as "a concentrated effort to devote agency lawyers, investigators, support staff, and resources to ensuring [that elections are] run transparently and securely." To suggest these behaviors amount to nothing more than "public statements" without a demonstrated willingness to enforce S.B. 1 strains credulity. ROA.10755.

[9] State Defendants' reference to their position in *Paxton v. Longoria*, 646 S.W.3d 532 (Tex. 2022), does not change this analysis. Br. at 49. *Longoria* concerns the Unlawful Solicitation and Distribution of Application to Vote by Mail subsection of S.B. 1 § 7.04, Tex. Elec. Code § 276.016, and the Attorney General's enforcement of this provision through civil penalties. In the instant litigation, the Attorney General has not expressly disclaimed enforcement of all of S.B. 1's civil penalties. Further, the Texas Supreme Court cabined their discussion of the Attorney General's authority to enforce S.B. 1's civil penalties, stating it "shall have no effect beyond this case." *Longoria*, 646 S.W.3d at 542.

[10] *See* Secretary of State Election Advisory 2022-09.

[11] Secretary of State Form 5-15f.

ballots[12] and early voting hours and locations.[13] There can be no serious doubt that State Defendants have the power to enforce S.B. 1 and the "demonstrated willingness" to do so with vigor.

### 3. The prosecutorial authority of local officials does not diminish the enforcement authority of State Defendants.

A state official need not be the *only* official enforcing a challenged law in order to be a proper *Ex parte Young* defendant. State Defendants mistakenly rely on the prosecutorial discretion afforded local officials in S.B. 1. They seem to argue that because "this Court has been particularly attentive to the fact that 'the Texas Election Code delineates between the authority of the Secretary of State and local officials,'" it follows that for *Ex Parte Young* purposes, "each challenged provision is enforced by local election officials, not the Secretary." Br. at 28 (quoting *TARA*, 28 F.4th at 672). Not so. *Ex parte Young* requires that the official be "*an* . . . official who may or must take enforcement actions" against Plaintiffs who violate the challenged law, not be "*the only official*" who may or must take such action. *Whole Women's Health*, 152 S. Ct. at 535 (emphasis added). *TDP II* was also clear on this point. In analyzing the Secretary's role in the elections process, the Court noted that "[t]hough there is a division of responsibilities, the Secretary has the needed

[12] Secretary of State Election Advisory 2022-08 and 2022-12.
[13] Secretary of State Election Advisory 2022-07.

connection" to be a proper *Ex parte Young* defendant. *TDP II*, 978 F.3d at 180.

Thus, despite State Defendants' assertions to the contrary, that S.B. 1 tasks local officials with some concurrent enforcement actions does not diminish the enforcement duties of State Defendants. As the District Court noted, many of S.B. 1's provisions rely on multiple officials for their enforcement. The Secretary of State, for example, must design ballots and envelopes that local clerks utilize and distribute, as well as collect data on alleged violations of the law for dissemination to local prosecuting authorities. ROA.10605, 10613-10614. But preventing a state official from carrying out their allegedly unconstitutional duties will necessarily "constrain" the ability of others to continue their own S.B.1 enforcement actions.

It is thus of no consequence that local officials play an enforcement role as well. Plaintiffs have demonstrated more than the requisite enforcement connection between S.B. 1's provisions and State Defendants.

### C. Accepting State Defendants' Sovereign Immunity Claims Would Leave No Proper Defendant Responsible for S.B. 1's Enforcement.

State Defendants' sovereign immunity theories invite an absurd outcome in which no valid officer can be sued to provide relief from constitutional violations. State Defendants' arguments try to pass the buck from state officers to local authorities: the Secretary of State cannot be sued because her rules and prescribed forms are but friendly suggestions to local officials; and the Attorney General cannot

be sued because he needs to cooperate with local officials to enforce S.B. 1. At the same time, a number of the same local officials—including the District Attorneys of Dallas County, Harris County, Hidalgo County, and Williamson County; the Travis County Clerk; and the Elections Administrators of Dallas County and Hidalgo County—have asserted before this Court and courts within this circuit that they, too, are entitled to sovereign immunity because they have yet to threaten or initiate any prosecutions for S.B. 1 violations. *See, e.g.*, ROA.1166, 1208, 1557, 4747, 4779. The result is a license for the government to freely violate the Constitution, so long as there happens to be divided authority between state and local authorities. This nonsensical outcome is flatly inconsistent with *Ex parte Young* and *Whole Women's Health*, and it leaves Plaintiffs without any recourse for constitutional violations. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("the *Young* doctrine has been accepted as necessary . . . to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'").

## III. Plaintiffs Have Sufficiently Alleged Standing to Pursue Their Claims.

Plaintiffs invoking a federal court's jurisdiction must establish three requirements to establish standing: (1) an "injury in fact," (2) that is "fairly traceable to the challenged conduct of the defendant[s]," and (3) that is "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). State Defendants do not challenge the District Court's conclusion that plaintiffs have

organizational standing as a result of the injuries they will continue to suffer because of the "drain on [their] resources resulting from counteracting the effects" of S.B. 1. *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000); *see* ROA.10648-10653. Instead, State Defendants contend that Plaintiffs cannot show their injuries are fairly traceable to the enforcement of S.B. 1. They are mistaken.

At the pleading stage, Plaintiffs need only "allege a plausible set of facts establishing jurisdiction." *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012). To establish traceability in an election-law challenge, the defendants must have an "enforcement connection with the challenged statute." *OCA-Greater Hous.*, 867 F.3d at 613 (quoting *Okpalobi v. Foster*, 244 F.3d 405, 427 n.35 (5th Cir. 2001)).

The injuries caused by a Texas election statute are fairly traceable to and redressable by the Secretary and the Attorney General. The Texas Secretary of State is the "'chief election officer of the state.'" *OCA-Greater Hous.*, 867 F.3d at 613 (quoting Tex. Elec. Code § 31.001(a)); *see* ROA.6155. The Secretary's statutory duties include, among other things, providing the service or benefit at issue in this case, namely, voting and voting by mail. *See, e.g.*, Tex. Elec. Code §§ 31.004(a) (directing that the Secretary "assist and advise all election authorities with regard to the application, operation, and interpretation of this code and of the election laws outside this code"), 32.111(a)(1) (requiring the Secretary to "adopt standards of

training in election law and procedure for presiding or alternate election judges"), 31.005(a) (tasking the Secretary with taking "appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's election processes"). These provisions and others reaffirm that the Secretary plays a significant role in enforcing S.B. 1 as part of the Texas Election Code. *See supra* at § II.B.1.a.; *City of Austin*, 943 F.3d at 1002 (noting that in the Fifth Circuit, the Article III standing inquiry and the *Ex parte Young* analysis "significantly overlap").

Plaintiffs have also plausibly alleged that the Attorney General has a sufficient enforcement connection to the challenged provisions by virtue of his statutory duty to prosecute criminal offenses prescribed by the Election Code, *see* Tex. Elec. Code § 273.021; ROA.6157-6159, and his statutory authorization to collect a civil penalty from election officials who violate the Election Code. *See* Tex. Elec. Code § 31.129(b); ROA.6157-6158; *see also supra* at § II.B.1.b.

Defendants selectively quote from the U.S. Supreme Court's decision in *California v. Texas*, 141 S. Ct. 2104 (2021), to suggest that Plaintiffs' showing is deficient. Br. at 51, 53–54. That case is inapposite. *California v. Texas* involved a statutory provision that imposed a monetary penalty for not obtaining minimum essential health insurance coverage, but whose penalty Congress amended to set at zero dollars. *California*, 141 S. Ct. at 2112. The Court emphasized that because there

was effectively no penalty, the penalty provision was not "in effect." *Id.* at 2114. Thus, the plaintiffs could neither show that the defendants nor "*any kind of Government action or conduct* has caused or will cause the injury" of which the plaintiffs complained. *Id.* at 2114 (emphasis added).

*California v. Texas* did not articulate a new standard of traceability. It merely recognized the uncontroversial notion that where a statute's express language bars the defendants (or anyone else) from enforcement, the plaintiff cannot establish standing. *See id.* at 2115 (describing the statute at issue as "textually unenforceable"). Here, by contrast, Plaintiffs have alleged a plausible set of facts establishing that State Defendants have an "enforcement connection" with S.B. 1. *OCA-Greater Houston*, 867 F.3d at 613–14; *see supra* at § II.B.[14]

Defendants contend that certain voter-registration provisions of S.B. 1 are merely "information-sharing requirements that require the Secretary to transmit information" to other entities. Br. at 51–52. Not so. Section 2.05, for example, provides that the Secretary "shall prescribe rules for the administration of" the purging of voter rolls. Tex. Elec. Code § 16.0332(d); *see* ROA.6198. And section

[14] Because *California v. Texas* reaffirmed longstanding tenets of traceability, it does not call into question the Fifth Circuit's decision in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), which applied those tenets. *See id.* at 613 (noting that the facial invalidity of a Texas election statute "is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" (quoting Tex. Elec. Code § 31.001(a))).

2.07 directs the Secretary to provide notice to voter registrars if he determines that a voter on the statewide computerized voter registration list is no longer "a resident of the county in which the voter is registered to vote." Tex. Elec. Code § 18.068(a). Finally, section 2.06 requires the Secretary to sanction a voter registrar if he determines that the registrar failed substantially to comply with his rules or requirements implementing the statewide computerized voter registration list. *Id.* § 18.065(e). Were the Secretary not empowered to enforce the law in these ways, voter registrars' ability to identify and ensure compliance with some of S.B. 1's most deplorable provisions would be severely circumscribed.

Defendants contend that because Plaintiffs have not alleged that they or their members is a voter registrar, section 2.06 (which authorizes the Attorney General to sanction voter registrars who fail to comply with rules regarding the statewide computerized voter registration list) does not harm them. Br. at 51-52. This myopic view of the statute ignores that the threat of sanction by the Attorney General will ensure registrars' compliance with provisions of the law that directly harm Plaintiffs, including the creation of "suspense lists" of voters. *See* ROA.6157-6158. The harm wrought by S.B. 1 is thus directly traceable to the Attorney General's express statutory authority to sanction noncompliant voter registrars. *See* Tex. Elec. Code § 18.065(e).

Defendants' attempt to disclaim any enforcement authority over certain

provisions in Articles 3, 5, and 6 of S.B. 1 are likewise unavailing. Article Six provides, among other things, that those who assist voters must complete a form stating their name and address, relationship to the voter, and whether they "received or accepted any form of compensation or other benefit from a candidate, campaign, or political committee." Tex. Elec. Code § 64.0322(a). The Secretary is required to prescribe the required forms, without which there can be no enforcement of the challenged provisions. *See id.* §§ 64.009(h); 64.0322(b). Similarly, provisions of Article Three require the Secretary to adopt rules pertaining to voting inside a motor vehicle, outdoor polling places, and early voting hours. *See id.* §§43.031(b), 85.061(a), 85.062(b), 85.005(a), 85.006(e), 66.004; *see also* ROA.6199-6200, 6202-6204, 6224-6225. By adopting, implementing, and modifying the relevant rules, the Secretary compels or constrains the local officials who must follow the Secretary's directives. Finally, it is immaterial that Article Five's restrictions on voting by mail do not explicitly identify the Secretary or the Attorney General, because the Election Code makes clear that the Secretary is responsible for prescribing the design and content of vote-by-mail applications and mail ballot carrier envelopes. *See supra* at § II.B.; *see also Ex parte Young*, 209 U.S. at 157 (explaining that a state officer's enforcement authority may "arise out of the general law" or instead may be "specially created by the act itself"); ROA.6219-6220, 6224-6225.

Finally, Defendants insist that the challenged provisions of Articles 4, 7, and

8 are enforced by local prosecutors and that the Attorney General's involvement in the enforcement of these provisions is speculative. Br. at 53–54. As already described, however, it is not. *See supra* at § II.B.1.a.

Accordingly, Plaintiffs have satisfied the standing requirements for their claims.

## CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal for want for jurisdiction, or alternatively, affirm the District Court's order below.

Dated: February 8, 2023

Respectfully Submitted,

*/s/ J. Michael Showalter*

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## CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because this document contains 12,242 words, excluding parts exempted by the Rules.

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*/s/ J. Michael Showalter*
J. Michael Showalter

## CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2023, 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. I certify that counsel for the Plaintiffs-Appellees are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ J. Michael Showalter*
J. Michael Showalter

# *United States Court of Appeals*

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February 13, 2023

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No. 22-50775 consolidated with 22-50777 and 22-50778
La Union del Pueblo v. Nelson, et al.
USDC No. 5:21-CV-844
USDC No. 5:21-CV-848
USDC No. 5:21-CV-920

Dear Mr. Showalter,]

Your electronic brief filed February 8,2023 was filed incorrectly. The brief was filed in 22-50777 only and should have been filed in the main case 22-50775 and applied to the consolidated cases 22-50777 and 22-50778. The clerk's office has refiled it correctly as shown below.

| | |
|---|---|
| 02/08/2023 | APPELLEE'S MEMORANDUM BRIEF FILED by Arc of Texas, Mr. Jeffrey Lamar Clemmons, Delta Sigma Theta Sorority, Incorporated and Houston Area Urban League. Date of service: 02/08/2023 via email - Attorney for Appellees: Berkowitz, Bonifaz, Brown, Clements, Genecin, Ha, Holmes, Hostetler, Katuska, Prowant, Showalter, Spital, Wakschlag; Attorney for Appellants: Cole, Thompson [22-50777] (J. Michael Showalter ) [Entered: 02/08/2023 09:54 PM] |
| 02/08/2023 | APPELLEE'S BRIEF FILED by Arc of Texas, Mr. Jeffrey Lamar Clemmons, Delta Sigma Theta Sorority, Incorporated and Houston Area Urban League in 22-50777. E/Res's Brief deadline satisfied [22-50775, 22-50777, 22-50778] |

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

cc:
Ms. Jessica Ring Amunson
Mr. Eitan Berkowitz
Mr. John C. Bonifaz
Mr. Kenneth Eugene Broughton Jr.
Ms. Whitney A. Brown
Mr. Dayton Campbell-Harris
Mr. Adriel I. Cepeda Derieux
Ms. Sarah Xiyi Chen
Mr. Thomas Paul Clancy
Mr. Ben Clements
Mr. William Francis Cole
Mr. Ryan Vincent Cox
Mr. Aaron J. Curtis
Mr. Zachary Dolling
Mr. Victor Genecin
Mr. Paul Richard Genender
Mr. Derek Ha
Ms. Ashley Alcantara Harris
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Ms. Jennifer A. Holmes
Ms. Courtney Marie Hostetler
Mr. Jason Scott Kanterman
Mr. John Katuska
Mr. Michael Courtney Keats
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Mr. Christian Menefee
Mr. Hani Mirza
Mr. Sean Morales-Doyle
Ms. Nina Perales
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Mr. Edgar Saldivar
Ms. Lisa Snead
Mr. Samuel Spital
Mr. William Thomas Thompson
Mr. Zachary Tripp
Mr. Jerry Vattamala
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