No. 20-50683

In the United States Court of Appeals for the Fifth Circuit

TEXAS DEMOCRATIC PARTY; DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE; EMILY GILBY; TERRELL BLODGETT,
Plaintiffs-Appellees,

v.

RUTH HUGHS,
IN HER OFFICIAL CAPACITY AS THE TEXAS SECRETARY OF STATE,
Defendant-Appellant.

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

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Introduction

On the theory that the Constitution guarantees young voters the right to on-campus, in-person early voting, Plaintiffs demand that local officials be given almost unlimited discretion to choose when and where to set up temporary polling places. Texas recently passed HB 1888 to curtail that discretion after some local officials, in an attempt to influence the vote, abused their power by opening mobile polling places near their supporters.

Plaintiffs' challenge to this anti-electioneering law must be dismissed because the district court lacks jurisdiction over it. Instead of suing the local officials who control the location and operation of polling places, Plaintiffs sued the Texas Secretary of State. As a state official, suits against the Secretary are barred by state sovereign immunity. And the exception to sovereign immunity on which Plaintiffs rely, the *Ex parte Young* doctrine, does not apply here.

The *Ex parte Young* doctrine requires a showing that the Secretary has a particular duty to enforce the challenged laws and that she is likely to do so. Plaintiffs challenge sections 85.062 and 85.064 of the Texas Election Code, which implement HB 1888. Those sections are enforced by local officials, not the Secretary. Under circuit caselaw, that allocation of enforcement responsibility is dispositive—the Secretary is the wrong defendant. That is why this Court has already held that the Secretary does not have a duty to enforce section 85.062. It has said the same about a law that is essentially identical to section 85.064. Plaintiffs do not dispute these points. That is reason enough to reverse the district court.

Precedent also forecloses Plaintiffs' other attempts to connect the Secretary to enforcement. The Secretary sent local officials a summary of her understanding of HB 1888, an advisory document that Plaintiffs characterize as an act of enforcement. But it has long been the law that these kinds of public statements—which make no threat of enforcement—are *not* acts of enforcement. The Court has similarly rejected Plaintiffs' second argument—that the Secretary's general duties under the Election Code connect her to enforcement. Plaintiffs therefore failed to identify a connection to enforcement. They have not shown a likelihood of enforcement, either.

Sovereign immunity similarly bars the requested relief. Plaintiffs want to enjoin the Secretary from enforcing HB 1888. Because local officials enforce that law, Plaintiffs cannot obtain injunctive relief against the Secretary. And without the possibility of injunctive relief, their sought-after declaratory relief must fall away too.

The Court should reverse the district court and direct it to dismiss the case for lack of jurisdiction.

ARGUMENT

I. The Secretary Is Insufficiently Connected to Enforcement of HB 1888.

To invoke the exception to sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908), Plaintiffs must show that the Secretary is sufficiently connected to enforcement of the challenged laws. Blue Br. 11-12; Red Br. 21-22. That means Plaintiffs bear the burden of demonstrating that the Secretary has "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) ("*TDP*");

see Daves v. Dallas County, 984 F.3d 381, 400 (5th Cir. 2020) (recognizing that "recent cases have consistently required" this showing); Red Br. 22 (citing *TDP*). Plaintiffs have not met their burden: The Secretary has no particular duty to enforce HB 1888—locals do. There is no indication that she is likely to enforce it, either.

A. The Secretary does not have a particular duty to enforce HB 1888.

Because the connection-to-enforcement analysis proceeds "provision-by-provision," *TDP*, 978 F.3d at 179, so does the inquiry into the defendant's duty to enforce: "Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, [the Court's] *Young* analysis ends." *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019), *cert. denied*, No. 19-1441, 2021 WL 78079 (U.S. Jan. 11, 2021). If "no state official or agency is named in the statute in question, [the Court] consider[s] whether the state official [defendant] actually has the authority to enforce the challenged law." *Id.*; Blue Br. 12-13. The first question is dispositive here. The challenged law tasks local officials, not the Secretary, with enforcement.

1. Local officials are statutorily tasked with enforcing HB 1888.

It is undisputed that Plaintiffs' challenge to the Election Code focuses on sections 85.062 and 85.064 of the Texas Election Code, as modified by HB 1888. Blue Br. 13. These sections permit "the commissioners court" or "the governing body of [a] political subdivision" to establish temporary polling places for early voting, Tex. Elec. Code § 85.062(a)(1)-(2), to choose the location of those polling places, *id.* at § 85.062(b), and—subject to HB 1888's minimum-opening-hours requirement—to decide when and for how long they are open, *id.* § 85.064(b), (d). The challenged

laws therefore statutorily task local officials with enforcement. Plaintiffs sued the Secretary instead. That is the end of the inquiry—Plaintiffs picked the wrong defendant. Blue Br. 13-14.

The Court has confirmed this conclusion: "The Secretary of State of Texas [] has no connection to the enforcement of . . . Texas Election Code §[] 85.062." *Mi Familia Vota v. Abbott*, 977 F.3d 461, 468 (5th Cir. 2020). *Mi Familia* also held that the Secretary has no connection to the enforcement of section 85.063, *id.*, which provides that "[e]arly voting by personal appearance at each permanent branch polling place shall be conducted on the same days and during the same hours as voting is conducted at the main early voting polling place," Tex. Elec. Code § 85.063. That provision is materially identical to its neighbor, section 85.064, except that section 85.064 swaps out the word "permanent" for the word "temporary." *Id.* § 85.064(b). It follows that if the Secretary does not enforce section 85.063, she does not enforce section 85.064 either. Blue Br. 14.

2. *Mi Familia*'s on-point holding is indistinguishable.

Plaintiffs agree that *City of Austin* controls. *See* Red Br. 3, 21-22, 23, 25-26, 31; ROA.172. They do not dispute that *Mi Familia* held that the Secretary is unconnected to enforcement of section 85.062, or that the holding as to section 85.063 must apply with equal force to section 85.064. Without addressing any of these points, Plaintiffs opine that, "under this Court's precedents, the issuance of [the Secretary's election advisory] is enough, standing *alone*, to demonstrate a sufficient connection between the Secretary and the challenged law, even *before* the Court considers the Secretary's duties." Red Br. 13. Precisely which precedents Plaintiffs had

in mind is unclear—they rely on "*City of Austin*, 943 F.3d at 1001 (citing cases)," *id.* at 13, 23, but do not elaborate further. Nor do they explain why *City of Austin* would announce a controlling two-part test, only to carve out an exception *sub silentio* paragraphs later by "citing cases." At any rate, the Secretary's issuance of an advisory does not distinguish this case from *Mi Familia* because the Secretary "issued an advisory" about the laws challenged in that case as well. *Mi Familia*, 977 F.3d at 463.

Plaintiffs characterize the Secretary's argument as "based on a misreading of . . . *Mi Familia*." Red Br. 28. They do not say what the Secretary misread, but they do describe *Mi Familia* as "turn[ing] on a redressability issue." *Id.* at 29. It does not. The relevant portion of *Mi Familia*—the discussion of the Secretary's enforcement responsibilities in Part II of the opinion—begins with a reference to the "*Ex parte Young*" exception to "sovereign immunity," 977 F.3d at 467, ends with a conclusion as to the Secretary's "connection to . . . enforcement," *id.* at 468, and includes quotations of *Ex parte Young* itself as well as a sovereign-immunity decision from this Circuit, *see id.* at 467 n.17 & 468 n.21. This sovereign-immunity discussion makes no mention of Article III redressability or the plaintiffs' standing to sue the Secretary. Redressability appears later, in Part V—a part on which the Secretary has not relied in this appeal—and only after noting that earlier parts of the opinion dealt with "sovereign immunity." *Id.* at 470. *Mi Familia*'s *Ex parte Young* holding supplies the rule of the decision here and mandates reversal of the district court.

B. Precedent and forfeiture foreclose Plaintiffs' other arguments.

Every other provision Plaintiffs identify as a connection between the Secretary and enforcement of sections 85.062 and 85.064—the election advisory, her job

description, and her general duties—is irrelevant. Under *City of Austin*, the Court considers "whether the state official actually has authority to enforce the challenged law" only if review of the challenged law itself is not dispositive. *City of Austin*, 943 F.3d at 998. Because that review is dispositive here, the "*Young* analysis ends" and there is no basis for the broader analysis Plaintiffs urge. *Id.* In any event, the Court has already rejected the other provisions Plaintiffs proffer as insufficient to connect the Secretary to enforcement.

1. The Secretary's election advisory is not an act of enforcement.

Plaintiffs contend without supporting authority that "a formal Election Advisory *is* enforcement of the law." Red Br. 25. Plaintiffs made only a passing reference to this argument in the district court, and only in relation to the likelihood-of-enforcement requirement: "the Secretary has already issued an Election Advisory regarding the implementation of House Bill 1888, providing more than sufficient evidence of the likelihood of her enforcement." ROA.173; *see* Blue Br. 21. Plaintiffs therefore forfeited the argument through inadequate briefing in the district court. *See Union Pac. R.R. Co. v. La. Pub. Serv. Comm'n*, 662 F.3d 336, 340 (5th Cir. 2011) (per curiam) (explaining that arguments relating to sovereign immunity may be abandoned even though the immunity is jurisdictional); *United States v. Green*, 964 F.2d 365, 371 (5th Cir. 1992) (holding that appellant waived an argument when he referred to it "in one sentence and fail[ed] to provide any analysis whatsoever on the issue").

Plaintiffs' reliance on the advisory as the connection to enforcement—and the five reasons Plaintiffs offer in support—also fails on the merits. Enforcement "typically involv[es] compulsion or constraint." *City of Austin*, 943 F.3d at 1000. As a

result, "an official's public statement alone" does not "establish[] authority to enforce a law . . . for *Young* purposes." *TDP*, 978 F.3d at 181; Blue Br. 21-22.

Nevertheless, Plaintiffs first argue that election advisories "carry . . . weight" because they "are issued pursuant to" the Secretary's general duty to "*obtain and maintain* uniformity in the application, operation, and interpretation" of election laws. Red Br. 23 (quoting Tex. Elec. Code § 31.003). Plaintiffs' premise—that the advisory was issued pursuant to section 31.003—is suspect. They do not explain why the document—called an "advisory" and prepared to "*advise* [officials] of some changes in the law," ROA.209 (emphasis added)—springs from section 31.003 rather than, say, the Secretary's separate obligation to "assist and *advise* all election authorities with regard to" election law, Tex. Elec. Code § 31.004(a) (emphasis added), or why the advisory is not simply "divorced from any specific statutory authority" like "the letter from the Attorney General at issue in [*TDP*]." Red Br. 23.

This questionable assumption permeates and undermines Plaintiffs' second assertion—that advisories are "binding as a matter of law" because they "flow from [the Secretary's] specific statutory authority under [section] 31.003." *Id.* They identify no caselaw supporting this contention either, only non-expert testimony and factual allegations. *See id.* at 23-24 (quoting a declaration offered in the district court and testimony in another case). Whether advisories are binding "as a matter of law," however, *id.* at 23, is necessarily a "legal conclusion" that cannot be "couched as a

factual allegation," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). So "[P]laintiffs' assertion . . . [is] not entitled to the assumption of truth." *Id.* at 680.[1]

"Advice," of course, is generally not binding on the recipient, which is why Article III courts do not render advisory opinions. *See, e.g.*, *Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.2d 962, 969 (5th Cir. 1993); *Opinion*, Black's Law Dictionary (11th ed. 2019) (def. 1) (defining "advisory opinion" as a "nonbinding statement by a court of its interpretation of the law"). The ordinary sense of the word as connoting nonbinding guidance also explains why Texas courts have taken a dim view of the argument that a recipient of "the Secretary of State's assistance and advice" "lack[s] the authority to then form and act upon her own ultimate legal judgment." *In re Stalder*, 540 S.W.3d 215, 218 n.9 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

Assuming the advisory is an order with the force of law, it would still not be an act of enforcement. "The power to promulgate law is not the power to enforce it." *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020), *judgment vacated on other grounds sub nom. Planned Parenthood v. Abbott*, No. 20-305, 2021 WL 231539 (U.S. Jan. 25, 2021); *see Mi Familia*, 977 F.3d at 467 ("[T]he statutory authority . . . to issue, amend or

[1] In addition to being irrelevant, Plaintiffs' reliance on testimony in *Richardson v. Texas Secretary of State*, No. SA-19-cv-00963, 2020 WL 5367216 (W.D. Tex. Sept. 8, 2020), is improper and should be disregarded. *See* Red Br. 24. That testimony is not part of the record on appeal in this case and "a court cannot take judicial notice of the factual findings of another court." *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998). In any event, *Richardson* has been stayed pending appeal because "[t]he Secretary is likely to prevail in her defense [of] sovereign immunity." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 241 (5th Cir. 2020).

rescind an Executive Order is not the power to enforce it." (footnote and quotation marks omitted)). In *Daves*, for example, state-district-court judges' "promulgation of [a] bail schedule d[id] not equate to enforcement of it." 984 F.3d at 400. "Instead, enforcement of the bail schedules [fell] on the Magistrate Judges." *Id.* That meant that the magistrate judges were appropriate *Ex parte Young* defendants, but district-court judges were not. *Id.* Likewise, if the advisory in this case were binding, Plaintiffs agree that local officials, not the Secretary, would give it effect. *See* Red. Br. 23.

Third, Plaintiffs consider it relevant that the advisory is related to "specific statutory authority." *Id.* This contention cannot transform the advisory's summary of HB 1888 into *enforcement* of that law; it does not alter the *City of Austin* analysis; and it does not overcome the rejection of the same facts in *Mi Familia*. Part I.A.2, *supra*. In *Mi Familia*, the Governor's binding executive order was also issued under his "statutory authority." 977 F.3d at 467. But just like the Secretary, he was not connected to the enforcement of section 85.062 of the Election Code. *Id.* at 468.

Fourth, Plaintiffs claim that "[t]he issuance of Election Advisory 2019-20 compels elections officials to eliminate mobile voting locations, constraining Plaintiffs' right to vote." Red Br. 26. Plaintiffs' own allegations contradict this claim. For one, it is difficult to square with the material incorporated into one of the complaints, which indicates that at least one county *does* plan on offering mobile-voting sites, regardless of the advisory. Blue Br. 20. Plaintiffs do not address this issue, instead relying heavily on a declaration written by the Travis County Clerk and submitted to the district court. *E.g.*, Red Br. 6-7, 8, 19-20, 23-24. The clerk mentions the Secretary's advisory early in the declaration. ROA.204 ¶ 6. Later in the document, the

clerk opines that there will be a reduction in mobile voting in the 2020 election. ROA.206-07 ¶ 16. But the reasons she gives relate to local officials' enforcement of HB 1888 itself, not of the advisory. For example, she writes four times that "unless HB 1888 is enjoined," there will be some effect on Travis County, with no mention of the advisory or the Secretary's role in enforcement. ROA.206-07 ¶¶ 16, 17. And she says that "HB 1888"—not the advisory or Secretary—"will require us to offer fewer early voting locations." ROA.207 ¶ 16. Plaintiffs' characterization of the effect of the advisory therefore lacks record support.

Plaintiffs' fifth and final advisory-related argument draws on a line of cases finding a connection to enforcement from "threatening" letters. Red Br. 26-27. Plaintiffs reference "the Secretary's threatened enforcement of [HB 1888]," *id.* at 20, but there are no allegations in the record of threats to enforce HB 1888, and their "characteriz[ation]" of the Secretary's "guidance as a threat" does not make it so. *TDP*, 978 F.3d at 175; *see* Blue Br. 23. The advisory itself is not threatening because it does "not make a specific threat or indicate that enforcement was forthcoming." *TDP*, 978 F.3d at 181; *see* Blue Br. 23-24. As one of the complaints concedes, the advisory is nothing more than a "description of the legislation's operation." ROA.1449 ¶ 15; *accord* ROA.1448 ¶ 14; s*ee also* Red Br. 5-6.

Plaintiffs' response to this point is that it "is simply untrue" and that the advisory "*is* enforcement." Red Br. 25. Moreover, Plaintiffs dismiss (at 26) as "of no moment" the Secretary's observation (*see* Blue Br. 23) that the advisory "was sent to . . . election officials, not to the plaintiffs," *TDP*, 978 F.3d at 181, even though *TDP* considered the fact relevant in its enforcement analysis, *see id.* Plaintiffs cannot

carry their burden of overcoming sovereign immunity, *see Raj v. La. State Univ.*, 714 F.3d 322, 327-28 (5th Cir. 2013), by insisting that this Court's caselaw is wrong.

2. The Secretary's job description is irrelevant.

The district court relied on section 31.001's description of the Secretary as the "chief election officer of the state" to find a connection to enforcement. Tex. Elec. Code § 31.001(a); ROA.1193–94. That was in error. *See* Blue Br. 14-15. Plaintiffs correctly observe that this Court also relied on section 31.001 to support a finding of standing in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). Red Br. 30-31. They defend the district court's extension of that holding to the connection-to-enforcement inquiry by noting the overlap between standing and *Ex parte Young* and asserting that "it would make little sense to hold" differently in the sovereign immunity context. *Id.* at 31-32; *cf.* Blue Br. 16-19 (the Secretary's unaddressed arguments that *OCA* is inapplicable here). This attempt to fuse the two inquiries is at odds with Plaintiffs' efforts to distinguish *Mi Familia* based on the *differences* between the doctrines. Red Br. 29; Part I.A.2, *supra*. What's more, Plaintiffs' appeal to "sense" overlooks that the Court *has* held that section 31.001 is insufficient for *Ex parte Young* purposes. Blue Br. 15 (quoting *TDP*, 978 F.3d at 179); *id.* at 27.

According to Plaintiffs, their view that the Secretary' status as "chief election officer" makes her a proper defendant is "consistent with decades of voting rights jurisprudence in Texas and this Circuit." Red Br. 9; *see id.* at 9-10. Because none of the cited cases concern sovereign immunity or *Ex parte Young*, none of them help Plaintiffs here. In fact, one case was reversed by the Fifth Circuit, *see Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013), and in another the Secretary was not even

"a party to th[e] suit," *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006).

3. The Secretary's general duties do not contain a specific duty to enforce HB 1888.

Additionally, Plaintiffs claim that the Secretary is connected to enforcement by virtue of (1) her duty to "obtain and maintain uniformity in the application, operation, and interpretation of [the Election] [C]ode," because she prepares "directives and instructions," Tex. Elec. Code § 31.003, and (2) her power to "take appropriate action to protect [] voting rights" by "order[ing]" a "person to correct [] offending conduct" or asking the attorney general to bring proceedings, *id.* § 31.005; *see* Red Br. 27-30.

Plaintiffs forfeited the argument about section 31.005 because they did not raise it in the district court. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 (5th Cir. 2002); *compare* ROA.119 (Secretary's motion to dismiss, arguing that section 31.005 cannot be used to "coerce a local official in a case like this"), *with* ROA.172-75 (Plaintiffs' brief in opposition, saying nothing about section 31.005). And they forfeited their theory as to why section 31.003 supplies a "specific and relevant duty" through inadequate briefing below. Blue Br. 16. In any event, both arguments conflict with precedent. Both arguments, for example, failed in *Mi Familia*. *Id.* at 15-16; *see* Br. for Plaintiffs-Appellants at 51-52, *Mi Familia Vota v. Abbott*, 2020 WL 5759845 (5th Cir. Sept. 18, 2020) (No. 20-50793) (raising the same arguments about sections 31.003 and 31.005). That's because "the general duty to see that the laws of the state

are implemented" is not enough to establish a connection to enforcement. *City of Austin*, 943 F.3d at 999-1000 (quotation marks omitted).

Plaintiffs assert that section 31.003 is "much more than" a general duty because it appears in a statute. Red Br. 27-28. But Plaintiffs do not supply legal authority for this assertion; nor could they, given that *TDP* identified section 31.003 as one of "[t]he Secretary's general duties" and acknowledged that "the Secretary's duty to 'obtain and maintain' uniformity in the application of the Election Code is not 'a delegation of authority to care for any [*i.e.*, every] breakdown in the election process.'" 978 F.3d at 180 (quoting *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972)) (alteration in original).

Nor do Plaintiffs explain why *TDP* would recognize that "the Texas Election Code delineates between the authority of the Secretary of State and local officials," or why the Court would mandate a "provision-by-provision analysis" of the Code, *id.* at 179, if sections 31.003 and 31.005 were always enough to connect the Secretary to every provision of the Code. *See* Blue Br. 15. And, as above, if Plaintiffs are correct that the Secretary implements section 31.003 by passing binding rules, that section cannot supply the required connection to enforcement. Part I.B.1, *supra*.

Plaintiffs again string-cite cases that do not alter the analysis, claiming that the Secretary has "ignor[ed]" them. Red Br. 29; *see id.* at 29-30. None of the Fifth Circuit decisions they cite discuss *Ex parte Young*. One of the district-court cases is a suit against the Louisiana Governor and Attorney General. *See Hall v. Louisiana*, 983 F. Supp. 2d 820 (M.D. La. 2013). Yet Plaintiffs devote nearly half of the next page of their brief arguing that caselaw about other States' public officials cannot apply to

the Secretary. *See* Red Br. 31 n.7. Next, they identify a district-court decision granting the Secretary's motion to dismiss because Plaintiffs TDP, DSCC, and DCCC do not have standing to sue her—a holding Plaintiffs have not appealed. *See Miller v. Hughs*, 471 F. Supp. 3d 768, 776 (W.D. Tex. 2020). Last, they cite *Texas Democratic Party v. Hughs*, 474 F. Supp. 3d 849 (W.D. Tex. 2020), a case in the same district court as this one, making the same mistake it made here. *Id.* at 853-54. The Secretary has not ignored that case; she has appealed it. And in that appeal, a panel of this Court has already held that standing cases like *OCA-Greater Houston* are not dispositive of the sovereign-immunity issue. *See Tex. Democratic Party v. Hughs*, 974 F.3d 570 (5th Cir. 2020) (per curiam).

C. The Secretary has not demonstrated a willingness to enforce HB 1888.

Assuming some relevant duty exists, the "mere fact" that the Secretary "*has* the authority to enforce" sections 85.062 and 85.064, *City of Austin*, 943 F.3d at 1001, is insufficient to show a "demonstrated willingness" to exercise that duty, *TDP*, 978 F.3d at 179. Past "specific enforcement actions" will sometimes suffice for that purpose. *City of Austin*, 943 F.3d at 1001. But Plaintiffs concede that "the Secretary has not yet instituted" any proceedings "to compel compliance with Election Advisory 2019-20." Red Br. 25 n.5.

Plaintiffs consider such a showing unnecessary because local officials have so far followed the law. *Id.* As Plaintiffs acknowledge, however, *NiGen*—the lone case on which they rely—stands only for the proposition that "*Ex parte Young* [may be] satisfied" where the official "ha[s] sent letters threatening prosecution." *Id.* (citing

NiGen Biotech, L.L.C. v. Paxton, 804 F.3d 389, 395 (5th Cir. 2015)). The Secretary has not threatened prosecution here. Part I.B.1, *supra*. And just as the advisory does not "establish[] [her] authority to enforce [the] law," it does not establish "the likelihood of [her] doing so" either. *TDP*, 978 F.3d at 181; *see* Blue Br. 21-24.

Plaintiffs next point out that the Attorney General sued local officials last year for breaking mail-in voting laws. Red Br. 6. That fact never makes it past Plaintiffs' Statement of the Case because it does not appear in the record, it was not presented to the district court, and the conduct regarding "*different* statutes under *different* circumstances does not show that [the Secretary] is likely to [engage in enforcement] here." *City of Austin*, 943 F.3d at 1002. In any event, litigation that post-dates Plaintiffs' complaints is irrelevant because jurisdictional questions like sovereign immunity "depend[] on the facts *as they exist when the complaint is filed*." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (plurality op.).

The record is therefore devoid of allegations or evidence demonstrating that the Secretary is likely to enforce sections 85.062 and 85.064. And "[s]peculation" alone "is inadequate to support an *Ex parte Young* action." *In re Abbott*, 956 F.3d at 709.

II. The Relief Plaintiffs Request Is Unavailable Under *Ex parte Young*.

As cases like *Mi Familia* show, a plaintiff may not rely on *Ex parte Young* if the injunctive or prohibitory relief she requests will not bind the officials enforcing the challenged law. That makes those kinds of relief—the only kinds Plaintiffs seek—unavailable here.

A. Injunctive relief is unavailable because local officials, who are not defendants, enforce HB 1888.

The parties agree that Plaintiffs do not seek a mandatory injunction—that is, an order that the Secretary engage in specific affirmative action. Blue Br. 25; Red Br. 17. And Plaintiffs no longer argue, as they did in the district court, that an injunction against the Secretary "would . . . bind local officials." ROA.172; Blue Br. 25; Red Br. 17-18 (describing the issue as "a red herring"). That presents a problem: Plaintiffs seek an injunction prohibiting the Secretary from enforcing HB 1888. ROA.107; ROA.1453. Local officials, not the Secretary, enforce HB 1888. Local officials are not defendants to this suit. And a prohibitory injunction in this case will not bind local officials. Plaintiffs picked the wrong *Ex parte Young* defendant. Blue Br. 24-28.

1. Plaintiffs characterize this issue as a question of standing not properly before the Court. Red Br. 18-20; *id.* at 33. As they recognize, however, there are "certain[] notable similarities between [standing and *Ex parte Young*]." *City of Austin*, 943 F.3d at 1002; *see* Red Br. 30. But the overlap is not perfect because the two doctrines serve different purposes.

For example, the redressability requirement (like other prerequisites for Article III standing) ensures that courts do not render advisory opinions. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993). Even when a plaintiff has standing, however, she must still satisfy *Ex parte Young*'s narrow exception to sovereign immunity, which permits a federal court to "to do nothing more" than "command[] a state official" to "refrain from violating federal law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). As a result, regardless of

standing, the "state officer who was made a party" must have a "close official connection" to the challenged law, "or else [the lawsuit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party," in violation of sovereign immunity. *Ex parte Young*, 209 U.S. at 156-57; *see City of Austin*, 943 F.3d at 997 (similar).

That is why *Mi Familia* holds that when a plaintiff seeks injunctive relief under *Ex parte Young*, "such an injunction must be directed to those who have the authority to enforce those statutes." 977 F.3d at 468. When it comes to situating polling places, "[t]hat responsibility falls on local officials." *Id.* Plaintiffs' response—a line from a standing opinion, *see* Red Br. 19-20—confuses redressability with the separate and distinct *Ex parte Young* inquiry set out in *Mi Familia*.

2. Moreover, the "facts" that Plaintiffs contend "distinguish the case here from *Mi Familia*," Red Br. 19, are not facts at all but a misstatement of the county clerk's declaration. Plaintiffs claim that the declaration "demonstrat[es] that [the clerk] would utilize mobile voting locations *but for the Secretary's enforcement of HB 1888*." *Id.* (citing "DeBeauvoir Decl. ¶¶ 16-17"); *see id.* at 20 ("[A]t least [one] county has affirmed that it would offer them, but for HB 1888 and the Secretary's threatened enforcement of it."). Not so. As explained above, *see* Part I.B.1, *supra*, references to the Secretary are notably absent from the cited portions of the declaration:

> [*U*]*nless HB 1888 (2019) is enjoined*, there will be far fewer early voting locations available in Travis County in 2020. Accordingly, without question, *HB 1888 will require us* to offer fewer early voting locations, making access to early voting less equal, less convenient, and less accessible than it was before HB 1888.

> . . . For example, *unless HB 1888 is enjoined*, Travis County likely will not be able to place an early voting location on Austin Community College's . . . campuses . . . . Similarly, *unless HB 1888 is enjoined*, Travis County likely will not be able to place an on-campus early voting at Huston-Tillotson University or St. Edwards University. Also similarly, *unless HB 1888 is enjoined*, Travis County likely will not be able to place an early voting location at the Westminster senior living facility.

ROA.206-07 ¶¶ 16-17 (emphases added).

Even with every inference to which Plaintiffs are entitled, this paragraph does not establish the link Plaintiffs describe between the Secretary and the availability of mobile voting. There is no allegation that the clerk would violate the Election Code were it not for the advisory or the possibility of some enforcement action by the Secretary. To the contrary, the clerk confirms that HB 1888's amendments to the Election Code bind local officials of their own force, independent of the advisory: "HB 1888"—not the Secretary—"will require" modifications to temporary polling places. ROA.207 ¶ 16. The number of voting locations may change "unless HB 1888"—not the Secretary's advisory—"is enjoined." ROA.206-07 ¶ 16.

The complaints' silence as to the advisory similarly suggests that it is not the roadblock to relief Plaintiffs now say it is. Plaintiffs describe in detail "[t]he passage of HB 1888 and its harm." ROA.99 (emphasis and capitalization altered). They allege "[t]he bill has already produced . . . significant harm." ROA.101 ¶ 37. "Temporary early voting locations . . . at college locations," Plaintiffs contend, "are also likely to be closed . . . as a result of HB 1888." ROA. 102 ¶ 37. It is "HB 1888's prohibition on temporary early voting locations" that Plaintiffs believe furthers "no legitimate interest." ROA.103 ¶ 44. And Plaintiffs say they need relief for those

"who live on or near college and university campuses that previously hosted temporary early voting locations and have been banned from doing so under HB 1888." ROA.104 ¶ 45. The Secretary is not mentioned because "HB 1888's mechanism for th[e] attack on temporary polling places" is not the advisory, but "the addition of a new requirement to Section 85.064 of the Texas Election Code." ROA.1444 ¶ 2. In place of the Secretary, the complaints describe how *local* enforcement of the Election Code gives life to HB 1888. Blue Br. 20.

Thus, the record does not bear out Plaintiffs' new theory that the advisory is the real target of the lawsuit. In that sense, Plaintiffs are correct that *Mi Familia* is distinguishable—this case is more clear-cut. There, a prohibitory injunction against the Secretary would at least have left local officials with some discretion. *Id.* at 26. Even then, that was not enough because it would not "require *counties*" to do what plaintiffs wanted. *Mi Familia*, 977 F.3d at 468 (emphasis modified); Blue Br. 26-27. Here, Plaintiffs claim "the counties are *categorically prohibited* from offering mobile locations." Red Br. 20. Given that HB 1888 binds local officials regardless of the Secretary's involvement, and because an injunction against the Secretary would not run against those officials, counties would *remain* "categorically prohibited" even if the district court issued an injunction in this case.

Plaintiffs therefore have no basis in law or fact to argue that "elections officials will once again have the power to offer [mobile] locations" "[i]f Plaintiffs[] are successful in obtaining an injunction." *Id.*; *see id.* at 17. As in *Mi Familia*, if Plaintiffs want to stop enforcement of HB 1888, they must sue local officials. *See* 977 F.3d at 468. Plaintiffs cannot obtain a prohibitory injunction against the Secretary. They

cannot get a mandatory injunction either: Plaintiffs are clear that they have not asked for one. Red Br. 17, 20. And any attempt to obtain an injunction requiring "official affirmative action," such as "an order requiring [the Secretary] to withdraw [her] advice," is categorically barred by sovereign immunity. *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam); Blue Br. 24.

3. Even if Plaintiffs are correct that they have a standing problem rather than an *Ex parte Young* deficit, reversal would still be required. The Court has the power to dismiss for lack of standing even when the appeal is interlocutory or, as here, brought under the collateral-order doctrine. *E.g.*, *City of Austin*, 943 F.3d at 1003 n.3; *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001) ("[D]espite the limited nature of [the] Rule 23(f) appeal," "this court has the duty to determine whether standing exists even if not raised by the parties.").

B. The request for declaratory relief fares no better.

The request for declaratory relief shares the same flaws as the requested injunction—it would not bind or affect the officials who implement the temporary-polling-place laws Plaintiffs challenge. Blue Br. 29.

In addition, because injunctive relief is unavailable, any declaratory relief would be impermissibly retrospective. *Id.* (quoting *Freedom from Religion Found. v. Abbott*, 955 F.3d 417, 425–26 (5th Cir. 2020)); *cf. Tex. Emp'rs' Ins. Ass'n v. Jackson*, 862 F.2d 491, 505-06 (5th Cir. 1988) (en banc) (holding that, when federalism concerns are implicated, declaratory relief is just as impermissible as an injunction). Plaintiffs characterize this argument as "illogical" and "ha[ving] no basis in case law." Red Br. 34. But they do not discuss *Freedom from Religion* or explain why they believe the

Secretary's reliance on that case is misplaced. They do not dispute that declaratory relief becomes retrospective when injunctive relief falls away. *See, e.g.*, *Green v. Mansour*, 474 U.S. 64, 67 (1985). Nor do they not dispute that retrospective relief is unavailable under *Ex parte Young*. *See id.* at 68.

Finally, Plaintiffs insist that their "identifi[cation] [of] an ongoing violation arising from laws or orders already in existence" means it would "def[y] logic" and violate *Ex parte Young*'s "straightforward inquiry" requirement for their declaratory relief to be dismissed. Red Br. 34. This Court, sitting en banc, has held otherwise. Plaintiffs' current theory is that the relief they seek will strip the advisory of its purportedly binding effect. *Id.* at 19-20. In *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460 (5th Cir. 2020) (en banc), however, where the plaintiff also asked for declaratory relief, the Court explained that "the voiding of a final state agency order [] is quintessentially retrospective and thus out of bounds under *Young*." *Id*. at 473 (quotation marks omitted). So too here.

Conclusion

The Court should reverse the district court's denial of sovereign immunity and remand to the district court with instructions to dismiss Plaintiffs' claims.

Respectfully submitted.

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Certificate of Service

On February 3, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,041 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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