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
Civil Action No. 1:19-cv-1063-LY

BRIEF OF PLAINTIFFS-APPELLEES TEXAS DEMOCRATIC PARTY, DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, EMILY GILBY, AND TERRELL BLODGETT

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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 Fifth Circuit 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:

Plaintiffs-Appellees

1. Texas Democratic Party: no parent corporation or stock.
2. Democratic Senatorial Campaign Committee a/k/a DSCC: no parent corporation or stock.
3. Democratic Congressional Campaign Committee a/k/a DCCC: no parent corporation or stock.

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Because Defendant-Appellant and her attorneys are government entities, disclosure is unnecessary under the fourth sentence of Fifth Circuit Rule 28.2.1.

/s/ Marc E. Elias

STATEMENT REGARDING ORAL ARGUMENT

The issue in this appeal is not novel or particularly complex. It does, however, stand to have a profound impact on how parties litigate cases implicating the fundamental right to vote in Texas federal courts. Although Plaintiffs-Appellees are of the view that the question was settled by prior decisions of this Court, the Secretary sought interlocutory review on this issue, claiming that she was entitled to sovereign immunity under the Eleventh Amendment because she had no connection to the enforcement of a Texas election law. That appeal effectively stayed this case, foreclosing the possibility of having the matter considered on the merits in time for the November election. Absent clear and unequivocal direction from this Court regarding the Texas Secretary of State's relationship to Texas election laws, there is a serious threat that the Secretary's contention will continue to needlessly complicate and delay this and other voting rights cases in the future. Oral argument would help ensure that this important matter is thoroughly considered on an accurate record.

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TO THE HONORABLE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT:

The question this appeal presents is simple: does the Eleventh Amendment bar Plaintiffs-Appellees' suit against the Texas Secretary of State (the "Secretary") in a case challenging a Texas election law that the Secretary has taken formal, affirmative steps to enforce pursuant to her statutory authority? The answer is, plainly, no. Under the longstanding *Ex parte Young* framework, private parties may bring suits for injunctive

or declaratory relief against state officials acting in violation of federal law, consistent with the Eleventh Amendment.

To determine whether *Ex parte Young* applies, this Court asks two questions. *First*, do the plaintiffs allege an ongoing violation of federal law and do they seek relief properly characterized as prospective? Here, the answer is clearly yes. At issue is a recent Texas election law, Texas House Bill 1888 ("HB 1888"), which modified Texas Election Code § 83.064 to prevent elections officials from utilizing "mobile" or "temporary" early voting locations, locations open for fewer hours and/or days rather than open for the entirety of the early voting period. Elections officials had, prior to HB 1888, used these locations to provide more robust early voting opportunities for individuals whose personal circumstances would otherwise make the burden of traveling to a polling place especially difficult, including young and elderly voters. Plaintiffs sued, alleging that HB 1888 violates the Twenty Sixth Amendment's prohibition on laws that unconstitutionally abridge the right to vote on account of age and also unconstitutionally burdens the right to vote under the First and Fourteenth Amendments—allegations that must be taken as true at these stage in the proceedings because this appeal is taken from the order denying the Secretary's motion to dismiss, *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012). Moreover, Plaintiffs sought solely prospective injunctive and declaratory relief. To

the extent the Secretary argues otherwise, her arguments are easily rejected.

This triggers the *second* question relevant to the *Ex parte Young* analysis. Does the official in question—here, the Secretary—have "some connection [to] the enforcement" of the challenged act to authorize the suit against them? *Ex parte Young*, 209 U.S. 123, 157 (1908). As this Court noted recently in *Texas Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020), although "[t]he precise scope of the requirement for a connection has not been defined," it has long been understood that the nexus need not be all-inclusive or overwhelming. A mere "'scintilla of enforcement' by the relevant state official with respect to the challenged law' will do." *Id.* (quoting *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019)).

Therefore, this, too, does not present a difficult question in this case: the Secretary has used her authority under the Texas Election Code to issue a formal directive mandating the elimination of mobile polling locations pursuant to HB 1888. In addition, the Secretary's role as Texas's "chief election officer"—both in practice and as prescribed by the Texas Election Code, *see* Tex. Elec. Code § 31.003—makes indisputable that she has more than the minimum connection necessary to thwart immunity.

Nevertheless, the Secretary persists in claiming that she has been wrongfully hauled into court and is entitled to the protections of

sovereign immunity. The Secretary is wrong. The district court's denial of the motion to dismiss should be affirmed, and this matter remanded so that it may proceed to consideration on the merits.

ISSUE PRESENTED

1. Does the *Ex parte Young* exception to sovereign immunity apply in this lawsuit challenging a law that the Texas Secretary of State has taken formal steps to enforce, and which has violated and continues to violate Plaintiffs' constitutional rights?

STATEMENT OF THE CASE

I. THE SECRETARY ENFORCES HB 1888, WHICH INJURES PLAINTIFFS AND COUNTLESS OTHER TEXAS VOTERS BY MAKING IT MORE DIFFICULT FOR THEM TO EXERCISE THEIR RIGHT TO VOTE.

This action challenges HB 1888, a law that, in September 2019, drastically changed election administration in Texas, forbidding elections officials from offering "mobile" or "temporary" polling places during early voting, permitting only fulltime locations that stay open during the entire early voting period. ROA.89-90. Prior to HB 1888's passage, the flexibility to utilize temporary polling places had enabled elections officials to offer early voting at minimal cost to help ensure equal opportunity to cast a ballot for citizens whose personal circumstances would otherwise make the burden of traveling to a permanent polling place especially difficult, including young and elderly voters. The passage of HB 1888, and the immediate and unequivocal steps that the Secretary took to enforce it,

changed all of that. As a result, countless Texas voters, including Plaintiffs, have found it more difficult, and in some cases, impossible, to vote.

Immediately after HB 1888's passage, the Secretary took formal, affirmative steps to enforce the new law and stop the use of mobile or temporary polling locations in Texas. This action was consistent with her role as the State's "chief election officer," and the Texas Election Code's explicit mandate that the Secretary "shall obtain and maintain uniformity in the application, operation, and interpretation of" the Texas Election Code, and "[i]n performing this duty, . . . shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code." Tex. Elec. Code § 31.003. Consistent with this duty, on October 9, 2019, the Secretary issued a detailed election advisory to all of Texas's elections officials, instructing them on what they must do to comply with the law. *See* Texas Sec'y of State, "Temporary Branch Locations and County Election Precincts and Polling Places – NEW LAW: House Bill 1888 and House Bill 1048" ("Election Advisory 2019-20"), ROA.209-214.

The Secretary made it unmistakably clear that elections officials no longer had the discretion to offer mobile or temporary polling locations. *See* Election Advisory 2019-20 at ROA.209 ("[HB 1888] eliminated the concept of 'mobile voting' by now requiring all temporary branch polling places to remain open at the same fixed location for the duration of the

early voting period."); *id.* at ROA.211 ("Once a temporary branch polling place is established, it must be open for all of the same weekdays as the main early voting location."). If an elections official were to reject the Advisory and act in violation of it, the Secretary has the explicit power to, through the Texas Attorney General, "bring a suit in her name to obtain a writ of mandamus against any county official who refuses to follow her interpretations of the voting laws." *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 831 (S.D. Tex. 2012), *rev'd and remanded sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (reversed and remanded on other grounds). Indeed, just this past election cycle the Secretary directed the Attorney General to sue the Harris County Clerk for seeking to send vote by mail applications to every voter in the county under the age of 65 despite the Secretary's guidance. *See State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *2 (Tex. Oct. 7, 2020).

HB 1888 and the Secretary's Election Advisory had an immediate and deleterious effect on access to voting for many vulnerable Texas voters, including Plaintiffs. For example, in the 2018 general election Travis County offered sixty-one temporary locations along with twenty-nine fulltime early voting locations. Decl. of Dana DeBeauvoir ¶ 11 ("DeBeauvoir Decl."), ROA.203-207. As a result of the ensuing passage of HB 1888 and the Secretary's enforcement of the same, Travis County was only able to offer 30 fulltime early voting locations in total in the higher-turnout 2020 general election. *See* Travis County Clerk, *Travis County*

Early Voting Locations for the November 3, 2020 General Election, 19 available at https://countyclerk.traviscountytx.gov/images//pdfs/notice_of_elections/2020.11.03/ORDER_CALLING_AN_ELECTION-__ENGLISH_and_SPANISH_Combined.pdf.[1] Plaintiff Terrell Blodgett, a 96-year-old veteran who spent a lifetime in government service, was unable to vote in November 2019 because the mobile polling location that had historically been present at his assisted living center disappeared. ROA.1449-50. Other voters who previously relied on mobile polling locations have faced and will continue to face transportation hurdles and increased travel time to vote because of HB 1888 and the Secretary's enforcement of it, including Plaintiff Emily Gilby and other members and supporters of the TDP, DSCC, and DCCC (the "Organizational Plaintiffs"). ROA.93-96. In sum, HB 1888, and the Secretary's enforcement of it, hurts voters across Texas because it deprives election officials of the flexibility and discretion to "provide access to the franchise for as many voters . . . as possible, based on the specific needs of [the]

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[1] This Court may take judicial notice of any fact "not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court." *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001); *Harris v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll. ex rel. LSU Health Sci. Ctr. Shreveport*, 409 F. App'x 725, 727 n.2 (5th Cir. 2010).

voters, and within the bounds of the limited resources at [each county's] disposal," an option that is "essential" to election officials' "making access to the franchise fair and as equally accessible as is practicable." DeBeauvoir Decl. ¶ 14.

II. PLAINTIFFS SUED THE SECRETARY, ALLEGING CONSTITUTIONAL VIOLATIONS AND SEEKING DECLARATORY AND INJUNCTIVE RELIEF.

Plaintiffs are two voters burdened by HB 1888 as well as statewide and national organizations that support the election of Democratic candidates to public office. ROA.93-96; ROA.1445; ROA.1449-50. Organizational Plaintiffs initiated their challenge in the U.S. District Court for the Western District of Texas over a year ago on October 30, 2019. *See* ROA.21-39. In it, they challenged HB 1888 as a violation of the First, Fourteenth, and Twenty-Sixth Amendments to the U.S. Constitution. *See* ROA.34-39. On November 26, 2019, Organizational Plaintiffs filed an Amended Complaint adding Plaintiff Emily Gilby. *See* ROA.89-108. Plaintiff Terrell Blodgett filed a separate lawsuit from the other Plaintiffs. ROA.1443-55. Initially, the Texas Young Democrats and Texas College Democrats were also plaintiffs in Mr. Blodgett's suit. ROA.1443. Those two organizations dismissed their claims, ROA.442, and the lawsuits were consolidated on December 30, 2019. ROA.224-25; ROA.1485-86.

As described above and alleged in the pleadings, the Secretary's continued enforcement of HB 1888 burdens the fundamental

constitutional rights of Plaintiffs (and, in the case of the Organizational Plaintiffs, their members) in elections in Texas. ROA.102-108; ROA.1452-54. Further, Organizational Plaintiffs have diverted and reallocated resources to combat the obstacles to voting that HB 1888 has created. ROA.94-96. To address these severe and irreparable injuries, Plaintiffs sought relief in the form of declaratory judgment and a preliminary and permanent injunction of the continued enforcement of HB 1888. ROA.107, 1454.

Given her issuance of Election Advisory 2019-20 and consistent with decades of voting rights jurisprudence in Texas and this Circuit, Plaintiffs named the Secretary, who serves as Texas's chief elections official, in her official capacity, as the Defendant in this action. *See* ROA.96-97; ROA.1446; *see also, e.g.*, *Voting for Am., Inc.*, 888 F. Supp. 2d at 816 (concerning volunteer deputy registrars); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006) (concerning whether party officer can declare candidate ineligible); *Tex. Indep. Party v. Kirk*, 84 F.3d 178 (5th Cir. 1996) (concerning declaration of intent to run for office); *Tolpo v. Bullock*, 356 F. Supp. 712, 713 (E.D. Tex. 1972), aff'd, 410 U.S. 919 (1973) ("Defendant, Bob Bullock, is the Secretary of State of Texas, responsible for the enforcement of the Texas election laws."); *Fagin v. Hughs*, 473 F. Supp. 3d 711, 717 (W.D. Tex. 2020) ("It is clear that Plaintiff has standing to bring his claims challenging the constitutionality of the Texas Election Code against Secretary Hughs

who 'is the chief election officer of the state' charged with administering that same Code.") (quoting Tex. Elec. Code § 31.001).[2]

III. THE DISTRICT COURT DENIED THE SECRETARY'S MOTION TO DISMISS.

Shortly after Plaintiffs filed their Amended Complaint, the Secretary moved to dismiss, arguing that sovereign immunity barred the case against her and that *Ex parte Young* did not apply. ROA.114-140.[3] The district court denied that motion in an order issued on August 11, 2020. ROA.1189-1200.

In that order, the district court found that the Secretary could not rely on the defense of sovereign immunity because the *Ex parte Young* exception applies. ROA.1194. Specifically, the district court explained that the Secretary's sovereign immunity argument was "based upon Hughs's improper assertion that the Secretary of State does not enforce Texas election law." *Id.* The district court had already rejected that

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[2] This Circuit's precedent is consistent with the Texas Supreme Court's descriptions of the Secretary's role and responsibilities in Texas's election scheme. *See, e.g.*, *Cascos v. Tarrant Cnty. Democratic Party*, 473 S.W.3d 780, 786 (Tex. 2015) (per curiam) ("The secretary of state is the state's chief election officer responsible for ensuring the uniform application and interpretation of election laws throughout Texas.").

[3] The Secretary made several additional arguments in the motion to dismiss. ROA.114-140. The court rejected all but those regarding a separate claim brought by Mr. Blodgett alleging a violation of the Americans with Disabilities Act. ROA.1198-99. The Secretary has only appealed the district court's ruling on the sovereign immunity question. ROA.1201-02.

assertion in the standing context, noting that this Court had previously held that "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State of Texas itself and its Secretary of State, who serves as the 'chief election officer of the state.'" ROA.1193 (quoting *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017) (quoting Tex. Elec. Code Ann. § 31.001(a))). The district court further explained that sovereign immunity cannot be asserted in this case because a federal court may "consistent with the Eleventh Amendment, [] enjoin state officials to conform their future conduct to the requirements of federal law." ROA.1194 (quoting *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004)). Given that this is precisely the request Plaintiffs make, the district court held that "the immunity from suit that Texas and Hughs otherwise enjoy in federal court offers no shield in this case." *Id.*

IV. THE SECRETARY APPEALED, STAYING PROCEEDINGS ON THE MERITS AND PRECLUDING RELIEF BEFORE THE NOVEMBER 2020 ELECTION.

The district court's denial of the motion to dismiss cleared the way for its consideration of Plaintiffs' pending motion for a preliminary injunction. ROA.1147-85. Before the district court could rule on that motion, however, the Secretary noticed this interlocutory appeal on August 14, 2020. ROA.1201-02. The Secretary took the position that the mere noticing of the appeal stayed the case in its entirety, and the district court declined to exercise jurisdiction over the matter while the appeal

was pending. ROA.1201-02, 1259-60. As a result, Plaintiffs' preliminary injunction motion has been stayed, together with all proceedings below.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order denying the motion to dismiss on sovereign immunity grounds.

1. The district court was correct to conclude that sovereign immunity does not bar Plaintiffs' claims because this case falls squarely within the *Ex parte Young* exception.

2. *First*, Plaintiffs seek declaratory and injunctive relief, which is exactly the kind of relief contemplated by *Ex parte Young*. To avoid an Eleventh Amendment bar, Plaintiffs must allege ongoing violations of federal law and seek prospective relief. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Whether Plaintiffs properly seek prospective relief is a "straightforward inquiry," which injunctive relief "clearly satisfies." *Id.*

3. HB 1888 has "present and persistent consequences," which the Supreme Court recognizes as exactly the kind of harm contemplated by *Ex parte Young*. *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 738 (5th Cir. 2020) (citing *Papasan v. Allain*, 478 U.S. 265, 282 (1986)); *see also Verizon Md.*, 535 U.S. at 646. Relief that qualifies as prospective for purposes of *Ex parte Young* involves "[r]emedies designed to end a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Papasan*, 478 U.S. at 282; *Reeves*, 954 F.3d at 737. This includes

injunctions, like the one requested here, that direct "officials to conform their future conduct to the requirements of federal law." *McCarthy ex rel. Travis*, 381 F.3d at 412 (quoting *Quern v. Jordan*, 440 U.S. 332, 337 (1979)).

4. *Second*, the Secretary has more than enough of a connection to the enforcement of HB 1888 to thwart immunity. The Secretary issued Election Advisory 2019-20 specifically to enforce HB 1888 and to constrain elections officials, imposing an unconstitutional burden on the right to vote in violation of the First and Fourteenth Amendments and abridging the right to vote on account of age in violation of the Twenty-Sixth Amendment. The Secretary understandably seeks to downplay the importance and effect of Election Advisories, but Texas election law and a declaration from an election official in this litigation (as well as testimony from elections officials in other matters) demonstrate their force and effect. In fact, under this Court's precedents, the issuance of Election Advisory 2019-20 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 with regard to Texas election law. *See City of Austin*, 943 F.3d at 1001 (citing cases).

5. In addition, the Secretary's clear legal duties under Texas law also require rejection of her contention that she does is not sufficiently connected to the enforcement of HB 1888 to come within *Ex parte Young*. "The fact that the state officer, *by virtue of his office*, has *some* connection

with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (emphases added); *see also NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 392-95 (5th Cir. 2015) (holding *Ex parte Young* exception applies in suit against Texas Attorney General where Attorney General was authorized to enforce Texas's Deceptive Trade Practices Act ("TDTPA") and sent "threatening letters" to do so). Decades of precedent in this Circuit, as well as this Court's consideration of the Secretary's role under the related doctrine of standing, compel this result. *See, e.g., Voting for Am., Inc.*, 732 F.3d at 382 (suing Secretary in lawsuit concerning volunteer deputy registrars); *Tex. Democratic Party*, 459 F.3d at 582 (suing Secretary in lawsuit concerning whether party officer can declare candidate ineligible); *Tex. Indep. Party*, 84 F.3d at 178 (suing Secretary in lawsuit concerning declaration of intent to run for office); *see also OCA-Greater Houston*, 867 F.3d at 613 (holding the Secretary is the proper defendant in a challenge to a Texas election law under Article III, as the "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.'").

6. Finally, the Secretary's arguments concerning Plaintiffs' request for injunctive relief fare no better. The declaratory relief requested would, in conjunction with injunctive relief, remedy Plaintiffs'

injuries, and the Secretary's intimation that declaratory relief is retroactive and prohibited by *Ex parte Young* finds no support in case law or logic.

STANDARD OF REVIEW

The Court reviews the jurisdictional determination of sovereign immunity de novo. *City of Austin*, 943 F.3d at 997. However, because this appeal is taken from the order denying the Secretary's motion to dismiss, the Court must construe the allegations in the complaint in the light most favorable to Plaintiffs. *Verizon Md.*, 535 U.S. at 645 ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.") (alterations incorporated); *Choice Inc. of Tex.*, 691 F.3d at 714 ("In assessing jurisdiction, the district court is to accept as true the allegations and facts set forth in the complaint.").

ARGUMENT

This Court's *Ex parte Young* analysis requires two steps: first, a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," *Verizon Md.*, 535 U.S. at 645 (alterations incorporated), and second, consideration of whether the official in question has "'some connection' to the state law's enforcement and threaten[s] to exercise that

authority." *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 517 (5th Cir. 2017). That analysis confirms that *Ex parte Young* applies here, where Plaintiffs allege ongoing First, Fourteenth, and Twenty-Sixth Amendment violations and seek declaratory and injunctive relief, and where the Secretary is responsible for enforcing HB 1888 and has taken formal steps to do so.

I. PLAINTIFFS SEEK DECLARATORY AND PROSPECTIVE INJUNCTIVE RELIEF, SATISFYING THE FIRST STEP OF THE *EX PARTE YOUNG* INQUIRY.

Plaintiffs seek an injunction preventing the Secretary's continued enforcement of HB 1888 and its attendant constitutional harms, satisfying the requirements of the first step of this Court's *Ex parte Young* inquiry. The Secretary tries to escape this result by misstating what Plaintiffs are requesting and, alternatively, arguing that Plaintiffs' requested relief will not remedy their harm. These arguments are false and legally incorrect, and should be rejected.

HB 1888 went into effect at the end of 2019, and since then it has prevented the utilization of mobile voting locations in multiple elections. This has unconstitutionally burdened Plaintiffs' and their members' right to vote in violation of the First, Fourteenth, and Twenty-Sixth Amendments. ROA.102-07. Plaintiffs accordingly seek forward-looking declaratory and injunctive relief to protect themselves from further injury from the continued enforcement of HB 1888. ROA.107. This is

sufficient to satisfy *Ex parte Young*. *See, e.g.*, *Verizon Md.*, 535 U.S. at 646; *see also Green*, 474 U.S. at 68 (noting that relief that qualifies as prospective for purposes of *Ex parte Young* includes "[r]emedies designed to end a continuing violation of federal law"); *Reeves*, 954 F.3d at 737 (holding *Ex parte Young* is satisfied where plaintiffs allege that "defendants' actions are *currently* violating federal law").

The Secretary attempts to avoid this clear result by falsely arguing that Plaintiffs seek a mandatory injunction requiring that elections officials *utilize* mobile polling locations. Appellant's Br. 24-26. There are numerous flaws with this argument. *First*, as the Secretary herself acknowledges, Plaintiffs have repeatedly clarified that this is not the relief they seek. *Id*. at 25-26. From their Complaint and throughout these proceedings, Plaintiffs have consistently been clear that they seek an injunction prohibiting the Secretary from enforcing HB 1888, which would have the effect of returning to elections officials the *discretion* to utilize mobile voting locations, as they did prior to the enactment of the law. This is, of course, a prohibitory injunction, which the Secretary acknowledges is permissible under *Ex parte Young*. *Id*. at 24 (citing *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472 (5th Cir. 2020)). Plaintiffs do not seek an order requiring elections officials to offer such locations, making the question the Secretary claims the Court must answer here—"[d]oes the *Ex parte Young* doctrine permit Plaintiffs to bind local officials through a prohibitory injunction against the

Secretary?" *Id.* at 25-26—a red herring irrelevant to the question of sovereign immunity.

The Secretary then distorts the record to argue that—if what Plaintiffs seek is merely a prohibitory injunction enjoining the Secretary from enforcing HB 1888—this remedy cannot afford Plaintiffs relief because it will not require elections officials to utilize mobile voting locations. *Id.* at 27-28. The Secretary never explains how this concern (that Plaintiffs requested relief will not remedy their injury) fits under the *Ex parte Young* analysis, or otherwise relates to the sovereign immunity inquiry presently before this Court. Instead, it appears to be an attempt to improperly expand the scope of this appeal to also reach the district court's denial of the Secretary's arguments that Plaintiffs lacked standing to proceed in this case. But that decision is not one that (unlike the sovereign immunity decision) the Secretary may immediately appeal as of right, nor has the Secretary sought leave to file an interlocutory appeal on that question. *See* 28 U.S.C. § 1292(b); *Catlin v. United States*, 324 U.S. 229, 236 (1945) ("[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable."). In any event, it is also wrong.[4] As a matter of

[4] To the extent the Secretary meant this argument to be another reason why the Secretary is the wrong official under the second prong of this Court's *Ex parte Young* inquiry, that argument fails for the reasons described below. *See infra* at 21-33.

law, Plaintiffs do not need to demonstrate that the relief sought will "completely cure the injury . . . it's enough if the desired relief would lessen it." *Inclusive Communities Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019). Plaintiffs made such a showing in the proceedings below, offering a declaration from the Travis County Clerk (Ms. DeBeauvoir) in response to the Secretary's motion to dismiss demonstrating that she would utilize mobile voting locations *but for the Secretary's enforcement of HB 1888*. DeBeauvoir Decl. ¶¶ 16-17. This easily satisfies any redressability questions.

These facts also distinguish the case here from *Mi Familia Vota v. Abbott*, 977 F.3d 461 (5th Cir. 2020), the thin reed on which the entirety of the Secretary's argument relies. In *Mi Familia Vota*, plaintiffs challenged the Secretary's enforcement of an "electronic-voting-devices-only" provision of an election statute. *Id.* at 468. This provision limited counties to using electronic voting devices and prohibited the use of paper ballots. Importantly, the plaintiffs sought to *require* all counties to offer an option to vote with paper ballots, and the Court concluded that relief would not follow from enjoining the Secretary's enforcement of the electronic device provision, because counties would still have the discretion to choose between using electronic devices or paper ballots, *regardless of* the injunction. *See id.*

This case is not analogous. Without the injunction that Plaintiffs seek here, the counties do not have the discretion to offer mobile voting

at all. As a result of HB 1888—and more directly, as a result of the Secretary's enforcement of that law—the counties are *categorically prohibited* from offering mobile locations. If Plaintiffs' are successful in obtaining an injunction, elections officials will once again have the power to offer such locations. And as noted, at least county has affirmed that it would offer them, but for HB 1888 and the Secretary's threatened enforcement of it. DeBeauvoir Decl. ¶¶ 16-17. Particularly in light of the fact that this matter remains at the pleading stage, Plaintiffs have sufficiently established that an injunction will lessen their injury by leading to the return of mobile voting locations in at least one county, where Plaintiff Blodgett resides and where organizational Plaintiffs have hundreds of thousands of members and supporters. This is exactly the type of relief contemplated by *Ex parte Young*.

Finally, while, for the reasons discussed, the question in the current context is academic, the Secretary's assertion that mandatory injunctions are prohibited under *Ex parte Young* is far from certain as a matter of law. Indeed, a panel of this Court noted last year that this precise issue "is an unsettled question that has roused significant debate." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 241 (5th Cir. 2020) (quoting *Green Valley*, 969 F.3d at 472 n.21). The question is no doubt further complicated by the difficulty courts have had in agreeing on what precisely constitutes affirmative as opposed to prohibitory injunctions. *Green Valley*, 969 F.3d at 471. The Court in *Richardson* found that it

"need not settle that debate" in that case, 978 F.3d at 241, nor need the Court do so here. It is worth emphasizing, however, that authority from both this Court and the Supreme Court make clear that *Ex parte Young* permits injunctions that direct "officials to conform their future conduct to the requirements of federal law." *McCarthy ex rel. Travis*, 381 F.3d at 412 (quoting *Quern*, 440 U.S. at 337). It is on this basis that both this Court and the Supreme Court have placed affirmative obligations on state officials to remedy ongoing constitutional harms under *Ex parte Young*. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (rejecting assertion of sovereign immunity concerning requirement that state pay for future educational components of relief to remedy harms caused by state's constitutional violations); *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Parish*, 756. F.3d 380, 387-88 (5th Cir. 2014) (noting school board "remained subject to affirmative obligations" by permanent injunction issued by court in 1974 to remedy constitutional harms).

II. THE SECRETARY HAS SUFFICIENT CONNECTION TO THE ENFORCEMENT OF HB 1888 TO SATISFY *EX PARTE YOUNG*.

The district court correctly concluded that the Secretary has a sufficient connection to the enforcement of HB 1888 to satisfy *Ex parte Young*. That exception to sovereign immunity "allows private parties to bring suits for injunctive or declaratory relief against individual state officials acting in violation of federal law" whenever a "state official, by virtue of his office," has "*some* connection with the enforcement of the

[challenged] act . . . . " *City of Austin*, 943 F.3d at 997 (quotation marks omitted) (emphasis added). Although "the precise scope of the requirements for a connection has not been defined," this Court reiterated in a decision issued just a few months ago that a "scintilla of enforcement by the relevant state official with respect to the challenged law will do." *Tex. Democratic Party*, 978 F.3d at 179 (quoting *City of Austin,* 943 F.3d at 1002) (quotation marks omitted). These standards are easily and clearly satisfied on the record before this Court.

A. THE SECRETARY HAS TAKEN AFFIRMATIVE STEPS TO ENFORCE HB 1888.

The Secretary's connection to the enforcement of HB 1888 amounts to far more than a mere "scintilla." In fact, mere weeks after HB 1888's passage, the Secretary took formal, affirmative steps to enforce HB 1888, issuing Election Advisory No. 2019-20 through which the Secretary unequivocally directed the counties that they no longer had any discretion to offer early voting at mobile or temporary locations. *See* Election Advisory 2019-20 at ROA.209 ("This bill eliminated the concept of 'mobile voting' by now requiring all temporary branch polling places to remain open at the same fixed location for the duration of the early voting period."); *id.* at ROA.211 ("Once a temporary branch polling place is established, it must be open for all of the same weekdays as the main early voting location.").

The issuance of Election Advisory No. 2019-20 is itself enough to fulfill the second step of this Court's *Ex parte Young* inquiry. *See City of Austin*, 943 F.3d at 1001 (citing cases). It is thus not surprising that the Secretary attempts to downplay the importance of Election Advisories, *see* Appellant's Br. 20-24, but in reality they carry significantly more weight than she contends. *First*, Election Advisories are issued pursuant to a specific statutory mandate to the Secretary, which states: "The secretary of state *shall obtain and maintain* uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code." Tex. Elec. Code § 31.003. In this way (among others), Election Advisories are different than, for example, the letter from the Attorney General at issue in *Texas Democratic Party,* in which the Attorney General stated his non-binding view of the law divorced from any specific statutory authority to "obtain and maintain" the uniform action of county elections officials. *See* 978 F.3d at 181.

Second, given that the Secretary's Election Advisories flow from her specific statutory authority under Tex. Elec. Code § 31.003, elections officials treat them as binding as a matter of law. *See, e.g.*, DeBeauvoir Decl. ¶ 4 ("Per her authority to maintain uniformity of Texas's election laws, the Secretary is authorized to and does prepare detailed and

comprehensive written directives and instructions relating to certain election laws both within and outside of Texas's Election Code, which I and other local election officials are required to follow."); *id.* ¶ 6 ("Pursuant to her authority, the Secretary issues Election Advisories, which are the Secretary's formal opinions and interpretations of Texas's election laws. These Election Advisories are published and maintained on the Texas Secretary of State's website and, as stated above, must be followed by local elections administrators and county clerks."); *Richardson v. Tex. Sec'y of State*, No. SA-19-CV-00963-OLG, 2020 WL 5367216, at *14 (W.D. Tex. Sept. 8, 2020) (noting that elections officials from Brazos and McAllen counties "testified that they viewed the Secretary's [Election Advisories] as binding").

That elections officials consider the Secretary's formal advisories binding makes sense, as the Secretary herself has previously explained in other federal litigation that she has the power to, through the Texas Attorney General, "bring a suit in her name to obtain a writ of mandamus against any county official who refuses to follow her interpretations of the voting laws." *Voting for Am., Inc.*, 888 F. Supp. 2d at 831. Mandamus is, of course, only available under Texas law when an act sought to be compelled is "purely ministerial" and "there is nothing left to the exercise of discretion or judgment." *In re State ex rel. Ogg*, 610 S.W.3d 607, 610 (Tex. App. 2020). The availability of mandamus relief to enforce the Secretary's commands under Texas law demonstrates that elections

officials have no leeway to vary from the Secretary's interpretations of the state's election laws. Given the Secretary's position in other litigation, she can hardly contend otherwise here.

Because an Election Advisory is one of the Secretary's formal mechanisms for ensuring uniformity of Texas's election laws, its issuance is plainly evidence of "compulsion or constraint" sufficient for enforcement under this Court's precedents. *City of Austin*, 943 F.3d at 1000. While the Secretary claims that the advisory "[does] not intimate that formal enforcement [is] on the horizon" or evidence enforcement power, Appellant's Br. 24, this is simply untrue: a formal Election Advisory *is* enforcement of the law pursuant to the Secretary's statutory authority, backed up by the Secretary's ability to direct the Texas Attorney General to institute a mandamus action in her name if it is not followed. And the Secretary issued such an Election Advisory regarding compliance with HB 1888, demonstrating not merely an intent to enforce the law, but formal enforcement of the law.[5]

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[5] While it is true the Secretary has not yet instituted a mandamus action to compel compliance with Election Advisory 2019-20, that is of no moment. Elections officials have complied with her instructions, so she has had no need to utilize this remedy, and this Circuit's precedents demonstrate that she need not complete every step of enforcement prior to suit for her to be the proper official under *Ex parte Young*. *See, e.g.*, *NiGen*, 804 F.3d at 395 (finding *Ex parte Young* satisfied where Texas's attorney general had sent letters threatening prosecution but not yet begun any prosecution). Indeed, the fact that not even *one county* has

And the fact that Election Advisory 2019-20 is directed to elections officials rather than Plaintiffs is also of no moment, *contra* Appellant's Br. 23, as this court has made clear that direct enforcement of the challenged law against Plaintiffs themselves is not required to satisfy *Ex parte Young*. *See City of Austin*, 943 F.3d at 1001 ("[T]he *Air Evac* panel noted that *direct* enforcement of the challenged law was not required: actions that constrained the plaintiffs were sufficient to apply the *Young* exception to the *Air Evac* officials under this court's *K.P.* holding."). The issuance of Election Advisory 2019-20 compels elections officials to eliminate mobile voting locations, constraining Plaintiffs' right to vote in a manner sufficient to meet the second step of the *Ex parte Young* inquiry.

The Secretary's issuance of Election Advisory 2019-20 standing alone provides the requisite connection to enforcement required by *Ex parte Young*. *See, e.g.*, *NiGen*, 804 F.3d at 392-95 (finding Texas's Attorney General to be the appropriate official under *Young* given that he sent letters threatening prosecution); *City of Austin*, 943 F.3d at 1001 (noting that in *NiGen* the Court did not examine the Attorney General's connection to enforcement because "the fact that Paxton sent letters threatening enforcement of the DTPA makes it clear that he had not only the authority to enforce the DTPA, but was also constraining the

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chosen to defy the Secretary's directive rather plainly demonstrates the understood mandatory effect of an Election Advisory.

manufacturer's activities"). This Court should accordingly hold the Secretary to satisfy the second prong of the *Ex parte Young* inquiry here.

B. THE SECRETARY'S STATUTORY DUTIES RELATED TO ELECTIONS SHOW A CONNECTION SUFFICIENT TO SATISFY *EX PARTE YOUNG.*

While this Court need not consider the Secretary's connection to the enforcement of HB 1888 further given that she has taken formal steps to enforce the law through Election Advisory 2019-20, the Secretary's statutory authority over elections also provides the requisite connection to enforcement under the second step of the *Ex parte Young* inquiry.

The Secretary attempts to obscure her general duties under the Election Code, but those arguments fall apart upon scrutiny; her responsibilities regarding Texas's election laws standing alone are sufficient to satisfy the second step *Ex parte Young* inquiry. *See* Appellant's Br. 14-16. The Secretary—as Texas's "chief election officer"—is responsible for the enforcement of each provision of the Texas Election Code. *See* Tex. Elec. Code § 31.003. The Election Code unequivocally states that the Secretary "shall obtain and maintain uniformity in the application, operation, and interpretation of" Texas's election laws, including by "prepar[ing] detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code." *Id.* This is much more than just a simple, "general duty to see that the laws of the state are implemented," as the Secretary now

claims. Appellant's Br. 15 (quoting *City of Austin*, 943 F.3d at 999-1000). It is a specific statutory mandate giving the Secretary the authority and responsibility to *ensure* uniform implementation of Texas's Election Code.

The Secretary also has the express power under § 31.005(a)-(b) to "take appropriate action to protect" voting rights "from abuse by the authorities administering the state's electoral processes," which includes "order[ing] the person to correct the offending conduct." In fact, the Secretary's authority to issue orders to protect voting rights is accompanied by its own enforcement scheme which authorizes the Secretary to enforce the orders: if an official "fails to comply, the secretary may seek enforcement . . . by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general." *Id.* at 31.005(b). Thus, the Secretary is not just the chief election officer tasked with maintaining uniformity of the laws, the law also *expressly authorizes* her to remedy voting rights violations by elections officials. *See id.*

The Secretary claims that her broad duty to enforce the Election Code is insufficient to establish a scintilla of enforcement, but that argument is based on a misreading of this Court's recent decisions in *Texas Democratic Party* and *Mi Familia Vota*. Appellant's Br. 15. The Secretary claims that the holding in *Texas Democratic Party* that the Texas Attorney General's non-specific duty to uphold all of the laws of

the state of Texas was not a sufficient connection to enforcement means that her specific responsibilities for elections are also insufficient to establish the requisite connection to enforcement under *Ex parte Young*. Appellant's Br. at 16. That is not at all true.

First, the *Texas Democratic Party* panel was explicit that it need not even consider whether the Secretary's broad election authority was sufficient for the purposes of *Ex parte Young* because the "Secretary's specific duties" regarding the challenged statute were sufficient to determine that sovereign immunity did not bar the suit. 978 F.3d at 180. It therefore declined to offer any opinion on whether the Secretary's duty to ensure uniformity provided any sufficient connection to enforcement. *Id.*[6] And, as noted above, the *Mi Familia Vota* decision turned on a redressability issue with the requested relief not present here. *See supra* at 19-20.

While the Secretary's argument hinges on a misreading of recent precedent, the Secretary ignores that, for decades, this Circuit has permitted similar suits against her in challenges to a wide variety of Texas election laws. *See, e.g., Voting for Am., Inc.*, 732 F.3d at 382 (concerning volunteer deputy registrars); *Tex. Democratic Party*, 459

[6] Indeed, as explained above, the Secretary's issuance of Election Advisory 2019-20, standing alone, similarly means that this Court need not further consider the Secretary's connection to enforcement to find her the correct official under *Ex parte Young*.

F.3d at 582 (concerning whether party officer can declare candidate ineligible); *Tex. Indep. Party*, 84 F.3d 178 (concerning declaration of intent to run for office). In fact, the U.S. Supreme Court affirmed a decision in the Eastern District of Texas nearly fifty years ago, in which that court found that the Secretary is "responsible for the enforcement of the Texas election laws." *Tolpo*, 356 F. Supp. at 713. And district courts in this Circuit have repeatedly and uniformly followed the Circuit's and the Court's lead in confirming and affirming the Secretary's role in enforcement of Texas's elections laws. *See, e.g.*, *Miller v. Hughs*, 471 F. Supp. 3d 768, 775 (W.D. Tex. 2020) (rejecting the same sovereign immunity argument raised here); *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 853 (W.D. Tex. 2020) (similar); *Hall v. Louisiana*, 983 F. Supp. 2d 820, 832 (M.D. La. 2013) (similar). To accept the Secretary's argument now would result in a sea change of the law established in case after case in this Circuit.

This Court's standing jurisprudence also bolsters the conclusion that the Secretary's statutory enforcement responsibilities regarding Texas election laws are a sufficient connection to make her the proper defendant under the second step of *Ex parte Young*. This Court has unequivocally held that the Secretary is the proper defendant in a challenge to a Texas election law under Article III, as the "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.'" *OCA-Greater Houston*, 867 F.3d at 613 (quoting Tex. Elec. Code § 31.001(a)).[7]

The Secretary recognizes that *OCA-Greater Houston* is a particularly difficult precedent for her and accordingly seeks to confine its holding merely to the realm of standing, *see* Appellant's Br. 16-19, but the precedents of this Court and those of at least four Sister Circuits do not support her. This Court has repeatedly held that the inquiries under Article III standing and the second prong of *Ex parte Young* are almost identical, and that "it may be the case that an official's 'connection to [ ] enforcement' is satisfied when standing has been established." *City of Austin*, 943 F.3d at 1002; *see also Air Evac EMS, Inc.*, 851 F.3d at 520 (noting the "significant overlap" between the requirements of Article III and Ex Parte Young); *NiGen*, 804 F.3d at 395 n.5 (describing inquiries

[7] Contrary to the Secretary's assertion, *OCA-Greater Houston* is not the subject of a circuit split. Appellant's Br. 19 n.10. In *Jacobson v. Fla Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020), the Eleventh Circuit determined that the Florida Secretary of State was not the proper defendant in a case regarding a Florida election law concerning the order of candidates on the ballots given the division of responsibilities between elections officials and the Secretary under Florida law. Of course, the Florida and Texas Secretaries of States have very different roles and responsibilities within their state's election schemes as do—presumably—the Secretaries of State of every state in the union. The Secretary offers no analysis of how her statutory role regarding Texas elections is similar to that of the Florida Secretary of State, and the Eleventh Circuit's analysis of Florida Secretary of State's role in Florida's election scheme does not (and, as a matter of logic, cannot) create a split with this Court's analysis of the Texas Secretary of State's role in an entirely different election scheme.

under both questions as similar). This analysis is consistent with the law and analysis concerning the relationship between the *Ex parte Young* and Article III standing inquiries in at least four Sister Circuits. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) ("[A]t the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy [the connection to the enforcement] element of Ex parte *Young*."); *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 960 (8th Cir. 2015) (noting the court's previous findings that a sufficient connection for *Ex parte Young* purposes met the Article III standing requirement and assuming the inquiries are equivalent); *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013) (explaining the "common thread" between Article III standing analysis and *Ex parte Young* analysis); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (same). Given this Court's holding that the Secretary is the proper official for a challenge to a Texas election statute under Article III due to her role and responsibilities concerning Texas elections, it would make little sense to hold her to not similarly have a sufficient connection to enforcement under *Ex parte Young.*

Finally, *Ex parte Young* itself makes clear that the Secretary's specific authority over elections is sufficient to bring her under its ambit in a case facially challenging the constitutionality of a Texas election

laws. "The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *Ex parte Young*, 209 U.S. at 157. The Secretary has a unique and special connection to Texas election law, and this connection satisfies the second step of the *Ex parte Young* inquiry.

While this Court need not consider the Secretary's election responsibilities under the second step of *Ex parte Young* given her issuance of Election Advisory 2019-20, these responsibilities independently provide the requisite connection to the enforcement of HB 1888.

III. THE SECRETARY'S ARGUMENTS REGARDING PLAINTIFFS' REQUESTED DECLARATORY RELIEF ARE UNAVAILING.

The Secretary's final arguments regarding Plaintiffs' request for declaratory relief must likewise be rejected. The Secretary briefly makes two arguments here. First, the Secretary argues that a declaration regarding the constitutionality of HB 1888 would bind the Secretary and not elections officials and therefore not provide Plaintiffs the relief they seek. Appellant's Br. 29. This is merely a rehash of the Secretary's redressability concerns and should be rejected for the same reasons already addressed above. *See supra* at 18-20.

The Secretary also seems to intimate that somehow declaratory relief is unavailable under *Ex parte Young* because *Ex parte Young* only permits prospective relief, Appellant's Br. 29, but this has no basis in case law and is illogical. To the extent the Secretary means to suggest that declaratory relief would be retroactive because it would declare that the *previous* passage of the law was unconstitutional, that position is inconsistent with this Court and the Supreme Court's frequent application of *Ex parte Young* when a party identifies an ongoing violation arising from laws or orders already in existence. *See, e.g.*, *Verizon Md.*, 535 U.S. at 646; *Papasan*, 478 U.S. at 282; *Tex. Democratic Party*, 978 F.3d at 180; *Reeves*, 954 F.3d at 738; *K.P.*, 627 F.3d at 124-25. The Secretary's theory defies logic: a plaintiff's ongoing harm will likely always arise from some past action (whether a statute, order, constitution, or otherwise), and broadly coloring this as retrospective relief will ensure that no party makes it past the court's "straightforward" *Ex parte Young* inquiry. *See Air Evac EMS, Inc*, 851 F.3d at 517 ("Despite these restrictions, the Court has reinforced *Ex parte Young*'s being a 'straightforward inquiry' and specifically rejected an approach that would go beyond a threshold analysis."). Such an understanding of *Ex parte Young* is undoubtedly incorrect.

Conclusion

For the foregoing reasons, this Court should affirm the district court's denial of the Secretary's motion to dismiss on sovereign immunity grounds.

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CERTIFICATE OF SERVICE

On January 13, 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) no privacy redactions were required under 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 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 8,148 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type-style requirements of Rule 32(a)(5)(A) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

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