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

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC, *Plaintiffs*, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, *Defendant.*	CIVIL ACTION NO. 1:19-cv-01063

THE TEXAS SECRETARY OF STATE'S REPLY
IN SUPPORT OF HER MOTION TO DISMISS

TABLE OF CONTENTS

I. The Secretary of State Is Not a Proper Defendant

Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss ("Resp."), ECF No. 28, highlights a fundamental flaw in their lawsuit. Plaintiffs admit that they "ask for only a prohibitory injunction, requiring that the Secretary not enforce" HB 1888. Resp. at 9. That admission is fatal to their claims because the Secretary does not enforce HB 1888. In other words, Plaintiffs seek an order prohibiting the Secretary from doing something that she has no power to do. That is not a proper use of the *Ex parte Young* exception to sovereign immunity, and it proves that Plaintiffs lack standing to sue the Secretary.

The Fifth Circuit recently highlighted the limited scope of *Ex parte Young* in *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019). The Secretary's lack of enforcement power makes this case even easier than *Paxton*. There, the Attorney General conceded that he had the power to enforce the challenged statute, *id.* at 998, but there was no reason to think "he [wa]s likely to do" so. *Id.* at 1002. Here, not only is there no reason to think the Secretary "is likely to" enforce HB 1888, there is no reason to think she can. *See* Def.'s Mot. Dism. ("MTD"), ECF No. 21, at 3–4; *see also Lewis v. Governor of Ala.*, No. 17-11009, 2019 WL 6794813, *7 (11th Cir. Dec. 13. 2019). Thus, Plaintiffs requested relief—"a prohibitory injunction, requiring that the Secretary not enforce" HB 1888—is a request to enjoin something that does not and cannot happen. Resp. at 9.

Plaintiffs purport to identify only one way the Secretary enforces HB 1888: through an Election Advisory. Resp. at 8. But an Election Advisory is just that—an advisory. The advisory Plaintiffs cite merely restates what the law requires. It does not suggest the Secretary implements HB 1888 or that she will enforce it against local officials.

Plaintiffs focus on the Secretary's role as "chief election officer," Resp. at 4, but that title is not "a delegation of authority to care for any breakdown in the election process." *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (Reavley, J.) (narrowly interpreting "chief election officer").

Plaintiffs implausibly complain that the Secretary's lack of enforcement power makes "Texas elections . . . entirely unregulated." Resp. at 6. Not so. The Legislature regulates elections through the Election Code, and local officials are sworn to follow those laws. *See* TEX. CONST. art. XVI, § 1(a). The Secretary does not argue "there is no official in Texas whom voters can sue to challenge unconstitutional laws." Resp. at 6. She argues, as the Supreme Court has held, that voters must sue the official who enforces the challenged law. MTD at 2–7. But even if Plaintiffs were right, the concern that "no one would have standing" to challenge a law "is not a reason to find standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (quotation omitted).

Cases like *Nader v. Connor*, 332 F. Supp. 2d 982, 985 (W.D. Tex. 2004), in which the Secretary had a role in enforcing the challenged statute, are inapposite. Resp. at 8. There, the law required the Secretary to count and verify signatures to determine who was going to be on the ballot. *Nader*, 332 F. Supp. 2d at 985. Here, the Secretary plays no role in implementing HB 1888. And of course, *Nader*, which "neither noted nor discussed" jurisdiction, "does not stand for the proposition that no [jurisdictional] defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).

OCA-Greater Houston v. Texas, 867 F.3d 604 (5th Cir. 2017), also does not help Plaintiffs. "Sovereign immunity ha[d] no role to play" there because it had been abrogated. *Id.* at 614. But here, sovereign immunity has not been abrogated. Thus, *OCA-Greater Houston* is irrelevant to the Secretary's *Ex parte Young* argument.

But even as it relates to standing, *OCA-Greater Houston* cannot be read so broadly as to cover this case. Plaintiffs offer no limiting principle for their interpretation of *OCA-Greater Houston*. They would grant standing to any plaintiff to sue the Secretary over any provision contained in the Texas Election Code—merely because she is designated the "chief elections officer." Resp. at 4. But such a broad rule would contradict other Fifth Circuit precedent. In *City of Austin*, for example, the district court relied on the Attorney General's status as "the chief law enforcement officer of the state." 325

F. Supp. 3d 749, 755 (W.D. Tex. 2018). But the Fifth Circuit reversed. Giving the title no weight, the court instead analyzed the likelihood of enforcement. *See* 943 F.3d at 1003 (finding "it's unlikely that the City had standing" because there was no "significant possibility" of future enforcement); *see also LULAC v. Edwards Aquifer Auth.*, No. 5:12-cv-620, 2014 WL 12495605, at *5–6 (W.D. Tex. Mar. 31, 2014) (finding plaintiffs lacked standing to sue the Secretary of State, despite her status as the "chief election officer," for voting-rights claims).[1]

A more limited reading of *OCA-Greater Houston* is required. Its reasoning is limited to cases in which there is "no private right of action." 867 F.3d at 613; MTD at 6 n.2. HB 1888, by contrast, is enforced through a private right of action. MTD at 3.[2]

At the end of the day, Plaintiffs are not interested in preventing the Secretary's "enforcement" of HB 1888. They practically admit that what they really want is a judgment binding local officials, but their suggestion that a judgment against the Secretary would do so is ill founded. Resp. at 7. Rule 65 provides that a court "order binds only . . . the parties"; their "officers, agents, servants, employees, and attorneys"; and "other persons who are in active concert or participation with" the foregoing. FED. R. CIV. P. 65(d)(2). Local officials do not fit any of those categories, and Plaintiffs provide no contrary argument.

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[1] Plaintiffs briefly argue for collateral estoppel. Resp. at 4 n.1. Nonmutual collateral estoppel does not apply against the government. *See United States v. Mendoza*, 464 U.S. 154, 162 (1984); *State of Idaho Potato Comm'n v. G&T Terminal Packaging, Inc.*, 425 F.3d 708, 714 (9th Cir. 2005). Moreover, the other conditions are not satisfied. The issue in this case is not "identical to that litigated in" *OCA-Greater Houston*; the issue was not "fully and vigorously litigated" before; any rule applicable to this case was not necessary to support the judgment in the previous case; and "special circumstance[s]" make collateral estoppel unfair here. Resp. at 5 n.1.

[2] Plaintiffs argue that the private right of action at issue here also would have applied in *OCA-Greater Houston*. Resp. at 5. The Fifth Circuit thought otherwise. *See* 867 F.3d at 613. That the private-right-of-action issue was not briefed in *OCA-Greater Houston* is another reason not to broadly apply that case to the facts here. *See Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) (holding a "cursory answer to an ancillary and largely unbriefed question does not warrant the same level of deference we typically give our precedents").

II. Plaintiffs Lack Standing to Challenge HB 1888

The Secretary's motion to dismiss argued that no plaintiff plausibly alleged standing.[3] Plaintiffs' response does not undermine those arguments.

As a threshold matter, Plaintiffs claim the Court need not consider the Secretary's standing arguments because at least one plaintiff has standing. Resp. at 20. In fact, no Plaintiff has standing, as explained below. In any event, the Court should dismiss any Plaintiff who lacks standing, regardless of whether another plaintiff has standing.[4]

A. Gilby Lacks Standing

The Secretary previously explained Gilby does not have standing because she has not plausibly alleged where local officials will locate early voting polling places for the 2020 general election. MTD at 7–9. In response, Plaintiffs point to only one sentence in their FAC: "Unless HB 1888 is enjoined, Southwestern University will be unable to host a temporary early voting location, making it far more difficult for Ms. Gilby . . . to cast her ballot." Resp. at 11 (quoting FAC ¶ 18).

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[3] Plaintiffs question whether the Secretary challenged TDP's standing. Resp. at 19 n.4. She did. MTD at 9–14 (arguing the Committee Plaintiffs lack Article III and statutory standing). The Secretary refers to the organizational plaintiffs, including TDP, as the "Committee Plaintiffs" because that is how they refer to themselves in the related ballot order case. *See* Complaint, *Miller v. Hughs*, No. 1:19-cv-1071-LY, ECF No. 1 at 2 n.2 (W.D. Tex. Nov. 1, 2019).

[4] "[W]hile some courts have refrained from a standing analysis once one plaintiff has established standing to assert a claim, there is at least some authority suggesting that this doctrine may be limited to appellate review." *Town of Southold v. Town of E. Hampton*, 406 F. Supp. 2d 227, 235 n.5 (E.D.N.Y. 2005), *aff'd in part and vacated in part on other grounds*, 477 F.3d 38 (2d Cir. 2007). Moreover, "nothing in the cases addressing this principle suggests that a court *must* permit a plaintiff that *lacks* standing to remain in a case whenever it determines that a co-plaintiff has standing." *Thiebaut v. Colo. Springs Utilities*, 455 F. App'x 795, 802 (10th Cir. 2011). Here, multiple factors weigh in favor of fully considering standing: (1) any other approach "would not fully address [Defendant's] motion," (2) failing to decide standing "would leave at least some of the plaintiffs in a state of legal limbo," (3) "if one group of plaintiffs lack standing, defendants would at least be entitled to partial dismissal," and (4) "judicial economy" supports quickly deciding issues that can narrow or streamline the case at an early stage. *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1092–93 (D. Ariz. 2011).

First, Plaintiffs' assertion that Southwestern will not host an early voting polling place is conclusory and speculative, not a plausible factual allegation. HB 1888 does not ban polling places from university campuses. Whether Williamson County and Southwestern University will establish a polling place on campus is a matter of speculation. Plaintiffs do not allege that the relevant local officials have already made a decision regarding the 2020 general election.[5] Nor do they allege any basis for inferring the future decisions of third parties not before the Court. *See* MTD at 8–9.

Second, even the absence of polling places from campus would not establish that voting would be "far more difficult for Ms. Gilby." Local officials may choose locations more convenient than an on-campus location would be. Even accepting *arguendo* Plaintiffs' irrelevant Exhibit D, many polling places would be quite convenient for Gilby. For example, 1101 N. College St. is only 1.1 miles away from campus. There are also early voting polling places within a few blocks of I-35, on which Gilby presumably commutes to and from her job as a legislative aide at the Capitol in downtown Austin.[6] *See* HR 1578 (86th Leg.), https://capitol.texas.gov/tlodocs/86R/billtext/html/HR01578F.htm. Gilby has not plausibly alleged that an on-campus location is necessarily more convenient than these locations, much less than whatever locations Williamson County will use for the 2020 general election.

B. The Committee Plaintiffs Lack Article III Standing

The Secretary's motion to dismiss argued that the Committee Plaintiffs cannot establish associational standing because they have not "identif[ied] members who have suffered the requisite harm." MTD at 9. Plaintiffs do not dispute their failure to identify members of the DSCC and DCCC. Instead, they urge the Court not to require such identification. Resp. at 14.

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[5] Because Plaintiffs' claims challenge the polling places for the 2020 *general* election, their exhibit concerning the 2020 *primary* elections is irrelevant. *See* Resp. at 11 (citing Ex. D).

[6] Resp., Ex. D (listing "301 SE Inner Loop, Georgetown" and "301 W. Bagdad Avenue, Round Rock").

Plaintiffs' argument contradicts binding precedent. In *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009), the Supreme Court "required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm." The dissent would have "accept[ed] the organization's self-description of the activities of its members" and then determined whether "there is a statistical probability that some of those members are threatened with concrete injury." *Id.* at 497. But the majority rejected that approach because the "requirement of naming the affected members has never been dispensed with in light of statistical probabilities." *Id.* at 498–99. Even when "it is certainly possible—perhaps even likely—that one" member would have standing, "that speculation does not suffice." *Id.* at 499.

Similarly, in *NAACP v. City of Kyle*, the Fifth Circuit found no associational standing because the NAACP had not established that "a specific member of the NAACP has been" injured. 626 F.3d 233, 237 (5th Cir. 2010). "[E]vidence suggesting, in the abstract, that some minority members may be" injured was "insufficient." *Id.*

Contrary to Plaintiffs' suggestion, these cases apply "in the voting rights context." Resp. at 14; *see N.C. State Conference of NAACP v. N.C. State Bd. of Elections*, 283 F. Supp. 3d 393, 402 n.6 (M.D.N.C. 2017).

Plaintiffs have not alleged that Gilby is a member of any of the Committee Plaintiffs. That she may be a "supporter" is not enough. Resp. at 14. "[I]ndicia of membership" is required. MTD at 10. For DSCC and DCCC, Plaintiffs do not argue there is any indicia of membership. For TDP, Plaintiffs claim that they alleged "Gilby is among TDP's membership ranks," Resp. at 20, but they actually alleged only that Gilby is "the current president of the Southwestern University College Democrats." Resp. at 20 (quoting FAC ¶ 18). Absent additional allegations, involvement in College Democrats does not establish membership in TDP. *See* William E. Thro & Charles J. Russo, *Odious to the Constitution: The Educational Implications of* Trinity Lutheran Church v. Comer, 346 Ed. Law Rep. 1, 17 n.85 (2017)

("[S]ome universities insist that all student groups . . . refrain from discriminating for any reason. Under this 'all-comers policy,' the Young Democrats had to allow Republicans to join . . . ."); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 675 n.5 (2010) ("Hastings' all-comers policy is hardly novel. Other law schools have adopted similar requirements.").[7]

Nor do the Committee Plaintiffs have organizational standing. MTD at 11–13. Plaintiffs only argument is that "HB 1888 frustrates their mission of electing Democrats" because they "must divert resources from other specific organizational priorities to address problems caused by the burdens HB 1888 imposes." Resp. at 12–13. But this is not responsive.

First, Plaintiffs have not established that HB 1888 impairs "their mission of electing Democrats" because they have not plausibly alleged that HB 1888 would cause any Democratic candidate to lose a race. MTD at 11. Plaintiffs argue that other cases have recognized standing without requiring a voter "to predict and plead the outcoming [sic] a future election." Resp. at 15. Of course, many plaintiffs would have such standing insofar as the right to vote is a cognizable legal interest regardless of whether a voter's preferred candidate wins. But the Committee Plaintiffs do not have a right to vote. MTD at 13. That is why they rely on their interest in "electing Democrats." Resp. at 12. When a plaintiff claims to be protecting an interest in "electing Democrats," a plausible allegation that the challenged statute would prevent the election of at least one Democrat is not too much to ask.

Second, Plaintiffs do not explain how they can satisfy the *City of Kyle* requirements for organizational standing. They have neither alleged that their reactions to HB 1888 "differ from [their]

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[7] *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), does not help Plaintiffs. Resp. at 15. That case found associational standing based on an identified candidate who "step[ped] into the shoes of" the TDP "after the primary election." *Id.* at 588. Here, Plaintiffs have not identified any Democratic candidates, much less one who has won a primary election. Although their Response refers to "the candidates they have endorsed," Resp. at 15, Plaintiffs' FAC does not identify any such candidates, or even allege that Plaintiffs have endorsed any 2020 candidates in Texas.

routine [political] activities" nor "identified any specific projects" allegedly put on hold. MTD at 12 (quoting *City of Kyle*, 626 F.3d at 238). Plaintiffs offer no substantive response to this point.

C. The Committee Plaintiffs Lack Statutory Standing

The Secretary's motion to dismiss argued that the Committee Plaintiffs lack statutory standing because they "are necessarily asserting the rights of third parties," which § 1983 does not permit. MTD at 14. Plaintiffs respond that they can bring third-party claims because they satisfy the associational-standing test. Resp. at 17–18. As discussed above, the Committee Plaintiffs do not have associational standing. Moreover, Plaintiffs' associational-standing argument cannot support their organizational-standing claims (i.e., the claims based on their asserted "direct injuries").

Plaintiffs assert that "[a] claim based on an organization's *direct* injury . . . is *not* a third-party claim." Resp. at 18. That is wrong. A plaintiff relying on third parties' rights necessarily brings a third-party claim, even if the plaintiff can establish its own injury in fact. *See Conn v. Gabbert*, 526 U.S. 286, 292–93 (1999) (barring a lawyer's challenge to a search as a third-party claim, even though the search injured the lawyer, because the challenge was based on a client's alleged rights); *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011) (barring a third-party claim "[e]ven where Article III standing requirements are satisfied").

The Committee Plaintiffs also argue they have statutory standing because their asserted injuries satisfy the zone-of-interests test. Resp. at 18. But the zone-of-interests test is distinct from the rule against third-party standing. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014). Plaintiffs have to satisfy *both* tests. *See, e.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982); *Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 801 (5th Cir. 2012).

Plaintiffs' contention that "courts often find that organizations have standing under 42 U.S.C. § 1983" is irrelevant. Resp. at 18. Organizations often establish associational standing or vindicate

their own rights. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). The problem here is that Plaintiffs rely on the right to vote, which the Committee Plaintiffs do not have. MTD at 13.

III. HB 1888 Is Constitutional

The Secretary identified multiple interests justifying HB 1888. MTD at 19–21. Plaintiffs do not attempt to rebut them. Instead, Plaintiffs suggest the Court cannot consider them at the pleading stage. Resp. at 22–23. The Fourth Circuit has explicitly rejected Plaintiffs' argument that the court "may not weigh [the State's] interests without discovery." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016). That makes sense because the Secretary need not provide "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

Plaintiffs also suggest the Court cannot evaluate "the severity of the [alleged] injury imposed by the challenged provision" at the pleading stage. Resp. at 21. Again, the Fourth Circuit has squarely rejected that argument. *See Libertarian Party of Va.*, 826 F.3d at 718 (declining to await "development of a full factual record" before assessing the plaintiff's allegations of burden).

Thus, it is no surprise federal courts often resolve challenges to the Texas Election Code on a motion to dismiss. *See, e.g.*, *Faas v. Cascos*, 225 F. Supp. 3d 604, 607 (S.D. Tex. 2016); *Meyer v. Texas*, 2011 WL 1806524, at *3 (S.D. Tex. May 11, 2011). This Court is no exception.

In *Kennedy v. Pablos*, for example, this Court considered challenges to the Texas Election Code's "sore loser" statutes, which prohibit candidates who lose in a primary election from running as candidates in the general election. 2017 WL 2223056, at *1 (W.D. Tex. May 18, 2017). Granting a motion to dismiss, the Court held that the statutes "are constitutionally sound" because they impose a minimal burden on the First and Fourteenth Amendment rights of candidates. *Id.* at *5. The Court also credited the "legitimate and important interests" in the statutes. *Id.* The statutes "therefore withst[oo]d scrutiny under the *Anderson-Burdick* framework." *Id.*

Similarly, this Court dismissed a challenge to the Election Code's "winner-take-all" method for selecting presidential electors. *League of United Latin Am. Citizens v. Abbott*, 369 F. Supp. 3d 768, 774 (W.D. Tex. 2019). The Court found that the plaintiffs had not identified any associational harms. *See id.* at 782 (noting that the plaintiffs' challenge did not involve an issue of ballot access, a deprivation of the ability to vote for a particular candidate, or a restriction on a political party's "associational opportunities"). The Court also found that any "harms are justified by Texas' interest in maximizing its electoral power by having its Presidential Electors vote in a unified bloc." *Id.* at 783.

The same analysis applies here. First, Plaintiffs do not identify any associational burdens, a necessary precondition to invoking the *Anderson-Burdick* framework. MTD at 16–17. Thus, the Court can dismiss their First and Fourteenth Amendment claims at the pleading stage. Second, even if the *Anderson-Burdick* framework applies, and the Court must weigh the State's asserted interests against the supposed burdens, the Court can credit the State's unrebutted interests in preventing gamesmanship, avoiding voter confusion, and increasing opportunities to vote. MTD at 19. "Each of these interests finds support in Supreme Court precedent" and thus "sufficiently justify the slight, non-discriminatory burden on Plaintiffs." *Kennedy*, 2017 WL 2223056, at *5.

Plaintiffs' Equal Protection and Twenty-Sixth Amendment claims fail for similar reasons. The same justifications that support HB 1888 in the context of *Anderson-Burdick* also validate HB 1888 against those claims. MTD at 21–24.[8]

CONCLUSION

The Secretary respectfully requests that the Court dismiss the First Amended Complaint.

[8] Plaintiffs assert that the same *Anderson-Burdick* test applies to both their right-to-vote claim and equal-protection claim. Resp. at 23. If so, the latter should be dismissed or struck as redundant. *See* FED. R. CIV. P. 12(f).

Date: December 31, 2019

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on December 31, 2019, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
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