IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JESSIE GLORIA; LUIS BOTELLO-FAZ; NICOLAS MACRI; PAT GRANT; JENNIFER RAMOS; and ISAIAH RODRIGUEZ,

Plaintiffs,

v.

RUTH HUGHS, in her official capacity as the Texas Secretary of State,

Defendant.

CIVIL ACTION NO. 5:20-cv-00527-OLG

THE TEXAS SECRETARY OF STATE'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, STRIKE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Consitutional Provisions

Other Authorities

INTRODUCTION

Plaintiffs argue that the Twenty-Sixth Amendment requires Texas to provide younger voters with mail-in ballots. That contradicts the amendment's text and history. The Twenty-Sixth Amendment applies only to the right to vote, not the claimed right to vote *by mail*. Because Plaintiffs are permitted to vote in other ways, the Constitution does not mandate that they be provided mail-in ballots. Texas and numerous other States have long used age to determine eligibility to vote by mail. In Texas, this practice has existed almost as long as the Twenty-Sixth Amendment has. In fact, the bill that first authorized older voters to cast mail-in ballots also lowered Texas's voting age to eighteen, as the recently ratified Twenty-Sixth Amendment required. What is more, Plaintiffs' own allegations support distinguishing between older and younger voters for purposes of voting by mail.

In any event, Plaintiffs' claims suffer from fatal jurisdictional defects. First, sovereign immunity bars their claims because the Secretary of State (the only defendant in this case) does not enforce the provision Plaintiffs challenge. Plaintiffs cannot sue the Secretary under *Ex parte Young* because enjoining the Secretary from enforcing a law that she does not enforce anyway is nonsensical. Second, Plaintiffs do not have Article III standing because they have not plausibly alleged that the Secretary's actions cause a certainly impending injury or that relief against the Secretary could redress their supposed injuries.

Finally, the only injunction Plaintiffs request is improper as a matter of law. This Court cannot order the Secretary to expand voting by mail. Even if Plaintiffs' claims were successful, no injunction under *Ex parte Young* could require the Secretary to act in an official capacity. Also, a Court ordering equal treatment in response to an anti-discrimination claim cannot expand the supposedly discriminatory exception (voting by mail) at the expense of the general rule chosen by the Legislature (voting in person). Only the Texas Legislature could make that choice.

BACKGROUND

I. Texas Law Allows Voters to Vote by Mail Only in Limited Circumstances

Texas law has long required most voters to cast their ballots in person, either on Election Day, *see* Tex. Elec. Code ch. 64, or during an early voting period prescribed by the Legislature, *see id.* § 82.005. This is not merely a matter of tradition or an effort to mark the significance of voting. It represents a deliberate policy chosen by the Legislature to curb fraud and abuse. *See McGee v. Grissom*, 360 S.W.2d 893, 894 (Tex. App.—Fort Worth 1962, no writ) (per curiam).

Of course, the Texas Legislature has also balanced the risk of fraud against the unique hardships some voters face in casting a ballot at a polling place. In 1917, the Legislature passed the first absentee voting law to allow qualified voters to vote even if they expected to be away from their jurisdictions on election day. Act of May 26, 1917, 35th Leg., 1st C.S., ch. 40, 1917 Tex. Gen. Laws 62.

In 1975, the Legislature "extended absentee voting to voters 65 years of age or older . . . ." *In re State of Texas*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020) (citing Act of May 30, 1975, 64th Leg., R.S., ch. 682, § 5, 1975 Tex. Gen. Laws 2080, 2082). That was just a few years after Texas (and a sufficient number of other States) ratified the Twenty-Sixth Amendment.[1] The timing was not coincidental. The 1975 bill was a significant revision to the Election Code, and one of its purposes was "to bring the Texas Election Code into conformity with" the Twenty-Sixth Amendment as well as recent court decisions.[2] To that end, the 1975 bill reduced the voting age from twenty-one to eighteen. As a result, the same bill that lowered the voting age also authorized voting by mail for

[1] Tex. S. Con. Res. 65, 62nd Leg., R.S. (Apr. 27, 1971), https://lrl.texas.gov/scanned/sessionLaws/62-0/SCR_65.pdf.

[2] Tex. S.B. 1047: Bill Analysis, House Committee on Elections, 64th Leg., R.S., https://lrl.texas.gov/LASDOCS/64R/SB1047/SB1047_64R.pdf#page=82.

Texans older than sixty-five.[3] The amendment was adopted by an overwhelming vote in both houses of the Texas Legislature.[4]

Today, Texas law allows voters to vote by mail in limited circumstances, namely when voters: (1) anticipate being absent from their county of residence; (2) have a disability that prevents them from appearing at the polling place; (3) are sixty-five or older; (4) are confined in jail; or (5) participate in the address confidentiality program. Tex. Elec. Code §§ 82.001-.004, .007.

A voter who wants to vote by mail must submit an application "to the early voting clerk for the election who serves the election precinct of the applicant's residence." Tex. Elec. Code § 84.001(d). The early voting clerk "review[s] each application for a ballot to be voted by mail" and either "provide[s]" a ballot or rejects the application. Tex. Elec. Code § 86.001. Once a voter has filled in a mail-in ballot, it "must be returned to the early voting clerk." *Id.* § 86.006(a). The local early voting ballot board then processes and counts the mail-in ballot. *See id.* § 87.001, *et seq.*

II. Texas Voters Will Be Able to Safely Cast an In-Person Ballot

Our federal system places primary responsibility to protect the health and safety of Americans upon the States. *See In re Abbott*, 954 F.3d 772, 793 (5th Cir. 2020). Likewise, primary responsibility over the conduct of elections belongs to the States, and courts presume that States discharge these duties in good faith. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). To accomplish both these ends, the state officials charged with guiding Texas through this crisis have been assiduously monitoring

[3] Tex. S.B. 1047, 64th Leg., R.S., § 3, https://lrl.texas.gov/LASDOCS/64R/SB1047/SB1047_64R.pdf#page=144 (replacing "twenty-one years of age" with "18 years of age"); *id.* § 5, https://lrl.texas.gov/LASDOCS/64R/SB1047/SB1047_64R.pdf#page=145 (adding "who will be 65 years of age or older" to a section entitled "Who may vote absentee").

[4] House Journal, 64th Leg., R.S. (May 28, 1975) at 4204, https://lrl.texas.gov/scanned/Housejournals/64/05281975_83_4199.pdf (recording a vote of "136-3-11" on SB 1047); Senate Journal, 64th Leg., R.S. (May 30, 1975) at 1932, https://lrl.texas.gov/scanned/SenateJournals/64/05301975_85_1899.pdf (recording a vote of "Yeas 26, Nays 5" on SB 1047).

COVID-19 for months and will continue to do so as long as the COVID-19 disaster continues.

On March 13, 2020, Governor Abbott exercised his statutory authority under the Texas Disaster Act, Tex. Gov't Code § 418.001, *et seq.*, and declared a state of disaster in all of Texas's 254 counties. Proclamation (Mar. 13, 2020 11:20 a.m.); *see Salmon v. Lamb*, 616 S.W.2d 296, 298 (Tex. App.—Houston [1st Dist.] 1981, no writ.) (discussing Governor's emergency authority in election context).

Since the disaster declaration, State officials have adopted multiple measures to protect, among numerous other things, the uniformity and integrity of elections during the ongoing effort to slow the spread of COVID-19. To date, the Governor has:

- Ordered the special election for Senate District 14 to be held on July 14, 2020, stating that holding the election on an earlier date "would prevent, hinder, or delay necessary action in coping with the declared disaster by placing the public's health at risk and threatening to worsen the ongoing public health crisis." Tex. Gov. Proclamation (Mar. 16, 2020 7:30 p.m.);

- Allowed political subdivisions to postpone elections scheduled for May 2, 2020, to November 3, 2020. Tex. Gov. Proclamation (Mar. 18, 2020 10:00 a.m.); and

- Postponed the May 26, 2020 primary runoff to July 14, 2020. Tex. Gov. Proclamation (Mar. 20, 2020 6:35 p.m.).

In consultation with the relevant state agencies, the Governor has also issued appropriate suspensions to allow the election cycle to proceed safely in light of COVID-19. Most recently, the Governor issued a proclamation expanding early voting for the July 14 election. *See* Tex. Gov. Proclamation (May 11, 2020 5:30 p.m.). The proclamation provides that "early voting by personal appearance shall begin on Monday, June 29, 2020, and shall continue through the fourth day before election day, excluding any legal state or federal holidays." *Id.* at 3. The purpose of the expansion of early voting is to "to ensure that elections proceed efficiently and safely when Texans go to the polls to cast a vote in person during early voting or on election day" by providing election officials with sufficient time to "implement appropriate social distancing and safe hygiene practices." *Id.* at 2.

The Secretary of State has issued several advisories, including one providing guidance to local election officials on postponing elections scheduled for May 2, 2020.[5] The Secretary urged local officials to exercise their authority to postpone elections scheduled for May 2, 2020, pursuant to the Governor's March 18, 2020 proclamation. As a result, most elections previously scheduled for May were postponed until at least July. The Secretary of State's office also has alerted election officials to the Governor's May 11 proclamation and noted that counties have the "flexibility to offer voters extended early voting hours." Mass Email re: Proclamation regarding early voting for July 14, 2020 Elections (May 11, 2020). The advisory further explained that the State of Texas is receiving $24.5 million in federal funds to "prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle." *Id.* Those funds will be sub-granted to Texas counties. *Id.*

The Secretary also has issued "recommended health protocols" for both voters and local election officials.[6] Developed "[i]n consultation with the Texas Department of State Health Services," these protocols will "help ensure the health and safety of all voters, election office personnel, polling place workers, and poll watchers in Texas."[7]

ARGUMENT

The Court should dismiss Plaintiffs' claims for lack of jurisdiction and failure to state a claim. First, sovereign immunity precludes Plaintiffs' claims against the Secretary. Second, Plaintiffs have not plausibly alleged Article III standing. Third, Section 82.003 does not violate the Twenty-Sixth

[5] Texas Secretary of State, Election Advisory No. 2020-12: Actions for May 2, 2020 Uniform Election Date (March 18, 2020), https://www.sos.state.tx.us/elections/laws/advisory2020-12.shtml.

[6] Texas Secretary of State, Health Protocols for Voters & Health Protocols for Elections, https://www.sos.state.tx.us/elections/forms/health-protocols-for-voters.pdf.

[7] Texas Secretary of State, Secretary Of State's Office Releases Guidance On Recommended Health Protocols For Texas Election Officials And Voters (May 26, 2020), https://www.sos.state.tx.us/about/newsreleases/2020/052620.shtml.

Amendment, both because it does not abridge the right to vote and because the State has good reason to distinguish between older and younger voters. Fourth, even if Plaintiffs' claims were otherwise meritorious, they could not receive the injunction they seek.

I. Sovereign Immunity Bars Plaintiffs' Claims

Sovereign immunity precludes claims against state officials unless the *Ex parte Young* exception applies. *See McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004). *Ex parte Young* "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation . . . ." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). Consequently, *Ex parte Young* applies only when the defendant enforces the challenged statute. *See Ex parte Young*, 209 U.S. 123, 157 (1908) ("some connection with the enforcement of the act"); *City of Austin v. Paxton*, 943 F.3d 993, 1001–02 (5th Cir. 2019); *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) ("the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty").

The Secretary does not implement Section 82.003. Local officials decide whether an application for a mail-in ballot is approved or rejected. *See* Tex. Elec. Code § 86.001 (requiring the "early voting clerk" to "review each application for a ballot to be voted by mail" and either "provide" a ballot or reject the application); *In re State of Texas*, --- S.W.3d ---, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020) (describing the role of county clerks in Part III of the majority opinion). Thus, an injunction to prevent the Secretary from "rejecting early vote by mail ballot applications" would be meaningless. ECF 1 at 14. It could not prevent any alleged violation of federal law. Regardless of any injunction, the Secretary neither accepts nor rejects applications to vote by mail.

Plaintiffs do not identify any enforcement actions taken by the Secretary. Instead, they cite the Secretary's title, "chief elections officer." ECF 1 ¶ 17 (citing Tex. Elec. Code § 31.001(a)). 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) (narrowly interpreting "chief election officer").

The Secretary cannot coerce local officials into enforcing (or not enforcing) Section 82.003. Local officials do not report to the Secretary. They are elected or appointed locally, and they are not bound by the Secretary's views. *See In re Stalder*, 540 S.W.3d 215, 218 n.9 (Tex. App.—Hous. [1st Dist.] 2018, no pet.) (expressing doubt that a "party chair lacked the authority to then form and act upon her own ultimate legal judgment" despite "having received the Secretary of State's assistance and advice in response to an inquiry"); *Ballas v. Symm*, 351 F. Supp. 876, 888 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974) ("Plaintiff admits that the Secretary's opinions are unenforceable at law and are not binding.").[8]

Even if the Secretary could coerce local officials (or approve vote-by-mail applications herself), a federal court could not order her to do so. The *Ex parte Young* exception is limited to injunctions "prevent[ing] [a state official] from doing that which he has no legal right to do." *Ex parte Young*, 209 U.S. at 159. It does not authorize injunctions directing "affirmative action." *Id.*; *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949) (noting sovereign immunity applies "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign"). Thus, sovereign immunity bars "cases where the [defendant] sued could satisfy the court decree only by acting in an official capacity." *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971); *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001) ("Because this requested relief would require us to order federal officials to take

[8] Thus, a recent dispute about the interpretation of the Election Code was resolved, not when the Secretary issued instructions to local officials, but when the Attorney General filed a petition for a writ of mandamus against local officials who are charged with approving or rejecting mail-in ballot applications under the Election Code. *See In re State of Texas*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020).

various forms of affirmative action and affect the disposition of sovereign property, the suit does not fall within the ultra vires doctrine.").

The Eleventh Circuit has noted "it is doubtful that a federal court would have authority to order" "the Secretary [of State] to promulgate a rule requiring [local election officials] to [perform their duties] contrary to the [state] statute" being challenged. *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1211–12 (11th Cir. 2020). In this circuit, however, it is more than doubtful. Under *Zapata*, this Court cannot order the Secretary to act in an official capacity.

II. Plaintiffs Do Not Have Article III Standing

Article III standing requires: (1) injury in fact, (2) causation, and (3) redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Here, Plaintiffs have not plausibly alleged standing.

A. Injury in Fact

The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiffs have not plausibly alleged such an injury here.

Plaintiffs do not allege they will be ineligible to vote by mail. To be sure, they complain that the age provision does not authorize them to vote by mail. But they fail to allege that none of the other provisions authorizing mail-in ballots apply to them. If Plaintiffs are eligible to vote by mail, the age provision does not injure them, and they lack Article III standing. Plaintiffs therefore have not carried their burden to plausibly allege an injury in fact.

Assuming Plaintiffs are injured would be particularly inappropriate in this case. Some of their allegations appear to affirmatively undermine any claim of injury. Plaintiff Gloria, for example, alleges that she suffers from lupus, which has left her "autoimmune compromised." ECF 1 ¶ 11. Plaintiff Ramos has "a skin disorder that lowers her ability to fight infection." *Id.* ¶ 15. These allegations suggest

Plaintiffs Gloria and Ramos may be eligible to vote by mail under the "disability" provision: "A qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." Tex. Elec. Code § 82.002(a); *see In re State of Texas*, 2020 WL 2759629 (explaining "a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether . . . to apply to vote by mail because of disability").

Plaintiff Macri alleges that he "is currently a high school senior in College Station, Texas, scheduled to graduate in May 2020." ECF 1 ¶ 13. Public information demonstrates that he plans to move to New Hampshire and attend Dartmouth College,[9] but the complaint does not explain whether Plaintiff Macri intends to register to vote in New Hampshire or remain registered in Texas. If he registers in New Hampshire, then Texas's election laws will not affect Plaintiff Macri. If he remains registered in Texas, he will presumably be eligible to vote by mail due to "absen[ce] from the county of the voter's residence" Tex. Elec. Code § 82.001(a).

Moreover, Plaintiffs' asserted injuries are tied to their desire to vote by mail, which is based on the current threat posed by COVID-19. *See* ECF 1 ¶¶ 11–16. But concerns about future elections are speculative. Plaintiffs cannot plausibly allege what type of threat COVID-19 will pose in the future. As the Texas Supreme Court recently recognized:

> There is much uncertainty about the disease and about the future. There are reports that the disease will weaken in the heat of summer, or not; that there may be a second wave later in the year, or not; and that a vaccine could be available as soon as the fall, or not.

[9] *See* Twitter Profile of Nicolás Macri, https://twitter.com/RealNicoForReal; Tweet (Apr. 7, 2020), https://twitter.com/RealNicoForReal/status/1247718658048172032 (tweeting Plaintiff Macri's "intent to enroll at Dartmouth as a member of the Class of 2024"); Tweet (Apr. 7, 2020), https://twitter.com/RealNicoForReal/status/1247709626046590978 (tweeting "Never though[t] I'd move to a city smaller than College Station" and including the hashtag "#Dartmouth24s").

In re State of Texas, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020). Speculation about the future course of an unpredictable virus cannot establish a "*certainly impending*" Article III injury in fact. *Clapper*, 568 U.S. at 409.

B. Causation and Redressability

Plaintiffs cannot establish standing to sue the Secretary because her actions do not cause their alleged injuries. Whether an application for a mail-in ballot is approved depends on the actions of local officials, not the Secretary. *See* Tex. Elec. Code § 86.001 (requiring the "early voting clerk" to "review each application for a ballot to be voted by mail" and either "provide" a ballot or reject the application). Plaintiffs' asserted injuries are not "fairly traceable to the challenged action of the defendant"; they are "the result of the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation and alterations omitted). As the Eleventh Circuit recently explained, a plaintiff does not have standing to sue a Secretary of State for the actions of local officials. *See Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1207 (11th Cir. 2020) (holding that the plaintiffs lacked standing because state "law tasks [local officials], independently of the Secretary, with printing the names of candidates on ballots").

Even if Section 82.003 causes Plaintiffs' asserted injuries, that is not sufficient because it does not answer the question at hand: whether the Secretary causes their injuries. *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (dismissing for lack of standing because courts should not "confuse[] the statute's immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the defendants").

In addition, Plaintiffs' purported injuries are not redressable because an injunction against the Secretary would not help Plaintiffs. The Secretary does not enforce the challenged provisions, so enjoining her from such enforcement would not have any real-world effect. An injunction against the Secretary would not prevent local officials from continuing to enforce the challenged provisions, as

the Election Code requires.[10]

III. Section 82.003 Is Constitutional

Plaintiffs bring only one claim: that permitting voters older than sixty-five to vote by mail violates the Twenty-Sixth Amendment. *See* ECF 1 at 12. Plaintiffs are wrong for two reasons. First, Section 82.003 does not affect the right to vote. Second, Section 82.003 is justified under any standard of review, especially given the long coexistence of provisions allowing older voters to vote by mail and the Twenty-Sixth Amendment.

A. No Denial or Abridgement of the Right to Vote

The Twenty-Sixth Amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI. It protects only the right to vote, not other rights.

The right to vote is not at issue here. Plaintiffs' claim centers instead on "a claimed right to receive absentee ballots." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969).

In *McDonald*, the plaintiffs were eligible voters incarcerated in Illinois jails. *Id.* at 803. Their incarceration meant they could not "readily appear at the polls" to vote. *Id.* They wanted to vote by mail, but Illinois law "made absentee balloting available to [only] four classes of persons: (1) those who are absent from the county of their residence for any reason whatever; (2) those who are

[10] Although *OCA-Greater Houston v. Texas* found standing to sue the Secretary, its reasoning does not apply here. 867 F.3d 604 (5th Cir. 2017). It was limited to claims of "facial invalidity." *Id.* at 613. In light of their many allegations concerning COVID-19, Plaintiffs appear to be bringing an as-applied challenge. *See, e.g.*, ECF 1 ¶¶ 11–16. Moreover, *OCA* distinguished *Okpalobi* on the ground that *Okpalobi* involved a private right of action. *See* 867 F.3d at 613. This case also involves a private right of action. Although the Secretary cannot enforce Section 82.003 against local officials, in appropriate circumstances a losing candidate can through an election contest. *See* Tex. Elec. Code §§ 221.003(a), 232.002. Thus, taken on its own terms, *OCA* does not apply to this case. In any event, the extent of the Secretary's power must be determined on a case-by-case basis. As a result, *OCA*'s ruling on that issue cannot extend beyond the record and briefing before that court. To the extent it does, the Secretary preserves the argument that it was wrongly decided.

'physically incapacitated,' so long as they present an affidavit to that effect from a licensed physician; (3) those whose observance of a religious holiday precludes attendance at the polls; and (4) those who are serving as poll watchers in precincts other than their own on election day." *Id.* at 803–04. As a result, the plaintiffs' "applications [to vote by mail] were refused." *Id.* at 804.

The Supreme Court rejected the plaintiffs' equal protection claims. *See id.* at 810–11. Its reasoning is particularly instructive here. The Court first decided "how stringent a standard to use in evaluating the" Illinois law. *Id.* at 806. More stringent scrutiny would have been warranted if, as the plaintiffs argued, the Court had been "dealing generally with an alleged infringement of a basic, fundamental right." *Id.* at 807. But "[s]uch an exacting approach [wa]s not necessary" because "there [wa]s nothing in the record to indicate that the Illinois statutory scheme has an impact on [the plaintiffs'] ability to exercise the fundamental right to vote." *Id.* No Illinois statute "specifically disenfranchise[d]" the plaintiffs. *Id.* at 808. The Court was not willing to assume "Illinois ha[d] in fact precluded [the plaintiffs] from voting." *Id.* The record did not indicate whether "the State might" provide other methods for the plaintiffs to vote. *Id.* at 808 n.6. As a result, it was "not the right to vote that [wa]s at stake [t]here but a claimed right to receive absentee ballots." *Id.* at 807.

The same reasoning applies here. Texas has not "specifically disenfranchised" Plaintiffs. Everyone agrees that Plaintiffs are legally entitled to vote on Election Day or during early voting. To be sure, Plaintiffs allege that they "would strongly prefer to vote by mail." ECF 1 ¶ 14. But that is irrelevant. The *McDonald* Court did not ask whether the plaintiffs there preferred voting by mail to the alternative options the State might offer. *See McDonald*, 394 U.S. at 808 n.6. The potential legal availability of other methods of voting was sufficient for the Court to decide that "the right to vote" was not "at stake" in that case. *Id.* at 807. As the Supreme Court explained later the same term, there is a vast difference between "a statute which made casting a ballot easier for some who were unable to come to the polls" and a "statute absolutely prohibit[ing] [some]one from exercising the franchise."

Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 n.6 (1969).

Because Plaintiffs here have other options for voting, they are necessarily asserting a "right to receive absentee ballots," not "the right to vote." *McDonald*, 394 U.S. at 807. That precludes any Twenty-Sixth Amendment claim. The Twenty-Sixth Amendment has a far narrower scope than the Equal Protection Clause does. While courts use the Equal Protection Clause to analyze all kinds of discrimination in all areas of law, the Twenty Sixth Amendment applies only to age discrimination in "[t]he right . . . to vote." U.S. Const. amend. XXVI. It has nothing to say about the "claimed right to receive absentee ballots." *McDonald*, 394 U.S. at 807. Because Plaintiffs' complaint does not implicate the right to vote, their Twenty-Sixth Amendment claim fails as a matter of law.

McDonald is particularly relevant to interpreting the Twenty-Sixth Amendment. The Supreme Court decided *McDonald* in 1969. The Twenty-Sixth Amendment was proposed and ratified only two years later in 1971. That authoritative contemporaneous interpretation of the right to vote controls the meaning of the right to vote in the Twenty-Sixth Amendment. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322–26 (2012) (describing the prior-construction canon).

Thus, it is no surprise that courts have recognized the limited scope of the Twenty-Sixth Amendment since the beginning. The Twenty-Sixth Amendment does not extend beyond the right to vote to any related rights. In *Meyers v. Roberts*, for example, the Supreme Court of Minnesota held that the Twenty-Sixth Amendment "on its face applies only to the right to vote" and "says nothing about the right to hold office." 246 N.W.2d 186, 189 (Minn. 1976). That the right to hold office is related to the right to vote was irrelevant. When the plaintiff appealed to the U.S. Supreme Court, it dismissed "for want of a substantial federal question." 429 U.S. 1083 (1977); *see also Spencer v. Bd. of Ed. of the City of Schenectady*, 291 N.E.2d 585, 585 (N.Y. 1972) ("[T]he Twenty-Sixth Amendment which conferred only the right to vote on 18-year-olds and extended no concurrent right to hold office did not effect

a change in the Public Officers Law.").

This same reasoning is still followed today. In *Nashville Student Organizing Committee v. Hargett*, the court rejected a Twenty-Sixth Amendment challenge to a voter identification law because such a law "is not an abridgment of the right to vote, let alone a denial of it, for purposes of a Twenty-Sixth Amendment claim." 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015). The court explained: "[T]he handful of cases cited by the parties in which a state court or federal district court outside of this circuit has found a violation of the Twenty-Sixth Amendment—while not binding on the court—have involved state actions that actually blocked young people from voting rather than simply excluded measures that would make it easier for them to do so." *Id.* at 757–58.

"That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment).

If Plaintiffs decline to take advantage of legally available options for voting, that is their choice. But their choice is not attributable to the Secretary. As discussed above, State and local governments are taking all reasonable steps to make in-person voting safe. The Sixth Circuit recently recognized that federal courts "cannot hold private citizens' decisions to stay home for their own safety against the State." *Thompson v. Dewine*, — F.3d —, No. 20-3526, 2020 WL 2702483, at *4 (6th Cir. May 26, 2020) (per curiam). In *Thompson*, a state law required "procuring signatures" to place an item on the ballot. *Id.* That task was made "harder (largely because of a disease beyond the control of the State)," but the increased difficulty "d[id]n't mean that Plaintiffs are excluded from the ballot." *Id.* In any event, the difficulty was attributable to "private citizens' decisions to stay home for their own safety" in light of COVID-19, not the State. *Id.* As a result, the court held that "the State has not excluded Plaintiffs from the ballot" and that "the burden imposed on them by the State's initiative requirements

cannot be severe." *Id.*

The same is true here. Some Plaintiffs claim they do not want to vote in person because of COVID-19. Texas and its local governments are taking appropriate steps to control the virus and thereby alleviate such fears. But to the extent Plaintiffs find those measures insufficient, their refusal to vote in person is not attributable to the State, much less the Secretary.

To the extent Plaintiffs rely on the supposed insufficiency of State and local efforts to make in-person voting safe, they present a nonjusticiable political question. In *Coalition for Good Governance v. Raffensperger*, the plaintiffs complained that COVID-19 made in-person voting unsafe unless election officials adopted various changes to both in-person and mail-in voting. No. 1:20-cv-1677, 2020 WL 2509092, at *1 (N.D. Ga. May 14, 2020). But the court concluded the plaintiffs' claims presented "a classic political question"—"whether the executive branch has done enough." *Id.* at *3. "[T]here are no discernable and manageable standards" that would allow a court "to decide issues such as how early is too early to hold the election or how many safety measures are enough." *Id.* at *3. The same is true here.

B. Providing Mail-In Ballots to Older Voters Is Common and Constitutional

Even if Plaintiffs could use the Twenty-Sixth Amendment to challenge Texas's decision to make mail-in ballots available to older voters, Section 82.003 would pass any level of scrutiny.

Plaintiffs recognize that mail-in voting is not constitutionally compelled. *See* ECF 1 ¶ 2 (noting Texas "opted to make mail in voting an option"); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) ("[T]here is no constitutional right to an absentee ballot."). Thus, their theory is not that States are required to provide mail-in ballots. Instead, they argue Texas cannot engage in differential treatment by providing the vote-by-mail option to older voters unless Texas also extends the option to younger voters. *See* ECF 1 ¶ 5 (asking for "relief prohibiting Texas from selectively discriminating against voters on account of age").

Plaintiffs' theory is novel. At least eight States, including every State in this Circuit, use age to determine eligibility to vote by mail.[11] Among States that require an excuse to vote by mail, "[i]t is . . . common to provide this option for elderly voters."[12] Other States previously used age to determine eligibility to vote by mail.[13]

The Twenty-Sixth Amendment is nearly fifty years old. And for almost that whole time, Texas has provided mail-in ballots to older voters without providing them to younger voters. As explained above, the same bill that lowered Texas's voting age from twenty-one to eighteen (as required by the Twenty-Sixth Amendment) also instituted voting by mail for Texans over sixty-five. Thus, on Plaintiffs' theory, Texas has *never* complied with the Twenty-Sixth Amendment. But if that were true—and if numerous other States had been similarly violating the Twenty-Sixth Amendment—one suspects someone would have noticed before Plaintiffs filed suit in 2020.

There is relatively little judicial precedent interpreting the Twenty-Sixth Amendment. It "must be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (quotation omitted). When determining whether legislative prayer violates the Establishment Clause, the Supreme Court found dispositive the fact "[t]hat the First Congress

---

[11] Ind. Code § 3-11-10-24(a)(5) ("elderly voter"); *id.* § 3-5-2-16.5 ("'Elderly' means a voter who is at least sixty-five (65) years of age."); Ky. Rev. Stat. § 117.085(a)(8) ("Not able to appear at the polls on election day on the account of age"); La. Rev. Stat. § 18:1303(J) ("A person who has attained the age of sixty-five years or more may vote absentee by mail upon meeting the requirements of this Chapter."); Miss. Code. § 23-15-715(b) ("persons who are sixty-five (65) years of age or older"); S.C. Code § 7-15-320(B)(8) ("persons sixty-five years of age or older"); Tenn. Code § 2-6-201(5)(A) ("A person sixty (60) years of age or older"); Tex. Elec. Code § 82.003 ("65 years of age or older"); W. Va. Code § 3-3-1(b)(1)(B) ("Physical disability or immobility due to extreme advanced age"); *see also* National Conference of State Legislatures, *Excuses to Vote Absentee* (Apr. 20, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx.

[12] National Conference of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options* (May 19, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[13] *See, e.g.*, Mich. Comp. Laws § 168.758(1)(d) (2018) ("60 years of age or older").

provided for the appointment of chaplains only days after approving language for the First Amendment." *Id.* Similarly, the Supreme Court has considered state laws from the time the Fourth Amendment was ratified to determine that amendment's scope. *See Atwater v. Lago Vista*, 532 U.S. 318, 337–40 (2001); c*f. Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, No. 18-1334, 2020 WL 2814298, at *7 (U.S. June 1, 2020). The same reasoning applies here. The same Legislature that prioritized compliance with the Twenty-Sixth Amendment authorized voting by mail for older, but not younger, Texas voters. Plaintiffs point to no historical evidence that anyone found this pairing incongruous, much less unconstitutional. Plaintiffs' theory should be rejected.

Of course, Texas and other States have good reason to allow older voters to vote by mail. Voting at a polling place often poses unique challenges for them. Section 82.003 is a commonsense way to facilitate exercise of the franchise for Texans who are more likely to face everyday obstacles to movement, outings, and activity than younger Texans are.

In their complaint, Plaintiffs focus on the challenges posed by COVID-19. Although those challenges were unforeseeable at the time the Texas Legislature enacted Section 82.003, they provide additional support for the law as applied today. Plaintiffs acknowledge that older and younger voters are not similarly situated: "[T]he mortality rates of COVID-19 are higher among older Americans." ECF 1 ¶ 34. Plaintiffs argue that (1) voting in person increases the risk of contracting COVID-19, *see id.* ¶ 3, and (2) that COVID-19 is more serious for older voters than it is for younger voters, *see id.* ¶ 34. Thus, their claim answers itself. Offering an accommodation to the group at higher risk is not unconstitutional. It is common sense.[14]

[14] One court recently concluded that other plaintiffs were likely to succeed on an as-applied Twenty-Sixth Amendment challenge to Section 82.003. *See Tex. Democratic Party v. Abbott*, No. 5:20-cv-438-FB, 2020 WL 2541971, at *27 (W.D. Tex. May 19, 2020), but that injunction has been administratively stayed. *See* No. 20-50407, 2020 WL 2616080 (5th Cir. May 20, 2020) (per curiam). In any event, the district court in *Texas Democratic Party v. Abbott* was incorrect, in part because it did not address many of the arguments raised above.

IV. Plaintiffs' Requested Injunction Is Improper as a Matter of Law

Even if this Court eventually rules in Plaintiffs' favor (it should not), it will not be able to issue an injunction *expanding* eligibility to vote by mail. If the "discrimination" of allowing only some voters to vote by mail must be remedied, the State could either expand or contract eligibility to vote by mail.

As the Supreme Court recently reiterated, "[w]hen the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (quotation omitted). "Because the manner in which a State eliminates discrimination 'is an issue of state law,' upon finding state statutes constitutionally infirm, [the Supreme Court] ha[s] generally remanded to permit state courts to choose between extension and invalidation." *Id.* at 1698 n.23 (quoting *Stanton v. Stanton*, 421 U.S. 7, 18 (1975)). Thus, rather than decide this policy issue for Texas, the court should "leave it to [the State] to select" how to remedy the purported problem with its law. *Id.* at 1686.

If the Court insisted on picking a remedy itself, *Morales-Santana* would require it to "strik[e] the discriminatory exception" and "extend[] the general rule." 137 S. Ct. at 1699. Here, the general rule requires in-person voting. It is the exception allowing older voters to vote by mail that Plaintiffs consider discriminatory. *See* Tex. Elec. Code 82.003 (authorizing mail-in voting only "if the voter is 65 years of age or older"); *In re State of Texas*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020) ("The Legislature has very deliberately limited voting by mail to voters in specific, defined categories."). This Court could not extend that supposedly discriminatory exception in derogation of the general rule chosen by the Texas Legislature.

Moreover, as discussed above, the *Ex parte Young* exception to sovereign immunity does not allow a federal court to "require affirmative action by the sovereign." *Larson*, 337 U.S. at 691 n.11. While a federal court can, in an appropriate case, "prevent [a state official] from doing that which he

has no legal right to do," *Ex parte Young*, 209 U.S. at 159, it cannot order a state official to "act[] in an official capacity." *Zapata*, 437 F.2d at 1026. Accepting Plaintiffs' applications to vote by mail, providing them with ballots, and then counting their mail-in ballots would undoubtedly require "affirmative action by the sovereign" and "act[s] in an official capacity." As a result, this Court cannot order the Secretary to let Plaintiffs vote by mail.

Moreover, even if the Court could order such relief, it would necessarily be limited to the Plaintiffs. Plaintiffs request an injunction covering all "otherwise qualified Texas voters," ECF 1 at 14, but as the Fifth Circuit recently explained, when plaintiffs do "not sue as class representatives," a "district court lack[s] authority to enjoin enforcement of [the challenged law] as to anyone other than the named plaintiffs." *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)). Here, Plaintiffs have not sued as class representatives. An injunction prohibiting enforcement of Texas law as to non-plaintiffs would be improper.

The Court should dismiss Plaintiffs' claims insofar as they seek such an improper injunction. In the alternative, the Court should strike the portions of the complaint requesting such relief. *See Walker v. Pettit Const. Co.*, 605 F.2d 128, 130 (4th Cir.), *on reh'g sub nom. Frith v. E. Air Lines, Inc.*, 611 F.2d 950 (4th Cir. 1979) (holding a district court should have granted a motion to strike a request for certain damages in a prayer for relief because those damages were "not recoverable under" the relevant statute); *Gray v. City of Santa Fe*, 89 F.2d 406, 410 (10th Cir. 1937) (explaining that a "motion to strike" is appropriate "[w]hen a complaint otherwise states a good cause of action" but "demands relief to which the plaintiff is not entitled").

CONCLUSION

The Secretary respectfully requests that the Court dismiss Plaintiffs' complaint or, in the alternative, strike Plaintiffs' request for an improper injunction in paragraph (b) of their prayer for relief.

Date: June 3, 2020

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

PATRICK K. SWEETEN
Associate Deputy for Special Litigation

/s/William T. Thompson
WILLIAM T. THOMPSON
Special Counsel

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548
Tel.: (512) 936-1414
Fax: (512) 936-0545
patrick.sweeten@oag.texas.gov
will.thompson@oag.texas.gov

COUNSEL FOR THE TEXAS SECRETARY OF STATE

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 3, 2020, and that all counsel of record were served by CM/ECF.

/s/William T. Thompson
WILLIAM T. THOMPSON