No. 20-50654

In the United States Court of Appeals for the Fifth Circuit

LINDA JANN LEWIS; MADISON LEE; ELLEN SWEETS; BENNY ALEXANDER; GEORGE MORGAN; VOTO LATINO; TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; TEXAS ALLIANCE FOR RETIRED AMERICANS,

Plaintiffs-Appellees,

v.

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Defendant-Appellant.

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

REPLY BRIEF FOR APPELLANT

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Introduction

Plaintiffs filed this lawsuit to force "Texas [to] remove unnecessary restrictions on voting by mail." ROA.38. They sued the Texas Secretary of State, seeking an injunction that would prohibit the Secretary from enforcing certain statutes and compel the Secretary to create and implement new voting rules to replace them. Plaintiffs' suit is barred by sovereign immunity. They cannot invoke the exception to sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908), because the Secretary lacks a sufficient connection to enforcement of the challenged statutes and because *Ex parte Young* does not permit an injunction compelling the Secretary to take affirmative action in her official capacity. Plaintiffs' requested relief is unavailable for the separate reason that federal courts do not have authority to order a state official to promulgate regulations.

In their attempt to rewrite Texas election law through a mandatory injunction against the Secretary, plaintiffs thus asked the district court to disregard sovereign immunity, cast aside the limits of *Ex parte Young*, and exceed the constitutional authority of federal courts. The district court stood ready to oblige. This Court should correct that error and hold that plaintiffs' claims are barred by sovereign immunity.

Argument

I. The Secretary Lacks a Sufficient Connection to Enforcement of the Challenged Statutes.

To invoke the exception to sovereign immunity under *Ex parte Young*, a plaintiff must show that the defendant has a "sufficient connection to the enforcement of the challenged law." *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019) (brackets

omitted). Otherwise, the suit "is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Ex parte Young*, 209 U.S. at 157. This Court has held that a sufficient connection exists if the defendant has both (1) "the particular duty to enforce the statute in question and" (2) "a demonstrated willingness to exercise that duty." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) ("*TDP*") (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)).

To determine the correct *Ex parte Young* defendant, the Court focuses on the specific "provision that is the subject of the litigation." *Id.*; s*ee Air Evac EMS, Inc. v. Tex. Dept. of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 515-16 (5th Cir. 2017) (explaining that the inquiry focuses on the allegations in the complaint). "Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, [the] *Young* analysis ends." *City of Austin*, 943 F.3d at 998. But if "no state official or agency is named in the statute in question, [the Court] consider[s] whether the state official actually has the authority to enforce the challenged law." *Id.*

As *City of Austin* explains, courts look beyond the "statute in question" only "[w]here no state official or agency is named" in that statute. *Id.*; *cf. Morris*, 739 F.3d at 746 (in a suit against the Governor challenging Texas Government Code section 501.063, ending the *Ex parte Young* analysis because the section itself tasked an agency, not the Governor, with its enforcement). Here, the challenged laws task local officials, not the Secretary, with enforcement. *See* Blue Br. 13–15. The "*Young*

analysis ends" there, and *City of Austin*'s second step is irrelevant. *City of Austin*, 943 F.3d at 998.

A. The Secretary lacks the requisite connection to enforcement.

1. Local officials are statutorily tasked with enforcement of the challenged provisions.

Plaintiffs' attempt to overcome sovereign immunity fails at the first step of the *Ex parte Young* analysis because the statutory provisions they challenge charge local officials with enforcement. "Determining whether *Ex parte Young* applies to a state official requires a provision-by-provision analysis." *TDP*, 978 F.3d at 179. A defendant's "general duty to see that the laws of the state are implemented" is not sufficient. *City of Austin*, 943 F.3d at 999–1000. The requirement that a defendant has "the particular duty to enforce the statute in question" means that "the official must be statutorily tasked with enforcing the challenged law." *TDP*, 978 F.3d at 179.

The first step of the analysis thus requires the court to determine whether a particular official is charged with enforcing the particular statutory provision. "Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, our *Young* analysis ends." *City of Austin*, 943 F.3d at 998. That is the case here. In the case of the so-called "postage tax," plaintiffs cannot identify any statutory provision that imposes such a tax, and to the extent they challenge the manner in which mail-in ballots are prepared, local officials are statutorily tasked with that responsibility. With respect to the other challenged provisions, the text of the Election Code and plaintiffs' own complaint demonstrate that the Secretary is not a proper defendant because other officials are specifically

tasked with enforcement of the ballot-receipt deadline, the signature-matching requirement, and the ballot-harvesting ban.

Plaintiffs' attempt to charge the Secretary with enforcement of the so-called "postage tax" fails because they do not identify any statute imposing that supposed tax, nor do they explain how the Secretary enforces it. Even if Texas law imposed this "postage tax," it would be enforced by the county election officials who prepare and deliver mail-in ballots to voters. *See* Tex. Elec. Code § 86.002(a) ("The early voting clerk shall provide an official ballot envelope and carrier envelope with each ballot provided to a voter."). In reality, the postage requirement is not imposed by the State of Texas but by the United States Postal Service. *See* 39 U.S.C. § 404(a), (a)(2), (a)(4) ("[T]he Postal Service shall have the following specific powers": "to prescribe . . . the amount of postage and the manner in which it is to be paid"; and "to provide and sell postage stamps.").

County election officials enforce the ballot-receipt deadline when they receive mail-in ballots and determine whether they are timely. Plaintiffs correctly allege that voters "return the marked mail-in ballots to the counties." ROA.55. When county election officials receive mail-in ballots, they have a statutory duty to determine whether the ballots are timely and to reject them if they are not. *See* Tex. Elec. Code § 86.011(a) ("The early voting clerk shall determine whether the return of a voter's official carrier envelope for a ballot voted by mail is timely."); *id.* § 86.011(c) ("If the return is not timely, the clerk shall enter the time of receipt on the carrier envelope and retain it for the period for preserving the precinct election records.").

Likewise, local officials are statutorily tasked with enforcement of the signature-matching requirement. In their complaint, plaintiffs allege that the Election Code "requires county officials to verify each mail-in voter's signature," ROA.45, and that "the county" notifies voters of a signature mismatch, ROA.47. That is consistent with the relevant statutory provisions, which assign responsibility for enforcement to county officials. *See* Tex. Elec. Code § 87.041(a) ("The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to accept the voter's ballot."); *id.* § 87.0431(a) ("Not later than the 10th day after election day, the presiding judge of the early voting ballot board shall deliver written notice of the reason for the rejection of a ballot to the voter at the residence address on the ballot application.").

And local prosecutors are specifically charged with enforcement of the criminal prohibition on possession of a voter's mail-in ballot. *See, e.g.*, *id.* § 86.006(i) (establishing standards for "the prosecution of an offense under Subsection (f)" by "the prosecuting attorney").

Thus, to the extent plaintiffs challenge specific Texas voting laws, local officials are statutorily tasked with their enforcement. The Secretary, "a different official[,] is the named defendant." *City of Austin*, 943 F.3d at 998. Plaintiffs have therefore failed to establish "the requisite connection," *id.* at 1002,and their attempt to invoke the *Ex parte Young* exception fails.

2. The Secretary's general duties do not establish a sufficient connection to enforcement of any specific statutory provision.

Unable to show that the challenged statutes task the Secretary with enforcement, plaintiffs eschew this Court's provision-by-provision analysis altogether. Instead, they contend that "[m]ore than sufficient connection is present here based on the Secretary's general duties under the Texas Election Code." Red Br. 25. Plaintiffs are mistaken. This Court has held that neither the Secretary's status nor her general power to supervise the application of state election law creates a sufficient connection to the enforcement of any particular statutory provision to satisfy the *Ex parte Young* exception.

Plaintiffs claim that the Secretary has a sufficient connection to enforcement of the specific statutes they challenge by virtue of "the undeniable authority that comes with her role as the state's *chief elections official*." Red Br. 4. This Court has already rejected that argument. *See TDP*, 978 F.3d at 179 ("[T]he Secretary is the 'chief election officer of the state.' . . . Still, we must find a sufficient connection between the official sued and the statute challenged." (citation omitted)); *compare* Brief for Plaintiffs-Appellants at 51, *Mi Familia Vota v. Abbott*, 977 F.3d 461 (5th Cir. 2020) (No. 20-50793), 2020 WL 5759845, at *51 (arguing that the Secretary "is indisputably connected to enforcement of the Texas Election Code" because "she is the 'chief election officer of the state'"), *with Mi Familia Vota*, 977 F.3d at 468 (holding that the Secretary was not sufficiently connected to the enforcement of four provisions of the Election Code); *cf. City of Austin*, 943 F.3d at 1000 (rejecting the district court's conclusion that the Attorney General's status as the State's chief law

enforcement officer provided "some connection to the enforcement of the statute" in question (quotation marks omitted)).

The Secretary's general duties under sections 31.003–.005 do not provide the necessary connection, either. This Court has held, to the contrary, that section 31.003 creates "general duties" and that "the Secretary's duty to 'obtain and maintain' uniformity in the application of the Election Code is not 'a delegation of authority to care for any [*i.e.*, every] breakdown in the election process.'" *TDP*, 978 F.3d at 180 (quoting *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972)); *see also Morris*, 739 F.3d at 746 (explaining that *Ex parte Young* requires more than a "general duty to see that the laws of the state are implemented"). In *Mi Familia Vota*, the Court rejected the plaintiffs' argument that the Secretary was "indisputably connected to enforcement" of the challenged law because of her powers under sections 31.003 and 31.005. *Compare Mi Familia Vota*, 977 F.3d at 468 & n.25, *with* Brief for Plaintiffs-Appellants at 51, *Mi Familia Vota*, *supra*, 2020 WL 5759845, at *51.

Plaintiffs forfeited their argument that section 31.004 provides the necessary connection by failing to raise it in the district court. But in any event, they provide no authority for the proposition that the Secretary's duty to "assist and advise all election authorities" implies the authority to enforce any particular statutory provision. *See* Red Br. 26–27. It does not. Enforcement involves "compulsion or constraint." *City of Austin*, 943 F.3d at 1002. Texas courts have been skeptical of the argument that local officials who receive the secretary's "assistance and advice" "lack[] the authority to then form and act upon [their] own ultimate legal judgment." *In re Stalder*, 540 S.W.3d 215, 218 n.9 (Tex. App.—Houston [1st Dist.] 2018,

no pet.). And even if the Secretary's advice *did* have the binding force of law, "the statutory authority . . . to issue" a binding order "is not the power to enforce it." *Mi Familia Vota*, 977 F.3d at 467.

Plaintiffs argue that *TDP* supports their position, but they ignore a critical distinction. There, the challenged statute merely provided: "A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day." Tex. Elec. Code § 82.003. The Court therefore had to move to the second part of the *City of Austin* inquiry and look elsewhere in the Code. Only then did the Court determine that the Secretary had a sufficient connection to enforcement because she was tasked with designing the application for mail-in ballots, and local authorities were required to use that form. *TDP*, 978 F.3d at 179–80. That meant the Secretary had "the authority to compel or constrain local officials." *Id.* at 180. Here, by contrast, the statutes task local officials with enforcement, so there is no need to move to the second step of the inquiry, and in any case, an injunction against the Secretary would not affect the duty of local officials to enforce the challenged provisions.

For similar reasons, plaintiffs' attempt to distinguish *Mi Familia Vota* only shows why the same result is required here. There, plaintiffs sought an injunction directing the Secretary not to enforce a statute that prohibited counties opting into a countywide-voting program from using paper ballots. 977 F.3d at 465. But the Secretary did not print or distribute ballots, and an order enjoining enforcement of the mandatory-electronic-ballot provision would have left county officials with discretion to continue using electronic ballots exclusively. *Id.* at 468. Thus, an injunction against the Secretary would not have produced the requested relief—paper ballots.

Id. The logic of *Mi Familia Vota* applies *a fortiori* here because, as plaintiffs concede, county officials have *no discretion* to accept untimely ballots or "choose not to engage in signature matching at all." Red Br. 37. An injunction against the Secretary therefore would not provide plaintiffs' requested relief because it would not affect local officials' statutory duty to enforce the challenged provisions. And as in *Mi Familia Vota*, those local officials—none of whom are parties—"cannot be enjoined in this suit." 977 F.3d at 468.

Plaintiffs' appeal to earlier authority is simply mistaken. Contrary to their assertion, this Court has not "permitted similar suits against [the Secretary's] predecessors" "for decades." Red Br. 38. The circuit cases they cite do not address sovereign immunity and therefore do not constitute precedent on the issue.[1] *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."). *Hall v. Louisiana*, 983 F. Supp. 2d 820 (M.D. La. 2013), was a suit against the Louisiana Governor and Attorney General. The district court in *Miller v. Hughs*, 471 F. Supp. 3d 768 (W.D. Tex. 2020), granted the Secretary's motion to dismiss for lack of standing. And *Texas Democratic Party v. Hughs*, 474 F. Supp. 3d 849 (W.D. Tex. 2020), has been stayed pending appeal, *see Tex. Democratic Party v. Hughs*, 974 F.3d 570 (5th Cir. 2020) (per curiam). The

[1] *See Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 595 (5th Cir. 2006) (noting that the Secretary was not a party); *Tex. Indep. Party v. Kirk*, 84 F.3d 178 (5th Cir. 1996); *see also Tolpo v. Bullock*, 356 F. Supp. 712 (E.D. Tex. 1972), *aff'd*, 410 U.S. 919 (1973).

"unbroken and long-standing line of cases" that plaintiffs describe does not exist, and more recent cases have consistently rejected the position they advance here. *See, e.g.*, *Mi Familia Vota*, 977 F.3d at 467–68.

3. Even if plaintiffs had standing, that would not establish the *Ex parte Young* exception to sovereign immunity.

In her opening brief, the Secretary explained why *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), does not support plaintiffs' attempt to avoid sovereign immunity. First, that decision had no occasion to consider sovereign immunity because the Court deemed it to be abrogated. Second, because it deemed sovereign immunity to be abrogated, the Court had no occasion to hold—and it did not hold—that individual plaintiffs had standing to sue the Secretary alone to challenge any particular election law, let alone every provision of the Election Code.[2] Thus, even assuming that *OCA-Greater Houston* was correctly decided, it does not establish that plaintiffs have standing, much less that they can invoke *Ex parte*

[2] Plaintiffs deny that *OCA-Greater Houston* is now the subject of a circuit split. Red Br. 39 n.11. A dissenting judge in the Eleventh Circuit thought otherwise. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1284 (11th Cir. 2020) (Jill Pryor, J., dissenting). And the majority in *Jacobson* rejected the very reasoning that plaintiffs offer here—specifically, that the Florida Secretary of State's general authority and her status as "chief election officer" established standing. *See id.* at 1254 (majority op.) (rejecting an attempt to "rely on the Secretary's general election authority" and her "position as 'the chief election officer of the state'" "to establish traceability" (quoting Fla. Stat. § 97.012)). As interpreted by plaintiffs, *OCA-Greater Houston* conflicts directly with that decision. In fairness, however, if *OCA-Greater Houston*'s discussion of standing to sue the Secretary is properly considered *dictum* based on the presence of the State itself as a defendant, then the decision does not necessarily create a direct split with the Eleventh Circuit.

Young's exception to sovereign immunity. *See Tex. Democratic Party v. Hughs*, 974 F.3d at 570-71.

Plaintiffs offer no response to these points. Instead, they refer to *OCA-Greater Houston*'s purported "holding that the Secretary is the proper official for a challenge to a Texas election statute under Article III," Red Br. 41, and they imply that because there is some similarity between the test for standing and the test under *Ex parte Young*, *OCA-Greater Houston* must mean that the Secretary never has sovereign immunity in a challenge to a Texas election law.

Plaintiffs are wrong for two reasons. First, *OCA-Greater Houston* did not hold that the plaintiffs had Article III standing to sue the Secretary alone—the State of Texas was also a named defendant. To the extent it suggested as much, it was *dictum*, and if that were its holding, it would be incorrect. Second, and more importantly, if plaintiffs were correct that Article III and *Ex parte Young* always lead to the same result, that would not help them here; it would only prove that their alleged injuries are not redressable in a suit against the Secretary.[3] Plaintiffs would get no redress from an injunction ordering the Secretary to stop enforcing the "postage tax," to stop rejecting late ballots, to stop rejecting ballots for mismatched signatures, or to stop enforcing the ballot-harvesting ban. Local officials would remain bound by the

[3] Plaintiffs attempt to hedge against this point by suggesting that the Secretary cannot challenge their standing in this appeal. Again, plaintiffs are mistaken. The Court has the power to dismiss for lack of standing even when the appeal is interlocutory or, as here, brought under the collateral-order doctrine. *E.g.*, *City of Austin*, 943 F.3d at 1002–03, 1003 n.3.

Election Code to reject untimely ballots and ballots with mismatched signatures; local election officials and prosecutors would remain bound to enforce the ballot-harvesting ban; and the United States Postal Service would remain free to require postage for delivery of ballots through the U.S. mail. This is a compelling reason to question plaintiffs' reading of *OCA-Greater Houston* and the district court's conclusion that plaintiffs have standing. It is no reason to ignore the "particular duty" requirement when sovereign immunity applies.

B. Plaintiffs do not allege that the Secretary has enforced or threatened to enforce the challenged provisions.

Although their attempt to satisfy *Ex parte Young* fails at the first step, plaintiffs also fail to show that the Secretary has demonstrated a willingness to enforce the challenged statutes. Plaintiffs argue that the Secretary's guidance and advice to local officials demonstrate a willingness to enforce the challenged provisions. But to the extent their examples pertain to the relevant statutes, they only underscore that enforcement falls to local officials, not the Secretary.

Plaintiffs contend, for example, that the Secretary has demonstrated her willingness to enforce the ballot-receipt deadline, Tex. Elec. Code § 86.007, by "direct[ing] county officials not to count domestic ballots received after election day or ballots from overseas and military voters until six days after election day (when the Early Voting Ballot Board reconvenes)," Red Br. 20. According to plaintiffs, this demonstrates an exercise of authority over "ballot counting, and the timeline for it." *Id.* But this involvement with "ballot counting" does not show that the Secretary has enforced or demonstrated her willingness to enforce the provision in question here: the

ballot deadline. *See City of Austin*, 943 F.3d at 1002 (holding that state official's choice "to defend *different* statutes under *different* circumstances does not show that he is likely to do the same here"); *TDP*, 978 F.3d at 179 ("Determining whether *Ex parte Young* applies to a state official requires a provision-by-provision analysis."). Plaintiffs do not allege that the Secretary has compelled county officials to discard late ballots, much less rejected ballots herself. And there would be no reason for her to do so since, as plaintiffs admit, the statute itself compels local officials to discard untimely ballots, and those officials have "no 'discretion' to disregard state law." Red Br. 24.

The same is true of the signature-matching statute. Plaintiffs argue that the Secretary has demonstrated her willingness to enforce the signature-match requirement because she has provided guidance to county officials. *Id.* at 20–21. But providing a "directive" in the form of a handbook for the local officials who examine signatures on absentee ballots does not show a willingness to enforce the underlying statute, even if the Secretary *could* enforce it in the future. *See* Part I(A)(2), *supra*; *City of Austin*, 943 F.3d at 1001–02 ("[T]he mere fact that the Attorney General *has* the authority to enforce" a statute does not establish "the requisite 'connection to [its] enforcement.'"). Indeed, if the Secretary did not publish a handbook for local election officials, they would still remain bound by the statute to discard ballots with mismatched signatures. *See* Red Br. 37 (acknowledging that counties do not have discretion "not to engage in signature matching"). Plaintiffs' own argument thus underscores that the challenged provision, Texas Election Code section 87.027, is enforced by the local officials who determine whether signatures match.

Similarly, plaintiffs argue that the Secretary enforces the ballot-harvesting statute because she provides a form to guide local officials, Red Br. 21, and because she has the authority to refer complaints to the Attorney General for enforcement, *id.* at 22. Neither argument was raised in the district court, but both fail in any case. First, providing guidance to local officials does not coerce or constrain those officials, much less constitute enforcement of the challenged statute. *See* Part I(A)(2), *supra*. Second, the Secretary's ability to refer complaints to the Attorney General does not suffice because it implies enforcement by a different state official. And plaintiffs do not allege (as they must) that the Secretary has made any such referral. *See City of Austin*, 943 F.3d at 1001–02.

Plaintiffs attempt to demonstrate the Secretary's willingness to enforce the so-called "postage tax" with the new allegation that she "collects, reviews, and grants voters' requests for postage-paid *voter registration forms*." Red Br. 23 (emphasis added). According to plaintiffs, this "shows her ability to circumscribe election postage issues." *Id.* But they do not identify the source of that supposed authority, nor do they explain how it creates authority to provide postage for mail-in ballots. More importantly, plaintiffs do not explain how this alleged authority amounts to enforcement of the so-called "postage tax." The Secretary's opening brief explained (at 22–23) that neither she nor the State of Texas imposes a postage requirement; the United States Postal Service does. Plaintiffs offer no response.

Having failed to identify any demonstrated willingness to enforce the specific statutes that they challenge, plaintiffs allege that the Secretary has shown her general willingness to ensure uniform application of Texas law. Red Br. 23–24. That

argument would fail even if the Secretary's general duties implied enforcement authority, which they do not. *See* Part I(A)(2), *supra*. Plaintiffs refer to a single lawsuit brought by the Attorney General in the name of the State to prevent a county clerk from violating state law. *See* Red Br. 24. That lawsuit post-dates plaintiffs' complaint, *see Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 569 n.4 (1992) ("[J]urisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*"), and it is not part of the record on appeal.[4] At any rate, the need to have the Attorney General file suit cuts against plaintiffs' argument that the Secretary's general duties imply enforcement authority over local officials. *See Jacobson*, 974 F.3d at 1253–54. And the existence of a lawsuit to enforce a different provision in different circumstances is insufficient to show a willingness to enforce the statutes challenged here. *City of Austin*, 943 F.3d at 1002.

II. Sovereign Immunity and Federalism Principles Bar Plaintiffs' Requested Relief.

A. Sovereign immunity bars plaintiffs' request for mandatory injunctive relief.

Plaintiffs seek an injunction compelling the Secretary to take affirmative action in her official capacity to change the substance of Texas election law, then somehow

[4] *See Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417 n.4 (5th Cir. 2012) (citing "the general rule that a party may not add documents to the record that were not presented to the district court"). This Court has explained further that "a party may not avoid [that] rule . . . by requesting that the appellate court take judicial notice of the document." *Id.*; *see also MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 315 (5th Cir. 2019) (explaining that the Court is "prohibited . . . from receiving jurisdictional evidence on appeal").

enforce that unwritten law against non-party local election officials. Among other things, plaintiffs seek an order directing the Secretary to "ensure that ballot envelopes have prepaid postage" and "put into the policies and procedures a requirement that voters have an 'opportunity to cure any issues with signature verification before their ballots are rejected.'" Red Br. 42. But *Ex parte Young*'s exception to sovereign immunity applies only when "a federal court commands a state official to do nothing more than refrain from violating federal law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). It does not permit a federal court to order state officials to take "official affirmative action." *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam). Moreover, federal courts have no power "to order state officials to promulgate legislation, regulations or executive orders." *Mi Familia Vota*, 977 F.3d at 469. That is fatal to plaintiffs' claims.

Rather than engage with those points, plaintiffs quibble about the distinction between "nondiscretionary statutory duties *to* act under Sections 31.003-.004 [and] discretionary authority to decide *how* to act." Red Br. 42. That distinction is illusory and immaterial. Plaintiffs cannot deny that their requested relief would require the Secretary to take affirmative action in her official capacity. And it would do so by forcing her to act under provisions of state law that are "discretionary in nature" because they grant "an element of judgment or choice." *St. Tammany Par. ex rel. Davis v. FEMA*, 556 F.3d 307, 323 (5th Cir. 2009); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 242 (5th Cir. 2020) (noting that section 31.003 grants discretion to the Secretary); *see also Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984) ("A law that fails to specify the precise action that the official must take in each instance creates only

discretionary authority."). *Ex parte Young* does not authorize federal courts to control the exercise of a state official's discretion. *Ex parte Young*, 209 U.S. at 158 ("There is no doubt that the court cannot control the exercise of the discretion of an officer."); *Richardson*, 978 F.3d at 241–42 (recognizing that proposition as settled); *Vann v. Kempthorne*, 534 F.3d 741, 754 (D.C. Cir. 2008) (holding that courts may not "oblige" officers to use "discretionary authority to comply with [an] injunction").

It is no answer to say, as plaintiffs do, that they merely seek to enjoin the Secretary *to exercise* her discretionary powers, not to dictate *how* she exercises her authority. To begin with, an order enjoining the Secretary *to act* without telling her *how to* act would be impermissibly vague and invalid under Rule 65. *See, e.g.*, *Scott v. Schedler*, 826 F.3d 207, 212 (5th Cir. 2016) (per curiam) (holding that an injunction ordering the Louisiana Secretary of State to "to maintain in force and effect his policies, procedures, and directives . . . without defining what those policies are or how they can be identified" lacked the specificity required by Rule 65(d)). Setting that defect aside, the distinction plaintiffs attempt to draw is immaterial under *Ex parte Young*, which rests on the fiction that a state official acting in violation of federal law is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. To enjoin the same state official to take affirmative action in his official capacity would destroy the fiction that allows the court to avoid sovereign immunity in the first place.

Unsurprisingly, plaintiffs cite no authority to support their theory of sovereign immunity. *Thomas ex rel. D.M.T. v. School Board of St. Martin Parish*, 756 F.3d 380 (5th Cir. 2014), does not address sovereign immunity at all. And their reliance on

school-desegregation litigation (Red Br. 46–47) is misplaced for multiple reasons, including that the defendants in those cases often did not enjoy sovereign immunity, *see, e.g.*, *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977) (holding that school board could not assert sovereign immunity), were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-38 (1968); *see also Milliken v. Bradley*, 433 U.S. 267, 290 (1977) (noting States' affirmative duty "to eliminate . . . all vestiges of state-imposed segregation"), and often participated in crafting remedial decrees, *see id.* at 296 (Powell, J., concurring) (noting that "the State expressly agreed" to certain remedial measures and did not object to others).

Plaintiffs' attempt to distinguish *Vann v. Kempthorne*, Red Br. 45, misses the point. There, the requested injunction did not compel affirmative action; it merely required the tribe to stop enforcing part of its constitution. That the tribe might choose to amend its constitution *in response* to the injunction was irrelevant because it "would not be the direct result of judicial compulsion." *Vann*, 534 F.3d at 754. Here, by contrast, plaintiffs request an affirmative injunction compelling the Secretary to change the substance of Texas statutes, then somehow compel local officials to implement that unenacted law. That affirmative relief is not an incidental effect of a prohibitory injunction, nor is it merely a potential response to the injunction by defendants. *Cf. id.* It is the very object of plaintiffs' suit—they want "Texas [to] remove unnecessary restrictions on voting by mail." ROA.38. Even if the Secretary could provide that relief (she cannot), *Ex parte Young* does not permit the federal

courts to enjoin her to act in her official capacity, and federal courts have no power to enjoin state officials to rewrite state law. *Mi Familia Vota*, 977 F.3d at 469. Plaintiffs cannot sidestep those jurisdictional pitfalls by seeking an injunction that compels the Secretary to exercise her official authority but does not provide the details.

B. Prohibitory or declaratory relief against the Secretary would be ineffective.

A prohibitory injunction against the Secretary would be futile. Even if the district court ordered the Secretary not to enforce the challenged provisions, that would not require county officials to stop enforcing them. *Id.* at 468. As plaintiffs recognize, for instance, "county elections officials have no authority to count ballots received after the election-day receipt deadline." Red Br. 3. A prohibitory injunction against the Secretary could not give county officials that authority.

Plaintiffs argue that an injunction against the Secretary would bind local officials, but they provide no authority other than a bare citation to Rule 65. Red Br. 47. This Court has held, however, that because plaintiffs have not named any local officials as defendants, they "cannot be enjoined in this suit." *Mi Familia Vota*, 977 F.3d at 468. So a prohibitory injunction against the Secretary "would not afford the Plaintiffs the relief that they seek" and would serve no purpose. *Id.* The Secretary, therefore, "is not a proper defendant." *Id.* As a result, *Ex parte Young* does not permit a prohibitory injunction against the Secretary. And because the requested injunctive relief is unavailable, "the Eleventh Amendment bar[s] a claim for declaratory relief." *Freedom from Religion Found. v. Abbott*, 955 F.3d 417, 425–26 (5th Cir. 2020).

III. The Secretary Did Not Waive Sovereign Immunity.

Plaintiffs' argument that the Secretary waived sovereign immunity fails for two reasons. First, plaintiffs forfeited their waiver argument by failing to raise it in district court. *See Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 (5th Cir. 2002). Second, the Secretary never signaled an intent to waive sovereign immunity. She asserted sovereign immunity in her motion to dismiss, ROA.105, and when that motion was denied, she appealed. There is no basis to find a waiver.

Plaintiffs now argue that the Secretary waived sovereign immunity by opposing their motion for a preliminary injunction while her motion to dismiss was pending. But "[a] state's waiver of immunity must be unequivocal." *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000); *accord Union Pac. R.R. Co. v. La. Pub. Servs. Comm'n*, 662 F.3d 336, 341 (5th Cir. 2011). While waiver may be proven by "action other than an express renunciation," this Court has explained that "[t]he common thread" in such cases "is that the state cannot simultaneously proceed past the motion and answer stage to the merits and hold back an immunity defense." *Neinast*, 217 F.3d at 279. This case has not proceeded "past the motion and answer stage," and the Secretary has not "h[e]ld back an immunity defense." *Cf. id.* at 279–80 (holding that "Texas did not unequivocally waive its right to assert immunity from suit," even though it failed to raise sovereign immunity in district court, where "Texas's only filing was a motion to dismiss based on the Tax Injunction Act").

Plaintiffs concede that the Secretary would not have waived sovereign immunity had she failed to raise it in the district court. *See* Red Br. 14 n.2; *Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974) (describing it as "well settled . . . that the Eleventh

Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court"). But having asserted it, they argue, the Secretary was required to do no more—and passively accept a preliminary injunction—or else waive the already-asserted defense. If plaintiffs were right, a defendant could never raise sovereign immunity at summary judgment after engaging in discovery on the merits. They are not. *See, e.g.*, *Kermode v. Univ. of Miss. Med. Ctr.*, 496 F. App'x 483, 489 (5th Cir. 2012) ("[W]e have never held that a state has waived its sovereign immunity when it asserted sovereign immunity as an affirmative defense in its answer and again in its motion for summary judgment."); *cf. Union Pac.*, 662 F.3d at 341–42 (finding sovereign immunity validly raised for the first time on appeal after the State had litigated the merits to summary judgment in district court); *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 289 (5th Cir. 1993) (refusing to find waiver of foreign sovereign immunity where the defendant "had participated in discovery and trial preparation for two years before filing its motion to dismiss on the basis of sovereign immunity"). While the Secretary could have withheld her sovereign-immunity defense in the district court and raised it for the first time on appeal, nothing compelled her to do so, and she cannot be punished for declining to sandbag plaintiffs and the district court.

Plaintiffs essentially fault the Secretary for opposing their attempt to secure a preliminary injunction while her motion to dismiss was pending. To be sure, the Secretary would have preferred to resolve the question of sovereign immunity before the case proceeded. But plaintiffs demanded that the case move forward. Before the Secretary's motion to dismiss was fully briefed, plaintiffs filed their motion for

preliminary injunction, accompanied by multiple declarations, multiple expert reports, and over three hundred pages of exhibits. *See* ROA.236-612. The Secretary was entitled to oppose plaintiffs' preliminary-injunction motion, and doing so did not unequivocally waive sovereign immunity. She reasonably requested additional time and the opportunity to confront the mountain of evidence marshaled by plaintiffs—at all times maintaining that their claims were barred by sovereign immunity.

Plaintiffs also complain that the Secretary continued to comply with preexisting discovery deadlines after her motion to dismiss was denied. Red Br. 15. The record shows why. The district court had entered a scheduling order for discovery and briefing on plaintiffs' preliminary-injunction motion. ROA.654. The Secretary maintained that her notice of appeal divested the district court of jurisdiction and stayed discovery. ROA.692. Plaintiffs disagreed and urged the district court to retain jurisdiction and order that discovery continue. ROA.717. Discovery stopped as soon as the district court rejected plaintiffs' request. ROA.737. Choosing not to violate an existing scheduling order did not unequivocally waive sovereign immunity. *Cf. Union Pac.*, 662 F.3d at 342 (holding that sovereign immunity was not waived "given the involuntary nature of the State's participation in th[e] suit," even though it was not raised until after summary judgment).

Conclusion

The Court should reverse the district court's order and render judgment dismissing Plaintiffs' complaint for lack of subject-matter jurisdiction.

Respectfully submitted.

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Certificate of Service

On March 16, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,328 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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