

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY;)
GILBERTO HINOJOSA, Chair of the)
Texas Democratic Party; JOSEPH)
DANIEL CASCINO; SHANDA MARIE)
SHANSING; and BRENDA LI GARCIA,)

Plaintiffs,)

and)

LEAGUE OF UNITED LATIN)
AMERICAN CITIZENS (LULAC), and)
TEXAS LEAGUE OF UNITED LATIN)
AMERICAN CITIZENS,)

5:20-cv-00438-FB

Plaintiff-Intervenors,)

v.)

GREG ABBOTT, Governor of Texas;)
KEN PAXTON, Texas Attorney General;)
RUTH HUGHS, Texas Secretary of State;)
DANA DEBEAUVOIR, Travis County)
Clerk; and JACQUELYN F. CALLANEN,)
Bexar County Elections Administrator,)

Defendants.)

**DEFENDANT BEXAR COUNTY ELECTIONS ADMINISTRATOR
JACQUELYN CALLANEN’S REPLY IN SUPPORT OF HER MOTION TO DISMISS**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes Defendant Bexar County Elections Administrator Jacquelyn Callanen, and files this Reply in support of her Motion to Dismiss (docket no. 148).

ARGUMENT

1. Plaintiff's central claims in this case challenge the validity of Section 82.003 of the Texas Election Code, a state law enacted by Texas's Legislature and Governor and administered under the interpretative guidance and using the official forms provided to local officials by the Secretary of State. In addition to naming those state officials as Defendants, Plaintiffs¹ sued the local elections administrators for two of Texas's 254 counties: Travis County Clerk Dana DeBeauvoir and Bexar County Elections Administrator Jacquelyn Callanen. Defendant Callanen's Motion to Dismiss, currently pending before the Court, asserts two primary arguments. Docket no. 148. First, she argued that the claims against her in this litigation should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1), because Plaintiffs' alleged injuries are not fairly traceable to her and the judicial remedy for those injuries would involve relief directed against the state Defendants, not her. Second, she argued that the claims against her in this action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), because Plaintiffs have not pleaded facts showing that any act or omission of Defendant Callanen—or any County official—violated their rights, and indeed do not mention Defendant Callanen at all in their pleadings other than to identify her as a party.

A. Plaintiffs Cannot Show That Their Alleged Injuries Were Caused by Defendant Callanen or Could be Remedied by Judicial Relief Directed Against Her

2. In response, Plaintiffs argue that because both state and local elections officials are involved in the administration of early voting by mail, both are proper defendants to their challenge to the validity of Section 82.003 of the Texas Election Code. Docket no. 156 at 4. But standing

¹ For ease of reference, "Plaintiffs" refers collectively to Plaintiffs and Plaintiff-Intervenors.

requires more than mere ‘involvement’: Plaintiffs must show, *inter alia*, that their injuries are fairly traceable “to the defendant’s allegedly unlawful conduct[.]” *Texas v. California*, No. 19-1019, 2021 WL 2459255, at *4 (U.S. June 17, 2021) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). Plaintiffs do not identify any “unlawful conduct” by Defendant Callanen. Local officials like her did not pass Section 82.003 through the legislature, or sign it into law, issue interpretative guidance for its administration, and do not design the forms that are used to give effect to its restrictions on voters’ eligibility to obtain a ballot to vote by mail.

3. Of course, local officials *do* play a role in the administration of early voting by mail as a practice. As identified by the Court of Appeals in this case, local officials are tasked with “review[ing] each application for a ballot to be voted by mail” and “mail[ing] without charge an appropriate official application form.” *Texas Democratic Party v. Abbott*, 978 F.3d 168, 180 (5th Cir. 2020) (quoting Tex. Elec. Code §§ 86.001(a) and 84.012). But Plaintiffs do not dispute the constitutionality of vote-by-mail as a practice; they challenge the validity of a specific limitation on vote-by-mail eligibility imposed by a specific statute, Section 82.003 of the Election Code. Merely having a role in the practice of voting by mail is not enough to show a link between Plaintiff’s claimed injury and the allegedly unlawful operation of the specific statute they challenge. It is the Secretary of State who designs the application forms for mail-in ballots and provides those forms to local officials, *Texas Democratic Party*, 978 F.3d at 179, and it is those application forms, as well as the text of Section 82.003 itself, that inflict the injury that Plaintiffs allege, by excluding voters under age 65 from no-excuse eligibility to early vote by mail. Local officials’ duties under *other* vote-by-mail provisions that Plaintiffs do not attack as unlawful, such as Sections 86.001(a) or 84.012, cannot establish those officials’ connection to Section 82.003 or the Secretary of State’s application forms. *California*, 2021 WL 2459255, at *9.

4. Plaintiffs correctly observe in their response that many of the Fifth Circuit cases analyzing whether state officials are the proper defendants to Election Code challenges address the question of whether the relief sought would fall within the *Ex Parte Young* exception to the state officials' sovereign immunity—an issue generally not implicated in claims against local officials. Docket no. 156 at 4 & n.2. But Defendant Callanen's arguments under Rule 12(b)(1) do not involve sovereign immunity or *Ex Parte Young*. They arise from causation and redressability requirements of Article III standing, which apply to all parties and all claims. *Cuno*, 547 U.S. at 342. Significantly, applicability of the *Ex Parte Young* exception turns on whether the immune defendant has a "sufficient connection" to the enforcement of the allegedly unconstitutional law, *Texas Democratic Party*, 978 F.3d at 179, while Article III's causation requirement raises a distinct question: Whether the plaintiff's injury is "fairly traceable to the defendant's allegedly unlawful conduct[.]" *California*, 2021 WL 2459255, at *4. Plaintiffs argue that their injuries are "fairly traceable" to all Defendants, since the Election Code sets out a "division of responsibilities" under which all defendants play a role in administering early voting by mail. This argument conflates the analyses of the state's sovereign immunity and the plaintiffs' Article III standing, and misstates the relevant causation inquiry, which does not test each defendants' connection to voting-by-mail as a practice, but their connection to the allegedly unlawful operation of the specific statutory provision Plaintiffs challenge. And notwithstanding Plaintiffs' representation of the appellate rulings in this case, the Fifth Circuit has *not* found that "Defendant Callanen 'has the needed connection' to serve as a proper defendant in this matter." Docket no. 156 at 4 (quoting *Texas Democratic Party*, 978 F.3d at 180); *but cf.* *Texas Democratic Party*, 978 F.3d at 180 ("Though there is a division of responsibilities, *the Secretary* has the needed connection." (emphasis added)).

5. For similar reasons, Plaintiffs cannot satisfy the redressability requirement of Article III standing. The analysis of redressability goes to “the relationship between ‘the judicial relief requested’ and the ‘injury’ suffered.” *California*, 2021 WL 2459255, at *4 (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984), abrogated by *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)). Plaintiffs seek relief on a statewide basis, but no remedy imposed against Defendant Callanen could provide that statewide relief. Nor are Plaintiffs required to join the local election administrators for each of Texas’s 254 counties to obtain statewide relief. The Court of Appeals in this case has already identified the discrete act by which Plaintiffs’ injuries are produced statewide: The Secretary of State, in addition to her general duty to “obtain and maintain uniformity in the application, operation, and interpretation of” the Texas Election Code, Tex. Elec. Code 31.003, has the “specific and relevant duty to design the application form for mail-in ballots[.]” *Texas Democratic Party*, 978 F.3d at 179. It is this application form that, as required by Section 82.003, excludes voters under age 65 from obtaining ballots to vote by mail, unless they can show their eligibility in a different, non-age-related category. The only effective statewide remedy for the injury Plaintiffs allege would need to be directed at the Secretary of State’s formulation of that application, not at any conduct or action of local elections officials. *Texas Democratic Party*, 978 F.3d at 180 (“a finding that the age-based option denies or abridges younger voters’ right to vote might lead to prohibiting the Secretary from using an application form that expressed an unconstitutional absentee-voting option.”); *see generally California*, 2021 WL 2459255, at *6 (“Remedies . . . ordinarily ‘operate with respect to specific parties.’ . . . not simply . . . ‘on legal rules in the abstract.’” (quoting *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring))).

B. Plaintiffs Have Not Stated Any Viable Claim Against Defendant Callanen

6. Plaintiffs cannot trace their injury to any action of Defendant Callanen, or identify any judicial remedy directed at Defendant Callanen for the injury they allege, because they do not identify any conduct on her part that they contend is unlawful. As a general matter, “[p]ersonal involvement is an essential element of a civil rights cause of action”: To be liable, a defendant “must be either personally involved in the acts causing the deprivation of a person’s constitutional rights, or there must be a causal connection between an act of the [defendant] and the constitutional violation sought to be redressed[.]” *Thompson v. Crnkovich*, 788 F. App’x 258, 259 (5th Cir. 2019). Plaintiffs allege no such personal involvement. Aside from identifying Defendant Callanen as a party, their pleadings do not mention her at all. In their response opposing Defendant Callanen’s Motion to Dismiss, Plaintiffs argue that “Defendant Callanen’s enforcement of the statute [i.e., Section 82.003] . . . violates Plaintiffs’ rights.” Docket no. 156 at 5. But as discussed above, it is not any action of Defendant Callanen that produces the age-based limitation on eligibility to early vote by mail that constitutes Plaintiffs’ claimed injury. That exclusion is set out in state law, and made effective by the Secretary of State’s promulgation of the Application for Ballot by Mail form² for use by local elections officials. *See* Tex. Elec. Code §§ 82.001 through 82.004. That state-developed form, not Defendant Callanen, “enforces” Section 82.003 by limiting who may apply to early vote by mail.

7. Plaintiff allege federal constitutional and statutory violations, and seek declaratory and injunctive relief and an award of attorneys’ fees against Defendant Callanen, but have not pleaded

² That form is available at <https://www.bexar.org/DocumentCenter/View/25422/Application-for-Ballot-by-Mail>.

facts showing that she, as opposed to the State of Texas and its officials, infringed on their eligibility to early vote by mail. As to Defendant Callanen, these claims should be dismissed.

CONCLUSION

8. Plaintiffs allege that Section 82.003 of the Texas Election Code violates the Twenty-Sixth Amendment and the Voting Rights Act, and injures them by unlawfully abridging their right to vote. Defendant Callanen did not cause that injury, and judicial action directed against her cannot remedy it. Plaintiffs therefore have not established their Article III standing as to their claims against her, which should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). And since Plaintiffs have not pleaded facts showing that Defendant Callanen has engaged in any unlawful conduct or cause the injuries they allege, they have also failed to state any viable claim against her, and she should additionally be dismissed from this litigation pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully Submitted,

JOE GONZALES
Bexar County Criminal District Attorney

By: /s/ Robert Green

ROBERT D. GREEN
Bar No. 24087626
Assistant District Attorney, Civil Division
101 W. Nueva, 7th Floor
San Antonio, Texas 78205
Phone: (210) 335-2146
Fax: (210) 335-2773
robert.green@bexar.org
*Attorney for Defendant Bexar County Elections
Administrator Jacquelyn Callanen*

CERTIFICATE OF SERVICE

I do hereby certify on the 18th day of June, 2021, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which provided electronic service upon all parties.

/s/ Robert Green
ROBERT D. GREEN