No. 22-50778

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22-50775

LA UNION DEL PUEBLO ENTERO; FRIENDSHIP-WEST BAPTIST CHURCH; ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST, AND TEXOMA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; TEXAS IMPACT; MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS; TEXAS HISPANICS ORGANIZED FOR POLITICAL EDUCATION; JOLT ACTION; WILLIAM C. VELASQUEZ INSTITUTE; JAMES LEWIN; FIEL HOUSTON, INCORPORATED,

Plaintiffs–Appellees,

v.

JANE NELSON, In Her Official Capacity as Texas Secretary of State; WARREN K. PAXTON, In His Official Capacity as Attorney General of Texas; STATE OF TEXAS,

Defendants–Appellants,

consolidated with
No. 22-50777

MI FAMILIA VOTA; MARLA LÓPEZ; MARLON LÓPEZ; PAUL RUTLEDGE,

Plaintiffs–Appellees,

v.

GREGORY W. ABBOTT, In His Official Capacity as Governor of Texas; JANE NELSON, In Her Official Capacity as Secretary of State of Texas; WARREN K. PAXTON, In His Official Capacity as Attorney General of Texas,

Defendants–Appellants,

DELTA SIGMA THETA SORORITY, INCORPORATED; HOUSTON AREA URBAN LEAGUE, THE ARC OF TEXAS; JEFFREY LAMAR CLEMMONS,

Plaintiffs–Appellees,

v.

GREGORY WAYNE ABBOTT, In His Official Capacity as the Governor of Texas; WARREN KENNETH PAXTON, JR., In His Official Capacity as the Attorney General of Texas,

Defendants–Appellants,

MI FAMILIA VOTA; MARLA LÓPEZ; MARLON LÓPEZ; PAUL RUTLEDGE,

Plaintiffs–Appellees,

v.

GREG ABBOTT, In His Official Capacity as Governor of Texas; JANE NELSON, In Her Official Capacity as Texas Secretary of State; WARREN KENNETH PAXTON JR., In His Official Capacity as Attorney General of Texas,

Defendants–Appellants,

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consolidated with
No. 22-50778

LA UNION DEL PUEBLO ENTERO; ET AL,

Plaintiffs,

v.

GREGORY W. ABBOTT, In His Official Capacity as Governor of Texas; ET AL,

Defendants,

OCA-GREATER HOUSTON; LEAGUE OF WOMEN VOTERS OF TEXAS; REV UP-TEXAS; WORKERS DEFENSE ACTION FUND,

Plaintiffs–Appellees,

v.

JANE NELSON, In Her Official Capacity as Texas Secretary of State; KEN PAXTON, Texas Attorney General,

Defendants–Appellants,

On Appeal from the United States District Court
for the Western District of Texas
San Antonio Division – No. 5:21-cv-00844

BRIEF OF PLAINTIFFS-APPELLEES OCA-GREATER HOUSTON, LEAGUE OF WOMEN VOTERS OF TEXAS, REVUP-TEXAS, and WORKERS DEFENSE ACTION FUND

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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- League of Women Voters of Texas
- REVUP-Texas
- Workers Defense Action Fund

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Intervenors

- Harris County Republican Party
- Dallas County Republican Party
- Republican National Committee
- National Republican Senatorial Committee
- National Republican Congressional Committee

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Dated: February 16, 2023

/s/ Adriel I. Cepeda Derieux
Adriel I. Cepeda Derieux
Counsel of Record for OCA-GH Plaintiffs-Appellees

STATEMENT OF ORAL ARGUMENT

Because this appeal involves the straightforward application of longstanding principles, it is Plaintiffs-Appellees position that oral argument would not significantly aid the Court in resolving the appeal. *See* Fed. R. App. P. 34(a)(2). If, however, this Court determines that oral argument would assist the Court in resolving the appeal, Plaintiffs-Appellees request leave to participate.

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COUNTER-STATEMENT OF THE ISSUES

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2. Are State Defendants immune from Plaintiffs' constitutional and statutory claims?
3. Have Plaintiffs plausibly alleged Article III Standing?
4. Does the Voting Rights Act of 1965 abrogate State sovereign immunity?

JURISDICTIONAL STATEMENT

The Jurisdictional Statement in the brief State Defendants submitted is incomplete and inaccurate. Plaintiffs-Appellees dispute that this Court has jurisdiction to consider State Defendants' interlocutory appeal. The district court's order is not a "final decision[] of [a] district court[] of the United States," 28 U.S.C. § 1291, and is unreviewable under the collateral order doctrine or this Court's pendent appellate jurisdiction.

STATEMENT OF THE CASE

I. PLAINTIFFS CHALLENGE S.B.1.

Texas has long used its State-level offices to enforce its election laws. It has also devoted substantial resources to bringing charges for Election Code infractions. In 2021, the Texas Attorney General created an "Election Integrity Unit" to "continue to pursue prosecutions for criminals willing to commit election crimes." ROA.5870 ¶ 47. Meanwhile, the Secretary of State (the "Secretary") lies at the heart of Texas's election law enforcement, as the State's "chief election officer," Tex. Elec. Code § 31.001(a), responsible for "obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of this code and of the election laws outside this code," *id.* § 31.003. Together, these two State officers investigate and enforce the Texas Election Code, often in cooperation with local prosecutors.

The Legislature's 2021 omnibus elections bill, known as S.B.1, adds to this enforcement scheme. ROA.5852 ¶ 2. S.B.1 imposes new requirements on voters to include ID numbers when voting by mail. S.B.1 §§ 5.02, 5.03, 5.06, 5.07, 5.08, 5.10, and 5.12 (amending Tex. Elec. Code §§ 31.002); ROA.5886–87 ¶¶ 97–101. These new ID requirements lead to increased rejections, especially among voters with disabilities and voters who speak languages other than English. *See, e.g.*, ROA.5890–5891 ¶¶ 112–14.

S.B.1 also criminalizes certain types of voting assistance, like forbidding "compensation" in the context of mail-in voting support. S.B.1 § 6.06 (amending Tex. Elec. Code § 86.0105). These threatened criminal penalties chill voters' ability to select their assistants of choice. ROA.5904–05, ¶¶ 162–65. Finally, S.B.1 prohibits efforts to persuade voters to support a candidate or measure in the presence of a ballot, pejoratively known as "vote harvesting." ROA.5886 ¶ 96(C). S.B.1 thus broadly criminalizes a wide range of interactions that may occur between voters and organizers, including legitimate efforts to ensure that voters with disabilities receive the assistance they are entitled to under federal law. *See* S.B.1 § 7.04 (adding Tex. Elec. Code § 276.015); *see, e.g.*, ROA.5915–25, ¶¶ 195–239.

In September 2021, OCA-GH Plaintiffs-Appellees[1] alleged the above provisions of S.B.1 each violate multiple provisions of federal law—the Voting Rights Act ("VRA"), the Civil Rights Act, the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and/or the First & Fourteenth Amendments to the U.S. Constitution. ROA.5853 ¶ 7. Plaintiffs are membership organizations alleging that S.B.1's restrictions would have a profound impact on their ability to advance their respective missions, as well as their members' abilities to vote and assist others with voting, and infringe upon their core First Amendment rights.

II. THE DISTRICT COURT LARGELY DENIES STATE DEFENDANTS' MOTION TO DISMISS, AND THEY APPEAL.

On February 8, 2022, State Defendants filed a motion to dismiss claims Plaintiffs brought against them. ROA.7236. First, State Defendants sought sovereign immunity from Plaintiffs' constitutional claims, arguing "Plaintiffs cannot assert the *Ex parte Young* exception to sovereign immunity." *Id.* Second, State Defendants reiterated their *Ex parte Young* arguments to assert that Plaintiffs lacked standing based on traceability and redressability. *Id.*; ROA.7247–48. State Defendants also argued Plaintiffs failed to plead facts satisfying their ADA and Rehabilitation Act claims. ROA.7236. Finally, State Defendants contested this

[1] Plaintiffs-Appellees are organizations OCA-Greater Houston, League of Women Voters of Texas, REVUP Texas, and Workers Defense Action Fund, (collectively "Plaintiffs").

Court's holding in *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (2017), suggesting it was wrongly decided and that Congress did not abrogate state sovereign immunity under Section 2 of the VRA. ROA.7254–55.

The district court granted in part and denied in part the motion. ROA.10663. The order permitted Plaintiffs to proceed against State Defendants with challenges to sections 5.02, 5.03, 5.06, 5.07, 5.10, 5.12, 6.06, and 7.04 of S.B.1.[2] ROA.10723. The court held that sovereign immunity did not bar Plaintiffs' claims under the *Ex parte Young* exception, and explained that State Defendants had the enforcement duties and willingness to enforce the challenged S.B.1. provisions. ROA.10668–90. Notably, the district court recognized that Texas waived sovereign immunity from Plaintiffs' Rehabilitation Act claim. ROA.10710.

The district court likewise held that Plaintiffs have standing to assert their claims against State Defendants. ROA.10711–17. It found that Plaintiffs had adequately alleged the challenged provisions of S.B.1 will harm their organizations and members, which State Defendants do not meaningfully dispute. ROA.10712–14; ROA.7247–48; Br.20. The court further concluded that Plaintiffs' injuries

[2] The district court also held that a modified injunction in a different case, *OCA-Greater Houston v. Texas*, 1:15-cv-679-RP, 2022 WL 2019295 (W.D. Tex. June 6, 2022), mooted Plaintiffs' challenge to the portions of Section 6.04. *See* ROA.10695.

were traceable to State Defendants, given their authority to enforce the challenged election code provisions, and redressable by the courts. ROA.10714–17.

Accordingly, the district court concluded that Plaintiffs could proceed against State Defendants with their challenges to the following S.B.1 provisions, which each create or implicate different election code rules:

- Sections 5.02, 503, 5.06, 5.07, 5.10 and 5.12 which collectively implement a new requirement for voters to include an identification number when voting by mail, and can be implemented only "if and when the Secretary modifies vote-by-mail applications and mail ballot carrier envelopes to integrate the new identification requirements," and leave no room for local officials to deviate from the Secretary's prescribed forms and rules. S.B.1 § 5.02 (amending Tex. Elec. Code § 84.002); S.B.1 § 5.03 (amending Tex. Elec. Code § 84.011(a)); S.B.1 § 5.06 (amending Tex. Elec. Code § 84.035); S.B.1 § 5.07 (amending Tex. Elec. Code § 86.001); S.B.1 § 5.10 (amending Tex. Elec. Code § 86.015(c)); S.B.1 § 5.12 (amending Tex. Elec. Code § 87.0271); ROA.10673–77.

- Section 6.06, which criminally prohibits offering or providing compensation to, or accepting compensation from, "another person for assisting" mail-in voters and is enforced by the Secretary and Attorney General. S.B.1 § 6.06 (amending Tex. Elec. Code § 86.0105); ROA.10696.

- Section 7.04, which criminalizes knowingly compensating or being compensated for "in-person interaction with one or more voters, in the physical presence of an official ballot or a ballot voted by mail, intended to deliver votes for a specific candidate or measure," which the Secretary and Attorney General also enforce. *Id.* (creating Tex. Elec. Code § 276.015); ROA.10681–83.[3]

[3] The district court correctly observed that Plaintiffs' challenge only the portion of Section 7.04 that codifies new offenses under section 276.015. ROA.10681 at n.14.

State Defendants subsequently appealed the district court's order.

SUMMARY OF THE ARGUMENT

The Court lacks jurisdiction to hear State Defendants' appeal from the district court's Order denying their motion to dismiss. ROA.10663. To the extent the Order finds Plaintiffs have standing to bring claims against State Defendants, it is not immediately appealable under the collateral order doctrine. Nor are State Defendants entitled to interlocutory review of the district court's finding that sovereign immunity does not bar Plaintiffs' *Ex parte Young* claims against them. A proper application of sovereign immunity would remove State Defendants from litigation and require dismissal of *all* claims. *Planned Parenthood Gulf Coast, Inc. v. Phillips*, 24 F.4th 442, 450 (5th Cir. 2022) (en banc). But Plaintiffs raise unchallenged claims under Title II of the ADA and Section 504 of the Rehabilitation Act—respectively, statutes whereby Congress abrogated the State's sovereign immunity or where State Defendants waived their immunity by accepting federal funds.[4] ROA.5896–5900; ROA.5913–15. Plaintiffs also assert claims for injunctive relief under Section 208 of the VRA. ROA.5911–13. And while State Defendants challenge the district court's conclusion that Section 208 abrogates their sovereign immunity, they necessarily concede that this Court

[4] As discussed *infra*, State Defendants do not appeal the district court's finding that "Texas waived the Secretary's and the Attorney General's immunity for claims under § 504 of the Rehabilitation Act." ROA.10710.

recently held otherwise. Br.50 (citing *OCA-Greater Hous.*, 867 F.3d at 614). Because State Defendants do not seek immunity from standing trial on valid claims, the interlocutory Order denying their sovereign immunity defense against others is not subject to immediate review. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995).

Nor are State Defendants entitled to sovereign immunity from Plaintiffs' constitutional claims. The well-settled *Ex parte Young* exception to sovereign immunity applies to officials who [1] possess a "particular duty to enforce the statute in question and," [2] show "willingness to exercise that duty." *Tex. Democratic Party v. Abbott* (*Tex. Democratic Party II*), 978 F.3d 168, 179 (5th Cir. 2020). The Secretary and Attorney General do both. State Defendants enforce the challenged S.B.1 provisions under the election code and this Court's precedent. Their actions both before and after S.B.1's passage reflect eagerness to enforce the provisions. They are proper defendants.

Plaintiffs possess standing to bring their claims against State Defendants as well. Plaintiffs properly pled that they have suffered and will suffer injuries traceable to State Defendants' enforcement of the challenged S.B.1 provisions and would likely be redressed by a favorable decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Lastly, there is no merit to State Defendants' argument that this Court ought to revisit its precedent recognizing that Congress purposefully abrogated states' Eleventh Amendment immunity to suit when it enacted the VRA. *See OCA-Greater Hous.*, 867 F.3d at 614. State Defendants correctly note that the panel is bound by *OCA-Greater Houston*, which both begins and ends any questions presently before the Court.

ARGUMENT

I. STANDARD OF REVIEW

The Fifth Circuit reviews questions of "sovereign immunity and standing *de novo*." *Tex. All. For Retired Ams. v. Scott* (*Texas Alliance*), 28 F.4th 669, 671 (5th Cir. 2022). Courts "accept all factual allegations in the [Plaintiffs'] complaint[s] as true" when reviewing appeals of a motion to dismiss. *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001); *see also Wooten v. Roach*, 964 F.3d 395, 399 (5th Cir. 2020). The same standard applies when determining defendants' immunity from pleaded claims. *Loupe v. O'Bannon*, 824 F.3d 534, 536 (5th Cir. 2016) ("In determining immunity, we accept the allegations of [the plaintiff's] complaint as true.").

II. THIS COURT LACKS JURISDICTION UNDER THE COLLATERAL ORDER AND PENDENT APPELLATE JURISDICTION DOCTRINES TO CONSIDER STATE DEFENDANTS' APPEAL.

The Court lacks jurisdiction over this appeal. Appellate jurisdiction is limited to "final decisions." 28 U.S.C. § 1291. But this appeal was taken from the denial of a motion to dismiss, which "is not a final decision under section 1291." *Solorzano v. Mayorkas*, 987 F.3d 392, 396 (5th Cir. 2021) (citation omitted).

Nor does the appeal fall under the "extraordinarily limited" doctrine allowing review of otherwise nonfinal orders. *Acoustic Sys. v. Wenger Corp.*, 207 F.3d 287, 291 (5th Cir. 2000). State Defendants do not "assert[] sovereign immunity from th[e] *entire* lawsuit." *Phillips*, 24 F.4th at 450 (emphasis added). Plaintiffs' claims under Section 208 of the VRA, Title II of the ADA, and Section 504 of the Rehabilitation Act all pierce State Defendants' sovereign immunity in some manner. And State Defendants leave the district court's denial of their sovereign immunity defense on these claims unchallenged or concede it away. *See* Br.19, 50. Thus, application of sovereign immunity wouldn't "remove [State Defendants] from this litigation." *Phillips*, 24 F.4th at 450.

Insofar as State Defendants bring *all* of Plaintiffs' claims to this Court, they do so on the basis that Plaintiffs lack standing—a "defense of lack of subject matter jurisdiction [that] is not immediately appealable." *Keyes v. Gunn*, 890 F.3d 232, 235 n.4 (5th Cir. 2018). The Court therefore lacks "pendent appellate

jurisdiction" over this additional argument. *See Escobar v. Montee*, 895 F.3d 387, 391–92 (5th Cir. 2018).

A. This Court lacks jurisdiction over State Defendants' sovereign immunity defense.

State Defendants do not dispute that they appeal from an interlocutory order. Br.3, 22. Instead, State Defendants invoke the "collateral order doctrine," which deems a narrow set of "decisions of the district court [as] final … although they do not dispose of the litigation." *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 925 (5th Cir. 1996). This doctrine only applies where district court rulings are "[1] conclusive, [2] [] resolve important questions separate from the merits, and [3] [] are effectively unreviewable on appeal from [a] final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted); *accord Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1708 n.2 (2017).

Interlocutory appellate jurisdiction over Eleventh Amendment rulings only attaches when "a proper application of sovereign immunity would … require dismissal of *all claims*." *Phillips*, 24 F.4th at 450 (emphasis added). This Court's precedent asks whether "the state assert[ed] sovereign immunity from suit[.]" *Id.* at 449. If the state did not do so in full, there is no appellate jurisdiction, because "a proper invocation of sovereign immunity will be from the '*entire suit*.'" *Id.* (quoting *McCarthy v. Hawkins*, 381 F.3d 407, 411 (5th Cir. 2004)) (emphasis added)); *see also P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S.

139, 144 (1993) ("The entitlement is an *immunity from suit* rather than a mere defense to liability …."). This "entire-suit standard" ensures that a state isn't "deprived" of constitutional protections where it "assert[s] immunity from the lawsuit." *Phillips*, 24 F.4th at 449–50.

State Defendants' appeal does not fall within the "stringent" collateral order exception because it does not claim full immunity from suit. *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). State Defendants acknowledge that Plaintiffs raise claims under the ADA and Rehabilitation Act. Br.19. But, with very narrow exceptions,[5] the district court said these claims may proceed and State Defendants do not challenge them. *See* ROA.10723; Br.3–4. And in the case of Plaintiffs' VRA claims, State Defendants concede that their immunity defense—discussed *infra*—is in open conflict with this Circuit's precedent. *See* Br.50; *Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020). So, a "proper application of sovereign immunity" would not "remove [State Defendants] from this litigation and require dismissal of all claims." *Phillips*, 24 F.4th at 449. As a result, the collateral order doctrine is inapplicable, because State Defendants don't assert "an 'entitlement not to stand trial or face the other burdens of litigation.'"

[5] The district court dismissed Plaintiffs' Title II claims against the Attorney General. It did not dismiss Plaintiffs' VRA and Rehabilitation Act claims against the Attorney General. ROA.10700. The district court did not dismiss any claims against the Secretary.

Shanks v. Allied-Signal, Inc., 169 F.3d 988, 991–92 (5th Cir. 1999) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *see also Acoustic Sys.*, 207 F.3d at 291–92.

This Court's *en banc* decision in *Phillips* points the way. In *Phillips*, plaintiffs brought constitutional claims against the Louisiana Health Department under 42 U.S.C. § 1983. *See* 24 F.4th at 445. The Department—like State Defendants—moved to dismiss for several reasons, including sovereign immunity. *Id.* The district court denied the motion and this Court exercised appellate jurisdiction because sovereign immunity would remove the Department "from the 'entire suit'" despite only being invoked against one claim.[6] *Id.* at 449 (quoting *McCarthy*, 381 F.3d at 411). The Court retained jurisdiction because the Department's defense afforded immunity from the entire suit. *Phillips* thus squarely fits with Supreme Court precedent teaching that the collateral order doctrine safeguards the "central benefits" of a state's "'*immunity from suit*'"—

[6] The Department defended against claims that the state's denial of an application to provide abortion services violated plaintiffs' constitutional rights. *See* 24 F.4th at 447. Plaintiffs also challenged a Louisiana law that would have denied them taxpayer funding if the state granted their licenses. The Department didn't defend against plaintiffs' funding claim on sovereign immunity grounds, which this Court held didn't matter because the defense it presented would still foreclose "*all the relief* Plaintiffs request[ed]." *Id.* (emphasis added) (quotation marks omitted). That is plainly not the case here, where Plaintiffs can obtain relief on VRA, ADA, or Rehabilitation Act claims if *Ex parte Young* did not overcome State Defendants' sovereign immunity.

"avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial." *Metcalf & Eddy*, 506 U.S at 526)). Where, as here, State Defendants would still bear the "costs and general consequences" of litigation, no collateral order jurisdiction attaches. *See Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994) ("[F]oundation for the interlocutory appeal authorized by [*Metcalf & Eddy*] is the existence of a right not to be a litigant.").

State Defendants cite no authority suggesting this Court has jurisdiction over an interlocutory appeal when sovereign immunity leaves unchallenged claims open to further litigation. And consistent with *Phillips*, the weight of relevant authority cuts against them. *See, e.g.*, *Espinal-Dominguez v. Puerto Rico*, 352 F.3d 490, 494 (1st Cir. 2003) (no jurisdiction to review denial of sovereign immunity where other claims in the complaint abrogated protections and "opened the Eleventh Amendment portal at least part-way"); *Burns-Vidlak ex rel. Burns v. Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999) (no collateral jurisdiction where state "subject to suit … in federal court on … Title II and Section 504 claims"); *Pullman Const. Indus., Inc. v. United States*, 23 F.3d 1166, 1169 (7th Cir. 1994) ("Only an 'explicit … constitutional guarantee that trial will not occur' creates the sort of right that supports immediate review.'") (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989)); *In re Adirondack Ry. Corp.*, 726 F.2d 60, 62 (2d Cir. 1984) (finding "no basis for viewing the striking of the defense of sovereign

immunity as a final order" when defense did not relieve the state "from the burden of litigating" other claim).

This Court therefore lacks jurisdiction under the collateral order doctrine for reasons similar to those addressed in these cases. Unlike defendants in *Phillips*, State Defendants will still litigate various claims even if this Court affords them their relief sought on appeal. *See* 24 F.4th at 450. They invoke the Eleventh Amendment as a "defense to liability" from some claims, *not* "an immunity from suit" "effectively lost if [the] case is erroneously permitted to go to trial." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citations omitted). Moreover, State Defendants can appeal their limited immunity defense after final judgement. *See Digit. Equip. Corp.*, 511 U.S. at 868. Thus the third needed factor for collateral order jurisdiction—that the issue on appeal be unreviewable from a final judgment—is lacking. *See Metcalf & Eddy, Inc.*, 506 U.S. at 144.

B. This Court also lacks jurisdiction over State Defendants' standing arguments.

The district court's ruling that Plaintiffs have standing to bring their claims (*see infra* Part IV) is likewise not subject to interlocutory review. "[D]enial of a motion to dismiss … upon jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945); *see also Keyes*, 890 F.3d at 235 n.4; *Matter of Green Cnty. Hosp.*, 835 F.2d 589, 596 (5th Cir. 1988). State Defendants' standing argument—that Plaintiffs' injuries cannot be traced to the

Secretary or Attorney General, *see* Br.52–54—is a garden variety standing defense. Yet, State Defendants nowhere explain why its resolution ought to "qualify for expedited consideration." *Swint*, 514 U.S. at 51. That is unsurprising.

This Court may review the standing portion of the district court's order only if it has "pendent appellate jurisdiction," which is not applicable for two reasons. First, State Defendants forfeited any such argument for appellate jurisdiction by not raising it in their opening brief. *See Wallace v. Cnty. of Comal*, 400 F.3d 284, 291–92 (5th Cir. 2005) (question whether pendent jurisdiction proper to consider non-final ruling where court collaterally reviewed denial of officers' immunity waived when "made for the first time in defendants' reply brief").[7]

Second, this appeal does not present one of the "rare and unique circumstances" where pendent appellate jurisdiction is proper.[8] *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009). "Interlocutory appeals are generally disfavored …." *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997).

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[7] *See also United States v. Hodge*, 933 F.3d 468, 478 n.5 (5th Cir. 2019) ("[W]e do not consider issues raised for the first time in a reply brief.").

[8] Even if the Court were to find it has collateral order jurisdiction to review State Defendants' appeal of the district court's rulings on Plaintiffs' *Ex parte Young* and Section 1983 claims (which it should not, *see supra*), that would not extend pendent appellate jurisdiction over the remaining standing arguments. *See Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) (denoting "the collateral order doctrine allows [] review of the district court's denial of qualified immunity [but] that allowance does not confer 'pendent appellate jurisdiction' over [] other issues.").

Pendent appellate jurisdiction over rulings that would not otherwise qualify for immediate review are even more so, as it "would encourage parties to parlay … collateral orders into multi-issue interlocutory appeal tickets," contrary to the final judgment rule and collateral order doctrine. *Swint*, 514 U.S. at 449–50; *cf. Escobar*, 895 F.3d at 391 ("pendent appellate jurisdiction is carefully circumscribed"). Indeed, pendent appellate jurisdiction over the district court's rulings on standing is appropriate only if they are "(1) … 'inextricably intertwined' with the decision over which [it] has [collateral] jurisdiction' or (2) if 'review of the former decision [is] necessary [for] meaningful review of the latter." *Id.* (quoting *Swint*, 514 U.S. at 51). Because neither condition applies, the Court should decline to assert pendent appellate jurisdiction where, as here, State Defendants seek to prematurely bootstrap standing to defendants' immunity defenses on non-final review. *See, e.g.*, *Freyre v. Chronister*, 910 F.3d 1371, 1379 (11th Cir. 2018); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999); *Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496 n.2 (7th Cir. 1993).

1. There are no "inextricably intertwined" issues over which this Court should assert pendent jurisdiction.

To be "inextricably intertwined" for purposes of pendent jurisdiction, claims must "involve *precisely* the same facts and elements" on which collateral appellate

jurisdiction exists. *See Escobar*, 895 F.3d at 392–93 (emphasis added).[9] It must be "'coterminous with, or subsumed in, the claim before the court on interlocutory appeal.'" *Shannon v. Koehler*, 616 F.3d 855, 866 (8th Cir. 2010) (quoting *Kincade v. City of Blue Springs*, 64 F.3d 389, 394 (8th Cir. 1995)). "[A]ppellate resolution of the collateral appeal [must] *necessarily* resolve[] the pendent claim as well." *Mattox v. City of Forest Park*, 183 F.3d 515, 524 (6th Cir. 1999) (citation omitted).

Such careful delineation over when pendent appellate jurisdiction applies follows from this Court's precedent. In *Anderson v. Valdez*, an officer filed an interlocutory appeal of an order denying his qualified immunity defense. 845 F.3d

[9] *Escobar* recognized three other circumstances in which "[p]endent appellate jurisdiction may be proper." 895 F.3d at 392. None apply. Specifically, pendent appellate jurisdiction may be proper where "(1) the court will decide some issue in the properly brought interlocutory appeal that necessarily disposes of the pendent claim; (2) addressing the pendent claim will further the purpose of officer-immunities by helping the officer avoid trial; [or] (3) the pendent claim would be otherwise unreviewable[.]" *Id.* at 392–93. First, there are no "properly brought" interlocutory issues (*see supra* Part II.A.), and even if there were, standing arguments could not be "necessarily dispose[d]" that way. Second, standing does not concern itself with whether potentially-immune defendants can avoid trial, it ensures that a specific plaintiff has properly called upon the court's judicial power. *See Spokeo, Inc.*, 578 U.S. at 338 (noting "doctrine limits the category of litigants empowered to maintain a lawsuit in federal court …."); *see also Rogers v. Brockette*, 588 F.2d 1057, 1062 (5th Cir. 1979) ("[A] principal purpose of standing doctrine is to prevent the inappropriate party from forcing a judicial resolution of an issue."). Lastly, denial of a lack of subject matter jurisdiction defense is not "[o]rdinarily … immediately appealable." *Keyes*, 890 F.3d at 235 n.4. Standing is therefore not "otherwise unreviewable."

580, 588 (5th Cir. 2016). The officer also argued the district court erred by determining that the plaintiff had stated a constitutional claim for relief. *Id.* The panel exercised pendent appellate jurisdiction over the additional appeal because the district court's denial of immunity "depended on its determination that [the plaintiff] had adequately stated a claim[.]" *Id.* at 589. Because the officer sought immunity only from the constitutional claim he argued the plaintiff failed to state, the issues were "inextricably intertwined." *See id.* at 589.

State Defendants' *Ex parte Young* arguments do not precisely subsume their broad attack on Plaintiffs' standing. Look at Plaintiffs' ADA and Rehabilitation Act claims, for instance. In *Anderson*—as in other cases State Defendants rely upon[10]—this Court exercised pendent appellate jurisdiction over Article III standing arguments when exclusive overlap existed with whether *Ex parte Young* subjected the defendant to suit to begin with.[11] *See* 845 F.3d at 588–89. But the same isn't true when the Court is called upon to consider claims under statutes for

[10] *See, e.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 424–25 (5th Cir. 2001) (exercising pendent appellate jurisdiction over defendants' standing claim where plaintiffs brought only constitutional claims under the *Ex parte Young* exception to Eleventh Amendment immunity); *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010) (same); *Air Evac EMS, Inc. v. Tex., Dep't of Ins., et al.*, 851 F.3d 507, 513 (5th Cir. 2017) (same).

[11] Even when that is the case, this Court has hesitated from asserting pendent appellate jurisdiction. *See City of Austin v. Paxton*, 943 F.3d 993, 1003 n.3 (5th Cir. 2019).

which Congress abrogated state immunity. Courts deploy different analyses to determine whether state officials are immune under *Ex parte Young* or congressional abrogation. *See, e.g.*, *Turnage v. Britton*, 29 F.4th 232, 239 (5th Cir. 2022) ("[S]overeign immunity … does not apply when the state consents to suit or when Congress abrogates the state's immunity."). Claims that distinct do not present sufficiently "intertwined" issues to exercise pendant appellate jurisdiction. *Cf. Swint*, 514 U.S. at 51 (no "inextricably intertwined" issues where "[t]he individual defendants' qualified immunity turns on whether they violated clearly established federal law" and "the county commission's liability turns on the allocation of law enforcement power").

For example, the injury element of standing on Plaintiffs' unchallenged ADA claim turns on whether a disabled "individual [can] show [] that a[] [discriminatory condition] actually affects his activities in some concrete way." *Frame v. City of Arlington*, 657 F.3d 215, 236 (5th Cir. 2011) (collecting cases); *see also Deutsch v. Annis Enters., Inc.*, 882 F.3d 169, 174 (5th Cir. 2018) ("If the plaintiffs could show that the ADA violation actually would affect them in a concrete way, they would have shown an actual or imminent injury.") (internal

quotation marks omitted).[12] This injury-in-fact prong is narrower than a general *Ex parte Young* standing analysis, and does not include "precisely" the same facts and elements as State Defendants' sovereign immunity argument.[13] Absent precision, this Court should decline exercising pendent appellate jurisdiction without a challenge to Plaintiffs' ADA and Rehabilitation Act claims. *See Escobar*, 895 F.3d at 392–93.

Similarly, the immunity issues State Defendants claim are subject to immediate review and the standing arguments they do try to collaterally append to that order are not coterminous. This Court can "resolve the [sovereign] immunity issue … without reaching the merits of appellant' challenge to [] standing." *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278 (11th Cir. 1998). On immunity, State Defendants claim that *Ex parte Young* doesn't apply to the Secretary or Attorney General because the challenged S.B.1 provisions "are enforced … by local election officials." Br.53. Yet on standing, State Defendants do not just focus on whether

[12] Elements and procedures necessary to state a claim under the Rehabilitation Act are "operationally identical" to those under the ADA. *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 676 n.8 (5th Cir. 2004).

[13] Plaintiffs plead injuries to both individual members and as organizations, which is discussed *infra*. State Defendants' single sentence mentioning Plaintiffs' injuries fails to distinguish between the statutory and constitutional claims, nor between individual members and the organizations themselves. *See* Br.53. For this additional reason, pendent appellate jurisdiction is improper because precision is lacking over "the same facts and elements" of Plaintiffs' different claims and State Defendants' arguments. *See Escobar*, 895 F.3d at 392.

the Secretary and Attorney General "enforce[] the challenged provisions" in a way that informs the standing factors of "traceability" and "redressability." *Id.* at 51. They also challenge whether or not Plaintiffs have suffered cognizable Article III injury *at all*. *See id.* at 53. For reasons explained *infra*, the district court correctly concluded that Plaintiffs have suffered particularized injuries. But *none* of State Defendants' *Ex parte Young* arguments cast doubt on whether Plaintiffs have properly alleged injury and thus make out "the 'first and foremost' of standing's three elements."[14] *Spokeo, Inc.*, 578 U.S at 338–39; *see also Summit Med. Assocs.*, 180 F.3d at 1335 ("[W]e may exercise jurisdiction over standing *only* if standing and Eleventh Amendment immunity are [] inextricably intertwined ….). That matters, because "each" of the standing "element[s] is an 'irreducible constitutional

[14] Plaintiffs recognize that in an unpublished opinion, a panel of the Court recently found pendent appellate jurisdiction over justiciability issues proper where a panel will collaterally review denial of Eleventh Amendment immunity defenses, in part, because of the "'significant overlap'" between the Court's jurisprudence in both areas. *Williams v. Davis*, 2023 WL 119452, *3 (5th Cir. Jan. 6, 2023) (quoting *City of Austin*, 943 F.3d at 1002). *Williams*, however, prudently warned that "panels should review each case to determine whether or not it is an appropriate case for such an exercise." *Id.* at *4. As detailed, this case is unlike *Williams* because the issue of Eleventh Amendment immunity and Defendants' standing challenge are neither "'inextricably intertwined' [nor] 'necessary to ensure meaningful review.'" *Id.* at *3 (quoting *Escobar*, 895 F.3d at 391).

minimum.'"[15] *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Here, State Defendants only cursorily challenge Plaintiffs' well-pled injuries. *See* Br.53. But the "facts and elements" that would settle whether Plaintiffs have properly asserted injuries in no way bears on what this Court would consider on immediate review of the district court's denial of sovereign immunity on *Ex parte Young* claims.[16] *See Cantu v. Rocha*, 77 F.3d 795, 805 (5th Cir. 1996) (deeming pendent appellate jurisdiction not proper when an issue is "separate and narrower" to that considered on interlocutory review); *Lyons v. PNC Bank, Nat'l Assoc.*, 26 F.4th 180, 190 (4th Cir. 2022) (issue is "inextricably intertwined" when "'the same specific question will underlie both the appealable and the non-

[15] *See also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (cabining Court's holding on standing to "only redressability" and noting "it remain[ed] for the plaintiff to establish the other elements of standing"). Plaintiffs establish all the standing elements. *See infra* Part IV. But as explained above, State Defendants incorrectly claim their *Ex parte Young* defenses—which at best go to traceability and redressability—make it proper for this Court to also consider standing arguments on immediate review that would require inquiry into Plaintiffs' properly asserted Article III injury.

[16] For example, on resource diversion, the Court would consider whether Plaintiffs' complaint properly pled they have suffered "concrete[] and demonstrabl[e] injur[y] [to] the organization[s]' activities," specifically by "drain[s] [on] the organization[s]' resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Explained *infra* Part IV, Plaintiffs properly plead these injuries, as explained *infra* Part IV. Moreover, at this stage, "general factual allegations of injury resulting from the defendant[s]' conduct may suffice." *Tex. State LULAC v. Elfant*, 52 F.4th 248, 255 n.4 (5th Cir. 2022).

appealable order'" (quoting *Scott v. Fam. Dollar Stores, Inc.,* 733 F.3d 105, 111 (4th Cir. 2013)). The injury issue cannot be "inextricably intertwined" as a result.

Further, State Defendants do not meaningfully address Plaintiffs' alleged injury concerning the diversion of resources, or the district court's findings on that score. At best, State Defendants argue that any injuries are "traceable to local election officials' enforcement," not the Secretary's or Attorney General's actions. Br.53. But they concede those arguments go to traceability, not whether plaintiffs have suffered injury. *See id.* at 51. So, by fully bootstrapping their standing defense to their *Ex parte Young* arguments (*see id.*), State Defendants both dispute that Plaintiffs meet any of the standing elements, yet fail to set forth any arguments going to injury—the "most important" element the Court would consider. *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1204 (11th Cir. 1991). That alone shows their *Ex parte Young* defense involves "separate" questions than their standing arguments. *Cantu*, 77 F.3d at 805.

2. Immediate review of non-appealable rulings is not needed to ensure "meaningful review" of possibly appealable rulings.

Immediate review of Plaintiffs' standing is in no way "necessary to ensure meaningful review" of State Defendants immunity arguments. *See Triad Assocs., Inc.*, 10 F.3d at 496 n.2; *see also Summit Med. Assocs., P.C.*, 180 F.3d at 1334. As noted, State Defendants can preserve their appeals on standing and bring them to

the Court once final judgment issues. *See Keyes*, 890 F.3d at 235 n.4; *Matter of Green Cnty. Hosp.*, 835 F.2d at 596.

III. STATE DEFENDANTS ARE NOT IMMUNE FROM PLAINTIFFS' CONSTITUTIONAL AND STATUTORY CLAIMS.

State Defendants' appeal necessarily fails because Plaintiffs bring claims under the VRA, ADA, and Rehabilitation Act—for which Congress abrogated Texas's sovereign immunity. *See supra* Part II. But State Defendants' challenge to the district court's order on Plaintiffs' *Ex parte Young* claims separately lacks merit. The Eleventh Amendment does not preclude Plaintiffs' constitutional claims because these properly fall under the exception recognized in *Ex parte Young*.

A. The *Ex parte Young* exception to Eleventh Amendment sovereign immunity applies to OCA-GH Plaintiffs' constitutional claims.

The Eleventh Amendment affords state officials sovereign immunity from suits in their official capacity. U.S. Const. amend. XI. The *Ex parte Young* exception, however, "permits plaintiffs to sue a state officer in his official capacity for an injunction to stop ongoing violations of federal law." *Texas Alliance*, 28 F.4th at 671. State officers can be sued provided they bear "'some connection with the enforcement of the act' in question or [are] 'specially charged with the duty to enforce the statute' and [are] threatening to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014). "The text of the challenged law

need not actually state the official's duty to enforce it …." *City of Austin*, 943 F.3d at 997–98. And the needed "connection" to enforcement is generally met if the officer is duty-bound and willing to "compel or constrain" someone "to obey the challenged law." *Texas Alliance*, 28 F.4th at 672.

With motions on the pleadings, courts "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (citation and quotation marks omitted). As the district court correctly recognized (ROA.10670–71), this differs from what this Court has said must be the inquiry in the context of entering an injunction, where published precedent calls for a "provision-by-provision" inquiry looking for a "connection to the enforcement of the particular statutory provision" at issue.[17] *Tex. Democratic Party II*, 978 F.3d at 179–80. Still, State Defendants'

[17] This Court's published cases calling for a "provision-by-provision" analysis have all come in the context of reviewing a district court's injunction. *See Tex. Democratic Party II*, 978 F.3d at 174 (vacating preliminary injunction); *Texas Alliance*, 28 F.4th at 670 (same). Those cases are consistent with "recent Supreme Court[] … jurisprudence explain[ing] that the inquiry into whether a suit is subject to the *Young* exception does not require an analysis of the merits of the claim." *City of Austin*, 943 F.3d at 998 (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 646 (2002)). *Texas Democratic Party v. Hughs* (*Tex. Democratic Party III*), 860 F. App'x 874 (5th Cir. 2021) (unpublished), which applied the "provision-by-provision" inquiry on a motion to dismiss posture is unpublished and thus not binding. *See Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

arguments fail even on a "provision-by-provision" basis. *See id.* at 179. State Defendants are sufficiently connected to each challenged provision, as discussed below.

B. The Secretary's statutorily-tasked enforcement duties are integral to S.B.1.

Plaintiffs plausibly plead that the Secretary can and will enforce sections 5.02, 5.03, 5.07, 5.08, 5.10, 5.12, and 6.06 of S.B.1. Her enforcement power over these provisions is not some "general duty." *Tex. Democratic Party v. Abbott* (*Tex. Democratic Party I*), 961 F.3d 389, 400–01 (5th Cir. 2020). Rather, it is "particular" and needed "to enforce the statute[s] in question[.]" *Tex. Democratic Party II*, 978 F.3d at 179. Moreover, the Secretary's office has shown the requisite willingness to act consistent with its authority to enforce the relevant provisions.

1. Sections 5.02, 5.03, 5.07, 5.08, and 6.06

a) Plaintiffs properly pled that the Secretary has enforcement authority over Sections 5.02, 5.03, 5.07, 5.08, and 6.06.

Section 5.02 "generally provides that an applicant must now submit their driver's license, election identification certificate, or personal identification card number on their vote-by-mail application[.]" ROA.10672; *see* Tex. Elec. Code § 84.002(a)(1-a). Section 5.03 changes the law by providing that going forward, there *must* be a space for the information Section 5.02 requires in vote-by-mail applications. Tex. Elec. Code § 84.011(a)(3-a). In turn, Section 5.07 directs early voting clerks to reject any applications if the newly-required information is missing

or different from identification information listed in a voter's registration application. *Id.* § 86.001(f). Section 5.08 similarly directs early voting clerks to reject voter submissions, but for containing incorrect or missing information on the mail carrier envelope.

These provisions contemplate new vote-by-mail forms and prescribe uniform standards—*i.e.*, the forms must have space for newly-required information—for statewide enforcement. In Texas, it is the Secretary to whom the law delegates the duty to "design" and "maintain uniformity of" forms across the state. Tex. Elec. Code §§ 31.002, 31.003. Moreover, the Secretary has enforcement tools at her disposal to constrain local officials and compel their compliance. *Id.* § 31.005. The Secretary's specific duties regarding forms for mail-in-voting with statewide use are critical to these sections' force as law.

Likewise, Section 6.06 prohibits compensating, or offering to compensate another for assisting voters when voting by mail. Tex. Elec. Code §§ 86.0105(a), (c). The Secretary enforces this provision by designing the vote-by-mail carrier envelopes to require assistants to state whether they received any compensation. Tex. Elec. Code §§ 86.010(e), 31.002, 86.013(d); ROA.5865–66 ¶ 37; ROA.5904–05 ¶ 164.

Contrary to what they at times argue (*see* Br.31–32), State Defendants correctly suggest elsewhere that no sensible reading of S.B.1 would completely

diffuse enforcement responsibility of the challenged provisions across hundreds of local election officials. *See id.* at 10 (S.B.1 meant to "avoid a patchwork of varying applications of the State's election laws").[18] S.B.1's new mail-ballot scheme would be dead letter law without the Secretary's actions, since the provisions assume that S.B.1-compliant vote-by-mail application forms and mail-in-ballot carrier envelopes *will* be "designed by the Secretary." *Id.* at 32. Importantly, the Secretary has done just that. Acting under statutory authority, her office has already prescribed a form for a vote-by-mail application that Texas counties use in administering their elections.[19] And while *voters* are not bound to use this form (*see* Br.36), State Defendants cannot deny that local officials generally are. *See* Tex. Elec. Code § 31.002(d) (local election officials "shall" use forms prescribed by the Secretary); *see also Tex. Democratic Party II*, 978 F.3d at 180 ("Because local authorities are required to use the Secretary's absentee-ballot form … the Secretary has the authority to compel or constrain local officials ….")

[18] *See also* Br.11 (highlighting S.B.1's design to ensure "conduct of elections be uniform and consistent throughout" Texas).

[19] Tex. Sec'y of State, Final Report on Audit of 2020 General Election in Texas (Dec. 2022), https://www.sos.state.tx.us/elections/fad/2020-Audit-Full.pdf, pp. 200.

(citation omitted)). The Secretary has likewise designed updated carrier envelopes to comply with S.B.1's new requirements.[20]

Indeed—and as alleged—the Secretary's close "connection with the enforcement" of these S.B.1 Sections is unavoidable. *Ex parte Young*, 209 U.S. at 157. S.B.1 Article 5 mail-in voter identification provisions and Section 6.06 direct specific changes to vote-by-mail applications and carrier envelopes, and it is the Secretary who is duty-bound by Texas law to prescribe these materials' designs. *See* Tex. Elec. Code § 31.002(a). Plaintiffs have thus properly alleged that the Secretary "has the *specific* and relevant duty to design the application form for mail-in ballots … and to provide that form to local authorities and others who request it." *Tex. Democratic Party II*, 978 F.3d at 179–80 (emphasis added). Put simply, "the Election Code requires the Secretary to modify vote-by-mail applications, so that they include the statutorily-required space[s] … that the Election Code now requires." ROA.10602. The same statutory authorities require the Secretary to modify mail-voting carrier envelopes. Tex. Elec. Code §§ 86.010(e), 31.002, 86.013(d). The Code thereby forcefully and "statutorily tasks" the Secretary with enforcing S.B.1's Article 5 and 6 provisions, which could

[20] *See, e.g*, Tex. Sec'y of State, Information About Returning Your Carrier Envelope, (Jan. 2022), https://www.sos.texas.gov/elections/forms/pol-sub/6-17f.pdf.

not take meaningful effect without her action. *City of Austin*, 943 F.3d at 998. As a result, it does not matter that Sections 5.02, 5.03, 5.07, and 6.06 do not directly mention the Secretary. *See Ex parte Young*, 209 U.S. at 157 ("[W]hether [connection with act's enforcement] arises out of the general law, or is specially created by the act itself, is not material so long as it exists."); *see also City of Austin*, 943 F.3d at 997–98 ("[C]hallenged law need not actually state the official's duty to enforce it.").

Texas Democratic Party II, is particularly instructive. That case "held the Secretary was sufficiently connected to a challenged statute [allowing] voters 65-and-older to vote by mail," precisely because of the "Secretary's duty to design the mail-in ballot application form." *Texas Alliance*, 28 F.4th at 673 (citing *Tex. Democratic Party II*, 978 F.3d at 179–80). So too here, where the Secretary's duties demand that she designs new forms that comply with S.B.1 for the new law's scheme to have statewide application. *Cf.* Br.32. As in *Texas Democratic Party II*, "[t]he statutory duties that matter [here] are the ones for the Secretary regarding applications for absentee ballots." 978 F.3d at 179. And as in *Texas Democratic Party II*, those duties are directly "connect[ed] to the enforcement" of the challenged provisions.[21] *Id.*

[21] The district court also correctly denoted that, as here, "the provision at issue in *Texas Democratic Party II* … did not explicitly refer to the Secretary either."

Texas Democratic Party II guides the way further because, as there, the Secretary's statutory enforcement duties surely "compel or constrain" local officials' actions. 978 F.3d at 180. The Texas election laws specifically require the Secretary to provide "the application form for mail-in ballots" she has designed "to local authorities and others who request it." *Id.* at 179 (citing Tex. Elec. Code §§ 31.002(a), (b)). In turn, the Election Code requires local officials "to use the Secretary's absentee-ballot form outside of emergency situations[.]" *Tex. Democratic Party II*, 978 F.3d at 180 (citing Tex. Elec. Code § 31.002(d)). These provisions likewise apply to the Secretary's prescribed design for carrier envelopes. Tex. Elec. Code §§ 31.002, 86.013. So, when S.B.1 directs early voting clerks to reject mail-ballot applications or carrier envelopes if certain information is missing, all the new law does is instruct local officials to reject the *Secretary*'s designed forms if they have been filled out improperly. State Defendants concede the point, acknowledging the relief Plaintiffs' seek on the merits "would … prevent local officials from *using a form* prescribed by the Secretary." Br.36. Hence, as "[i]n *Texas Democratic Party II*, local election officials [are] *required* to use the Secretary's form, so an injunction ordering the

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ROA.10604. This Court "located the Secretary's duties to enforce the provision in another section of the Election Code." *Id.*

Secretary to revise [it] would [] constrain[] those officials." *Texas Alliance*, 28 F.4th at 673.[22]

State Defendants suggest that these challenged S.B.1 provisions could be enjoined without requiring the Secretary to update the related elections forms. That glides past the fact that this would lead to inaccurate and misleading forms being used statewide, which would surely harm Plaintiffs and their members. For instance, even if elections administrators *weren't* required to reject vote-by-mail applications without ID numbers, the Secretary's statewide prescribed application form would still say to voters: "YOU MUST PROVIDE ONE of the following numbers." Tex. Sec'y of State, Application for a Ballot by Mail, (Jan. 2022) https://webservices.sos.state.tx.us/forms/5-15f.pdf. And while State Defendants admit that a court could order the Secretary to remove this section of the application form, they argue only that local officials would *also* need to stop enforcing the ID requirements. Br.51. But a "division of responsibilities" with local officials does not obviate the Secretary's connection to the enforcement of Texas' election laws. *See Tex. Democratic Party II*, 978 F.3d at 180. Plaintiffs have therefore adequately pleaded that the Secretary is the proper defendant.

[22] *See also Richardson v. Flores*, 28 F.4th 649, 654 n.9 (5th Cir. 2022) (indicating *Texas Democratic Party II* "held the Secretary enforced a challenged [] restriction on mail-in voting, because she created the mail-in application form that local officials had to use").

State Defendants misrely on *Richardson v. Flores*, 28 F.4th 649 (5th Cir. 2022), and *Texas Alliance for Retired Americans v. Scott*, 28 F.4th at 669. To start, *Richardson* and *Texas Alliance* both state that they are reviewing preliminary injunction orders, not Rule 12 motions. That matters because on a motion to dismiss, "[t]he court's task is to determine whether the plaintiff has stated a … claim that is plausible, not to evaluate the[ir] likelihood of success." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). The latter is a "decidedly far more searching inquiry." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 134 (D.C. Cir. 2020).

Moreover, in *Richardson*, the Court stated that the plaintiffs challenged "*how* local officials verify the signature on [] forms," not the Secretary's designing of forms to comply with challenged statutes, as Plaintiffs allege here. 28 F.4th at 654 n.9 (emphasis added). That difference is meaningful, because it was local officials' actions, not the Secretary's, that the Court concluded were at issue. *Id.* Similarly, plaintiffs in *Texas Alliance* challenged the repeal of Tex. Elec. Code § 52.071, "which required that a 'square' for straight-ticket voting '*shall be printed* to the left of each political party's name.'" 28 F.4th at 672 (quoting Tex. Elec. Code § 52.071(a)). The panel explained that because the statute did not identify the Secretary, and because Fifth Circuit precedent provides "[t]he Texas Secretary of State is not responsible for printing … ballots," enforcement authority belonged

to local officials. *Id.* (quoting *Mi Familia Vota*, 977 F.3d at 468 (alterations adopted)).

Plaintiffs' challenge is different. Unlike *Texas Alliance*, it does not concern printing ballots, nor do the challenged provisions reserve enforcement authority exclusively with local officials. Additionally, some provisions Plaintiffs challenge explicitly reference the Secretary, *see* Tex. Elec. Code §§ 86.0015, 87.0271, unlike those at issue in *Texas Alliance*. To the extent *Texas Alliance* applies, the decision demonstrates how precedent outlining the contours of a state official's role should be followed. *See* 28 F.4th at 672. Rather than suggest that the Secretary is the wrong defendant, *Texas Alliance* shows why she is the proper one.

b) Plaintiffs properly pled that the Secretary is willing to enforce Sections 5.02, 5.03, 5.07, 5.08, and 6.06.

In addition to the Secretary's duty to prescribe forms that local officials use, Plaintiffs have also pled that the Secretary has expressed willingness to exercise authority to enforce S.B.1 Article 5 mail-in voter identification provisions as well as Section 6.06. *See Tex. Democratic Party I*, 961 F.3d at 401 ("[O]ur precedent suggests that the Secretary [] bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provision[] … [t]hat [] suggests [] *Young* is satisfied ….''). As alleged, the Secretary plans to issue binding advisories and directives under her direct authority that would require local election officials to use S.B.1-updated mail-in ballot applications and carrier envelopes. ROA.5865–

66. Indeed, as counties struggled to roll out S.B.1's vote-by-mail provisions, the Secretary took an active enforcement role. For example, the Secretary advised counties when they had improperly rejected mail-in ballot applications, and urged counties to "seek" the Secretary's "advice and assistance." ROA.6105. State Defendants nowhere suggest that the Secretary has stood idly by as other officials enforce S.B.1—they just claim her actions are not "enforcement." But the district court correctly found that the Secretary is clearly "connected" to the new law's enforcement for the above-cited reasons. The Secretary's office's actions show she is not only willing to act on that connection, she already has.

2. Sections 5.10 and 5.12

S.B.1 Sections 5.12 and 5.10 establish similar regimes as 5.02, 5.03, 5.07, 5.08, and 6.06. Section 5.12 further concerns the enforcement procedures for S.B.1's ID requirements on mail ballot carrier envelopes. Tex. Elec. Code § 87.0271. Importantly, Section 5.12 not only lists ways voters may cure mail ballots rejected for failing to meet these new ID requirements, *id.* § 87.0271(a)(4) (citing *id.* § 86.002), but expressly empowers "the secretary of state" to "prescribe any procedures necessary to implement" those cures, *id.* § 87.0271(f).

The Secretary's connection to Section 5.12's enforcement is thus clear from the statute's text. *See City of Austin*, 943 F.3d at 997–98 (whether challenged law's text "state[s] the official's duty to enforce" is not necessary for *Ex parte*

Young, but "may make that duty clearer"). Her enforcement connection is also apparent for many of the same reasons described above. "The statutory duties that matter [here] are the ones for the Secretary regarding applications for absentee ballots." *Tex. Democratic Party II*, 978 F.3d at 179. And the Secretary's duties compel her to design mail carrier envelopes for mail ballots that now contain space for applicants to include information "required under Section 84.002(a)(1-a) or Section 86.002" of the election code. Tex. Elec. Code § 87.0271(a)(4). Further, "the Secretary has the authority to compel or constrain local officials based on actions she takes" regarding mail-voting forms. *Tex. Democratic Party II*, 978 F.3d at 180 (citing *City of Austin*, 943 F.3d at 1000). Plaintiffs' challenge to Section 5.12 accordingly fits neatly within this Court's precedent.[23]

Section 5.10 relatedly concerns tracking applications for mail-in ballots and the mail-in ballots themselves. Tex. Elec. Code § 86.015. The statute commands "[t]he secretary of state [to] develop or otherwise provide an online tool to each early voting clerk" that enables voters to track their applications and ballots. *Id.*

[23] State Defendants' cite *Lewis v. Scott* for the proposition that the Secretary does not enforce Section 5.12. Br.32. In *Lewis*, this Court found the Secretary's enforcement authority too attenuated from Tex. Elec. Code § 86.002, for him to be the proper defendant. But that decision concerned pre-S.B.1 § 86.002. Section 5.12 changed a completely different statute: Tex. Elec. Code § 87.0271. The difference matters because under § 87.0271, the Secretary "may prescribe *any* procedures necessary to *implement* this section," which is authority broader than § 86.002's old enforcement delegation.

§ 86.015(a). Like Section 5.12, the statute empowers the Secretary to "adopt rules and prescribe procedures as necessary to implement" Section 5.10.

Here too the Secretary's connection to Section 5.10 follows from the statute's text and implementation. Texas's Legislature expressly identified the Secretary as the official charged with "develop[ing] or otherwise provid[ing]" the electronic tracking tool. Tex. Elec. Code § 86.015(a). That delegation is a sufficient "'connection to the enforcement of [Section 5.10] that is the subject of litigation'" on appeal. *Lewis v. Scott*, 28 F.4th 659, 664 (5th Cir. 2022) (quoting *Tex. Democratic Party II*, 978 F.3d at 179). Moreover, the fact local officials use the Secretary's tracking tool does not preclude her enforcement duty—it reaffirms it. *See Tex. Democratic Party II*, 978 F.3d at 180. The Secretary *must* design the tool, and local officials are "compel[led] or constrain[ed]" to use it. *Texas Alliance*, 28 F.4th at 672. State Defendants do not suggest otherwise; they just note that voters have the "option" to use the Secretary's tracking tool. But they correctly note that this Court's *Ex parte Young* analysis asks whether the official being sued "'compel[s] or constrain[s] *anyone*.'" Br.33 (quoting *Texas Alliance*, 28 F.4th at 672 (emphasis added)). Local officials are clearly "anyone."

The Secretary's "willingness" to enforce Sections 5.12 and 5.10, beyond prescribing the forms that local officials must use, resembles her willingness to enforce the previously discussed S.B.1 provisions. *See City of Austin*, 943 F.3d at

1000 (quoting *Livingston*, 739 F.3d at 746). In January 2022, the Secretary "urge[d] all county election officials to contact the [] Secretary [] to seek advice and assistance" regarding new requirements for mail-in voting.[24] ROA.6105. The Secretary has also gone ahead and created the tracking tool that now collects data from local officials using the tool the Secretary designed and created under Section 5.10. *Id.* Further, the Secretary issued advisories outlining mandatory procedures for counties to comply with S.B.1's changes to mail-in applications and carrier envelopes, specifying that the "Secretary of State is prescribing these procedures to implement the corrective action process mandated in SB 1."[25] In addition to the reasons discussed *supra*, the Secretary's statutory duty, public statements, and binding advisories reflect her willingness to enforce both Sections subject to this litigation.

3. Section 6.06

Finally, the Secretary enforces the challenged provisions of S.B.1 by reporting violations to the Texas Attorney General and local prosecutors.

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[24] Press Release, SOS, Secretary Scott Calls on Travis County to Correct Erroneous Mail Ballot Application Rejections, (Jan. 14, 2022), https://www.sos.state.tx.us/about/newsreleases/2022/011422.shtml.

[25] Election Advisory No. 2022-08, Keith Ingram, Dir. of Elections, Tex. Sec'y of State (Jan. 28, 2022), https://www.sos.texas.gov/elections/laws/advisory2022-08.shtml; Election Advisory No. 2022-12, Keith Ingram, Dir. of Elections, Tex. Sec'y of State (Feb. 11, 2022), https://www.sos.state.tx.us/elections/laws/advisory2022-12.shtml.

ROA.5866–67 ¶ 39. The Secretary *must* refer suspected criminal violations to the Attorney General. Tex. Elec. Code § 31.006.[26] The Secretary therefore plays an integral gatekeeping role in determining when there is "reasonable cause to suspect a crime has occurred" for many of the cases that the Attorney General prosecutes. ROA.5866–67 ¶ 39. She also frequently receives complaints that are referred to the Attorney General for investigation and prosecution. *Id.* As explained below, the Attorney General continues to enforce criminal penalties in the challenged provisions through investigations and prosecutions in partnership with local officials. Many of the referred complaints are related to voter assistance and mail-in-voting, as well as vote harvesting. *Id.* The Secretary of State Election Audit Division was also created to "ensure any cases of illegal voting or election crimes are investigated by the proper law enforcement authorities." *Id.*

The Secretary refers civil election code violations to the Attorney General as well. Indeed, the district court recounted prior testimony from an Elections Administrator that her actions were constrained out of fear that the Secretary "would refer her conduct to the Attorney General, who, in turn, could impose civil

[26] For example, in October 2022, then-Secretary John Scott stated that if his office "find[s] something suspicious that may rise to [the] level [of voter fraud], we immediately pass it off to the local district attorney or the attorney general's office." Michael Hardy, *Texas Election Chief Speaks Out on Conspiracy "Nuts," Death Threats, and President Biden's Legitimacy*, TEXAS MONTHLY, (Oct. 10, 2022), https://www.texasmonthly.com/news-politics/john-scott-texas-secretary-state-election-fraud/.

penalties upon her, including revocation of her retirement." ROA.10679–80 n.13 (citing Tex. Elec. Code §§ 31.129(c), 34.005).

Plaintiffs have sufficiently alleged that the Secretary's credible threat of prosecution compels or constrains voters and local officials. For example, the Secretary enforces violations of Section 6.06, which criminally prohibits compensating, or offering to compensate another for assisting voters when voting by mail. Tex. Elec. Code §§ 86.0105(a), (c). The Secretary is required to add a space on vote-by-mail carrier envelopes for assistants to state whether they received any compensation. *Id.* §§ 86.010(e), 31.002; ROA.5865–66 ¶ 37; ROA.5904–05 ¶ 164. Failure to complete this form correctly is a state jail felony. *See* Tex. Elec. Code § 86.010(g); ROA.5865–66 ¶ 37; ROA.5904–05 ¶ 164. Local elections administrators are required to use the Secretary's updated forms. Tex. Elec. Code § 31.002. Accordingly, the Secretary enforces the restrictions on assistance in Section 6.06 by once again prescribing the necessary forms for its enforcement, but also by providing the mechanism for identifying criminal violations. ROA.5865–66 ¶ 37; ROA.5904–05 ¶ 164.

The Secretary enforces each of S.B.1's challenged provisions. She prescribes updated forms used to implement the provisions statewide, she promulgates rules governing how counties should implement the challenged provisions, and she reports any election code violation to the Attorney General and

local prosecutors. The Secretary has a sufficient connection to the challenged S.B.1 provisions for *Ex parte Young* purposes.

C. The Attorney General enforces Sections 7.04 and 6.06.

The Attorney General's office is both able, and has shown itself willing, to enforce Sections 7.04 and 6.06. Both sections include criminal provisions that the Attorney General continues to enforce through prosecutions in partnership with local prosecutors. Section 7.04 is S.B.1's anti-"vote harvesting" provision, which makes the offense a third-degree felony. *See* ROA.5915–18, ¶¶ 195–207; *see also* Tex. Elec. Code § 276.015. Likewise, Section 6.06 makes it a state jail felony for someone to compensate or offer to compensate another for assisting voters. Tex. Elec. Code §§ 86.0105(a), (c); ROA.5904 ¶ 163. Plaintiffs pled that the Attorney General willingly enforces both election code felony provisions.

1. *The Attorney General prosecutes election code violations with the consent of local authorities.*

The Attorney General consistently investigates and prosecutes violations of the Texas Election Code. ROA.5867–70, ¶¶ 41–47. He regularly prosecutes election code violations, and not only maintains but has repeatedly sought added funding for an "Election Fraud Unit" that investigates and prosecutes election code-related offenses. ROA.5870 ¶ 47. That remains true after *State v. Stephens*, where the Texas Court of Criminal Appeals recently held that it is unconstitutional for the Attorney General to unilaterally prosecute election code violations under

Texas-based separation of powers principles. *See* No. PD-1032-20, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021), *reh'g denied*, No. PD-1032-20, 2022 WL 4493899 (Tex. Crim. App. Sept. 28, 2022). After *Stephens*, the Attorney General cannot *independently* prosecute violations of the election code. *Id.* at *8.

Critically, however, *Stephens* upheld the Attorney General's practice of prosecuting election code violations with the consent of local prosecuting attorneys. *Stephens,* 2021 WL 5917198; *see* Tex. Gov't Code § 402.028.[27] And after *Stephens*, the Attorney General has vowed to do just that, assuring the public that the office will continue to prosecute election code violations related to assistance and vote harvesting. To that end, the Attorney General established a "2022 General Election Integrity Team," making clear the office "is … prepared to take action against unlawful conduct," specifically outlining crimes related to voter assistance and "vote harvester[s]."[28] The Attorney General's office has not minced

[27] *Stephens* also left intact the Attorney General's authority to *investigate* election violations, allowing him to facilitate prosecutions and participate in enforcement of the challenged provisions through investigations. Tex. Elec. Code § 273.001(b) (Attorney General "may conduct an investigation on [his] own initiative to determine if criminal conduct occurred in connection with an election"); *id.* § 273.001(a) (where voters present affidavits alleging criminal conduct in a multi-county election, "the attorney general shall investigate the allegations"). He likewise has the power to "direct the county or district attorney … to conduct or assist the attorney general in conducting the investigation[.]" *Id.* § 273.002.

[28] Press Release, Off. of the Att'y Gen., AG Paxton Announces Formation Of 2022 General Election Integrity Team (Oct. 24, 2022),

words: it expressly intends to enforce election code violations related to voter assistance and vote harvesting, even after *Stephens*. *Compare id.*, *with In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020), *cert. granted, judgement vacated sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (finding no willingness to enforce where the "Attorney General threatened that GA-09 *would be enforced*, not that *he* would enforce it").

As *Stephens* requires, the Attorney General's office has been consistently clear that it will partner with local prosecutors to enforce election code violations, loudly declaring it stands "prepared to assist any Texas county in combating this insidious, un-American form of fraud."[29] Its public website touts these collaborations, and the Attorney General has voiced his understanding that the "law also authorizes the [office] to proffer assistance to local prosecutors,"[30]

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https://www.texasattorneygeneral.gov/sites/default/files/images/press/2022%20GENERAL%20ELECTION%20INTEGRITY%20TEAM%20PSA.pdf; Press Release, Off. of the Att'y Gen., Paxton Announces Statewide 2022 General Election Integrity Team (Oct. 24, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-announces-statewide-2022-general-election-integrity-team.

[29] Press Release, Off. of the Att'y Gen., AG Paxton: San Antonio Election Fraudster Arrested for Wide-spread Vote Harvesting and Fraud (Jan. 13, 2021), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-san-antonio-election-fraudster-arrested-widespread-vote-harvesting-and-fraud.

[30] Off. of the Att'y Gen., Criminal Prosecutions, https://www.texasattorneygeneral.gov/divisions/criminal-justice/criminal-prosecutions (last visited Jan. 11, 2023).

indicating that the Attorney General continues to proactively seek out these prosecutorial partnerships.

Putting words to deed, the Attorney General has repeatedly paired with local officials to prosecute claimed election code violations similar to those his office would prosecute under the challenged S.B.1 provisions.[31] Indeed, even before *Stephens*, the Attorney General habitually participated in election code prosecutions at the invitation of and with the consent of local authorities. *See, e.g.*, ROA.5868 ¶¶ 43–44. As alleged, then, these are not hypothetical instances of an "official's public statement alone" about willingness to enforce a law. *In re Abbott*, 956 F.3d at 709. The Attorney General has put words to action.

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[31] *See, e.g.*, Press Release, Off. of the Att'y Gen., AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme (Sept. 24, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-joint-prosecution-gregg-county-organized-election-fraud-mail-balloting-scheme ("The Texas Attorney General will prosecute this case alongside the Gregg County District Attorney."); Press Release, Off. of the Att'y Gen., AG Paxton Announces Significant Voter Fraud Initiative and Offers Assistance in Addressing Starr County Voter Fraud (Feb. 5, 2018), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-significant-voter-fraud-initiative-and-offers-assistance-addressing-starr-county ("District Attorney Escobar invited my office to assist him with … enforcement."). At the motion to dismiss stage, publicly available press releases from the Attorney General represent a small percentage of the over 500 pending election charges that his office is reported actively prosecuting as of 2021, and are sufficient to support Plaintiffs' allegations. *See* Press Release, Off. of the Att'y Gen., AG Paxton Announces Formation of 2021 Texas Election Integrity Unit (Oct. 18, 2021), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-formation-2021-texas-election-integrity-unit; ROA.7876 n.8.

Outspoken commitment to participate in election prosecutions alongside local prosecutors goes well beyond "speculation" that the office intends to continue to do so. *Cf. In re Abbott*, 956 F.3d at 709.

2. The Attorney General previously enforced similar provisions and both encouraged passage of and promised to enforce Sections 6.06 and 7.04.

The Attorney General's enforcement extends specifically to violations encompassed by Sections 6.06 and 7.04, which address voter assistance and "vote harvesting." From S.B.1's inception, the Attorney General's office staff testified before lawmakers in favor of the bill and its predecessors, emphasizing that the challenged provisions would allow the Attorney General to address and prosecute vote harvesting and unlawful voter assistance. ROA.5869 ¶ 45. Representatives from the Attorney General's office answered legislators' hypotheticals about scenarios in which the Attorney General would prosecute violations under the proposed changes to the election code. *Id.* And as recently as November 2022, the Attorney General's office maintained that it was "prepared to take action against unlawful conduct" while highlighting vote harvesting and unlawful voter assistance.[32] These statements show that when it comes to alleged voter assistance

[32] Press Release, Off. of the Att'y Gen., AG Paxton Announces Formation Of 2022 General Election Integrity Team (Oct. 24, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-announces-statewide-2022-general-election-integrity-team.

and vote harvesting violations, the Attorney General has had both bark and bite. The office has made clear its willingness to prosecute violations of S.B.1's challenged provisions, and has also acted frequently on similar preexisting laws. ROA.5870 ¶ 47.[33] The Attorney General has habitually shown willingness to prosecute election code violations related to the challenged provisions, including while advocating *for* new prosecutorial tools in S.B.1's challenged provisions. ROA.5869.

[33] *See also, e.g.*, Press Release, Off. of the Att'y Gen., AG Paxton Successfully Prosecutes Woman Who Pleads Guilty to 26 Felony Counts of Voter Fraud (June 17, 2022), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-successfully-prosecutes-woman-who-pleads-guilty-26-felony-counts-voter-fraud (announcing prosecution involving voter assistance and "vote-harvesting"); Press Release, Off. of the Att'y Gen., Work of AG Paxton's Election Fraud Unit Results in Arrests of 4 Members of Organized Voter Fraud Ring in North Fort Worth (Oct. 12, 2018), https://www.texasattorneygeneral.gov/news/releases/work-ag-paxtons-election-fraud-unit-results-arrests-4-members-organized-voter-fraud-ring-north-fort ("My office is committed to ensuring that paid vote harvesters who fraudulently generate mail ballots, stealing votes from seniors, are held accountable …."); Press Release, Off. of the Att'y Gen., AG Paxton's Office to Prosecute Nine Counts of Voter Fraud from Nueces County (Mar. 7, 2018), https://www.texasattorneygeneral.gov/news/releases/ag-paxtons-office-prosecute-nine-counts-voter-fraud-nueces-county (announcing AG prosecution of "vote harvesting"); Press Release, Off. of the Att'y Gen., AG Paxton Announces Formation of 2021 Texas Election Integrity Unit ("Furthermore, Attorney General Paxton continues to pursue prosecutions for criminals willing to commit election crimes. Since taking office in 2015, the Attorney General has resolved 286 prosecutions of Texas Election Code criminal offenses against 76 defendants. Attorney General Paxton is currently prosecuting over 500 felony election fraud offenses in Texas courts."); ROA.7876 n.8.

That focus on the very same issues that Sections 6.06 and 7.04 address meets the specificity *Young* requires. The challenged provisions cannot reasonably be described as "*different* statutes under *different* circumstances." *Cf. City of Austin*, 943 F.3d at 1002. Indeed, the Attorney General consistently states that he is going to enforce Code provisions related to voter assistance and vote harvesting, and regularly prosecutes alleged violations with the cooperation of local authorities. These clear statements and prosecutions are more than sufficient to allege that the Attorney General is likely to enforce Sections 6.06 and 7.04. And Plaintiffs have sufficiently alleged that their actions have been constrained by fear of Sections 6.06 and 7.04 enforcement. *See, e.g.*, ROA.5856–65, ¶¶ 17, 18, 21, 22, 25, 26, 33, 34. When "an official can act, and there's a significant possibility that he or she will act to harm a plaintiff, the official has engaged in enough 'compulsion or constraint' to apply the *Young* exception." *See City of Austin*, 943 F.3d at 1002. To hold that anything more is required to bring suit against the Attorney General would violate the maxim that "it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution." *Just. v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

IV. PLAINTIFFS HAVE PLAUSIBLY ALLEGED STANDING ON THEIR CLAIMS AGAINST STATE DEFENDANTS.

The district court correctly found that Plaintiffs have standing to challenge the disputed S.B.1 provisions. As organizational plaintiffs, Plaintiffs need only

"meet[] the same standing test that applies to individuals." *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999). Plaintiffs have standing because they meet three well-settled requirements: (1) an injury, (2) traceable to Defendants, (3) that the court can redress. *Spokeo, Inc.*, 578 U.S. at 338. Moreover, at the "pleading stage," "general factual allegations of injury resulting from the defendant's conduct [] suffice[.]" *Lujan*, 504 U.S. at 561.[34]

A. Plaintiffs have standing to sue in their own right.

An organization may plead injury by alleging that the challenged practice will frustrate its activities, or that it will need to "devote resources to counteract a defendant's allegedly unlawful practices." *E.g.*, *Fowler*, 178 F.3d at 360; *see also, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). "[A]n Article III injury-in-fact need not be substantial; 'it need not measure more than an identifiable trifle.'" *OCA-Greater Hous.*, 867 F.3d at 612. The Plaintiffs have alleged more than enough here as to each challenged provision.

[34] State Defendants' motion to dismiss did not contest that Plaintiffs sufficiently alleged an injury in fact as required for organizational and associational standing. *See* ROA.6102 n.2. On appeal, Defendants vaguely question for the first time whether Plaintiffs have been injured by the challenged provisions in S.B.1 Articles 5 and 6. Br.52–53. Plaintiffs summarize their alleged injuries in fact out of an abundance of caution.

1. Sections 5.02, 5.03, 5.07, 5.08, 5.10, 5.12, and 6.06

Plaintiffs have alleged that the challenged Article 5 provisions impose restrictive requirements on voting by mail in violation of federal law. And they specifically allege how these provisions will force them to expend significant resources to fulfill their missions. ROA.6263 ¶ 14, 6264–65 ¶ 17, 6266 ¶ 20, 6267–68 ¶ 23, 6269 ¶ 27, 6270 ¶ 30, 6293–303. For example, Plaintiffs will divert resources to inform and educate mail-in voters on how to find or obtain one of the forms of identification deemed acceptable by the challenged provisions. ROA.6299 ¶ 115. They will divert resources from voter registration and advocacy to educate voters who do not understand the complicated new requirements. ROA.6299–300 ¶ 116. And they will divert resources to help individuals who are unable to access their driver's license or Social Security numbers. ROA.6299 ¶ 115. Plaintiffs have also alleged that Section 6.06's prohibition on compensation to a person assisting mail in voters will impose new burdens, specifically on the rights of voters with disabilities and language minorities. ROA.6312–13, ¶¶ 162–65. To overcome these restrictions, Plaintiffs allege that they must further divert resources from their core activities. These include: expending additional resources to hire additional staff to work on voter education, spending money to create new training materials for volunteers and independent contractors, (ROA.6313–14 ¶ 166); producing new educational videos and voting procedure manuals

(ROA.6314 ¶ 167); and "institut[ing] massive education campaigns to inform voters with disabilities about these rules and to avoid [newly instituted] criminal penalties[]" ROA.6314–15 ¶ 169. This work will necessarily divert Plaintiffs' resources from their core missions.

The alleged diversion of resources caused by Sections 5.02, 5.03, 5.07, 5.10, 5.12 and by Section 6.06 are more than sufficient to support standing. This Court recently upheld Plaintiff OCA-GH's standing to challenge a statute that OCA-GH alleged "'perceptibly impaired' [its] ability to 'get out the vote,'" based on OCA-GH's assertion that it was forced to go "out of its way to counteract the effect of Texas'[] allegedly unlawful" statute by "educat[ing] voters" on how to avoid or meet the challenged law's burdens. *OCA-Greater Hous.*, 867 F.3d at 612. The allegations here are just as strong. Plaintiffs' allegations of costly new efforts to "identify and counteract" the effects of S.B.1—which will "frustrate[] … [Plaintiffs'] efforts" to assist and engage with more voters—establish an organizational injury-in-fact. *Havens Realty Corp.*, 455 U.S. at 379; *see also, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1335 (N.D. Ga. 2018).

2. Section 7.04

With respect to the "vote-harvesting" provision—Section 7.04—which criminalizes compensated voter-interactive activities whenever they are done in the

presence of a ballot—Plaintiffs have alleged a direct injury: the loss of First Amendment rights.

A plaintiff suffers an Article III injury if the credible threat of a law's enforcement chills his speech or causes self-censorship. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014); *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021). Plaintiffs need only assert "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder[.]" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Here, Plaintiffs allege that they engage in interactive voter activities—from canvassing voters' homes, to hosting candidate and issues forums—as part of their missions, and that they pay or otherwise compensate staff or volunteers who assist in those activities. *See* ROA.6265–72, ¶¶ 18, 22, 26, 34. This is constitutionally-protected conduct because organizations like Plaintiffs, whose core missions involve political and civic engagement, are undoubtedly protected First Amendment rights. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010); ROA.6263 ¶14, 6266 ¶ 19,6267–68 ¶ 23, 6271 ¶ 32. By interfacing with citizens at educational and advocacy events, as well as at voters' own doors, Plaintiffs and others throughout Texas engage in "the type of interactive communication concerning political change that is appropriately described as 'core political

speech.'" *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). State-imposed burdens on such core First Amendment-protected activities are *in themselves* sufficient to support direct injury and constitutional standing-to-sue. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976).[35]

Section 7.04 prohibits and chills Plaintiffs from engaging in these activities. Plaintiffs have no way of knowing when conversations about voting for a candidate or measure might occur at these activities and happen to take place in the presence of a ballot. Yet, Section 7.04 criminalizes these paid, in-person interactions with voters (like the ones Plaintiffs engage in) and imposes penalties—including a two-ten-year prison sentence and penalties of upwards of $35,000. ROA.6323–24 ¶ 195; ROA.6326 ¶¶ 205, 207. Further, the provision is substantially overbroad and vague, subjecting Plaintiffs to prosecution without prior notice of precisely what activities are illegal. ROA.6324 ¶¶ 196, 199.

B. Plaintiffs have sufficiently alleged injury to their members.

Plaintiffs also have associational standing on behalf of their members. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the

[35] While this threat of constitutional harm is alone sufficient to confer standing, Plaintiffs also allege that Section 7.04 will injure them in other ways. *See* ROA.6327 ¶ 210.

claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quoting *Hunt v. Wash. State Apple Advert Comm'n*, 432 U.S. 333, 343 (1977)).

Plaintiffs more than meet the requirements for demonstrating associational standing. They have pled that they have members who will be injured and would otherwise have standing to sue in their own right, *see* ROA.6262–63, ¶¶ 9–13, 6290 ¶ 86, 6308 ¶ 144 (all Plaintiffs); ROA.6263–65 ¶ 14–17, 6293–94 ¶ 96, 6309 ¶ 149, 6323 ¶ 189, (OCA-GH); ROA.6265–66 ¶ 18–20, 6290 ¶ 85, 6295 ¶ 101, 6309 ¶ 151, 6323 ¶ 190, (LWVTX); ROA.6266–68 ¶ 21–24, 6290 ¶ 85, 6294 ¶ 97, 6307 ¶ 139, 6309–10 ¶ 152 (REV-UP); ROA.6269–70 ¶ 28–30, 6296 ¶ 106, 6310 ¶ 154, 6323 ¶ 192 (WDAF). Plaintiffs have also pled that this lawsuit is germane to their organizational purposes, which are each harmed by the provisions in S.B.1, ROA.6263–65 ¶ 14–17 (OCA-GH), 6265–66 ¶18–20 (LWVTX); 6266–68 ¶ 21–24 (REV-UP); 6269–70 ¶ 28–30 (WDAF). Finally, Plaintiffs seek equitable relief for claims that would require evidence from only a representative sample of their members. *Ass'n of Am. Physicians*, 627 F.3d at 552.

C. State Defendants caused Plaintiffs' injuries and the courts can redress them.

Defendants admit their traceability and redressability arguments only rehash their sovereign immunity defenses. Br.24. Plaintiffs satisfy traceability and

redressability requirements because the State Defendants enforce the challenged provisions in S.B.1 and declaratory or injunctive relief against them would restrain their enforcement of the challenged laws, relieving Plaintiffs and their members from their injuries. *See* ROA.10714–17.[36] That is enough. On a motion to dismiss, the Court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim.'" *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 529 (5th Cir. 1996) (quoting *Lujan*, 504 U.S. at 561); *accord OCA-Greater Hous.*, 867 F.3d at 610.

V. THE VRA ABROGATES THE STATE'S SOVEREIGN IMMUNITY.

To purportedly "preserve" their argument for further review, State Defendants appeal the district court's finding that State Defendants are not immune to Plaintiffs' VRA claim because Congress abrogated Eleventh Amendment protections in enacting that statute. Br.50. That argument fails, for reasons State Defendants concede. *Id.* This Court recognized Congress's intent to abrogate state sovereign immunity and permit private actions against States for VRA violations in *OCA-Greater Houston*. *See* 867 F.3d at 614 ("The VRA … validly abrogated state sovereign immunity."). Nothing has changed in the intervening years, and *OCA-*

[36] As this Court has explained, a plaintiff challenging an election law satisfies the traceability requirement where the defendant has an "'enforcement connection with the challenged statute.'" *See OCA-Greater Hous.*, 867 F.3d at 613 (quoting *Okpalobi*, 244 F.3d at 427 n.35). As discussed above, Plaintiffs clear that modest bar.

Greater Houston correctly binds the district court and three-judge panels of this Court.

CONCLUSION

For all of these reasons, this court should dismiss State Defendants' appeal and affirm the district court's judgment.

Dated: February 16, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because it contains 12,982 words, excluding parts exempted by the Rules.

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/s/ Adriel I. Cepeda Derieux
Adriel I. Cepeda Derieux

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Adriel I. Cepeda Derieux
Adriel I. Cepeda Derieux

United States Court of Appeals

FIFTH CIRCUIT
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February 10, 2023

Mr. Adriel I. Cepeda Derieux
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No. 22-50778 OCA-Greater Houston v. Jane Nelson
USDC No. 5:21-CV-844
USDC No. 5:21-CV-848
USDC No. 5:21-CV-920

Dear Mr. Cepeda Derieux,

We have determined that your brief is deficient (for the reasons cited below) and must be corrected within 14 days. We note that our Quality Control Program advised you of some of these deficiencies when you filed the document.

The caption on the brief does not match the Court's Official Caption as required by **FED. R. APP. P.** 32(a)(2)(C). See the Official Caption, below:

Case No. 22-50778

No. 22-50775

La Union del Pueblo Entero; Friendship-West Baptist Church; Anti-Defamation League Austin, Southwest, and Texoma; Southwest Voter Registration Education Project; Texas Impact; Mexican American Bar Association of Texas; Texas Hispanics Organized for Political Education; JOLT Action; William C. Velasquez Institute; James Lewin; Fiel Houston, Incorporated,

Plaintiffs - Appellees

v.

Jane Nelson, In Her Official Capacity as Texas Secretary of State; Warren K. Paxton, In His Official Capacity as Attorney General of Texas; State of Texas,

Defendants - Appellants

---

consolidated with
No. 22-50777

Mi Familia Vota; Marla Lopez; Marlon Lopez; Paul Rutledge,

Plaintiffs - Appellees

v.

Gregory W. Abbott, In His Official Capacity as Governor of Texas; Jane Nelson, In Her Official Capacity as Secretary of State of Texas; Warren K. Paxton, In His Official Capacity as Attorney General of Texas,

Defendants - Appellants

Delta Sigma Theta Sorority, Incorporated; Houston Area Urban League, The Arc of Texas; Jeffrey Lamar Clemmons,

Plaintiffs - Appellees

v.

Gregory Wayne Abbott, In His Official Capacity as the Governor of Texas; Warren Kenneth Paxton, Jr., In His Official Capacity as the Attorney General of Texas,

Defendants - Appellants

Mi Familia Vota; Marla Lopez; Marlon Lopez; Paul Rutledge,

Plaintiffs - Appellees

v.

Greg Abbott, In His Official Capacity as Governor of Texas; Jane Nelson, In Her Official Capacity as Texas Secretary of State; Warren Kenneth Paxton, Jr., In His Official Capacity as Attorney General of Texas,

Defendants - Appellants

---

consolidated with
No. 22-50778

La Union Del Pueblo Entero; Et al,

Plaintiffs

v.

Gregory W. Abbott, In His Official Capacity as Governor of Texas; Et al,

Defendants

OCA-Greater Houston; League of Women Voters of Texas; REVUP-Texas; Workers Defense Action Fund,

Plaintiffs - Appellees

v.

Jane Nelson, In Her Official Capacity as Texas Secretary of State; Ken Paxton, Texas Attorney General,

Defendants - Appellants

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk

Renee McDonough

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