No. 20-50683

In the United States Court of Appeals for the Fifth Circuit

TEXAS DEMOCRATIC PARTY; DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE; EMILY GILBY; TERRELL BLODGETT,
Plaintiffs-Appellees,

v.

RUTH HUGHS,
IN HER OFFICIAL CAPACITY AS THE TEXAS SECRETARY OF STATE,
Defendant-Appellant.

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

BRIEF FOR APPELLANT

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Certificate of Interested Persons

No. 20-50683

Texas Democratic Party; Democratic Senatorial Campaign Committee; Democratic Congressional Campaign Committee; Emily Gilby; Terrell Blodgett,
Plaintiffs-Appellees,

v.

Ruth R. Hughs,
in her official capacity as the Texas Secretary of State,
Defendant-Appellant.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Appellant, as a governmental party, need not furnish a certificate of interested persons.

/s/ Matthew H. Frederick
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary to decide this case. Plaintiffs challenge two provisions of the Texas Election Code and seek prohibitory injunctive relief against the Texas Secretary of State. Recent decisions from this Court—including a case discussing one the two provisions at issue here—indicate that Plaintiffs' claims and relief are barred by sovereign immunity. If the Court grants oral argument, however, Defendant requests the opportunity to participate to assist the Court in resolving the appeal.

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INTRODUCTION

Whatever the scope of the right to vote, it does not require early voting. *See McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802 (1969); *Tex. Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020) ("*TDP*"); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020). Plaintiffs want to re-fashion that right—not through the democratic process, but by judicial decree. And not just in this case. In the last year alone, the Texas Democratic Party and its affiliates have filed at least five other lawsuits within the Fifth Circuit, each case pressing its own novel theory of the right to vote. According to those plaintiffs, Texas's 60-year-old ballot-order statute violates the right to vote because it does not list their preferred candidate first;[1] the extension of mail-in ballots to the elderly and disabled constitutes invidious age discrimination;[2] the elimination of straight-ticket voting is illegal because it might take too long to select candidates individually;[3] and, they insist, the Constitution mandates digital voter registration by smartphone.[4]

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[1] *Miller v. Hughs*, No. 1:19-CV-1071-LY, 2020 WL 4187911 (W.D. Tex. July 10, 2020) (dismissing case).

[2] *TDP*, 978 F.3d at 194 (reaching the merits and vacating district court's injunction).

[3] *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564 (5th Cir. 2020) (staying injunction against the Secretary); *Bruni v. Hughs*, No. 5:20-cv-35, 2020 WL 3452229 (S.D. Tex. June 24, 2020) (dismissing related case).

[4] *Tex. Democratic Party v. Hughs*, No. SA-20-CV-08-OLG, 2020 WL 4218227 (W.D. Tex. July 22), *plaintiffs' motion for summary affirmance denied*, 974 F.3d 570 (5th Cir. 2020) (per curiam).

This litigation continues that pattern. In response to documented instances of electioneering, Texas passed a law (HB 1888) that extends the hours of operation for in-person early-voting sites. Plaintiffs claim that this law denies or abridges university students' right to vote on account of age because it might lead to fewer on-campus early-voting sites. Leaving campus, they say, would be unduly burdensome. So they sued the Texas Secretary of State, demanding that she stop enforcing HB 1888.

This presents a problem for Plaintiffs: The Secretary does not enforce HB 1888. Local officials, not the Secretary, are tasked with choosing locations for early-voting sites. Because the Secretary is not connected to the enforcement of the challenged law, Plaintiffs cannot rely on the *Ex parte Young* doctrine to bring a suit against her.

This should not come as a surprise to Plaintiffs. In every one of their other lawsuits, local officials have been directly responsible for enforcing the challenged law. And in all but one of those lawsuits, they have named only the Secretary as a defendant. As this circuit's most recent sovereign-immunity decisions make clear, Plaintiffs cannot invoke *Ex parte Young* to sue the Secretary every time they take issue with an election law. The district court, however, denied the Secretary's motion to dismiss based on sovereign immunity, relying on legal theories now rejected in those recent decisions.

"Sovereign immunity is the privilege of the sovereign not to be sued without its consent." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). That privilege certainly has its exceptions, but Plaintiffs satisfy none of them. If it is to mean anything, then, the privilege must at least protect against meritless lawsuits

from serial litigators uninterested in naming the correct defendants. This Court should reverse the district court's order denying sovereign immunity.

Statement of Jurisdiction

Plaintiffs invoked the district court's subject-matter jurisdiction under 28 U.S.C. sections 1331 and 1343. ROA.93; ROA.1445. This Court has jurisdiction over the appeal under 28 U.S.C. section 1291. On August 11, 2020, the district court denied the Secretary's motion to dismiss on sovereign-immunity grounds. ROA.1194; ROA.1199–1200. The Secretary filed a notice of appeal from that denial on August 14, 2020. ROA.18; ROA.1201. Under the collateral-order doctrine, an order denying sovereign immunity to a state official is immediately appealable. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993); *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 284–85 (5th Cir. 2000).

Issue Presented

Whether the Texas Secretary of State is the proper defendant in a lawsuit challenging and seeking to enjoin the enforcement of a statute that the Secretary does not enforce.

Statement of the Case

I. Early Voting in Texas

A. Texas's decentralized early-voting system

In Texas, any person qualified and registered to vote may take advantage of in-person early voting—that is, the opportunity to vote at a polling station before

election day. Tex. Elec. Code §§ 81.001(a), 82.005, 85.003.[5] Chapter 85 of the Texas Election Code provides for the local administration of in-person early voting. The chapter contains some inflexible provisions: Early voting must run from seventeen days before election day to four days before election day, *id.* § 85.001(a); polls must be set up in the county clerk's main and branch offices during weekday office hours, *id.* §§ 85.002(a), .005(a), .061(a), .063; and a minimum number of additional, temporary polling places[6] must be set up per county, *id.* § 85.062(d).

Beyond those provisions, the other details are left to local officials—specifically, the early voting clerk and the county commissioners court.[7] The Code directs that the early voting clerk, a position filled during a general election by the county clerk,[8] "shall conduct the early voting in each election." Tex. Elec. Code §§ 83.001(a), .002. And in every meaningful sense, the early voting clerk *does* "conduct" the early voting at temporary polling places: At the beginning of each day of early voting, he

[5] The Code refers to this kind of voting as "early voting by personal appearance." Tex. Elec. Code § 82.005. This brief uses the terms "early voting" and "in-person early voting" interchangeably to refer to this kind of voting.

[6] The Code refers to early-voting polling places other than those located at the county clerk's main and branch offices as "temporary branch polling place[s]." Tex. Elec. Code § 82.062(g). This brief uses the term "temporary polling place" to describe this kind of polling place.

[7] A commissioners court consists of four commissioners and a county judge—all elected positions. Tex. Const. art. V § 18. Despite the judicial-sounding titles—"a remnant of Texas's time as part of Mexico"—the county judge and commissioners court perform principally executive functions. *Cutrer v. Tarrant Cty. Local Workforce Dev. Bd.*, 943 F.3d 265, 267 n.1 (5th Cir. 2019).

[8] In Texas, the county clerk is an elected local official. Tex. Const. art. V § 20.

unsecures the voting machines, *id.* § 85.033, staffs the branch with election officers he has chosen, *id.* § 85.009(a), and "follow[s] the procedure for accepting a . . . voter," *id.* § 85.031(a). And at the end of the day, he "secure[s] each voting machine," *id.* § 85.033. In all, he is generally "in charge of and responsible for the management and conduct of the election at the [temporary] polling place." *Id.* § 32.071 (setting out the responsibilities of a presiding election judge); *see id.* § 83.001(c) (giving the early voting clerk "the same duties and authority with respect to early voting as a presiding election judge").

The commissioners court is also delegated a significant degree of responsibility over early voting. Central to this litigation, the commissioners court has the discretion to establish "one or more early voting polling places other than the main early voting polling place." *Id.* § 85.062(a), (a)(1). These temporary polling places "may be located . . . at any place in the territory served by the early voting clerk and may be located in any stationary structure." *Id.* § 85.062(b). Temporary polling places may also be located "in a movable structure." *Id.* This decentralized approach allows counties to tailor their early-voting locations to the needs of their constituents.

B. Texas passes HB 1888 after electioneering by local officials comes to light.

But this system is also susceptible to abuse. Before September 2019, the commissioners court could establish temporary branches "on any one or more days" during the early-voting period, open only on those days and at those times the commissioners court saw fit. Tex. Elec. Code § 85.064(c) (2018); *id.* § 85.065 (2018). In other words, local officials could create "pop-up" or "mobile-voting" polling places

in particular locations for limited times. Some officials took advantage of this power "to influence the vote" by temporarily setting up polling places near their supporters. ROA.100 ¶ 32.

To stop this "selective harvesting of targeted votes," the Texas Legislature passed and Governor Abbott signed House Bill 1888 (HB 1888). ROA.117; *see* ROA.101 ¶ 35. The law, which went into effect on September 1, 2019, requires that all temporary polling places remain open throughout the early-voting period for at least eight hours each weekday. Tex. Elec. Code § 85.064(b)(1); ROA.89 ¶ 1; ROA.101 ¶ 35. That way, all voters—not just those favored by local officials—can be sure that their local temporary polling place will be there when they are ready to vote.

II. District-Court Litigation

A. Plaintiffs claim that the lack of temporary polling places on campus and in senior-living facilities burdens the right to vote.

Plaintiffs sued. Emily Gilby, a student at Southwestern University in Williamson County, alleged that HB 1888 would prevent her university from "host[ing] a temporary early voting location." ROA.93–94 ¶ 18. And she alleged that her "busy schedule" was "likely to make it difficult . . . to vote on Election Day." ROA.94 ¶ 18.

Three groups affiliated with the Democratic Party claimed that HB 1888 would result in a reduction of temporary polling places "on or near college campuses." ROA.91 ¶ 6. These plaintiffs reasoned that the prospect of having to go off-campus would deter "young voters," who are "more likely to be discouraged" "[w]hen faced with a long line," ROA.98 ¶ 27, more "rel[iant] on public transportation" "while having demanding and inflexible school and work schedules," ROA.97 ¶ 25,

and "less likely to know where to vote" due to "information costs," ROA.97 ¶ 26. The groups asserted that these hardships would frustrate their efforts to "engage young, Democratic voters." ROA.96 ¶¶ 22, 23.

Terrell Blodgett alleged that the absence of a nearby voting location would "exclude[] him from participation in voting," ROA.1450 ¶ 20, despite his eligibility to vote by mail, *see* Tex. Elec. Code §§ 82.002–.003.[9]

Plaintiffs claimed that the possibility of "counties . . offer[ing] significantly fewer early voting locations," ROA.101–02 ¶ 37, would violate their First and Fourteenth Amendment right to vote, deny them the equal protection of the laws, and deny or abridge the right to vote on account of age in violation of the Twenty-Sixth Amendment, ROA.102–07; ROA.1452–53. Mr. Blodgett also claimed that HB 1888 violated Title II of the Americans with Disabilities Act (ADA). ROA.1453–54.

Although Plaintiffs' claims focused on the harm caused by counties' removal of temporary polling places, they chose not to sue the counties or county officials. Instead, they named Ruth Hughs, in her capacity as the Texas Secretary of State, as the sole defendant. ROA.96 ¶ 24; ROA.1446 ¶ 9. Plaintiffs offered no explanation for this decision. But they noted that the Secretary is "the Chief Election Officer for Texas," and that her "responsibilities include . . . assisting county election

[9] Mr. Blodgett filed a separate lawsuit from Ms. Gilby and the other plaintiffs. Initially, the Texas Young Democrats and Texas College Democrats were also plaintiffs in Mr. Blodgett's suit. ROA.1443. Those two organizations voluntarily dismissed their claims, ROA.442, and the Gilby and Blodgett lawsuits were consolidated, ROA.224–25; ROA.1485–86.

officials[,] . . . ensuring the uniform application and interpretation of election laws throughout Texas," and "administering the Texas Election Code." ROA.96–97 ¶ 24 (citing Tex. Elec. Code § 31.001(a)); *see* ROA.1446 ¶ 9.

As a remedy, Plaintiffs sought (1) a declaration that HB 1888 is unconstitutional and violative of the ADA; (2) a permanent injunction enjoining the Secretary, "her respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from implementing, enforcing, or giving any effect to HB 1888"; and (3) attorneys' fees. ROA.107; *see* ROA.1453.

B. The District Court Denies the Secretary's Motion to Dismiss.

The Secretary moved to dismiss for lack of subject-matter jurisdiction and failure to state a claim. ROA.114; ROA.228; ROA.251; ROA.1462. In particular, she argued that (1) Plaintiffs could not rely on the *Ex parte Young* exception to sovereign immunity because she does not enforce and has not threatened to enforce HB 1888, ROA.118–20; (2) for the same reason, Plaintiffs had failed to show—as required by Article III—that she caused their injuries or could redress them, ROA.120–22; (3) Plaintiffs had not plausibly alleged an injury-in-fact, ROA.124–28; (4) the organizational plaintiffs did not have "statutory standing" under *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014), ROA.128–29; and (5) HB 1888 did not violate the Constitution or the ADA, ROA.129–39.

The district court rejected all but one of these arguments. ROA.1189. The court held that 42 U.S.C. section 1983, Mr. Blodgett's cause of action, was an inappropriate vehicle for his ADA claim. ROA.1198–99.

In a portion of its decision titled "Authority of the Texas Secretary of State for Standing Purposes," ROA.1193, the district court held that Plaintiffs had "met their burden to show that their alleged injury is traceable to and redressable by Hughs" because "as the chief election officer of the state, the Texas Secretary of State 'is instructed by statute to "obtain and maintain uniformity in the application, operation, and interpretation of [the] code and of the election laws outside [the] code."'" ROA.1194 (quoting *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 613–14 (5th Cir. 2017), in turn quoting Tex. Elec. Code § 31.003).

In the same section of its opinion, the district court tersely disposed of the Secretary's sovereign-immunity argument:

> This argument is similarly based upon Hughs's improper assertion that the Secretary of State does not enforce Texas election law. However, sovereign immunity cannot be asserted in this case. [A] federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law. Therefore, the immunity from suit that Texas and Hughs otherwise enjoy in federal court offers no shield in this case.

ROA.1194 (quotation marks and citations omitted; brackets in original).

The district court also held that Plaintiffs had alleged sufficient facts to support standing and that their constitutional claims passed muster at the motion-to-dismiss stage. ROA.1194–98. The court therefore dismissed Mr. Blodgett's ADA claim and denied the motions to dismiss in all other respects. ROA.1199. The Secretary timely filed a notice of appeal. ROA.18; ROA.1201.

Summary of the Argument

The district court erred when it denied the Secretary's motion to dismiss. At the time the district court issued its ruling, there were several open questions as to the scope of the *Ex parte Young* exception to sovereign immunity. Since then, however, the Fifth Circuit has resolved those questions in a series of cases. Those cases require reversal of the district court for at least two independent reasons.

I. First, to rely on *Ex parte Young*, Plaintiffs were required to show that the Secretary has a "particular duty to enforce" Texas Election Code sections 85.062 and 85.064, the two provisions at issue here, and that she has a "demonstrated willingness to exercise that duty." *TDP*, 978 F.3d at 179. Plaintiffs and the district court ignored this requirement, relying instead on the Secretary's general duties under the Election Code and caselaw that does not apply *Ex parte Young*. A "general duty to enforce the law," however, "is insufficient for *Ex parte Young*" purposes. *Id.* at 181. And this Court has already held that section 85.062 is enforced by local officials, not the Secretary. *Mi Familia Vota v. Abbott*, 977 F.3d 461, 468 (5th Cir. 2020). The Court's reasoning in that case applies equally to section 85.064. *Cf. id.* (discussing a similar provision).

Plaintiffs also assert that the Secretary demonstrated her willingness to enforce these laws when she issued an advisory that explained her understanding of HB 1888. But these kinds of non-binding advisories do not establish the Secretary's authority to enforce HB 1888, "or the likelihood of [her] doing so." *TDP*, 978 F.3d at 181. The Secretary is not a proper *Ex parte Young* defendant.

II. Plaintiffs fare no better with their prayer for relief. They ask the court to declare HB 1888 unconstitutional and stop the Secretary from enforcing it. This would be a pointless exercise because the Secretary does not enforce HB 1888. If Plaintiffs want the return of pop-up polling locations, they must secure an injunction or some other relief against the local officials responsible for setting up temporary polling places. None of those officials are defendants here, so they "cannot be enjoined in this suit." *Mi Familia*, 977 F.3d at 468. Plaintiffs therefore cannot obtain the relief they seek through *Ex parte Young*. *Id.* at 468–69.

Standard of Review

This Court "review[s] the district court's jurisdictional determination of sovereign immunity de novo." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019).

Argument

I. Plaintiffs Cannot Rely on the *Ex parte Young* Exception to Sovereign Immunity Because the Secretary Is Not Sufficiently Connected to the Enforcement of HB 1888.

As a general rule, "federal courts may not entertain a private person's suit against a State." *Stewart*, 563 U.S. at 254. A State's sovereign immunity—sometimes called Eleventh-Amendment immunity—"also prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin*, 943 F.3d at 997.

Although a suit against a state official in his official capacity is typically considered a suit against the State, the *Ex parte Young* doctrine carves out a narrow exception: "when a federal court commands a state official to do nothing more than refrain

from violating federal law, he is not the State for sovereign-immunity purposes." *Stewart*, 563 U.S. at 255. It follows from the scope of the exception that the officer named as the defendant "must have some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157 (1908).

Applying this rule, the Fifth Circuit has held that a plaintiff seeking to invoke *Ex parte Young*'s exception must show that the official named as a defendant has (1) "the particular duty to enforce the statute in question"; and (2) "a demonstrated willingness to exercise that duty." *TDP*, 978 F.3d at 181. Here, Plaintiffs cannot make either showing. Local officials, not the Secretary, enforce HB 1888. And the complaints are devoid of any factual allegations indicating that the Secretary has enforced or will enforce that law.

A. The Secretary does not enforce HB 1888.

Plaintiffs challenge HB 1888. Local officials "have 'the particular duty to enforce'" that law. *City of Austin*, 943 F.3d at 999 (quoting *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc)). The Secretary does not. Plaintiffs named the wrong defendant to invoke *Ex parte Young*'s exception to sovereign immunity. This circuit has already held that the Secretary does not have a sufficient connection to the enforcement of the Election Code's in-person early-voting provisions.

1. "Determining whether *Ex parte Young* applies to a state official requires a provision-by-provision analysis." *TDP*, 978 F.3d at 179. "This is especially true here because the Texas Election Code delineates between the authority of the Secretary of State and local officials." *Id.* The *Ex parte Young* analysis is supposed to be a "straightforward inquiry." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S.

635, 645 (2002). So this circuit has adopted a simple, bright-line rule for determining whether "the plaintiff has named the proper defendant": "Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, our *Young* analysis ends." *City of Austin*, 943 F.3d at 998. Applying that rule makes quick work of this case. The Secretary does not enforce either of the two provisions at issue here, Texas Election Code sections 85.062 and 85.064.

Plaintiffs allege they will be harmed by a possible change in the number and location of temporary polling places. *See, e.g.*, ROA.101–02 ¶ 37; ROA.103 ¶ 43; ROA.1450 ¶ 18. Section 85.062 covers those considerations. It places enforcement in the hands of local officials: "[O]ne or more early voting polling places . . . may be established by . . . the commissioners court . . . or . . . the governing body of the political subdivision." Tex. Elec. Code § 85.062(a). As for location, temporary polling places "may be located in any stationary structure as directed by the authority establishing the branch office," and in certain elections "may be located in a movable structure." *Id.* § 85.062(b). The particular duty to enforce this section falls on local officials, not the Secretary. For that reason, this Court has already held that "[t]he Secretary of State of Texas . . . has no connection to the enforcement of . . . Texas Election Code §[]85.062." *Mi Familia*, 977 F.3d at 468.

Plaintiffs also challenge section 85.064 of the Texas Election Code. ROA.89 ¶ 1 & n.1; ROA.1444 ¶ 2. That section sets out the minimum number of hours during which early voting at temporary polling places "shall be conducted." Tex. Elec. Code § 85.064(b). It is "[t]he early voting clerk," not the Secretary, who

"conduct[s] the early voting in each election." *Id.* § 83.001(a). During a primary or general election, the county clerk is the early voting clerk. *Id.* § 83.002. During other elections, the Code assigns the role to other local officials, but never to the Secretary. *See id.* §§ 83.002–.007. The Secretary does not enforce section 85.064.

In *Mi Familia*, the Fifth Circuit considered the Secretary's connection to a related provision, section 85.063. *See Mi Familia*, 977 F.3d at 467–78. Like section 85.064, the neighboring section 85.063 sets fixed hours for early-voting locations. *Compare* Tex. Elec. Code § 85.063 ("Days and Hours for Voting: Permanent Branch"), *with id.* § 85.064 ("Days and Hours for Voting: Temporary Branch). As the Court explained, "[t]here is no suggestion in any statutes or regulations that" the Secretary "has authority to enforce or would play a role in enforcing" section 85.063. *Mi Familia*, 977 F.3d at 467–68. For that reason, she had no connection to its enforcement. *Id.* at 468.

The same is true here. Local officials are "statutorily tasked with enforcing" HB 1888. *City of Austin*, 943 F.3d at 998. The Secretary, "a different official," is the named defendant. *Id.* That should have been the end of this lawsuit.

2. But the district court did not engage with the Fifth Circuit's bright-line rule. Instead, it took the view that the Secretary enforced HB 1888 because she is the "chief election officer of the state" and because she is directed to "obtain and maintain uniformity in the application, operation, and interpretation of this code and election laws outside this code." ROA.1193–94 (quoting Tex. Elec. Code §§ 31.001(a), .003). That is incorrect.

As already noted, this circuit requires "a provision-by-provision analysis" of the Code to determine whether the Secretary has the authority to enforce the "particular statutory provision that is the subject of the litigation." *TDP*, 978 F.3d at 179. That analysis would be pointless if *Ex parte Young* were satisfied merely by the invocation of her role as "chief election officer." The Court has therefore rejected attempts to rely on section 31.001(a) for *Ex parte Young* purposes. *See, e.g.*, *id.* ("The plaintiffs have included the Secretary of State as a defendant, understandable since the Secretary is the chief election officer of the state. Still, we must find a sufficient connection between the official sued and the statute challenged." *Id.* (citation and quotation marks omitted)); *compare* Br. for Plaintiffs-Appellants at 51, *Mi Familia Vota v. Abbott*, 2020 WL 5759845 (5th Cir. Sept. 18, 2020) (No. 20-50793) (arguing that the Secretary "is indisputably connected to enforcement of the Texas Election Code" as the "chief election officer of the state"), *with Mi Familia*, 977 F.3d at 468 (holding that the Secretary has no connection to enforcement of "Texas Election Code §§ 85.062–85.063"); *and compare City of Austin v. Paxton*, 325 F. Supp. 3d 749, 755 (W.D. Tex. 2018) (holding that the Texas Attorney General had authority to enforce a provision of the Texas Local Government Code as "the chief law enforcement officer of the state"), *with City of Austin*, 943 F.3d at 1000 ("The district court . . . h[eld] that the Attorney General possesses some connection to the enforcement of the statute . . . . We disagree." (quotation marks omitted)).

Reliance on section 31.003 is similarly flawed. "The required connection to apply the *Ex parte Young* exception to a state official is not merely the general duty to see that the laws of the state are implemented." *City of Austin*, 943 F.3d at 999–1000

(quotation marks and brackets omitted); *see also TDP*, 978 F.3d at 181 (similar). For example, this Court has held that the Texas Attorney General's "duty to enforce and uphold the laws of Texas" is "insufficient for *Ex parte Young*." *TDP*, 978 F.3d at 181. Section 31.003 is the same: it imposes nothing more than a general obligation to "obtain and maintain uniformity." Tex. Elec. Code § 31.003. That is why the *Mi Familia* plaintiffs' assertion that section 31.003 created a connection to enforcement fared no better than their argument about section 31.001. *See* Br. for Plaintiffs-Appellants at 51, *Mi Familia*, *supra* (citing Tex. Elec. Code § 31.003).

Plaintiffs have never tried to explain how section 31.003 confers a "specific and relevant duty" to enforce HB 1888. *TDP*, 978 F.3d at 179. Plaintiffs dismissed the Secretary's position on section 31.003 as a "cut-and-paste argument" "based almost entirely on the ill-considered premise that the Secretary does not have a sufficient connection to the enforcement of Texas election law." ROA.171–72. In their view, the connection-to-enforcement requirement "is easily cleared here" because "the Secretary has significantly more than a scintilla of enforcement where Texas's election laws are concerned." ROA.173 (quotation marks omitted). It is therefore not at all obvious how section 31.003's direction to "obtain and maintain uniformity in the application, operation, and interpretation" of election laws creates *any* relevant duty on the Secretary's part—let alone a specific duty—to enforce a law delegating to local officials the power over temporary polling places. Tex. Elec. Code. § 31.003.

3. The district court may have believed, as Plaintiffs asserted, that its *Ex parte Young* holding was required by *OCA-Greater Houston*, 867 F.3d 604. *See* ROA.172

(Plaintiffs' brief asserting that "*OCA-Greater Houston* forecloses the argument that the Secretary is not the proper defendant"). If so, that too was a mistake.

OCA-Greater Houston involved a nonprofit organization's suit against the Secretary and the State of Texas challenging the Election Code's interpreter-assistance laws under section 208 of the Voting Rights Act. 867 F.3d at 607–08. Addressing Article III standing to sue the Secretary, the panel held that the organization had shown "that its injury [was] fairly traceable to and redressable by the defendants." *Id.* at 614. The Court noted that it based its conclusion on the Secretary's role as "chief election officer of the state" and her duty to "obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code." *Id.* at 613–14 & nn.14, 44 (quoting Tex. Elec. Code §§ 31.001(a), .003).

Plaintiffs seem to believe that *OCA-Greater Houston* stands for the proposition that the Secretary is always the proper defendant in election-law litigation. *See* ROA.170; *but see Mi Familia*, 977 F.3d at 468–69. They are wrong for two reasons.

First, there is no reason to believe that *OCA-Greater Houston* intended to establish a broad rule that the Secretary is sufficiently connected to the enforcement of *every* voting law. When identifying the proper defendant, this circuit first looks at the challenged law itself. *City of Austin*, 943 F.3d at 998. If "a state actor or agency" other than the defendant "is statutorily tasked with enforcing" that law, the defendant is the wrong party. *Id.* If, however, "no state official or agency is named in the statute in question, we consider whether the state official actually has the authority to enforce the challenged law." *Id.* The *OCA-Greater Houston* panel appears to have

followed this approach. As the panel observed, it was not clear from the face of the challenged provision, Tex. Elec. Code § 61.033, who was tasked with enforcing that law. *See OCA-Greater Houston*, 867 F.3d at 613. So it looked more broadly and determined that enforcement of the provision was the Secretary's job. *Id.* at 613–14.

Assuming that *OCA-Greater Houston* was correct, its approach leads to the opposite result in this case—local officials are named in the challenged portions of the Election Code and statutorily tasked with enforcing the temporary-polling-place laws. *See* Parts I.A.1, I.A.2, *supra*. As a result, there is no need to do what the *OCA-Greater Houston* panel did and look beyond the statute for the appropriate official.

Second, the panel in *OCA-Greater Houston* did not purport to extend its reasoning about standing to the *Ex parte Young* context. Rather, the Court held that "[s]overeign immunity has no role to play here" because it considered the Voting Rights Act to have abrogated state sovereign immunity. *OCA-Greater Houston*, 867 F.3d at 614; *see Tex. Democratic Party v. Hughs*, 974 F.3d at 570–71 (noting that *OCA-Greater Houston* "did not resolve" questions about the application of the *Ex parte Young* doctrine).

So even if Plaintiffs' reading of the *OCA-Greater Houston* approach to standing is correct, it does not govern this circuit's approach to *Ex parte Young*. Nor could it. The Court has explained that the *Ex parte Young* analysis demands a "provision-by-provision" showing of enforcement responsibilities; sweeping generalizations about the Election Code as a whole will not do. *TDP*, 978 F.3d at 179; *see* Parts I.A.1, I.A.2,

supra. Whatever the merits of *OCA-Greater Houston*,[10] it does not align with this circuit's *Ex parte Young* jurisprudence. And whatever the overlap between standing and the connection-to-enforcement inquiry, *see City of Austin*, 943 F.3d at 1002, the *OCA-Greater Houston* decision provides no support for the district court's sovereign-immunity ruling.

4. Finally, Plaintiffs advanced a misguided policy argument in the court below, suggesting that the Secretary's position would make Texas election laws impossible to challenge or enforce:

> It is also worth pausing for a moment to consider the sheer irrationality of what the Secretary argues for here. The logical results of her assertion would be that there is no official in Texas whom voters can sue to challenge unconstitutional laws, that Texas's election code is essentially unenforceable, and that Texas elections are, in fact, entirely unregulated.

ROA.171. The Secretary's argument leads to no such results. Indeed, it is difficult to reconcile this position with Plaintiffs' roughly contemporaneous decision to sue several local officials in federal and state court regarding other early-voting provisions of the Texas Election Code. *See TDP*, 978 F.3d at 174–75 (describing the state-court

[10] *OCA-Greater Houston* is now the subject of a circuit split. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1284 (11th Cir. 2020) (Jill Pryor, J., dissenting) (noting that the Eleventh Circuit has split from *OCA-Greater Houston*'s standing analysis); *id.* at 1254 (majority opinion of William Pryor, C.J.) (rejecting an attempt to "rely on the Secretary's general election authority" and her "position as 'the chief election officer of the state' . . . to establish traceability"); *id.* (holding that injunctive and declaratory relief against the Secretary would not redress plaintiffs' injuries given that local officials were directly responsible for enforcing the challenged election law).

litigation); *Tex. Democratic Party v. Abbott*, 461 F. Supp. 3d 406, 441–42 (W.D. Tex. 2020) (identifying the Travis County clerk and Bexar County early voting clerk as federal-court defendants in a constitutional challenge to Texas's early-voting laws).

The notion that no one else is responsible for enforcing the Election Code also sits uncomfortably with the complaints, which characterize *county clerks* as the "chief elections official[s]" that "employ[] temporary early voting," ROA.98–99, which discuss HB 1888's impact on *counties'* placement of temporary polling sites, ROA.101–02; ROA.1450–51, and which rely on a newspaper article explaining that "after the Legislature outlawed temporary polls," at least one *local* official "decided . . . to spend the money needed to make pop-up voting sites on eight college campuses permanent," Michael Wines, *The Student Vote is Surging. So Are Efforts to Suppress It*, N.Y. Times (Oct. 24, 2019) (incorporated by reference into Plaintiffs' complaint at ROA.92 ¶ 8; ROA.99 ¶¶ 28, 29; ROA.100 ¶ 32; ROA.101–02 ¶ 37).[11]

These allegations confirm what this Court has already held: local officials enforce the in-person early-voting laws. The Secretary does not.

B. The Secretary does not have "a demonstrated willingness" to enforce HB 1888.

The Secretary does not enforce the challenged portions of HB 1888. And she has shown no inclination to begin enforcement, given that that task has been assigned by statute to local officials. Assuming that she *can* enforce HB 1888, however, there is no evidence that she *will*. This too requires reversal.

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[11] *Available at* https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html.

1. "Panels in this circuit have defined enforcement as typically involv[ing] compulsion or constraint." *City of Austin* 943 F.3d at 1000 (quotation marks omitted; brackets in original). That means it is not enough to show that the defendant "*has* the authority to enforce" the challenged law—that alone "cannot be said to 'constrain'" anyone. *Id.* at 1001. A plaintiff must also allege facts to show that the defendant is "likely" to exercise that enforcement power. *Id.* at 1002; *see also Ex parte Young*, 209 U.S. at 155–56 (noting that an injunction against officials may be permissible when they have a duty to enforce the law "*and* . . . threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act" (emphasis added)).

The district court rejected the Secretary's contention that she was not likely to enforce HB 1888, but it did not explain why. ROA.1194. Presumably, the court adopted the Plaintiffs' position. In its brief before the district court, Plaintiffs noted that the Secretary had issued an "Election Advisory regarding the implementation of House Bill 1888." ROA.173. This advisory, they claimed, "provid[ed] more than sufficient evidence of the likelihood of [] enforcement." ROA.173.

Plaintiffs did not elaborate any further. But parties suing a state tend to use an official's public statements to show (1) the official has the authority to enforce the challenged law; and (2) the likelihood that she will in fact do so. *See In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020); *City of Austin*, 943 F.3d at 1001. Whichever showing Plaintiffs were trying to make, they face an insurmountable hurdle: This Court's "cases do not support the proposition that an official's public statement alone establishes authority to enforce a law, or the likelihood of his doing so, for *Young*

purposes." *In re Abbott*, 956 F.3d at 709; *accord TDP*, 978 F.3d at 181. This case is no different.

2. A public statement alone cannot establish enforcement authority or the likelihood of enforcement. But an official's "letter[] threatening formal enforcement" might. *City of Austin*, 943 F.3d at 1001; *see In re Abbott*, 956 F.3d at 709. In *City of Austin*, for example, the Court explained that a prosecutor's "numerous threatening letters" to a plaintiff "alleging that [plaintiff] was in violation of the Texas Deceptive Trade Practices Act" "ma[de] it clear that [the prosecutor] had . . . the authority to enforce the [Act]" and "was also constraining" the plaintiff. 943 F.3d at 1001 (quotation marks omitted). The problem for Plaintiffs is that an advisory letter—like the one the Secretary sent—is not a letter threatening enforcement.

Consider *TDP*, where one of the plaintiffs in this case, the Texas Democratic Party, argued unsuccessfully that a different advisory established the *Ex parte Young* connection in that case. There, a state court had suggested in ongoing litigation that anyone who feared COVID-19 was considered disabled and entitled to vote by mail in Texas. *TDP*, 978 F.3d at 174. The Texas Attorney General "sen[t] a letter to Texas judges and election officials" explaining that that was incorrect "[b]ased on the plain language of the" Texas Election Code. *Id.* at 175. "The letter ordered public officials to refrain from advising voters who" were not disabled "but nonetheless feared COVID-19 to vote by mail. The letter [also] warned third parties that if they advised voters to vote by mail without a qualifying disability, then the party could be subject to criminal liability under the Texas Election Code." *Id.*

The Texas Democratic Party "characterize[d] this guidance as a threat . . . and rel[ied] on it for part of their argument opposing sovereign immunity." *Id.* The Court rejected that argument. Unlike the fact pattern described in *City of Austin*, the *TDP* letter "was sent to judges and election officials, not to the plaintiffs." *Id.* at 181. It "did not make a specific threat or indicate that enforcement was forthcoming." *Id.* "Instead, the letter explained that advising voters to pursue disability-based mail-in voting without a qualifying condition constituted a felony." *Id.* "As a result," the Court concluded that the letter "did not intimate that formal enforcement was on the horizon." *Id.* (brackets and quotation marks omitted). "Accordingly, the Attorney General lack[ed] a requisite connection to the challenged law, and *Ex parte Young* [did] not apply to him." *Id.*

There is barely any daylight between the Texas Democratic Party's argument there and its similarly incorrect argument here. The Secretary's advisory was sent to "Election Officials," not Plaintiffs. ROA.209. It does "not make a specific threat or indicate that enforcement was forthcoming." *TDP*, 978 F.3d at 181. Instead, the advisory explains that the Secretary "wish[es] to advise" the recipients "of some changes in the law that passed during the 86th Regular Session (2019) in regards to early voting by personal appearance." ROA.209. After setting out the Secretary's understanding of HB 1888's impact on the Election Code, ROA.209–10, the advisory responds to "some frequently asked questions regarding these changes and the issues that may arise," ROA.209; *see* ROA.210–12. In fact, the Secretary's letter is even *less* threatening than the Attorney General's—it makes no mention of any criminal liability for violating the Election Code.

In short, the advisory "[does] not intimate that formal enforcement [is] on the horizon." *TDP*, 978 F.3d at 181. Nor does it evidence any enforcement power. *See In re Abbott*, 956 F.3d at 709 (holding that a press release in which "the Attorney General did not even threaten to enforce" the challenged law failed to "show authority to enforce [the law] for *Ex parte Young* purposes"). If the district court relied on the advisory in support of its denial of sovereign immunity, that was in error.

* * *

The Secretary does not enforce HB 1888. She never has. And nothing suggests that she will. Because she is not sufficiently connected to the enforcement of HB 1888, she is not a proper *Ex parte Young* defendant. Sovereign immunity bars the claims against her. They should have been dismissed.

II. *Ex parte Young* Also Bars the Relief Plaintiffs Seek.

Even if the Secretary had some connection to the enforcement of HB 1888, *Ex parte Young* would still bar Plaintiffs' relief. The relief Plaintiffs say they seek would have to be directed at the officials charged with establishing temporary polling places—the local officials. But those officials are not the defendants here.

1. The *Ex parte Young* "doctrine is limited to th[e] precise situation" where "a federal court commands a state official to do nothing more than refrain from violating federal law." *Stewart*, 563 U.S. at 255. In other words, an *Ex parte Young* suit may be permissible when the injunctive relief sought is prohibitory. S*ee Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472 (5th Cir. 2020) (en banc) (noting that a prayer for relief "[o]n its face . . . satisfie[d] *Young*" because it "request[ed] relief

prospectively requiring the [officials] to refrain from taking future actions to enforce an unlawful order").

According to Plaintiffs, that is exactly what they seek. Their complaints request an injunction "permanently enjoining the Secretary of State, her respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from implementing, enforcing, or giving any effect to HB 1888." ROA.107; *see* ROA.1454 (similar).

But given that local officials are charged with enforcing HB 1888 and setting up temporary polling places, an order prohibiting the *Secretary* from enforcing that law would not be effective. Nevertheless, when the Secretary suggested that Plaintiffs really wanted *mandatory* relief (that is, an order requiring the Secretary to take an affirmative act), Plaintiffs insisted that she was incorrect:

> Plaintiffs are not seeking a mandatory injunction. Plaintiffs ask for only a prohibitory injunction, requiring that the Secretary not enforce a plainly unconstitutional law, and the Secretary fails to explain how the requested injunction would be mandatory. Contrary to the Secretary's assertion, the relief requested here is, in fact, the very basis for the *Ex [p]arte Young* exception to Eleventh Amendment sovereign immunity.

ROA. 174. Plaintiffs added that "an injunction upon [the Secretary] would . . . bind local officials," ROA.172 (citing Fed. R. Civ. P. 65(d)(2)), and they maintained that the Secretary's view to the contrary was "plainly not true," ROA.172. The caselaw does not support Plaintiffs' confidence.

Because Plaintiffs have so forcefully disavowed any claim to mandatory relief, their entitlement to an injunction turns on the answer to one question: Does the *Ex*

parte Young doctrine permit Plaintiffs to bind local officials through a prohibitory injunction against the Secretary? As the *Mi Familia* panel held, it does not.

The *Mi Familia* plaintiffs challenged the use of electronic voting machines. 977 F.3d at 465. They wanted polling places to give voters a choice between electronic machines and paper ballots. *Id.* Some counties, however, "participate[d] in Texas's Countywide Polling Place Program." *Id.* That program required "the use of electronic voting machines, which means that those counties [did] not provide paper ballots." *Id.* Rather than sue the counties, the plaintiffs sued the Secretary for injunctive relief. *Id.* at 464. One of their justifications for naming the Secretary was that she was statutorily tasked with implementing and enforcing the program, so she could be enjoined from enforcing the program's electronic-devices-only requirement. *See id.* at 468 (citing Tex. Elec Code § 43.007). But that's not how *Ex parte Young* works.

The Court acknowledged that it could "enjoin state officials from enforcing statutes." *Mi Familia*, 977 F.3d at 468. But the panel cautioned that "such an injunction must be directed to those who have the authority to enforce those statutes." *Id.* Plaintiffs wanted paper ballots to be made available. The Secretary, however, "is not responsible for printing or distributing ballots. That responsibility falls on local officials." *Id.* at 468 & n.24 (citing Tex. Elec. Code §§ 31.043, 52.002). So an order directing the *Secretary* "not to enforce the electronic-voting-devices-only provision in section 43.007" "would not require *counties* who currently are participating in the [program] to print and use paper ballots. . . . It would remain their choice as to whether to incur the expense of printing, distributing and counting paper ballots

instead of utilizing the electronic devices they already have in place." *Id.* at 468 (emphasis modified).

A prohibitory injunction against the Secretary, therefore, "would not afford the Plaintiffs the relief that they seek." *Id.* That meant "the Secretary of State [was] not a proper defendant." *Id.* (quotation marks omitted). As the panel concluded, the officials that *could* afford the plaintiffs relief—"county or other local officials"—were not defendants and could not be reached through a prohibitory injunction against the Secretary: "No county or local official is a party to the current suit and cannot be enjoined in this suit to print and use paper ballots." *Id.* In short, *Ex parte Young* was unavailable. And sovereign immunity barred the constitutional claims against the Secretary. *Id.* at 469.

Mi Familia requires the same result here. In this case, Plaintiffs and the district court identified two provisions they said empowered the Secretary to enforce HB 1888: her appointment as "chief election officer of the state" in section 31.001(a), and her duty to "obtain and maintain uniformity in the application, operation, and interpretation" of election laws set out in section 31.003. *See* ROA.1194. Plaintiffs also suggested that the Secretary's advisory about HB 1888 was an act of enforcement. ROA.173. Even if Plaintiffs were right (and they are not), a prohibitory injunction against the Secretary would *still* be barred by sovereign immunity.

Plaintiffs' lawsuit seeks the return of mobile-voting polling places to university campuses and senior-living facilities. ROA.101–02; ROA.1449–51. But the Secretary is not responsible for determining where to place temporary polling places or for deciding whether they should be mobile. "That responsibility falls on local officials."

Mi Familia, 977 F.3d at 468; *see* Tex. Elec. Code §§ 85.062, .064; Part I.A.1, *supra*. So even if the district court issued a prohibitory injunction enjoining the Secretary from acting as chief election officer, from maintaining uniformity, from issuing another advisory, and from enforcing the current advisory, that injunction would not "*require*" local officials to establish mobile voting in Plaintiffs' preferred locations. *Mi Familia*, 977 F.3d at 468. "It would remain [the local officials'] choice as to" whether to set up temporary polling places, whether to place them where Plaintiffs wish, and "whether to incur the expense" of doing so." *Id.*; *see* Wines, *supra* (noting that local officials are the ones who make budgeting and placement decisions about temporary polling places).

In other words, a prohibitory injunction would "not afford the Plaintiffs the relief that they seek." *Id.* The Secretary, therefore, "is not a proper defendant." *Id.* The injunction should have been "directed to those who have the authority to enforce those statutes. In the present case, that would be county or other local officials." *Id.* But by virtue of Plaintiffs' own litigation decisions, "[n]o county or local official is a party to the current suit and [they] cannot be enjoined in this suit to" establish mobile-voting locations. *Id.* As a result, *Ex parte Young* does not permit a prohibitory injunction against the Secretary—the only kind of injunction Plaintiffs request. ROA.107, 174; ROA.1454. As in *Mi Familia*, the request for injunctive relief should have been dismissed on sovereign-immunity grounds.

2. Plaintiffs also sought declaratory relief. ROA.107; ROA.1445. That too must be dismissed. Like the prohibitory injunctive relief requested here, a declaration as

to the constitutionality of HB 1888 would bind the Secretary but not the local officials. That would not afford Plaintiffs the relief they seek.

Additionally, *Ex parte Young* is available only for certain "relief properly characterized as prospective." *Verizon*, 535 U.S. at 645. Retrospective relief, on the other hand, remains barred by sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104–05 (1984). Once the requested injunctive relief is unavailable, "the Eleventh Amendment bar[s] a claim for declaratory relief." *Freedom from Religion Found. v. Abbott*, 955 F.3d 417, 425–26 (5th Cir. 2020).

* * *

Plaintiffs chose to pursue prohibitory injunctive relief against the Secretary. And they chose not to name local officials as defendants. Whatever the reason for those decisions, the result should be clear: sovereign immunity bars this suit. The district court erred by holding otherwise.

Conclusion

The Court should reverse the district court's denial of sovereign immunity and remand to the district court with instructions to dismiss Plaintiffs' claims.

Respectfully submitted.

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Certificate of Service

On November 16, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,986 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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