No. 20-50654

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

RUTH HUGHS, TEXAS SECRETARY OF STATE,

Defendant-Appellant.

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

BRIEF FOR APPELLANT

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Certificate of Interested Persons

No. 20-50654

Linda Jann Lewis, Madison Lee, Ellen Sweets, Benny Alexander, George Morgan, Voto Latino, Texas State Conference of the National Association for the Advancement of Colored People, and Texas Alliance for Retired Americans,

Plaintiffs-Appellees,

v.

Ruth Hughs, 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 multiple provisions of the Texas Election Code governing voting by mail, and they seek prohibitory and mandatory injunctive relief against the Texas Secretary of State. Recent decisions from this Court indicate that sovereign immunity bars Plaintiffs' claims and requested relief. If the court grants oral argument, however, the Secretary requests the opportunity to participate to assist the Court in resolving this appeal.

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INTRODUCTION

Plaintiffs brought this suit to change Texas laws on mail-in voting. Because sovereign immunity bars a suit against the State itself, Plaintiffs sued the Texas Secretary of State. But "sovereign immunity also prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (citing *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974)). *Ex parte Young*, 209 U.S. 123 (1908), recognizes an exception to sovereign immunity, but it is a narrow one, available only when "a federal court commands a state official to do nothing more than refrain from violating federal law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Here, Plaintiffs have named the wrong official, and they seek the wrong kind of relief.

Ex parte Young does not permit plaintiffs to avoid state sovereign immunity "simply by naming an individual state officer as a party in lieu of the State." *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc) (plurality op.). The defendant must have a "'sufficient connection [to] the enforcement' of the challenged act." *City of Austin*, 943 F.3d at 998 (quoting *Ex parte Young*, 209 U.S. at 157). Plaintiffs' decision to name the Secretary as the sole defendant is therefore fatal to their case. Local election officials, not the Secretary, enforce the statutory provisions Plaintiffs challenge. And Plaintiffs identify no act of enforcement by the Secretary that would make her a proper *Ex parte Young* defendant.

Plaintiffs' attempt to avoid sovereign immunity fails for the separate reason that *Ex parte Young* does not permit the relief they seek. To the extent Plaintiffs seek prohibitory injunctive relief against the Secretary, that relief would have no effect

because the Secretary does not implement or enforce the challenged statutes. To the extent Plaintiffs seek a mandatory injunction requiring the Secretary to take affirmative action in her official capacity, sovereign immunity bars their suit as a suit against the State.

The relief Plaintiffs seek reveals the true nature of their suit: Plaintiffs do not want to enjoin the State's laws, but to rewrite them. Yet *Ex parte Young*'s narrow exception to sovereign immunity does not allow a district court to assume the role of a legislature through an injunction against a state official. The district court's refusal to dismiss Plaintiffs' claims, if allowed to stand, would permit these and future plaintiffs to change Texas election laws simply by naming the Secretary as a placeholder defendant. This Court should reverse the district court's sovereign-immunity ruling and direct it to dismiss Plaintiffs' claims for lack of jurisdiction.

Statement of Jurisdiction

Plaintiffs invoked the district court's subject-matter jurisdiction under 28 U.S.C. sections 1331 and 1343. ROA.19. This Court has jurisdiction over the appeal under 28 U.S.C. section 1291. On July 28, 2020, the district court denied the Secretary's motion to dismiss on sovereign-immunity grounds. ROA.669–72. The Secretary filed a timely notice of appeal from that denial on August 7, 2020. ROA.690; *see* Fed. R. App. P. 4(a)(1). 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).

Issues Presented

1. Whether *Ex parte Young* permits a lawsuit against the Texas Secretary of State to challenge provisions of the Texas Election Code where:

(a) the Secretary does not implement or enforce the challenged laws, and

(b) the Secretary has not taken any step toward enforcement.

2. Whether *Ex parte Young* permits a lawsuit against the Secretary where the plaintiffs seek an injunction compelling the Secretary to take affirmative action in her official capacity.

Statement of the Case

I. Plaintiffs Seek to Change Texas Election Law Through a Suit Against the Secretary of State.

Plaintiffs Linda Jann Lewis, Madison Lee, Ellen Sweets, Benny Alexander, George Morgan, Voto Latino, the Texas State Conference of the NAACP, and the Texas Alliance for Retired Americans filed this lawsuit on May 11, 2020, seeking declaratory and injunctive relief against Texas Secretary of State Ruth Hughs in her official capacity. ROA.15. Plaintiffs challenged four aspects of voting by mail in Texas "in the context of" the COVID-19 pandemic. Those requirements, as characterized by Plaintiffs, are:

> (1) the requirement that voters pay for the postage to return their early voting ballots by mail . . . , Tex. Elec. Code § 86.002;
>
> (2) the requirement that returned ballots be postmarked no later than 7:00 p.m. on election day and received by the county at the address designated on the ballot carrier envelope no later than 5:00 p.m. on the day after the election to be counted . . . , *id.* § 86.007;

> (3) the requirement that voters must submit two handwriting samples that "match"—a standard determined by election officials—in order to have their early voting ballots counted . . . , *id.* § 87.027; and
>
> (4) the criminalization of a person assisting a voter in returning a marked mail ballot . . . , *id.* § 86.006.

ROA.18. Plaintiffs alleged that in the context of the COVID-19 pandemic, these four statutory provisions "independently and collectively pose[d] direct and severe burdens on the right to vote, either by unduly burdening the process, or by unjustifiably raising the risk that substantial numbers of valid ballots . . . w[ould] be rejected and not counted by the State in the coming November Election." ROA.18.

Through their lawsuit against the Secretary, Plaintiffs sought to change the law on mail-in voting in Texas. As Plaintiffs put it, "[t]he solution is obvious: all Texans should be given the choice to cast their ballots by mail." ROA.35. But even universal mail-in voting would not be sufficient. In addition to allowing every registered voter to vote by mail, Plaintiffs argued that "Texas must also ensure that every voter has the *ability* to vote by mail to ensure their ballots are counted," and that "Texas must remove unnecessary restrictions on voting by mail that will otherwise deny its citizens their fundamental right to vote." ROA.38.

First, Plaintiffs challenged Texas Election Code section 86.002, which they characterized as a "Postage Tax." ROA.38. According to Plaintiffs, section 86.002 "requires voters to pay for the postage to return their marked mail-in ballot to their county of residence." ROA.38. They alleged that through the so-called "postage tax," "Texas effectively imposes a monetary cost on voters whose only option to vote safely is to cast a vote by mail." ROA.39.

Second, Plaintiffs challenged Election Code section 86.007, which they characterized as the "Ballot Receipt Deadline." ROA.41. According to Plaintiffs, section 86.007 is misleading because it "suggests to voters that it is possible to mail a ballot at 7:00 p.m. on election day such that the county receives it by 5:00 p.m. the next day," but "the USPS advises that First-Class mail typically takes approximately *three and a half days* to arrive at its destination even under *normal* circumstances." ROA.41. And given "increased mail demands around the time of an election," the USPS recommends that "citizens mail their ballots *at least a week before* ballots are due." ROA.41. Plaintiffs alleged that the COVID-19 pandemic had already caused "an increase in postal delays," ROA.41, which would be exacerbated by "a budgetary crisis the USPS is facing due to COVID-19—a crisis that threatens to shutter the entire agency." ROA.42. Because of these "budget and personnel struggles," Plaintiffs predicted that the USPS's effort "to deliver an unprecedented number of vote-by-mail ballots across the country—both from county elections officials to voters, and then back again"—would result in "an increase in the number of ballots that are not timely returned before the Ballot Receipt Deadline and are thus not counted." ROA.42. As a result, Plaintiffs alleged that enforcing the statutory deadline for receipt of mail-in ballots would likely disenfranchise "hundreds of thousands of Texas voters" because of "the vagaries of a postal service operating under a budget crisis during a global pandemic." ROA.44.

Third, Plaintiffs challenged the "Signature Match Requirement" in Election Code section 87.027, which "requires county officials to verify each mail-in voter's signature by comparing it with the voter's signature on the vote-by-mail application

and, if needed or available, other signatures from the voter over the previous six years." ROA.45. Plaintiffs alleged that this provision imposes "unsustainable burdens" on the right to vote because "the county officials that verify signatures are untrained and have no expertise in forensic handwriting," ROA.45, and because signature matching "is at best a highly dubious and challenging art" even for experts. ROA.46. Plaintiffs also complain that "Texas provides voters with no opportunity to cure election officials' mistaken determinations" because "the county need only notify the voter" of a "signature mismatch within 10 days *after* the election." ROA.47. As a result, Plaintiffs allege, "voters are subject to disenfranchisement based on the untrained guesses of overworked elections officials," ROA.46, as those "untrained election administrators will mistakenly and arbitrarily reject ballots from qualified voters." ROA.47.

Fourth, Plaintiffs challenged Election Code section 86.006—the "Voter Assistance Ban," ROA.47—which makes it unlawful for a person to possess another voter's mail-in ballot unless the person is (1) "related to the voter," (2) "living in the same dwelling," (3) "an early voting clerk or a deputy early voting clerk," (4) eligible under state law to lawfully assist the voter, (5) a U.S. Postal Service employee, or (6) "a common or contract carrier working in the normal course of the carrier's authorized duties." Tex. Elec. Code § 86.006(f). Plaintiffs allege that this imposes "an undue burden on voters generally and will operate to disenfranchise a large swath of Texas's eligible voters during the current pandemic," ROA.48, because "criminalization of voter assistance deters good Samaritans from assisting those who are unable to deliver their ballots themselves." ROA.48. Thus, voters

"who cannot submit their mail-in ballots in person will either have to rely on the overextended USPS or may simply be deterred from submitting their mail-in ballots altogether." ROA.49.

Plaintiffs alleged that all of the challenged provisions impose an undue burden on the right to vote in violation of the First and Fourteenth Amendments. ROA.49. They alleged that the ballot-receipt deadline and the signature-match requirement deprive them of equal protection in violation of the Fourteenth Amendment. ROA.52–53. They alleged that the signature-match requirement and the voter-assistance ban deprive them of procedural due process in violation of the Fourteenth Amendment. ROA.53–54. And they alleged that the so-called Postage Tax—that is, the requirement that voters provide the postage necessary for the U.S. Postal Service to deliver their mail-in ballots—constitutes a poll tax in violation of the Twenty-Fourth Amendment. ROA.54–55.

Plaintiffs sought a declaration that all four challenged provisions violate the Constitution. ROA.55. They also sought the following injunctive relief against the Secretary of State[1]: (1) an injunction requiring the Secretary "to provide prepaid postage on the ballot carrier envelopes used to return the marked mail-in ballots to the counties," ROA.55; (2) an injunction preventing the Secretary "from rejecting vote-by-mail ballots if those ballots are postmarked by 7:00 p.m. on election day and received by the county election administrator before it canvases the election," ROA.55; (3) an

[1] Plaintiffs' request for injunctive relief included the Secretary's "respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them." ROA.55.

injunction preventing the Secretary "from rejecting mail-in ballots on signature verification grounds," ROA.55, or requiring the Secretary "to provide voters the opportunity to cure any issues with signature verification before their ballots are rejected," ROA.56; and (4) an injunction preventing the Secretary "from implementing, enforcing, or giving any effect to the Voter Assistance Ban," ROA.56.

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

On June 3, 2020, Secretary Hughs moved to dismiss the complaint based on sovereign immunity, lack of standing, and failure to state a claim on which relief can be granted. ROA.102; ROA.105; ROA.107; ROA.114. First, she argued that *Ex parte Young* does not apply because she lacks a sufficient connection to enforcement of the challenged provisions. ROA.105–07; ROA.632. Local election officials are responsible for providing, processing, and counting mail-in ballots, *see* Tex. Elec. Code §§ 86.002(a), 86.011, 87.041(a), and local prosecutors are responsible for prosecuting criminal offenses. *See, e.g.*, Tex. Gov't Code § 44.115. Second, she argued that *Ex parte Young* does not permit suits that seek injunctions requiring officials to affirmatively exercise the State's sovereign authority. ROA.107; ROA.632 n.1. Plaintiffs responded to the motion to dismiss on June 17, ROA.137, and moved for a preliminary injunction on June 22, ROA.236.

The district court denied the motion to dismiss on July 28. ROA.656. Rejecting the Secretary's argument that sovereign immunity barred Plaintiffs' claims, the district court held that two provisions of the Texas Election Code provided a sufficient connection to enforcement of the challenged statutes to satisfy *Ex parte Young*. First, the court relied on Election Code section 31.003, which provides that the Secretary

"shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code." *See* ROA.670. Second, the court relied on Election Code section 31.005, which provides that the Secretary "may take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes," Tex. Elec. Code. § 31.005(a); that "[i]f the secretary determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner than impedes the free exercise of a citizen's voting rights, the secretary may order the person to correct the offending conduct," *id.* § 31.005(b); and that "[i]f the person fails to comply, the secretary may seek enforcement of the order by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general," *id.*

The district court also rejected the Secretary's argument that *Ex parte Young* does not permit federal courts to issue injunctions requiring a state official to take affirmative action in her official capacity. ROA.669–71. The court reasoned that *Ex parte Young* merely requires a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." ROA.671 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002)). It concluded that Plaintiffs satisfied *Ex parte Young* because they alleged "that the challenged restrictions are ongoing violations of federal law, and the relief they seek is prospective." ROA.672.

III. The Secretary Appeals the Denial of Her Motion to Dismiss Based on Sovereign Immunity.

The Secretary filed a timely notice of appeal on August 7. ROA.690. The Secretary advised the district court that the notice of appeal divested it of jurisdiction, so Plaintiffs' claims could not proceed while the appeal was pending. ROA.692. Plaintiffs urged the district court to retain jurisdiction over the case despite the appeal and order that discovery continue. ROA.717. The district court declined to do so. ROA.738.

Plaintiffs moved in this Court to dismiss the Secretary's appeal as frivolous or summarily affirm. A panel of this Court denied the motion to dismiss the appeal as frivolous but granted the motion to summarily affirm. *See Lewis v. Hughs*, No. 20-50654, 2020 WL 5511881 (5th Cir. Sept. 4, 2020) (per curiam). The Secretary then filed a petition for rehearing en banc.

On October 2, the Court withdrew its order granting Plaintiffs' motion for summary affirmance, denied Plaintiffs' motion for summary affirmance and to dismiss the appeal, and directed the Clerk of Court to place this case for assignment to a panel for consideration on the merits. *See Lewis v. Hughs*, No. 20-50654, 2020 WL 6066178 (5th Cir. Oct. 2, 2020) (per curiam). The Court later denied the Secretary's petition for rehearing en banc. *See* Order, *Lewis v. Hughs*, No. 2050654 (5th Cir. Nov. 5, 2020) (per curiam).

Summary of the Argument

Plaintiffs' complaint should have been dismissed because their claims are barred by sovereign immunity. The exception to sovereign immunity recognized in *Ex parte*

Young does not apply because the Texas Secretary of State lacks the requisite connection to enforcement of the challenged mail-in-voting laws. The Secretary does not enforce those laws at all; local officials do. *Ex parte Young* permits federal courts to provide a narrow remedy against state officials sued in their official capacity: an injunction preventing future violations of federal law. No prohibitory injunction against the Secretary could remedy Plaintiffs' alleged injuries because she does not enforce the challenged statutes and has taken no steps to do so.

Even if the Secretary had the requisite connection to enforcement of the challenged laws, sovereign immunity would bar Plaintiffs' claims because they seek a mandatory injunction compelling the Secretary to take affirmative action in her official capacity and implement policies that are not provided for by state law. Whether or not sovereign immunity bars all mandatory injunctions against state officials, it certainly bars mandatory injunctions that seek to control a state official's discretionary exercise of authority under state law.

Standard of Review

The District Court's denial of sovereign immunity is reviewed *de novo*. *See City of Austin*, 943 F.3d at 997; *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 962 (5th Cir. 2014). In reviewing a motion to dismiss, the court analyzes the pleadings as well as documents that are attached or necessarily incorporated. *See Jackson v. City of Hearne*, 959 F.3d 194, 204–05 (5th Cir. 2020); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

ARGUMENT

I. Plaintiffs Cannot Invoke *Ex parte Young*'s Exception Because the Secretary Lacks the Necessary Connection to Enforcement of the Challenged Statutes.

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 "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. at 157.

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." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) ("*TDP*"). Here, Plaintiffs cannot make either showing. Texas law does not impose a "Postage Tax," as Plaintiffs allege, but to the extent Plaintiffs challenge the manner in which mail-in ballots are prepared, distributed, and processed, those functions are performed by local officials. Local officials also enforce the Ballot Receipt Deadline, the Signature Match Requirement, and the Voter

Assistance Ban. Plaintiffs' complaint contains no factual allegation that the Secretary has enforced or will enforce those laws.

A. The Secretary lacks the requisite connection to enforcement.

1. The Secretary is not tasked with implementation or enforcement of the challenged statutes.

"Determining whether *Ex parte Young* applies to a state official requires a provision-by-provision analysis." *Id.* 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.* A defendant's "general duty to see that the laws of the state are implemented" is not sufficient. *City of Austin*, 943 F.3d at 999–1000. Rather, "the official must have the requisite connection to the enforcement of the particular statutory provision that is the subject of the litigation." *TDP*, 978 F.3d at 179.

The *Ex parte Young* analysis is supposed to be a "straightforward inquiry." *Verizon*, 535 U.S. at 645. 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 this rubric to the relevant statutory text provides a clear answer here. The Secretary does not enforce the postage requirement, the Ballot Receipt Deadline, the Signature Match Requirement, or the Voter Assistance Ban.

First, Plaintiffs challenge "the requirement that voters pay for the postage to return their early voting ballots by mail." ROA.18. The Secretary does not prepare or provide ballot carrier envelopes; county election officials do. *See* Tex. Elec. Code

§ 86.002(a) ("The early voting clerk shall provide an official ballot envelope and carrier envelope with each ballot provided to a voter."). As Plaintiffs' complaint acknowledges, voters "return the marked mail-in ballots to the counties." ROA.55.

Second, Plaintiffs challenge the statutory requirement "that returned ballots be postmarked no later than 7:00 p.m. on election day and received by the county at the address designated on the ballot carrier envelope no later than 5:00 p.m. on the day after the election to be counted." ROA.18. The Secretary does not receive mail-in ballots or determine if they are timely; county election officials do. *See* Tex. Elec. Code § 86.011(a) ("The early voting clerk shall determine whether the return of a voter's official carrier envelope for a ballot voted by mail is timely."), § 86.011(c) ("If the return is not timely, the clerk shall enter the time of receipt on the carrier envelope and retain it for the period for preserving the precinct election records."). Plaintiffs' complaint acknowledges that mail-in ballots are "received by the county election administrator." ROA.55.

Third, Plaintiffs challenge the statutory requirement that the signature on the completed mail-in ballot must match the signature on the carrier envelope or another signature from the previous six years. ROA.45. They also complain that Texas law does not provide voters with notice or an opportunity to cure a mismatched signature before election day. ROA.47. But the Secretary does not verify signatures; she does not accept or reject mail-in ballots; and she does not notify voters of mismatched signatures. The Election Code tasks local election officials with all of these duties. *See* Tex. Elec. Code § 87.041(a) ("The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to

accept the voter's ballot."); *id.* § 87.0431(a) ("Not later than the 10th day after election day, the presiding judge of the early voting ballot board shall deliver written notice of the reason for the rejection of a ballot to the voter at the residence address on the ballot application."); *id.* § 87.027 (describing the circumstances and manner in which the early voting clerk shall appoint a signature verification committee). As Plaintiffs' complaint correctly indicates, the Election Code "requires county officials to verify each mail-in voter's signature," ROA.45, and "the county" notifies voters of a signature mismatch, ROA.47.

Fourth, Plaintiffs challenge the statute that makes it a criminal offense to possess another voter's mail-in ballot subject to specific exceptions. ROA.48; Tex. Elec. Code § 86.006(f) (enumerating circumstances in which "[a] person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another"). But the Secretary does not enforce that statute because she does not prosecute criminal offenses. That task is assigned to local officials. *See, e.g.*, *id.* § 86.006(i) (establishing standards for "the prosecution of an offense under Subsection (f)" by "the prosecuting attorney"); Tex. Gov't Code § 44.115 ("The criminal district attorney of Bexar County shall attend each term and session of the district, county, and justice courts in Bexar County held for the transaction of criminal business and shall exclusively represent the state in all matters before those courts.").

This presents a problem for Plaintiffs. Local officials are "statutorily tasked with enforcing the challenged law[s]," but the Secretary, "a different official[,] is the named defendant." *City of Austin*, 943 F.3d at 998. "[T]he requisite connection is"

therefore "absent." *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020). The district court should have dismissed the claims. *See City of Austin*, 943 F.3d at 998.

2. The Secretary's general power to oversee the electoral process does not create the necessary connection to enforcement.

The district court did not engage in a provision-by-provision analysis of the challenged statutes. Instead, it took the view that the Secretary enforced HB 1888 because she is the State's "chief election officer" and because she is directed to "obtain and maintain uniformity in the application, operation, and interpretation of [the Election Code] and of the election laws outside th[e] code." ROA.670 (quoting Tex. Elec. Code §§ 31.001(a), .003). The district court also relied on the Secretary's power "to 'take appropriate action to protect' voting rights 'from abuse by the authorities administering the state's electoral processes,' a power that includes 'order[ing] the person to correct the offending conduct.'" ROA.670–71 (quoting Tex. Elec. Code § 31.005(a)–(b)). That is incorrect.

This circuit's "provision-by-provision analysis" requires courts to consider the relevant provisions of the Election 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 title or general authority. The Court has therefore rejected attempts to rely on the Secretary's role as "chief election officer" under 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." (citation and quotation marks omitted)); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 468 (5th Cir. 2020) (rejecting the argument that the Secretary's status as "chief election officer" provided a connection to enforcement of "Texas Election Code §§ 85.062–85.063"); *cf. City of Austin*, 943 F.3d at 1000 (rejecting the district court's conclusion that the Attorney General's status as the State's chief law enforcement officer provided "some connection to the enforcement of the statute" in question (quotation marks omitted)).

The district court's reliance on section 31.003 suffers from the same flaw. "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. Likewise, section 31.003 imposes nothing more than a general obligation to "obtain and maintain uniformity." Tex. Elec. Code § 31.003.

The district court did not explain how section 31.003 confers a "specific and relevant duty" to enforce the statutes challenged by Plaintiffs. *TDP*, 978 F.3d at 179. Plaintiffs dismissed the Secretary's position that she lacked some connection to enforcement of the challenged laws as "[n]onsense." ROA.141. In their view, the Secretary's duty to "obtain and maintain uniformity" under section 31.003 was more than enough to establish "some connection" to enforcement because "the statute's

use of the word 'shall' makes clear these duties are mandatory." ROA.141–42. But neither Plaintiffs nor the district court explained 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—much less a specific duty—to enforce laws directing local election officials in the distribution and processing of mail-in ballots, let alone to enforce a criminal prohibition on unauthorized possession of a mail-in ballot. Tex. Elec. Code. § 31.003.

Section 31.005 does not support the district court's conclusion, either. That section permits—but does not require—the Secretary to "take appropriate action," including the issuance and enforcement of an order "to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes." *Id.* § 31.005(a). These "general duties" do not demonstrate the necessary "particular duty" or willingness to enforce the "particular statutory provision that is the subject of the litigation." *TDP*, 978 F.3d at 179.

This Court already considered and rejected a similar argument in *Mi Familia Vota*. There, the plaintiffs challenged a portion of the Texas Election Code that mandates the use of electronic voting devices. 977 F.3d at 468. They sued the Secretary, requesting an injunction ordering that paper ballots be made available at polling places. *Id.* at 465. In an attempt to overcome the Secretary's sovereign-immunity defense, plaintiffs claimed that she was "indisputably connected to enforcement" of the challenged law because of her powers under sections 31.003 and 31.005. Br. for Plaintiffs-Appellants at 51, *Mi Familia Vota v. Abbott*, 2020 WL 5759845 (5th Cir. Sept. 18, 2020) (No. 20-50793). This Court disagreed. Scrutinizing the Secretary's

connection to the electronic-voting-device provision, the Court agreed that the Code *did* grant her some supervisory power. *Mi Familia Vota*, 977 F.3d at 468. But that was not enough. At bottom, plaintiffs challenged the lack of paper ballots. And the "Secretary [was] not responsible for printing or distributing ballots." *Id.* The Code assigned that responsibility to county administrators. *Id.* at 468 n.24. The Secretary therefore lacked the requisite connection, and sovereign immunity applied. *Id.* at 468 & n.25 (quoting *In re Abbott*, 956 F.3d at 709).

The same result is required here. As in *Mi Familia Vota*, Plaintiffs point to the Secretary's general duties under sections 31.003 and 31.005 as establishing a duty to enforce. *See* ROA.142, 150–51 (Plaintiffs' brief in opposition to the motion to dismiss). But whatever the scope of those general duties, Plaintiffs' claims target specific statutory provisions governing the distribution and processing of mail-in ballots. That is not the Secretary's particular responsibility. The Code assigns that responsibility to county officials. *They* are the proper defendants. The Secretary, by contrast, lacks a sufficient connection to the challenged statutes and is an improper defendant under *Ex parte Young*. Sections 31.003 and 31.005 are of no moment. *See Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (explaining that the Secretary's broadly-worded statutory duties are not "a delegation of authority to care for any breakdown in the election process"); *see also TDP*, 978 F.3d at 180; *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *6 (Tex. Oct. 7, 2020) (Blacklock, J., concurring) (noting that relators "pointed to no authority that would authorize [the Secretary of State]—much less impose a duty on her—to issue her own orders to local election officials contradicting the Governor's").

3. Cases that address standing in a different context do not inform the question of sovereign immunity.

The district court also based its *Ex parte Young* analysis on *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017). *See* ROA.670–71. There, a nonprofit organization sued the Secretary and the State of Texas to bring a facial challenge to 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, the panel concluded that "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" *Id.* at 613 & n.34 (quoting Tex. Elec. Code § 31.001(a)). The standing analysis in *OCA-Greater Houston* does not establish that the Secretary is sufficiently connected to the enforcement of any particular voting law, let alone *every* voting law. That is so for at least two reasons.

First, the Court *OCA-Greater Houston* pointedly declined to address sovereign immunity because it held that the State's immunity was validly abrogated by the Voting Rights Act. *Id.* at 614 ("Sovereign immunity has no role to play here."). The Court concluded only that the facial invalidity of the challenged law was "fairly traceable to and redressable by the State itself and its Secretary of State." *Id.* at 613. Because sovereign immunity had been abrogated, there was no reason to consider whether the Secretary had the necessary connection to enforcement under *Ex parte Young*. And since the plaintiffs were able to proceed directly against the State, the Court did not have to explain—and it made no attempt to explain—how the plaintiff's injury was traceable to or redressable by the Secretary of State, as opposed to

"the State itself and its Secretary of State." *Id.* *OCA-Greater Houston* therefore did not hold that plaintiffs have standing to challenge any particular election law by suing the Secretary of State alone.[2]

Second, assuming that *OCA-Greater Houston*'s approach to standing is correct in the circumstances of that case, it does not govern this circuit's approach to *Ex parte Young*. Nor could it. This 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. *OCA-Greater Houston* 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.

[2] *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). To the extent *OCA-Greater Houston* purported to hold that plaintiffs always have standing to challenge Texas election laws by suing only the Secretary, the Secretary preserves her argument that the case was wrongly decided.

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

Even if the Secretary had authority to enforce the statutes challenged here—and she does not—Plaintiffs do not plausibly allege that she has attempted to do so. "[E]nforcement," for *Ex parte Young* purposes, "typically involv[es] compulsion or constraint." *Id.* at 1000. By definition, "specific enforcement actions" by the defendant "with respect to the challenged law" will supply the requisite connection to enforcement under *Ex parte Young*. *Id.* at 1001–02. But "the mere fact that" an official "*has* the authority to enforce" falls short of establishing "the requisite 'connection to . . . enforcement.'" *Id.* Plaintiffs' complaint does not allege any enforcement by the Secretary; they did not identify any enforcement in their briefing below; and the district court's order did not address the issue at all. That is an independent reason why Plaintiffs cannot rely on *Ex parte Young* to avoid sovereign immunity.

In their complaint, Plaintiffs make the general assertion that the Secretary "is the State's chief elections officer and, as such, is responsible for the administration and implementation of election laws in Texas, including the Vote by Mail Restrictions at issue in this complaint." ROA.30 (citing Tex. Elec. Code § 31.001(a)). They also allege, in passing, that "the Secretary's enforcement of the Postage Tax" will burden voting rights. ROA.55. Both of these statements are conclusory legal assertions and therefore not entitled to a presumption of truth. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." (quotation marks

omitted)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[L]abels and conclusions . . . will not do."). Moreover, Plaintiffs' assertion that the Secretary enforces "the Postage Tax" is self-evidently false. The so-called "Postage Tax" is not a tax, and neither the State nor the Secretary require postage for delivery through the U.S. Mail; the United States Postal Service does.

Not once do Plaintiffs allege that the Secretary enforces or has threatened to enforce the Ballot Receipt Deadline, the Signature Match Requirement, or the Voter Assistance Ban. To the contrary, the facts alleged in their complaint demonstrate that the statutory provisions they challenge are implemented and enforced by local officials, not the Secretary. Plaintiffs allege, for instance, that election officials process absentee ballot applications and deliver absentee ballots to voters, ROA.43; that county election administrators count ballots, ROA.44; that County officials verify signatures on mail-in ballots, ROA.45; that "overworked elections officials" perform signature matching, ROA.46; that "untrained election administrators will mistakenly and arbitrarily reject ballots from qualified voters," ROA.47; that counties notify voters when their ballots have been rejected, ROA.51; that county election administrators receive mail-in ballots, ROA.55; and that the signature-matching requirement "guarantees that voters will be treated differently on entirely arbitrary grounds, depending on who happens to review their signature." ROA.46. This last allegation demonstrates Plaintiffs' failure to satisfy *Ex parte Young*: under no circumstances will the Secretary be the one "who happens to review their signature." Plaintiffs' allegations demonstrate that their claims must be dismissed because "the

Secretary of State is not a proper defendant." *Mi Familia Vota*, 977 F.3d at 468 (quotation marks omitted).

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

The district court's order should be reversed for an additional, independent reason: the relief Plaintiffs seek is barred by sovereign immunity and principles of federalism. To overcome sovereign immunity, it is not enough to name the correct defendant. Plaintiffs' requested relief must also fall within the narrow class of remedies permitted by *Ex parte Young*. First, the relief sought must be prospective; retrospective relief remains barred by sovereign immunity. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). Second, the *Ex parte Young* exception applies only in the "precise situation" where "a federal court commands a state official to do nothing more than refrain from violating a federal law." *Stewart*, 563 U.S. at 255.

Plaintiffs cannot clear these hurdles. They seek a mandatory injunction that would force the Secretary to rewrite Texas laws on mail-in voting, then somehow enforce that rewritten law against the local officials who distribute and process mail-in ballots. That is far more than a command to do nothing more than stop violating federal law. To the extent Plaintiffs seek a prohibitory injunction against the Secretary, that relief would be ineffective because local officials, not the Secretary, enforce the statutes that Plaintiffs challenge. And since Plaintiffs are not entitled to injunctive relief, their request for declaratory relief is likewise barred.

A. Sovereign immunity bars a mandatory injunction ordering the Secretary to take affirmative action in her official capacity.

Even if the Secretary had the power to rewrite the Election Code and coerce local officials to comply—and she can do neither—sovereign immunity would not permit a mandatory injunction compelling her to take affirmative action to do so. And Plaintiffs' request for mandatory injunctive relief against the Secretary goes beyond what a federal court can order under the *Ex parte Young* exception. That exception "rests on the . . . fiction that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Id.* (citation and quotation marks omitted). By contrast, when "the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign," the fiction cannot be sustained and the "suit . . . fail[s] as one against the sovereign," barred by sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949). In other words, *Ex parte Young* can be used to *stop* an official from acting, but it does not permit a court to order an official to *exercise* sovereign power by taking an official act. *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971); *see Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam) (dismissing on sovereign-immunity grounds an action "seeking to obtain an order requiring [an agency director] to withdraw" his formal "advice to the federal agencies" because "the order requested would require the [d]irector's official affirmative action").

For Plaintiffs, this limit to *Ex parte Young* is insurmountable. To achieve their desired result, the district court would have to order the Secretary to perform

affirmative acts by exercising the sovereign power granted to her as a state official. The district court has no authority to award that relief.

The en banc Court has recently questioned whether "sovereign immunity bars *all* affirmative injunctions" or just those that would "control the Secretary in her exercise of *discretionary* functions." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 241 (5th Cir. 2020) (citing *Green Valley Spec. Util. Dist. v. City of Schertz*, 969 F.3d 460, 472 n.21 (5th Cir. 2020) (en banc)). Whatever the Court's doubts, the rule in *Larson*'s footnote 11 remains the law of this circuit. *See Danos*, 652 F.3d at 583 (applying the *Larson*-footnote-11 prohibition against ordering an official to take "affirmative action"); *Green Valley*, 969 F.3d at 472 n.21 ("leav[ing] for another day" a re-examination of *Larson*'s footnote 11). Because earlier panels have applied the footnote, the rule of orderliness requires future panels to do the same "until the decision is overruled . . . by either the United States Supreme Court or by the Fifth Circuit sitting en banc." *Gahagan v. USCIS*, 911 F.3d 298, 302 (5th Cir. 2018), *cert. denied*, 140 S. Ct. 449 (2019).

But the impropriety of Plaintiffs' requested relief does not hinge on the court's application of the rule of orderliness. Even if a federal court may order *some* affirmative action, it is well settled that a court may not order a state official to perform a *discretionary* action. *See, e.g.*, *Ex parte Young*, 209 U.S. at 158 ("There is no doubt that the court cannot control the exercise of the discretion of an officer."); *Richardson*, 978 F.3d at 241–42 (recognizing that proposition as settled); *Vann v. Kempthorne*, 534 F.3d 741, 754 (D.C. Cir. 2008) (holding that courts may not "oblige" officers to use "discretionary authority to comply with [an] injunction");

see also Stewart, 563 U.S. at 255 ("The [*Ex parte Young*] doctrine . . . does not apply . . . when the judgment sought would . . . interfere with public administration." (quotation marks omitted)).

Even assuming, as Plaintiffs contend, that Texas law empowers the Secretary to compel local election officials to act contrary to the Election Code or stop enforcing criminal laws, every statute that could conceivably confer that power involves the exercise of discretionary authority. *See Lightbourn v. County of El Paso*, 118 F.3d 421, 428–29 (5th Cir. 1997) ("Review of the provisions of the Texas Election Code that refer to the Secretary's role in elections reveals that most give discretion to the Secretary to take some action."). Section 31.003 directs the Secretary to "obtain and maintain uniformity in the application, operation, and interpretation of . . . election laws." Tex. Elec. Code § 31.003. That section leaves the Secretary "considerable discretion and latitude" in how to maintain uniformity. *Richardson*, 978 F.3d at 242. Because it grants the Secretary "an element of judgment or choice" in her methods, any act she takes pursuant to that section is "discretionary in nature" for sovereign-immunity purposes. *St. Tammany Parish ex rel. Davis v. FEMA*, 556 F.3d 307, 323 (5th Cir. 2009); *see also id.* ("If a statute, regulation, or policy leaves it to . . . [an] agency to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary."); *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984) ("A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority."); *Richardson*, 978 F.3d at 242 ("[Section] 31.003 leaves [the Secretary] considerable discretion and latitude in how to [execute the statute.] By prescribing detailed and

specific procedures that the Secretary must include in her advisory, the district court impinges upon her discretionary authority in flat violation of *Young*.").

The same is true of section 31.005. The district court's order implies that section 31.005 empowers the Secretary to usurp the Legislature's authority and unilaterally alter vote-by-mail requirements. But that section says only that the Secretary "*may* take appropriate action to protect the voting rights" of Texans "[i]f the Secretary determines that" an official "is imped[ing] the free exercise of a citizen's voting rights." Tex. Elec. Code § 31.005 (emphasis added). As this Court has held, section 31.005's permissive language makes it discretionary. *Lightbourn*, 118 F.3d at 429 (listing section 31.005 as a provision that "give[s] discretion to the Secretary"). Because the Secretary has "discretion to take enforcement actions" under section 31.005, "the district court cannot . . . compel such actions under *Young*." *Richardson*, 978 F.3d at 243. In short, whatever the precise scope of the bar against affirmative injunctive relief, Plaintiffs cannot overcome it.

B. A prohibitory injunction or declaratory judgment against the Secretary would not provide relief to Plaintiffs.

1. In addition to demanding that the Secretary pay for postage on mail-in ballots and create a notice-and-cure process for mismatched signatures, Plaintiffs seek an injunction ordering the Secretary to refrain from enforcing certain provisions of the Election Code. But that injunction would achieve nothing because the Secretary does not enforce those provisions in the first place. Plaintiffs ask the district court to

enjoin "Defendant, and her respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them from":

- "rejecting vote-by-mail ballots if those ballots are postmarked by 7:00 p.m. on election day and received by the county election administrator before it canvases the election";
- "rejecting mail-in ballots on signature verification grounds"; and
- "implementing, enforcing, or giving any effect to the Voter Assistance Ban."

ROA.55–56. Because local officials are responsible for distributing and processing mail-in ballots, *they* would implement or enforce the statutes Plaintiffs challenge, not the Secretary. *See* Tex. Elec. Code §§ 86.002, 86.006, 86.007, 87.027. It would be meaningless to enjoin the Secretary to refrain from performing acts that she cannot and does not perform.

In theory, the district court "could order the Secretary not to enforce" the Ballot Deadline Requirement, the Signature Verification Requirement, or the Voter Assistance Ban, but "that still would not require counties" to stop enforcing those provisions of the Election Code. *Mi Familia Vota*, 977 F.3d at 468. "That responsibility falls on local officials. It would remain their choice as to whether to" enforce the relevant statutes. *Id.* But because Plaintiffs have not named any local officials as defendants, they "cannot be enjoined in this suit." *Id.* A prohibitory injunction against the Secretary, therefore, "would not afford the Plaintiffs the relief that they seek" and would serve no purpose. *Id.*

The Secretary, therefore, "is not a proper defendant." *Id.* 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 because of Plaintiffs' decision to sue the Secretary alone, "[n]o county or local official is a party to the current suit and [they] cannot be enjoined in this suit to" stop enforcing the challenged laws on mail-in ballots. *Id.* As a result, *Ex parte Young* does not permit a prohibitory injunction against the Secretary. As in *Mi Familia Vota*, the request for injunctive relief should have been dismissed on sovereign-immunity grounds.

2. Plaintiffs also sought declaratory relief. ROA.55–56. But like the prohibitory injunctive relief requested here, a declaration as to the constitutionality of the challenged Election Code provisions would bind the Secretary but not the local officials who implement and enforce them. That would not give 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).

Conclusion

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

Respectfully submitted.

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Certificate of Service

On December 11, 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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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,230 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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