UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, *Plaintiffs*, v. GREG ABBOTT, *et al.*, *Defendants*.	§ § § § § § §	Case No. 5:21-cv-844-XR
OCA-GREATER HOUSTON, *et al.*, *Plaintiffs*, v. JOHN SCOTT, *et al,*. *Defendants*.	§ § § § § § §	Case No. 1:21-cv-780-XR

STATE DEFENDANTS' MOTION TO DISMISS THE OCA-GREATER HOUSTON PLAINTIFFS' AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs moved to dismiss the OCA Plaintiffs' original complaint. *See* ECF 55. At hearing on November 16, the Court warned Plaintiffs to "file an amended complaint to cure the[] deficiencies" identified by the State Defendants." Ex. A at 12. Plaintiffs since filed an amended complaint, *see* ECF 137, but it contains many of the same deficiencies as before.

First, Plaintiffs' claims asserted against the Secretary of State and Attorney General are barred by sovereign immunity because Plaintiffs fail to establish a sufficient enforcement connection between those officers and the challenged provisions of Senate Bill 1 (SB1). The majority of the provisions at issue are enforced by local election officials, like the early-voting clerk or an election judge. Insofar as the Secretary is involved at all, his actions do not harm Plaintiffs. Neither have Plaintiffs established that prosecution by the Attorney General is "forthcoming," particularly in light of the recent ruling by the Texas Court of Criminal Appeals that Texas law prohibits such prosecutions. *See State v. Stephens*, No. PD-1032-20, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021).[1] This means that Plaintiffs cannot assert the *Ex parte Young* exception to sovereign immunity—and it also means that Plaintiffs' alleged injuries are neither caused by the State Defendants nor redressable by injunctive relief directed at the Secretary or the Attorney General for purpose of Article III standing.

Second, with respect to Plaintiffs' claims under the Americans with Disabilities Act (ADA) Rehabilitation Act, and Section 208 of the Voting Rights Act (VRA), they fail to state a claim on several bases. Plaintiffs fail to identify specific members with qualifying disabilities as to each of the relevant entity plaintiffs. Moreover, Plaintiffs lack standing to assert their disability claims, fail to demonstrate that the State Defendants are proper defendants, and fail to plead legally sufficient claims.

Plaintiffs had the opportunity to cure these deficiencies when they amended their complaint, but they failed to do so. The State Defendants respectfully request that their claims be dismissed.[2]

---

[1] The State of Texas and the Attorney General believe that *Stephens* was wrongly decided. The State has filed a motion asking the Texas Court of Criminal Appeals to reconsider its decision.

[2] Plaintiffs' claims also fail for reasons not addressed in this Motion. To conserve judicial economy, the State Defendants assert only the arguments raised in this Motion, but reserve the right to raise additional arguments at a later juncture.

BACKGROUND

This is one of several lawsuits attacking SB1, which amends the Texas Election Code. The OCA Plaintiffs' suit targets portions of Article 5 and Article 6 of that law.

I. SB1 Article 5: Mail Voting

Article 5 of SB1 generally concerns voting by mail, including among other things ballot-application requirements and procedures for accepting or rejecting applications and ballots. The sections the OCA Plaintiffs challenge are addressed below.

Sections 5.02 and 5.03 pertain to the requirements of applications for mail-in ballots and the prescribed form of the application itself. Section 5.02 requires that applications include the applicant's driver's license number, other form of identification, or a statement that the applicant has not been issued one of those forms of identification. Tex. Elec. Code § 84.002(a)(1-a). Section 5.03 amends the prescribed application form to include a space for this information. *Id.* § 84.011(a)(3-a). The requirements themselves are enforced by the early-voting clerk, not the Secretary. *See id.* § 86.001(a) (early-voting clerk "shall review each application for a ballot to be voted by mail" for compliance with statutory requirements).

Section 5.06 concerns the actions the early-voting clerk must take if rejecting an application for a mail-in ballot. *See* Tex. Elec. Code § 84.035. SB1 amends the Election Code to authorize the election judge to allow the applicant to submit a provisional ballot in certain circumstances. *See id.* § 84.035(b). This section imposes no duties on, and is not enforced by, the Secretary.

Section 5.07 directs the early-voting clerk to reject applications for mail-in ballots that do not contain the information required by Sections 5.02 and 5.03. *See* Tex. Elec. Code § 86.001(f). It also requires that the clerk notify the applicant of the rejection and give the applicant an opportunity to cure the application's defects. *See id.* § 86.001(f-1), (f-2). Section 5.07, like Sections 5.02 and 5.03, is enforced by the early-voting clerk, not the Secretary.

Section 5.10 concerns electronic tracking of the status of applications for mail-in ballots and voted ballots. SB1 amends the requirements for that online mail ballot tracker to make it easier for voters to furnish required information; the tool now must allow voters to add or correct the

identification information required by SB1 Section 5.02. *Id.* § 86.015(c)(4). While the Secretary of State is responsible for developing the tool, *id.* § 86.015(a), the early-voting clerk is responsible for supplying relevant information for the system. If the Secretary were enjoined from ensuring the online tool functioned as required, that would make voting more difficult.

Section 5.12 creates a method by which mail-in voters can correct defects in submitted mail ballots. Tex. Elec. Code § 87.0271. If a ballot contains one of several listed defects, and the voter can correct the defect and return the ballot before election day, the signature verification committee (a local body of review constituted by the early voting clerk) must provide the voter the opportunity to do so. *See id.* §§ 87.027, 87.0271(a), (b). The committee may do so by returning the ballot and a notification of the defect to the voter by mail, if there is sufficient time for the voter to return the ballot by mail. *Id.* § 87.0271(b)(2). If not, the committee may tell the voter by phone or e-mail of (i) the defect in the ballot and (ii) the two ways to remedy the defect: cancelling the mail-in ballot and voting in person or correcting the defect in person within the sixth day after Election Day. *Id.* § 87.0271(c). The Secretary of State "may prescribe any procedures necessary to implement this section," *id.* § 87.0271(f), but the statute itself is enforced by the local election officials.

II. SB1 Article 6: Voter Assistance

Article 6 of SB1 generally concerns voter assistance, eligibility requirements for giving or receiving assistance, and related procedures. Plaintiffs challenge the following specific sections.

Sections 6.03, 6.04, and 6.05 establish procedures for voting assistants. Texas law, like federal law, entitles certain voters to assistance in marking or reading the ballot if they have an applicable physical disability or are unable to read the language in which the ballot is written. Tex. Elec. Code § 64.031. Following SB1, a person other than an election officer who assists a voter must take an oath, administered by the local election officer, swearing that the voter is eligible to receive assistance and that the assistant will assist the voter within the confines of the law. *See* Tex. Elec. Code § 64.034. The assistant must also complete a form identifying the assistant's name and address, the voter's name and address, and stating whether the assistant received any compensation or benefit from a candidate,

campaign, or political committee. *Id.* § 64.0322(a). While the Secretary of State is responsible for prescribing the form, the completed forms are submitted with the ballot and reviewed by local election officials, who are then responsible for accepting or rejecting the ballot. *Id.* § 64.0322(b); *see also id.* § 86.010(e) (form must be incorporated into the official carrier envelope of the mail-in ballot).

Section 6.06 concerns penalties for violating voter-assistance laws. It amends the Election Code to make persons who compensate someone; offer to compensate someone; or solicit, receive, or accept compensation for assisting voters liable for a state jail felony offense. *Id.* § 86.0105(a), (c). It defines "compensation" by referring to the Penal Code's definition of "economic benefit" and exempts from its coverage "an attendant or caregiver previously known to the voter." *Id.* § 86.0105(e) (citing Tex. Penal Code § 38.01), (f).

III. SBI Article 7: Election Offenses

Section 7.04 concerns election fraud, misconduct, and other unlawful practices. It implements several new election offenses, including vote harvesting for benefit, *see* Tex. Elec. Code § 276.015; unlawful solicitation and distribution of application to vote by mail, *id.* § 276.016; unlawful distribution of early voting ballots and balloting materials, *id.* § 267.017; perjury in connection with election procedures, *id.* § 276.018; and unlawfully altering election procedures, *id.* § 276.019.

ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiffs' Claims

At bottom, the Court lacks subject-matter jurisdiction over Plaintiffs' claims with respect to the State Defendants because the Secretary of State and Attorney General either (i) do not enforce the SB1 sections Plaintiffs challenge, or (ii) do not harm Plaintiffs with the actions they take to implement a particular provision and could not redress any injuries by changing their behavior. The former means that Plaintiffs' claims are barred by sovereign immunity, and the latter means that Plaintiffs lack standing to assert their claims. This interrelation is common because the "Article III standing analysis and *Ex parte Young* analysis 'significantly overlap.'" *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (quoting *Air Evac EMS, Inc. v. Tex. Dept. of Ins.*, 851 F.3d 507, 520 (5th Cir. 2017).

Sovereign immunity "prohibits suits against state officials or agencies that are effectively suits against a state." *Id.* "*Ex parte Young* allows injunctive or declaratory relief against a state official in her official capacity, but only if the official has a sufficient 'connection' with the enforcement of the allegedly unconstitutional law." *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467 (5th Cir. 2020) (citing *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020)). Fifth Circuit "precedents distill three rules" relevant to the enforcement-connection inquiry:

> (1) "[I]t is not enough that the state official was merely the but-for cause of the problem that is at issue in the lawsuit";
>
> (2) "[W]here a statute is being challenged, . . . a provision-by-provision analysis is required"; and
>
> (3) "[I]n the particular context of Texas elections . . . the Secretary's role varies, so [the plaintiffs] must identify the Secretary's specific duties within the particular statutory provision."

Tex. Democratic Party v. Hughs, 860 F. App'x 874, 877 (5th Cir. 2021) (per curiam) (citing *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 175, 179–81 (5th Cir. 2020)).

In addition, a state official "is not a proper defendant" if enjoining the official from performing the applicable statutory duty would not "afford the Plaintiffs the relief they seek." *Mi Familia Vota*, 977 F.3d at 467. In that situation, even assuming the plaintiffs sustained an injury-in-fact, the state defendants did not *cause* those injuries, and thus enjoining those officials will not *redress* their injuries. *See City of Austin*, 943 F.3d at 1002 (plaintiffs lack standing unless there is "a significant possibility that [the state official] will act to harm a plaintiff."). Put simply, a plaintiff lacks standing to seek injunctive relief from a defendant whose official actions do not harm him.

At the pleading stage, "the plaintiffs' burden is to allege a plausible set of facts establishing jurisdiction." *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012) (citing *Davis v. United States*, 597 F.3d 646, 649–50 (5th Cir. 2009)). Because the OCA Plaintiffs fail to do so—they do not allege facts sufficient to invoke the *Ex parte Young* exception or establish standing as to the State Defendants—their claims against the State Defendants must be dismissed.

A. Plaintiffs Fail to Plausibly Allege an Enforcement Connection for the Secretary of State

With respect to the Secretary of State, Plaintiffs purport to challenge SB1 Sections 5.02, 5.03, 5.06, 5.07, 5.10, 5.12, 6.03, 6.04, 6.05, and 6.06. *See* ECF 137 ¶¶ 35–39. Even as repleaded, they do not allege a sufficient enforcement connection between the Secretary and those sections to establish jurisdiction.

1. The Secretary of State Lacks a Sufficient Enforcement Connection to the Challenged Provisions

The Secretary does not enforce the challenged sections of SB1 for purposes of *Ex parte Young* and Article III standing. The Secretary either has no connection to them or has a connection that does not create enforcement responsibility, which falls on local officials.

First, enforcement of many of the requirements are specifically committed to other officials, like the early-voting clerk, election judge, or signature verification committee. *Cf. Mi Familia Vota*, 977 F.3d at 468 (Secretary has no enforcement connection with respect to ballot-printing restrictions: "The Secretary is not responsible for printing or distributing ballots. That responsibility falls on local officials."). Indeed several sections—Sections 5.02, 5.06, 5.07, and 6.06—neither mention nor involve the Secretary of State at all. *See* Background § I–II.

Second, the connection between the Secretary and the challenged sections does not create authority of the type that would permit jurisdiction under *Ex parte Young*. For instance, the Secretary must create the tool by which voters can update their personal information for mail-ballot applications. *See* Tex. Elec. Code § 86.015(a). The Secretary must create and promulgate the forms required by Section 5.03 and Sections 6.02–6.04, and he may prescribe procedures to implement Section 5.12's ballot-cure requirements. But these duties do not establish sufficient enforcement connections. For one, creating forms and developing an online ballot tracker do not harm Plaintiffs. *See Mi Familia Vota*, 977 F.3d at 468 ("Directing the Secretary not to enforce the electronic-voting-devices-only provision in [Texas Election Code] section 43.007 would not afford the Plaintiffs the relief that they seek, and therefore, the Secretary of State is not a proper defendant.") (quotation omitted). For two, while the

Secretary's duties are mandatory, they are also ministerial—that is, they compel action by nobody but the Secretary himself. "Enforcement," on the other hand, is defined by "compulsion or constraint." *City of Austin*, 943 F.3d at 1000 (quoting *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010)). Plaintiffs do not allege how creating a form or an online tool compels or constrains them.

2. Plaintiffs' Allegations to the Contrary do Not Establish Otherwise

Plaintiffs offer several theories of why the Secretary enforces these SB1 sections. None has merit.

First, they contend that the Secretary has a sufficient enforcement connection because he is the "Chief Election Officer" of Texas. ECF 137 ¶ 35. In that capacity, Plaintiffs argue, he "routinely issues guidance to the county registrars," as well as "oversee[s] counties' administration of elections." *Id.* ¶¶ 35–36; *see also id.* ¶ 37 ("administering the Texas Election Code"). But the Fifth Circuit has rejected the idea that general legal administration creates an enforcement connection: "A general duty to enforce the law is insufficient for *Ex parte Young*." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) citing *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) ("The required connection is not merely the general duty to see that the laws of the state are implemented, but the particular duty to enforce the statute in question. . . ."). The fact that the Secretary is the State's chief election officer says nothing about whether he enforces the specific sections Plaintiffs challenge.

To be sure, the Fifth Circuit previously—and wrongly—found standing satisfied in an earlier suit against the Secretary of State because the Secretary "serves as the 'chief election officer of the state.'" *OCA-Greater Houston v. Hughs*, 867 F.3d 604, 613 (5th Cir. 2017). But *OCA* "involved a *facial* challenge under the Voting Rights Act," not "an as-applied challenge to a law enforced by local officials." *Tex. Democratic Party v. Hughs*, 974 F.3d 570, 571 (5th Cir. 2020) (per curiam) (distinguishing *OCA*). Its reasoning is limited, at least, to cases considering "[t]he facial validity of a Texas election statute." *OCA*, 867 F.3d at 613.

In any event, *OCA* is inconsistent with Texas authorities, which control on the underlying question of Texas law: Does being the "chief election officer" empower the Secretary to enforce

Section 6.04? No, because the "Secretary's title chief election officer is not a delegation of authority to care for any breakdown in the election process." *In re Hotze*, 627 S.W.3d 642, 649 (Tex. 2020) (Blacklock, J., concurring) (describing *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972)) (quotation marks omitted). *OCA* did not consider these precedents, or any other opinions from Texas courts. Justice Blacklock's *In re Hotze* concurrence post-dated *OCA*, so the *OCA* court did not have a chance to consider that opinion. And the *OCA* court appears to have been unaware of *Calvert*, which was not cited in the parties' briefs. Because *OCA* did not "squarely address[]" Texas cases interpreting the Secretary's role as chief election officer, it is not binding "by way of stare decisis." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *see Wilson v. Taylor*, 658 F.2d 1021, 1034–35 (5th Cir. 1981) (refusing to follow a Fifth Circuit opinion that conflicted with a previous Supreme Court opinion that "was not called to the attention of the [first Fifth Circuit] panel").

Second, Plaintiffs insist that the Secretary's designing of the forms used for mail-ballot applications and voter assistance means that he "enforces" the substance of the laws they challenge. ECF 137 ¶ 37. Not so. Plaintiffs oppose the personal-identification requirement for mail-in voting and the oath to refrain from accepting compensation for voter assistance, but the Secretary has nothing to do with *enforcing* those requirements. He merely designs the forms that address those requirements. *See* Tex. Elec. Code § 31.002(a). The responsibility for enforcing those requirements—for determining whether the substantive law, rather than the design of the form, has been met—is committed to the early-voting clerk and other local election officials.

The Secretary's role in designing a form, *see* ECF 137 ¶ 37, might be sufficient in a case where the plaintiff's supposed injury is tied to discrimination that allegedly occurs on the form itself. *E.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d at 180. But that reasoning does not apply here. The OCA Plaintiffs complain not about the design of the form but that SB1 "requir[es] an application for ballot by mail or a mail-in ballot to be automatically rejected" in certain circumstances. ECF 137 ¶ 120. Those rejections are issued by local election officials, and they would occur regardless of the Secretary's actions in designing the form. For example, if "the early voting clerk" determines than an "application does not fully comply with the applicable requirements prescribed by [Title 7 of the

Election Code]," then the application is considered "defective" and the local officials send a "notice" explaining the "defect" rather than a mail-in ballot. Tex. Elec. Code § 86.008. Indeed, the Election Code separately requires local officials to "reject" an application "if the applicant is not entitled to vote by mail," *id.* § 86.001(c), and anyone "who has not made an application as provided by [Title 7 of the Election Code] is not entitled to receive an early voting ballot to be voted by mail." *Id.* § 84.001(f).

Third, Plaintiffs point to Texas Election Code Section 31.005, which authorizes the Secretary to "take appropriate action to protect the voting rights" of Texas citizens. *See* ECF 137 ¶ 38. But they fail to connect this statute to SB1. Nor could they; Section 31.005 has nothing to do with SB1. Plaintiffs' argument goes to the Secretary's general administration of elections, not any enforcement connection specific to SB1. *See Tex. Democratic Party*, 961 F.3d at 400–01.

Fourth, and last, Plaintiffs argue the Secretary "routinely collaborates with the Texas Attorney General to enforce election laws." ECF 137 ¶ 39. They claim this connection extends to the referring of election complaints to the Attorney General. *See id.* This does not suffice both because referring an election complaint for potential enforcement by another official is not "compulsion or constraint," *City of Austin*, 943 F.3d at 1000 (quoting *K.P.*, 627 F.3d at 124), and because, as explained below, the OCA Plaintiffs have not plausibly alleged that the Attorney General has a sufficient enforcement role. *See* Argument § I.B.

* * *

Plaintiffs fail to demonstrate the Secretary of State has a sufficient enforcement connection to the provisions of SB1 they challenge. Sovereign immunity thus bars the claims asserted against him.

B. Plaintiffs Fail to Plausibly Allege an Enforcement Connection for the Attorney General

Neither do Plaintiffs establish a sufficient enforcement connection with the Attorney General. As to him, Plaintiffs purport to challenge SB1 Sections 6.04, 6.05, 6.06, and 7.04. They argue that the Attorney General is sufficiently connected to the enforcement of these provisions because he "is the chief law enforcement office of the State of Texas and is empowered to enforce Texas law." ECF 137

¶ 40. They allege that he is authorized to prosecute election laws, *see id.*, has lawfully prosecuted election offenses in past cases, *id.* ¶ 41, may initiate enforcement proceedings based on the new offenses, *id.* ¶ 42, posts on Twitter about his commitment to enforcing election laws generally, *id.* ¶ 43, and "maintains" election-specific divisions within the Attorney General's Office, *id.* ¶ 44. But Plaintiffs fail to grapple with binding precedent from the Texas Court of Criminal Appeals and the Fifth Circuit.

In *State v. Stephens*, the Court of Criminal Appeals held that Texas Election Code § 273.021—which states that "[t]he attorney general may prosecute a criminal offense prescribed by the election laws of this state"—"is unconstitutional" and the Attorney General "cannot initiate prosecution [of election cases] unilaterally." No. PD-1032-20, 2021 WL 5917198, at *1, 8 (Tex. Crim. App. Dec. 15, 2021). Accordingly, "the authority of the Attorney General is limited to assisting the district or county attorney upon request." *Id.* at *9. This Court must "take the word of the highest court on criminal matters of Texas as to the interpretation of its law." *Arnold v. Cockrell*, 306 F.3d 277, 279 (5th Cir. 2002) (per curiam). "Speculation that [the Attorney General] might be asked by a local prosecutor to 'assist' in enforcing" SB1 "is inadequate to support an *Ex parte Young* action against the Attorney General." *In re Abbott*, 956 F.3d at 709 (citing *City of Austin*, 943 F.3d at 1000). Accordingly, these and other allegations relating the Attorney General's authority to prosecute violations of Texas's elections law are also insufficient to establish the Attorney General as a proper defendant.

Even if the OCA Plaintiffs could overcome *Stephens*, they cannot overcome the Fifth Circuit's holding in *City of Austin*: "the mere fact that the Attorney General *has* the authority" to enforce a challenged law is insufficient to establish the requisite enforcement connection for purposes of *Ex parte Young*. 943 F.3d at 1001. Here, prosecution by the Attorney General—assuming it were allowed—would be discretionary, *see* Tex. Elec. Code § 273.021 ("The attorney general *may* prosecute a criminal offense prescribed by the election laws of the state.") (emphasis added). It is the plaintiffs' burden to show that "enforcement [is] forthcoming." *Tex. Democratic Party*, 978 F.3d at 181. "[A]n official's public statement" is insufficient to demonstrate a "likelihood" of enforcement. *Id.* (quoting *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020), *vacated as moot*, *Planned Parenthood for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (per curiam)). So are letters, if they make no "specific threat or indicate that enforcement [is]

forthcoming." *Id.* And the same is true of previous enforcement actions. *See City of Austin*, 943 F.3d at 1002 (enforcement of "different statutes under different circumstances does not show that he is likely to do the same here."). Instead, Plaintiffs must set forth specific facts demonstrating that "formal enforcement [is] on the horizon." *Tex. Democratic Party*, 978 F.3d at 181 (quoting *NiGen Biotech, LLC v. Paxton*, 804 F.3d 389, 392 (5th Cir. 2015)).

Simply put, nothing in Plaintiffs' complaint supports the conclusion that formal enforcement is on the horizon. At best, Plaintiffs allege that they think the Attorney General has the authority to prosecute violations of the SB1 sections listed above and has previously prosecuted election offenses. That is not sufficient. Plaintiffs are required to plead specific facts showing that the Attorney General is likely to enforce sections of *SB1* such that *they* would be injured. They do not.

C. Plaintiffs Fail to Demonstrate an Alternative Exception to Sovereign Immunity

As explained above, the *Ex parte Young* exception to sovereign immunity does not apply. The Court therefore lacks jurisdiction over the claims the OCA Plaintiffs assert against the State Defendants unless they demonstrate an alternative exception to sovereign immunity. *See Tex. Democratic Party*, 978 F.3d at 179 (sovereign immunity applies unless it has been "waived by the state, abrogated by Congress, or an exception applies."). They fail to do so.

Count 1 (Section 101, Civil Rights Act of 1964). "Congress has not abrogated sovereign immunity for Civil Rights Act claims." *Tex. Democratic Party*, 860 F. App'x at 877 n.3.

Counts 2 and 5 (Title II, ADA). As explained in Defendants' first Motion to Dismiss, the Supreme Court "established a three-part test for determining whether Title II validly abrogates states' sovereign immunity." *Block v. Tex. Bd. of Law Examiners*, 952 F.3d 613, 617 (5th Cir. 2020). A court must determine, on a "claim-by-claim basis":

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

Id. (quoting *United States v. Georgia*, 546 U.S. 151, 159 (2006)). Under *Georgia*, if the plaintiff alleges no conduct that violates Title II, sovereign immunity applies. *Id.* at 617–19. As explained below, Plaintiffs have not alleged the Secretary of State has engaged in conduct violating Title II, so he is entitled to sovereign immunity on Counts 2 and 5.

Counts 3 and 6 (Rehabilitation Act). Plaintiffs assert claims under the Rehabilitation Act. Although a defendant can "waive[] sovereign immunity under § 504 of the Rehabilitation Act," Plaintiffs plead no plausible facts to show such waiver. *Block*, 952 F.3d at 619.

Count 4 (Section 208, VRA). Although *OCA-Greater Houston v. Texas* holds that the VRA abrogates sovereign immunity, 867 F.3d 604, 614 (2007), that case was wrongly decided. "Congress did not unequivocally abrogate state sovereign immunity under Section 2 of the Voting Rights Act." *Ala. State Conference of the NAACP v. Alabama*, 949 F.3d 647, 655 (11th Cir. 2020) (Branch, J., dissenting). Nor did it do so in Section 208. When the VRA authorizes relief against States, it does so through suits brought by the Attorney General, *see, e.g.*, 52 U.S.C. § 10308(d), which the Supreme Court has held are not subject to sovereign immunity. *See West Virginia v. United States*, 479 U.S. 305, 312 n.4 (1987); *United States v. Mississippi*, 380 U.S. 128, 140 (1965). Although this Court is bound by *OCA-Greater Houston*, the State Defendants preserve this argument for appeal.

Counts 7 and 8 (Section 1983). "Congress has not abrogated state sovereign immunity . . . under § 1983," *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013).

D. Plaintiffs Fali to Plausibly Allege Traceability or Redressability

As explained above, sovereign immunity bars the OCA Plaintiffs' claims asserted against the State Defendants because the latter do not have a sufficient enforcement connection to the challenged provisions. But even if the OCA Plaintiffs could overcome sovereign immunity, they would still lack standing to bring their claims because any role the State Defendants have in implementing SB1 does not actually impose the injuries they have alleged sustained. To reiterate, the *Ex parte Young* analysis "significantly overlap[s]" with the traceability and redressability analysis. *City of Austin*, 943 F.3d at

1002. The most important difference is that traceability and redressability are still required even when sovereign immunity is inapplicable. *See* U.S. Const. art. III, § 2.

II. Plaintiffs Fail to State a Claim Under the ADA, Rehabilitation Act, or Section 208

With respect to the Secretary and Attorney General, Plaintiffs assert two forms of disability-discrimination claims: (i) under the ADA and the Rehabilitation Act, *see* ECF 137 ¶¶ 124–170, 177–189, and (ii) under Section 208 of the VRA, *id.* ¶¶ 171–176. None of their allegations state a claim upon which relief can be granted. Plaintiffs do not have qualifying disabilities, and they may not bring claims on behalf of persons who actually do. Further, they do not allege a sufficient connection between either the Secretary of State or the Attorney General and the enforcement of the challenged sections of SB1. The claims must therefore be dismissed. *See* Fed. R. Civ. P. 12(b)(1), (6).

A. Plaintiffs Fail to Allege Qualifying Disabilities

None of the Plaintiffs has a qualifying disability. Indeed, none of them *could* have a qualifying disability; each of them is an artificial entity that is incapable of being disabled. ECF 137 ¶¶ 14, 19, 23, 28, 32. For that reason alone, their claims must be dismissed.

Associational standing does not rescue Plaintiffs. Although Plaintiffs allege they have disabled members, *id.* ¶¶ 9–12, only REVUP identifies those members. *See id.* ¶¶ 11, 165–167. The other Plaintiffs' failure to identify members who would themselves have standing to bring their claims means that they have failed to state valid claims. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2017) (Souter, J.) (dismissing for lack of standing claim of entity plaintiff that identified no member was affected by challenged regulation); *Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008) (dismissing for lack of standing claims of entity plaintiff that identified no member affected by disability policy); *see also Comcast Corp. v. Natl. Assoc. of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020) ("[T]he essential elements of a claim remain constant through the life of a lawsuit. What a plaintiff must do to satisfy those elements may increase as a case progresses from complaint to trial, but the legal elements themselves do not change.").

B. Plaintiffs Cannot Assert Disability Claims as Third Parties

Even if each Plaintiff had identified particular members, their amended claims would still fail because Plaintiffs purport to bring individual claims on behalf of third parties. *See Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011) (plaintiff lacks statutory standing where "alleged rights at issue" belong to a third party); *see also Lexmark Intl., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28 nn.3–4 (2014); *accord, e.g.*, *Sims v. Tex. Dept. of Hous. & Cmty. Affairs*, No. 4:05-cv-2842, 2005 WL 3132184, at *4 (S.D. Tex. Nov. 21, 2005) (Rosenthal, J.) (dismissing ADA and Rehabilitation Act claims); *Baaske v. City of Rolling Meadows*, 191 F. Supp. 2d 1009, 1016–17 (N.D. Ill. 2002) (dismissing ADA claim for lack of third-party standing).

The third element of the associational-standing test demands that "neither the claim asserted nor the relief requested requires participation of individual members," *Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency*, 937 F.3d 533, 536 (5th Cir. 2019), which in turn depends on "the claim's substance." *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009). If the claim at issue has an "individualized element," then "[t]he involvement of" individual members "is essential to the resolution of the" claim. *Id.*

Plaintiffs' claims require individual participation, so they cannot be asserted by third-party entities. Disability claims, in particular, must be determined in a "case-by-case manner." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002). For example, in a failure-to-accommodate case, it is a plaintiff's burden "to specifically identify the disability and resulting limitations and to request an accommodation in direct and specific terms." *Windham v. Harris County*, 875 F.3d 229, 236 (5th Cir. 2017). The plaintiff must show that a provider of public services understood the limitations resulting from a particular disability; "[o]therwise, it would be impossible for the provider to ascertain whether an accommodation is needed at all, much less identify an accommodation that would be reasonable under the circumstances." *Id.*; *see also Wilson v. City of Southlake*, 936 F.3d 326, 329–30 (5th Cir. 2019) (only material difference between standards for ADA and Rehabilitation Act claims is causation requirements); *Friends for Am. Free Enter. Assn. v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 577 (5th Cir. 2002) (the "nature of the claims asserted" demonstrates that individual participation is necessary). The case-

by-case nature of a disability claim applies with equal force to challenges made under § 208. *E.g.*, *Ray v. Texas*, No. 2:06-cv-385, 2008 WL 3457021, at *1–3, *6–7 (E.D. Tex. Aug. 7, 2008) (considering specific effect of voting law on particular elderly plaintiffs under § 208).

Nothing in the amended complaint suggests that disabled voters will face "uniform" issues across Texas's 254 counties and despite variation in individual disabilities. *Prison Justice League v. Bailey*, 697 F. App'x 362, 363 (5th Cir. 2017) (per curiam). In the absence of such uniformity, individual participation is crucial for understanding the merits of disability claims. Indeed, Plaintiffs cannot even claim to be protecting the entire class of those covered by the law; none of the persons identified in the amended complaint claims an entitlement to assistance on the basis of blindness or inability to read or write, two of the categories of persons covered by Section 208. 52 U.S.C. § 10508.

In fact, overlap between this amended complaint and the Houston Justice Plaintiffs' amended complaint highlights the error in allowing a plaintiff to make a broad assertion of associational standing without identifying specific members. Here, REVUP identifies three of the exact same members as does The Arc of Texas—a Houston Justice plaintiff. *Compare* ECF 137 ¶¶ 9–11, 165–167 *with* ECF 139 ¶¶ 58–61. Far from identifying persons with unique interests that would entitle them to sue as a representatives, these plaintiff groups cannot even identify *different people*.

Disability claims require individual participation. Their purpose is to ensure that a particular plaintiff, with a particular disability, can vindicate his particular rights. Plaintiffs here attempt to bring claims under the ADA, Rehabilitation Act, and Section 208 as an undifferentiated whole. That is not how disability claims work.

C. Plaintiffs' Alleged Injuries are Not Traceable to the State Defendants

Stating a claim for disability discrimination, whether under the ADA or the Rehabilitation Act, requires a plausible allegation that a service, program, or activity that is being denied is "provided by" the public entity being sued. *Ivy v. Williams*, 781 F.3d 250, 255 (5th Cir. 2015) (citing *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998)), *vacated as moot sub nom. Ivy v. Morath*, 137 S. Ct. 414 (2016). Plaintiffs' claims fail because the State Defendants do not provide the benefits Plaintiffs say they should receive.

In *Ivy*, the Fifth Circuit explained that plaintiffs there could not state a claim against the Texas Education Agency regarding "driver education" because TEA did "not provide the program, service, or activity of driver education." 781 F.3d at 258. TEA merely regulated and supervised the schools that provided driver education, rather than providing that service itself. The agency therefore did not "provide[]" the service for purposes of the ADA and Rehabilitation Act. *Id.*

So too here. As explained above, local election officials, not the Secretary or Attorney General, administer Texas elections. Among other things, they receive and review ballot applications, *see* Texas Election Code § 86.001; mail carrier and ballot envelopes to voters, *id.* § 86.002; receive and process marked ballots, *id.* §§ 86.006, 86.007(b), 86.011; verify voter signatures, *id.* §§ 87.027(i), 87.041(b)(2); and count the results, *id.* § 87.061. The State Defendants do not share those duties.

In substance, the logic of Plaintiffs' claims would impose supervisory liability on the State Defendants. But the Fifth Circuit rejected that logic in *Lightbourn v. El Paso County*, 118 F.3d 421 (5th Cir. 1997). There, a group of plaintiffs who were blind and mobility-impaired sued the Secretary of State because the voting equipment at their polling places did not allow them to vote with complete secrecy. *Id.* at 423–24. The district court held the ADA required the development and adoption of new voting systems—and that the Secretary had violated it because he failed to ensure the local election authorities complied with that mandate. The Fifth Circuit reversed, explaining that the Secretary was not responsible for local officials' non-compliance with the ADA. *See id.* at 432 (the Secretary has "no duty under either Texas law or the ADA to take steps to ensure that local officials comply with the ADA"); *see also id.* at 429 (although "[t]he Texas Election Code does contain some provisions requiring the Secretary to take action with respect to elections," they do not make the Secretary responsible for local compliance).

The same is true here for the voter-assistance and signature-match language that Plaintiffs challenge. Local elections officials, not the State Defendants, provide the benefits of the services that Plaintiffs contend they have been denied. Plaintiffs cannot plausibly allege that the State Defendants, who do not enforce the portions of SB1 challenged by the disability claims, have excluded anyone from a program or denied to anyone a benefit.

D. Plaintiffs' Claims Fail on the Merits

Finally, Plaintiffs have not plausibly alleged that SB1 actually discriminates against voters with disabilities—that they are "excluded from participation in, or being denied benefits of," or "otherwise being discriminated against" in voting. *Smith*, 956 F.3d at 317. In fact, Texas law expressly prohibits election officials from interpreting the Texas Election Code "to prohibit or limit the right of a qualified individual with a disability from requesting a reasonable accommodation or modification to any election standard, practice, or procedure mandated by law or rule that the individual is entitled to request under federal or state law." Tex. Elec. Code § 1.022.

Disabled Texans have multiple options to vote in every election. Among others, they may vote:

- in a polling place during early voting, *see id.* § 41.001, 82.005;
- at the curbside during early voting, *see id.* § 64.009;
- in a polling place on Election Day, *see id.* § 81.001;
- at the curbside on Election Day, *see id.* § 64.009; or
- by mail, *id.* at 82.002(a)

These are the same options offered to other voters, except that non-disabled voters are generally not eligible for curbside voting and may vote by mail only if they are elderly or satisfy other special conditions. *See id.* §§ 64.009, 82. 001–004, 82.007–008.

Plaintiffs have not plausibly alleged how SB1 has so curtailed the availability of voting through any one of these five methods that it constitutes an exclusion from participating in, or denial of the benefits of, the election process. *See also* 28 C.F.R. § 35.150 ("service, program, or activity, *when viewed in its entirety*" must be accessible, but public entity does not necessarily need to "make *each* of its existing facilities accessible") (emphases added). After all, Plaintiffs have a right to vote, not a right to vote by their preferred method. *See McDonald v. Bd. of Election Commrs.*, 394 U.S. 802, 807 (1969) (plaintiffs had "right to vote," not "a claimed right to receive absentee ballots").

Nor have Plaintiffs plausibly alleged that the operation of SB1 has "failed to make reasonable accommodations" in voting. *Smith*, 956 F.3d at 317. Texas law allows for numerous accommodations for disabled voters. It guarantees to disabled voters the right to request a reasonable accommodation for or modification of any mandatory election standard, practice, or procedure if the voter is entitled to such a request under federal or state law. Tex. Elec. Code § 1.022. Texas law also requires particular accommodations for in-person voting. At least one voting station at each polling location must have an accessible voting system that allows voters to cast a ballot both independently and secretly. *See id.* § 61.012. Polling locations must meet strict standards, including curb cuts or temporary nonslip ramps, ground floor access, wide doorframes, handrails, and the removal of any barrier that impedes a voter's pathway to the voting station. *Id.* § 43.034. To the extent voters cannot enter a polling location, local election officials must offer alternatives, such as curbside voting, which allows voters to vote without ever leaving their cars. *Id.* § 64.009.

At bottom, the law requires *reasonable* accommodations, not preferred accommodations. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 275 (2d Cir. 2003) (neither ADA nor Rehabilitation Act requires equal access or equal results for individuals with disabilities). Texas's accommodations may not match Plaintiffs' preferences perfectly, but they are not required to do so. Texas is required to offer its disabled voters meaningful access to the opportunity to vote. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985) (reasonable accommodation must give qualified individuals "meaningful access"); *Cadena*, 946 F.3d at 725 (qualified individuals have a right to "meaningful access"). That is what Texas does—and Plaintiffs do not allege otherwise.

* * *

With respect to their claims under the ADA, Rehabilitation Act, and Section 208 of the VRA, Plaintiffs fail to state a claim from which relief can be granted. They fail to identify specific members, cannot assert these highly individualized claims as a third party, fail to demonstrate that the State Defendants deny them the access they seek, and fail to show that SB1 violates the ADA and RA as a matter of substance. These claims must be dismissed.

III. The OCA Plaintiffs Lack Private Causes of Action Under the VRA and CRA

Finally, the OCA Plaintiffs' claims under §§ 2 and 208 of the Voting Rights Act and Section 101 of the Civil Rights Act must be dismissed because those statutes do not create a private cause of action. State Defendants will not burden the Court with further briefing on these issues that they raised in their previous Motion to Dismiss, ECF 54 at 16–21, because of the Court's denial of these arguments during the November 16, 2021 status conference. State Defendants respectfully disagree with that ruling and raise these arguments to preserve them for further review.

CONCLUSION

The State Defendants respectfully request that the Court dismiss the claims asserted by the OCA-Greater Houston plaintiffs.

Date: January 5, 2022

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548
Tel.: (512) 463-2100
Fax: (512) 457-4410

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN
Deputy Attorney General for Special Litigation
patrick.sweeten@oag.texas.gov
Tex. State Bar No. 00798537

WILLIAM T. THOMPSON
Deputy Chief, Special Litigation Unit
will.thompson@oag.texas.gov
Tex. State Bar No. 24088531

COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on January 5, 2022, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, *Plaintiffs*, v. GREG ABBOTT, *et al.*, *Defendants*.	§ § § § § § §	Case No. 5:21-cv-844-XR
OCA-GREATER HOUSTON, *et al.*, *Plaintiffs*, v. JOHN SCOTT, *et al,*. *Defendants*.	§ § § § § § §	Case No. 1:21-cv-780-XR

EXHIBIT A

NOVEMBER 16, 2021 HEARING TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNION DEL PUEBLO ENTERO, ET AL,
PLAINTIFFS,
vs.
GREGORY W. ABBOTT, ET AL,
DEFENDANTS.

DOCKET NO. 5:21-CV-844-XR

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
NOVEMBER 16, 2021

APPEARANCES:

FOR THE PLAINTIFFS:
SEAN MORALES DOYLE, ESQUIRE
BRENNAN CENTER FOR JUSTICE
120 BROADWAY
SUITE 1750
NEW YORK, NY 10271

UZOMA NKWONTA, ESQUIRE
ELIAS LAW GROUP LLP
10 G STREET NE, SUITE 600
WASHINGTON DC 20002

JENNIFER HOLMES, ESQUIRE
NAACP LEGAL DEFENSE & EDUCATIONAL FUND INC
40 RECTOR STREET, FIFTH FLOOR
NEW YORK NY 10006

RYAN V. COX, ESQUIRE
TEXAS CIVIL RIGHTS PROJECT
2911 N. MAIN AVENUE
SAN ANTONIO TX 78212

WENDY J. OLSON, ESQUIRE
STOEL RIVES LLP
101 S. CAPITOL BLVD, SUITE 1900
BOISE ID 83702

DANIEL JOSHUA FREEMAN, ESQUIRE
U.S. DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVENUE
4CON 8.143
WASHINGTON DC 20530

LIA SIFUENTES DAVIS, ESQUIRE
DISABILITY RIGHTS TEXAS
2222 WEST BRAKER LANE
AUSTIN TX 78758

FOR THE DEFENDANTS: PATRICK SWEETEN, ESQUIRE
WILLIAM THOMAS THOMPSON, ESQUIRE
TEXAS ATTORNEY GENERAL
P.O. BOX 12548
MC 009
AUSTIN TX 78711

CHAD ENNIS, ESQUIRE
TEXAS PUBLIC POLICY FOUNDATION
901 CONGRESS AVENUE
AUSTIN TX 78701

REPORTED BY: GIGI SIMCOX, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

(San Antonio, Texas; November 16, 2021, at 1:30 p.m., in open court.)

THE COURT: With that, let's turn to the civil case.

21-844, La Union Del Pueblo versus Gregg Abbott and others.

Let's take a roll call here.

For La Union, or LUPE, who do we have?

MR. MORALES DOYLE: Good afternoon, Your Honor.

Shawn Morales Doyle from the Brennan Center for Justice on behalf of La Union Del Pueblo Entero. I have with me a number of attorneys. I'm not sure if I can run through the list, or you want to get —

THE COURT: No, that's all right. One per party will do for now, and if I have to recognize anybody else who speaks, let's just try to be clear for the court reporter.

The other case was LULAC. Who do we have for LULAC?

MR. NKWONTA: Good afternoon, Your Honor.

Uzoma Nkwonta on behalf of LULAC. And I'll also introduce my colleagues, Kassie Yukevich and Graham White.

THE COURT: Thank you.

For Houston Justice?

MS. HOLMES: Good afternoon, Your Honor.

Jennifer Holmes on behalf of the Houston Justice plaintiffs, and I also have a number of colleagues joining us today.

THE COURT: Thank you.

For OCA-Greater Houston?

MR. COX: Hi, Judge. Ryan Cox on behalf of the OCA-Greater Houston plaintiff group, along with several other cocounsel as well.

THE COURT: Thank you.

Mi Familia Vota?

MS. OLSON: Good afternoon, Your Honor.

Wendy Olson with Stoel Rives in Boise, for the Mi Familia Vota plaintiffs. We have several counsel -- cocounsel on the line, including Sean Lyons, who is our local counsel from Lyons & Lyons.

THE COURT: Thank you.

And for the State defendants?

MR. SWEETEN: Your Honor, Patrick Sweeten and Will Thompson on behalf of the State defendants.

THE COURT: Thank you.

And for the United States?

MR. FREEMAN: Good afternoon, Your Honor.

Dan Freeman on behalf of the United States. With me on the line are Richard Dellheim, Dana Paikowsky, Mike Stewart, and Jennifer Yun.

THE COURT: Thank you.

So I apologize for the criminal docket. I don't know how that got snuck into the calendar, but it did. So I

apologize for that.

Let's work through some of the issues here in this case. First, let's take care of housekeeping.

We have a motion for leave to file an amicus brief by Donna G. Davidson. That's Docket Number 78. That's opposed by Mi Familia Vota.

It's just an amicus brief. I'm just going to -- that's going to be granted. I'll read and consider the arguments made in there, but the foundation for government accountability, just because of the sheer number of the lawyers I have in this, will be denied speaking time.

Number 2. Motion to appear pro hac vice by Stewart Whitson. Docket Number 76. That's granted.

Motion to appear pro hac vice for Chase Martin. Docket Number 77. That's granted.

Motion to appear pro hac vice Stewart Whitson.

Mr. Whitson, I think you wanted to pay us twice. I'll take your money, but that's moot. So that's denied.

Next. Public Interest Legal Foundation's motion to intervene. Docket Number 43.

Let me turn to you, Mr. Sweeten. What's the State of Texas' position on that?

MR. SWEETEN: Your Honor, can you read that again, please?

THE COURT: Yeah. This is a motion to intervene

filed by the Public Interest Legal Foundation.

MR. SWEETEN: Your Honor, the State does not object to the intervention.

THE COURT: So now, that's kind of interesting to me, because if that's your position how does Public Interest Legal Foundation have standing when you're contending that the other defendants don't have standing?

MR. SWEETEN: Well, Your Honor, I'm not conceding that they have standing or not. I'm just suggesting that the State's position is that, you know, we're not actively objecting to the request.

I feel like that's up to those parties to make the case for their intervention. I'm certainly not, you know, suggesting that they have it or don't. We're just not objecting to that request.

And we haven't objected to amicus requests that we've seen also.

THE COURT: Well, that's not the same as intervention.

MR. SWEETEN: No, that's true.

THE COURT: So that's denied.

Public Interest Legal Foundation, to the extent that you want to file any amicus briefs, I'll consider that whenever you decide you want to do that. But with regard to intervention, the State is ably defended and they can argue

any positions they feel they need to argue on their own.

Next. Motion to intervene by Dallas County Republican Party and others. Docket Number 57.

What's the State of Texas' position on that, Mr. Sweeten?

MR. SWEETEN: Same position, Your Honor.

No objection.

THE COURT: Same ruling. Denied.

So again, the Dallas County Republican Party can file any amicus briefs it wishes to file in this case. But again, the State is more than ably represented and their positions are ably represented by the Attorney General's Office.

Motion to appear pro hac vice by E. Stewart Crosland. That's denied since I denied the intervention.

That was Docket 71.

Docket 72. A motion to appear by Stephen Kenny. That's denied because I denied the intervention.

So I think that takes care of housekeeping.

Let's move to the motions to dismiss, and I guess let me start with asking a background question. And I'm not sure who wants to speak to this here from the plaintiffs' groups.

Why are you opposing filing an omnibus complaint?

I'll start with LUPE first.

MR. MORALES DOYLE: Sure, Your Honor. Sean Morales again.

We are opposing to filing this omnibus complaint I think for a few reasons. One of them is that we don't have all the same interests or claims represented, i.e., the various plaintiffs to this case.

Our complaint, for instance, is bringing not only different theories and different claims than some of the other plaintiffs' groups, but on behalf of different interests we represent a number of organizational plaintiffs in addition to an election judge and an election administrator, and so I think that we are, while our interests are aligned with all of them, we have different theories and different claims that we're bringing.

And though I can understand the potential expediency of having one omnibus complaint, there's also a whole lot of work that will go into coming up with omnibus pleadings for all these various groups and interests, and I do not believe that the resources that will go into figuring out a way to coordinate all of those pleadings actually provide -- are worth the benefit that is provided by an omnibus complaint.

THE COURT: So I can't force you-all to do that. I believe you're making a mistake by doing that. And I think you're also putting a lot more work on the State by having to respond to these individual complaints, and a lot more work on the Court.

But again, technically and procedurally I can't

require this. I would highly advise you-all to reconsider that position in the future because this doesn't make much sense to me. But that's where we're at apparently.

So on the motion to dismiss, some of the plaintiffs have failed to allege which specific provisions of SB 1 they are complaining of. So why doesn't this failure require a dismissal and an amended complaint?

So for example, on 21-844, no specific provisions of SB 1 are cited for your Fourteenth equal protection claim, your Fifteenth Amendment right to vote claim, your Section 2 Voting Rights Act claim, your Section 208 Voting Rights Act claim, and your ADA claim.

In 21-848, there were no specific provisions of SB 1 cited regarding the Fifteenth Amendment right to vote claim.

In 21-920, no specific provisions of SB 1 are cited regarding the First and Fourteenth Amendment right to vote claims, the Fourteenth Amendment equal protection claims, the Fifteenth Amendment right to vote claims, and the Section 2 Voting Rights Act claim.

So why shouldn't I grant the motion to dismiss regarding those failures and require an amended complaint?

LUPE.

MR. MORALES DOYLE: Your Honor, I think we did specify the provisions of SB 1, but I understand you may be saying that in the actual language of the count it is not made

clear. I think that in our response to the motions to dismiss it will be -- we will make very clear which of the provisions we are challenging and each of our theories.

I think in the body of the facts of the complaint we tried to make that clear. I apologize if in the language of the count itself we haven't done -- again, specified each of those things.

We will address that in our response to the motions to dismiss. And I don't think filing an amended pleading is the best way to handle that.

THE COURT: Well, I'm not sure responding to your motion to dismiss is going to necessarily cure that.

I was hoping in the initial order that I sent out -- I was trying to avoid the motions fights that I knew was coming, and so I tried to advise you-all to limit the burden on you-all, the burden on the State, and the burden on the Court on having to litigate over items that we shouldn't have to litigate. And so I'm real disappointed my advice was not taken.

I'll, of course, wait for your response on that, but I can -- I'm already warning you guys. I don't see how if it's not in the complaint in the body of the causes of action how doing a response is going to cure that.

So be forewarned. If you don't file an amended complaint, you sort of know which way this is headed.

So regarding those plaintiffs alleging a violation of the ADA, these entity plaintiffs haven't specifically alleged what disabilities the members have, or how the disability limits any major life activity. Doesn't this require an amended complaint?

Who wants to tackle that one from the plaintiffs' group? Whoever has got the ADA claims.

Don't everybody speak at once.

MS. DAVIS: Your Honor, this is Lia Sifuentes Davis with the OCA plaintiffs.

We have included ADA claims in our pleadings, and at this stage of the pleading we just have an organizational plaintiff. And our motions to dismiss will address how the organizational plaintiff has standing to bring these claims.

THE COURT: Yeah. Again, just you-all can waste time drafting responses to motions to dismiss, but I don't think you-all are hearing me. So you know, it's a whole lot easier just to forego the response to dismiss and file an amended complaint to cure these deficiencies, but, you know, you-all do what you think is best.

The State is arguing that all claims are barred by sovereign immunity and so what exception is going to apply? And here, with regard to the State defendants, the Governor, the Secretary of State, and the Attorney General, and I guess I'm more curious about the claims against the Governor.

For those plaintiff groups who have claims against the Governor, how does the Governor have any enforcement authority in this legislation?

I'll start with LUPE.

MR. MORALES DOYLE: Thank you, Your Honor.

I'm trying to make sure I give my colleagues an opportunity as well here.

We think that the Governor plays a practical role in the enforcement of the election code in reality, but we understand the argument that the State is making with regard to the way that the ex-parte en doctrine has been interpreted in the Fifth Circuit and we are taking seriously those arguments, but we do think that the -- and contemplating, as we are with all these things, that the possibility of whether an amended complaint would make sense, or whether adjusting our claims makes sense, but I do want to say that we do believe that the Governor in the State of Texas, as a practical matter, does play a role in both shaking hand and enforcing the election code, whether or not that is made clear in every instance in the language of the election code itself.

But I don't mean to speak on behalf of any of the plaintiff groups besides the LUPE group.

THE COURT: So I'm not making any rulings, but in light of the Fifth Circuit's requirements about how I'm supposed to look at the Governor's role in enforcement on a

specific provision by provision basis, this is not a ruling, but I don't see it, and so you-all might as well start looking at doing amended complaints here because I don't think you're going to pass muster.

Now, Mr. Sweeten, before I do all your work for you, the Secretary of State and the Attorney General, I mean, how is it that you are arguing they have no enforcement? I mean, if you look at all these sections of SB 1 their names are everywhere.

MR. SWEETEN: Your Honor, I'm going to let Mr. Thompson address the motion to dismiss, if I may.

MR. THOMPSON: Thank you, Your Honor. Will Thompson for the State defendants.

We think that the main point referring to the Secretary of State and Attorney General that although they may have some roles in some circumstances, this is as Your Honor pointed out, a provision by provision question.

And so what we have in a lot of these complaints are kind of general allegations that the secretary does something with regard to SB 1, which isn't really sufficient.

What we need to know is what do the plaintiffs think that the secretary does with regard to each provision that's being challenged. How allegedly does the secretary cause the injury that's at issue in each claim?

And that's what we're missing in these complaints.

It's what we tried to confer about before we filed motions to dismiss. And we think that if we were to go provision by provision with more specific allegations, we would find out that many of the individual claims truly have no connection to the secretary and are, instead, probably, at best, connected to the local election codes.

THE COURT: So you anticipated my question, Mr. Thompson. So if not the Governor, and not the Secretary of State, and not the Attorney General, well, then, who is the proper defendant in this case?

MR. THOMPSON: Your Honor, it's a difficult question to answer in the abstract because the Fifth Circuit requires a provision by provision and claim by claim analysis. So it is possible that the proper defendant will differ based on which claim is at issue, but for some things it will certainly be local election officials.

THE COURT: But let me press you on the Secretary of State and the Attorney General. I mean, you're not arguing that they have no role whatsoever in investigation and enforcement, are you?

MR. THOMPSON: Your Honor, we are not saying that they have no role under SB 1 at all. They certainly have some role and I didn't mean to suggest the opposite.

What I am saying is that we can't really analyze whether they're a proper defendant for any case under SB 1.

It really just depends on what injury is at issue. And for some of these plaintiffs at the very least we don't think it's met.

It's not clear whether it's met with regard to any of them because the plaintiffs haven't met their burden of specific allegations about what conduct from the defendants they are complaining of.

THE COURT: Again, I'm not making any rulings here but this ought to be clear signals to all the plaintiff groups, you need to further amend your complaints here to address these challenges because otherwise you're just wasting everybody's time with responses to motions to dismiss, making me rule on the motions, in all likelihood giving you adverse rulings, and then forcing you to amend.

I don't understand why we just can't go to amending now. This makes no sense to me whatsoever.

Okay. Now, with regard to what the plaintiffs are alleging, I want to understand this. Are plaintiffs asserting only organizational standing, or are any plaintiffs asserting associational standing?

Is there any plaintiff asserting associational standing? Please speak up now or forever hold your peace.

MR. COX: Judge, for the OCA plaintiffs all of our individual clients allege both associational and organizational standing. All five.

THE COURT: Okay. The OCA.

Anyone else besides OCA?

MR. NKWONTA: Your Honor --

MS. HOLMES: Your Honor, the Houston Justice plaintiffs, two of our clients, the Delta Sigma Theta Sorority and The Arc of Texas are asserting associational standing.

THE COURT: Remind me again who the frat/sorority group is.

MS. HOLMES: The Delta Sigma Theta Sorority.

THE COURT: Thank you.

I'm sorry. I cut someone else off.

MR. NKWONTA: Your Honor, for the LULAC plaintiffs, three of our organizational plaintiffs are asserting associational standing. That would be LULAC Texas, the Texas Alliance for Retired Americans, and Texas AFT.

THE COURT: Thank you.

Anyone else?

MR. MORALES DOYLE: Yes, Your Honor.

On behalf of LUPE plaintiffs, a number of our members -- or a number of our plaintiffs are members of organizations asserting associational standing, but not all of them.

And one of our plaintiff organizations, Texas Impact, is, in fact, an organization of other organizations, and so in some sense its members may be a little bit more complicated, in other words, Your Honor, but we are alleging both

associational and organizational standing.

THE COURT: So did I cut off anybody? Anybody else?

Okay. So for all those groups who are asserting associational standing, I haven't seen where you are identifying specific members of those associations who would themselves have standing to sue.

Again, on the amended complaint here, that I hope is forthcoming, or amended complaints, plural, you-all need to flush that out because I don't see where many of you have articulated those individuals sufficient to withstand any challenge.

Next one. Regarding WCVI and ADL. I'm unsure by reading the complaints currently how these organizations establish an injury.

MR. MORALES DOYLE: I just want to make sure I got it right. ADL, and what was the other group you named, Your Honor?

THE COURT: WCVI.

MR. MORALES DOYLE: Yes. Okay. Those are not -- I want to make sure I'm getting our groups correct here, but those are not groups for which we are making associational standing claims. We are making organizational standing claims in terms of diversion of resources and the impact on the mission of those organizations to do their work to educate and engage voters in Texas.

THE COURT: So let me stop you there, Mr. Morales.

So there I thought you argued -- check me on the complaint language, because my notes may very well be wrong -- but I thought you said those entities were really research organizations.

And so when you said "research organizations," I thought, well, I mean, how is their research being -- how are they being injured in their research capacities? But when you file these amended complaints, which again I hope are forthcoming, I hope you articulate with more clarity how there's injury to those two organizations.

MR. MORALES DOYLE: Understood, Your Honor.

I will just say I don't think that ADL is primarily a research organization. WCVI is, in part, a research organization.

But I think both of these organizations are -- do certain educational functions and work with constituent and community members, and that is where the standing comes from.

But I understand your point about the specificity of allegations there.

THE COURT: Thank you.

So now, Mr. Sweeten, the organizational standing.

Is the State arguing on association -- pardon me. I just said it wrong. On organizational standing, haven't the plaintiffs sufficiently alleged injuries to establish

organizational standing? Why is that deficient there?

MR. SWEETEN: Mr. Thompson will address that.

THE COURT: You're ducking all the hard questions to Mr. Thompson.

MR. SWEETEN: I am, Your Honor. I've got a really good help here today, so I know to lean on it when I need it.

Thank you.

THE COURT: Mr. Thompson.

MR. THOMPSON: Thank you, Your Honor.

We do think that the organizational standing allegations are deficient. One large reason, I think, cuts across many of the plaintiffs groups is that they want a diversion of resources theory.

A diversion of resources can be a sufficient injury but it is not a sufficient injury in and of itself. It has to be a diversion that is used to avoid some other underlying injury in fact.

THE COURT: So, I mean, have you read *OCA-Greater Houston*, Fifth Circuit, 2017, 867 F.3d, 604?

MR. THOMPSON: It's been probably a few weeks, but I've read it, Your Honor.

THE COURT: Yeah, because you didn't cite it when you were briefing your standing.

MR. THOMPSON: I don't think that this issue was raised properly in *OCA-Greater Houston*. The Court decided a

number of things in that case without kind of briefing on the topic, and our position would be that the Court did not fully consider and therefore did not rule upon, by virtue of stare decisis, a number of issues that we've raised.

THE COURT: Well, I'm bound -- whether you think the Fifth Circuit was well-informed or not, I'm bound by what they said.

MR. THOMPSON: I think that's almost right, Your Honor. When an issue is not briefed before the Court, we therefore often don't understand the court to be implicitly deciding it.

If the court had said, you know, "Despite the lack of briefing, we have independently researched the question and concluded the following," that would be one thing. We think we're not in that situation, Your Honor.

I suppose we could read *OCA-Greater Houston* to create a circuit split, but as a general rule we try to avoid reading Fifth Circuit precedent to split with the D.C. Circuit and things like that.

THE COURT: So I'm trying to get this case to the merits. So how do you think the plaintiffs, in their amended complaint, fix the deficiencies for the injury?

MR. THOMPSON: Sure, Your Honor.

I think what we need are allegations that explain what this law does to them in the absence of a diversion of

resources. Does it injure them as groups in some way that they then try to avoid through the diversion of resources.

I'll give an example, Your Honor. If, for example, a plaintiff in a hypothetical case said, you know, what I like to do on the weekend is I hand out pamphlets. And, you know, the city government has enacted some kind of ordinance that requires me to go get a license in order to hand out pamphlets, and if I don't get the license I'll be prosecuted.

Well, what that individual could do is allege that either he has paid the fee to get the license, and that is an injury in fact, that caused an injury or he would have broken the law, or that he's not going to pay the fee and he faces a threat of prosecution for trying to hand out pamphlets without a license.

So kind of flip side to the same point. You're either injured because when you don't comply the law is going to do something to you, or you incur some kind of cost to avoid that underlying injury.

That's not what we have here. What we have here are a lot of organizations that seem to be relying on kind of general allegations that they don't like the consequences of this law for third parties. And because they don't like the social consequences, the alleged social consequences of the law, they spend money to try and change those consequences. I don't think that's a sufficient injury in fact.

THE COURT: So all the plaintiffs have heard that, whether you want to try to amend in light of that. I'm not saying you have to, but again, I'm trying to get us to the merits without more motion to dismiss diversions.

And so if you want to rely just on your existing allegations, that may or may not meet the Fifth Circuit. I'll hear the State's -- or I'll see whether or not the State's arguments about how the Fifth Circuit was not well-informed, but this is easily curable by you-all just adding more sentences to your amended complaint is what I'm trying to emphasize.

Next one. In the motion to dismiss the defense are asserting that there's no private cause of action under Section 2 of the Voting Rights Act.

So I'm assuming this is another hard one for Mr. Thompson?

MR. SWEETEN: Your Honor, anything on the motions to dismiss is Mr. Thompson today. Thank you.

THE COURT: So, Mr. Thompson, so in Shelby County the chief justice talked about injunctive relief is available in appropriate places to block voting laws from going into effect. And the chief justice said both the federal government and individuals have sued to enforce Section 2.

It sure appears that the chief justice believes there's a private cause of action.

MR. THOMPSON: I have to respectfully disagree, Your Honor. I think the chief justice was actually very careful to say that they "have" sued, not that it was "proper" for them to have sued.

Just a few months ago Justice Gorsuch flagged --

THE COURT: We're not talking about Justice Gorsuch and his -- that's all -- we're not going there.

We're talking about what a majority opinion held.

MR. THOMPSON: Well, then, Your Honor, I'll point out that in the majority opinion from the Supreme Court they have consistently said things like, "We assume without deciding that Section 2 creates a private cause of action," which they are able to do because it's not a jurisdictional requirement.

There is no holding from the majority of the United States Supreme Court saying that there is, in fact, a private cause of action under Section 2.

THE COURT: I disagree. That part of the motion to dismiss is denied.

With regard to defendants asserting there's no private cause of action under Section 208 of the Voting Rights Act. So, Mr. Thompson, 52 U.S.C., Section 10302 says, "Whenever the Attorney General or an aggrieved person institutes a proceeding," so how is there no private cause of action?

MR. THOMPSON: Sure.

The provision Your Honor quoted does not actually create a cause of action. It recognizes that causes of actions exist under other sources of law. It is of course not limited to Section 2 or Section 208.

So we believe that it refers to, for example, 1983 suits regarding constitutional claims, but certainly included within that even we if sought VRA claims were themselves included in that provision, it would presumably be the implied cause of action under Section 5 of the Supreme Court recognizing *Allen*. That was the explanation that Justice Thomas gave in *Morris*.

THE COURT: That part of the motion to dismiss is denied. The statute is clear about an aggrieved person is able to institute a proceeding.

Next one. No private cause of action under the materiality provision of the Civil Rights Act. So now that the United States has joined this case, does this make this issue all moot or not?

MR. THOMPSON: I don't think so, Your Honor. It may reduce its practical import. We will of course address the United States' claims in our pleadings regarding their claim which has not yet been filed.

But it is certainly true that if, for example, Your Honor held that the United States had the cause of action but the private plaintiffs do not, it would then be improper to

grant any relief to the private plaintiffs. They wouldn't be prevailing parties that represent attorneys fees. They are not going to affect this kind of ruling even if the Court is able to reach the merits under a different party's claim.

THE COURT: So, well then, OCA plaintiffs, I mean, do you want to amend your complaint and drop this or not? The government is saying even if the United States is successful then you're getting zero.

MR. COX: It may have that kind of practical impact, but I think to get the relief of our client, that our clients are seeking, we plan to continue to seek that relief and we believe that there is a private cause of -- private right of action under 208 generally and we'll be -- expect to be briefing that for the Court on Thursday.

THE COURT: Okay. I won't make any ruling on that.

Where are we at?

Help me understand this. In your motion to dismiss LUPE's complaint, the defendants seem to assert that SB -- well, I can't even make your argument. I don't seem to understand it.

What are you arguing with regard to LUPE's complaint and the Supremacy Clause?

MR. MORALES DOYLE: I'm sorry, Your Honor.

I'm trying to refresh my recollection. I believe you're referring to Count 10 of the complaint, and we said

that Count 10 is redundant and therefore should be dismissed or stricken because Count 10 just says that SB 1 violates the Supremacy Clause. That's not really a claim. I'm not sure how else to put it.

The Supremacy Clause is a rule of decision for when there is a conflict of federal and state law. So if the plaintiffs had established some other violation of federal law, then the Supremacy Clause would tell us that federal law trumps state law. But there is no independent cause of action that says you have somehow violated the Supremacy Clause standing alone.

THE COURT: Okay. Now I understand it.

So again, in the amended complaints that are coming down you may want to clear that language up as to whether or not you are trying to assert an independent cause of action, or are you just throwing surplusage in there about the Supremacy Clause.

Okay. Let's try to figure out now where do we go forward on discovery, a scheduling order, and a trial date.

So you-all were good enough to send me the initial disclosures this morning. My law clerks quickly tabulated this. The plaintiffs have identified 165 individuals. And the defendants have identified 132. That's ridiculous.

So what appears to have happened is that I think one or both sides, or I guess there's multiple sides here, some of

you included like every member of the Texas legislature who voted in favor of SB 1, is what it looks like.

Now, we all know most of these legislators didn't have anything to do with the drafting. They probably didn't even know what they were voting on, except what they were told by leadership to vote on. A lot of them probably didn't even read it. So how they become persons with knowledge of relevant facts perplexes me.

Mr. Thompson, since you get all the hard questions, how do you respond?

MR. THOMPSON: I'll be happy to respond, Your Honor.

I think I can safely say on behalf of all the parties that we didn't mean to suggest all of those people would be witnesses or anything like that.

Under the Supreme Court's latest opinion in *Brnovich* which addressed an intentional discrimination claim and Voting Rights Act, it rejected the Cat's Paw Theory, which Your Honor may be familiar with from employment cases for determining kind of the intent of the legislature.

And so at least from my personal perspective, I think what we were trying to say there is to the extent there are intentional discrimination claims one can't just establish it by the alleged intent of a bill sponsor or a leader, or something like that.

THE COURT: So we need to get reasonable about how

many people need to be deposed. So you-all are to file amended initial disclosures and clearly delineate the Tier 1, Tier 2 individuals, for lack of a better phrase, and Tier 2 being just mere legislators who voted who didn't have anything to do with the drafting of this bill or any amendments, or anything like that.

And so those people need to be listed, if you want to list them, as a Tier 2 group so we have a better understanding of who the Tier 1 group is, because by listing everybody, and I'm not saying anybody is doing this, but somebody could be hiding a person with great knowledge of relevant facts in this laundry list of 165 or 132. So we'll have none of that.

So let's file amended initial disclosures within ten days. Exchange with each other. And then I want to see also, so file those with the court. And so --

MR. ENNIS: Your Honor, may I add one thing on that? This is Chad Ennis for Medina County.

Another thing, your clerks may have missed it in the big pile of initial disclosures they received, but there are several designations for things like "All of the witnesses that testified at the hearings for these bills."

And that is literally hundreds of people without any designation of who they are. You know, if there are specific people who testified that they are interested in calling as witnesses, I think they should just identify the people. And

we'd ask that that go into the exchange in ten days as well.

THE COURT: So, thank you, Mr. Ennis.

So let's figure out for Rule 26(a)(1) disclosure purposes the mere public speakers who attempted or did actually speak at any committee hearings for this legislation, to the extent that they are aggrieved individuals, or individuals injured by any, and who are claiming to be part of the associational standing, I could see where those have knowledge of relevant facts.

So Mr. Ennis raises a good point. Asterisk who those people are. But, yeah, a broad designation like that is -- let's even put those like into the third tier group. Put Tier 1 -- Tier 1, what I'm really interested in, is who really needs to be deposed first, because we're going to have to phase discovery here, given the large amount of folks at issue here.

And so if -- to the extent you are relying on some broad categories like that, let's put names and then better descriptors as Mr. Ennis is suggesting.

Anybody else with a good suggestion on that?

MR. MORALES DOYLE: Your Honor, I would just -- this is Sean Morales Doyle on behalf of LUPE plaintiffs.

I would just say that we did not make a broad disclosure like that, but that there are, we believe, folks who offered testimony in committee hearings on Senate Bill 1

outside of our clients and folks who would be aggrieved by the law that have relevant information, especially to the extent that the legislators, who are proponents of Senate Bill 1 relied upon or cited to facts that were put to them by folks in committee hearings in justifying their passage of this bill.

I think -- so I just want to say that I don't think -- I think that there are folks who testified at those hearings who have information relevant to the claims in our case outside of the type of information that you mentioned there.

THE COURT: And that's fair. And so those are -- you know, properly should be disclosed as 26(a)(1), but let's at least put some descriptors here so we know who we are talking about and what they said and where they said it, so we all know why they are there.

Okay. Now --

MS. OLSON: Your Honor, this is Wendy Olson on behalf of Mi Familia Vota plaintiffs.

Your direction was to do this in ten days. I'm wondering if we could have until that Monday, November 29th, because ten days is Friday, the 26th, which is the day after Thanksgiving and I know people have travel plans, but I would just make that request.

THE COURT: That's fair. The 29th it is.

Okay. With that said, I guess I was initially under the impression that we were going to be under a much more expedited schedule, but it seems that the plaintiffs are going to want to have the March primary come and go with no injunctive relief requested from this Court.

Am I correct in that understanding?

MR. SWEETEN: Your Honor, this is Patrick Sweeten with the State defendants.

I want to just say that that was an assumption upon which this schedule that we outlined, which I think is a compressed final trial schedule that we based it on, and we had discussions both -- we had two discussions I believe with all of the plaintiffs and they said as much.

And we had a discussion with the Department of Justice and they indicated it was not their intention to bring forward a preliminary injunction.

So, you know, the negotiations that took place back and forth on those issues are predicated upon that assumption. So I think I can answer that for the group because that's certainly what we were told and what we affirmed.

THE COURT: And so that's why I want to confirm this.

So again, some plaintiff groups speak up. Is that the understanding or not?

MR. MORALES DOYLE: On behalf of LUPE plaintiffs, it is correct that we are not planning to pursue preliminary

injunctive relief prior to the March primary.

I do just want to say that it is not that we would like to see the March primary come and go without relief in this case, but for a variety of reasons we think it's important that the Court have a full trial record before it is deciding these claims, and given the time frame that we're working on in this case and the amount of evidence that we've already discussed we're going to need to be compiling, that's the decision that we've made at this point.

THE COURT: So then in terms of a scheduling order, if the plaintiff groups want to develop facts about what takes place in the March primary and what issues take place with regard to the ability of your constituents to vote, I mean, that's going to be yet another round of discovery that the State defendants are going to be entitled to discover on.

And so how is it that you see a March primary, fact discovery now on the March primary, dispositive motions being filed, and then a trial date, as you're suggesting in July. How does all that happen?

MR. MORALES DOYLE: Well, Your Honor, I think it will be a whole lot of work. I think all of us have -- we have set the -- we have proposed a discovery close deadline that is after the March primary in order to allow for discovery to continue, but we have also proposed an expert discovery time line that contemplates the majority of expert discovery

happening prior to that March primary in order to not have all of this happening at the very end of the case.

I think the evidence that comes out of the March primary, of course none of us knows what it's going to be at this point, but I think we also know that how -- the evidence that comes out of the March primary is not going to be all the evidence in this case.

There's going to be probative on some points, certainly not on others, as primaries are, you know, different than general elections, so we are trying to build a plan that allows for a great deal of hopefully the majority of discovery to happen early in this case but also allows for the parties to take into account what does in fact happen in the first set of elections under SB 1 in March.

We understand that will make things very difficult for all of us, including Your Honor, after the March primary, but we think it is incredibly important that the final resolution of this case before Your Honor happens with enough time for any appeal and any further proceedings after the trial to be resolved in time for the November primary.

And in light of Supreme Court precedent about changes to elections in advance of an election -- excuse me -- the November general election, we think it is crucial that the trial happen earlier in the year so that we have time to sort everything out and come to a final resolution of this case

before November to make sure that voters in the State of Texas have their rights protected and that it's a fair election.

THE COURT: Does any other plaintiff group wish to speak in addition to the comments Mr. Morales already made?

Mr. Sweeten.

MR. SWEETEN: Yes, Your Honor.

THE COURT: So I mean, the plaintiffs are asking me to do a heck of a -- and everybody, to do a heck of a lot of work in a short period of time. I'm willing to put the effort in.

I mean, is there any dispositive motions you see that could be filed without the benefit of discovery that's just a strictly legal issue that at least we don't have everything having to be decided, argued, briefed, and ruled upon at the end?

MR. SWEETEN: Your Honor, I think so.

I think there could be some motions for summary judgment.

Let me address the overall schedule which is, you know, they have indicated and we have indicated to the Court, and this is the very reason why we don't agree to set a trial date on July 5th at this point, which is that we have agreed to a very truncated discovery process.

We think that, you know, we're going to give it our best shot. We -- you know, if we start getting a bunch of

late disclosures of fact witnesses, you know, that could change that.

I can tell you, and this is likely an issue that you're going to want to -- you know, you may want to talk to us about later, but certainly my recent discussions with the DOJ have certainly brought to question, you know, whether or not we are going to be able to make this schedule go. But that's the very reason.

We are planning to -- there is an awful lot of work. The first step is the motions to dismiss. And as the Court is saying, you know, get these complaints. Tell us what is the complaint. Well, what is the specific statutory problem?

They're apparently not going to agree to a uniformed complaint, which I think would really, you know, make this, you know, be a lot easier and increase the potential to meet this schedule.

But we think that, you know, we're hopeful we can meet this schedule. We do think that there will be some issues that may be subject to judgment as this goes along. But that's, you know, one of the reasons that we think that maybe we wait until, you know, we wait to set the trial date to see if we're actually going to be able to work through this schedule.

But you know, we're giving our best shot, based on their, you know, representation to us. There's not a

preliminary injunction, you know, proceeding. We're trying to make this work. And I think this Court is doing -- I think this is great -- a great service.

As the Court knows in our redistricting challenges, when you have multiple --

THE COURT: Let's not bring that up.

MR. SWEETEN: I was just thinking, it's been four years, I think, since I've seen you, Your Honor.

Anyway, I think strictures. I think making them plead what is their claim. Tell us what that is. And then I think, you know, following the orderly process of this case.

We'll attempt to, you know, give best efforts to that discovery schedule that we have laid out, but we do think that we may want to see how that's going to make a determination as to whether the trial date is -- you know, when that should be set.

THE COURT: Does the U.S. want to chime in on this?

MR. FREEMAN: Yes, Your Honor. Dan Freeman for the United States.

The United States agrees that this is an extremely aggressive schedule. In particular, the schedule anticipates that experts would be disclosed at the beginning of February.

Now, we stand ready to work to meet this schedule, however, this schedule is only possible if the parties agree to participate in discovery and not engage in dilatory

tactics.

And Mr. Sweeten has advised the Court, and we advised the Court in our 26(f) report that we filed last night, that the United States has already issued a request for production to the State. The State informed us at our 26(f) conference that it did not intend to produce any documents in response to that request or database extracts as the case may be.

But they at the same time refused to stipulate to an early written formal response to that request and would allow the United States to get them out of the court and to bring a motion to compel.

And those type of delays are going to prevent the parties from being able to meet the schedule and are going to prevent the parties from being able to vindicate the rights of Texas voters, as Mr. Morales Doyle represented before.

We believe this is a separate issue that is best addressed at the -- toward the conclusion of this pretrial conference, but I'm happy to address it now.

MR. SWEETEN: Well, Your Honor, if the DOJ is going to accuse me of dilatory tactics, I'd like to address that right now. May I, Your Honor?

THE COURT: No. One sec.

I think most people on the screen know me. I don't want to dwell on fights. I want to move the thing forward.

So I know you don't like the moniker, and I would

take offense if someone said that to me too, but let's just move forward.

So just like I'm trying to tell the plaintiffs, file an amended complaint, and I'm telling them, and I'm telling everybody, file amended 26(a)(1) disclosures, motions to compel, none of us have time to fight over motions to compel.

Now, if the government is going to assert -- the government -- the State defendants are going to assert legislative privilege or some other privilege, let's talk privilege logs. Have you-all talked about how you're going to do a privilege log?

MR. SWEETEN: Your Honor, to my knowledge, there's been no discussion about a privilege log with any of the parties, that I know of.

THE COURT: Is that the basis of where you think you're not going to be able to cooperate on the U.S.'s request for documents? Is that --

MR. SWEETEN: Your Honor, I thought you didn't want me to address that, but I think I need to because counsel, you know, seems to be indicating that we're saying, "We're not giving you any documents." That's not what we're saying.

What happened, Your Honor, is that on November 4th the DOJ filed a lawsuit. We received last Friday a request, not for just documents, we received a request for an entire database from the DPS, which has 29 million people

that are on there. They also asked for the --

THE COURT: One second.

The DPS, Texas Department of Public Safety?

MR. SWEETEN: Yeah. They asked for the entirety -- well, I shouldn't say the entirety. They asked for a number of data fields from DPS. They asked for the 17 million entry TEAM's database from SOS.

They have asked for two databases because -- and we're still -- we're going to have a lot of discussions about this with opposing counsel because this is a breathtaking request. The only time in the history of DPS that they have given this up was when Mr. Freeman and DOJ sued us under Section 5, which would have been the spring of 2012, and then the carryover litigation was the Section 2 litigation.

So what we're going to address, Mr. Freeman's request, which he sent last Friday, we've basically had all of -- you know, it was Friday evening. We've had all of two business days.

We've been trying to get information about those databases but it is a sweeping request made in the eleventh -- you know, after we have had multiple discussions with these plaintiffs to get a large amount of data, including data from senators, you know, politicians, federal judges, state judges. That's all on the DPS voter databases.

So we have got a lot of issues to work through, but

this was sprung upon us in a call last week when he said, "We're going to ask for the databases." And I said "No."

And, you know, we're looking and evaluating the request that we got on Friday. It is going to take experts from both of those agencies to come in and explain what would be, you know, possible, what would be, you know, a really hard lift, but that by itself, asking for database extracts, which has a long process, which I can go through --

THE COURT: No. That's okay. One second. One second.

So let me go back to the United States. What's the relevance of the data?

MR. FREEMAN: Sure, Your Honor.

SB 1 requires individuals who wish to cast a mail ballot to list their identification number on their mail ballot request, as well as their mail ballot carrier envelope.

And SB 1 requires that early voting clerks shall reject any mail ballot application that doesn't include an identification number, if that individual has been issued an identification number that does not identify the same voter identified in the applicant's application for voter registration.

Now, the problem with this is that TEAM does not necessarily contain every voter's up-to-date driver's license number. There are voters who --

THE COURT: Let's --

MR. FREEMAN: TEAM. Excuse me, Your Honor. TEAM is the state's voter registration database.

THE COURT: Thank you.

MR. FREEMAN: Now, the problem, Your Honor, is that in some cases the voter may have registered to vote soon after moving to Texas while they still had an out-of-state driver's license and listed a social security number on their voter registration application.

They then obtain a Texas driver's license. They list their Texas driver's license number on their mail ballot application as instructed, and then their application for a mail ballot will be rejected because it doesn't match what was on their voter registration application.

Now, what the United States seeks to -- and that rejection violates Section 101 of the Civil Rights Act of 1964, the materiality provision.

Now, what the United States intends to do is quite similar to what the United States did in *Texas v Holder* when the State of Texas sued the United States under Section 5 of the Voting Rights Act, and in *Veasey v Abbott*, where United States, among several private plaintiff groups sued the State under Section 2 of the Voting Rights Act.

The State has produced these database extracts twice before, in terms of DPS. In terms of voter registration

database, the State has produced that database to the United States previously outside of litigation, as it's subject to production upon demand by the Attorney General under Title 3 of the Civil Rights Act of 1964.

The State has also produced voter registration database to the United States in both of those cases.

Experts are then able to compare those two databases to determine where there are voters on the voter registration database who do not have their proper driver's license listed.

It is my understanding that there are also voters in the DPS databases who have multiple driver's license numbers listed, because it's possible to have an identification card and a driver's license over the course of your life. They will not know which one of those numbers is in the voter registration database and will be disenfranchised as a result.

It is possible that individuals who have surrendered their driver's license and no longer have that document to be able to provide that number as SB 1 requires, and they will be disenfranchised as a result.

And so the United States is asking the State to do exactly what it did twice before in litigation, once where it sued the United States, and once where the United States sued the State. Both times where the State enacted legislation that put these driver's license numbers at issue in a restriction on the right to vote.

THE COURT: So let me suggest this here.

Let me -- can the government achieve what it's attempting to achieve by merely sending out requests for admission, asking the State to admit that there are these following discrepancies that you just identified, and then sending out an interrogatory by asking them to identify how many times these kind of occurrences have occurred?

And then in the event that they refuse to do so or claim it's unduly burdensome or whatever, then you come back and asking to do -- to get the databases and do the work yourself.

Go ahead.

MR. FREEMAN: Your Honor, I'm not certain that the State would be willing or able to conduct this analysis with the sort of degree of accuracy and expertise that the experts that the United States has retained have been able to do in the past.

Courts have relied on experts retained by the United States when conducting this sort of match during a *Veasey* litigation, a voter right litigation. The State opposed an alternative algorithm for matching the voter file to DPS files. The State ultimately abandoned that algorithm, as it determined -- well, I won't speak for the State.

The State abandoned the algorithm that it had proposed, and the United States, and ultimately the court

moved forward with the analysis that the United States was able to provide.

The various claims that the State has made about the burden of this production, in fact, the State has done this before. The code has been written before.

I personally at the State's request flew down to Texas to pick up a copy of the database extract in the *Texas v Holder* litigation so that we could address security concerns the State had. The United States is happy to agree to the same types of protective orders to address the State's concerns.

We see this as critical to the United States' claims under the Civil Rights Act of 1964 and we believe that the State's immediate assertion, the burden of the request outweighs the benefit.

One, it's contrary to the spirit of Rule 26, and the committee notes to the 2015 amendment specifically said that these type of default assertions -- I mean, immediate assertions that no discovery in response to a particular request is possible because of the burden should not be allowed.

THE COURT: Okay.

MR. FREEMAN: And we're not asking the State to produce immediately. We're simply asking them to allow us to tee this up.

THE COURT: Thank you.

So at this point there's not a motion to compel before me to rule on. You-all continue to meet and confer.

I will say this, Mr. Sweeten, in light of the representations that are being made that this has happened before, any arguments of unduly burdensomeness, you're going to have a steep hill to climb to overcome that, but I'm not making any rulings.

And so, again, to the extent that you can enter into protective orders to protect the sensitivity of this information, but again this is premature for me to make any rulings. I'm not making any rulings.

MR. SWEETEN: Your Honor, let me just say. I won't argue the motion because I hear the Court.

I agree. I think right now what's happening is this issue, we're jumping the gun on this. We will have discussions with DOJ regarding this issue. I wanted to raise these concerns to the extent that they impact scheduling.

But, you know, we also just -- I want the Court to know that there is going to be a lot of interfacing with our team and experts at both of these agencies about, you know -- about these issues, and these things take time.

So we will address their discovery requests. We'll be happy to talk to DOJ about this. But overall, I think, you know, I think this is something we can deal with as this goes

along, but I wanted to flag this issue to the Court.

THE COURT: No, thank you.

So now, we still -- we walked away from privilege.

To the extent that the State is not -- is going to claim privilege to any documents, I want a privilege log. And so it's going to have to articulate clearly the authors, author, or authors, plural, the recipient, or recipients, plural.

And if the author or the recipient wasn't a legislative -- a legislator, or a legislative aid, it seems highly improbable that you can in good faith articulate legislative privilege in those kind of scenarios.

To the extent that you think you can in good faith articulate legislative privilege, I want a log, and the Bates stamp, and I will review, in camera if need be, any documents subject to any privilege.

Okay. We've covered a lot today. Hopefully we're going to move things along. I'll be very disappointed if I don't get amended complaints, folks. I don't know how to make that point anymore clear.

MR. MORALES DOYLE: Your Honor.

THE COURT: Yes.

MR. MORALES DOYLE: I do not want to necessarily represent that I'm speaking on behalf of all the plaintiffs here, although I think I may be. We hear you. We are dealing

right now with a response deadline on the motions to dismiss of this Thursday.

And so --

THE COURT: That deadline is extended for 15 days.

Hopefully that deadline will never be met and we see amended complaints well before that.

MR. MORALES DOYLE: Thank you, Your Honor.

MR. SWEETEN: Your Honor, may I get a reciprocal extension on any replies?

THE COURT: Yes.

MR. SWEETEN: Thank you, Your Honor.

I do think there was one issue that I don't know that we addressed to the Court, and that is the order with the deposition limitations. I don't know if the Court wants to entertain that at this point.

THE COURT: Let me backtrack here because I didn't finish off on trial now.

What I'm contemplating is setting the trial date for July right now, just so for purposes of my calendaring I can hold something as a placeholder that we can all try to aspire to.

But I will tell everybody that, you know, I will be reasonable to all parties in the event that circumstances don't allow us to meet that. But for a placeholder, that's what I'm going to set for now.

Now, with regard to numbers of depositions, until I see the amended initial disclosures I really can't say right now what I think is an appropriate first tier of discovery depositions. So once I get the initial disclosures, the amended initial disclosures then I will set a first round of deposition -- number of depositions to be had for the first tier of discovery.

MR. SWEETEN: Thank you, Your Honor.

And Your Honor, if I may just say, the one issue I think that we are -- you know, we want to be -- you know, alert the Court to, is the number of plaintiffs that are in this case.

There are -- I think the count -- it's in our filing, but there's something like 30 organizational plaintiffs and six individual plaintiffs. I think that's right.

We don't need -- you know, some are making ADA claims. Some are making others. We don't need a full seven hours for those folks, but we need the number that might be necessary to take those plaintiffs.

And so that was our concern with, you know, just picking a fixed number, because I think that judicial economy, you know, can be increased by, you know, taking a shorter deposition but not being constrained by, you know, this hard number, particularly when we're faced, you know, with basically the number of plaintiffs that they are asking to

limit us to. So we're more for hours than limitations but we can certainly address that down the road if the Court prefers.

THE COURT: Yeah. Continue to meet and confer on this.

I mean, I'll tell you this, plaintiff groups, I've just completed a very difficult trial on the Sutherland Springs mass shooting case. It was at least four dozen, five dozen plaintiffs with at least two dozen plaintiffs' attorneys, and they all managed to have a unified front, and so I don't understand your reluctance to an amended complaint and you-all going forward on that basis.

Mr. Morales was very articulate about why he thought that was not feasible. It sounded real great.

But honestly, Mr. Morales, as I heard it, I mean, it sounded great, you delivered it great, but it really wasn't persuasive to me about why you-all can't join together.

I think an amended omnibus complaint will make this case go much smoother for everyone involved. And so I highly recommend that after this call you-all try to get together and try to figure that out.

MR. FREEMAN: Your Honor, may I --

MR. MORALES DOYLE: Excuse me.

THE COURT: Mr. Freeman.

MR. FREEMAN: Your Honor, I was just going to ask, do you include the United States in that request, because it

would be exceedingly difficult for us to be able to confer with private plaintiffs.

THE COURT: I see that. You have a different representation to this. So I exclude the U.S. from that discussion.

MR. FREEMAN: Thank you, Your Honor.

THE COURT: Who else wanted to chime in?

MR. COX: Judge, it also implicates the issue that we do have one party, Isabel Longoria, who is both a plaintiff and a defendant in the case, and how we would manage to have a unified omnibus complaint in that respect; I'm not sure.

THE COURT: Yeah. So I'm not making any rulings. I can't force you to do that. You-all continue to talk among yourselves and see what's best.

Even if you don't do an omnibus complaint, you-all really need to treat this almost as an MDL. You need to have one or two of your group serve as the lead lawyer to speak on behalf of discovery issues and so forth. We've got to make this case more manageable, and an MDL analogy makes most sense to me.

MR. MORALES DOYLE: We will absolutely discuss with one another. I want to assure you, Your Honor, that all of plaintiffs' counsel have been in touch with one another. We are not trying to make this more complicated than it needs to be and we will discuss what you proposed.

THE COURT: Okay. What have I forgotten? Anybody want to speak up?

MR. SWEETEN: Nothing from the State, Your Honor.

MR. FREEMAN: Nothing from the United States, Your Honor.

THE COURT: So I didn't give a deadline for amended complaints.

So I guess the deadline needs to be whatever date I gave you to file the response to motion to dismiss. So you either file a response to a motion to dismiss, or you file an amended complaint, by the --

Did I say the 29th? Did I give you a date or not? I don't remember.

MR. MORALES DOYLE: You said 15 days, Your Honor, which I believe would put us at December 1st. Unless that is 15 days from today, or 15 days from the deadline.

THE COURT: Let's just make this simple.

Amended initial disclosures by everybody due by December 1.

Responses to motion to dismiss or amended complaints due by December 1st.

If there's responses to motions to dismiss, then the State has 14 days thereafter to file any reply briefs.

Was that clear enough?

MR. MORALES DOYLE: Yes, Your Honor.

MR. ENNIS: May I raise one more thing, from Medina County? This is Chad Ennis.

THE COURT: Yes.

MR. ENNIS: You mentioned, and I think we got sidetracked, was, is there a way to get rid of some of these claims, or at least deal with some of these claims that are purely legal claims?

And I think it may make sense for Your Honor to order us or get us to meet and confer on are there any of these claims that present purely legal issues that we can agree that we can brief early and get them to Your Honor and get them disposed of without the need for discovery or back and forth, and really kind of focus the case.

Obviously, we think omnibus pleadings would help a ton, but if we don't get that, at least we could try to focus this down on what are factual issues that we have to fight about and how do we get this thing ready for trial in July.

THE COURT: So I already ordered you-all to do that in my first order. It was in there in the laundry list.

Meet and confers are not a one-time occasion, so they can be continuing. And so continue to meet and confer on that and all the other issues. It would benefit us all, if we're going to be in this push to July, if we can take up some strictly legal matter.

Now, Mr. Sweeten, I'm not saying your side is being

unreasonable, but if you start arguing that, you know, everything can be disposed of by summary judgment, well, you know, that's not going to help me either.

And so, I mean, for example intentional discrimination. You can't tee that up by summary judgment without discovery, just as an example.

And so you-all continue to meet and confer to figure out what, if any, discrete issues are solely legal issues and that I can take up earlier rather than later.

MR. SWEETEN: Yes, Your Honor.

THE COURT: Anybody else?

Okay. We'll meet again.

Thank you.

(Concludes proceedings.)

-o0o-

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: 11/19/2021

/s/ Gigi Simcox
United States Court Reporter
655 East Cesar E. Chavez Boulevard
San Antonio TX 78206
Telephone: (210)244-5037