UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, *Plaintiffs*, v. THE STATE OF TEXAS, *et al.*, *Defendants*.	§ § § § § § §	Case No. 5:21-cv-844-XR [Lead Case]

MOTION TO DISMISS THE FIRST AMENDED COMPLAINT OF LA UNIÓN DEL PUEBLO ENTERO, ET AL.

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INTRODUCTION

In their First Amended Complaint (ECF 140), the LUPE Plaintiffs still fail to address sovereign immunity and standing claim-by-claim and provision-by-provision, as Fifth Circuit precedent requires. They assert claims against the Secretary of State, Attorney General, and now the State of Texas, but they have failed to plead facts supporting an exception to sovereign immunity. Nor have they plausibly alleged standing to assert their claims.

The LUPE Plaintiffs' claims also fail as a matter of law. They cannot assert an Americans with Disabilities Act ("ADA") claim without identifying particular voters with identified disabilities. And their Voting Rights Act ("VRA") claims fail because they, as non-voters, do not have implied causes of action. So if the Court concludes it has jurisdiction, it should dismiss Counts IV-VI and Count IX for the reasons explained below. *See* Fed. R. Civ. P. 12(b)(6). The LUPE Plaintiffs' amendments in response to the State Defendants' original motion to dismiss (i.e., dropping the Governor and one of eleven counts from the original complaint) are not enough to meet their pleading burden.[1]

ARGUMENT

I. Plaintiffs Cannot Satisfy *Ex parte Young*

Sovereign immunity "prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). Although "*Ex parte Young* allows injunctive or declaratory relief against a state official in her official capacity," it applies only when "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).

Fifth Circuit "precedents distill three rules": (1) "it is not enough that the state official was merely the but-for cause of the problem that is at issue in the lawsuit"; (2) "where a statute is being

[1] Of course, the State Defendants believe that Plaintiffs' other claims are meritless as well. But for the sake of judicial efficiency, they will address those claims and other issues in subsequent motions, if necessary. *See* ECF 31, Order to Consolidate, *La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-844-XR (W.D. Tex. Sept. 30, 2021).

challenged, . . . a provision-by-provision analysis is required"; and (3) "in 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, 877–78 (5th Cir. 2021) (per curiam) (citing *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 175, 179–81 (5th Cir. 2020)).

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)). During the status conference, the parties discussed this issue. The State Defendants argued that "the plaintiffs haven't met their burden of specific allegations about what conduct from the defendants they are complaining of." Ex. A at 16. The Court sent "clear signals to all the plaintiff groups, you need to further amend your complaints here to address these challenges." *Id.* But the LUPE Plaintiffs did not adequately address this problem in their amended complaint. They still fail to allege relevant enforcement roles for the Secretary of State and Attorney General on a claim-by-claim and provision-by-provision basis.

A. Plaintiffs Have Not Plausibly Alleged an Enforcement Role for the Secretary

Sovereign immunity precludes the LUPE Plaintiffs' claims against the Secretary of State because he does not have a sufficient connection with enforcement of the challenged SB1 provisions. As the Fifth Circuit explained, "in the particular context of Texas elections, . . . the Secretary's role varies," so Plaintiffs "must identify the Secretary's specific duties within the particular statutory provision." *Tex. Democratic Party*, 860 F. App'x at 877–78 (citing *Tex. Democratic Party*, 978 F.3d at 179–80). The LUPE Plaintiffs fail to address the Secretary's enforcement authority "provision-by-provision" as required. *Id.* at 877.

The LUPE Plaintiffs assert Counts I–X against the Secretary. In these counts, they challenge SB1 §§ 2.04, 2.07, 2.10, 3.04, 3.09, 3.10, 3.12, 3.13, 4.01, 4.06, 4.07, 4.09, 4.10, 5.07, 5.11, 5.13, 6.01,

6.03–6.07, and 7.04. *See* ECF 140 ¶¶ 217, 230, 244, 257, 268, 274, 288, 304, 313, 325. The LUPE Plaintiffs fail to allege the Secretary's connection to enforcement of these provisions. The Secretary, in fact, does not enforce them.

For example, the LUPE Plaintiffs allege that §§ 2.04 and 2.10 require registrars to provide information to the Secretary and others, and that this "will have a chilling effect on voter registration" and "facilitate investigation and prosecution of perfectly legal activity by voters." *Id.* ¶¶ 141–43, 220. Neither provision authorizes the Secretary to undertake an investigation or prosecution. *Cf.* SB1 § 2.10 (referring to "an investigation" by "the county or district attorney"). An injunction against the Secretary could not prevent any allegedly injurious enforcement. The Secretary is a mere recipient of information. It is difficult to imagine how the Secretary could be enjoined from receiving information. As for § 2.07, the Secretary sends information to voter registrars, but the LUPE Plaintiffs concede that voter registrars determine whether a voter is removed from the voter registration list. *See* ECF 140 ¶ 144. Sharing information is not enforcement, as it does not involve "compulsion or constraint." *City of Austin*, 943 F.3d at 1000.

SB1 §§ 3.04 and 3.13 relate to the location of polling places, but the Secretary does not designate polling locations. *See Tex. Democratic Party v. Hughs*, 997 F.3d 288, 291 (5th Cir. 2021) (finding that "[t]he Secretary plays no role"); *see also* Tex. Elec. Code §§ 43.002–43.004 (assigning this responsibility to local officials). The Secretary does not enforce §§ 3.09, 3.10, or 3.12 either. These provisions amend Texas Election Code §§ 85.005, 85.006(b) and (e), and 85.061(a), respectively, which are enforced by the early voting clerk. *See* Tex. Elec. Code §§ 83.001–83.0012 (identifying whom is the early voting clerk and specifying that "[t]he early voting clerk shall conduct the early voting in each location"); *see also id.* §§ 85.005, 85.006(b), 85.006(e), 85.061(a) (specifying how the early voting clerk shall conduct early voting in certain elections).

The Secretary also does not enforce the challenged provisions relating to watchers, that is,

§§ 4.01, 4.06, 4.07, 4.09, and 4.10. These provisions do not specify an enforcement role for the Secretary. *Id.* §§ 32.075, 33.051, 33.056, 33.061, 33.063. The only alleged connection between the Secretary and these provisions in the LUPE Plaintiffs' amended complaint is one paragraph concerning a guide on the Secretary's website. ECF 140 ¶ 34. SB1 does not require the Secretary to publish that guide. The LUPE Plaintiffs misquote Texas Election Code § 33.008, which was added by SB1 § 4.04. Section 4.04 requires that the Secretary "develop and maintain a training program for watchers," but the LUPE Plaintiffs have not explained how providing online training and a certification upon completion to watchers has any relation to the harm they allege. *See Mi Familia Vota*, 977 F.3d at 465 (explaining that the Secretary is not a proper defendant where "[d]irecting the Secretary not to enforce [the challenged provision] would not afford the Plaintiffs the relief that they seek").

As to the challenged voting-by-mail provisions—§§ 5.07, 5.11, 5.13—the Secretary does not enforce these either. As the LUPE Plaintiffs admit, the early voting clerk enforces the ballot-application requirement of § 5.07. Tex. Elec. Code § 86.001(c); *see* ECF 140 ¶ 130. The LUPE Plaintiffs also admit that the signature verification committee enforces the carrier-envelope requirement of § 5.11. Tex. Elec. Code § 87.027(i); *see* ECF 140 ¶ 139. The early voting ballot board enforces the carrier-envelope requirement of § 5.13, not the Secretary. Tex. Elec. Code § 87.041(a).

The Secretary also does not enforce the challenged assistance-of-voters provisions in §§ 6.01 and 6.03–6.07. The LUPE Plaintiffs admit that local officials, not the Secretary, enforce §§ 6.01, 6.03–6.05, and 6.07. ECF 140 ¶ 46. The LUPE Plaintiffs complain that § 6.01 "discourages voter assistance" because individuals "must complete and sign a form." *Id.* ¶ 110. The LUPE Plaintiffs do not mention any relevant role for the Secretary (just receiving the form), *see id.*, and in fact, the Secretary's only potentially relevant role is to "prescribe the form." Tex. Elec. Code § 64.009(h). But the LUPE Plaintiffs are not complaining about the design of the form. Instead, they complain about having to "complete and sign [the] form," which will allegedly "deter individuals from giving these rides." ECF

140 ¶ 110. The LUPE Plaintiffs do not discuss who enforces the requirement if someone refuses to fill out the form (not the Secretary), nor do they claim that the Secretary will otherwise require them to fill out the form. Under Texas law, the form is "provided by" a local "election officer." Tex. Elec. Code § 64.009(f).

SB1 § 6.04 requires an oath, but it is "an election officer at the polling place," not the Secretary, that administers and enforces the oath requirement. *Id.* § 64.034; *see also id.* §§ 32.071 ("The presiding judge is in charge of and responsible for the management and conduct of the election at the polling place . . . .); 32.074 ("An election judge or clerk may administer the oath required or authorized to be made at a polling place.").

Concerning § 6.05, the LUPE Plaintiffs complain that requiring assistors "to fill out additional information on the mail ballot carrier envelope . . . will deter assistors and increase the risk that the ballot will be rejected." ECF 140 ¶ 107. Once again, SB1 does not delegate to the Secretary authority to enforce this requirement. Tex. Elec. Code § 86.010. The LUPE Plaintiffs complain that § 6.06 will "deter . . . assistors who fear prosecution." ECF 140 ¶ 109. However, the Secretary is not authorized to prosecute violations of § 6.06. *See* Tex. Elec. Code § 86.0105. SB1 § 6.07 merely requires that space appear on the carrier envelope for "indicating the relationship . . . to the voter" of "a person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier." *Id.* § 86.013(b). The LUPE Plaintiffs complain that § 6.07 creates "additional burdensome steps" and subjects voters to criminal penalties, ECF 140 ¶ 320, but the Secretary is not delegated authority to enforce this provision either. Tex. Elec. Code § 86.013(b).

The final provision of SB1 that the LUPE Plaintiffs challenge is § 7.04. Section 7.04 adds §§ 276.015–.019 to the Election Code, but the Secretary is not authorized to enforce those provisions. *See id.* §§ 276.015–.019.

As they did in their original complaint, the LUPE Plaintiffs improperly seek to rely on general

statutes concerning the Secretary's authority. It is not enough to cite Texas Election Code § 31.001, which provides that the Secretary "is the chief election officer of the state." ECF 140 ¶ 22. Nor is it sufficient to rely on general statutes granting the Secretary election oversight authority. *See id.* ¶¶ 24–25, 29–30 (citing Tex. Elec. Code §§ 31.003–.005). Plaintiffs must "identify the Secretary's specific duties within the particular statutory provision" at issue. *Tex. Democratic Party*, 860 F. App'x at 877–78. By omitting the required "provision-by-provision analysis," *id.*, the LUPE Plaintiffs fail to sufficiently allege how enjoining the Secretary will prevent the alleged harm from the challenged SB1 provisions. *See Mi Familia Vota*, 977 F.3d at 465.

The LUPE Plaintiffs include allegations regarding the Secretary's authority under other sections of the Texas Election Code, but in each instance, they fail to sufficiently allege how enjoining the Secretary from acting pursuant to the authority granted by those general statutes will prevent the alleged harm. *See* ECF 140 ¶¶ 26–35. For example, the LUPE Plaintiffs allege that, by monitoring registrars, the Secretary "directly affect[s] the amount of the new civil penalty for which the registrar becomes liable," *id.* ¶ 26, but the Secretary is not authorized to recover that penalty. *See* Tex. Elec. Code § 18.065. And, as explained above, although the Secretary designs some forms, the LUPE Plaintiffs fail to allege how enjoining the Secretary from that task will prevent the alleged harm from the challenged SB1 provisions. *See* ECF 140 ¶¶ 27–28. The LUPE Plaintiffs' allegations regarding the Secretary's general authority to perform inspections, pass along information to others, and provide training are similarly lacking. *See id.* ¶¶ 29–34.

B. The Attorney General is Also Immune

Sovereign immunity also bars the LUPE Plaintiffs' claims against the Attorney General. Again, allegations that the Attorney General has a general duty to enforce state laws, *id.* ¶¶ 36–38, are not enough to satisfy *Ex parte Young*. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 401–02 (5th Cir. 2020). A "provision-by-provision analysis is required" to show that a state official has the requisite

connection to each challenged provision. *Tex. Democratic Party*, 860 F. App'x at 877. The LUPE Plaintiffs assert claims against the Attorney General based on numerous SB1 provisions, *see* ECF 140 ¶¶ 217, 230, 244, 257, 268, 274, 288, 304, 313, 325, but for most of these provisions, they fail to address the Attorney General's enforcement role at all. By failing to include these necessary allegations, the LUPE Plaintiffs have not satisfied their burden to show that the Attorney General is a proper defendant.

Where the LUPE Plaintiffs do attempt to address the Attorney General's enforcement role, their allegations fall short. The LUPE Plaintiffs complain that SB1 § 2.04 "will have a chilling effect on voter registration" due to the "added threat of criminal prosecution." ECF 140 ¶ 141. But the Attorney General does not enforce § 2.04. Under that provision, he merely receives information. *See* SB1 § 2.04 (codifying Tex. Elec. Code § 15.028). As explained above, enforcement is defined by "compulsion or constraint," *City of Austin*, 943 F.3d at 1000, but § 2.04 does not empower the Attorney General to compel or constrain anyone. Because "the requisite connection is absent," the *Ex parte Young* analysis ends there. *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (citing *City of Austin*, 943 F.3d at 998), *vacated as moot sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021).

The LUPE Plaintiffs allege that § 6.01 "will deter individuals from giving" rides to the polls to seven or more voters—even though doing so "is not illegal" under SB1—because such drivers "must complete and sign a form." ECF 140 ¶ 110. The Attorney General has no role in that process, except that the form is "available to the attorney general for inspection upon request." SB1 § 6.01 (codifying Tex. Elec. Code § 64.009(g)). That is not "compulsion or constraint." *City of Austin*, 943 F.3d at 1000.

In relation to other provisions of SB1, the LUPE Plaintiffs allege that the Attorney General "prosecutes potential violations of Texas election law." ECF 140 ¶¶ 289, 305, 314, 326. But that ignores a recent ruling from the Texas Court of Criminal Appeals. Just last month, that court held that Texas Election Code § 273.021—which provides 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." *State v. Stephens*, 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.[2] 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 to 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.

II. Plaintiffs Cannot Sue the State of Texas

The LUPE Plaintiffs assert Counts IV, V, and VI against the State of Texas. *See* ECF 140 ¶¶ 257, 268, 274. Each of these counts is barred by sovereign immunity. "Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)). "Unless waived by the state, abrogated by Congress, or an exception applies, the immunity precludes suit." *Tex. Democratic Party*, 978 F.3d at 179 (citing *City of Austin*, 943 F.3d at 997).

Counts IV and V raise claims under the Voting Rights Act. Although *OCA-Greater Houston* held that the Voting Rights Act abrogates sovereign immunity, that case was wrongly decided. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017). "Congress did not unequivocally abrogate state sovereign immunity under Section 2 of the Voting Rights Act." *Ala. State Conference of*

[2] 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.

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.

With respect to the LUPE Plaintiffs' ADA claim in Count VI, 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, the LUPE Plaintiffs have not alleged conduct violating Title II, *see infra* Part IV.A, so Texas is entitled to sovereign immunity on Count VI.

III. Plaintiffs Lack Standing

A. Plaintiffs Bear the Burden of Establishing Standing on a Claim-by-Claim Basis

"[S]tanding is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation omitted). At the pleading stage, Plaintiffs must "clearly . . . allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 339 (2016) (quotation omitted). A plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant; and

(3) that is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Artificial entities have two options for trying to establish standing: (1) associational standing and (2) organizational standing. *See NAACP v. City of Kyle*, 626 F.3d 233, 237–38 (5th Cir. 2010). For associational standing, the entity must show that (1) its members would independently have standing; (2) the interests the organization is protecting are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019). For organizational standing, the plaintiff must establish, in its own right, an injury in fact, causation, and redressability. *Id.*

Because the LUPE Plaintiffs are "invoking federal jurisdiction," they "bear[] the burden of establishing these elements." *Lujan*, 504 U.S. at 561. Additionally, because "[s]tanding is not dispensed in gross," Plaintiffs must plausibly allege "standing to challenge *each provision* of law at issue." *In re Gee*, 941 F.3d 153, 161–62 (5th Cir. 2019) (per curiam) (emphasis added). But rather than proceed "provision-by-provision" and "claim-by-claim," *id.* at 165, 170, the LUPE Plaintiffs' standing allegations often treat SB1 as an undifferentiated whole. That does not suffice.

B. Plaintiffs Have Not Plausibly Alleged Traceability or Redressability

As an initial matter, the LUPE Plaintiffs lack standing because their alleged harms are neither traceable to State Defendants nor redressable by this Court. By and large, the LUPE Plaintiffs challenge SB1 as an undifferentiated whole, without tying their alleged injuries to particular enforcement actions by any of the State Defendants. The LUPE Plaintiffs name the State of Texas as a defendant for Counts IV, V, and VI, but they fail to allege enforcement of the provisions challenged in those counts by a state official such that the alleged harm is traceable to the State and redressable by a favorable decision. To the extent the LUPE Plaintiffs attempt to allege enforcement by state officials, they reference the Secretary and Attorney General. But, as explained in Part I, the Secretary

and Attorney General do not have broad power to enforce all of SB1. The *Ex parte Young* analysis above "significantly overlap[s]" with the traceability and redressability analysis. *City of Austin*, 943 F.3d at 1002. However, traceability and redressability are still required even when sovereign immunity is inapplicable. *See* U.S. Const. art. III, § 2. Thus, even if the State Defendants are not immune from suit, the Court should dismiss the LUPE Plaintiffs' claims for lack of standing because of Plaintiffs' failure to adequately plead enforcement of the challenged SB1 provisions by the State Defendants.

To be sure, *OCA-Greater Houston* 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.'" 867 F.3d at 613. 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").

C. No Plaintiff Has Associational Standing

The amended complaint does not plausibly allege facts establishing associational standing. A plaintiff cannot have associational standing unless one of its members independently satisfies the Article III standing requirements. *Ctr. for Biological Diversity*, 937 F.3d at 536. The plaintiff must therefore make two threshold showings: (1) that it has "members" within the meaning of the associational standing test from *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977) (requiring "indicia of membership"), and (2) that identified members have "suffered the requisite harm," *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). The LUPE Plaintiffs here have done neither.

First, the LUPE Plaintiffs have not alleged facts establishing that they have "members" under the *Hunt* test. Plaintiffs ADL, SVREP, and WCVI do not assert associational standing. ECF 140 ¶¶ 12–13, 18 (asserting only organizational standing). The remaining entity Plaintiffs assert that they have members, at least in the colloquial sense, but they fail to allege that their purported members "possess all of the indicia of membership": that "[t]hey alone elect the members of the [governing board]; they alone may serve on the [governing board]; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them." *Hunt*, 432 U.S. at 344–45. Generally, members must "participate in and guide the organization's efforts." *Ass'n for Retarded Citizens of Dall. v. Dall. Cnty. Mental Health & Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994). More specifically, the members must "elect leadership, serve as the organization's leadership, and finance the organization's activities, including the case's litigation costs." *Texas Indigenous Council v. Simpkins*, No. 5:11-cv-315, 2014 WL 252024, at *3 (W.D. Tex. Jan. 22, 2014) (Rodriguez, J.). The LUPE Plaintiffs allege no such facts. *See* ECF 140 ¶¶ 9–11, 14–17, 19, 146–166, 178–205, 207–14.

Second, even assuming the entity Plaintiffs have members, they have failed to "identify

members who have suffered the requisite harm" to establish injuries in fact. *Summers*, 555 U.S. at 499. As this Court recognized at the status conference, the LUPE Plaintiffs' original complaint did not "identify[] specific members of those associations who would themselves have standing to sue." Ex. A at 18. The Court advised the plaintiffs "to flush that out because I don't see where many of you have articulated those individuals sufficient to withstand any challenge." *Id.* But the LUPE Plaintiffs did not follow that advice. The only individual identified in the amended complaint, James Lewin, is not alleged to be a member of the entity Plaintiffs. ECF 140 ¶¶ 20, 215.

This defect, on its own, is sufficient to support dismissal. *See*, *e.g.*, *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2017) (Souter, J.) (dismissing claim for lack of standing where entity plaintiff failed to identify a member who was affected by the challenged regulation); *Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008) (dismissing claim for lack of standing where entity plaintiff failed to identify a member who was affected by the disability policy).[3]

Finally, even if Plaintiffs otherwise had associational standing (they do not), they would not be able to rely on associational standing for their disability-based claims: Count V under § 208 of the VRA and Count VI under the ADA. The third element of associational standing demands that "neither the claim asserted nor the relief requested requires participation of individual members." *Ctr. for Biological Diversity*, 937 F.3d at 536. "To determine whether" a "claim require[s] individual participation," courts "examine[] the claim's substance." *Cornerstone Christian Sch. v. UIL*, 563 F.3d 127, 134 (5th Cir. 2009). If the claim has an "individualized element," then "[t]he involvement of" individual members "is essential to the resolution of the" claim. *Id.*

Here, the LUPE Plaintiffs' disability claims require the participation of individual members,

[3] Although an unpublished opinion of the Fifth Circuit once noted that the panel was "aware of no precedent holding that an association must set forth the name of a particular member in its complaint," *Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012), the precedent cited above holds exactly that.

both because they have individualized elements and because of the relief requested. For example, "to prevail on a claim of disability discrimination under the ADA, a party must prove that he has a disability," *Neely v. PSEG Tex., LP*, 735 F.3d 242, 245 (5th Cir. 2013) (citations omitted), and that the disability "substantially limits an individual in a major life activity," *Garrett v. Thaler*, 560 F. App'x 375, 383 (5th Cir. 2014) (per curiam); *see also Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021, at *1–3, *6–7 (E.D. Tex. Aug. 7, 2008) (as to § 208, considering the specific effect of Texas early voting law on group of elderly plaintiffs). This requires "a case-by-case analysis" of specific facts and circumstances, with respect to each particular plaintiff. *Duncan v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 469 F. App'x 364, 369 (5th Cir. 2012) (per curiam). The LUPE Plaintiffs' "complaint alleges no facts suggesting" 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.

D. None of the Entity Plaintiffs Plausibly Allege a Cognizable Injury

The entity Plaintiffs have not plausibly alleged that they, as organizations, will suffer injuries in fact. They therefore lack organizational standing.

ADL: Plaintiff ADL claims standing on two grounds, but neither suffices. First, ADL alleges that it "is concerned that" its future activities "would place" it "at risk of prosecution." ECF 140 ¶ 168. But "subjective fear . . . does not give rise to standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). ADL does not even assert that it is likely to be prosecuted, much less plausibly allege that the risk of prosecution is more than "speculative." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018).

Second, ADL claims it "will be required to divert and expend resources on designing its voter education to properly inform Texas voters about SB1[]." ECF 140 ¶ 169. As an initial matter, an

organization's "self-serving observation that it has expended resources to educate its members and others regarding [the challenged law] does not present an injury in fact." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). If standing were so broad, law professors would always have standing to challenge any new law.

In any event, although the diversion of resources can constitute a requisite injury under certain circumstances, "[n]ot every diversion of resources to counteract [a] defendant's conduct . . . establishes an injury in fact." *City of Kyle*, 626 F.3d at 238. "The change in plans must still be in response to a reasonably certain injury imposed by the challenged law." *Zimmerman*, 881 F.3d at 390. A diversion of resources is thus cognizable only if the plaintiff "would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Here, ADL does not allege an underlying injury that its alleged diversion was needed to counteract. Nor does it "identify 'specific projects that [it] had to put on hold or otherwise curtail in order to respond to' the defendant's conduct." *Def. Distributed v. U.S. Dep't of State*, No. 1:15-cv-372-RP, 2018 WL 3614221, at *4 (W.D. Tex. July 27, 2018) (quoting *City of Kyle*, 626 F.3d at 238).

WCVI: Plaintiff WCVI argues that it "will be forced to divert resources" for the purposes of "explaining," "analyzing," and "informing Texas Latino voters about SB1[]." ECF 140 ¶ 206. Again, diverting resources to educate individuals about a challenged law "does not present an injury in fact." *Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1434. Moreover, where, as here, WCVI has not alleged that it "would have suffered some other injury if it had not diverted resources," the mere allegation of diversion or resources is insufficient to confer standing. *Zimmerman*, 881 F.3d at 390.

MABA-TX: Plaintiff MABA-TX alleges that SB1 will have "negative effects" on third parties and "communities," supposedly requiring MABA-TX "to divert resources to prepare new educational materials" as well as "educate" third parties "about SB1[]." ECF 140 ¶¶ 190, 192. That does not confer

standing for the reasons explained above. A plaintiff's opposition to a law's effects is not a cognizable injury, *see Ass'n of Community Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 362 n.7 (5th Cir. 1999); *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996), nor is the expense of educating others about SB1, *see Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1434. Moreover, MABA-TX has not alleged "any specific projects" it will have "to put on hold" due to its alleged diversion of resources. *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000). Finally, MABA-TX's concern that SB1 could affect who wins elections, *see* ECF 140 ¶ 193, does not suffice because "[a]n organization's general interest in its preferred candidates winning as many elections as possible is . . . a 'generalized partisan preference[]' that federal courts are 'not responsible for vindicating.'" *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1263 (11th Cir. 2020) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018)).

Texas HOPE: Plaintiff Texas HOPE offers three proposed injuries, but none succeeds. First, Texas HOPE argues that it "will be forced to divert resources to educate its membership about SB1[]," ECF 140 ¶ 197, but again, educating members is not a cognizable injury in fact. *See Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1434. Second, Texas HOPE contends that SB1 will "depress Latino turnout," ECF 140 ¶ 198, but an "abstract social interest in maximizing voter turnout . . . . cannot confer Article III standing." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014); *see Gill*, 138 S. Ct. at 1933. Third, "Texas HOPE *believes* it will have difficulty recruiting election workers because" potential volunteers suffer from "confusion" and "fear" about SB1. ECF 140 ¶ 199 (emphasis added). A plaintiff's speculative belief about the reactions of third parties to a challenged law cannot support standing, both because it is based on "conjecture" and because it is "based on third parties' subjective fear." *Clapper*, 568 U.S. at 417 n.7.

LUPE: Plaintiff LUPE alleges four theories of standing, but each fails. First, LUPE alleges that "SB1 will injure LUPE by exposing the organization's paid staff and members to investigation

and prosecution." ECF 140 ¶ 152. However, LUPE does not assert that it is likely to be investigated or prosecuted, much less plausibly allege that the risk of investigation or prosecution is more than "speculative." *Zimmerman*, 881 F.3d at 390. Second, it claims "SB1 will frustrate [its] mission" by "reducing voter turnout." ECF 140 ¶ 160. That is not an injury in fact. *See Fair Elections Ohio*, 770 F.3d at 461. Third, LUPE alleges that it will "divert its resources . . . to counteract the negative effects" on voter turnout. ECF 140 ¶ 158. Because the alleged underlying effect on voter turnout is not a cognizable injury, neither is a diversion of resources meant to prevent that non-injury. *See Zimmerman*, 881 F.3d at 390; *La Asociacion de Trabajadores de Lake Forest*, 624 F.3d at 1088. Fourth, LUPE alleges it "will be required to divert resources . . . to comply with SB1's" rules regarding "assisting voters," ECF 140 ¶ 161, but LUPE does not allege any "imminent" and "*certainly impending*" plans to provide such assistance to would-be voters. *Clapper*, 568 U.S. at 409. Even if that were an injury in fact, it would not give LUPE standing to challenge any of the other provisions at issue.

Friendship-West: Plaintiff Friendship-West lacks standing for many of the reasons discussed above. First, Friendship-West alleges that "SB1 will frustrate [its] mission," ECF 140 ¶ 162, but "[f]rustration of an organization's objectives is the type of abstract concern that does not impart standing." *Nat'l Treasury Emps. Union*, 101 F.3d at 1429. Second, it alleges that SB1 "will frustrate its ability to operate as a polling place." ECF 140 ¶ 162. However, Friendship-West fails to allege how. This purely hypothetical alleged injury cannot support standing. *See Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 187 (M.D.N.C. 2020) (citing *Clapper*, 568 U.S. at 402). Third, Friendship-West alleges that it "will . . . be required to divert and expend resources . . . to ensure that its congregants and community members comply with SB1's new, often confusing, and vague restrictions," ECF 140 ¶ 166, but educating others about the law is not an injury in fact. *Nat'l Taxpayers Union*, 68 F.3d at 1434. Fourth, Friendship-West alleges that it "believes" that third parties will react to SB1 in ways it does not like, ECF 140 ¶ 165, but again, supposed injuries based on "conjecture"

and "third parties' subjective fear" are doubly insufficient. *Clapper*, 568 U.S. at 417 n.7.

SVREP: Plaintiff SVREP alleges that SB1 will have "negative effects" on voter turnout and that it must "divert its resources . . . to counteract" those "negative effects." ECF 140 ¶ 171; *see id.* ¶ 176. That does not establish standing because SVREP's "abstract social interest in maximizing voter turnout . . . . cannot confer Article III standing." *Fair Elections Ohio*, 770 F.3d at 461. Like LUPE, SVREP also alleges it "will be required to divert resources . . . to comply with SB1's" rules regarding "assisting voters," ECF 1 ¶ 173, but SVREP does not allege any "imminent" and "*certainly impending*" plans to provide such assistance to would-be voters. *Clapper*, 568 U.S. at 409. But even if SVREP were injured, its standing would be limited to challenging provisions that increase the costs of assisting voters.

Texas Impact: Plaintiff Texas Impact allegedly foresees "difficulty recruiting election workers" due to "confusion about SB1's new rules for partisan poll watchers and fear among volunteers of criminal prosecution for conduct that could 'obstruct the view of a watcher.'" ECF 140 ¶ 179. But again, standing cannot be "based on third parties' subjective fear." *Clapper*, 568 U.S. at 417 n.7. Next, Texas Impact claims it "has already" diverted, and "anticipates being required to continue" diverting, its time and resources "toward ensuring that its members comply with SB1[]," ECF 140 ¶ 182, but Texas Impact does not allege what "reasonably certain injury imposed by" SB1 this alleged diversion is a "response to." *Zimmerman*, 881 F.3d at 390; *see La Asociacion de Trabajadores de Lake Forest*, 624 F.3d at 1088. Nor does Texas Impact allege which provisions of SB1 allegedly impose these compliance costs.

Jolt Action: Plaintiff Jolt Action alleges that "SB1 will frustrate [its] mission" and that it wants "to counteract the negative effects of SB1," ECF 140 ¶¶ 200, 204, but even a "direct conflict" between an "organization's mission" and a challenged law does not suffice "to confer standing on the organization." *Fowler*, 178 F.3d at 362 n.7. Like LUPE and SVREP, Jolt Action, alleges it "will be

required to divert resources . . . to comply with SB1's" rules regarding "assisting voters," ECF 140 ¶ 205, but Jolt Action does not allege any "imminent" and "*certainly impending*" plans to provide such assistance to would-be voters. *Clapper*, 568 U.S. at 409. But even if Jolt Action were injured, its standing would be limited to challenging provisions that increase the costs of assisting voters.

Fiel: Plaintiff Fiel alleges the same injuries as Jolt Action, *see* ECF 140 ¶¶ 207, 209, 211, and they fail for the same reasons.

OCA-Greater Houston, about which the Court asked at the status conference, is not to the contrary. In that case, the Fifth Circuit considered whether a plaintiff's alleged diversion of resources was an injury in fact. The court analyzed a "critical distinction": whether the expenses "were related to litigation" or "unrelated to litigation." *OCA-Greater Hous.*, 867 F.3d at 612. That is an important limitation on organizational standing, but it is not at issue in this case.

In this case, one key question is whether the LUPE Plaintiffs' alleged diversions of resources are self-inflicted injuries or necessary responses to cognizable injuries they otherwise would have suffered. *OCA-Greater Houston* did not analyze that question, seemingly because the parties did not brief it. The court there simply did not consider whether the plaintiff's "change in plans" was "in response to a reasonably certain injury imposed by the challenged law," as other precedent requires the Court to address here. *Zimmerman*, 881 F.3d at 390.

E. The Entity Plaintiffs Violate the Bar on Third-Party Standing

Finally, the entity Plaintiffs lack standing for another reason: the bar on third-party standing. Section 1983 provides a cause of action only when *the plaintiff* suffers "the deprivation of any rights" at issue. 42 U.S.C. § 1983. The same is true for Plaintiffs' other causes of action. A "third party may not assert a civil rights claim based on the civil rights violations of another individual." *Barker v. Halliburton Co.*, 645 F.3d 297, 300 (5th Cir. 2011) (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1160–61 (5th Cir. 1986)). Thus, where the "alleged rights at issue" belong to a third party, the plaintiff lacks statutory

standing, regardless of whether the plaintiff has suffered his own injury. *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28 nn.3–4 (2014). Here, the entity Plaintiffs rely on the rights of third parties because they do not possess the relevant rights (*e.g.*, the right to vote, the right not to be discriminated against based on a disability). The LUPE Plaintiffs have not alleged any exception to the general prohibition on third-party standing.

F. Plaintiff Lewin is Not Injured

Plaintiff Lewin has not alleged a cognizable injury. He claims that he "*may* hesitate to volunteer" because of certain SB1 provisions regarding poll watchers. ECF 140 ¶ 215 (emphasis added). That is not an "actual or imminent" injury. *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (citing *Lujan*, 504 U.S. at 560). Subjective chill is not sufficient to establish an injury in fact, *see Clapper*, 568 U.S. at 401 (distinguishing between a certainly impending injury and one built on subjective fear), but a plaintiff who is himself unsure whether he will be chilled certainly has not established an injury in fact. He has "failed to sufficiently plead the actual chilling of [his] First Amendment rights so as to constitute an injury for standing purposes." *Guan v. Mayorkas*, No. 1:19-cv-6570, 2021 WL 1210295, at *13 (E.D.N.Y. Mar. 30, 2021); *see Ass'n of Am. Physicians & Surgeons, Inc. v. HHS*, 224 F. Supp. 2d 1115, 1125 (S.D. Tex. 2002), *aff'd*, 67 F. App'x 253 (5th Cir. 2003) (per curiam) (dismissing for lack of standing due no "actual chill").

IV. Plaintiffs' Claims Fail as a Matter of Law

If the Court concludes it has jurisdiction, it should streamline this case by dismissing claims that fail as a matter of law.

A. Plaintiffs Failed to State a Claim under the ADA

The Court should dismiss Count VI because the LUPE Plaintiffs have not stated an ADA claim. The ADA requires a plaintiff to plausibly allege: "(1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is

responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability." *Hale v. Harrison Cnty. Bd. of Supervisors*, 8 F.4th 399, 404 n.† (5th Cir. 2021) (per curiam) (quoting *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011) (per curiam)). The LUPE Plaintiffs have not plausibly alleged that they are disabled, that State Defendants provide the relevant service, that SB1 will prevent them from receiving assistance, or that reasonable accommodations are unavailable.

1. Plaintiffs Do Not Allege a Qualifying Disability

As an initial matter, the LUPE Plaintiffs do not have qualifying disabilities. Most of the plaintiffs in this case are artificial entities that could not be disabled. ECF 140 ¶¶ 9–19. Plaintiff Lewin does not allege that he is disabled. *Id.* ¶ 20.

Three of the entity Plaintiffs—LUPE, Texas Impact, and Fiel—claim to have disabled members, *see* ECF 140 ¶¶ 10, 146–48, 180, 212, 280, but that does not help them here. The LUPE Plaintiffs attempt to litigate the ADA rights of third parties despite "[t]he prohibition on third-party standing." *Sims v. Tex. Dep't of Hous. & Cmty. Affs.*, No. 4:05-cv-2842, 2005 WL 3132184, at *4 (S.D. Tex. Nov. 21, 2005) (Rosenthal, J.) (dismissing ADA and Rehabilitation Act claims); *see also Baaske v. City of Rolling Meadows*, 191 F. Supp. 2d 1009, 1016–17 (N.D. Ill. 2002) (dismissing an ADA claim for lack of third-party standing). Claims to third-party standing are even weaker where, as here, the plaintiffs' allegations do not tie the claim to "any identifiable individual" with a disability. *Sims*, 2005 WL 3132184, at *5.

Even if LUPE, Texas Impact, and Fiel could litigate the ADA rights of identified members, they have not plausibly alleged facts establishing a qualifying disability for those members. As the Court noted at the status conference, "these entity plaintiffs haven't specifically alleged what disabilities the members have, or how the disability limits any major life activity." Ex. A at 12. But the LUPE Plaintiffs did not heed the Court's advice to "file an amended complaint to cure these

deficiencies." *Id.*

Their amended complaint is based on the same conclusory assertions included in their original complaint. Asserting that their members include disabled voters does not suffice. *See* ECF 140 ¶¶ 10, 146–47, 180, 212. Asserting that these disabled voters "have disabilities that limit major life activities" is also insufficient. *See id.* ¶¶ 10, 148, 280. Even at the pleading stage, "a formulaic recitation of the elements of the cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Pleading a qualifying disability requires alleging "facts sufficient to allow [the Court] to reasonably infer that" the individuals have: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Hale*, 642 F.3d at 499–500. Because no Plaintiff has "alleged any facts displaying what her disability is or how her disability substantially limits one of her major life activities," the Court should dismiss Count VI. *Houston v. DTN Operating Co.*, No. 4:17-cv-35, 2017 WL 4653246, at *6 (E.D. Tex. Oct. 17, 2017); *see also Payne v. Midcrown Pavilion Apartments*, No. SA-19-cv-407-FB, 2021 WL 3813378, at * 12 (W.D. Tex. Aug. 26, 2021) (recommending dismissal because the complaint alleged "no medical facts" showing "that Mr. Payne is disabled under . . . the ADA").

Even if the Court finds LUPE's, Texas Impact's, and Fiel's allegations sufficient (it should not), State Defendants respectfully request that the Court at least dismiss Count VI as to the eight Plaintiffs who do not claim to be disabled or have disabled members: Friendship-West, ADL, SVREP, MABA-TX, Texas HOPE, Jolt Action, WCVI, and Lewin.

2. Defendants Do Not Administer Elections

The LUPE Plaintiffs' ADA claim also fails for an independent reason: They have not plausibly alleged a "service[], program[], or activit[y] for which the public entity is responsible." *Hale*, 642 F.3d at 499. Plaintiffs allege that "[v]oting" is the relevant "activity." ECF 140 ¶ 278. Plaintiffs make the conclusory allegation that "[t]he State of Texas is a public entity . . ., and the individual Defendants

are the public officials responsible for running these public entities," but they fail to allege facts to support this assertion as to the State Defendants. *Id.* ¶ 279.

The Fifth Circuit's opinion in *Ivy v. Williams* illuminates the "provided by" standard. 781 F.3d 250 (5th Cir. 2015), *vacated as moot sub nom. Ivy v. Morath*, 137 S. Ct. 414 (2016). There, the Fifth Circuit held that plaintiffs 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." *Id.* at 258. TEA did not teach driver education. *Id.* at 255. That TEA "provides the licensure and regulation of driving education schools" did not mean it also provides "driver education itself." *Id.* "[H]eavy regulation" and the provision of "sample course materials and blank certificates" to schools were not enough to say that TEA itself provided the educational service provided by the schools.

The same logic applies here. In general, local election officials administer Texas elections. They receive and review ballot applications, Tex. Elec. 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. State Defendants do not share those responsibilities.

In substance, the LUPE Plaintiffs would impose supervisory liability on the State Defendants. But the Fifth Circuit rejected that tactic in *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997). There, blind and mobility-impaired plaintiffs 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 had held that the Secretary had a positive obligation to ensure that local election authorities complied with the ADA—one that the Secretary had violated, it concluded, by failing to encourage the development and adoption of new voting systems. Reversing the district court, the Fifth Circuit held that the Secretary was not responsible for local officials' non-compliance with the ADA. *See id.* at 432 (holding that the Secretary has "no duty under either Texas law or the ADA to take steps to

ensure that local officials comply with the ADA").

In reaching that decision, the Fifth Circuit analyzed the Secretary's legal obligations. First, many provisions in the Election Code "give discretion to the Secretary to take some action," but "[p]rovisions merely authorizing the Secretary to take some action do not confer a legal duty on [her] to take the contemplated action." *Id.* at 429. Second, 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 with the ADA. *Id.* For similar reasons, the Attorney General and the State of Texas generally are not responsible for local election officials' compliance with the ADA.

3. Texas Law Does Not Discriminate Against Disabled Voters

The ADA does not apply unless the relevant exclusion, denial, or discrimination is "by reason of [the plaintiff's] disability." 42 U.S.C. § 12132. Here, the LUPE Plaintiffs have not identified any provision of SB1 that discriminates against voters with disabilities. Plaintiffs are not "excluded from participation in, or being denied benefits of," or "otherwise being discriminated against" in voting. *Smith v. Harris Cnty.*, 956 F.3d 311, 317 (5th Cir. 2020).

In fact, state law expressly prohibits election officials from interpreting any provision of 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.

Texans with disabilities have multiple options to vote: (1) voting in a polling place during early voting, (2) curbside voting during early voting, (3) voting in a polling place on Election Day, (4) curbside voting on Election Day, and (5) voting by mail. *See* Tex. Elec. Code §§ 41.001, 64.009, 81.001, 82.002(a). These are the same options offered to other voters, except that voters without

disabilities may not be eligible for curbside voting or voting by mail. *See id.* §§ 64.009, 82.002(a).

Texas's "program of voting comprises its entire voting program, encompassing all of its polling locations throughout the [relevant jurisdiction], as well as its alternative and absentee ballot programs." *Kerrigan v. Phila. Bd. of Election*, No. 2:07-cv-687, 2008 WL 3562521, at *13 (E.D. Pa. Aug. 14, 2008); *see also* 28 C.F.R. § 35.150 (explaining that "service, program, or activity, when viewed in its entirety" must be accessible but that a public entity does not necessarily need to "make each of its existing facilities accessible") (emphases added).

The LUPE Plaintiffs suggest that SB1 will "mak[e] it harder for [disabled voters] to get necessary assistance," ECF 140 ¶ 281, but they do not allege getting appropriate assistance will be impossible. Nor do they allege that any particular voter will be unable to vote.

"[T]here are no allegations that permit the inference that [any] decision" under SB1 "was made because of [a Plaintiff's] disability status." *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 417–18 (5th Cir. 2021). "[A] conclusory allegation that" Defendants "discriminated against [Plaintiffs] based on [a] disability" does not satisfy "the Rule 8 pleading standard." *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 600–01 (5th Cir. 2021).

4. Texas Already Provides Reasonable Accommodations

To the extent the LUPE Plaintiffs raise a failure-to-accommodate theory, it fails because Plaintiffs have not plausibly alleged that Texas has "failed to make reasonable accommodations" in voting. *Smith*, 956 F.3d at 317. Texas law provides numerous accommodations for disabled voters. Texas law guarantees that they can request a reasonable accommodation or modification to any election standard, practice, or procedure mandated by law or rule that they are entitled to request under federal or state law. Tex. Elec. Code § 1.022.

Moreover, Texas law also ensures accommodations will be made 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. *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.

The LUPE Plaintiffs do not allege any problems with these accommodations, but even if they do not match Plaintiffs' preferences perfectly, they still offer disabled voters meaningful opportunities to vote. That is enough under federal law. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985) (holding that a reasonable accommodation must give qualified individuals "meaningful access"); *Cadena v. El Paso Cnty.*, 946 F.3d 717, 725 (5th Cir. 2020) (stating that qualified individuals have a right to "meaningful access").

B. Plaintiffs Lack a Private Cause of Action for Their VRA Claims

Finally, the LUPE Plaintiffs' claims under §§ 2 and 208 of the Voting 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 53 at 24–29, 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

State Defendants respectfully request that the Court dismiss the claims against them.

Date: January 5, 2022

Respectfully submitted.

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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.

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. THE STATE OF TEXAS, *et al.*, *Defendants*.	§ § § § § § §	Case No. 5:21-cv-844-XR [Lead Case]

EXHIBIT A

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

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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.)

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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
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