CAUSE NO. 2021-57207

TEXAS STATE CONFERENCE OF THE NAACP, COMMON CAUSE TEXAS, DANYAHEL NORRIS, HYUN JA NORMAN, FREDDY BLANCO, MARY FLOOD NUGENT, and PRISCILLA BLOOMQUIST	§	
Plaintiffs,	§	IN THE DISTRICT COURT
v.	§	HARRIS COUNTY, TEXAS
GREG ABBOTT, in his official capacity as the Governor of Texas; JOHN or JANE DOE, in his or her official capacity as the Secretary of State of Texas; JOE ESPARZA, in his official capacity as the Deputy Secretary of the State of Texas; and, KEN PAXTON, in his official capacity as the Attorney General of Texas,	§	189th JUDICIAL DISTRICT
Defendants.	§	

STATE DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 91a OF THE TEXAS RULES OF CIVIL PROCEDURE

Plaintiffs Texas State Conference of the NAACP, *et al.* (Plaintiffs) have hailed a litany of State officials—the Governor of Texas, an unnamed Secretary of State, the Deputy Secretary of State, and the Attorney General of Texas (State Defendants)—into court to challenge dozens of provisions of the Texas Election Code that were either amended or added through a bill commonly identified by the moniker Senate Bill 1 (SB1). In their zeal to file a lawsuit, however, Plaintiffs failed to file a procedurally sound lawsuit.

First, Plaintiffs sued the wrong parties, and have wholly failed to connect the enforcement of the Texas Election Code provisions they seek to challenge to any of the four state officials they have sued. Second, Plaintiffs have failed to invoke a proper waiver of sovereign immunity. Plaintiffs'

reliance on Texas Election Code § 273.081 fails because that provision does not expressly waive State sovereign immunity, and in any event, the provision does not authorize a free-wheeling right to sue random state actors to challenge the constitutional validity of every provision of the Texas Election Code.

Because Plaintiffs have failed to name proper parties and failed to invoke a valid waiver of sovereign immunity, this Court should dismiss this case.

Legal Standard

To establish standing to challenge provisions of the Texas Election Code, the plaintiff must sue the party responsible for the enforcement of those provisions. *See City of El Paso v. Tom Brown Ministries*, 505 S.W.3d 124, 147 (Tex. App.—El Paso 2016, no pet.) (holding that the City of El Paso lacked the requisite enforcement connection to the challenged statute); *Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 297-98 (Tex. App.—Austin 1996, no writ) (holding that, in a statutory challenge, the plaintiff must sue the party "with authority to enforce [the] particular statute" because otherwise the declaration would be an advisory opinion).

"Sovereign immunity implicates a court's subject matter jurisdiction." *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 749 (Tex. 2020). The doctrine provides immunity both from suit and from liability. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). It preserves the separation of powers and protects public funds. *Univ. of Incarnate Word v. Redus*, 602 S.W.3d 398, 404 (Tex. 2020). In suits against the State, the plaintiff's "burden to affirmatively demonstrate the trial court's jurisdiction" "encompasses the burden of establishing a waiver of sovereign immunity." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). Because the State Defendants are sued in their official capacities only, they are entitled to invoke sovereign immunity. Pet. ¶¶ 76-79; *Tex. A&M Univ. Sys. v. Koseoglu,* 233 S.W.3d 835, 843-44 (Tex. 2007) (holding that "an official sued in his official

capacity would assert sovereign immunity[,]" and that "[w]hen a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the government itself").

A motion filed under Rule 91a of the Texas Rules of Civil Procedure is a proper vehicle to assert a lack of subject matter jurisdiction. *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 621-22 (Tex. 2021) (sovereign immunity); *see also Lexington v. Treece*, No. 01-17-00228-CV, 2021 WL 2931354, at *13-15 (Tex. App.—Houston [1st Dist.] 2021) (not reported) (standing). Because this motion challenges the Court's subject-matter jurisdiction, it is addressed to all claims alleged in Plaintiffs' Petition. Tex. R. Civ. P. 91a.2.

Argument

I. Any purported injury is not traceable to or redressable by the named State Defendants.

Because Plaintiffs have not plausibly alleged facts demonstrating an enforcement connection for each of the named Defendants to each of the provisions Plaintiffs seek to challenge, they have failed to establish the requisite standing for their challenges.

A. The Governor does not enforce the challenged provisions of the Texas Election Code.

Plaintiffs cannot establish standing to sue the Governor by relying on some generalized power or duty to enforce state law. *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc). Instead, the plaintiff must plead that the named "official can act" with respect to the specific challenged law *and* that "there's a significant possibility that he or she will act to harm [the] plaintiff." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). "The power to promulgate law is not the power to enforce it." *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020), *vacated as moot*, 141 S. Ct. 1261 (2021) (holding that Governor Abbott was not a proper defendant in the plaintiffs' challenge to the Governor's Executive Order GA-09); *see also Mi Familia Vota v. Abbott*, 977 F.3d 461, 467 (5th Cir. 2020). Even though the Governor signed Senate Bill 1, he lacks any connection to the enforcement of the provisions that Plaintiffs challenge.

Recently, the Texas Supreme Court held that a plaintiff seeking to enjoin enforcement of an executive order does not have standing to sue the Governor. In *In re Abbott*, the plaintiffs were judges who challenged GA-13, an executive order that "change[d] the rules applicable to judges' decisions regarding pretrial bail" in response to the COVID-19 disaster. 601 S.W.3d 802, 805 (Tex. 2020) (orig. proceeding) (per curiam). The plaintiffs argued that they had standing to sue the Governor because he had "the power to enforce GA-13 against the judiciary" under the Texas Disaster Act. *Id.* at 811. The Texas Supreme Court disagreed, concluding that there was "no credible threat of prosecution." *Id.* at 812 (quotation marks omitted). The Court noted that "[t]he State . . . readily concedes that the Governor cannot initiate such prosecutions" and that "the State in its briefing disclaims any intention by the Governor or the Attorney General to affirmatively enforce GA-13." *Id.* Although the Court recognized that the executive order was not "toothless," it focused its analysis on the State's acknowledgment "that GA-13's enforcement will not come in the form of criminal prosecutions by the Governor or the Attorney General." *Id.* Because the Governor disavowed any authority to initiate prosecutions for violations of the executive order, the Court concluded that the plaintiffs lacked standing and that the trial court therefore lacked subject-matter jurisdiction to enjoin the Governor. *Id.* at 812-13.

That reasoning applies with greater force here. The Governor's connection to Senate Bill 1 is his signature on the final product, and he cannot enforce Senate Bill 1 himself. Any injunction prohibiting the Governor from enforcing the Texas Election Code as amended or supplemented by Senate Bill 1—something he cannot and will not do—would not redress any harm alleged by Plaintiffs. *See Abbott*, 601 S.W.3d at 807 (explaining that, to have standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct *and likely to be redressed by the requested relief"* (emphasis added)).

The redressability requirement for standing applies with equal force to requests for declaratory judgments. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995); *Garcia v. City of Willis*, 593 S.W.3d 201, 207-08 (Tex. 2019). In *Lone Starr Multi Theaters, Inc.*, the court aptly summarized the standing requirement as follows: "In a declaratory judgment action, there must exist *between the parties* a justiciable controversy that will be determined by the judgment; otherwise the judgment amounts to no more than an advisory opinion, which a court does not have the power to give." *Lone Starr Multi Theaters, Inc.*, 922 S.W.2d at 297 (emphasis in original). This Court recognized that "the trial court in the present cause was without jurisdiction to declare the obscenity statutes unconstitutional and enjoin their enforcement because authority to enforce the statutes is constitutionally vested not in the attorney general but in district and county attorneys." *Id.* at 298.

Similarly, in *OHBA Corp. v. City of Carrollton*, the plaintiff "filed suit seeking a declaratory judgment and an injunction regarding the City of Carrollton's enforcement of its housing code." 203 S.W.3d 1, 3 (Tex. App.—Dallas 2006, pet. denied). The Fifth Court of Appeals recognized that because the plaintiff had "merely a theoretical dispute," the trial court "lacked subject matter jurisdiction over the declaratory judgment claim." *Id.* at 6.

Like the plaintiffs in *Garcia, City of Carrollton*, and *Lone Starr Multi Theaters, Inc.*, Plaintiffs here have not established that their requested declaratory or injunctive relief will remedy an actual or imminent harm. Because the Governor has no role in enforcing the provisions that Plaintiffs challenge, any harm those provisions may allegedly cause Plaintiffs cannot be redressed by declarations or injunctions entered against him. Accordingly, Plaintiffs lack standing to obtain injunctive or declaratory relief against the Governor.

B. Plaintiffs have not plausibly alleged an enforcement role for the Secretary of State.

Plaintiffs appear to cite the Secretary's status as the State's top election official as a reason why he is a proper defendant.[1] Pet. ¶¶ 77-78. That allegation does not satisfy standing requirements because it does not identify the Secretary's specific duties within the particular statutory provisions being challenged. *See Tom Brown Ministries*, 505 S.W.3d at 147 (holding that the City of El Paso lacked the requisite enforcement connection to the challenged statute); *Lone Starr Multi Theatres, Inc.*, 922 S.W.2d at 297-98 (holding that, in a statutory challenge, the plaintiff must sue the party "with authority to enforce [the] particular statute" because otherwise the declaration would be an advisory opinion). But a general duty is all that Plaintiffs allege. The challenged provisions contain no specific enforcement obligation, let alone a specific obligation related to SB1. *See Tex. Democratic Party v. Hughs*, 860 F. App'x 874, 877 (5th Cir. 2021) (per curiam) ("[I]n 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" at issue) (citing *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179–80 (5th Cir. 2020). Citing general obligations does not suffice.

C. Plaintiffs have not plausibly alleged an enforcement role for the Attorney General.

As with the Governor and the Secretary of State, Plaintiffs have not identified the Attorney General's enforcement role with sufficient specificity. Instead, Plaintiffs cite the Texas Constitution for the proposition that the Attorney General is the "chief law enforcement officer of Texas" under the Texas Constitution. Pet. ¶ 79. That generalized obligation is insufficient. That allegation does not satisfy standing requirements because it does not identify the Attorney General's specific duties within the statutory provisions being challenged. *See Tom Brown Ministries*, 505 S.W.3d at 147 (holding that

[1] Plaintiffs name "John/Jane Does" as the Secretary of State, despite naming the Deputy Secretary of State in the paragraph that follows. Pet. ¶¶ 77-78. Plaintiffs presumably sued both the absent seat and the deputy in an abundance of caution, but that is improper. The current Secretary of State is John B. Scott. *See* Texas Secretary of State, *available at* https://www.sos.state.tx.us/ (last visited Nov. 14, 2021). Without conceding that Secretary Scott is a proper party, to the extent that Plaintiffs intend to name the Secretary of State in their suit, Secretary Scott holds that office.

the City of El Paso lacked the requisite enforcement connection to the challenged statute); *Lone Starr Multi Theatres, Inc.*, 922 S.W.2d at 297-98 (holding that, in a statutory challenge, the plaintiff must sue the party "with authority to enforce [the] particular statute" because otherwise the declaration would be an advisory opinion). But a general duty is all that Plaintiffs allege. The challenged provisions contain no specific enforcement obligation, let alone a specific obligation related to SB1. Citing general obligations does not satisfy the obligation for each Plaintiff to establish standing for each provision of Senate Bill 1 they are challenging.

II. The Texas Election Code does not waive sovereign immunity for Plaintiffs' claims.

Plaintiffs rely upon § 273.081 of the Texas Election Code as the basis for this Court's subject matter jurisdiction. Pet. ¶ 19. It provides that "[a] person who is being harmed or in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring." Tex. Elec. Code § 273.081. That section does not permit Plaintiffs' suit for at least two reasons.

First, Section 273.081 applies only to *statutory*, not constitutional, violations. The plain language of the statute refers to "a violation or threatened violation *of this code*." Tex. Elec. Code § 273.081 (emphasis added). But Plaintiffs' claims are that the code itself violates the State constitution. *See* Pet. ¶¶ 213-72. That is why precedent applying Section 273.081 deals with statutory, not constitutional, violations. *See, e.g.*, *In re Gamble,* 71 S.W.3d 313, 318 (Tex. 2002) (orig. proceeding) (discussing injunctive relief provided by section 273.081 in context of violation of section 141.032 by party chair); *Cook v. Tom Brown Ministries,* 385 S.W.3d 592, 608 (Tex. App.–El Paso 2012, pet. denied) (mem. op.) (reversing trial court's denial of injunctive relief for Election Code violation and ordering city clerk to decertify and return recall petitions); *Ramirez v. Quintanilla,* Nos. 13-10-00449-CV, 13-10-00450-CV, 13-10-00454-CV, 2010 WL 3307370, at *15–16 (Tex. App.–Corpus Christi Aug. 20, 2010, pet. denied) (mem. op.) (affirming temporary injunction enjoining special election). However, nothing

in the section expressly permits an action to challenge the constitutional validity of the Texas Election Code itself.

Second, the language in Section 273.081 does not expressly waive the State's immunity from suit or liability. The fact that it authorizes "appropriate injunctive relief" in some circumstances—such as when sovereign immunity has been waived by a separate statute or because the defendant is a private party—does not mean that such relief is available against the State or its officers in this case. *See Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 287 (5th Cir. 2000) (rejecting as "a fatal logical leap" the argument "that a congressional intent to abrogate state sovereign immunity flows from the fact that an implied private cause of action exists under a statute applicable to states and private individuals"). "[A] waiver of immunity must be clear and unambiguous," *Tooke v. City of Mexia*, 197 S.W.3d 325, 333 (Tex. 2006), *see also* Tex. Gov't Code § 311.034 (immunity waivers must be "effected by clear and unambiguous language"), so any ambiguity must be resolved in favor of retaining immunity, *see Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). Because Section 273.081 can be read as authorizing injunctive relief in certain suits without authorizing such relief in these circumstances, it does not clearly and unambiguously waive sovereign immunity.

Third, even if Section 273.081 otherwise applied it would not authorize Plaintiffs to seek declaratory relief. The scope of § 273.081 is expressly limited to "appropriate injunctive relief." Plaintiffs nonetheless seek declaratory relief outside the scope of the asserted waiver. *See* Pet. at 91.

Again, it is Plaintiffs' burden to demonstrate a valid waiver of sovereign immunity, not the defendants' burden to affirmatively negate it. *Swanson*, 590 S.W.3d at 550. Because § 273.081 does not waive the State's immunity from suit or liability or waive immunity to sue for declaratory relief, Plaintiffs have failed to meet their burden of demonstrating this Court's subject matter jurisdiction.

Conclusion

For all these reasons, the Court should grant this motion, and dismiss all claims against all named State Defendants.

Dated: November 14, 2021.

Date: November 15, 2021

Respectfully submitted.

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