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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, *Plaintiff*,	§	IN THE DISTRICT COURT
	§	HARRIS COUNTY TEXAS
v.	§	
	§	189th JUDICIAL DISTRICT
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 State of Texas; KEN PAXTON, in his official capacity as the Attorney General of Texas, *Defendant*	§	

PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS

Plaintiffs' Petition is based solely on allegations that Senate Bill 1 ("SB 1") threatens Plaintiffs' various state constitutional rights relating to their right to vote, their right to be free from racial and ethnic discrimination, their right to due process, and their right to free speech, expression, and association. Plaintiffs request only declaratory and injunctive relief to stop Defendants from implementing the law. Defendants' motion does not allege that these claims fail to state an action. Rather, it is limited to two points: (1) that Plaintiffs lack standing because they

have not named Defendants as to whom redress may be obtained, and (2) the claims are barred by sovereign immunity. The motion should be summarily dismissed.

As to Defendants' first argument, the precedent is overwhelming that the Secretary of State is the proper party to sue for redress relating to the implementation of election laws.[1] Similarly, the Attorney General, as the chief law enforcement officer of the state, is a proper party to sue to prevent prosecution under unconstitutional statutes. Even if the Governor is not a proper party,[2] Plaintiffs have standing to bring this suit against the remaining Defendants.

As to sovereign immunity, the law is equally clear: Texas's law of sovereign immunity does not bar suit against state actors solely for declaratory and injunctive relief, to prevent violation of this state's constitution. Indeed, were Defendants correct, state officials could never be sued to stop constitutional violations, which obviously is not and cannot be the case.

BACKGROUND

In the wake of the historic 2020 election cycle, in which record numbers of Texan voters of color exercised their constitutional rights to vote despite a worldwide pandemic, the Texas legislature responded by passing SB 1, a sweeping revision of the state's Election Code that would make it more difficult for all voters—but particularly voters of color—to vote. As set forth in detail in the Petition, the Texas house and senate, by rushing SB 1 through to passage, adding last-minute amendments and undertaking decisions behind closed doors, among other procedural irregularities, undermined conventional legislative processes and procedures to ensure SB 1 would come to a vote and pass, over vocal objection from legislators and members of the public. The

[1] At the time the Petition was filed, John Scott had not yet been appointed as the Secretary of State. Having been so appointed, he is substituted as a Defendant in this case automatically pursuant to Tex. App. R. Civ. P. 7.2.
[2] Plaintiffs concede that the Governor was named in error under the prevailing law and consent to dismissal of the Governor from this suit. Plaintiffs will file a notice of nonsuit concurrently with this Opposition.

Governor then signed SB 1 into law on September 7, leaving its enforcement to the Secretary of State, the Attorney General, and numerous local officials and authorities.

Among other restrictions, SB 1 imposes the following burdens, which Defendants and the Texas Legislature knew would be—and intended to be—most burdensome on voters of color:[3]

1) SB 1 impermissibly expands the ability of poll watchers to harass and intimidate voters in polling places, which are tactics voters of color have been historically and particularly subjected to throughout Texas history.[4] *See* Pet. ¶¶ 11, 143–57. Under SB 1, election judges are now threatened with criminal penalties—to be enforced by the Attorney General, among others—simply for attempting to keep the peace within polling locations. *See* Pet. ¶ 155.
2) SB 1 bans county election officials from soliciting vote-by-mail requests and distributing unsolicited vote-by-mail applications to voters directly and to third parties like civic engagement organizations, which directly harms Plaintiffs Texas State Conference of the NAACP and Common Cause Texas. These organizations have in the past relied and continue to rely on such methods for outreach to voters of color.[5] Pet. ¶¶ 159–61. Violation of this new ban is a state jail felony, enforceable by the Attorney General. Pet. ¶¶ 12, 160–61.
3) SB 1 imposes a new error-prone matching process that requires rejection of any application to vote by mail if there is any discrepancy between the application and the

[3] The specific provisions at issue, their expected and intended effects, and the history of discrimination that serve as necessary context are set forth in detail in the Petition. Plaintiffs do not repeat these allegations here because Defendants do not challenge them at this time, and they are not relevant to the narrow defenses Defendants have chosen to assert.
[4] These revisions to the Election Code are in Sections 4.01(g), 4.06(g), 4.07(e), 4.09, 6.01, and 8.01 of SB 1.
[5] This revision to the Election Code was listed in Section 7.04 of SB 1.

voter's identification information in the statewide registration database.[6] Pet. ¶¶ 13, 162–69. This matching process is much more likely to fail voters of color.

4) SB 1 dissuades voter assistants from acting to empower voters with disabilities or limited understanding of English from exercising their right to vote by forcing such assistants to first undergo unnecessary administrative steps, including making vague and onerous oaths under penalty of perjury.[7] Pet. ¶¶ 14, 170–82. Voter assistants could face potential criminal penalties, including state felony charges, for violations of these new rules, which would be enforced by the Attorney General, among others. Pet. ¶¶ 176, 178.

5) SB 1 prohibits drive-thru voting and overnight voting—methods of voting used frequently by voters of color in the 2020 election cycle—despite admission from the top election official in the Secretary of State's office that there was no evidence whatsoever of any fraud associated with drive-thru or overnight voting.[8] Pet. ¶ 15, 183–91.

6) SB 1 limits the hours for early voting on the final Sunday before Election Day even though it is common knowledge that Black voter engagement organizations regularly conduct "Souls to the Polls programs," which seek to link voter outreach efforts with Sunday morning religious services.[9] Pet. ¶¶ 16, 189. The limited hours reduce the likelihood that voters of color will have time to vote after the conclusion of religious services.

[6] These revisions to the Election Code were listed in Sections 5.02, 5.03, 5.07, 5.08, 5.10, 5.12, and 5.13 of SB 1.
[7] These revisions to the Election Code were listed in Sections 6.01, 6.03, 6.04, and 6.05 of SB 1.
[8] These revisions to the Election Code were listed in Sections 3.04, 3.10, 3.12, 3.13, and 4.12 of SB 1.
[9] This revision to the Election Code was listed in Section 3.09 of SB 1.

Plaintiffs assert that SB 1 violates Sections 3, 3(a), 8, and 19 of Article I of the Texas Constitution. Plaintiffs seek declarations that SB 1 was enacted with a discriminatory intent and that it violates each of these sections of the Texas Constitution. Plaintiffs further seek an injunction prohibiting Defendants from enforcing the challenged provisions of SB 1. Plaintiffs do not seek monetary damages.

ARGUMENT

I. Legal Standard

When addressing a motion to dismiss under Tex. R. Civ. P. 91a, this Court must "construe the pleadings liberally in the plaintiff's favor, look to the pleader's intent, and accept as true the pleading's factual allegations." *Darnell v. Rogers*, 588 S.W.3d 295, 301 (Tex. App.—El Paso 2019, no pet.); *accord Cooper v. Trent*, 551 S.W.3d 325, 329 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). This same liberal construction of the pleadings in the plaintiff's favor applies when a pleading is challenged on jurisdictional grounds. *See San Jacinto River Auth. v. Burney*, 570 S.W.3d 820, 830 (Tex. App.—Houston [1st Dist.] 2018, *aff'd sub nom.*, 627 S.W.3d 618 (Tex. 2021)).

II. Plaintiffs Have Standing to Assert Their Claims.

The minimum requirements for standing when challenging government action are not in dispute. Plaintiffs need plead only (1) an "actual or imminent" "invasion of a legal, protected or cognizable interest," (2) a "causal connection between the injury and the conduct complained of" such that "the injury [is] fairly traceable to the challenged action of the defendant," and (3) that "it [is] likely, and not merely speculative, that the injury will be redressed by a favorable decision." *City of El Paso v. Tom Brown Ministries*, 505 S.W.3d 124, 137 (Tex. App.—El Paso 2016, no pet.) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) and *Brown v. Todd*, 53

S.W.3d 297, 305 (Tex. 2001)). Actual enforcement of the challenged statute is not necessary for standing. *Id.* at 145 ("It is well established that a plaintiff who wishes to engage in constitutionally protected activity that is proscribed by statute does not need to first violate the statute and expose himself to arrest or other negative consequences in order to establish an injury for standing purposes, and may instead bring a request for a pre-enforcement review of the statute."). Plaintiffs need prove only a "credible threat of prosecution." *Id.*

Defendants do not challenge Plaintiffs' assertion of an actual or imminent violation of their constitutional rights. Defendants challenge only whether such violation is fairly traceable to, and thus is redressable by, the Defendants in this lawsuit. Mot. at 3–7. For two of the Defendants, this showing is made easily.

To begin with, the Secretary of State is the top elections official in the state and, as such, courts consistently recognize that the Secretary of State is a proper defendant for challenging the constitutionality of portions of the Election Code. *See, e.g., OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) ("[A] challenge to Texas voting law is, without question, fairly traceable to and redressable by the State itself and its Secretary of State"); *Tex. All. for Retired Ams. v. Hughs*, 489 F. Supp. 3d 667, 684 (S.D. Tex. 2020) ("Plaintiffs bring a facial challenge to a generally applicable Texas election statute, and Plaintiffs' injuries are therefore fairly traceable to and redressable by the Secretary."). Such conclusions make sense because, as was recognized in *Texas Democratic Party v. Abbott*, the Secretary is directly responsible for ensuring the uniform application and enforcement of Texas's election laws and has specific statutory duties to do so:

> [T]he Secretary of State has the duty to "obtain and maintain uniformity in the application, operation, and interpretation of" Texas's election laws, including by "prepar[ing] detailed and comprehensive written directives and instructions relating to" those vote-by-mail rules. And the Secretary of State has the power to "take appropriate action to protect" Texans' voting rights "from abuse by the authorities administering the state's electoral processes."

961 F.3d 389 (5th Cir. 2020) (citing Tex. Elec. Code § 31.003, § 31.005(a)). Given these rights and obligations, the Secretary of State can claim a lack of standing here only by "essentially disown[ing] [his] role as the chief election officer of Texas," which he cannot do. *Hughs*, 489 F. Supp. 3d at 684.

The Attorney General, too, is directly responsible for enforcing the challenged sections of the Election Code, many of which carry clear criminal penalties for their violations. *City of El Paso v. Tom Brown Ministries*—the same case Defendants cite when arguing Plaintiffs lack standing to bring a claim against the Attorney General—recognized explicitly that the Attorney General's Office and local district attorney's offices would be appropriate defendants for claims alleging that provisions of the Texas Election Code were unconstitutional. 505 S.W.3d at 139 (listing "the State Attorney General's Office or a local district attorney's office" among the enforcement agencies who can enforce the Election Code and thus were proper defendants in a claim that some provision in the Code is unconstitutional).[10] The Petition cites numerous instances in which the challenged provisions of SB 1 implicate potential criminal penalties that the Attorney General may enforce. *See* Pet. ¶ 155, 160–61, 176, 178. As such, the Attorney General is also a properly named Defendant in this lawsuit.

III. Sovereign Immunity Does Not Protect Defendants from the Equitable Relief Sought Here.

It is black letter law that sovereign immunity does not apply to purely equitable claims arising from constitutional violations. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 369 (Tex. 2009) ("[W]hile governmental immunity bars suits for retrospective monetary relief, it does not

[10] While such criminal penalties can be sought by local authorities in addition to the Attorney General, the Attorney General can pursue them nonetheless and an order prohibiting him from doing so would redress Plaintiffs' injuries in a material way.

preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions"); *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) ("[A] plaintiff whose constitutional rights have been violated may sue the state for equitable relief"); *City of Beaumont v. Boullion*, 896 S.W.2d 143, 149 (Tex. 1995) ("[S]uits for equitable remedies for violation of constitutional rights are not prohibited" under the Texas Constitution); *Andrade v. NAACP of Austin*, 287 S.W.3d 240, 247 (Tex. App. 2009) ("Suits for equitable relief may be maintained against governmental entities for constitutional violations") *rev'd on other grounds* 345 S.W.3d 1 (Tex. 2011).

Defendants' singular focus on the extent of any waiver under Section 273.081 of the Election Code misses the point. Mot. at 7–8.[11] Plaintiffs do not argue that sovereign immunity has been waived for these claims. They argue it never existed in the first place because Plaintiffs are not seeking monetary damages and, instead, seek nothing more than to require Defendants to comply with their constitutional obligations. *See Heinrich*, 284 S.W.3d at 372 ("[I]t is clear that suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity"). Here, Defendants cannot enforce the challenged provisions of the Election Code, as it has been modified by SB 1, without violating the Texas Constitution and they do not even attempt to contend otherwise at this stage of the proceedings. Thus, any effort to enforce the challenged provisions would, in effect, be an *ultra vires* action, which is not protected by sovereign immunity. *Id.* Plaintiffs seek nothing more than to compel Defendants to

[11] Plaintiffs pleaded that jurisdiction exists with this Court under "Section 273.081 [of the Election Code] and other laws," which would include this Court's general jurisdiction under Article V, Section 8 of the Texas Constitution, Section 24.007 of the Texas Government Code, as well as the Texas Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.001 et seq. Defendants do not contend that this Court lacks subject matter jurisdiction over the claims asserted here.

comply with their existing legal obligations under the Texas Constitution and sovereign immunity does not shield Defendants from these obligations.

CONCLUSION

Defendants do not contest the adequacy of Plaintiffs' claims, as pleaded. As is set forth above, those claims have been asserted against valid Defendants—the Secretary of State and the Attorney General—who cannot hide behind the guise of sovereign immunity to avoid complying with their constitutional obligations. The Motion should be denied.

Dated: December 13, 2021

Respectfully submitted,

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