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IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT
HOUSTON, TEXAS

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Clerk

JOHN OR JANE DOE, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE 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,

Appellants,

v.

TEXAS STATE CONFERENCE OF THE NAACP; COMMON CAUSE TEXAS; DANYAHEL NORRIS; HYUN JA NORMAN; FREDDY BLANCO; MARY FLOOD NUGENT; AND PRISCILIA BLOOMQUIST,

Appellees.

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On Appeal from the 189th Judicial District Court, Harris County
Cause No. 2021-57207

BRIEF OF APPELLEES

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Nature of the Case	Two interest groups and five Texas residents seek a judgment (1) declaring that various newly enacted Texas Election Code provisions violate both particular provisions of the Texas Constitution, CR.79–93, 94, and the Constitution as a whole, CR.93–94, and (2) enjoining the Secretary of State, the Deputy Secretary of State, and the Attorney General from enforcing the challenged provisions. CR.95.
Trial Court	189th Judicial District Court, Harris County Hon. Scott Dollinger
Course of Proceedings	Defendants moved to dismiss all of Plaintiffs' claims under Texas Rule of Civil Procedure 91a, alleging the trial court lacked subject-matter jurisdiction because Plaintiffs failed to name the proper parties, failed to connect the enforcement of the challenged Texas Election Code provisions to the named state officials, and failed to invoke a proper waiver of sovereign immunity. CR.115–23. The trial court denied Defendants' Rule 91a motion, CR.339, and Defendants noticed this interlocutory appeal under TEXAS CIVIL PRACTICE AND REMEDIES CODE section 51.014(a)(8), CR.343.

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COUNTER STATEMENT OF ISSUES PRESENTED

1. Have Appellees[1] pleaded standing to challenge Senate Bill 1 ("SB1") given that SB1 impermissibly and unconstitutionally burdens Appellees' right to vote; to be free from racial and ethnic discrimination; to due process; and to free speech, expression, and association?

2. Did the trial court correctly determine that Appellees have standing to challenge SB1 given that the Secretary of State is the chief election officer of the State and the Attorney General is Texas's chief law enforcement officer?

3. Have Appellees sufficiently pleaded claims against the Secretary of State and Attorney General in their official capacities such that they are not immune from suit?

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[1] "Appellees" or "Plaintiffs" include the members, supporters, and constituents of Texas State Conference of the NAACP ("Texas NAACP"), Common Cause Texas ("CC Texas"), and individual Plaintiffs impacted by the various provisions of the newly enacted provisions of the Texas Election Code.

STATEMENT OF FACTS

After the 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 SB1, a sweeping revision of the state's Election Code, specifically designed to make voting more difficult for all Texans—particularly Texans of color. As set forth in detail in the Petition, the Texas Legislature rushed SB1 to passage, adding last minute amendments, excluding civil rights groups and legislators of color from the decision-making process, and undermining conventional legislative procedures to ensure SB1 would come to a vote and pass, despite an avalanche of objections from legislators and public stakeholders. The Governor signed SB1 into law on September 7, 2021, leaving its enforcement and implementation to the Secretary of State and the Attorney General.

SB1 is a quintessential voter suppression law. As the Petition recounts in detail, SB1 imposes significant and unconstitutional burdens on the right of Texans to vote. These burdens—which were purposefully designed to most heavily burden voters of color—include impermissibly expanding the ability of poll watchers to harass and intimidate voters, *see* CR.51–54 (¶¶ 143–57); banning county election officials from soliciting vote-by-mail requests and distributing unsolicited vote-by-mail applications to voters and to third parties like the organizational plaintiffs, *see* CR.54–55 (¶¶ 159–61); imposing new error-prone vote-by-mail matching

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requirements, *see* CR 55–57 (¶¶ 162–69); requiring new oaths and burdensome administrative hurdles to voter assistants who help voters with disabilities or limited English understanding, *see* CR.57–60 (¶¶ 170–82); and prohibiting drive-thru voting and overnight voting—and limiting early voting—despite admissions from election officials that that these programs were effective and did not facilitate voter fraud, *see* CR.61–63 (¶¶ 183–191).

Appellants were served with the Petition on September 15, 2021 and filed a Rule 91a motion to dismiss on November 15, 2021. *See* CR.115. In that 8-page motion, Appellants argued, *inter alia*, that (1) Appellants' alleged injuries were not fairly traceable to and redressable by the Secretary of State ("SoS") and Attorney General because they do not enforce the challenged provisions of SB1, and (2) Appellees claims were barred because any exemption from sovereign immunity applied solely to statutory (not constitutional) claims, and for injunctive (not declaratory) relief. CR.119. Appellants' motion *did not* argue that Appellees had failed to allege injury-in-fact and *did not* allege that Appellees' constitutional claims were facially invalid and therefore barred by sovereign immunity. On October 26, 2021, various Republican Committees petitioned to intervene, and thereafter, on December 22, 2021, filed their own Rule 91a motion to dismiss. CR.103, CR.296. The Republican Committees' motion argued that Appellees failed to plead facts sufficient to state each of their claims. CR.168–211. After hearing oral argument,

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the District Court correctly denied both Appellants' and the Republican Committees' Rule 91a motions. CR.339. This interlocutory appeal by Appellants followed, pursuant to Texas Civil Practice and Remedies Code section 51.014(a)(8), which permits an interlocutory appeal from an order of the district court that "grants or denies a plea to the jurisdiction by a governmental unit." The Republican Committees did not and could not have sought review of the denial of their Rule 91a motion.

SUMMARY OF THE ARGUMENT

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In this appeal, Appellants allege two bases for lack of subject matter jurisdiction: (1) Appellees lack standing to vindicate their state constitutional rights to vote and be free from discrimination (among others), and (2) Appellees' claims are barred by sovereign immunity. Both of these arguments fail as a matter of law based on the clear and detailed allegations in Appellees' Petition.

First, Appellees plead an injury-in-fact that is traceable to and redressable by Appellants sufficient to confer standing. The Petition alleges that Appellees' right to vote (or their members' right to vote) is impermissibly and unconstitutionally burdened by provisions of SB1 that restrict various alternative methods of voting and voter assistance. Appellees further allege that SB1's vague poll watcher provisions will subject election workers to civil and criminal penalties merely by taking action to prevent the intimidation of historically marginalized voters. The

"plain, direct and adequate interest in maintaining the effectiveness" of a vote—whether on behalf of a group of voters or an individual voter—is a "legally cognizable injury" sufficient to confer standing. *Baker v. Carr*, 369 U.S. 186, 208 (1962).

Appellants' transparent attempts to repackage the Republican Committees' failure-to-state-a-claim arguments as sounding in subject matter jurisdiction find no basis in the law or facts. Appellants cannot prematurely ask the court to litigate the merits of this case under the guise of determining whether Appellees have alleged an injury-in-fact sufficient to satisfy standing. A plaintiff does not lack standing "simply because he cannot prevail on the merits of his claim; he lacks standing when his claim of injury is too slight for a court to afford redress." *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763, 774 (Tex. 2020) (internal citations and quotation marks omitted). And, even if Appellants' challenges to Appellees' injury allegations were proper at this stage, as the trial court found, Appellants have alleged sufficient facts to sustain each of their claims.

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The trial court also properly rejected Appellants' arguments that the SoS does not have enforcement authority concerning the challenged provisions of SB1. "[W]ithout question," Appellees' claims are "fairly traceable to and redressable by the [SoS], who serves as the 'chief election officer of the state.'" *OCA-Greater*

Houston v. Texas, 867 F.3d 604, 613 (5th Cir. 2017) (quoting TEX. ELEC. CODE § 31.001(a)).

Second, for the same reasons that Appellees' injuries are traceable to and redressable by Appellants, Appellees have adequately alleged that sovereign immunity does not apply to Appellees' claims. That conclusion is unchanged by Appellants' arguments—raised by Appellants for the first time on appeal—that Appellees have not adequately pleaded their claims. The trial court correctly rejected those arguments when raised by the Republican Committees in their Rule 91a motion, and Appellants provide no basis to depart from that ruling.

For these reasons, the Court should affirm the trial court's denial of Appellants' Rule 91a motion, deny the newly-raised challenges to the Court's subject matter jurisdiction, and remand this case for further proceedings.

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STANDARD OF REVIEW

A trial court's ruling on subject matter jurisdiction—including standing and sovereign immunity—is reviewed de novo. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004) ("As a component of subject matter jurisdiction, we review a claimant's standing de novo."); *Hoff v. Nueces Cnty.*, 153 S.W.3d 45, 48 (Tex. 2004) ("We review a plea to the jurisdiction based on sovereign immunity de novo because the question of whether a court has subject matter

jurisdiction is a matter of law.”).[2] However, when challenges to subject matter jurisdiction are “raised for the first time on appeal, the test must be lenient because there is no opportunity for the plaintiff to cure a pleading defect.” *Tex. Bd. of Chiropractic Exam’rs v. Texas Med. Ass’n*, 616 S.W.3d 558, 567 (Tex. 2021) (internal quotations and alterations omitted). Under such circumstances, appellate courts must therefore “construe the pleadings in favor of the party asserting jurisdiction, and, if necessary, review the record for evidence supporting jurisdiction.” *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex. 2012); *accord Tex. Ass’n of Bus. v. Tex. Air Ctrl. Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). “[I]f the pleadings and record neither demonstrate jurisdiction nor conclusively negate it, then in order to obtain dismissal of the plaintiff’s claim, the defendant entity has the burden to show either that the plaintiff failed to show jurisdiction despite having had full and fair opportunity in the trial court to develop the record and amend the pleadings; or, if such opportunity was not given, that the plaintiff would be unable to show the existence of jurisdiction if the cause were remanded to the trial court and such opportunity afforded.” *Rusk*, 392 S.W.3d at 96.

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[2] When, as here, an interlocutory appeal is taken from the denial of a Rule 91a motion challenging subject matter jurisdiction rather than a plea to the jurisdiction, the Court nevertheless applies “the standard of review for pleas to the jurisdiction.” *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 823 n.1 (Tex. App.—Austin 2014, no pet.).

Moreover, a challenge to subject matter jurisdiction "does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction." *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000); *accord TAC Realty, Inc. v. City of Bryan*, 126 S.W.3d 558, 561 (Tex. App.—Houston [14th Dist.] 2003, pet. granted, judgm't vacated w.r.m.). Thus, in resolving jurisdictional issues, an appellate court cannot weigh the claims' merits, "but must confine itself to the evidence relevant to the jurisdictional issue." *Bland Indep. Sch. Dist.*, 34 S.W3d at 555.

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ARGUMENT

I. APPELLEES HAVE ALLEGED STANDING

Despite the clear allegations of the Petition that Appellees' right to vote is impermissibly and unconstitutionally burdened by SB1, Appellants argue for the first time on appeal that Appellees lack standing because they do not allege an injury-in-fact. The Court should reject Appellants' arguments, which essentially claim that *no voter* is injured by SB1. The trial court properly denied those arguments when they were raised by the Republican Committees below, and they are of no greater persuasion when parroted by Appellants here. Indeed, Appellants' attempts to recast these as standing arguments holds even less weight because they seek to litigate the merits of Appellees' claims, not Appellees' ability to assert them in this case.

Moreover, as the trial court found, Appellees' injuries are traceable to and redressable by Appellants. The SoS has enforcement authority concerning the challenged provisions and enjoining the unconstitutional provisions of SB1 will prevent the SoS from continuing to injure Appellees. To the extent the Attorney General is successful in reversing the Court of Criminal Appeals' recent holding in *State v. Stephens*, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021) that he does not have enforcement authority over election-related matters, the Attorney General's position in that appeal would plainly conflict with any argument here that he does not enforce the challenged provisions of SB1.

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For the reasons stated below, this Court should reject Appellants' arguments and find that Appellees sufficiently plead injury-in-fact.

A. Appellees Pleaded Facts Sufficient to Establish Actual or Threatened Injury

To plead injury-in-fact sufficient to challenge SB1, Appellees are required to allege only that (1) they will suffer some actual or threatened injury under SB1, and (2) SB1 "unconstitutionally restricts [their] own rights." *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996). Appellees allege, *inter alia*, that they or their members are injured by SB1's impermissibly burdensome and discriminatory restrictions on alternative voting methods and expansion of permissible poll watcher activities. That is sufficient to establish injury-in-fact.

Appellants incorrectly argue that Appellees' status as voters (or associations of voters) does not give them standing because "any injury stemming from that status is a generalized grievance shared by the entire population." Br. at 16–17 (relying on *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001)).[3] But as the Texas Supreme Court has held, the "generalized grievance" bar to standing does not apply merely because the injury "is suffered by large numbers of people." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 (Tex. 2011). To the contrary, if standing were denied "simply because many others are also injured, "[it] would mean that the most injurious and widespread Government actions could be questioned by nobody." *Id.* (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686–88 (1973)). Both Organizational Appellees and Individual Appellees meet their burden to plead injury-in-fact.

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1. Organizational Appellees Plead Injury-in-Fact

Organizational Appellees allege injury-in-fact sufficient to confer both organizational and associational standing. To maintain standing as an organization, Organizational Appellees must plead a "concrete and demonstrable injury to the

[3] Appellants' reliance on *Brown* is misplaced. There, the plaintiff challenged the mayor's authority to issue an executive order prohibiting city employees from discriminating based on sexual orientation. *Brown*, 53 S.W.3d at 299. The Texas Supreme Court unremarkably held that the plaintiff's "status as a voter" did not confer standing to allow him to generally "challenge the lawfulness of governmental acts" that he previously voted against in a referendum election. *Id*. at 302.

organization's activities," such as a "drain on the organization's resources" or "perceptibl[e] impair[ment]" of the organization's ability to fulfill its mission. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982).[4] Organizational Appellees allege that SB1 threatens an essential purpose of the organizations' mission: protecting the right to vote. CR.11 (¶ 21), CR.16 (¶ 32). The Petition further alleges that if SB1 stands, Texas NAACP and CC Texas will have to divert their limited resources to combatting the consequences of the loss of political power of the communities it represents, resources that the organization would have committed to other important programs. CR.16 (¶ 30), CR.21 (¶ 39).

Appellants' own cited cases confirm that Organizational Appellees have pleaded organizational standing here. In *Lewis v. Hughs*, the court held that organizational standing was adequately alleged where the organizations "allege[d] that they are membership organizations[,] that the challenged restrictions injure their membership's right to vote[, and] getting out their membership's vote is germane to their purpose." 475 F. Supp. 3d 597, 613 (W.D. Tex. 2020), *rev'd sub nom. on other grounds Lewis v. Scott*, 28 F. 4th 659 (5th Cir. 2022); *see also Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (holding that standing was satisfied where organization plead that

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[4] "Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law," Texas courts "look to the more extensive jurisprudential experience of the federal courts" on issues of standing. *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

"its members would otherwise have standing to sue in their own right" and "the interests it seeks to protect are germane to the organization's purpose") (internal quotations omitted).[5] The Petition alleges that Texas NAACP has "more than 10,000 members," a large portion of whom "are residents registered to vote in Texas," CR.12 (¶ 23); and that CC Texas has "more than 52,000 members and supporters spread across nearly every county in Texas, a substantial number of whom are registered to vote in Texas," CR.17 (¶ 33). The Petition further alleges that SB1 will unlawfully infringe upon the voting rights of each of these organization's members. CR.12–21 (¶¶ 25–30, 34–39). The Petition also alleges the organizational Appellees seek to protect interests germane to their purposes. Texas NAACP "works to ensure the political, educational, social, and economic equality of all persons and to eliminate hatred and racial discrimination, including by removing all barriers of racial discrimination through democratic processes" such as elections. CR.11 (¶ 21). Likewise, Texas CC's "mission is to build a more equitable democracy and ensure free, fair, and accessible elections in Texas." CR.16 (¶ 32). Organizational Appellees have plainly met their burden to plead organizational standing.

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[5] The third pleading requirement of organizational standing articulated in *Tex. Ass'n of Bus.*—that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"—is irrelevant here. 852 S.W.2d at 446. When, as here, a lawsuit seeks declaratory and injunctive relief based on allegations applicable to all members, participation of individual members of organizations is not required. *See, e.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F. 3d 547, 551–53 (5th Cir. 2021).

2. *Individual Appellees Plead Injury-in-Fact*

Likewise, the Petition establishes concrete, particularized injury-in-fact for each individual Appellee. Appellees Norris and Norman are individual voters who allege that SB1 impermissibly burdens their right to vote. "[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue" to challenge the legality of a voting law. *Baker*, 369 U.S. at 206. Appellee Norris alleges that he is a registered voter and he and his family faced a greater risk of adverse health outcomes from COVID-19, which made them fear voting in-person. CR.22–23 (¶¶ 42–45). Appellee Norman is also a registered voter and provides Korean language assistance to Korean Americans with limited-English proficiency. CR.23–24 (¶¶ 47–51). SB1 will make it harder for Appellee Norman to help such voters and as a result will make it more difficult for these voters to vote. CR.24 (¶ 52). Both Appellees Norris and Norman also allege that they fear the expansion of poll watchers' rights under SB1 will result in increased voter intimidation that will impact their ability to vote peacefully. CR.22 (¶ 45), CR.27 (¶ 56).

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Appellees Blanco, Nugent, and Bloomquist are each election judges who allege that they fear SB1's civil penalties, including loss of employment, and SB1's criminal sanctions will prevent their ability to do their job. CR.27–32 (¶¶ 57–75). More specifically, Individual Appellees Blanco, Nugent, and Bloomquist allege that they fear that their responsibility as election judges to preserve the peace and sanctity

of the polling place is obstructed by SB1 because the provisions pertaining to poll watchers will create a hostile, intimidating environment for voters. Moreover, Individual Appellees Blanco, Nugent, and Bloomquist allege that the poll watcher provisions of SB1 are vague; consequently, they fear that they may undertake conduct with respect to poll watchers that they believe is lawful and in accordance with their authority as election judges, but nevertheless subjects them to civil and/or criminal penalties, thereby chilling their ability to perform their duties as election judges. *Id*.

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B. Appellants' Standing Arguments Are Impermissible Merits Arguments

In their 8-page Rule 91a motion in the trial court, Appellants did not challenge Appellees' standing on any grounds. CR.115–26. Nevertheless, in their briefing to this Court, Appellants spill pages of ink arguing that SB1 will not result in harm to any voter, and therefore Appellees cannot plead injury-in-fact. A cursory review of the record reveals that Appellants have done little more than recast the Republican Committees' unsuccessful Rule 91a failure-to-state-a-claim arguments as standing arguments. *Compare* CR.181–84 *with* Br. at 17–21. But whether a plaintiff lacks standing is a distinct inquiry from whether a plaintiff states a claim: a plaintiff does not lack standing "simply because he cannot prevail on the merits of his claim; he lacks standing when his claim of injury is too slight for a court to afford redress." *Pike*, 610 S.W.3d at 774 (internal citations and quotation marks omitted).

Appellees allege that they will suffer injury as a result of the unnecessarily burdensome provisions of SB1 and absent some argument that those allegations were "fraudulently made . . . in an effort to confer standing," the Court must accept them as true. *TAC Realty, Inc.*, 126 S.W.3d at 564. That is all that is required for Appellees to allege injury-in-fact, and nowhere in its brief do Appellants argue that the Petition does not make those allegations. Instead, Appellants ask this Court to decide whether Appellees can *prove* that they are injured by SB1. Such an inquiry is improper at this stage of the litigation. As the Texas Supreme Court has repeatedly held, "whether a party can prove the merits of its claim or satisfy the requirements of a particular statute does not affect the court's subject-matter jurisdiction." *Pike*, 610 S.W.3d at 777; *see also Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 800 (Tex. 2021) (holding that whether plaintiffs can prevail on their claims "are issues going to the merits, not standing"). Appellants' arguments that SB1 did not or could not have caused Appellants' alleged injuries are simply "not relevant to the question of whether [Appellees] have standing." *TAC Realty, Inc.*, 126 S.W.3d at 565; *accord Andrade*, 345 S.W.3d at 9 (holding that it is "not . . . necessary to decide whether appellants' allegations of impairment of their votes . . . will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it" (internal quotation marks omitted)). Appellees have sufficiently alleged injury-in-fact.

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C. Appellees Sufficiently Allege Injury As to Each Count

Even if Appellants did not improperly seek to adjudicate the merits of these claims, their arguments still fail because Appellees allege an injury as to each count in the Petition. The trial court properly rejected these merits-based, failure-to-state-a-claim arguments when they were made by the Republican Committees, and they fare no better when repackaged as standing arguments here.

1. Count I: Discriminatory Intent Claim[6]

Appellees' intentional discrimination claim (Count I) alleges that SB1 violates the Texas Constitution's guarantee of equal protection under the law because it was enacted with the discriminatory purpose of curtailing methods of voting and/or voter assistance used by Black, Hispanic, and Asian voters. *See* CR.80–81 (¶¶ 217–22).

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Appellants do not dispute that individual voters (such as Appellees Norris and Norman) and voting advocacy groups (such as Appellees Texas NAACP and CC Texas) have standing to bring equal protection claims to challenge discriminatory voting laws such as SB1. Br. at 17. Appellants concede the Petition explicitly alleges that SB1 disparately impacts Black, Hispanic and Asian voters. *Id.* And Appellants cannot dispute that Appellees are themselves members or represent members of these disfavored classes. *See* CR.21 (¶ 40), CR.23 (¶¶ 46–47). Appellants argue instead that Appellees do not have standing because the future injuries alleged are

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[6] Count I is alleged by Appellees Texas NAACP, CC Texas, Norris and Norman.

"hypothetical and speculative." Br. at 18. In particular, Appellants claim that Appellees have failed to allege that (1) the alternative voting methods curtailed by SB1 would have been used in future elections; (2) voter turnout will decrease as a result of the curtailed alternative voting methods; and (3) the curtailed alternative voting methods disproportionately burden voting. *Id*. Appellants are wrong.

First, Appellants' claim that it is speculative that alternative voting methods such as overnight voting, drive-thru voting, and multiple ballot drop box locations would be available in future elections because they were only being provided to address the pandemic, *see* Br. at 18–19, is disingenuous at best. As Appellants well know, Harris County election officials have sued Appellants in order to challenge the limits placed on their ability to make available these alternative voting methods in future elections. *See* Complaint, *La Union del Pueblo Entero v. Abbott*, Case No. 5:21-cv-00844, ECF 1 at 3 (Sept. 3, 2021). It is also immaterial that these alternative voting procedures were available only in Harris County and Travis County. Appellees (and their members) asserting Count I are Harris County voters and therefore the restrictions on Harris County's ability to continue to provide alternative voting methods directly injures these Appellees. Moreover, Appellants ignore the Petition's allegations in Count I that Appellees are injured by the voter assistance provisions which unnecessarily burden limited-English speaking voters by making it more difficult for them to cast their ballot. CR.80 (¶¶ 218–19). Voter assistance

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was available long before the pandemic, and there is no basis to conclude that it would not have continued to be available in the same manner had SB1 not been enacted.[7]

Second, Plaintiffs are not required to plead that voter turnout will decrease across the state of Texas as a result of SB1's restrictions on alternative voting methods and voter assistance. To the contrary: Appellees are required only to "allege facts showing disadvantage to themselves as individuals" to satisfy standing. *Baker*, 369 U.S. at 206. As discussed *supra*, Appellees have pleaded that the changes to voting laws imposed by SB1 unconstitutionally burden their ability to cast a ballot.

Third, Appellants' claim that Appellees are required to plead that "the challenged provisions disproportionately burden voting for [a] protected class of voters," (Br. at 19) again misstates Appellees' pleading burden and the law. Article I, Section 3 of the Texas Constitution, which prohibits intentional discrimination, is coextensive with the Equal Protection Clause in that both "safeguard against invidious discrimination between classes of persons." *Richards v. LULAC*, 868 S.W.2d 306, 312 (Tex. 1993). Texas courts apply the federal analytical approach to

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[7] Nor are Appellees' claims speculative because it cannot be guaranteed that they will "vote in the future" or use the alternative methods of voting if made available. The Texas Supreme Court has recognized that, in voting cases, such contingencies do not present a barrier under "the standing doctrine," which might "insist on a more substantial injury in other contexts," because "voting rights present a special situation." *Finance Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 584 (Tex. 2013).

discriminatory intent claims under the Fourteenth Amendment of the United States Constitution, as set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977), to similar claims brought under Article I, Section 3 of the Texas Constitution. *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 923 (Tex. 2020). As *Arlington Heights* makes clear, discriminatory impact "*may*" be "an important starting point" in a discriminatory intent claim. 429 U.S. at 266 (emphasis added); *see infra* II.C.1. In any event, the Petition specifically alleges that voters of color used the alternative methods banned by SB1 at a higher rate than white voters—nearly 56% of extended early voters and 53% of drive-thru voters were people of color—illustrating that people of color are likely to be disproportionately impacted by SB1's restrictions on these voting methods. CR.37 (¶ 91).[8] Appellants misquote *Texas Democratic Party v. Abbott*, which does not state that the right to vote "is not abridged unless the challenged law creates a barrier to voting that makes it more difficult for the challenger to exercise her right to vote

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[8] Appellants argue that Plaintiffs have not demonstrated a meaningful disparity because, according to Appellants, the 56% and 53% figures representing voters who either voted during extended hours or drive-thru, respectively, when compared against the 70.7% total population of color in the county, would "seem to show that the extended voting options were disproportionately used by whites, and their abolition disfavors those voters." Br. at 21. That claim fails for three reasons. First, Appellants compare apples to oranges, i.e., they are comparing total population percentages to voting-age-population percentages, rendering the comparison meaningless. Second, based upon the allegations in the Petition, the Court can infer that there will be a greater impact on the voters of Harris County than in other, less diverse, counties in Texas. Third, the State's factual argument is improper on this motion.

relative to some benchmark," Br. at 19 (emphasis added), but rather that the right to vote "is not abridged unless the challenged law creates a barrier to voting that makes it more difficult for the challenger to exercise her right to vote ***relative to the status quo***." *Tex. Democratic Party*, 978 F.3d 168, 192 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021) (emphasis added). The status quo for Appellees is not the "voting rules applied throughout the State," Br. at 20, but the voting rules in Harris County prior to SB1 where Appellees reside and vote. Appellees allege that SB1's elimination of the alternative voting methods previously available in Harris County will result in it being more difficult for them to cast their ballot.

2. Counts II, IV, V, VII: Right to Vote Claims[9]

In Counts II, IV, V, and VII, Appellees allege in detail how the challenged provisions of SB1 will substantially burden Appellees' (and their members') right to vote. Appellants, however, claim that Appellants cannot allege an injury-in-fact for their right-to-vote claims because the challenged provisions relating to poll watchers, solicitation and distribution of vote-by-mail applications, and mail-in ballot match requirements do not affect voters or individual voting rights and therefore do not present a barrier to voting. Br. at 22–25. Appellants, however,

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[9] Counts II, IV, V, and VII are alleged by Appellees Texas NAACP, CC Texas, Norris and Norman.

ignore the clearly pleaded allegations detailing how these provisions impact Appellees' right to vote.

For instance, the Petition avers that (1) the poll watcher provisions "will deter election officials from taking action to protect voters from conduct that will make voters . . . feel uncomfortable or intimidated, or otherwise deter them from voting," CR.83 (¶ 229); (2) the restrictions on solicitation and distribution of vote-by-mail applications will burden all "eligible voters" who "may not be able to vote by mail" if they are not solicited by election officials at community gatherings, and voters who rely on the pick-up of applications at any number of places and events, CR.87 (¶ 247); (3) the restrictions on assistants will burden the elderly and physically disabled and those who need language assistance, and impermissibly burdens "voters' right to vote," CR.88–89 (¶¶ 250–51); and (4) the match requirement for voting by mail threatens the vote of "eligible mail-in voters," CR.92–93 (¶¶ 265–68).

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Although Appellants disagree that these provisions affect Appellees' right to vote, the facts as alleged must be accepted as true, and all fair inferences must be drawn in Appellees' favor. "[W]hether [Appellees'] claims will, ultimately, entitle them to relief" has no bearing on whether "they have standing to seek it." *Andrade*, 345 S.W.3d at 10.

3. *Count III: Void-for-Vagueness Claim*[10]

Appellants argue Appellees inadequately plead how the unconstitutional vagueness of SB1's poll watcher provisions will cause injury-in-fact to Appellees Blanco, Nugent and Bloomquist. Br. at 26; *see infra* II.C.4. This argument, again, ignores the Petition's clear pleadings. The Petition contains a multitude of allegations that Sections 4.01(g), 4.06(g), 4.07(e), 4.09, 6.01(e) prevent Appellees—three election judges—from knowing what conduct is or is not prohibited by the statute and that such vagueness negatively impacts their ability to carry out their duties, including because it raises the possibility for criminal penalty or loss of job. For example, Appellee Blanco "believes that the language in Sections 4.07(e) (denying "free movement"), 4.09 (taking "any action"), and 6.01(e) (authorizing watchers to "observe any activity" during curbside voting) "will prevent his ability do his job." CR.28 (¶¶ 59–60). Appellee Nugent does not know whether asking poll watchers to sit instead of stand "would qualify 'as an action' that denies them 'free movement,' as used in the provisions of SB 1" and she fears this uncertainty will impact her ability "to carry out her duties." CR.29 (¶¶ 64–65). Appellee Bloomquist "is concerned that SB 1's vague language will prevent her and other judges from being able to control the polling place and provide a safe and comfortable environment for voting." CR.31–32 (¶ 72).

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Appellants claim the Petition insufficiently alleges injury for section 4.06(g) which imposes criminal penalties on election judges if they "knowingly refuse[] to accept a watcher for service." As the Petition explains, Appellee Bloomquist "has experienced poll watchers presenting improper paperwork" in the past and has "turned them away to correct" their forms. CR.32 (¶ 74). She is concerned that these provisions will make it harder for her to execute her duties and ensure poll workers are submitting the proper paperwork. *Id*. Moreover, Appellees allege that section 4.06(g) creates confusion because it appears to duplicate section 33.061 and imposes another Class A misdemeanor. CR.85 (¶ 238). Appellants' claim that a statute cannot be vague based solely on duplication (Br. at 26), goes to the merits of whether section 4.06(g) is vague, not whether Appellees have alleged that it is.

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Appellants' arguments also fall short with respect to section 4.09, which makes it a Class A misdemeanor to "knowingly prevent a watcher from observing an activity or procedure," including "by taking any action to obstruct the view of a watcher or distance the watcher from the activity or procedure to be observed in a manner that would make observation not reasonably effective." CR.56 (¶ 154). Appellee Blanco alleges that this language is "vague" and that it "will prevent his ability to do his job–including his work to preserve the peace within the polling place

[10] Count III is alleged by Appellees Blanco, Nugent, and Bloomquist. *See Infra* II.C.4.

[and] allow as many eligible voters as possible to cast ballots." CR.27–28 (¶¶ 59–60). Appellees confusingly claim that the "scienter requirement saves [the] statute from a vagueness challenge." Br. at 27. Appellees' argument, however, does not address Appellees' allegations that the terms "any action" and "observation not reasonably effective" are vague. CR.85 (¶ 240).

Nor were Appellees required to plead, as Appellants contend, that they "intend to knowingly violate the law in the future," and the case on which Appellants rely to support this argument is inapposite. Br. at 27. In *Garcia v. City of Willis*, 593 S.W.3d 201 (Tex. 2019), the Texas Supreme Court held that an individual challenging the constitutionality of red-light cameras had standing to bring claims only for retrospective—rather than prospective—relief, because he had already paid civil penalties for their traffic violations and did not plead that he intended to run red lights in the future. *Id.* at 207. By contrast, Appellees allege that they fear criminal penalties because section 4.09 is so vague that they do not understand what is and is not permissible action they may take in monitoring poll workers. Appellees' "personal stake in the future application of" section 4.09 is precisely the kind of "particularized interest for standing that prospective relief requires." *Id.* at 208.[11]

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[11] In a footnote, Appellants summarily argue that section 4.07(e) and 6.01(g) "add nothing from a standing perspective," because they "define where a watcher is entitled to watch—not what Plaintiffs are entitled to do." *See* Br. at 27 n.13. This argument ignores the provisions themselves and Appellees' allegations. Section 4.07(e) prohibits an election judge from "den[ying] free movement where election activity is occurring within the location at which the watcher is serving,"

Finally, as to section 4.01(g), which requires an election judge to have "observed" a poll watcher committing a violation of the election code in order to remove the poll watcher, Appellees Blanco, Nugent, and Bloomquist have all alleged that the provision is vague as to whether they can remove a poll watcher for a poll watcher's disruptive conduct that they observe but that is not a per se violation of the election code (e.g., hovering over voters, standing extremely close to voters, or talking loudly in a polling place). CR.29 (¶ 64), CR.31–32 (¶¶ 70, 73, 75), CR.86 (¶ 242). Appellants argue that Appellees' fears that they will be penalized for unintentionally running afoul of section 4.01(g) are too generalized or speculative. Appellants rely on *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982), but that case *supports* Appellees' allegations that section 4.1(g) is void-for-vagueness. There, the U.S. Supreme Court held that a challenge to an ordinance that "implicates no constitutionally protected conduct" must fail unless it is "impermissibly vague in all of its applications." *Id.* at 494–95. The Court reversed the district court's *merits determination following a full evidentiary hearing* on the grounds that, among other things, the ordinance was unclear only in "*some* of its applications." *Id.* (emphasis in original).

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and section 6.01(g) grants poll watchers the right to observe "any activity" related to voter assistance including curbside voting activities. As election judges, Appellees Blanco, Nugent and Bloomquist are responsible for "preserv[ing] the peace within the polling place" and "allow[ing] as many eligible voters as possible to cast ballots." CR.27–28 (¶¶ 59–60). Thus, these provisions harm Appellees' ability to serve as election judges.

Appellants' argument that there is no cognizable injury because Appellees allege only that they may "need to make . . . close calls [that] would lead to some change in behavior" ignores the allegations and the law. Br. at 28. Appellants rely on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), but there the plaintiffs' alleged injury was that they were required to incur costs to protect the confidentiality of their communications because they feared they would be targeted for surveillance under the Foreign Intelligence Surveillance Act. *Id*. at 401. Plaintiffs' sole basis for believing that their communications were likely to be intercepted was that their work "require[d] them to engage in sensitive international communications with individuals who they *believe* are *likely* targets of surveillance." *Id*. (emphasis added). The Supreme Court held that plaintiffs' standing could not be supported by "expenditures based on hypothetical future harm." *Id*. at 402. That is far afield from Appellees' concrete allegations here that section 4.01(g) will subject *Appellees* to civil penalties for actions that they have *already* undertaken in previous elections to remove poll workers for disruptive conduct. CR.86 (¶ 242). In other words, Appellees' alleged injury is not based on some future, prospective action against a third party that has not yet occurred, but instead on action that Appellees themselves have already taken and would continue to undertake were it not for the vague provisions of section 4.01(g) and the threat of civil penalties against Appellees.

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4. *Count VI: Freedom of Speech, Expression & Association Claim*[12]

Appellee Norman alleges that his service helping Korean-American voters is protected core political speech and that she intends to continue providing voting assistance to Korean-American voters. *See infra* II.C.3. Nevertheless, Appellants argue that the Petition does not allege a "credible threat of enforcement," because it "has not alleged facts that SB 1 has been or would be enforced … against [Appellee Norman] or anyone else." Br. at 29. Appellants' argument is unavailing.

The Petition clearly alleges that SB1's voter assistant provisions burden voter assistants and threaten them with civil and criminal penalties. CR.21–27 (¶¶ 41–56), CR.90–91 (¶¶ 259–60). The Petition alleges the requirements of sections 6.01, 6.03, and 6.05 including "additional forms and statements under penalty of perjury" . . . will . . . dissuade persons like Plaintiff Norman from assisting voters in the first place." CR.90–91 (¶ 259) (emphasis added); *see also* CR.25 (¶ 53). The Petition also explains that section 6.04's oath provision chills speech by requiring voter assistants to swear, under penalty of perjury, that they will not "pressure" voters into accepting their assistance. CR.25 (¶ 52) CR.90 (¶ 260). Under these voter assistant provisions, Appellee Norman is forced to "self-censor[]," and this chilling of speech is "sufficient injury to support standing." *Ctr. for Individual Freedom v. Carmouche*,

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[12] Count VI is alleged by Appellee Norman.

449 F.3d 655, 660–61 (5th Cir. 2006) ("the Center's self-censorship constitutes sufficient injury to confer standing"); *see also Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330–31 (5th Cir. 2020) ("[The Court of Appeals] has repeatedly held, in the pre-enforcement context, that [c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." (internal quotations and citation omitted; alteration in original)); *Longoria v. Paxton*, No. 21-cv-1223, 2022 WL 447573, at *10 (W.D. Tex. Feb. 11, 2022) ("Plaintiffs have plausibly alleged an injury in fact (a chilling of their protected speech based on their credible fear of enforcement) . . . .").[13]

5. Count VIII: Cumulative Changes Claim[14]

Count VIII alleges that SB1, when viewed as a whole, intentionally and impermissibly increases the burden of voting for all Texans, and particularly for voters of color. CR.93 (¶¶ 270–71). "[T]he challenged provisions of SB 1, collectively, impermissibly burden [plaintiffs'] right to vote; fail to provide Plaintiffs and Organizational Plaintiffs' members adequate due process under Article 1,

[13] Appellants' assertion that Appellee Norman seeks standing "to assert the injuries of unidentified third parties," Br. at 29, is facially untrue. Appellee Norman alleges injury-in-fact on behalf of herself as a voter assistant.

[14] Count VIII is alleged by all Appellees.

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Section 19; and deprive Plaintiffs and Organizational Plaintiffs' members of their rights to free speech, expression, and association under Article I, Section 8 of the Texas Constitution." CR.93 (¶ 271). For all the reasons stated above in Counts I-VII, the Petition sufficiently alleges cognizable injury-in-fact under Count VIII.

D. Appellees' Injuries Are Traceable To And Redressable By Appellants

To establish standing, Appellants were required only to allege that their "injury [is] fairly traceable to the challenged action of the defendant," and 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)). The trial court properly rejected Appellants' arguments that Appellees' alleged injuries are not fairly traceable to, and thus redressable by, Appellants—the Secretary of State and Attorney General.

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1. The Secretary of State[15]

Texas courts routinely look to "federal standing requirements for guidance," particularly in cases involving voter challenges to state-enacted election laws. *Andrade*, 345 S.W.3d at 6–7; *accord Tex. Ass'n of Bus.*, 852 S.W.2d at 444 n.60. In

[15] Appellees made their claims against the Deputy SoS only "until such time as the office of the Secretary of State [was] filled." Pet. ¶ 78. Now that John B. Scott is serving in his official capacity as the SoS, Appellees no longer maintain their claims against the Deputy SoS.

arguing that the Appellees' alleged injuries are not clearly traceable to and redressable by the SoS, Appellants ignore the Fifth Circuit's clear holding that "[t]he facial invalidity of a Texas election statute is, *without question*, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) (quoting TEX. ELECTION CODE § 31.001(a)) (emphasis added).

Yet even absent the Fifth Circuit's unambiguous holding in *OCA-Greater Houston*, Appellees' challenges to SB1 would still be fairly traceable to the SoS because the Petition alleges "a causal connection between [their] injury and the conduct complained of," *OCA-Greater Houston*, 867 F.3d at 610 (quotation omitted), and Appellees plead that their injuries caused by the SoS "will be redressed by a favorable decision," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).[16]

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First, as the Petition alleges, SB1 contains provisions that impose a variety of criminal penalties. *See* CR.28 (¶ 59), CR.56 (¶ 155), CR.62 (¶ 178), CR.85 (¶ 237). For each of these provisions, the SoS is *required* to refer all "information indicating that criminal conduct in connection with an election has occurred" that he "receive[s]

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[16] Appellees need not demonstrate that the relief sought will completely cure the injury; showing that the desired relief "could potentially lessen its injury" in some way is sufficient. *See Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014).

or discover[s]" to the Attorney General if he "determines there is reasonable cause to suspect that criminal conduct occurred." *See* TEX. ELECTION CODE. § 31.0006(a). The "threat of prosecution" that Appellees therefore face is "directly traceable" to the SoS's "intention" to have alleged violators of SB1 prosecuted. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008). Indeed, the Attorney General's website provides a link to the SoS's complaint form and explains that the AG's office "does not have resources to actively detect fraud, but rather relies on members of the public and election officials to observe fraud and report it to the Secretary of State, who screens complaints pursuant to Election Code Section 31.006 and refers credible allegations to the OAG." OFFICE OF THE ATTORNEY GENERAL, Election Integrity, https://www.texasattorneygeneral.gov/initiatives/election-integrity (last visited May 16, 2022). A "judicial invalidation" of the challenged provisions of SB1 would give Appellees "direct relief" from review and referral by the SoS to the Attorney General from prosecution. *Roark & Hardee LP*, 522 F.3d at 544.

Second, the SoS is closely connected to the enforcement and implementation of the challenged vote-by-mail and voter-assistance provisions. The Texas Election Code *requires* the SoS to design the mail-in ballot application, the mail ballot carrier envelope, and the voter assistance forms. *See* TEX. ELECTION CODE §§ 31.001–31.002. Local officials, in turn, are *required* to use the forms designed by the SoS.

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Id. § 31.002(d). For example, the SoS-designed mail-in ballot application is what expressly requires that a voter "must provide" an identification number that can be matched in order to be accepted. *See* TEX. SEC'Y OF STATE, Application for Ballot by Mail, https://webservices.sos.state.tx.us/forms/5-15f.pdf. If SB1's matching provisions are invalidated, the SoS would be precluded from including those instructions on the official applications it prepares, thereby preventing injury to Appellees (and their members) by requiring election officials to review and compare those identification numbers.

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That Appellees' injuries are traceable to and redressable by the SoS's ability to design and print the vote-by-mail applications is in no way undermined by the authority relied upon by Appellants. The cases cited to by Appellees, *Texas Alliance for Retired Ams. v. Scott* ("*TARA*"), 28 F.4th 669 (5th Cir. 2022), *Lewis v. Scott*, 28 F.4th 659, 663–64 (5th Cir. 2022), and *Richardson v. Flores*, 28 F.4th 649, 653 (5th Cir. 2022) are misplaced. The Court did not assess standing in these cases, but rather whether the *Ex parte Young* doctrine applied to allow suits in federal courts by citizens of a state against their own state. As *TARA* recognized, the inquiry regarding *Ex parte Young* "has no bearing" on issues of standing. *TARA*, 28 F.4th at 674.

In any event, the cases are readily distinguishable. In *TARA*, the Fifth Circuit held that the SoS did not have authority to enforce the repeal of straight-ticket voting because he was *not responsible for printing ballots*, and thus enforcement fell to

those "charged with preparing the ballot." 28 F.4th at 673. Here, where the SoS is charged with preparing the mail-in ballot application, he necessarily enforces those provisions of SB1. And unlike in *Lewis* and *Richardson*, Appellees here do not challenge "the *processes* of verifying mail-in ballots and notifying voters," *Richardson*, 28 F.4th at 654 (emphasis added), but instead that SB1 (and subsequently, the mail-in ballot applications designed by the SoS) mandates this new method of matching identification numbers at all because it will inevitably lead to errors by local election officials. *See* CR.9 (¶ 13).

Third, the Secretary is inextricably linked to the enforcement and implementation of the poll-watcher provisions. Specifically, the SoS is *required* to train and certify poll watchers. *See* TEX. ELECTION CODE § 33.008. This training program "must 1) be available; (A) entirely via the internet; and (B) at any time, without a requirement for prior registration; and 2) provide a watcher who completes the training with a certificate of completion." *Id.* § 33.031(b). A poll-watcher "must present their certificate of completion to the presiding judge at the polling place in order to be accepted as a poll watcher." TEX. SEC'Y OF STATE, Texas Election Training Portal, https://pollworkertraining.sos.texas.gov/ (last visited May 16, 2022). As part of this role, the SoS provides poll workers with a self-published "Poll Watcher's Guide" that was updated in January 2022 to reflect the challenged poll watcher provisions in SB1—namely, sections 4.06 (amending TEX. ELECTION CODE

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§ 33.051), 4.09 (amending TEX. ELECTION CODE § 33.061(a)), and 4.01 (adding TEX. ELECTION CODE § 32.075(g)), discussed *supra*. *See* TEX. SEC'Y OF STATE, Poll Watchers Guide, https://www.sos.state.tx.us/elections/forms/pollwatchers-guide.pdf at 6, 9, 12. Thus, the SoS is directly responsible for instructing poll watchers on the poll watcher provisions that Appellees allege result in voter intimidation and confusion among election officials. If the challenged provisions are invalidated, the SoS will be compelled to amend its guidance, thereby ensuring that poll workers are instructed solely on non-vague provisions that do not have the effect of intimidating or discriminating against voters.

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Indeed, Appellants do not even attempt to argue that the above provisions, cited in the Petition, are not enforceable by the SoS. Appellants assert that Appellees must identify the Secretary's specific duties within the particular statutory provision," in order to have standing. Br. at 32. Appellees have done so here by alleging injury under provisions of SB1 that require enforcement from the SoS as discussed above.

2. The Attorney General

As Appellants acknowledge, the Court of Criminal Appeals recently held that the Attorney General's attempt to prosecute election-law violations is unconstitutional. Br. at 36; *see State v. Stephens*, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021) ("Since none of the Attorney General's enumerated

duties concern criminal or electoral matters, Election Code section 273.021 is unconstitutional."). In light of this recent ruling, Appellees acknowledge that their claims are no longer traceable to and redressable by the Attorney General.

However, Appellant Attorney General Paxton has petitioned for rehearing of the court's decision in *Stephens*. *See* State of Texas's Motion for Rehearing, *Stephens v. State*, No. PD-1032&1033-20 (Tex. Crim. App. Dec. 30, 2021). If that petition is successful and *Stephens* is reversed, then Appellees' claims are clearly traceable to and redressable by the Attorney General. Br. at 36.[17]

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In sum, Appellees have sufficiently pleaded standing. To the extent the Court concludes that "standing has not been alleged or shown, but the pleadings and record do not demonstrate an incurable jurisdictional defect," the case should "be remanded to the trial court" so that Appellees may have a "fair opportunity to develop the record relating to jurisdiction and to replead." *RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 429 (Tex. 2016).

II. APPELLANTS ARE NOT ENTITLED TO SOVEREIGN IMMUNITY

Appellants do not meaningfully dispute (nor could they) that it is black letter law that sovereign immunity does not apply, when, as here, Appellees allege purely

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[17] Future actions of third parties can support standing where those parties have "historically" behaved in a certain manner. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). The Attorney General has historically, and is *currently*, prosecuting violations of the Texas Election Code. *See* OFFICE OF THE ATTORNEY GENERAL, Election Integrity, https://www.texasattorneygeneral.gov/initiatives/election-integrity.

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 generally bars suits for retrospective monetary relief, it does not 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" (citation omitted)); *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).

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In their Rule 91a motion denied by the trial court, Appellants argued that the exemption to sovereign immunity did not apply to the claims and relief in this lawsuit. In this appeal, Appellants abandon those arguments entirely and instead raise three new arguments: (1) the SoS and Attorney General were not actively involved in any "unconstitutional acts" related to SB 1 or its enforcement and thus, have sovereign immunity and cannot be held liable; (2) Appellees should have named the *Office* of the SoS and the *Office* of the Attorney General rather than the SoS and Attorney General in their official capacities; and (3) Appellees do not adequately plead viable constitutional claims. Each of these arguments fail.

A. Appellants Have An Adequate Connection To The Enforcement of SB1

Appellants argue that "Plaintiffs still do not adequately allege that Defendants' respective agencies enforce the provisions in SB 1." Br. at 40. But as discussed above, both the Secretary of State and the Attorney General have specific duties related to the enforcement and implementation of SB1. *See supra*, Section I.D.

B. Appellees Properly Named Appellants In Their Official Capacities

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Appellants argue that "to challenge the constitutionality of provisions of SB1 via the UDJA's sovereign-immunity waiver, Appellees were required to sue the *Office* of the SoS and the *Office* of the Attorney General—not the individual officeholders named as defendants." Br. at 40. In so arguing, Appellants point *only* to the fact that the Texas Supreme Court has stated "for claims challenging the validity of . . . statutes . . . the Declaratory Judgement Act requires that the *relevant governmental entities* be made parties, and thereby waives immunity." *See* Br. at 40 (emphasis added) (citing *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015) and *Texas Educ. Agency. v. Leeper*, 893 S.W.2d 432, 466 (Tex. 1994)). But that is exactly what Appellees did here—Appellees named the SoS and the Attorney General *in their official capacities*, not as individuals. Appellants do not point to a single case in which the Court required plaintiffs to name an office as

a defendant instead of officeholders in their official capacities. Indeed, neither *Patel* nor *Leeper*—the only cases Appellants cite—dispute or even discuss whether suing a state official in their *official capacity*, as Appellees do here, is not the equivalent of suing a relevant "government entity."[18]

Moreover, in taking this interlocutory appeal, Appellants directly contradict this position. Appellants "noticed this interlocutory appeal pursuant to Texas Civil Practice and Remedies Code section 51.014(a)(8)," which permits an interlocutory appeal from an order of the district court that "grants or denies a plea to the jurisdiction ***by a governmental unit***."

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At bottom, there is simply no support for Appellants' argument that Appellees were required to sue Appellants' Offices rather than Appellants themselves.

C. Appellants' Challenges To Appellees' Constitutional Claims All Fail

Appellants assert that Appellees' constitutional claims are "not viable" and therefore sovereign immunity is not waived. But in making these arguments, Appellants again regurgitate the Republican Committee's failed Rule 91a failure-to-state-a claim arguments that the trial court roundly rejected. This Court should do

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[18] *Patel* merely stands for the proposition that government entities are not immune from suits that challenge the validity of statutes. 469 S.W.3d at 77. As to *Leeper*, not only do Appellants cite to a *dissenting* opinion, the opinion has absolutely nothing to do with whether a plaintiff must sue a state *office* instead of an officeholder in her official capacity. It merely addresses the availability of attorneys' fees in cases that waive sovereign immunity under the Declaratory Judgement Act. 893 S.W.2d at 466.

the same, particularly at this stage of the litigation. While the Court may review the pleadings to determine whether a prima facie claim has been alleged sufficient to waive sovereign immunity, that "does not mean that [a plaintiff] must prove his claim in order to satisfy the jurisdictional hurdle." *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009).

1. Appellees Sufficiently Allege a Discriminatory Intent Claim

Article I, Section 3 of the Texas Constitution is coextensive with the Equal Protection Clause of the Fourteenth Amendment, *Abbott v. Anti-Defamation League*, in that both "safeguard against invidious discrimination between classes of persons." 610 S.W.3d 911, 923 (Tex. 2020); *see also LULAC*, 868 S.W.2d at 312. When interpreting discriminatory intent claims under Article I, Section 3, Texas courts apply the federal analytical approach to discriminatory intent claims under the Fourteenth Amendment, as set forth in *Arlington Heights*, 429 U.S. at 268. Although a plaintiff alleging discriminatory intent bears the burden of overcoming the presumption that the State did not act with such intent, *Abbott*, 610 S.W.3d at 923, "'[r]acial discrimination need only be one purpose, and not even a primary purpose,' of an official action for a violation to occur." *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (en banc) (quoting *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009)).

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"Legislative motivation or intent is a paradigmatic fact question." *Veasey*, 830 F.3d at 230 (quoting *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000)). In *Arlington Heights*, the U.S. Supreme Court indicated that, in some cases, "impact may be an important starting point" in assessing discriminatory intent. 429 U.S. at 266. It then "set out five nonexhaustive factors to determine whether a particular decision was made with a discriminatory purpose, and courts must perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Veasey*, 830 F.3d at 230–31 (citing *Arlington Heights*, 429 U.S. at 266–68). "Those factors include: (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporary statements by members of the decision-making body." *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989) (citing *Arlington Heights*, 429 U.S. at 267–68). The Court in *Arlington Heights* stressed that not all of these factors need be present—or are even likely to be present—in every case. 429 U.S. at 231–32. Because the analysis is fact-intensive and based on the record as a whole, it is ill-suited for resolution without the benefit of discovery. At this early stage of the litigation, the Petition's allegations are more than sufficient to state a discriminatory intent claim.

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The Petition alleges that SB1's enactment came on the heels of a massive demographic change over the past decade, mostly concentrated in the State's most ethnically and racially diverse counties, and a successful 2020 election in which more Black and Hispanic voters were able to cast ballots despite the ongoing pandemic. CR.5 (¶ 2) CR.34 (¶ 81). When SB1 was enacted, the 2020 Census results revealed that the State had added nearly four million residents of color and that Harris County became even more diverse with a 43.7% Hispanic, 20% Black, 28.7% white, and 7% Asian population. *Id.* In 2020, Harris County implemented a series of measures to make it easier for voters to cast their ballots, including but not limited to establishing ten drive-thru voting sites; extending early voting hours on certain days leading up to the election; implementing twenty-four hour voting at eight polling locations; and installing multiple drop box sites that permitted voter to returning absentee ballots via drop box. CR.5 (¶ 3), CR.37–38 (¶¶ 92–94). It was no accident, the Petition alleges, that after an extremely successful election that saw unprecedented turnout levels, the Texas Legislature enacted SB1, which targets the very methods of voting that permitted counties like Harris to alleviate the substantial burdens faced by voters of color, including Black, Hispanic, and Asian voters. CR.10 (¶ 17).

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In addition to evidence of discriminatory impact, the Petition further recounts, in detail, myriad additional facts from which inferences of discriminatory intent

could be drawn. These include the legislature's awareness of—and purposeful refusal to acknowledge—information as to the potential for discriminatory impact on voters of color if SB1 were passed, CR.48–49 (¶¶ 124–26), CR.81 (¶ 220); the extraordinary deviations from standard procedures, including rushed processes, insufficient time provided to study amendments to the legislation, and the exclusion of Black and Latinx legislators from conferences, CR.6–8 (¶¶ 7, 8, 9, 10), CR.50 (¶ 129); the use of the phrase, "purity of the ballot," which has historic lineage as a justification for racially discriminatory voting laws including a prior version of SB 1, CR.39 (¶ 97), CR.72–74 (¶¶ 202–03); and the pretextual nature of the justifications provided by the proponents of SB1 to justify its passage, CR.6 (¶¶ 4–5), CR.39 (¶¶ 95–96). Count I of the Petition concludes by alleging that SB1, as a whole, was "enacted with the purpose of discriminating based on race or ethnicity" to make it "harder for Black, Hispanic, and Asian voters, as well as other minorities to vote." CR.81 (¶ 222). From its introductory paragraphs through the assertion of the claims, the Petition alleges that the provisions of SB 1, "individually and collectively," will adversely impact Texas's communities of color, and "[t]his is precisely what the legislature intended." CR.10 (¶ 17); *see also* CR.8–10 (¶¶ 11–16).

Rather than confront the sum of these allegations in arguing that Appellees' discriminatory intent claim is meritless, Appellants dispute individual allegations, asking this Court to reject the actual allegations and instead accept Appellants'

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alternate version of events. But in reviewing the sufficiency of Appellees' claims, the Court "take[s] as true all evidence favorable to the [plaintiff], and . . . indulg[es] every reasonable inference and resolve[s] any doubt in the [plaintiff's] favor. *City of Celina v. Blair*, 171 S.W.3d 608, 611 (Tex. App.—Dallas 2005, no pet.). For that reason alone, Appellants' arguments fail; however, Appellants' arguments also fail on the merits.

First, Appellants argue that the Legislature's admitted departures from normal procedure are not evidence of discriminatory intent because Appellees do not show that the "'fail[ure] to follow the proper procedures' [were] 'targeted to an[] identifiable minority group.'" Br. at 42 (quoting *Rollerson v. Port Freeport*, No. 3:18-cv-00235, 2019 WL 4394584, at *8 (S.D. Tex. Sept. 13, 2019), *aff'd*, 6 F.4th 633 (5th Cir. 2021)). *Rollerson* requires no such showing. In *Rollerson*, the Fifth Circuit explained that "procedural violations do not demonstrate invidious intent of their own accord" and that "they must have occurred in a context that suggest the decision-makers were willing to deviate from established procedures in order to accomplish a discriminatory goal." 6 F.4th at 640. There, the plaintiff had failed to tie the defendants' action "to any specific event or circumstance that is indicative of discriminatory intent," i.e., "that tend to exclude . . . benign purposes." *Id*. at 641. Not so here, where the Petition places the procedural violations in a context that allows for the inference of discriminatory intent, as explained above.

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Second, Appellants argue that the Legislature's omission of a racial impact analysis "proves nothing" because it is not part of the Legislature's "normal procedural sequence." Br. at 44. But the Petition alleges that the Legislature was bombarded with constituent feedback explaining that SB 1 would disparately impact voters of color and that it *purposefully* refused to conduct a racial impact analysis for that very reason. *See* CR.48–49 (¶¶ 124, 126), CR.78 (¶ 220). Months later, after fielding numerous questions about whether the proponents of SB1 had considered the impact of SB1 on voters of color, legislators replied by noting that they "were not advised or had not looked at this issue." CR.48 (¶ 125) (internal quotation omitted). The Legislature cannot ignore an avalanche of feedback that a bill disparately impacts voters of color and then cite that purported ignorance as evidence that it did not act with discriminatory intent. *See Veasey*, 830 F.3d at 236.

Third, Appellants take aim at Appellees' allegations that the Legislature excluded lawmakers of color from the legislative process, and targeted legislators who fled the capital in protest, arguing that the Legislature targeted Democrats. *See* Br. at 45 n.19. But, as Appellants seem to admit, the Petition alleges the opposite—it alleges that the Legislators targeted for arrest were "mostly minority legislators," (CR.81 ¶ 220), and that the Legislature specifically excluded "*only* members of color from the legislative process." *Id.*

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Fourth, Appellants argue that no inference of discriminatory intent may be drawn from the Legislature's justification of SB 1 as necessary to prevent fraud or promote election integrity and uniformity. Specifically, appearing to concede that there was not rampant fraud in the 2020 election, Appellants argue that a State may act prophylactically to prevent fraud "without waiting for it to occur and be detected within its own borders." Br. at 48 (citing *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021)). But as the Petition alleges, the Legislature used fraud as a *pretextual* justification for a law that it knew was discriminatory. CR.6 (¶ 5), CR.39 (¶ 95–96). The tenuousness of the Legislature's justification of a law may provide significant support for an ultimate finding of discriminatory intent. *Veasey*, 830 F.3d at 236–37. Such was the case in *Veasey*, where the Fifth Circuit, sitting *en banc*, highlighted nearly identical facts as pleaded by Appellees here:

> The district court also heard evidence that SB 14 is only tenuously related to the legislature's stated purpose of preventing voter fraud.
>
> * * *
>
> [T]here is evidence that could support a finding that the Legislature's race-neutral reason of ballot integrity offered by the State is pretextual.
>
> * * *
>
> The Legislature is entitled to set whatever priorities it wishes. Yet, one might expect that when the Legislature places a bill on an expedited schedule and subjects it to such an extraordinary degree of procedural irregularities, . . . such a bill would address a problem of great magnitude.

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Id. at 238.

Fifth, Appellants ineffectively dispute the Legislature's intent behind the use of the term "purity of the ballot box." Appellants argue that the use of the phrase "preserving the purity of the ballot" in an earlier version of what became SB1 is simply the "use of a phrase from the Texas Constitution that has been cited with favor by the Texas Supreme Court." Br. at 43. As the Petition alleges, that phrase is an historic dog whistle for racial discrimination and was being used to justify the need for SB1's passage. CR.72–74 (¶¶ 202–03). That the term falls within the Texas Constitution does make its use in this case nondiscriminatory. It is also telling that, after being called on it, the drafters of SB1 removed that language from the final bill.

2. *Appellees Sufficiently Allege Right-to-Vote Claims*

The right to vote is protected by Article I, Section 3 of the Texas Constitution. *State v. Hodges*, 92 S.W.3d 489, 496, 501–02 (Tex. 2002). When considering a burden on the right to vote, Texas courts utilize the *Anderson-Burdick* framework applied to federal constitutional claims, "'first consider[ing] the character and magnitude of the asserted injury to [voting] rights,' and then balanc[ing] the purported injury against the 'interests put forward by the State as justifications for the burden imposed by its rule.'" *Abbott*, 610 S.W.3d at 919 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). This test is a "flexible" sliding scale, in which the rigorousness of the court's inquiry increases with the severity of the

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burden, ranging from rational basis for "reasonable, nondiscriminatory restrictions" to strict scrutiny for "severe" impediments on the right to vote. *Id.* at 919–20. Restrictions that are "neither severe nor minimal" trigger a flexible analysis, wherein "the burden on plaintiffs rights must be weighed against the state's asserted interest and chosen means of pursuing it." *Tex. Alliance for Retired Ams. v. Hughs*, 489 F. Supp. 3d 667, 686 (S.D. Tex. 2020) (citations omitted), *rev'd in part, vacated in part sub nom., Tex. Alliance for Retired Ams. v. Scott*, 28 F.4th 669 (5th Cir. 2022).

In Counts II, IV, V, VII, and VIII of the Petition, Appellees allege in detail how the challenged provisions—individually and together—will substantially burden the right to vote of Appellees' members and Plaintiff voters. Nevertheless, Appellants make two arguments for dismissal: (1) the challenged law "must place an unconstitutional burden on 'most voters,' not just some voters more than others, Br. at 46, citing *Crawford* and *Abbott*; and (2) the State has legitimate interests that justify the burdensome restrictions of SB1. Both of these arguments fail.

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First, Appellants argue that Appellees' claims fail under *Anderson-Burdick* because they do not plead that the challenged portions of SB1 "impose material burdens on 'most voters.'" Br. at 46 (quoting *Abbott*, 610 S.W.3d at 921). Appellants misread the law at issue and distort the facts as pled.

Contrary to Appellants' assertions, neither *Crawford* nor *Abbott* announced a bright-line rule under which voting rights regulations are only cognizable under

Anderson-Burdick if they affect "most voters." Br. at 46. As the plurality in *Crawford* acknowledged, "[i]n neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008). In other words, that a law burdens only some voters is not in and of itself indicative of whether it constitutes an unconstitutional burden on the right to vote. Instead, the Court's holding in *Crawford* was based on a lack of evidence after a full hearing, leading the Court to find that Indiana's voter identification did not represent a "significant increase over the usual burdens of voting" for "most voters," and that "on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." *Crawford*, 553 U.S. at 198, 202.

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Abbott echoed this point, noting that concern about a "small class of voters" did not render the October Proclamation unconstitutional as a matter of law—not because any burden on this small class of voters would be permissible, but because "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Abbott*, 610 S.W.3d at 922 (quoting *Crawford*, 553 U.S. at 199) (emphasis added). Despite Appellants' best efforts to suggest otherwise, neither *Crawford* nor *Abbott* created a new test under which a

voting restriction can be deemed burdensome under *Anderson-Burdick* only if it affects most voters. Instead, *Crawford* and *Abbott* demonstrate that analyzing a right to vote claim under the *Anderson-Burdick* framework requires an evidentiary record and cannot be determined as a matter of law.

In any event, even if Appellants were right as to the standard, Appellees have pleaded that the provisions at issue do not merely burden a "subgroup of voters." Br. at 47. Instead, the Petition specifically alleges the ways in which the challenged provisions affect all Texas voters in some ways and all Texas voters who rely on the particular means of voting, while noting the ways in which they will disproportionately—though not exclusively—impact voters of color. *See* CR.8 (¶ 10), CR.10 (¶ 17) ("[T]hese provisions of SB 1 gravely threaten the fundamental right to vote of all Texans."). The Petition avers that: (1) the poll watcher provisions "will deter election officials from taking action to protect voters from conduct that will make voters" (not just, but particularly, voters of color) "feel uncomfortable or intimidated, or otherwise deter them from voting," CR.83 (¶ 228); (2) the restrictions on solicitation and distribution of vote-by-mail applications, it is alleged, will burden all "eligible voters" who "may not be able to vote by mail" if they are not solicited by election officials at community gatherings, and voters who rely on the pick-up of applications at any number of places and events, CR.87 (¶ 247); (3) the restrictions on assistants will burden the elderly and physically disabled and those who need

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language assistance, and impermissibly burdens "voters' right to vote," CR.88 (¶¶ 250–51); and (4) the match requirement for voting by mail threatens the vote of "eligible mail-in voters," CR.92–93 (¶¶ 265–68). Appellants apparently disagree with these allegations, *see* Br. at 46–47, but that is a factual dispute that only underscores that Appellees have alleged facts sufficient to state prima facie right-to-vote claims. *See Harding v. Cnty. of Dallas*, No. 3:15-cv-0131, 2015 WL 11121002, at *1 (N.D. Tex. May 28, 2015); *Georgia St. Conf. of NAACP v. Fayette County Bd. of Comm'rs*, 775 F.3d 1336, 1348 (11th Cir. 2015).

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Second, Appellants contend that any burden imposed by SB1's provisions is justified by the state's interests in "deterring and detecting voter fraud," "preventing Ballot tampering," and "promot[ing] uniformity of elections and increase[ing] confidence in electoral integrity." Br. at 47–48. The Petition repeatedly avers not only that no legitimate state interests justify the significant burdens created by SB1's provisions, but that the purported justifications are pretextual. CR.6 (¶ 5), CR. 81 (¶ 221), CR.83 (¶ 230), CR.87–89 (¶¶ 244, 248, 252), CR.93 (¶¶ 268, 272). Mere invocation by the State of voter fraud and election integrity does not meaningfully dispute those allegations or in any way show that Appellees have not stated prima facie right-to-vote claims. *Veasey*, 830 F.3d at 274–75.

Moreover, while Appellants attempt to attack each of these provisions singularly, they fail to consider the impact of SB1 in total, as pleaded expressly in

Count VIII of the Petition. Each of the challenged provisions hinders a voter's ability to cast a ballot; taken together they make every step of the voting process more difficult and make every voting method less accessible. This is yet another reason why Appellants' argument that SB1 does not sufficiently burden the right to vote is unavailing. SB1, in total, makes voting more difficult. A voter who attempts to vote in person must risk increased poll watcher intimidation, CR.55–57 (¶¶ 152–57), and compromised voter assistance, CR.62–63 (¶¶ 180–82), and can no longer access drive-thru voting if needed, CR.65 (¶ 191). A voter who needs to vote early will now encounter fewer early voting hours and fewer early voting days. CR.65 (¶ 189). A voter who instead attempts to vote by mail can no longer rely on solicitation and distribution of vote-by-mail applications from election officials, CR.57 (¶¶ 160–61), must risk the erroneous rejection of his application and/or ballot, CR.59–60 (¶¶ 167–68), and can no longer deliver his ballot by drop box. CR.65 (¶ 190). Each of these individual provisions impermissibly burden the right to vote, and collectively they make voting—at any time, in any place, by any method—more difficult. Indeed, the gravamen of Count VIII is that SB1, when viewed as a whole, intentionally and impermissibly increases the burden of voting for all Texans, and particularly for voters of color. *See* CR.93 (¶¶ 270–71).

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Appellants briefly challenge the legal basis for the cumulative burden claim by asserting that Appellees were "unable to cite a single case from either the U.S. or

Texas Supreme Courts supporting the theory advanced in Count VIII." Br. at 54. That may be so, but it is simply because neither the U.S. Supreme Court nor any Texas court has considered the issue. Indeed, it is equally telling that Appellants do not cite a single case in opposition to the cumulative burden claim, and they do not address the decisions from several federal courts that have recognized that cumulative effects of an election law can *collectively* have the overall effect of burdening the right to vote. *See* Order, *Ga. State Conf. of NAACP v. Raffensperger*, No. 21-01259, slip op. at 4 n. 8 (N.D. Ga. Dec. 9, 2021) ("State Defendants . . . analyze[] the challenged provisions out of context and do[] not account for Plaintiffs' contention that the challenged provisions also collectively violate the law."); *id.* at 25 (declining to dismiss plaintiffs' claims that "the individual provisions of SB 202, as well as their collective effect, impose "substantial burdens on Georgia's voters"); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 732 (M.D. Tenn. 2019) ("[T]he plaintiffs have demonstrated that these aspects of the Act, functioning together, create a cumulative burden that is even more difficult to justify as a constitutional matter."); *see also N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016).

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3. *Appellees Sufficiently Allege a Claim for Violation of Free Speech, Expression, and Association*

Count VI of the Petition alleges that sections 6.01, 6.03, 6.04, and 6.05 of SB1 contravene Article 1, Section 8 of the Texas Constitution by violating the free speech

and associational rights of voter assistants. CR.89-91 (¶¶ 253-61). Appellants' primary legal argument—that the challenged provisions do not implicate the First Amendment—is wrong as a matter of law. Appellants' remaining arguments raise factual disputes inappropriate for this stage of litigation.

Article 1, Section 8 of the Texas Constitution provides "[e]very person shall be at liberty to speak, write or publish his opinions on any subject . . . ." The Texas Supreme Court has construed Article 1, Section 8 to be at least coextensive with the First Amendment to the United States Constitution. *See Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002); *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992). The First Amendment protects "core political speech," described as "interactive communication concerning political change . . . ." *Meyer v. Grant*, 486 U.S. 414, 422 (1988). "When a law burdens core political speech, [the Supreme Court] applies 'exacting scrutiny,' and [it] uphold[s] the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). The Supreme Court has repeatedly struck down laws that "restrict political expression" by "limit[ing] the number of voices who will convey [plaintiffs'] message and the hours they can speak and, therefore, limit[ing] the size of the audience they can reach." *Meyer*, 486 U.S. at 422–23. The Fifth Circuit has thus explained that "the primary act of simply encouraging citizens to vote constitutes core speech and would be protected under the First Amendment. State

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restrictions on this activity would be analyzed under the lens of strict scrutiny . . . ." *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 897 (5th Cir. 2012).

Appellants argue that Sections 6.01, 6.03, 6.04, and 6.05 of SB 1 do not implicate the First Amendment because "assisting persons to vote is not protected speech." Br. at 51. To support this argument, Appellants rely primarily on *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013).[19] *Steen*, however, is inapposite. In that case, the Fifth Circuit distinguished between laws, like the provisions at issue here, that regulate "the process of advocacy itself, dictating who could . . . or how to go about speaking," and laws that "merely regulate the receipt and delivery of completed voter-registration applications, two non-expressive activities." 732 F.3d at 391. Indeed, in *Steen*, Texas did "not deny that some voter registration activities involve speech [such as] . . . 'helping' voters to fill out their forms," which the court describes as "constitutionally protected speech." *Id.* at 389. Other courts have ruled similarly. *See Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 224 (M.D.N.C. 2020) ("The court therefore finds that assisting voters in filling out a request form for an absentee ballot is 'expressive conduct' which implicates the First Amendment."); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich.

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[19] Appellants also rely on dicta from *Guerrero v. State*, 820 S.W.2d 378, 382 (Tex. App.—Corpus Christi, pet. ref'd 1991), for the proposition that voter assistance is not protected speech. But *Guerrero* said no such thing; it merely upheld a conviction—after trial—of a voter assistant who violated Texas election law by suggesting who a voter she was assisting should vote for. It is plainly inapposite to the claims at issue here, both procedurally and substantively.

2020) (offering to assist with absentee ballots, among other things, "necessarily involve political communication and association, and thus, just as in *Hargett*, the exacting scrutiny standard found in *Meyer* and *Buckley* is applicable."); *DSCC v. Simon*, No. 62-CV-20-585, 2020 WL 4519785, at *29 (Minn. Dist. Ct. July 28, 2020) (assisting with absentee ballots is a "discussion of whether to vote absentee and to allow your ballot to be collected . . . that inherently implicates political thought and expression."). Here, the Petition alleges that challenged provisions restrict *how* voter assistants, like Norman, may assist voters and express their advocacy, and *what* they may say or do to advance their advocacy. CR.25 (¶ 52) ("SB 1 will make it harder for Norman to help others, increasing the administrative burden on Norman and other assistants, thus chilling her ability to help voters"); CR.25 (¶ 53) ("She expects that these provisions will dissuade voters from seeking her help, and she knows that these provisions will chill her ability to drive voters and help them at the polls . . .").

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Appellants also argue that Section 6.01, 6.03, 6.04, and 6.05 do not sufficiently burden Appellees' speech. Br. at 53–54. In so arguing, Appellants once again raise a classic factual dispute that does not warrant dismissal. The Petition alleges, as Appellants seem to acknowledge, that Sections 6.01, 6.03, and 6.05 "place significant burdens on . . . protected speech and associational rights because their requirements of additional forms and statements under penalty of perjury . . .

will make it more difficult for Plaintiff Norman to assist voters and dissuade persons like Plaintiff Norman from assisting voters in the first place." CR.90 (¶ 259) (emphasis added); *see also* CR.25 (¶ 53). The Petition also explains that Section 6.04's oath provision chills speech by requiring voter assistants to swear, under penalty of perjury, that they will not "pressure" voters into accepting their assistance, which Plaintiff Norman asserts could "encompass many of Plaintiff Norman's activities, such as holding up signs and instructing fellow congregation members to seek out her assistance." CR.25 (¶ 52), CR.91 (¶ 260). That Appellants disagree with these assertions does not make them "conclusory," nor does it mean that Plaintiff Norman is seeking a right to "intimidate" voters, which she is plainly not.

4. *Appellees Sufficiently Allege a Due Process Claim*

Article 1, Section 19 of the Texas Constitution provides "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, expect by the due course of the law of the land." "Due course" has been interpreted by the Texas Supreme Court to be coextensive with the United State Constitution's Due Process Clause under which vague or unclear laws, whether criminal or civil, that violate due process cannot be enforced. *Texas Antiquities Comm. v. Dallas Cnty. Cmty. Coll. Dist.*, 554 S.W.2d 924, 928 (Tex. 1977) ("We adhere to the settled principle that statutory delegations of power may not be accomplished by language so broad and vague that persons 'of common intelligence

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must necessarily guess at its meaning and differ as to its application.'") (plurality opinion) (citation omitted).

A statute is unconstitutionally vague and thus abridges due process when, as here, "it fails to give fair notice of what conduct may be punished, forcing people to guess at the statute's meaning, … and threatening to trap the innocent," or "invites arbitrary and discriminatory enforcement by failing to establish guidelines for those charged with enforcing the law, allow[ing] policemen, prosecutors, and juries to pursue their personal predilections." *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998) (citations omitted). Laws that impose criminal penalties require higher levels of drafting clarity. *Id.*

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The Petition contains numerous allegations that Sections 4.01(g), 4.06(g), 4.07(e), 4.09, 6.01(e) are unconstitutionally vague. The Petition brings claims on behalf of three election judges, each of whom alleges that poll watcher statutes are difficult to understand and prevent them from knowing what conduct is or is not prohibited by the statute. For example, Plaintiff Blanco "believes that the language in Sections 4.07(e) (denying "free movement"), 4.09 (taking "any action"), and 6.01(e) (authorizing watchers to "observe any activity" during curbside voting) "are vague" and that "these provisions will prevent his ability do his job." CR.28 (¶¶ 59–60). Plaintiff Nugent "finds the provisions of SB 1 governing poll watchers to be vague." CR.29 (¶ 65), as she does not know whether asking poll watchers to sit

instead of stand "would qualify 'as an action' that denies them 'free movement,' as used in the provisions of SB 1." *Id.* Plaintiff Bloomquist "is concerned that SB1's vague language will prevent her and other judges from being able to control the polling place and provide a safe and comfortable environment for voting." CR.31 (¶ 72).

These averments are reinforced by other parts of the Petition. Section 4.06 imposes criminal penalties on election judges if they "knowingly refuse[] to accept a watcher for service." The Petition alleges that it is unclear what it means to "knowingly refuse[] to accept a watcher for service" because the statute curbs the discretion bestowed by other statutes on election judges to control the polling place. This conflict between exercising control over the polling and facing criminal liability for refusing to accept a watcher creates confusion around whether election judges even have the power to "remove disruptive and improper poll watchers against their fear of being charged with a Class A misdemeanor." CR.85 (¶ 238).

Section 4.09 makes it a Class A misdemeanor to "knowingly prevent a watcher from observing an activity or procedure." The Petition alleges that this section contains vague and undefined terms, such as "any action" and "observation not reasonably effective," terms that are not defined. *See* CR.28 (¶ 59), CR.85 (¶ 240).

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Section 4.07 prohibits an election judge from "den[ying] free movement where election activity is occurring within the location at which the watcher is serving," but Section 4.07 does not define what it means for an election judge to "deny free movement." Plaintiff Bloomquist explains that "she interprets 'free movement' as a watcher's ability to observe within the polling place without coming too close to voters or making them feel uncomfortable." CR.29 (¶ 65), CR.32 (¶ 73). Plaintiff Bloomquist does not know, from the face of the statute, whether "asking a poll watcher to stop hovering over a voter would qualify as 'an action' or fall under denying them 'free movement.'" CR.32 (¶ 73). Further, "free movement" could be interpreted to allow poll watchers to move anywhere in a polling location, and does not specify that the "free movement" must be related to their duties as poll watchers. CR.85 (¶ 239). Plaintiff Blanco states the same. CR.28 (¶ 59). Appellants argue that Appellees do not plead that Section 4.07 is vague in *all contexts.* Br. at 49-50. But again, this is simply not true. Appellees Blanco and Bloomquist clearly allege that they do not understand what actions Section 4.07 prohibits, even if Appellants wish that were not the case. CR.28 (¶ 59), CR.32 (¶ 73).

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Section 4.01(g) states that a "presiding judge may not have a watcher duly accepted for service . . . removed from the polling place for violating a provision of this code or any other provision of law relating to the conduct of elections, other than a violation of the Penal Code, unless the violation was observed by an election judge

or clerk." As the Petition explains, Section 4.01(g) does not explain what entails a "violation" in the context of this provision. CR.86 (¶ 242). Appellees' Blanco, Nugent, and Bloomquist have all alleged that it is part of their duty to create a comfortable environment for voting, and that part of that duty is ensuring that poll watchers do not hover over voters, stand extremely close to voters, or talk loudly in a polling place. *See* CR.29 (¶ 64), CR.31–32 (¶¶ 70, 73, 75), CR.86 (¶ 242). This provision creates uncertainty whether election judges will be able to remove poll watchers who engage in those activities without being subject to civil liability because it is unclear whether those activities are "violations" of the election code. CR.86 (¶ 242).

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Section 6.01(e) grants poll watchers the right to observe "any activity" related to voter assistance, including when an assistant drives seven or more voters to the polls or when an assistant provides in-person assistance to a voter who is either physically disabled or cannot see and/or read the language on the ballot. This section is vague because it does not define what "any activity" means—for example, it is unclear whether "any activity" might include hovering over and shadowing the voter assistance process or other activity that intimidates or otherwise makes voters uncomfortable. CR.28 (¶ 59). Appellants argue that that Section 6.01 is not impermissibly vague because the section only applies to "curbside" voting, and thus the phrase "'any activity' in subsection (e) does not 'provide[] poll watchers with

license to hover over and shadow the entire assistance process." Br. at 50. Not only does the Petition clearly acknowledge that this provision applies to curbside voting provisions, CR.55 (¶ 153), but even so Intervenors fail to clarify why the phrase "any activity" is less vague even if it applies to curbside voting. The same concerns about poll watchers hovering over voters and making them uncomfortable applies equally inside the polling place as it does outside. Intervenors' arguments for dismissal fail.

In sum, Appellees have pleaded that Appellants are not entitled to sovereign immunity. In the event the Court concludes that Appellees' pleading does not contain facts sufficient to establish a waiver of sovereign immunity, Appellants have not "eliminated the possibility" that Appellees could do so and therefore the case should be remanded to afford Appellees the opportunity to amend their pleadings. *Brazoria Drainage Dist. No. 4 v. Matties*, No. 01-17-00422-CV, 2018 WL 3468531, at *4 (Tex. App.—Houston [1st Dist.] July 19, 2018, no pet.) (mem. op.); *see also City of Forest Hill v. Cheesbro*, No. 02-18-00289-CV, 2019 WL 984170, at *4 (Tex. App.—Ft. Worth Feb. 28, 2019, no. pet.).

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CONCLUSION

The Court should affirm the trial court's denial of Appellants' Rule 91a motion and find that the Court does have subject matter jurisdiction over this action.

Dated: May 16, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 14,885 words. All text appears in 14-point typeface, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Lindsey B. Cohan

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I hereby certify that, on May 16, 2022, a true and correct copy of the foregoing document was served on all counsel of record using the Court's electronic case filing system.

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