No. 01-22-00122-CV

In the Court of Appeals for the First Judicial District Houston, Texas

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.

On Appeal from the
189th Judicial District Court, Harris County

REPLY BRIEF FOR APPELLANTS

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Introduction

The Texas Election Integrity Act of 2021, 87th Leg., 2d C.S. ("SB 1") was enacted following a year of unprecedented turmoil in the election process to increase public confidence in the integrity of Texas's elections by reducing the likelihood of fraud, protecting the secrecy of the ballot, promoting voter access, and ensuring that all legally cast ballots are counted. SB 1 § 1.04. The Act further ensures uniformity and consistency in the Texas Election Code and the conduct of elections. *Id.* § 1.03(2)(3).

Without disputing that these are permissible—indeed, laudable—aims, Plaintiffs charge that SB 1 is a racist statute and the "quintessential voter suppression law" because it no longer permits election officials in two counties (Harris and Travis) to continue to employ alternative and idiosyncratic emergency voting rules used in 2020 during a once-in-a-lifetime pandemic. *See, e.g.*, Appellees' Br. 1. The accusation is baseless. But the veracity of Plaintiffs' accusation is not at issue—the trial court's lack of jurisdiction over Plaintiffs' suit is.

Defendants' opening brief shows that Plaintiffs' suit founders on two jurisdictional shoals: Plaintiffs lack standing, and their claims are barred by sovereign immunity. Plaintiffs' suit should have been dismissed for want of jurisdiction under Texas Rule of Civil Procedure 91a. And because their pleadings are incurable, a remand for repleading would be futile. Accordingly, this Court should reverse the trial court's order denying Defendants' Rule 91a motion and render judgment dismissing Plaintiffs' lawsuit for a lack of subject-matter jurisdiction.

ARGUMENT

I. The Parties Agree on Several Key Points.

In their brief before this Court, Plaintiffs make two concessions that significantly narrow the scope of their appeal. Unfortunately, they make misstatements regarding the Defendants' position, which appear to broaden it. In reality, the parties agree that Plaintiffs' claims should be dismissed against two of the Defendants. They also agree on the standard of review and scope of the appeal.

A. Plaintiffs are no longer pursuing claims against the Attorney General and the Deputy Secretary of State.

As an initial matter, Plaintiffs have conceded that their claims against the Attorney General and Deputy Secretary of State should be dismissed. At page 34 of Appellees' Brief, Plaintiffs acknowledge "their claims are no[t] . . . traceable to and redressable by the Attorney General" in light of *State v. Stephens*, Nos. PD-1032-20 & PD-1033-20, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021, mot. reh'g pending).[1] And Plaintiffs "no longer maintain their claims against the Deputy [Secretary of State]." *See* Appellees' Br. 28 n.15. Accordingly, the Court need only decide whether Plaintiffs have standing to sue (and have stated a viable claim against) the Secretary of State.

[1] Plaintiffs are wrong (at 33) that if the Court of Criminal Appeals should grant the State's pending motion for rehearing in *Stephens*, *see* Mot. for Reh'g, *State v. Stephens*, No. PD-1032-20 & PD-1033-20 (Tex. Crim. App. Dec. 30, 2021), "Appellees' claims are clearly traceable to and redressable by the Attorney General." Plaintiffs need to show "an imminent threat," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 156 (2014), that the Attorney General would enforce a particular challenged provision *against them*, *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). They have not done so, as Defendants have explained. *See* Appellants' Br. 35-38.

B. Plaintiffs do not deny that Defendants may raise jurisdictional challenges for the first time on appeal.

Plaintiffs repeatedly complain that "[Defendants] argue for the first time on appeal" several issues. *E.g.*, Appellees' Br. 7. But they implicitly recognize (at 14-15)—as they must—that a party may raise jurisdictional arguments for the first time on appeal, *see, e.g.*, *Waco ISD v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000), and that courts must consider jurisdiction sua sponte even if not raised by the parties, *see, e.g.*, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993). Because Plaintiffs admit (at 4) that they have seen the same legal arguments—albeit not necessarily under the same legal doctrines—their complaint (at 6) that they had "no opportunity for the plaintiff to cure a pleading defect" rings hollow.

C. Both sides agree on the standard of review.

That being said, the parties agree on the standard of review that applies in this case. *Compare* Appellees' Br. 5-7, *with* Appellants' Br. 12-13. The Court should examine the pleadings, construe them in Plaintiff's favor, and determine whether Plaintiffs have alleged facts that affirmatively demonstrate the trial court's jurisdiction to hear the case. *Lexington v. Treece*, No. 01-17-00228-CV, 2021 WL 2931354, at *15 (Tex. App.—Houston [1st Dist.] July 13, 2021, pet. filed) (mem. op.). If the pleadings affirmatively negate the existence of jurisdiction, then a Rule 91a motion to dismiss may be granted without allowing Plaintiffs an opportunity to amend. *Id.*; *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

D. Both sides agree that the merits of Plaintiffs' constitutional claims are not the issue here.

The parties also agree on the *scope* of review. Specifically, Plaintiffs argue that the merits of their challenges to the constitutionality of SB 1 are not before the Court. *See* Appellees' Br. 4. Defendants agree. *See* Appellants' Br. 2. Nevertheless, Plaintiffs accuse Defendants of attempting to disguise "[i]mpermissible merits arguments" as jurisdictional arguments and attempting to have Plaintiffs "*prove*" their constitutional claims. *See* Appellees' Br. 13-14, 37-38.

Plaintiffs either misunderstand or deliberately mischaracterize Defendants' jurisdictional arguments—particularly as to sovereign immunity. Like a plea to the jurisdiction, a Rule 91a motion may challenge the existence of jurisdictional facts in a process that mirrors that of a traditional summary judgment. *Lexington*, 2021 WL 2931354, at *5 (citing *Mission CISD v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *City of Houston v. Guthrie*, 332 S.W.3d 578, 587 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)). A Rule 91a motion challenging standing "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Id.* (quoting *Heckman v. Williamson County*, 369 S.W.3d 137, 156 (Tex. 2012)); *see also Neff v. Brady*, 527 S.W.3d 511, 521 (Tex. App.—Houston [1st Dist.] 2017, no pet.). This necessarily requires an examination of the type of injury that is cognizable under a particular

legal theory,[2] and it may require the court to also consider other evidence in the record. *Lexington*, 2021 WL 2931354, at *5 (citing *Bland ISD v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)).

Likewise, a court reviews a Rule 91a motion based on sovereign immunity by examining the plaintiff's allegations to determine whether a waiver of immunity from suit exists. *See Johnson v. Gutierrez*, No. 01-18-00068-CV, 2018 WL 6053623, at *3 (Tex. App.—Houston [1st Dist.] Nov. 20, 2018, no pet.) (mem. op.). Although sovereign immunity is a separate inquiry from the merits of Plaintiffs' claims, the Supreme Court has repeatedly acknowledged that "[i]n some instances, . . . the Legislature has waived immunity from suit 'to the extent of liability,' which merges the two." *Dohlen v. City of San Antonio*, 643 S.W.3d 387, 392 (Tex. 2022) (citing *Miranda*, 133 S.W.3d at 224). A constitutional challenge to a statute brought under the Uniform Declaratory Judgment Act is such a claim: the Supreme Court has held that the UDJA waives sovereign immunity, but only to the extent that Plaintiffs have stated a viable claim. *E.g.*, *Hughs v. Dikeman*, 631 S.W.3d 362, 379 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (applying *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 77 (Tex. 2015) in an election-law case).

Where, as here, the Legislature has waived immunity to the extent of liability, determining the scope of such "waivers collapse[s] the jurisdictional and merits inquiries to some degree." *Dohlen*, 643 S.W.3d at 392 (citing *Alamo Heights ISD v.*

[2] For example, because "[s]tanding is not dispensed in gross," *Tex. Propane Gas Ass'n v. City of Houston*, 622 S.W.3d 791, 799 (Tex. 2021), an injury that might support standing for a claim under the void-for-vagueness doctrine would not necessarily support a claim under equal protection—or vice versa.

Clark, 544 S.W.3d 755, 784 (Tex. 2018)). Plaintiffs must plead *facts*—not legal conclusions—that "affirmatively demonstrate" that Plaintiffs "ha[ve] stated a valid claim not barred by sovereign immunity." *Matzen v. McLane*, No. 20-0523, 2021 WL 5977218, at *4 (Tex. Dec. 17, 2021). Because a statute that "waives immunity from suit to the extent of liability . . . directs the inquiry to the statute's elements," a court may be required "to consider those elements at both the jurisdictional and merits stages." *Dohlen*, 643 S.W.3d at 392 (citing *State v. Lueck*, 290 S.W.3d 876, 883 (2009)). And although the pleadings must be construed in favor of Plaintiffs, the burden remains on Plaintiffs to show jurisdiction—not on the "State to demonstrate that '[Plaintiffs] could never allege a viable [constitutional] claim.'"[3] *Matzen*, 2021 WL 5977218, at *4.

In sum, it is simply not true that, by urging the Court to follow well-established standards for jurisdictional challenges, Defendants are improperly seeking to force Plaintiffs "to put on their case simply to establish jurisdiction" or "*prove* that they are injured by SB1." *See* Appellees' Br. 7, 14.

II. Plaintiffs Lack Standing to Sue the Secretary of State.

Plaintiffs' factual allegations are insufficient to demonstrate standing to sue the only remaining defendant, the Secretary of State. Plaintiffs must affirmatively plead that they have suffered an injury in fact cognizable under each claim of relief (and for

[3] For this reason, Plaintiffs are wrong to assert (*e.g.*, at 44) that Defendants have conceded factual assertions—for example, about the presence or prevalence of voter fraud in the 2020 election—made in their complaint. Defendants *assumed* the truth of the factual allegations for the purpose of this appeal as they were required to do—they did not concede them. *E.g.*, *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 385 n.14 (Tex. 2012).

each form of injury), that the alleged injury is traceable to the Secretary's enforcement of the challenged Election Code provisions, and that an order enjoining the Secretary from enforcing the challenged provisions in the future will redress Plaintiffs' alleged injury. *See Heckman*, 369 S.W.3d at 154-55; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). They have not done so.

A. Injury-in-fact

As Appellants' Brief explained (at 16-30), Plaintiffs "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Heckman*, 369 S.W.3d at 154 (quoting *Lujan*, 504 U.S. at 560-61) (cleaned up). To determine whether Plaintiffs have done this, their allegations are analyzed on a plaintiff-by-plaintiff, claim-by-claim basis, to see whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. *Id.* at 153, 156. Neither the legal theories nor the putative facts that Plaintiffs' brief rely upon establish standing.

1. Equal-protection claim

Plaintiffs Texas NAACP and CC Texas argue (at 10) that they have organizational and associational standing to assert an equal-protection claim because, as a general matter, "if SB1 stands, [they] 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." But that is insufficient for organizational standing because "Plaintiffs have not identified any specific projects that [they] had to put on hold or otherwise

curtail in order to respond" to the challenged provisions of SB 1. *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). And it is irrelevant to associational standing.

For associational standing, what matters is whether these organizations have plausibly alleged facts demonstrating that SB 1 places their members "in a position of a constitutionally unjustifiable inequality vis-a-vis [other] voters." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 9 (Tex. 2011). But Plaintiffs have not alleged facts affirmatively demonstrating concrete and particularized injuries to their members relative to the appropriate "baseline" of other voters, *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 185 (5th Cir. 2020) (*TDP II*), which are actual and imminent rather than hypothetical and speculative.

Plaintiffs insist (at 16) that their equal-protection claim is not speculative, because "Harris County election officials have sued" Defendants in federal district court "to challenge the limits placed on their ability to make available these alternative voting methods in future elections." But this yet-to-be-resolved litigation seeks to preserve the "ability" to offer these "alternative voting methods" but does not promise that any particular clerk would offer any particular voting rule in any particular election. To find standing based on the clerks' mere filing of such a lawsuit would require "a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). Such a theory "does not satisfy the requirement that threatened injury must be certainly impending," unless Plaintiffs establish that each link in the chain is likely to occur. *Id.* Plaintiffs fail to do so. For example, Plaintiffs fail to mention that the Harris County Elections Administrator who was a plaintiff in that Complaint, *La Union del Pueblo Entero v. Abbott*, No. 5:21-cv-00844, ECF 1, at 3

(Sept. 3, 2021), has announced her resignation effective in just a few weeks, Kelly Mena, *Houston Area Election Official Resigns Amid Vote Count Discrepancy*, CNN (Mar. 8, 2022), https://tinyurl.com/ytenahsn. There are no allegations in the Complaint that would allow the Court to infer that her yet-to-be-named successor will continue either the litigation or Plaintiffs' preferred alternative voting rules, which after all were implemented to respond to the unprecedented public-health crisis in 2020.

Even if the alleged injury were sufficiently concrete to show an injury in Harris County, Plaintiffs are wrong to assert (at 17, 19) that they need not "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," but only that "SB1's elimination of the alternative voting methods previously available in Harris County will result in it being more difficult" for Harris County residents to vote. Even if that were the case for a county-specific claim (and it is not for the reasons Defendants have already explained), their suit asserts a facial challenge seeking statewide relief. *See* CR.91-92. Because Plaintiffs must show standing for every form of relief they seek, *Garcia v. City of Willis*, 593 S.W.3d 201, 207 (Tex. 2019), and the relief can be no broader than the constitutional violation, *see Lewis v. Casey*, 518 U.S. 343, 392-93 (1996) (Thomas, J., concurring) ("Systemwide relief is never appropriate in the absence of a systemwide violation."); *id.* at 361 (majority op.), the relevant comparison is voters statewide, not just a segment of voters in Harris County, *see Andrade*, 345 S.W.3d at 9.

And Plaintiffs' pleadings negate their assertion of a statewide injury. If SB 1's ban on these alternative voting rules severely burdens Plaintiffs' exercise of voting as they allege it does, then one would expect Harris County's voter turnout to have surpassed statewide voter turnout in 2020. But Plaintiffs allege that Harris County's voter turnout rate (66%) was the same as the statewide rate. CR.36 (¶ 87). This renders speculative their suppositions that (1) Harris County's idiosyncratic voting rules likely boosted turnout significantly in Harris County, or (2) SB 1's provisions disadvantage Plaintiffs to any significant degree relative to other voters statewide.

Plaintiffs counter (at 18 & n.8) by pointing to their allegation 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," and criticize Defendants for "compar[ing] apples to oranges" by pointing out that these figures are lower than would be suggested by Houston's overall demographics. This criticism misses the point: Defendants cited (at 21) the facts and figures that Plaintiffs provided in their complaint, which do not reflect a meaningful disparity between minority and non-minority use of these alternative voting rules. If additional facts would be necessary to state a viable claim falling within a waiver or exception to immunity (*e.g.*, the percentage of Houston's voting-age population who are minorities), Plaintiffs have not affirmatively demonstrated the court's jurisdiction, and their complaint should have been dismissed. *See Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 17 (Tex. 2015); *Andrade*, 345 S.W.3d at 11.

2. Right-to-vote claims

Plaintiffs also failed to establish standing on their right-to-vote claims, which are analyzed under the framework set out in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In short, they had to allege facts demonstrating that SB 1 "place[s] a barrier or prerequisite to voting, or otherwise make it more difficult to vote." *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 145 (5th Cir. 2020). But a law making it easier for some to vote, or imposing a slight, non-discriminatory burden on all voters equally does not abridge the right to vote. *Id.*; *TDP II*, 978 F.3d at 192. Though Defendants do not maintain that Plaintiffs must demonstrate that SB 1 infringed upon their right to vote to establish standing, *supra* pp. 4-6, the definitions of infringement and the right to vote do inform the type of injury cognizable under this claim.

Plaintiffs' right-to-vote claims do not satisfy these standards. For instance, many of the challenged provisions of SB 1 do not affect voters; they provide additional protections for poll watchers. *See* CR.82-83 (¶¶ 227-29 (citing SB 1 §§ 4.01, 4.06, 4.07, 4.09, 6.01(e))). Such regulations do not affect a voter's ability to cast a ballot at all, let alone create "a significant increase over the usual burdens of voting." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008). Thus, they create no cognizable injury under a right-to-vote theory.

Plaintiffs try (at 4, 12, 17) to avoid this conclusion by repeatedly citing *Baker v. Carr*, 369 U.S. 186 (1962). *Baker* provides little guidance as it predates *Lujan*—which has been described as the "cornerstone of modern Article III standing doctrine," *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1132 (11th Cir. 2021) (Newsom, J.

concurring)—by thirty years. It is also inapposite because the plaintiffs in that case were qualified voters in Tennessee, who claimed that their votes were diluted based on race. *Baker*, 369 U.S. at 230-31, 346. Although Plaintiffs have brought many claims, vote dilution is not one of them. *Baker* thus has little to say about what Plaintiffs must allege to have standing to assert these claims.

At bottom, Plaintiffs' response is to repeatedly insist (*e.g.*, at 20, 49, 55) that because their allegations must be accepted as true, Defendants are asking the Court to "disagree" with their factual allegations and prematurely adjudicate the merits of their claims. Not so. The putative facts to which Plaintiffs cite—for example, whether the right to vote includes the ability to vote by mail—are not facts at all: they are legal conclusions, *TDP II*, 978 F.3d at 189, which are *not* presumed to be true, *e.g.*, *Evanston*, 370 S.W.3d at 385 n.14. Because Plaintiffs have not alleged *facts* that affirmatively demonstrate that their right to vote has been impacted—let alone infringed as required under the *Anderson-Burdick* framework—their right-to-vote claims fail for lack of standing.[4]

[4] Plaintiffs also make much (at 18-19) about a typographical error on page 19 of Appellants' Brief, which quoted *TDP II* as stating 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 some benchmark.'" The quotation mark should have been placed after "relative" to reflect that the Fifth Circuit described the "benchmark" (Appellants' Br. 19) against which a voting regulation must be measured in two different ways. Plaintiffs cite only the description of that benchmark as the "status quo." *TDP II*, 978 F.3d at 185. But the opinion describes that benchmark elsewhere as a "baseline" because the *status quo* may not be an appropriate benchmark (*e.g.*, in a challenge to longstanding law). *Id.* Counsel apologizes for any confusion that may have arisen from her inadvertent misquotation.

3. Void-for-vagueness claim

Similarly, Plaintiffs have failed to establish an injury on the theory that SB 1 fails to give an ordinary person "fair notice" of the prohibited conduct. *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989); *Duncantell v. State*, 230 S.W.3d 835, 844-45 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). Defendants do not contest that Plaintiffs claimed to have changed their behavior due to the *existence* of the poll-watcher provisions. *Contra* Appellees' Br. 21-25. What Plaintiffs have not done is adequately allege facts showing they suffered a cognizable injury tied to the provisions' alleged failure to "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices," *Jordon v. De George*, 341 U.S. 223, 231-32 (1951); *see also Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018). Absent such allegations, Plaintiffs have failed to establish standing to bring these claims.

a. Plaintiffs contend section 33.051 is vague because it allegedly "duplicates" Texas Election Code section 33.061. But even assuming, *arguendo*, duplication creates unconstitutional vagueness, Plaintiffs have not alleged facts affirmatively demonstrating how they are injured by that duplication. Instead, Plaintiffs merely argue (at 22) that their failure to do so simply goes to the merits of their claim. That is no answer: if Plaintiffs were already barred from doing an activity by one admittedly constitutional statute, it is hard to see how adding a duplicative statute could have caused them a concrete harm even if that act were unconstitutionally vague (and it is not).

b. Plaintiffs also argue (at 22-23) that they have established standing to challenge SB 1 § 4.09, which proscribes election judges "knowingly prevent[ing] a watcher from observing" an "activity" at a polling place, because they subjectively believe that the challenged provisions are vague. But "subjective belief" that compliance with a challenged law would impinge upon a constitutional right is typically "not a cognizable injury" standing alone. *Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015); *accord Clapper*, 568 U.S. at 418 (collecting cases for the proposition that a "subjective chill" is inadequate to show an injury).

Plaintiffs also err by dismissing (at 23) the role of section 4.09's scienter requirement in demonstrating an injury. As the U.S. Supreme Court has held, looking objectively, "a scienter requirement in a statute 'alleviate[s] vagueness concerns.'" *McFadden v. United States*, 576 U.S. 186, 197 (2015) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007)). Plaintiffs have not alleged a "concrete or particularized stake in the . . . future application of" poll-watcher provisions notwithstanding that scienter requirement, because they do not allege that they will *knowingly* violate it in the future. *Garcia*, 593 S.W.3d at 207.

c. Plaintiffs' challenge to section 4.01(g) of SB 1 also is deficient. The section simply requires that, to remove a poll watcher for a violation of election law, the election judge must have witnessed the behavior. The alleged hypothetical poll-watcher behaviors that Plaintiffs suggest (at 24) may require some close calls for election

judges, but that does not render the statute "impermissibly vague" in all applications. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 (1982).[5] Moreover, that certain Plaintiffs may have removed poll watchers in the past, *see* Appellees' Br. 25, does *not* establish standing here, because SB 1 also clarified what poll watchers may observe. SB 1 §§ 4.07(e), 6.01(g). And Plaintiffs have not alleged that the activities that led to the ejection of poll watchers in the past will recur in the future—as they must to establish standing. *Garcia*, 593 S.W.3d at 207.

4. Free-speech claim

For similar reasons, Norman failed to establish standing to challenge the requirement that voter assistants swear oaths and complete forms based on her vague allegation that SB 1's requirements make it "more difficult" to assist voters and "dissuade" people from assisting voters. CR.90-91 (¶ 259). To bring a pre-enforcement First Amendment challenge, she must allege "an imminent threat" of enforcement *against her*. *Susan B. Anthony List*, 573 U.S. at 156. Norman has not done so.

Norman argues (at 26-27) that generally alleging her subjective belief that the provisions will have a chilling effect on her and others in the future establishes her standing. But for decades, the U.S. Supreme Court has held that "a plaintiff's no-

[5] Plaintiffs argue that *Hoffman* is distinguishable because "[t]he 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.'" Appellees' Br. 24 (citing *Hoffman*, 455 U.S. at 494-95). Such an argument, however, goes to the merits. Defendants merely cite *Hoffman* here to show what type of injury is cognizable on this claim.

tional or subjective fear of chilling is insufficient to sustain a court's jurisdiction under Article III." *Bell v. Keating*, 697 F.3d 445, 454 (7th Cir. 2012) (citing *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). Instead, she must allege "a 'claim of *specific present objective* harm or *a threat of specific future harm*.'" *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975) (emphasis added) (quoting *Laird*, 408 U.S. at 13-14). Norman can point to no fact tending to demonstrate that she faces a *specific* credible threat of enforcement or that SB 1's voter-assistance provisions will likely have an *objective* chilling effect on speech. *See Laird*, 408 U.S. at 13-14.

5. Cumulative-changes claim

Finally, Plaintiffs admit (at 27-28) that their theory of cumulative harm adds nothing to their injuries, which Plaintiffs insist may be "viewed" singly or "as a whole." But they cite no cases to support that theory, and it contravenes the rule that standing is analyzed "on a plaintiff-by-plaintiff, claim-by-claim basis." *Heckman*, 369 S.W.3d at 153. In any event, Plaintiffs' cumulative claim fails because each of their separate constitutional claims fail. *See Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 231-32 (Tex. 1990) (Hecht, J., dissenting) ("Nothing plus nothing plus nothing is still nothing, no matter how hard you believe, or hope, that it may be something.").

B. Traceability and redressability

Plaintiffs' allegations against the Secretary also do not satisfy the traceability and redressability elements of standing. These elements often "overlap as two sides of a causation coin." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005); *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1017 (D.C. Cir. 1997). Plaintiffs point to four facts that they maintain meet these elements. Because none of them shows

that the Secretary has authority to enforce the challenged provisions (traceability), an order enjoining the Secretary from doing so (redressability) would be "utterly meaningless." *See, e.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 421, 426-27 (5th Cir. 2001) (en banc). And Plaintiffs have not shown a substantial likelihood that the requested relief will remedy any alleged injury. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 487-88 (Tex. 2018) (citing *Lujan*, 504 U.S. at 568-70).

1. Section 31.001(a) of the Election Code

Plaintiffs recognize (at 29) that standing turns on the Secretary's alleged role in enforcing SB 1's provisions. To meet that standard, Plaintiffs rely primarily (at 29) on the Secretary's role as chief election officer, Tex. Elec. Code § 31.001(a), and a Fifth Circuit opinion citing that job title, *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017). This argument misses the mark for three primary reasons.

First, this Court is not bound by *OCA's* unreasoned explication of Texas law. Rather, Texas courts of appeals are bound to follow only the decision of the U.S. Supreme Court (on issues of federal law) and the Texas Supreme Court (on Texas law in civil cases). *See, e.g.*, *Turner v. PV Int'l Corp.*, 765 S.W.2d 455, 470 (Tex. App.—Dallas 1988), *writ denied*, 778 S.W.2d 865 (Tex. 1989) (per curiam).

Second, *OCA* reflects a misunderstanding of state law. Far from ruling that section 31.001(a) categorically confers standing in every Election Code case, the Texas Supreme Court has held that the Secretary's title "chief election officer" is *not* "a delegation of authority to care for any breakdown in the election process." *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972); *see also In re Hotze*, 627 S.W.3d 642, 649

(Tex. 2020) (orig. proceeding) (Blacklock, J., concurring) (confirming that *Bullock* remains good law).

Third, federal cases that post-date *OCA* demonstrate that not even the federal courts would apply the blanket approach Plaintiffs seek. For example, the U.S. Supreme Court has stated that "the relevant inquiry is whether the plaintiffs' injury can be traced to allegedly unlawful conduct of the defendant," not to a provision of law. *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (cleaned up). Section 31.001(a)'s general description of the Secretary has nothing to do with the conduct alleged in this case.

Similarly, more recent Fifth Circuit decisions have effectively limited *OCA* to its facts. In *City of Austin*, the court held that plaintiffs must plead that the named official "can act" with respect to the challenged law and that "there's a significant possibility that he or she will act to harm [the] plaintiff." 943 F.3d at 1002. And in *Texas Democratic Party v. Hughs*, the court applied *City of Austin* and its progeny to hold that, because "in the particular context of Texas elections, . . . the Secretary's role varies," Plaintiffs must "identify the Secretary's specific duties within the particular statutory provision" at issue. 860 F. App'x 874, 877 (5th Cir. 2021) (per curiam) (citing *TDP II*, 978 F.3d at 179-80). As section 31.001(a) does not provide the Secretary any duties relevant to this case, citing this provision does nothing to

demonstrate that Plaintiffs' alleged injuries are traceable to or redressable by the Secretary. *See Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019).[6]

2. Referral of information to the Attorney General

Plaintiffs next argue (at 29-30) that their alleged injuries are traceable to the Secretary because Texas Election Code section 31.006 obligates him to provide information regarding potential criminal conduct in an election to the Attorney General for an investigation. But "'[e]nforcement' typically involves compulsion or constraint." *K.P.*, 627 F.3d at 124. Because, as Plaintiffs concede (at 33), the Attorney General has no authority to enforce the challenged provision, referral of information to him does not compel Plaintiffs to do—or constrain them from doing—anything.

3. Matching requirement

Plaintiffs next argue (at 30-31) that the Secretary's mail-in ballot application form requires them to provide an ID number that can be matched by local election officials. But local election officers are empowered to enforce the match requirement—not the Secretary. *See* Tex. Elec. Code §§ 86.001, .0015(c), .002. As a result, enjoining the Secretary from listing the information the law requires on the mail-in

[6] Plaintiffs' try (at 31) to dismiss these cases as mere application of the *Ex parte Young* doctrine. This ignores that these cases all examine the scope of "enforcement" as defined by *Webster's Third New International Dictionary* 751 (1993)—not a definition peculiar to *Ex parte Young*. *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). They are also entirely consistent with how other Texas courts have considered "enforcement" in a standing context. *Paxton v. Simmons*, 640 S.W.3d 588, 602-04 (Tex. App.—Dallas 2022, no pet. h.); *Ector Cnty. All. of Bus. v. Abbott*, No. 11-20-00206-CV, 2021 WL 4097106, at *10 (Tex. App.—Eastland Sept. 9, 2021, no pet.) (mem. op.). Moreover, there is "significant overlap" between standing's two-sided causation requirement and *Ex parte Young's* connection-to-enforcement analysis. *Tex. Democratic Party v. Abbott*, 951 F.3d 389, 401 (5th Cir. 2020) (explaining that the two often rise or fall together).

ballot application might prevent voters from knowing the requirement exists, but local officials would still be required to enforce it on threat of a writ of mandamus. *Id.* § 273.061. Leaving aside the inequity that might result from such an order, an injury is not "fairly traceable" to the challenged action of the defendant if it would "'result[] from the independent action of some third party not before the court.'" *Heckman*, 369 S.W.3d at 155 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976)).

4. Poll-watcher training

Finally, Plaintiffs point (at 32-33) to the Secretary's role in training and certifying poll watchers. *See* Tex. Elec. Code § 33.008. Again, that role does not "involve[] compulsion or constraint" of poll-watchers—let alone Plaintiffs. *K.P.*, 627 F.3d at 124. The Secretary lacks authority to compel poll watchers to follow the law or constrain them from any alleged violation of Plaintiffs' rights. That duty falls to local election officials and prosecutors, whom Plaintiffs chose not to sue. Tex. Elec. Code §§ 33.051(a), (a-1), .061.

III. Sovereign Immunity Bars Plaintiffs' Suit.

Even if Plaintiffs had established standing, their claims must still fail because they do not fall within any waiver of sovereign immunity. Their complaint identifies the wrong defendant, and it fails to raise any viable claims.

A. Proper defendant

For sovereign immunity to be waived under the UDJA, the relevant governmental entities must be made parties. *Patel*, 469 S.W.3d at 76. Plaintiffs acknowledge this

bedrock of sovereign immunity law but insist (at 36) "that is exactly what [they] did here" by suing the Secretary in his official capacity. Plaintiffs are wrong: the Supreme Court has repeatedly stated that "[f]or claims challenging the validity of ordinances or statutes, . . . the Declaratory Judgment Act *requires* that the relevant *governmental entities* be made parties." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (emphases added) (citing Tex. Civ. Prac. & Rem. Code § 37.006(b); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98 (Tex. 2003); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994)); *see also, e.g.*, *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (per curiam); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995).

The Secretary is not an "entity" for this purpose. Plaintiffs counter (at 37) that the Secretary appealed under Texas Civil Practice & Remedies Code section 51.014, which refers to a "governmental entity." This supports the Secretary because section 51.014 expressly cross-references a statutory definition that defines "entity" broadly to include any "organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature." Tex. Civ. Prac. & Rem. Code § 101.001(3)(D). The omission of such a definition in the UDJA is presumed intentional. *E.g.*, *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017) (per curiam). Because the Secretary is not an "entity" under the UDJA, Plaintiffs have failed to hit the "procedural bull's eye" for overcoming sovereign immunity. *Hall v. McRaven*, 508 S.W.3d 232, 246 (Tex. 2017) (Willett, J., concurring).

B. No viable claims

Plaintiffs have also failed to establish a relevant immunity waiver because their claims are not "facially" "valid" or "viable." *Klumb*, 458 S.W.3d at 13; *Andrade*, 345 S.W.3d at 11; *see also Price v. TABC*, No. 01-12-01164-CV, 2014 WL 3408696, at *1, *3 (Tex. App.—Houston [1st Dist.] July 10, 2014, pet. denied) (mem. op.) (Huddle, J.).

1. Equal-protection claim

Plaintiffs argue (at 40) that "SB1's enactment [coming] on the heels of a massive demographic change over the past decade, mostly concentrated in the State's most ethnically and racially diverse counties" sufficiently alleges discriminatory purpose. It does not: when analyzing discriminatory purpose, courts start from the presumption that legislators "act[ed] in good faith and without invidious bias in formulating policy." *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 923 (Tex. 2020) (per curiam) (citing *Miller v. Johnson*, 515 U.S. 900, 915 (1995)); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). A challenged action's disparate impact "does not raise concerns of discriminatory classification unless the measure was adopted *because of*, and not merely in spite of, its disparate impact on the affected class." *Abbott*, 610 S.W.3d at 923.

Plaintiffs have alleged no facts to support their conclusion that the sine qua non of SB 1 was demographic change regarding the electorate. And no inference of discriminatory purpose can be drawn from that allegation because mere "awareness" of a disparate impact does not establish discriminatory purpose. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Plaintiffs argue (at 42) that they alleged "a context that allows for the inference of discriminatory intent" based on the Legislature's "departures from normal procedure." But Plaintiffs have alleged no facts affirmatively showing that the Legislature deviated from established procedures to accomplish a discriminatory goal or did so in a way that "*targeted*" a minority group. *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 640 (5th Cir. 2021) (emphasis added) (affirming *Rollerson v. Port Freeport*, No. 3:18-CV-00235, 2019 WL 4394584, at *8 (S.D. Tex. Sept. 13, 2019)).

Plaintiffs charge that the Legislature acted with discriminatory intent by "purposefully refus[ing] to conduct a racial impact analysis" when confronted with "an avalanche" of "constituent feedback" alleging SB 1 will have disparate impact on minority voters. *See* Appellees' Br. 43 (citing CR.48-49 (¶¶ 124-26); CR.48 (¶ 124)). To hold that declining a constituent request to conduct "racial impact analyses," CR.48 (¶ 125), raises an inference of animus would, however, effectively grant disgruntled individuals a heckler's veto over any controversial legislation. This the Supreme Court has not done. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

Plaintiffs next assert (at 43) that "mostly" minority legislators were targeted for arrest after fleeing the State and that "*only* members of color" were "specifically excluded" "from the legislative process." But as they must concede, calls to arrest truant lawmakers included all truants. *See* CR.51 (¶ 133). Because only Democrats were truant, the most that Plaintiffs' allegations demonstrate is partisanship oc-

curred in the legislative process around SB 1; any correlation with race was incidental. "[P]artisan motives," however, "are not the same as racial motives." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021). Relatedly, Plaintiffs insist that they alleged in paragraph 220 of their complaint that "*only*" minority members of the Legislature were excluded from the legislative process. But that citation does not support their current assertion that "only" minority Democratic legislators were excluded—particularly given that the facts of the truancy dispute are well-publicized and subject to judicial notice. *E.g.*, *Langdale v. Villamil*, 813 S.W.2d 187, 190 (Tex. App.—Houston [14th Dist.] 1991, no writ).

Lastly, Plaintiffs assert (at 44) that "the Legislature used fraud as a *pretextual* justification for a law that it knew was discriminatory." But they allege no facts to support this conclusion—only their own ipse dixit. Likewise, they conclusorily assert (at 45) that the drafters' removal of the phrase "purity of the ballot box" (a phrase which appears in the Texas Constitution) from an earlier version of SB 1 is sufficient to allege discriminatory motive. But the actions of individual legislators, even an author and sponsor of legislation, do not determine legislative intent. *See AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528-29 (Tex. 2006); *see also Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011).

2. Right-to-vote claims

Plaintiffs' facial right-to-vote claims similarly fail because they do not allege facts demonstrating that SB 1 "always operates unconstitutionally," *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 753 (Tex. 2020); *see also United States v. Salerno*, 481 U.S. 739,

745 (1987), or that it imposes material burdens on "most voters," *Crawford*, 553 U.S. at 198-99; *Abbott*, 610 S.W.3d at 921.

Plaintiffs agree that Defendants have set forth the relevant tests, but they attempt (at 47) to distinguish *Crawford*—as they do several cases setting the relevant legal standard, *see, e.g.*, Appellees' Br. 24—on the ground that it "was based on a lack of evidence after a full hearing." This repeated refrain ignores that federal law requires the complaint to plausibly allege any fact that must be proven at trial. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). And Plaintiffs' alleged facts would not show (as *Crawford* requires) that SB 1 always operates unconstitutionally or constitutes "a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198; *see also Brakebill v. Jaeger*, 905 F.3d 553, 558 (8th Cir. 2018).

3. Void-for-vagueness claim

Plaintiffs have also failed to allege facts demonstrating that SB 1's poll-watcher provisions (SB 1 §§ 4.01(g), 4.06(g), 4.07(e), 4.09, 6.01(e)) are "impermissibly vague in all of [their] applications." *Hoffman*, 455 U.S. at 495. Plaintiffs argue that their subjective beliefs (at 56), concerns (at 57), interpretations (at 58), and uncertainties (at 59) about the provisions sufficiently allege unconstitutional vagueness. But even if *they* believe the provisions could be clearer, "due process does not require 'impossible standards' of clarity." *Kolender v. Lawson*, 461 U.S. 352, 361 (1983); *see also Ex parte Ellis*, 309 S.W.3d 71, 86 (Tex. Crim. App. 2010). And "[m]any perfectly constitutional statutes use imprecise terms." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 (2018).

The language of SB 1's provisions "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices," and "[t]he Constitution requires no more." *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947). Plaintiffs have alleged no facts demonstrating that further precision is either required or practical. And "[i]t would strain the requirement for certainty in criminal law standards too near the breaking point to say that" it is impossible to determine which poll-watcher behaviors SB 1 criminalizes. *See id.* at 7.

4. Free-speech claim

Plaintiff Norman argues (at 52) that SB 1's restrictions on voter assistance infringe on "core political speech" protected under the First Amendment. But it is beyond cavil that "not every procedural limit on election-related conduct automatically runs afoul of the First Amendment." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013) (string citation omitted). Rather, only conduct that is "inherently expressive" receives First Amendment protection. *Rumsfeld v. Forum for Acad. & Instit. Rts., Inc.*, 547 U.S. 47, 66 (2006). Assisting voters to complete their ballots and transporting them to the polls (*see* Tex. Elec. Code §§ 64.009(f-1), 86.010(a)-(b)) are not actions that "inherently express[]" anything. *Steen*, 732 F.3d at 389; *see also Rumsfeld*, 547 U.S. at 66. And it is unlikely that voter assistance would be understood by others to convey any "particularized message." *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).

Plaintiffs argue (at 53) that *Steen* is inapposite because it did not address voter assistance as advocacy. Even if so, *Steen* still informs how this Court should view Plaintiffs' free-speech allegations and is persuasive authority on addressing whether

a voter assistant is engaged in protected speech when she has sworn an oath not to "suggest, by word, sign, or gesture, how the voter should vote" and to "prepare the voter's ballot as the voter directs." *See* Tex. Elec. Code § 64.034.

Plaintiffs also point to several non-precedential federal district-court cases that have held that it is expressive conduct protected under the First Amendment to (1) assist voters in filling out a form to receive an absentee ballot, (2) discuss with voters whether to vote absentee, (3) educate voters about their options to use and request absentee voter applications, and (4) collect voters' absentee ballots. *See* Appellees' Br. 53-54. While other parts of SB 1 may have some similarities to these cases, the voter-assistance provisions at issue in this claim regulate activities like reading or casting a ballot (*see* Tex. Elec. Code §§ 64.031. 032(c), 86.010(a)-(b))—which are different in kind from the types of expression underlying Plaintiffs' authority.

Finally, Plaintiffs argue (at 54) that Defendants are "rais[ing] a classic factual dispute that does not warrant dismissal." Again, not true. Plaintiffs have only Norman's conclusory statement that she subjectively believes it "will [be] more difficult for [her] to assist voters" and will "dissuade" others from assisting. Appellees' Br. 55. But Plaintiffs can point to no factual allegation that Norman *will not* provide voter assistance in the future, much less that others will be dissuaded from providing voter assistance in the future. Absent such an allegation, there is no viable claim that the provisions at issue (SB 1 §§ 6.01, .03, .05) place a significant burden on anyone's First Amendment rights. *Cf., e.g.*, *Weizhong Zehng v. Vacation Network, Inc.*, 468

S.W.3d 180, 186 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *In re Canales*, 113 S.W.3d 56, 72 (Tex. Rev. Trib. 2003, appeal denied).

5. Cumulative-changes claim

Although Plaintiffs insist (at 27-28) that they have pleaded standing regarding their novel theory of facial, cumulative constitutional harm, they make no response to Defendants' assertion that the claim itself is not viable under Texas law. *See* Appellees' Br. 37-59. They have therefore waived any such argument by insufficient briefing.

PRAYER

The Court should reverse the trial court's order denying Defendants' Rule 91a motion and render judgment dismissing Plaintiffs' lawsuit.

Respectfully submitted.

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