No. 22-50732

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MI FAMILIA VOTA; MARLA LOPEZ; MARLON LOPEZ; PAUL RUTLEDGE,
Plaintiffs-Appellees

v.

KIM OGG,
Defendant-Appellant

OCA-GREATER HOUSTON; LEAGUE OF WOMEN VOTERS OF TEXAS; REVUP-TEXAS; TEXAS ORGANIZING PROJECT; WORKERS DEFENSE ACTION FUND,
Plaintiffs-Appellees

v.

JOSE A. ESPARZA, IN HIS OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE (ACTING), ET AL.,
Defendants

KIM OGG,
Appellant

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LULAC TEXAS; VOTO LATINO; TEXAS ALLIANCE FOR RETIRED AMERICANS; TEXAS AFT;
Plaintiffs-Appellees

v.

JOSE ESPARZA, ET AL.,
Defendant

KIM OGG,
Appellant

DELTA SIGMA THETA SORORITY, INCORPORATED; HOUSTON AREA URBAN LEAGUE; THE ARC OF TEXAS; JEFFREY LAMAR CLEMMONS,
Plaintiffs-Appellees

v.

GREGORY WAYNE ABBOTT, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF TEXAS, ET AL.,
Defendants

KIM OGG,
Appellant

MI FAMILIA VOTA; MARLA LOPEZ; MARLON LOPEZ; PAUL RUTLEDGE,
Plaintiffs-Appellees

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
Defendants

KIM OGG,
Appellant

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On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
Civil Action No. 5:21-CV-844 (lead case); Civil Action No. 1:21-CV-780; Civil Action No. 1:21-CV-786; Civil Action No. 5:21-CV-848; Civil Action No. 5:21-CV-920
Honorable Xavier Rodriguez, United States District Judge, presiding

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BRIEF OF THE LULAC PLAINTIFFS AS APPELLEES

CERTIFICATE OF INTERESTED PERSONS

La Union Del Pueblo Entero, et al. v. Gregory W. Abbott, et al., No. 22-50732

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees do not object to oral argument if the Court believes it would be helpful to resolve this appeal.

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INTRODUCTION

Plaintiffs LULAC Texas, Voto Latino, Texas Alliance for Retired Americans, and Texas AFT ("LULAC Plaintiffs") named Harris County District Attorney Kim Ogg as a defendant in their constitutional and Voting Rights Act ("VRA") challenges to Texas Senate Bill 1 ("SB 1"), a law that LULAC—as well as numerous other private plaintiffs and the United States—allege unlawfully suppresses the voting rights of Texans. Plaintiffs sued Ogg in her official capacity because, under Texas law, enforcing the Election Code is "the specific duty of county and district attorneys." *State v. Stephens*, No. PD-1032-20, 2021 WL 5917198, at *6 (Tex. Crim. Ct. App. Dec. 15, 2021). While Ogg moved to dismiss the claims on sovereign immunity grounds, her defense had no likelihood of success as this Court has repeatedly held that the VRA validly abrogated sovereign immunity, *see, e.g.*, *Tex. All. For Retired Ams. v. Scott.*, 28 F.4th 669, 671 n.4 (5th Cir. 2022); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2022); *Fusilier v. Landry*, 963 F.3d 447, 455 (5th Cir. 2020); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017), and the Texas Court of Criminal Appeals has made clear that county prosecutors, like Ogg, are responsible for enforcing election laws such as SB 1. *Stephens*, 2021 WL 5917198, at *6. This enforcement responsibility means that injunctive relief against Ogg would redress Plaintiffs' harms, satisfying this Court's standard for invoking the *Ex parte Young* exception to sovereign immunity.

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Relying on these settled precedents, the district court correctly denied Ogg's motion to dismiss and subsequently denied her motion to stay the proceedings pending appeal; and yet Ogg waited more than five weeks before filing her present motion. Even if Ogg presented a more colorable merits argument that was not already foreclosed by settled law, a stay would be inappropriate because her unexplained delay in seeking relief from this Court undermines any claim of prejudice or irreparable harm from being required to participate in the district court proceedings below or responding to discovery requests issued on April 12 (more than five months ago).

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Discovery is now closed. It will temporarily reopen in November, but only to permit additional requests related to the November midterm elections. Ogg's stay motion thus falls well short of meeting her burden to justify this extraordinary intrusion into the ordinary appellate process.[1] Plaintiffs, on the other hand, will be harmed if a stay is entered. This barely-one-year-old case has already seen four

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[1] Ogg's merits arguments are so insubstantial—particularly as to VRA claims against her—that this Court likely lacks jurisdiction over the non-final order at issue. While the collateral order doctrine typically permits immediate appeal of an order denying a claim of sovereign immunity, *see Pickett v. Tex. Tech Univ. Health Sci. Ctr.*, 37 F.4th 1013, 1019 (5th Cir. 2022), "the claim of immunity must be 'substantial' to justify an appellate court's collateral order review," *Hous. Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265, 268-69 (5th Cir. 2007). "To be 'substantial,' such a claim must be more than 'merely 'colorable.'" *Martin v. Halliburton*, 618 F.3d 476, 483 (5th Cir. 2010). For the reasons set forth below, Ogg's claim of sovereign immunity is not sufficiently credible to invoke this Court's jurisdiction.

interlocutory appeals noticed, and the trial previously scheduled for July 2022 has already been pushed back to July 2023. Entering a stay at this juncture would impede the parties' efforts to prepare this case for trial and obtain a final resolution for future elections, which disserves the public interest. For these reasons, Ogg's belated request for a stay should be denied.[2]

BACKGROUND

LULAC Plaintiffs filed the underlying case on September 7, 2021, challenging various provisions of the State's omnibus voting law, SB 1, under the VRA and the First and Fourteenth Amendments to the U.S. Constitution. Pertinent to this appeal, Plaintiffs challenged and sought an injunction of Attorney General Paxton's enforcement of SB 1 Sections 4.06, 4.09, 6.04, and 7.04 ("Criminal Provisions"), which impose criminal penalties for various voting-related activities, including so-called "vote harvesting" services (§ 7.04), certain acts related to the provision of voter assistance (§ 6.04), efforts by public officials to solicit voters to submit absentee ballot applications (§ 7.04), and election officers' refusal to accept partisan poll watchers or interference with their ability to observe activities in polling places (§§ 4.06, 4.09).

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[2] Ogg seeks relief only as to herself, *see* Mot. at 3, 5; accordingly, even if the Court does grant her motion, it should not stay proceedings below as to any other party.

In January 2022, following a Texas Court of Criminal Appeals ruling which held that only local law enforcement officials had authority to independently enforce Election Code violations, *Stephens*, 2021 WL 5917198, at *1, *4, Plaintiffs amended their Complaint and added Ogg, the District Attorney from Texas's largest county, as a defendant. The operative Complaint seeks an injunction against Ogg to prevent enforcement of the Criminal Provisions. ROA. 6532.

Ogg moved for dismissal of all claims made against her in the consolidated matters, ROA.8698, and on August 8, the district court denied Ogg's motion. ROA.10792. In doing so, Judge Rodriguez found that Plaintiffs adequately alleged that, in her capacity as Harris County District Attorney, Ogg has a sufficient connection to the enforcement of SB 1's Criminal Provisions to trigger the *Ex parte Young* exception to sovereign immunity. ROA.10800, ROA.10807. Ogg filed a notice of appeal on August 10. ROA.10809. On August 15, Ogg filed a motion to stay further proceedings against her in the district court pending resolution of her appeal. ROA.10811. The district court denied her motion that same day. *See* ROA.109. Ogg then waited more than a month, until September 19, to file the instant motion before this Court seeking a stay of "all further discovery and related proceedings against her in the district court[.]" Mot. at 5.

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Meanwhile, the discovery proceedings below closed on August 12 for all parties, with the exception of Intervenors who may continue to propound and receive

discovery requests on matters related to the primary election until October 24. ROA.10505. The district court's amended scheduling order also permits additional limited discovery beginning on October 24, but only to address matters related to the November 2022 general election. *Id.* The most recent discovery requests sent to Ogg were served more than five months ago, in April 2022. Ogg served objections to these discovery requests in May 2022, and to date, no party has filed a motion to compel against her. Ogg has not explained whether or why she anticipates receiving any additional discovery requests in this matter.

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STANDARD OF REVIEW

A stay is an "intrusion into the ordinary processes of administration and judicial review" and accordingly is not granted as a matter of right. *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). The Court considers four factors in deciding whether to grant a stay pending appeal: (1) whether the stay applicant has made a strong showing that they are likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.* at 425-26.

ARGUMENT

I. Ogg has not demonstrated a substantial likelihood of success on the merits.

Ogg's sovereign immunity defense to Plaintiffs' VRA claims is entirely baseless because "[this] court has held that the Voting Rights Act validly abrogated sovereign immunity." *Tex. All. For Retired Ams.*, 28 F.4th at 671 n.4 (cleaned up); *Mi Familia Vota*, 977 F.3d at 469 ("There is no sovereign immunity with respect to [] Voting Rights Act claims."). This Court has thus repeatedly rejected claims of sovereign immunity by Texas state officials in suits brought under the VRA and should do so again here. *See, e.g.*, *Mi Familia Vota*, 977 F.3d at 469; *Fusilier*, 963 F.3d at 455; *OCA-Greater Hous.*, 867 F.3d at 614. Ogg's motion simply ignores this well-established precedent and makes no argument to rebut the district court's conclusion that Plaintiffs' VRA claims may proceed against her.[3]

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Sovereign immunity also cannot bar Plaintiffs' constitutional claims against Ogg (Counts II & III) under the exception set forth in *Ex parte Young*, 209 U.S. 123 (1908), which allows private parties to bring "suits for injunctive or declaratory relief against individual state officials acting in violation of federal law." *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013). For this exception to apply, the state

[3] Ogg's motion to dismiss below, in addition to raising sovereign immunity, claimed that Plaintiffs lacked standing to sue her for any of their claims, ROA.8698, but her motion to stay makes no such argument.

official "by virtue of his office," must have "some connection with the enforcement of the [challenged] act." *Ex parte Young*, 209 U.S. at 157. Ogg does not dispute that she has a sufficient connection to the Criminal Provisions—nor could she: the Texas Court of Criminal Appeals recently held that enforcing the criminal provisions of the Texas Election Code is "the specific duty of county and district attorneys." *Stephens*, 2021 WL 5917198, at *6. The Texas Constitution grants this authority to district attorneys exclusively, such that no other state officials—including the Texas Attorney General—have the authority to unilaterally prosecute violations of the Texas Election Code. *See id.* at *6-*8. In fact, no Texas official has a greater connection to the enforcement of the Criminal Provisions than county district attorneys.

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While Ogg suggests that this Court's precedents also require the sued official to take an "affirmative step" toward enforcing the challenged statute before *Ex parte Young* applies, Mot. at 5-7, the Supreme Court's decision in *Whole Women's Health v. Jackson*, 142 S. Ct. 522 (2021), refutes that argument. All nine Justices recognized that the applicability of *Ex parte Young* turned on the enforcement *authority* of the state official.[4] Specifically, the Supreme Court held that Texas executive licensing

[4] Justice Thomas, the lone dissenter from the Court's sovereign immunity analysis, also recognized that enforcement authority by itself is sufficient to establish a connection for purposes of *Ex parte Young*. *See Whole Women's Health*, 142 S. Ct. at 540 (Thomas, J., concurring in part) ("[A]n *Ex parte Young* defendant must have

officials cannot not invoke sovereign immunity as a defense to claims that their enforcement of a state statute restricting abortion access was unconstitutional because "[e]ach of these individuals is an . . . official who *may or must* take enforcement actions against the petitioners *if* they violate the terms of Texas's Health and Safety Code, including [the challenged abortion statute]." *Whole Women's Health*, 142 S. Ct. 535 (emphasis added). It accordingly held that "the petitioners may proceed against [the officials] *solely* based on [their] authority to supervise licensing of abortion facilities and ambulatory surgical centers." *Id.* at 536 n.3 (emphasis added).

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Meanwhile, the Fifth Circuit decisions that Ogg cites pre-date the Supreme Court's ruling in *Whole Women's Health*, and even in those cases this Court acknowledged that the "precise scope of the 'some connection' requirement" was "unsettled," and that the Court's "decisions are not a model of clarity on what 'constitutes a sufficient enforcement.'" *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 n.21 (5th Cir. 2020); *see also Tex. Democratic Party v. Hughs*, 860 Fed. Appx. 874, 877 (5th Cir. 2021) (noting that "binding precedents addressing . . . the *Ex parte Young* exception . . . do not provide as much clarity as we would prefer"). In light of the Supreme Court's decision in *Whole Women's Health*, Ogg's argument

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'some connection with the enforcement of the act'—i.e., 'the right and the power to enforce' the 'act alleged to be unconstitutional.'") (quoting *Ex parte Young*, 209 U.S. at 157).

that *Ex parte Young* requires an additional "affirmative" enforcement act must be rejected.

II. Ogg will not suffer irreparable harm absent a stay.

Ogg has not presented even a plausible claim of irreparable harm absent a stay, foreclosing any right to the extraordinary relief she seeks. *See Nken*, 556 U.S. at 432 (explaining authority to issue stay is justified by need "to prevent irreparable harm to the parties or to the public") (citing *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9 (1942)). Her brief discussion of irreparable harm exaggerates her present discovery burdens and fails to mention that the general discovery period has closed. While discovery will reopen temporarily in November to permit limited supplementary discovery into SB 1's impact on the general election, Ogg makes no attempt to explain why such discovery would involve her. Instead, she incorrectly asserts that, "[i]n the wake of the district court's order, some plaintiff groups pushed for extensive discovery from District Attorney Ogg," Mot. at 4, omitting the fact that the *only* discovery propounded on Ogg was served on in April 2022—four months *before* the district court's order. *Id*. (citing ROA.10829). Ogg responded to those requests in May 2022, and to date, no motion to compel has been filed against her.

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Ogg's claim of irreparable harm is further undercut by her dilatory effort to obtain a stay. Judge Rodriguez denied her motion to dismiss on August 2, 2022. ROA.10792. Roughly two weeks later, on August 15, Ogg filed a motion to stay

proceedings against her pending her appeal of the district court's order. ROA.10811. The district court denied the motion *sua sponte* the same day. ROA.109. Ogg then waited *over a month*, until September 19, to file the instant motion with this Court, which is nearly identical to the motion she filed with the district court a full five weeks earlier. *Compare* ROA.10811, *with* Mot. That tardiness in "seeking a stay" from this Court "vitiates much of the force of [Ogg's] allegations of irreparable harm." *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977); *see also Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993) (explaining that "inexcusable delay in filing" motion to stay "severely undermines the . . . argument that absent a stay irreparable harm would result").

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III. The remaining equitable factors counsel against a stay pending appeal.

A. The issuance of a stay will substantially injure Plaintiffs.

With trial in this matter now scheduled for July 2023, in what has repeatedly proved to be an increasingly complex litigation, Ogg's request for a stay potentially jeopardizes the existing—and already extended—scheduling order. It threatens to derail dispositive motion deadlines and the current trial schedule, which would impede Plaintiffs' efforts to secure timely relief for Texas voters and would prolong a case that has now endured four interlocutory appeals in less than a year. *Cf. Shenzhen Tange Li'an E-Com. Co. v. Drone Whirl LLC*, No. 1:20-CV-00738-RP, 2021 WL 1080795, at *2 (W.D. Tex. Mar. 19, 2021) (noting that delays in litigation

may harm a nonmoving party, and denying stay when moving party would likely be required to comply with discovery requests in any event).

B. The public interest weighs against a stay.

Plaintiffs seek to vindicate the constitutional and statutory voting rights of the large number of Texans, including Plaintiffs' members, who are harmed by SB 1. The public interest strongly weighs in favor of a swift resolution of those claims.[5] *See, e.g.*, *Weingarten Realty Invs. v. Miller*, 661 F.3d 904 (5th Cir. 2011) (finding that the public interest did not favor discretionary stay of proceedings pending appeal, which would impede speedy resolution of disputes); *see also Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012). The issuance of a stay would needlessly obstruct ongoing proceedings below and further prolong the resolution of a case implicating one of the most fundamental civil rights: the right to vote. And while the public surely has an interest in appellate courts considering serious legal questions, this Court's consideration of Ogg's question on appeal will not be hindered absent a stay.

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Ogg's remaining arguments on the public interest are not persuasive. She puts misplaced reliance on the district court decisions that this Court just partially affirmed in *Russell v. Jones*, — F.4th —, No. 21-20269, 2022 WL 4296644 (5th Cir.

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[5] Here, the government actor's interest and harm merge with that of the public. *See Nken*, 556 U.S. at 435.

Sept. 19, 2022), but those cases are not relevant because Ogg nowhere disputes that Congress validly abrogated sovereign immunity over Plaintiffs' VRA claims, or that waiver permits enforcement of third-party discovery in support of such claims. *See Russell*, 2022 WL 4296644, at *7 (explaining officer possessing sovereign immunity "may not be subject to judicial proceedings *unless there has been an express waiver of that immunity*" (quoting *Gen. Elec. Co.*, 197 F.3d at 597) (emphasis added)); *see also COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 277 (4th Cir. 1999) (similar). Similarly, Ogg's appeal does not raise the prospect that the district court will resolve "serious questions" regarding the constitutionality SB 1 "without certainty of jurisdiction." Mot. at 10 (quoting *Whole Woman's Health*, 13 F.4th at 447). Because Ogg is only one of several county officials properly named as defendants below, the district court's jurisdiction is not in question; the court will have an opportunity to address the constitutionality of SB 1 no matter the outcome of this appeal. Granting Ogg's request would merely create unnecessary litigation delays that disserve the public interest.

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CONCLUSION

Plaintiffs respectfully request that the Court deny Defendant Ogg's motion for a stay pending appeal.

Dated: September 29, 2022

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