No. 22-50732

In the 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.,

Defendants.

KIM OGG

Appellant.

DELTA SIGMA THETA SORORITY, INC.; 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.

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MI FAMILIA VOTA; MARLA LOPEZ; MARLON LOPEZ; PAUL RUTLEDGE,

Plaintiffs-Appellees,

v.

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

Defendants.

KIM OGG

Appellant.

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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PLAINTIFFS-APPELLEES' JOINT RESPONSE TO DEFENDANT-APPELLANT OGG'S MOTION FOR STAY PENDING APPEAL

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Plaintiff-Appellees The Arc of Texas, Delta Sigma Theta, Mi Familia Vota, League of Women Voters of Texas, OCA-Greater Houston, REVUP-Texas, and Workers Defense Action Fund[1] file this Joint Response in opposition to Defendant

[1] Texas Organizing Project moved to voluntarily withdraw as a plaintiff in this consolidated litigation on April 13, 2022, *see* ROA.99 (docket entry 366) and the district court granted that motion on April 14, 2022. *Id.* (text only order of April 14, 2022).

District Attorney Kim Ogg's Motion to stay all further discovery and related proceedings against her in the district court. The Motion should be denied for several reasons. First, Defendant Ogg cannot establish the requisite likelihood of success on her *Ex parte Young* arguments. But even if she could, Defendant Ogg will still face identical discovery below because many of the claims against her are not subject to a sovereign immunity defense. Accordingly, Defendant Ogg's Motion should be denied.

BACKGROUND

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Plaintiffs represent a diverse coalition of Texans challenging Texas's Election Protection and Integrity Act of 2021, known as S.B. 1. Defendant Ogg was named as a defendant because she has direct responsibility to enforce four of the law's challenged provisions, referred to in this motion as sections 6.04, 6.05, 6.06, and 7.04.

Among many other provisions challenged through this consolidated litigation, S.B. 1 placed burdens and prohibitions, enforced through threat of criminal sanction, on individuals who assist voters with disabilities and with limited English proficiency. Section 6.04 of S.B. 1 amended the Oath contained in section 64.034 of the Texas Election Code to require assistors to swear under penalty of perjury that they have conformed their assistance to the section's specifications, including limiting their assistance to "reading the ballot to the voter, directing the voter to read

the ballot, marking the voter's ballot, or directing the voter to mark the ballot." S.B. 1 § 6.04 (amending Tex. Elec. Code § 64.034). The District Court held that a modified injunction in *OCA Greater Houston v. Texas*, No. 1:15-CV-679-RP, 2022 WL 2019295 (W.D. Tex. June 6, 2022), mooted Plaintiffs' challenge to this portion of section 6.04. *See* ROA.10660. Still in effect is the remainder of section 6.04, which requires assistants to swear that the voter they are assisting "represented to [the assistor] they are eligible to receive assistance." S.B. 1 § 6.04 (amending Tex. Elec. Code § 64.034).[2] Perjury is a criminal offense under section 37.02 of the Texas Penal Code.

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Section 6.05 amended section 86.010 of the Texas Election Code to require detailed disclosures from the assistor on the voter's ballot envelope; failure to complete the disclosures is a felony. S.B. 1 § 6.05 (amending Tex. Elec. Code § 86.010); *see also* Tex. Elec. Code § 86.010(f)-(g).

Section 6.06 amended section 86.0105 of the Texas Election Code to create a strict liability state jail felony for "compensat[ing] or offeri[ing] to compensate

[2] Specifically, the injunction prohibits enforcement of the requirement that the assistor swear to limit their assistance to "reading the ballot to the voter, directing the voter to read the ballot, marking the voter's ballot, or directing the voter to mark the ballot." *See OCA Greater Houston v. Texas*, No. 1:15-CV-679-RP, 2022 WL 2019295, at *4 (W.D. Tex. June 6, 2022). The court left for resolution in this case the remaining language of the Oath, including whether it is unlawful to require assistors to swear under penalty of perjury that "the voter I am assisting represented to me they are eligible to receive assistance" and "I did not pressure or coerce the voter into choosing me to provide assistance." *Id*.

another person for assisting voters" who vote by mail, with "compensation" defined as "anything reasonably regarded as an economic gain or advantage." S.B. 1 § 6.06 (amending Tex. Elec. Code § 86.0105); *see also* Tex. Elec. Code § 86.0105; Tex. Penal Code § 38.01.

Requiring assistors to comply with these sections, at threat of criminal penalties if the volunteer assistors err, will discourage assistors from helping voters with disabilities or limited English proficiency to vote, which in turn will interfere with the right of those voters to access the franchise. ROA.6210–6212 ¶¶ 235-237; ROA.6308-6312 ¶¶ 152–165.

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Finally, section 7.04 of S.B. 1 amended section 276.015 of the Texas Election Code to create an offense for knowingly compensating, or being compensated for, the provision of "vote harvesting services," defined as "in-person interaction with one or more voters, in the physical presence of an official ballot or ballot voted by mail, intended to deliver votes for a specific candidate or measure." S.B. 1 § 7.04 (amending Tex. Elec. Code § 276.015); *see also* Tex. Elec. Code § 276.015. Section 7.04 inhibits the full exercise of both individual and organizational First Amendment rights, including core political speech. *See* ROA.6322-6332 ¶¶ 195–239.

Plaintiff The Arc of Texas alleges harm arising from the prospect of enforcement of sections 6.04 and 6.05 of S.B. 1; Plaintiffs Delta Sigma Theta and Mi Familia Vota allege harm arising from the prospect of enforcement of section

6.05 of S.B. 1. *See* MFV Second Amended Complaint, ROA.6141-6152 ¶¶ 42–66. Plaintiffs League of Women Voters of Texas, OCA-Greater Houston, REVUP-Texas, and Workers Defense Action Fund allege harm to both themselves and their members arising from the prospect of enforcement of sections 6.04, 6.06, and 7.04. *See* OCA Second Amended Complaint, ROA.6263-6272 ¶¶ 17–18, 21–22, 25–26, 33–34; ROA.6312-6318 ¶¶ 166–175; ROA.6324-6327 ¶¶ 202–213.

The Arc of Texas, Delta Sigma Theta, and Mi Familia Vota have been forced to divert resources away from their routine activities to address S.B. 1's illegal voter assistance limitations. *See* ROA.6143-6151 ¶¶ 48, 57, 64. The same is true for Plaintiffs League of Women Voters of Texas, OCA-Greater Houston, REVUP-Texas, and Workers Defense Action Fund with respect to both S.B. 1's illegal voter assistance limitations and S.B. 1's so-called "vote harvesting" prohibition. *See* ROA.6263-6272 ¶¶ 17–18, 21–22, 25–26, 33–34; ROA.6312-6315 ¶¶ 166–170; ROA.6324-6327 ¶¶ 209–213.

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The Arc of Texas and REVUP-Texas, in alleging harm on behalf of their members, additionally present examples of several individual members who rely on assistance at the polls and who will be unable to enjoy that assistance in future elections, either because it is outside the scope of lawful help enumerated in the now-enjoined portion of section 6.04, or because assistors are unwilling to help, given the

threat of criminal sanctions. *See* ROA.6147-6150 ¶¶ 58–61; ROA.6314-6317 ¶¶ 170–172.

Plaintiffs served Defendant Ogg with requests for production and interrogatories on April 12, 2022, but since then she has refused to meet and confer regarding discovery or to produce any of the requested materials. See ROA.10820-10845.

Defendant moved to dismiss the Complaint against her on several grounds, including sovereign immunity. The District Court denied Defendant Ogg's Motion to Dismiss, in part based on – in her own words – her "indisputabl[e]…statutory authority" to enforce S.B. 1's criminal provisions. *See* ROA.8706.

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Having appealed the denial of her Motion to Dismiss, Defendant Ogg moved to stay discovery below pending disposition of her appeal. *See* ROA.10811. The District Court denied the Motion, noting that it had "already addressed the merits" of Defendant Ogg's sovereign immunity arguments and that Defendant Ogg would likely be subject to Plaintiffs' relevant discovery requests regardless of whether or not she remained a named party in the suit. *See* ROA.109.

Defendant Ogg's identical arguments before this Court fail for identical reasons. Defendant Ogg's argument that she is immune from suit under *Ex parte Young* is contrary to precedent. Moreover, many of the claims against Defendant Ogg are grounded in federal legislation that abrogates sovereign immunity. The

discovery Defendant Ogg resists is relevant to those claims as well and would proceed regardless of her success on her *Ex parte Young* argument.

ARGUMENT

A stay pending appeal is "an extraordinary remedy," and a party moving for such equitable relief bears a "substantial" burden in making their case. *Texas v. United States,* 40 F.4th 205, 215 (5th Cir. 2022) (internal citation omitted). Courts analyzing such requests are guided by four factors: "(1) whether the applicant has made a strong showing of likelihood to succeed on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of a stay will substantially injure other interested parties; and (4) where the public interest lies." *Thomas v. Bryant,* 919 F.3d 298, 303 (5th Cir. 2019) (citing *Nken v. Holder,* 556 U.S. 418, 434 (2009)). The first two factors are "the most critical," and require movants to meet a particularly high bar. *Nken,* 556 U.S. at 434.

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Alternatively, a defendant may meet its burden by "present[ing] a substantial case on the merits' if (1) 'a *serious legal question* is involved' and (2) 'the balance of the equities weighs *heavily* in favor of granting the stay." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020) (quoting *Arnold v. Garlock, Inc.*, 278 F.3d 426, 439 (5th Cir. 2001)); compare Mot. at 7-8 (arguing Defendant Ogg need only "show that the serious legal question exists and that the equities favor the stay," omitting the requirement of showing a "substantial case on the merits" and that the

equities heavily favor a stay). This Court has made it clear, however, that this approach is an exception to the rule; "in the mine run of appeals, '*likelihood* of success remains a prerequisite,' and a "presentation of a substantial case . . . alone is not sufficient.'" *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020) (quoting *United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 361 (5th Cir. 2013)).

Here, assuming Defendant Ogg's Motion presents a "serious legal question," she has not demonstrated a "substantial," let alone "strong" likelihood of success on the merits of her sovereign immunity defense. Nor has she shown that the balance of equities favors, let alone *heavily* favors, a stay. She is therefore not entitled to a stay under either standard. Accordingly, her Motion to Stay should be denied.

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I. Defendant Ogg cannot establish a likelihood of success on the merits.

Defendant Ogg cannot prevail on her argument that she is immune from this lawsuit. Her argument that *Ex parte Young*, 209 U.S. 123 (1908), is not an exception to sovereign immunity for suit against a state official directly charged with enforcing the challenged law is contrary to precedent. Moreover, Ogg ignores that Plaintiffs have also brought claims under the Voting Rights Act of 1965 ("VRA"), the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act, all of which abrogate sovereign immunity.

a. Defendant Ogg is unlikely to prevail on her argument that she is immune from Plaintiffs' claims brought under 42 U.S.C. § 1983.

The *Ex parte Young* exception to sovereign immunity is met when a complaint requests injunctive relief to restrain state officials "from enforcing [a law] in contravention of controlling federal law." *Verizon Md., Inc. v. Pub. Serv. Comm. of Md.*, 535 U.S. 635, 645 (2002). Under the exception, "[s]uits for injunctive or declaratory relief are allowed against a state official acting in violation of federal law if there is a 'sufficient "connection" to enforcing an allegedly unconstitutional law.'" *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021) (quoting *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020)). "'Enforcement for *Young* purposes means 'compulsion or constraint.'" *Richardson v. Flores*, 28 F.4th 649, 655 (5th Cir. 2022) (quoting *City of Austin v. Paxton*, 943 F.3d 993, 1000 (5th Cir. 2019)). "[I]f an official *can* act, and there's a significant possibility that he or she *will* . . ., the official has engaged in enough compulsion or constraint to apply the *Young* exception." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020) (alteration in original).

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Defendant Ogg is directly tasked with enforcement of the State's criminal laws. *See* Tex. Gov't Code § 43.180(b). This includes prosecution of criminal violations of the Texas Election Code. *See generally State v. Stephens*, No. PD-1032-20, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021). Defendant Ogg therefore undeniably has enforcement authority over sections 6.04 and 6.05 of S.B. 1 and is

an appropriate defendant to Plaintiffs' claims under 42 U.S.C. § 1983 seeking to enjoin the enforcement of those provisions. *See* ROA.6216-6229 (Counts I-III); ROA.6306-6332 (Counts 3–8). Defendant Ogg has never disavowed enforcement of the challenged provisions and has stated in the past that enforcement of election laws "is a top priority for [her] Administration."[3]

Defendant Ogg attempts to inject a ripeness inquiry into *Ex parte Young*, arguing the exception does not apply because she has not threatened anyone with prosecution pursuant to the challenged sections of S.B. 1. Implied in Defendant Ogg's argument is that Plaintiffs would have to await criminal prosecution before bringing suit—an implication that the Court expressly rejected in *Ex parte Young*. *See* 209 U.S. at 148 (rejecting the notion that a party should have to suffer the risk of imprisonment and fines in order to test the validity of the rates at issue); *see also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021) (finding *Ex parte Young* satisfied as to "licensing official[s] who *may* or must take enforcement actions against petitioners if they violate the terms of" the challenged law) (emphasis added).

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[3] Cassandra Pollock, *Houston-area lawmakers urge DA to investigate possible "non-existent" March primary candidate*, Texas Tribune (Apr. 9, 2020), https://www.texastribune.org/2020/04/09/allegations-fake-candidate-houston-draw-calls-investigation/.

Indeed, "[e]nforcement for *Young* purposes means 'compulsion or constraint,'" *Richardson*, 28 F.4th at 655, and it is well-established that the prospect of criminal sanctions, even without an impending prosecution, constitutes constraint. For instance, in the standing context, which significantly overlaps with *Ex parte Young*, *Air Evac EMS, Inc. v. Texas Department of Insurance.*, 851 F.3d 507, 520 (5th Cir. 2017), a plaintiff who challenges a criminal prohibition before it is enforced can establish injury in fact by demonstrating the plaintiff's intent to engage in a course of conduct affected with a constitutional interest that is "arguably proscribed" by the challenged law and that there is a "credible threat of prosecution." *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 345 (5th Cir. 2013) (internal citations omitted). A credible threat of prosecution arises where a plaintiff shows she is "either presently or prospectively subject to the regulations, proscriptions, or compulsions." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020), as revised (Oct. 30, 2020)); *see also id.*, 979 F.3d at 335 (discussing presumption of credible threat of enforcement in pre-enforcement challenge to criminal law burdening First Amendment activity). A plaintiff need not allege specific ongoing enforcement actions to demonstrate constraint, particularly in the context of a newly enacted criminal statute. *See McCraw*, 719 F.3d at 345.[4] This injury is caused by the prospect

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[4] Awaiting the commencement of charges could give rise to abstention problems, *see Steffel v. Thompson*, 415 U.S. 452, 462 (1974); *Ex parte Young*, 209 U.S. at 162.

of enforcement, and therefore redressed by an injunction prohibiting the enforcing authority from taking enforcement action. *See Speech First*, 979 F.3d at 338. Even where the enforcing authority has failed to take affirmative enforcement action, plaintiffs who have been constrained by the mere prospect of enforcement have satisfied standing. *See Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 449 (5th Cir. 2019) ("That the Attorney General has not attempted to enforce the Guidance against Texas does not deprive it of standing."); *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) ("FCC's refusal to exercise its declared authority does not deprive states of standing.").

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Here, Plaintiffs filed a pre-enforcement challenge to S.B. 1. At the time their Second Amended Complaints were filed, no election had yet taken place under the new law. Even so, Plaintiffs have alleged that they have been harmed by the law's anticipated enforcement, including by diverting resources to educate voters who are subject to the requirements of sections 6.04, 6.05, 6.06, and 7.04 in anticipation of those provisions' enforcement. ROA.6141-6152 ¶¶ 42–66; ROA.6263-6272 ¶¶ 17–18, 21–22, 25–26, 33–34; ROA.6312-6318 ¶¶ 166–175; ROA.6324-6327 ¶¶ 202–213. Furthermore, The Arc of Texas, League of Women Voters of Texas, OCA-Greater Houston, REVUP-Texas, and Workers Defense Action Fund have pled that

Cf. McCraw, 719 F.3d at 345 ("When asking a federal court to engage in pre-enforcement review of a criminal statute, a plaintiff need not violate the statute[.]").

their members rely on assistance that they anticipate will be unavailable in light of these statutory provisions, and The Arc of Texas and REVUP-Texas have specifically named several of those members. *See* ROA.6147-6150 ¶¶ 58–61; ROA.6312-6318 ¶¶ 166–175.

Because Defendant Ogg is the official directly tasked with enforcing the challenged provisions, she cannot establish a likelihood of success on the merits, or even a substantial case thereon, of her claim that *Ex parte Young* does not apply in this case.

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b. Even if Defendant Ogg were immune under *Ex parte Young*, immunity is not a defense to the VRA, ADA, and Rehabilitation Act claims.

Inexplicably, Defendant Ogg fails to acknowledge that even if Plaintiffs cannot invoke *Ex parte Young* here, sovereign immunity is not available to her to defend against Plaintiffs' VRA, ADA, and Rehabilitation Act claims. *See* ROA.6230-6239, 6243-6252 (Counts IV, V, VII, VIII); ROA.6318-6327 (Counts 4–6). Even if she prevails on her *Ex parte Young* argument, Plaintiffs would still seek identical discovery from Defendant Ogg to develop their case on these claims.

"There is no sovereign immunity with respect to . . . Voting Rights Act claims." *Mi Familia Vota*, 977 F.3d 461, 469 n.26 (5th Cir. 2020). Defendant Ogg therefore has no sovereign immunity as to Plaintiffs' claims under sections 2 and 208 of the VRA. *See* ROA.6230-6239 (Counts IV-V); ROA.6318–20 (Count 4).

The Arc of Texas's, League of Women Voters of Texas's, OCA-Greater Houston's, REVUP-Texas's, and Workers Defense and Education Fund's claims under Title II of the ADA are also exempt from sovereign immunity. *See* ROA.6243-6249 (Count VII); ROA.6320-21 (Count 5). "Congress can abrogate this immunity if it (1) 'makes its intention to abrogate unmistakably clear in the language of the statute' and (2) 'acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment.'" *Block v. Texas Bd. of L. Exam'rs*, 952 F.3d 613, 617 (5th Cir. 2020). Both prongs are met here, as the District Court held. *See* ROA.10628-10643.

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First, "Congress provided for the ADA to abrogate state sovereign immunity." *Pickett v. Tex. Tech Univ. Health Scis. Ctr.*, 37 F.4th 1013, 1019 (5th Cir. 2022). Second, the Supreme Court applies a three-part test to determine, on a claim-by-claim basis, whether Title II validly abrogates sovereign immunity. *Block*, 952 F.3d at 617. It asks: "(1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id.* Plaintiffs have sufficiently pled that S.B. 1's onerous new voter assistance rules violate Title II of the ADA. ROA.6243-6249 ¶¶ 337–53; ROA.6307-18, 6320-21. And unreasonably burdening Plaintiffs'

and their members' right to vote is conduct that violates both the ADA and the Fourteenth Amendment. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling op.); *see also Valentine v. Collier*, 993 F.3d 270, 280–81 (5th Cir. 2021) (alleged conduct that violated the ADA and the Eighth Amendment, which applies to the states through the Fourteenth Amendment, abrogated sovereign immunity under Title II).

Moreover, in finding that sovereign immunity was abrogated in the context of court-access in *Tennessee v. Lane*, 541 U.S. 509, 518 (2004), the Court invoked "a pattern of unequal treatment in the administration of a wide range of public services, [including] voting." 541 U.S. at 525; *see also Doe v. Rowe*, 156 F. Supp. 2d 35, 57 (D. Me. 2001) (in case challenging state guardianship law as discriminating against voters with disabilities, holding that "Court concludes that State Defendants may not invoke sovereign immunity to shield them from Plaintiffs' claims under Title II of the ADA."); *see also Fla. State Conf. of the NAACP v. Lee*, No. 4:21CV187-MW/MAF, 2021 WL 6072197, at *9 (N.D. Fla. Dec. 17, 2021) (citing *Lane* as "explaining that Title II of the ADA validly abrogated state sovereign immunity under the Fourteenth Amendment, in part, because it targeted discrimination against disabled persons in voting.").

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Finally, under Section 504 of the Rehabilitation Act, a state waives its Eleventh Amendment immunity as to claims under Section 504 by accepting federal

funds. *See* 42 U.S.C. § 2000d-7(a); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (en banc) (holding that Louisiana education agencies waived immunity from Section 504 claims by accepting federal funding); *Danny R. ex rel. Ilan R. v. Spring Branch Indep. Sch. Dist.*, 124 F. App'x 289, 289–90 (5th Cir. 2005) (per curiam) (unpublished) (citing *Pace* in holding that Texas Education Agency is not immune from suit under Section 504). The waiver applies here because the State receives federal funding for elections. *See* ROA.6251 ¶ 361; ROA.

Defendant Ogg does not address Plaintiffs' VRA, ADA, and Rehabilitation Act claims and therefore has not even attempted to demonstrate a likelihood of success on the merits of immunity for those claims.

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II. Defendant Ogg will face no irreparable injury should discovery move forward.

Defendant Ogg cites no concrete injury that is curable by a stay of discovery. The only alleged injury Defendant Ogg claims she will suffer is the indignity of participating in federal court litigation as a party entitled to sovereign immunity. Given the inevitability of Defendant Ogg litigating Plaintiffs' claims based on legislative abrogation of sovereign immunity, this injury is insufficient to meet Defendant Ogg's burden.

The standard for showing irreparable injury is not a "lenient" one; movants must show that "irreparable injury is *likely* in the absence of" a stay. *Cf. Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (emphasis in original). An irreparable

injury that merits a stay must be "imminent and not speculative." *Cf. Greer's Ranch Café v. Guzman,* 540 F. Supp. 3d 638, 651 (N.D. Tex. 2021). In her Motion, Defendant Ogg points only to the "core irreparable injury" of "being 'wrongly haled into court'" and the resulting "intrusion upon state sovereignty" therefrom. Mot. at 8 (citing *Planned Parenthood Gulf Coast, Inc. v. Phillips*, 24 F.4th 442, 449-50 (5th Cir. 2022)). As Plaintiffs explain above, however, this Case involves no such intrusion. Plaintiffs' Complaints feature four types of claims that are grounded in federal legislation that abrogate immunity. Even in the unlikely case that Defendant Ogg prevails on her *Ex Parte Young* arguments, she will still be a defendant to Plaintiffs' VRA, ADA, and Rehabilitation Act claims, with identical discovery. Defendant cannot invoke the Eleventh Amendment to claim that injury results from participating in a case that will ultimately require her to "face the burdens" of discovery anyway. Mot. at 8. Defendant's alleged injury of being "wrongly haled into Court" is therefore highly speculative.

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III. Plaintiffs will be substantially injured by a stay.

Defendant Ogg asserts that her likelihood of success on the merits outweighs any injury to Plaintiffs, as Plaintiffs may continue to conduct discovery and litigate their claims and defenses against other Defendants prior to trial in July 2023. Mot. At 9. This argument fails to recognize the disruption that staying discovery against one party would cause.

Defendant Ogg proposes a universe in which she does not have to engage in discovery until her appeal is decided, while the remaining parties will continue to litigate under a scheduling order that has already closed discovery as to the 2022 primary election (Defendant Ogg unjustifiably refused to engage in this discovery) and will close discovery in March 2023 for the 2022 general election. *See* ROA.10505-10506. Then, the parties' efforts will be focused on dispositive motions and trial. *Id.* at 10507-10508. Under Defendant Ogg's proposal, the Plaintiffs will have to choose between forgoing discovery from Defendant Ogg or conducting truncated discovery in order to preserve the schedule, or requesting to delay a trial that was already significantly delayed over the Plaintiffs' objection. *See* ROA.9910-9925.

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This is an untenable choice. The Plaintiffs are entitled to conduct discovery to develop evidence to prove their claims. *See* Fed R. Civ. P. 26(b)(1). Forgoing or truncating discovery against Defendant Ogg would therefore jeopardize the airing of this dispute. But further delay of trial would irreparably harm Plaintiffs. The Plaintiffs have alleged unlawful burdens on their right to vote and their First Amendment rights caused by the changes wrought by S.B. 1. The first delay of trial precluded the possibility of relief before the 2022 general election. Delaying the trial further will almost certainly mean more elections will take place under this unlawful statutory regime. And Texas cannot re-run these elections without the

unconstitutional and illegal restrictions imposed by S.B. 1. *See Veasey v. Perry*, 769 F.3d 890, 895-96 (5th Cir. 2014) (recognizing the irreparable harm caused by conducting elections during election law litigation because "the State cannot run the election over again," applying the law as ultimately declared by merits resolution). Every election that takes place before this case is resolved therefore irreparably harms the Plaintiffs. The substantial injury to Plaintiffs weighs against a stay.

IV. The public interest does not favor a stay.

Finally, a stay of discovery is not in the public interest. As discussed above, a stay risks delaying the trial in this case, thereby allowing continued enforcement of a law that unconstitutionally burdens the right to vote. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014).

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Moreover, allowing development of a real-time record involving all parties involved is in the public interest. *See, e.g.*, Fed. R. Civ. P. 1 (stating Federal Rules's intention to "secure the just, speedy, and inexpensive determination of every action and proceeding").

The cases upon which Defendant Ogg relies—namely *Veasey v. Abbot*, 870 F.3d 387, 391 (5th Cir. 2017), and *Russell v. Harris Cty., Tex.*, 500 F. Supp. 3d 577, 583 (S.D. Tex. 2020), do not support the contrary position, which is effectively what they are offered for here. *Veasey*—selectively quoted to support the concept that an

appealing state need not address the public interest prong—merely adopted an agreed-upon stay of an injunction issued close to an election. *See* 870 F.3d at 391-92. And because Defendant Ogg has not even asserted sovereign immunity arguments relevant to the VRA, ADA, and Rehabilitation Act claims, she cannot invoke *Russell*, which dealt with a state entity that was entirely immune from the suit in which discovery was sought. *See Russell v. Jones*, -- F.4th --, 2022 WL 4296644 (5th Cir. Sept. 19, 2022).

CONCLUSION

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For the foregoing reasons, Plaintiff-Appellees The Arc of Texas, Delta Sigma Theta, Mi Familia Vota, League of Women Voters of Texas, OCA-Greater Houston, REVUP-Texas, and Workers Defense Action Fund respectfully request that this Court deny Defendant Ogg's Motion to stay discovery and related proceedings against her pending resolution of her interlocutory appeal.

Respectfully submitted,

/s/ J. Michael Showalter
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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2022 a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ J. Michael Showalter
J. Michael Showalter

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of FED. R. APP. P. 27(d)(2)(A) because it does not exceed 5,200 words.

/s/ J. Michael Showalter
J. Michael Showalter

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