UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, *Plaintiffs*, v. THE STATE OF TEXAS, *et al.*, *Defendants*.	§ § § § § § § §	Case No. 5:21-cv-844-XR [Lead Case]
LULAC TEXAS, *et al.*, *Plaintiffs*, v. JOHN SCOTT, *et al.*, *Defendants*.	§ § § § § § § §	Case No. 1:21-cv-786-XR [Consolidated Case]

MOTION TO DISMISS THE SECOND AMENDED COMPLAINT OF LULAC TEXAS, ET AL.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Legislative Materials

Statutes and Rules

Tex. Elec. Code

INTRODUCTION

LULAC Texas and their co-plaintiffs' Second Amended Complaint (ECF 207) is still deficient. First, rather than address sovereign immunity claim-by-claim and provision-by-provision, as Fifth Circuit precedent requires, the LULAC Plaintiffs seem to take it for granted that the Secretary of State and the Attorney General (here, the "State Defendants") enforce all of Senate Bill 1 ("SB1"). Tex. Leg., *An Act Relating to Election Integrity and Security*, S.B. 1, 87th Leg., 2d Spec. Sess. (2021). In that regard, they appear to have sued the State Defendants just because they are the State's top election and legal officials. The LULAC Plaintiffs fail to identify specific provisions of SB1 that these defendants enforce and how that enforcement causes their alleged injuries.

The same is true with respect to standing. Fifth Circuit precedent instructs the LULAC Plaintiffs to plead standing claim-by-claim and provision-by-provision. But the LULAC Plaintiffs do not attempt to comply with this pleading requirement. Moreover, the LULAC Plaintiffs disregard well-established Fifth Circuit standards on associational and organizational standing. As to associational standing, the LULAC Plaintiffs provide only cursory information on their members and membership structure, making it impossible to tell if their members have actually been injured and (even if they have) if the LULAC Plaintiffs have standing based on those injuries. And as to organizational standing, the LULAC Plaintiffs fail to identify concrete interests that, if injured, would support Article III standing. Instead, they point to general social interests like increasing voter turnout or educating the public on SB1. But Fifth Circuit law rejects standing based on such interests.

To date, the LULAC Plaintiffs' amendments have failed to resolve the threshold issues the State Defendants raised for the first time months ago. The State Defendants respectfully request that the Court dismiss the claims against them.

ARGUMENT

I. Plaintiffs Cannot Satisfy *Ex parte Young*

Sovereign immunity "prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). Although "*Ex parte Young* allows injunctive or declaratory relief against a state official in her official capacity," it applies only when "the official has a sufficient 'connection' with the enforcement of the allegedly unconstitutional law." *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467 (5th Cir. 2020).

Fifth Circuit "precedents distill three rules": (1) "it is not enough that the state official was merely the but-for cause of the problem that is at issue in the lawsuit"; (2) "where a statute is being challenged, . . . a provision-by-provision analysis is required"; and (3) "in the particular context of Texas elections . . . the Secretary's role varies, so [the plaintiffs] must identify the Secretary's specific duties within the particular statutory provision." *Tex. Democratic Party v. Hughs*, 860 F. App'x 847, 877–78 (5th Cir. 2021) (per curiam) (citing *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 175, 179–81 (5th Cir. 2020)).

At the pleading stage, "the plaintiffs' burden is to allege a plausible set of facts establishing jurisdiction." *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012) (citing *Davis v. United States*, 597 F.3d 646, 649–50 (5th Cir. 2009)). During the status conference, the parties discussed this issue. The State Defendants argued that "the plaintiffs haven't met their burden of specific allegations about what conduct from the defendants they are complaining of." Ex. A at 16. The Court sent "clear signals to all the plaintiff groups, you need to further amend your complaints here to address these challenges." *Id.* But neither of the LULAC Plaintiffs' amended complaints addressed this problem. They still fail to allege relevant enforcement roles for the Secretary of State and Attorney General on a claim-by-claim and provision-by-provision basis.

A. Plaintiffs Have Not Alleged that the Secretary of State Enforces the Challenged Provisions of SB1

Sovereign immunity precludes the LULAC Plaintiffs' claims against the Secretary of State because he does not have a sufficient connection with enforcement of SB1's challenged provisions. The LULAC Plaintiffs are required to identify which SB1 provisions they challenge and explain how the Secretary enforces those provisions. But they do no such thing.

As a preliminary matter, the LULAC Plaintiffs appear to cite the Secretary's status as the State's top election official as a reason why he is a proper defendant. Citing the Secretary's general authority under Texas Election Code §§ 33.001(a) and 31.003, they allege: "The Secretary is the State's chief elections officer and must 'obtain and maintain uniformity in the application, operation, and interpretation' of the State's election laws." ECF 207 ¶ 26. They further note the Secretary's authority under Texas Election Code § 31.005: "The Secretary has authority to 'take appropriate action to protect the voting rights' of Texans, including by ordering officials to correct offending conduct that 'impedes the free exercise of a citizen's voting rights.'" *Id.*

These allegations do not satisfy *Ex parte Young* because they do not "identify the Secretary's specific duties within the particular statutory provision" being challenged. *Tex. Democratic Party*, 860 F. App'x at 877–78 (citing *Tex. Democratic Party*, 978 F.3d at 179–80). "[I]t is not enough that the official have a '*general* duty to see that the laws of the state are implemented.'" *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400–01 (5th Cir. 2020) (citing *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). But a *general* duty is all that the LULAC Plaintiffs allege. These provisions contain no specific enforcement obligation, let alone a specific obligation related to SB1. *See Tex. Democratic Party*, 860 F. App'x at 877–78 ("[I]n the particular context of Texas elections, . . . the Secretary's role varies, so" the LULAC Plaintiffs must "identify the Secretary's specific duties within the particular statutory provision" at issue.) (citing *Tex. Democratic Party*, 978 F.3d at 179–80). Citing those general statutes does not suffice.

The LULAC Plaintiffs' other allegations fare no better. They challenge numerous provisions

of SB1, but only include allegations regarding the Secretary's duties in connection with two—§§ 4.04 and 6.03. ECF 207 ¶ 26. Indeed, the LULAC Plaintiffs make no mention at all of the Secretary's alleged role in enforcing SB1 except in their paragraph introducing that party. Thus, as an initial matter, the LULAC Plaintiffs' claims against the Secretary regarding every other provision of SB1 should be dismissed. Without a "provision-by-provision analysis," the LULAC Plaintiffs cannot carry their burden. *Tex. Democratic Party*, 860 F. App'x at 877.

The LULAC Plaintiffs' allegations regarding §§ 4.04 and 6.03 do not establish the requisite connection to enforcement. The LULAC Plaintiffs do not explain how enforcement by the Secretary results in the harms they allege. The Secretary is not a proper defendant because "[d]irecting the Secretary not to enforce [the challenged provisions] would not afford the Plaintiffs the relief that they seek." *Mi Familia Vota*, 977 F.3d at 468.

The Secretary's role under SB1 § 4.04 is not related to Plaintiffs' alleged injuries. That provision simply requires the Secretary to establish a training program for poll watchers, *see* Tex. Elec. Code § 33.008, that the training be publicly available, *id.* § 33.008(1), and that the system provide people who complete the training with a certificate, *id.* § 33.008(2). The LULAC Plaintiffs do not allege that the training program violates their rights. Indeed, their Second Amended Complaint does not mention the training program or § 4.04, except when describing the Secretary. *See* ECF 207 ¶ 26. Instead, the LULAC Plaintiffs complain about the potential future behavior of poll watchers, *see, e.g.*, *id.* ¶¶ 185–89, but they do not allege that behavior is connected to the Secretary. The LULAC Plaintiffs seem to admit that local election officials, not the Secretary, will implement the poll-watching provisions they challenge. *See, e.g.*, *id.* ¶ 180 (describing SB1's limitations on what election officials can do at polling places). *See Tex. Democratic Party*, 860 F. App'x at 878 (Secretary of State did not enforce voter registration law because the "county registrars are the ones who review voter registration applications.").

Nor is the Secretary's role under SB1 § 6.03 related to the LULAC Plaintiffs' alleged injuries. That provision requires a person who assists a voter to submit a form certifying the assistor's name, relationship to the voter, and whether he or she received compensation from a political entity for assisting the voter. Tex. Elec. Code § 64.0322(a). The Secretary is responsible only for designing the form. *Id.* § 64.0322(b). SB1 does not delegate authority to the Secretary to enforce compliance should an individual fail to provide the information or oath required by these provisions. *See id.* §§ 64.0322, 64.034. Indeed, the forms are not even submitted to the Secretary. They are submitted to local election officers, who are responsible for ensuring assistors comply with the rules.

Even if the LULAC Plaintiffs had tried to connect the other SB1 provisions they challenge to the Secretary, they would have failed. They assert Counts I and IV against the Secretary. ECF 207 at 52, 60. In Count I, the LULAC Plaintiffs challenge SB1 §§ 3.04, 3.09, 3.10, 3.12, 3.13, 4.01, 4.02, 4.06, 4.07, 4.09, 4.12, 5.01–5.03, 5.07, 5.08, 6.03, 6.04, and 7.04. *Id.* ¶ 252. But the LULAC Plaintiffs fail to allege the Secretary's connection to enforcement of these provisions. The Secretary in fact does not enforce them.

For example, SB1 §§ 3.09, 3.10 and 3.12 amend Texas Election Code §§ 85.005, 85.006(b) and (e), and 85.061(a), respectively, and the early voting clerk enforces these provisions. *See* Tex. Elec. Code §§ 83.001–83.0012 (identifying whom is the early voting clerk and specifying that "[t]he early voting clerk shall conduct the early voting in each election"); *see also id.* at §§ 85.005, 85.006(b), 85.006(e), 85.0061(a) (specifying how the early voting clerk shall conduct early voting in certain elections). SB1 §§ 3.04 and 3.13 include amendments relating to the location of polling places, but the Secretary does not designate polling locations. *See Tex. Democratic Party v. Hughs*, 997 F.3d 288, 291 (5th Cir. 2021) (finding that "[t]he Secretary plays no role"); *see also* Tex. Elec. Code §§ 43.002–43.004 (assigning this responsibility to local officials).

The Secretary also does not enforce the challenged provisions relating to watchers, that is, SB1

§§ 4.01, 4.02, 4.06, 4.07, 4.09, and 4.12. Section 4.02, at most, imposes obligations on poll watchers, not the Secretary. Tex. Elec. Code § 33.0015. The others specify no enforcement role for the Secretary. *See id.* §§ 32.075 (amended by § 4.01); 33.051 (amended by § 4.06); 33.056 (amended by § 4.07); 33.061 (amended by § 4.09); 86.006 (amended by § 4.12). As to §§ 5.01–5.03, and 5.07, the early voting clerk, not the Secretary, enforces the ballot-application requirements. Tex. Elec. Code § 86.001(c). SB1 § 5.08 requires that the carrier envelope include spaces for voters to include information, *id.* § 86.002(g)–(i), but the signature verification committee and early voting ballot board are responsible for verifying that individuals provide the required information. *See id.* §§ 87.0271, 87.041, 87.0411.

The Secretary does not enforce SB1 §§ 6.03 and 6.04 either. Section 6.03 is discussed above. Section 6.04 requires a person providing assistance to a voter that is not an election officer to take an oath administered by an election officer before providing assistance. *Id.* § 64.034. It is "an election officer at the polling place," not the Secretary, who administers and enforces the oath requirement. *Id.*; *see also id.* §§ 32.071 ("The presiding judge is in charge of and responsible for the management and conduct of the election at the polling place. . . ."); 32.074 ("An election judge or clerk may administer any oath required or authorized to be made at the polling place.").

Section 7.04 is both the final provision of SB1 challenged in Count I and the only provision challenged in Count IV. ECF 207 ¶¶ 252, 291. SB1 § 7.04 adds §§ 276.015–.019 to the Election Code. These provisions assign no enforcement role to the Secretary, and the LULAC Plaintiffs have not alleged that he enforces them.

B. Plaintiffs Have Not Alleged that the Attorney General Enforces the Challenged Provisions of SB1

Sovereign immunity also bars the LULAC Plaintiffs' claims against the Attorney General. Again, allegations that the Attorney General has a general duty to enforce state laws, ECF 207 ¶ 27, are not enough to satisfy *Ex parte Young*. *See Tex. Democratic Party*, 961 F.3d at 401–02. A "provision-by-provision analysis is required" to show that a state official has the requisite connection to each

challenged provision. *Tex. Democratic Party*, 860 F. App'x at 877. Though they challenge numerous SB1 provisions, the LULAC Plaintiffs only discuss the Attorney General in relation to five—§§ 2.04, 2.08, 6.03, 6.04, and 7.04. ECF 207 ¶ 27. For this reason, the LULAC Plaintiffs have not satisfied their burden to show that the Attorney General is a proper defendant for challenges to any other provision.

The LULAC Plaintiffs' allegations are also insufficient even for the provisions they mention: §§ 2.04, 2.08, 6.03, 6.04, and 7.04. The LULAC Plaintiffs observe that § 2.04 "requires the Attorney General to be informed of all instances of unlawful voting or registration" and contend that it "empowers the Attorney General to use that information to investigate and prosecute such crimes." ECF 207 ¶ 27. But the Attorney General does not *enforce* § 2.04. Under that provision, he merely receives information. *See* SB1 § 2.04 (amending Tex. Elec. Code § 15.028). Enforcement is defined by "compulsion or constraint," *City of Austin*, 943 F.3d at 1000, but § 2.04 does not empower the Attorney General to compel or constrain anyone. Because "the requisite connection is absent," the *Ex parte Young* analysis ends there. *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (citing *City of Austin*, 943 F.3d at 998), *vacated as moot sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021). In any event, the LULAC Plaintiffs do not contend that the Attorney General would violate federal law by merely receiving information.

Nor does the Attorney General enforce § 2.08. Under that provision, just like under § 2.04, the Attorney General receives information indicating that a criminal violation of the State's election laws may have occurred. In fact, the provision's primary effect is to establish that such information is not public information until after the investigation is completed. Tex. Elec. Code § 31.006(b). Nothing in Texas Election Code § 31.006 compels the Attorney General to take an enforcement action. Indeed, it expressly contemplates that he has discretion to determine that "the information referred does not warrant an investigation." *Id.* § 31.006(b)(2).

As for SB1 §§ 6.03, 6.04, and 7.04, the LULAC Plaintiffs allege that the "Attorney General

has . . . made clear that he plans to enforce" provisions of SB1, including "violations of voter assistance laws, like SB1 §§ 6.03–6.04, and so-called vote harvesting laws, like § 7.04," based on the Attorney General's announcement "that he would be forming the Texas Election Integrity Unit." ECF 207 ¶ 27. The LULAC Plaintiffs allege that "[t]he Attorney General is empowered to 'prosecute a criminal offense prescribed by the election laws of [the] state,' Tex. Elec. Code § 273.021(a), including the new criminal provisions of SB 1." *Id.* However, the Texas Court of Criminal Appeals recently held that Texas Election Code § 273.021 "is unconstitutional" and the Attorney General "cannot initiate prosecution [of election cases] unilaterally." *State v. Stephens*, No. PD-1032-20, 2021 WL 5917198, at *1, 8 (Tex. Crim. App. Dec. 15, 2021). As a result, "the authority of the Attorney General is limited to assisting the district or county attorney upon request." *Id.* at *9.[1] This Court must "take the word of the highest court on criminal matters of Texas as to the interpretation of its law." *Arnold v. Cockrell*, 306 F.3d 277, 279 (5th Cir. 2002) (per curiam).

The LULAC Plaintiffs acknowledge the *Stephens* decision, but maintain that "the Attorney General retains the power to assist district or county attorneys, upon request." ECF 207 at 11 n.1. However, they make no allegation that such a request has been made or is imminent in relation to the challenged SB1 provisions. "Speculation that [the Attorney General] might be asked by a local prosecutor to 'assist' in enforcing" SB1 "is inadequate to support an *Ex parte Young* action against the Attorney General." *In re Abbott*, 956 F.3d at 709 (citing *City of Austin*, 943 F.3d at 1000). Accordingly, these and other allegations relating to the Attorney General's authority to prosecute violations of Texas's election laws are also insufficient to establish the Attorney General as a proper defendant.

Because the LULAC Plaintiffs have not alleged, on a provision-by-provision basis, "that the Attorney General *has* the authority to enforce" the particular provisions at issue, *City of Austin*, 943

[1] The State of Texas and the Attorney General believe that *Stephens* was wrongly decided. The State has filed a motion asking the Texas Court of Criminal Appeals to reconsider its decision.

F.3d at 1001, there is no need to proceed to the next step in the analysis. Their claims fail out of the gate.

But if the Court reaches the second step, it must consider whether the LULAC Plaintiffs have plausibly alleged "that [the Attorney General] is likely to" enforce the particular provisions at issue in the way Plaintiffs claim. *Id.* at 1002. The decision of the Texas Court of Criminal Appeals discussed above holds that the Attorney General cannot do so unilaterally. *See Stephens*, 2021 WL 5917198, at *1, 8. And the LULAC Plaintiffs do not allege that any district or county attorney has, or is likely to, seek the Attorney General's assistance in prosecuting violations of the challenged SB1 provisions. Moreover, to the extent the LULAC Plaintiffs rely on the Attorney General's prior investigations and prosecutions, "that he has chosen to" enforce "*different* statutes under *different* circumstances does not show that he is likely to" enforce the provisions Plaintiffs challenge in the manner they allege. *City of Austin*, 943 F.3d at 1002. The LULAC Plaintiffs do not and cannot plausibly allege that the Attorney General will bring suits that violate federal law. That is especially true in light of the "presumption of regularity" afforded "prosecutorial decisions." *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *see also Hartman v. Moore*, 547 U.S. 250, 263 (2006).

C. Plaintiffs Do Not Plead an Alternative Exception to Sovereign Immunity

Sovereign immunity bars the LULAC Plaintiffs' claims unless they show that sovereign immunity has been "waived by the state, abrogated by Congress, or an exception applies." *Tex. Democratic Party*, 978 F.3d at 179 (citing *City of Austin*, 943 F.3d at 997). The *Ex parte Young* exception does not apply for the reasons above, and the LULAC Plaintiffs have not pleaded waiver or abrogation by Congress that would permit their claims to proceed. And if they had tried, they would have been wrong.

The LULAC Plaintiffs do not assert Counts II or III against the State Defendants in their Second Amended Complaint. ECF 207 at 54, 57. Those counts raise § 1983 claims, and "Congress

has not abrogated state sovereign immunity . . . under § 1983." *Raj v. LSU*, 714 F.3d 322, 328 (5th Cir. 2013). As to Counts I and IV, although *OCA-Greater Houston v. Texas* holds, without analysis, that the Voting Rights Act abrogates sovereign immunity, 867 F.3d 604, 614 (5th Cir. 2017), that case was wrongly decided. "Congress did not unequivocally abrogate state sovereign immunity under Section 2 of the Voting Rights Act." *Ala. State Conference of the NAACP v. Alabama*, 949 F.3d 647, 655 (11th Cir. 2020) (Branch, J., dissenting). Nor did it do so in Section 208. When the VRA authorizes relief against States, it does so through suits brought by the Attorney General, *see, e.g.*, 52 U.S.C. § 10308(d), which the Supreme Court has held are not subject to sovereign immunity. *See West Virginia v. United States*, 479 U.S. 305, 312 n.4 (1987); *United States v. Mississippi*, 380 U.S. 128, 140 (1965). Although this Court is bound by *OCA-Greater Houston*, the State Defendants preserve this argument for appeal.

II. Plaintiffs Lack Standing

A. Plaintiffs Bear the Burden of Establishing Standing on a Claim-by-Claim Basis

"[S]tanding is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation omitted). At the pleading stage, the LULAC Plaintiffs must "clearly . . . allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 339 (2016) (quotation omitted). A plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant; and (3) that is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Artificial entities have two options for trying to establish standing: (1) associational standing and (2) organizational standing. *See NAACP v. City of Kyle*, 626 F.3d 233, 237–38 (5th Cir. 2010). For associational standing, the entity must show that (1) its members would independently have standing; (2) the interests the organization is protecting are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *Ctr.*

for Biological Diversity v. EPA, 937 F.3d 533, 536 (5th Cir. 2019). For organizational standing, the plaintiff must establish, in its own right, an injury in fact, causation, and redressability. *Id.*

Because the LULAC Plaintiffs are "invoking federal jurisdiction," they "bear[] the burden of establishing these elements." *Lujan*, 504 U.S. at 561. Additionally, because "[s]tanding is not dispensed in gross," the LULAC Plaintiffs must plausibly allege "standing to challenge *each provision* of law at issue." *In re Gee*, 941 F.3d 153, 161–62 (5th Cir. 2019) (per curiam) (emphasis added). But rather than proceed "provision-by-provision" and "claim-by-claim," *id.* at 165, 170, the LULAC Plaintiffs' standing allegations often treat SB1 as an undifferentiated whole. That does not suffice.

B. Plaintiffs Have Not Plausibly Alleged Traceability or Redressability

As an initial matter, the LULAC Plaintiffs lack standing because their alleged harms are neither traceable to the State Defendants nor redressable by this Court. By and large, the LULAC Plaintiffs challenge SB1 as an undifferentiated whole, without tying their alleged injuries to particular enforcement actions by any of the State Defendants. But as explained in Part I, none of the State Defendants have broad power to enforce all of SB1. The *Ex parte Young* analysis above "significantly overlap[s]" with the traceability and redressability analysis. *City of Austin*, 943 F.3d at 1002. However, traceability and redressability are still required even when sovereign immunity is inapplicable. *See* U.S. Const. art. III, § 2. The LULAC Plaintiffs fail to address these requirements. Their claims against the State Defendants cannot proceed because they do not connect their alleged injuries to the Secretary's or the Attorney General's actions or explain how enjoining them will redress those injuries.

Any alleged injuries are not fairly traceable to the Attorney General for another reason. While the LULAC Plaintiffs acknowledge that the Attorney General lacks the authority to unilaterally prosecute election-law offenses according to the *Stephens* decision, they nonetheless attempt to establish standing based on his power to assist local prosecutors upon request. ECF 207 at 11 n.1. However, that argument rests on their highly speculative fear that: (1) a district or county attorney will

decide to prosecute an individual under one of the provisions challenged; (2) the individual to be prosecuted will be a member of one of the organizations bringing this challenge; (3) the county or district attorney will seek the assistance of the Attorney General; and (4) the Attorney General will agree to provide such assistance. Reliance on this "speculative chain of possibilities" is insufficient to establish that any prosecutorial injury "is certainly impending or is fairly traceable." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 (2013). Moreover, given that the first and third links in the above-described chain of contingencies would require the Court to engage in "guesswork as to how independent decisionmakers will exercise their judgment," this Court should "decline to abandon [the] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Id.*

To be sure, *OCA-Greater Houston* wrongly found standing satisfied in an earlier suit against the Secretary of State because the Secretary "serves as the 'chief election officer of the state.'" 867 F.3d at 613. But *OCA* "involved a *facial* challenge under the Voting Rights Act," not "an as-applied challenge to a law enforced by local officials." *Tex. Democratic Party v. Hughs*, 974 F.3d 570, 571 (5th Cir. 2020) (per curiam) (distinguishing *OCA*). Its reasoning is limited, at least, to cases considering "[t]he facial validity of a Texas election statute." *OCA*, 867 F.3d at 613.

In any event, *OCA* is inconsistent with Texas authorities, which control on the underlying question of Texas law: Does being the "chief election officer" empower the Secretary to enforce Section 6.04? No, because the "Secretary's title chief election officer is not a delegation of authority to care for any breakdown in the election process." *In re Hotze*, 627 S.W.3d 642, 649 (Tex. 2020) (Blacklock, J., concurring) (describing *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972)) (quotation marks omitted). *OCA* did not consider these precedents, or any other opinions from Texas courts. Justice Blacklock's *In re Hotze* concurrence post-dated *OCA*, so the *OCA* court did not have a chance to consider that opinion. And the *OCA* court appears to have been unaware of *Calvert*, which was not

cited in the parties' briefs. Because *OCA* did not "squarely address[]" Texas cases interpreting the Secretary's role as chief election officer, it is not binding "by way of stare decisis." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *see Wilson v. Taylor*, 658 F.2d 1021, 1034–35 (5th Cir. 1981) (refusing to follow a Fifth Circuit opinion that conflicted with a previous Supreme Court opinion that "was not called to the attention of the [first Fifth Circuit] panel").

C. No Plaintiff Has Associational Standing

Plaintiffs' Second Amended Complaint does not plausibly allege facts establishing associational standing. A plaintiff cannot have associational standing unless one of its members independently satisfies the Article III standing requirements. *Ctr. for Biological Diversity*, 937 F.3d at 536. The plaintiff must therefore make two threshold showings: (1) that it has "members" within the meaning of the associational standing test from *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1997) (requiring "indicia of membership"), and (2) that identified members have "suffered the requisite harm," *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). The LULAC Plaintiffs here have done neither.

The LULAC Plaintiffs have failed to establish they have "members" within the meaning of the *Hunt* test. Voto Latino does not even describe itself as having members. Indeed, the most recent financial disclosure form on its website told the IRS that it did not "have members," much less "members . . . who had the power to elect or appoint one or more members of the governing body." *See* ECF 54-2 (answering "No" to questions 6 and 7a in Part VI.A of IRS Form 990). Voto Latino instead claims to act on behalf of various Texas communities, *id.*, but the beneficiaries of a plaintiff's services do not qualify as members for purposes of associational standing. *See Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1010 n.4 (6th Cir. 2006) ("[T]he Northeast Ohio Coalition for the Homeless apparently seeks to assert a form of representational standing never recognized by any court—standing on behalf of the group served by the organization."). Not having members is fatal to

associational standing.

The remaining Plaintiffs claim to have members in the colloquial sense, but they fail to allege that each of those individuals "possess all of the indicia of membership": that "[t]hey alone elect the members of the [governing board]; they alone may serve on the [governing board]; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them." *Hunt*, 432 U.S. at 344–45. Generally, members must "participate in and guide the organization's efforts." *Ass'n for Retarded Citizens of Dall. v. Dall. Cnty. Mental Health & Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994). More specifically, the members must "elect leadership, serve as the organization's leadership, and finance the organization's activities, including the case's litigation costs." *Texas Indigenous Council v. Simpkins*, No. 5:11-cv-315, 2014 WL 252024, at *3 (W.D. Tex. Jan. 22, 2014) (Rodriguez, J.). The LULAC Plaintiffs assert no facts to this end.

Second, even assuming Plaintiffs have members, they fail to "identify members who have suffered the requisite harm" to establish injuries in fact. *Summers*, 555 U.S. at 499. This requires, among other things, allegations of a "specific member" and specific facts establishing how that member will suffer an injury in fact. *City of Kyle*, 626 F.3d at 237. As this Court recognized at the status conference, the LULAC Plaintiffs' original complaint did not "identify[] specific members of those associations who would themselves have standing to sue." ECF 177-1, Ex. A at 18. The Court advised the plaintiffs "to flush that out because I don't see where many of you have articulated those individuals sufficient to withstand any challenge." *Id.* But the LULAC Plaintiffs did not follow that advice in either of their amended complaints.

This defect is independently sufficient to warrant dismissal of the LULAC Plaintiffs' claims. *See Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2017) (Souter, J.) (dismissing claim for lack of standing where entity plaintiff failed to identify a member who was affected by the challenged regulation); *Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008) (dismissing

claim for lack of standing where entity plaintiff failed to identify a member who was affected by the disability policy).[2]

Moreover, to the extent the LULAC Plaintiffs seek to establish the requisite injury based on the Attorney General's authority to investigate and prosecute violations of SB 1, as explained above, the LULAC Plaintiffs have not credibly alleged that the Attorney General enforces the provisions challenged in this suit. *See* Part I.B, *supra*. As for the Attorney General's alleged investigative authority, *see* ECF 207 ¶ 27, "the mere existence, without more, of a governmental investigative and data-gathering activity" is insufficient to establish an imminent, concrete injury. *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 608 (6th Cir. 2008) (quoting *Laird v. Tatum*, 408 U.S. 1, 10 (1972)). Here, the LULAC Plaintiffs' attempt to establish an injury in fact based on a "possible," rather than "ongoing," investigation by the Attorney General is "speculative at best." *See Judicial Watch, Inc. v. Fed. Election Comm'n*, 293 F. Supp. 2d 41, 47–48 (D.D.C. 2003).

Finally, even if the LULAC Plaintiffs otherwise had associational standing (they do not), they would not be able to rely on associational standing for their disability-based claim: Count IV under § 208 of the VRA. The third element of associational standing demands that "neither the claim asserted nor the relief requested requires participation of individual members." *Ctr. for Biological Diversity*, 937 F.3d at 536. "To determine whether" a "claim require[s] individual participation," courts "examine[] the claim's substance." *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009). If the claim has an "individualized element," then "[t]he involvement of" individual members "is essential to the resolution of the" claim. *Id.*

Here, the LULAC Plaintiffs' disability claim requires the participation of individual members,

[2] Although an unpublished opinion of the Fifth Circuit once noted that the panel was "aware of no precedent holding that an association must set forth the name of a particular member in its complaint," *Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012), the precedent cited above holds exactly that.

both because it has individualized elements and because of the relief requested. First, a plaintiff must identify which aspect of § 208 has been violated. That statute applies to several different categories of impairments: "blindness, disability, or inability to read or write." 52 U.S.C. § 10508. And as with all impairments, these vary in degree and effect. For these reasons, a voter's entitlement to assistance under § 208 is based on a specific voter's disability and the assistance necessary to accommodate that voter. *See, e.g.*, *Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021, at *1–3, 6–7 (E.D. Tex. Aug. 7, 2008) (considering the specific effect of Texas early voting law on group of elderly plaintiffs). This requires a "case-by-case analysis" of plaintiff-specific facts and circumstances. *Duncan v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 469 F. App'x 364, 369 (5th Cir. 2012) (per curiam). The LULAC Plaintiffs' "complaint alleges no facts suggesting" that disabled voters will face "uniform" issues across Texas's 254 counties and despite variation in individual disabilities. *Prison Justice League v. Bailey*, 697 F. App'x 362, 363 (5th Cir. 2017) (per curiam). In the absence of such uniformity, individual participation is crucial for understanding the merits of a disability claim.

D. None of the Plaintiffs Plausibly Allege a Cognizable Injury

The LULAC Plaintiffs do not have organizational standing because they have not plausibly alleged that they, as organizations, will suffer injuries in-fact. The LULAC Plaintiffs do not claim to be "the object of the government action or inaction [they] challenge[]," so standing is "substantially more difficult to establish." *Lujan*, 504 U.S. at 562 (quotation omitted). Instead, all four Plaintiffs claim that SB1's effects on third parties force them to divert resources from other programs and activities. ECF 207 ¶¶ 20, 22, 24–25, 254, 285. As an initial matter, the LULAC Plaintiffs' allegations are insufficient because they treat SB1 as an undifferentiated whole rather than address "each provision of law at issue." *In re Gee*, 941 F.3d at 161–62. This Court must "decide [standing] on a provision-by-provision basis." *Id.* at 165.

In any event, although the diversion of resources can constitute a requisite injury under certain

circumstances, "[n]ot every diversion of resources to counteract [a] defendant's conduct . . . establishes an injury in fact." *City of Kyle*, 626 F.3d at 238. First, an organization's decision to divert resources cannot itself be speculative. "The change in plans must still be in response to a reasonably certain injury imposed by the challenged law." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 402. Rather, the organization must act in response to an impending injury. That is, a diversion of resources is cognizable only if the plaintiff "would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

The alleged underlying injury must also be concrete. "Frustration of an organization's objectives is the type of abstract concern that does not impart standing." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) (quotation omitted). Allegations of impaired "issue-advocacy" do not suffice. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005). Thus, "a showing that an organization's mission is in direct conflict with a defendant's conduct is insufficient, in and of itself, to confer standing on the organization to sue on its own behalf." *Ass'n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 361 n.7 (5th Cir. 1999).

In this case, none of the LULAC Plaintiffs identify a cognizable injury they would suffer if they did not divert their resources. LULAC claims that it "must divert resources . . . to address the adverse impacts of SB1." ECF 207 ¶ 20. LULAC does not claim that these "adverse impacts" affect *its* activities. Instead, it casts its objection as a concern over the burden SB1 allegedly imposes on LULAC's members. *Id.*; *see also id.* ¶¶ 254, 285. The most LULAC implies is a relationship between SB1 and voter turnout among Latino communities, which, it contends, is "critical" to its mission. *Id.* ¶ 20. But the "abstract social interest in maximizing voter turnout . . . cannot confer Article III

standing." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014). And an interest in increasing turnout for particular groups is akin to a "generalized partisan preference[]," which the Supreme Court held insufficient to establish Article III standing. *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). Regardless, "a stated interest in an issue is not enough unless there is a concrete showing of how the allegedly discriminatory . . . practice is going to impair the organization's activities." *Galveston Open Gov't Project v. U.S. Dep't of Hous. & Urban Dev.*, 17 F. Supp. 3d 599, 613 (S.D. Tex. 2014) (Costa, J.). That is missing here.

The harms alleged by Voto Latino fall flat for similar reasons. Voto Latino claims that it "will need to divert funds . . . , as well as the time and energy of its staff and volunteers in Texas, to educate its constituents" about SB1. ECF 207 ¶ 22. As an initial matter, an organization's "self-serving observation that it has expended resources to educate its members and others regarding [the challenged law] does not present an injury in fact." *Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). Voto Latino characterizes the diversion of resources as being directed towards "combat[ing] SB 1's effects on its core constituency" and "Texans that Voto Latino works to support" rather than SB1's impact on its own activities. ECF 207 ¶ 22; *see also id.* ¶¶ 254, 285. Voto Latino claims that SB1 "frustrates its mission of enfranchising and turning out Latinx voters in Texas." *Id.* ¶ 22. But again, maximizing voter turnout is not a concrete interest. *Fair Elections Ohio*, 770 F.3d at 461; *see also Gill*, 138 S. Ct. at 1933.

TARA and Texas AFT, meanwhile, argue that the diversion of resources is necessary to educate members on the new law, ECF 207 ¶¶ 24–25, but educating voters, on its own, is not an injury in-fact. *Nat'l Taxpayers Union*, 68 F.3d at 1434. In addition, to establish standing, "an organizational plaintiff must explain how the activities it undertakes in response to the defendant's conduct differ from its 'routine [] activities.'" *Def. Distributed v. U.S. Dep't of State*, No. 1:15-CV-372-RP, 2018 WL 3614221, at *4 (W.D. Tex. July 27, 2018) (quoting *City of Kyle*, 626 F.3d at 238). And it must "identify

'specific projects that [it] had to put on hold or otherwise curtail in order to respond to' the defendant's conduct." *Id.* (quoting *Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000)). TARA and Texas AFT allege none of this.

Finally, both TARA and Texas AFT contend that SB1 "threaten[s] the electoral prospects" of their "endorsed candidates," ECF 207 ¶ 23, impairing their ability "to help [their] membership select leaders" who support their memberships' interests. *Id.* ¶ 25. The argument fails, however, because not only have Plaintiffs not alleged that SB1 disproportionately affects the candidates TARA and Texas AFT prefer, but "[a]n organization's general interest in its preferred candidates winning as many elections as possible is still a 'generalized partisan preference[]' that federal courts are 'not responsible for vindicating.'" *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1206 (11th Cir. 2020) (quoting *Gill*, 138 S. Ct. at 1933). Thus, even though TARA claims that SB1 frustrates its mission, ECF 207 ¶ 23, none of the consequences that TARA attributes to SB1 constitute a legal harm. *See Berg v. Obama*, 586 F.3d 234, 240 (3d Cir. 2009) (explaining that a plaintiff's "wish that . . . voters had chosen a different presidential candidate" is not "a legal harm"); *see also Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000). TARA also appears to assert an interest in general voter turnout. ECF 207 ¶ 24 (alleging that TARA "spends resources on voter registration, phone banking, and GOTV [get-out-the-vote] activities"). But as explained above, that interest does not support Article III standing.

OCA-Greater Houston, about which the Court asked at the status conference, is not to the contrary. In that case, the Fifth Circuit considered whether a plaintiff's alleged diversion of resources was an injury in fact. The court analyzed a "critical distinction": whether the expenses "were related to litigation" or "unrelated to litigation." *OCA*, 867 F.3d at 612. That is an important limitation on organizational standing, but it is not at issue in this case.

In this case, one key question is whether the LULAC Plaintiffs' alleged diversions of resources are self-inflicted injuries or necessary responses to cognizable injuries they otherwise would have

suffered. *OCA* did not analyze that question, seemingly because the parties did not brief it. The court there simply did not consider whether the plaintiff's "change in plans" was "in response to a reasonably certain injury imposed by the challenged law," as other precedent requires the Court to address here. *Zimmerman*, 881 F.3d at 390.

E. Plaintiffs Violate the Bar on Third-Party Standing

Finally, the LULAC Plaintiffs lack standing for another reason: the bar on third-party standing. The LULAC Plaintiffs' Count III is based on § 1983, but that statute provides a cause of action only when *the plaintiff* suffers "the deprivation of any rights" at issue. 42 U.S.C. § 1983. The same is true for the LULAC Plaintiffs' other causes of action. A "third party may not assert a civil rights claim based on the civil rights violations of another individual." *Barker v. Halliburton Co.*, 645 F.3d 297, 300 (5th Cir. 2011) (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1160–61 (5th Cir. 1986)). Thus, where the "alleged rights at issue" belong to a third party, the plaintiff lacks statutory standing, regardless of whether the plaintiff has suffered his own injury. *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28 nn.3–4 (2014). Here, the LULAC Plaintiffs rely on the rights of third parties because they do not possess the relevant rights (*e.g.*, the right to vote, the right to assistance with voting if you have a disability). The LULAC Plaintiffs have not alleged any exception to the general prohibition on third-party standing.

III. Plaintiffs' Claims Fail as a Matter of Law

Finally, the LULAC Plaintiffs' claims under §§ 2 and 208 of the Voting Rights Act must be dismissed because those statutes do not create a private cause of action. State Defendants will not burden the Court with further briefing on these issues that they raised in their first Motion to Dismiss, ECF 54 at 16–21, because of the Court's denial of these arguments during the November 16, 2021 status conference. State Defendants respectfully disagree with that ruling and raise these arguments to preserve them for further review.

CONCLUSION

State Defendants respectfully request that the Court dismiss the claims against them.

Date: February 9, 2022

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548
Tel.: (512) 463-2100
Fax: (512) 457-4410

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN
Deputy Attorney General for Special Litigation
patrick.sweeten@oag.texas.gov
Tex. State Bar No. 00798537

WILLIAM T. THOMPSON
Deputy Chief, Special Litigation Unit
will.thompson@oag.texas.gov
Tex. State Bar No. 24088531

ERIC A. HUDSON
Senior Special Counsel
eric.hudson@oag.texas.gov
Tex. Bar No. 24059977

KATHLEEN T. HUNKER
Special Counsel
kathleen.hunker@oag.texas.gov
Tex. State Bar No. 24118415
**Application for Admission Pending*

LEIF A. OLSON
Special Counsel
leif.olson@oag.texas.gov
Tex. State Bar No. 24032801

JEFFREY M. WHITE
Special Counsel
jeff.white@oag.texas.gov
Tex. State Bar No. 24064380

JACK B. DISORBO
Assistant Attorney General
jack.disorbo@oag.texas.gov
Tex. State Bar No. 24120804

COUNSEL FOR STATE DEFENDANTS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on February 9, 2022, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, *Plaintiffs*, v. THE STATE OF TEXAS, *et al.*, *Defendants*.	§ § § § § § §	Case No. 5:21-cv-844-XR [Lead Case]
LULAC TEXAS, *et al.*, *Plaintiffs*, v. JOHN SCOTT, *et al.*, *Defendants*.	§ § § § § § §	Case No. 1:21-cv-786-XR [Consolidated Case]

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNION DEL PUEBLO ENTERO, ET AL,
PLAINTIFFS,
vs.
GREGORY W. ABBOTT, ET AL,
DEFENDANTS.

DOCKET NO. 5:21-CV-844-XR

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
NOVEMBER 16, 2021

APPEARANCES:

FOR THE PLAINTIFFS:
SEAN MORALES DOYLE, ESQUIRE
BRENNAN CENTER FOR JUSTICE
120 BROADWAY
SUITE 1750
NEW YORK, NY 10271

UZOMA NKWONTA, ESQUIRE
ELIAS LAW GROUP LLP
10 G STREET NE, SUITE 600
WASHINGTON DC 20002

JENNIFER HOLMES, ESQUIRE
NAACP LEGAL DEFENSE & EDUCATIONAL FUND INC
40 RECTOR STREET, FIFTH FLOOR
NEW YORK NY 10006

RYAN V. COX, ESQUIRE
TEXAS CIVIL RIGHTS PROJECT
2911 N. MAIN AVENUE
SAN ANTONIO TX 78212

WENDY J. OLSON, ESQUIRE
STOEL RIVES LLP
101 S. CAPITOL BLVD, SUITE 1900
BOISE ID 83702

DANIEL JOSHUA FREEMAN, ESQUIRE
U.S. DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVENUE
4CON 8.143
WASHINGTON DC 20530

LIA SIFUENTES DAVIS, ESQUIRE
DISABILITY RIGHTS TEXAS
2222 WEST BRAKER LANE
AUSTIN TX 78758

FOR THE DEFENDANTS:

PATRICK SWEETEN, ESQUIRE
WILLIAM THOMAS THOMPSON, ESQUIRE
TEXAS ATTORNEY GENERAL
P.O. BOX 12548
MC 009
AUSTIN TX 78711

CHAD ENNIS, ESQUIRE
TEXAS PUBLIC POLICY FOUNDATION
901 CONGRESS AVENUE
AUSTIN TX 78701

REPORTED BY: GIGI SIMCOX, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

(San Antonio, Texas; November 16, 2021, at 1:30 p.m., in open court.)

THE COURT: With that, let's turn to the civil case.

21-844, La Union Del Pueblo versus Gregg Abbott and others.

Let's take a roll call here.

For La Union, or LUPE, who do we have?

MR. MORALES DOYLE: Good afternoon, Your Honor.

Shawn Morales Doyle from the Brennan Center for Justice on behalf of La Union Del Pueblo Entero. I have with me a number of attorneys. I'm not sure if I can run through the list, or you want to get —

THE COURT: No, that's all right. One per party will do for now, and if I have to recognize anybody else who speaks, let's just try to be clear for the court reporter.

The other case was LULAC. Who do we have for LULAC?

MR. NKWONTA: Good afternoon, Your Honor.

Uzoma Nkwonta on behalf of LULAC. And I'll also introduce my colleagues, Kassie Yukevich and Graham White.

THE COURT: Thank you.

For Houston Justice?

MS. HOLMES: Good afternoon, Your Honor.

Jennifer Holmes on behalf of the Houston Justice plaintiffs, and I also have a number of colleagues joining us today.

THE COURT: Thank you.

For OCA-Greater Houston?

MR. COX: Hi, Judge. Ryan Cox on behalf of the OCA-Greater Houston plaintiff group, along with several other cocounsel as well.

THE COURT: Thank you.

Mi Familia Vota?

MS. OLSON: Good afternoon, Your Honor.

Wendy Olson with Stoel Rives in Boise, for the Mi Familia Vota plaintiffs. We have several counsel -- cocounsel on the line, including Sean Lyons, who is our local counsel from Lyons & Lyons.

THE COURT: Thank you.

And for the State defendants?

MR. SWEETEN: Your Honor, Patrick Sweeten and Will Thompson on behalf of the State defendants.

THE COURT: Thank you.

And for the United States?

MR. FREEMAN: Good afternoon, Your Honor.

Dan Freeman on behalf of the United States. With me on the line are Richard Dellheim, Dana Paikowsky, Mike Stewart, and Jennifer Yun.

THE COURT: Thank you.

So I apologize for the criminal docket. I don't know how that got snuck into the calendar, but it did. So I

apologize for that.

Let's work through some of the issues here in this case. First, let's take care of housekeeping.

We have a motion for leave to file an amicus brief by Donna G. Davidson. That's Docket Number 78. That's opposed by Mi Familia Vota.

It's just an amicus brief. I'm just going to -- that's going to be granted. I'll read and consider the arguments made in there, but the foundation for government accountability, just because of the sheer number of the lawyers I have in this, will be denied speaking time.

Number 2. Motion to appear pro hac vice by Stewart Whitson. Docket Number 76. That's granted.

Motion to appear pro hac vice for Chase Martin. Docket Number 77. That's granted.

Motion to appear pro hac vice Stewart Whitson.

Mr. Whitson, I think you wanted to pay us twice. I'll take your money, but that's moot. So that's denied.

Next. Public Interest Legal Foundation's motion to intervene. Docket Number 43.

Let me turn to you, Mr. Sweeten. What's the State of Texas' position on that?

MR. SWEETEN: Your Honor, can you read that again, please?

THE COURT: Yeah. This is a motion to intervene

filed by the Public Interest Legal Foundation.

MR. SWEETEN: Your Honor, the State does not object to the intervention.

THE COURT: So now, that's kind of interesting to me, because if that's your position how does Public Interest Legal Foundation have standing when you're contending that the other defendants don't have standing?

MR. SWEETEN: Well, Your Honor, I'm not conceding that they have standing or not. I'm just suggesting that the State's position is that, you know, we're not actively objecting to the request.

I feel like that's up to those parties to make the case for their intervention. I'm certainly not, you know, suggesting that they have it or don't. We're just not objecting to that request.

And we haven't objected to amicus requests that we've seen also.

THE COURT: Well, that's not the same as intervention.

MR. SWEETEN: No, that's true.

THE COURT: So that's denied.

Public Interest Legal Foundation, to the extent that you want to file any amicus briefs, I'll consider that whenever you decide you want to do that. But with regard to intervention, the State is ably defended and they can argue

any positions they feel they need to argue on their own.

Next. Motion to intervene by Dallas County Republican Party and others. Docket Number 57.

What's the State of Texas' position on that, Mr. Sweeten?

MR. SWEETEN: Same position, Your Honor.

No objection.

THE COURT: Same ruling. Denied.

So again, the Dallas County Republican Party can file any amicus briefs it wishes to file in this case. But again, the State is more than ably represented and their positions are ably represented by the Attorney General's Office.

Motion to appear pro hac vice by E. Stewart Crosland. That's denied since I denied the intervention.

That was Docket 71.

Docket 72. A motion to appear by Stephen Kenny. That's denied because I denied the intervention.

So I think that takes care of housekeeping.

Let's move to the motions to dismiss, and I guess let me start with asking a background question. And I'm not sure who wants to speak to this here from the plaintiffs' groups.

Why are you opposing filing an omnibus complaint?

I'll start with LUPE first.

MR. MORALES DOYLE: Sure, Your Honor. Sean Morales again.

We are opposing to filing this omnibus complaint I think for a few reasons. One of them is that we don't have all the same interests or claims represented, i.e., the various plaintiffs to this case.

Our complaint, for instance, is bringing not only different theories and different claims than some of the other plaintiffs' groups, but on behalf of different interests we represent a number of organizational plaintiffs in addition to an election judge and an election administrator, and so I think that we are, while our interests are aligned with all of them, we have different theories and different claims that we're bringing.

And though I can understand the potential expediency of having one omnibus complaint, there's also a whole lot of work that will go into coming up with omnibus pleadings for all these various groups and interests, and I do not believe that the resources that will go into figuring out a way to coordinate all of those pleadings actually provide -- are worth the benefit that is provided by an omnibus complaint.

THE COURT: So I can't force you-all to do that. I believe you're making a mistake by doing that. And I think you're also putting a lot more work on the State by having to respond to these individual complaints, and a lot more work on the Court.

But again, technically and procedurally I can't

require this. I would highly advise you-all to reconsider that position in the future because this doesn't make much sense to me. But that's where we're at apparently.

So on the motion to dismiss, some of the plaintiffs have failed to allege which specific provisions of SB 1 they are complaining of. So why doesn't this failure require a dismissal and an amended complaint?

So for example, on 21-844, no specific provisions of SB 1 are cited for your Fourteenth equal protection claim, your Fifteenth Amendment right to vote claim, your Section 2 Voting Rights Act claim, your Section 208 Voting Rights Act claim, and your ADA claim.

In 21-848, there were no specific provisions of SB 1 cited regarding the Fifteenth Amendment right to vote claim.

In 21-920, no specific provisions of SB 1 are cited regarding the First and Fourteenth Amendment right to vote claims, the Fourteenth Amendment equal protection claims, the Fifteenth Amendment right to vote claims, and the Section 2 Voting Rights Act claim.

So why shouldn't I grant the motion to dismiss regarding those failures and require an amended complaint?

LUPE.

MR. MORALES DOYLE: Your Honor, I think we did specify the provisions of SB 1, but I understand you may be saying that in the actual language of the count it is not made

clear. I think that in our response to the motions to dismiss it will be -- we will make very clear which of the provisions we are challenging and each of our theories.

I think in the body of the facts of the complaint we tried to make that clear. I apologize if in the language of the count itself we haven't done -- again, specified each of those things.

We will address that in our response to the motions to dismiss. And I don't think filing an amended pleading is the best way to handle that.

THE COURT: Well, I'm not sure responding to your motion to dismiss is going to necessarily cure that.

I was hoping in the initial order that I sent out -- I was trying to avoid the motions fights that I knew was coming, and so I tried to advise you-all to limit the burden on you-all, the burden on the State, and the burden on the Court on having to litigate over items that we shouldn't have to litigate. And so I'm real disappointed my advice was not taken.

I'll, of course, wait for your response on that, but I can -- I'm already warning you guys. I don't see how if it's not in the complaint in the body of the causes of action how doing a response is going to cure that.

So be forewarned. If you don't file an amended complaint, you sort of know which way this is headed.

So regarding those plaintiffs alleging a violation of the ADA, these entity plaintiffs haven't specifically alleged what disabilities the members have, or how the disability limits any major life activity. Doesn't this require an amended complaint?

Who wants to tackle that one from the plaintiffs' group? Whoever has got the ADA claims.

Don't everybody speak at once.

MS. DAVIS: Your Honor, this is Lia Sifuentes Davis with the OCA plaintiffs.

We have included ADA claims in our pleadings, and at this stage of the pleading we just have an organizational plaintiff. And our motions to dismiss will address how the organizational plaintiff has standing to bring these claims.

THE COURT: Yeah. Again, just you-all can waste time drafting responses to motions to dismiss, but I don't think you-all are hearing me. So you know, it's a whole lot easier just to forego the response to dismiss and file an amended complaint to cure these deficiencies, but, you know, you-all do what you think is best.

The State is arguing that all claims are barred by sovereign immunity and so what exception is going to apply? And here, with regard to the State defendants, the Governor, the Secretary of State, and the Attorney General, and I guess I'm more curious about the claims against the Governor.

For those plaintiff groups who have claims against the Governor, how does the Governor have any enforcement authority in this legislation?

I'll start with LUPE.

MR. MORALES DOYLE: Thank you, Your Honor.

I'm trying to make sure I give my colleagues an opportunity as well here.

We think that the Governor plays a practical role in the enforcement of the election code in reality, but we understand the argument that the State is making with regard to the way that the ex-parte en doctrine has been interpreted in the Fifth Circuit and we are taking seriously those arguments, but we do think that the -- and contemplating, as we are with all these things, that the possibility of whether an amended complaint would make sense, or whether adjusting our claims makes sense, but I do want to say that we do believe that the Governor in the State of Texas, as a practical matter, does play a role in both shaking hand and enforcing the election code, whether or not that is made clear in every instance in the language of the election code itself.

But I don't mean to speak on behalf of any of the plaintiff groups besides the LUPE group.

THE COURT: So I'm not making any rulings, but in light of the Fifth Circuit's requirements about how I'm supposed to look at the Governor's role in enforcement on a

specific provision by provision basis, this is not a ruling, but I don't see it, and so you-all might as well start looking at doing amended complaints here because I don't think you're going to pass muster.

Now, Mr. Sweeten, before I do all your work for you, the Secretary of State and the Attorney General, I mean, how is it that you are arguing they have no enforcement? I mean, if you look at all these sections of SB 1 their names are everywhere.

MR. SWEETEN: Your Honor, I'm going to let Mr. Thompson address the motion to dismiss, if I may.

MR. THOMPSON: Thank you, Your Honor. Will Thompson for the State defendants.

We think that the main point referring to the Secretary of State and Attorney General that although they may have some roles in some circumstances, this is as Your Honor pointed out, a provision by provision question.

And so what we have in a lot of these complaints are kind of general allegations that the secretary does something with regard to SB 1, which isn't really sufficient.

What we need to know is what do the plaintiffs think that the secretary does with regard to each provision that's being challenged. How allegedly does the secretary cause the injury that's at issue in each claim?

And that's what we're missing in these complaints.

It's what we tried to confer about before we filed motions to dismiss. And we think that if we were to go provision by provision with more specific allegations, we would find out that many of the individual claims truly have no connection to the secretary and are, instead, probably, at best, connected to the local election codes.

THE COURT: So you anticipated my question, Mr. Thompson. So if not the Governor, and not the Secretary of State, and not the Attorney General, well, then, who is the proper defendant in this case?

MR. THOMPSON: Your Honor, it's a difficult question to answer in the abstract because the Fifth Circuit requires a provision by provision and claim by claim analysis. So it is possible that the proper defendant will differ based on which claim is at issue, but for some things it will certainly be local election officials.

THE COURT: But let me press you on the Secretary of State and the Attorney General. I mean, you're not arguing that they have no role whatsoever in investigation and enforcement, are you?

MR. THOMPSON: Your Honor, we are not saying that they have no role under SB 1 at all. They certainly have some role and I didn't mean to suggest the opposite.

What I am saying is that we can't really analyze whether they're a proper defendant for any case under SB 1.

It really just depends on what injury is at issue. And for some of these plaintiffs at the very least we don't think it's met.

It's not clear whether it's met with regard to any of them because the plaintiffs haven't met their burden of specific allegations about what conduct from the defendants they are complaining of.

THE COURT: Again, I'm not making any rulings here but this ought to be clear signals to all the plaintiff groups, you need to further amend your complaints here to address these challenges because otherwise you're just wasting everybody's time with responses to motions to dismiss, making me rule on the motions, in all likelihood giving you adverse rulings, and then forcing you to amend.

I don't understand why we just can't go to amending now. This makes no sense to me whatsoever.

Okay. Now, with regard to what the plaintiffs are alleging, I want to understand this. Are plaintiffs asserting only organizational standing, or are any plaintiffs asserting associational standing?

Is there any plaintiff asserting associational standing? Please speak up now or forever hold your peace.

MR. COX: Judge, for the OCA plaintiffs all of our individual clients allege both associational and organizational standing. All five.

THE COURT: Okay. The OCA.

Anyone else besides OCA?

MR. NKWONTA: Your Honor --

MS. HOLMES: Your Honor, the Houston Justice plaintiffs, two of our clients, the Delta Sigma Theta Sorority and The Arc of Texas are asserting associational standing.

THE COURT: Remind me again who the frat/sorority group is.

MS. HOLMES: The Delta Sigma Theta Sorority.

THE COURT: Thank you.

I'm sorry. I cut someone else off.

MR. NKWONTA: Your Honor, for the LULAC plaintiffs, three of our organizational plaintiffs are asserting associational standing. That would be LULAC Texas, the Texas Alliance for Retired Americans, and Texas AFT.

THE COURT: Thank you.

Anyone else?

MR. MORALES DOYLE: Yes, Your Honor.

On behalf of LUPE plaintiffs, a number of our members -- or a number of our plaintiffs are members of organizations asserting associational standing, but not all of them.

And one of our plaintiff organizations, Texas Impact, is, in fact, an organization of other organizations, and so in some sense its members may be a little bit more complicated, in other words, Your Honor, but we are alleging both

associational and organizational standing.

THE COURT: So did I cut off anybody? Anybody else?

Okay. So for all those groups who are asserting associational standing, I haven't seen where you are identifying specific members of those associations who would themselves have standing to sue.

Again, on the amended complaint here, that I hope is forthcoming, or amended complaints, plural, you-all need to flush that out because I don't see where many of you have articulated those individuals sufficient to withstand any challenge.

Next one. Regarding WCVI and ADL. I'm unsure by reading the complaints currently how these organizations establish an injury.

MR. MORALES DOYLE: I just want to make sure I got it right. ADL, and what was the other group you named, Your Honor?

THE COURT: WCVI.

MR. MORALES DOYLE: Yes. Okay. Those are not -- I want to make sure I'm getting our groups correct here, but those are not groups for which we are making associational standing claims. We are making organizational standing claims in terms of diversion of resources and the impact on the mission of those organizations to do their work to educate and engage voters in Texas.

THE COURT: So let me stop you there, Mr. Morales.

So there I thought you argued -- check me on the complaint language, because my notes may very well be wrong -- but I thought you said those entities were really research organizations.

And so when you said "research organizations," I thought, well, I mean, how is their research being -- how are they being injured in their research capacities? But when you file these amended complaints, which again I hope are forthcoming, I hope you articulate with more clarity how there's injury to those two organizations.

MR. MORALES DOYLE: Understood, Your Honor.

I will just say I don't think that ADL is primarily a research organization. WCVI is, in part, a research organization.

But I think both of these organizations are -- do certain educational functions and work with constituent and community members, and that is where the standing comes from.

But I understand your point about the specificity of allegations there.

THE COURT: Thank you.

So now, Mr. Sweeten, the organizational standing.

Is the State arguing on association -- pardon me. I just said it wrong. On organizational standing, haven't the plaintiffs sufficiently alleged injuries to establish

organizational standing? Why is that deficient there?

MR. SWEETEN: Mr. Thompson will address that.

THE COURT: You're ducking all the hard questions to Mr. Thompson.

MR. SWEETEN: I am, Your Honor. I've got a really good help here today, so I know to lean on it when I need it.

Thank you.

THE COURT: Mr. Thompson.

MR. THOMPSON: Thank you, Your Honor.

We do think that the organizational standing allegations are deficient. One large reason, I think, cuts across many of the plaintiffs groups is that they want a diversion of resources theory.

A diversion of resources can be a sufficient injury but it is not a sufficient injury in and of itself. It has to be a diversion that is used to avoid some other underlying injury in fact.

THE COURT: So, I mean, have you read *OCA-Greater Houston*, Fifth Circuit, 2017, 867 F.3d, 604?

MR. THOMPSON: It's been probably a few weeks, but I've read it, Your Honor.

THE COURT: Yeah, because you didn't cite it when you were briefing your standing.

MR. THOMPSON: I don't think that this issue was raised properly in *OCA-Greater Houston*. The Court decided a

number of things in that case without kind of briefing on the topic, and our position would be that the Court did not fully consider and therefore did not rule upon, by virtue of stare decisis, a number of issues that we've raised.

THE COURT: Well, I'm bound -- whether you think the Fifth Circuit was well-informed or not, I'm bound by what they said.

MR. THOMPSON: I think that's almost right, Your Honor. When an issue is not briefed before the Court, we therefore often don't understand the court to be implicitly deciding it.

If the court had said, you know, "Despite the lack of briefing, we have independently researched the question and concluded the following," that would be one thing. We think we're not in that situation, Your Honor.

I suppose we could read *OCA-Greater Houston* to create a circuit split, but as a general rule we try to avoid reading Fifth Circuit precedent to split with the D.C. Circuit and things like that.

THE COURT: So I'm trying to get this case to the merits. So how do you think the plaintiffs, in their amended complaint, fix the deficiencies for the injury?

MR. THOMPSON: Sure, Your Honor.

I think what we need are allegations that explain what this law does to them in the absence of a diversion of

resources. Does it injure them as groups in some way that they then try to avoid through the diversion of resources.

I'll give an example, Your Honor. If, for example, a plaintiff in a hypothetical case said, you know, what I like to do on the weekend is I hand out pamphlets. And, you know, the city government has enacted some kind of ordinance that requires me to go get a license in order to hand out pamphlets, and if I don't get the license I'll be prosecuted.

Well, what that individual could do is allege that either he has paid the fee to get the license, and that is an injury in fact, that caused an injury or he would have broken the law, or that he's not going to pay the fee and he faces a threat of prosecution for trying to hand out pamphlets without a license.

So kind of flip side to the same point. You're either injured because when you don't comply the law is going to do something to you, or you incur some kind of cost to avoid that underlying injury.

That's not what we have here. What we have here are a lot of organizations that seem to be relying on kind of general allegations that they don't like the consequences of this law for third parties. And because they don't like the social consequences, the alleged social consequences of the law, they spend money to try and change those consequences. I don't think that's a sufficient injury in fact.

THE COURT: So all the plaintiffs have heard that, whether you want to try to amend in light of that. I'm not saying you have to, but again, I'm trying to get us to the merits without more motion to dismiss diversions.

And so if you want to rely just on your existing allegations, that may or may not meet the Fifth Circuit. I'll hear the State's -- or I'll see whether or not the State's arguments about how the Fifth Circuit was not well-informed, but this is easily curable by you-all just adding more sentences to your amended complaint is what I'm trying to emphasize.

Next one. In the motion to dismiss the defense are asserting that there's no private cause of action under Section 2 of the Voting Rights Act.

So I'm assuming this is another hard one for Mr. Thompson?

MR. SWEETEN: Your Honor, anything on the motions to dismiss is Mr. Thompson today. Thank you.

THE COURT: So, Mr. Thompson, so in Shelby County the chief justice talked about injunctive relief is available in appropriate places to block voting laws from going into effect. And the chief justice said both the federal government and individuals have sued to enforce Section 2.

It sure appears that the chief justice believes there's a private cause of action.

MR. THOMPSON: I have to respectfully disagree, Your Honor. I think the chief justice was actually very careful to say that they "have" sued, not that it was "proper" for them to have sued.

Just a few months ago Justice Gorsuch flagged --

THE COURT: We're not talking about Justice Gorsuch and his -- that's all -- we're not going there.

We're talking about what a majority opinion held.

MR. THOMPSON: Well, then, Your Honor, I'll point out that in the majority opinion from the Supreme Court they have consistently said things like, "We assume without deciding that Section 2 creates a private cause of action," which they are able to do because it's not a jurisdictional requirement.

There is no holding from the majority of the United States Supreme Court saying that there is, in fact, a private cause of action under Section 2.

THE COURT: I disagree. That part of the motion to dismiss is denied.

With regard to defendants asserting there's no private cause of action under Section 208 of the Voting Rights Act. So, Mr. Thompson, 52 U.S.C., Section 10302 says, "Whenever the Attorney General or an aggrieved person institutes a proceeding," so how is there no private cause of action?

MR. THOMPSON: Sure.

The provision Your Honor quoted does not actually create a cause of action. It recognizes that causes of actions exist under other sources of law. It is of course not limited to Section 2 or Section 208.

So we believe that it refers to, for example, 1983 suits regarding constitutional claims, but certainly included within that even we if sought VRA claims were themselves included in that provision, it would presumably be the implied cause of action under Section 5 of the Supreme Court recognizing *Allen*. That was the explanation that Justice Thomas gave in *Morris*.

THE COURT: That part of the motion to dismiss is denied. The statute is clear about an aggrieved person is able to institute a proceeding.

Next one. No private cause of action under the materiality provision of the Civil Rights Act. So now that the United States has joined this case, does this make this issue all moot or not?

MR. THOMPSON: I don't think so, Your Honor. It may reduce its practical import. We will of course address the United States' claims in our pleadings regarding their claim which has not yet been filed.

But it is certainly true that if, for example, Your Honor held that the United States had the cause of action but the private plaintiffs do not, it would then be improper to

grant any relief to the private plaintiffs. They wouldn't be prevailing parties that represent attorneys fees. They are not going to affect this kind of ruling even if the Court is able to reach the merits under a different party's claim.

THE COURT: So, well then, OCA plaintiffs, I mean, do you want to amend your complaint and drop this or not? The government is saying even if the United States is successful then you're getting zero.

MR. COX: It may have that kind of practical impact, but I think to get the relief of our client, that our clients are seeking, we plan to continue to seek that relief and we believe that there is a private cause of -- private right of action under 208 generally and we'll be -- expect to be briefing that for the Court on Thursday.

THE COURT: Okay. I won't make any ruling on that.

Where are we at?

Help me understand this. In your motion to dismiss LUPE's complaint, the defendants seem to assert that SB -- well, I can't even make your argument. I don't seem to understand it.

What are you arguing with regard to LUPE's complaint and the Supremacy Clause?

MR. MORALES DOYLE: I'm sorry, Your Honor.

I'm trying to refresh my recollection. I believe you're referring to Count 10 of the complaint, and we said

that Count 10 is redundant and therefore should be dismissed or stricken because Count 10 just says that SB 1 violates the Supremacy Clause. That's not really a claim. I'm not sure how else to put it.

The Supremacy Clause is a rule of decision for when there is a conflict of federal and state law. So if the plaintiffs had established some other violation of federal law, then the Supremacy Clause would tell us that federal law trumps state law. But there is no independent cause of action that says you have somehow violated the Supremacy Clause standing alone.

THE COURT: Okay. Now I understand it.

So again, in the amended complaints that are coming down you may want to clear that language up as to whether or not you are trying to assert an independent cause of action, or are you just throwing surplusage in there about the Supremacy Clause.

Okay. Let's try to figure out now where do we go forward on discovery, a scheduling order, and a trial date.

So you-all were good enough to send me the initial disclosures this morning. My law clerks quickly tabulated this. The plaintiffs have identified 165 individuals. And the defendants have identified 132. That's ridiculous.

So what appears to have happened is that I think one or both sides, or I guess there's multiple sides here, some of

you included like every member of the Texas legislature who voted in favor of SB 1, is what it looks like.

Now, we all know most of these legislators didn't have anything to do with the drafting. They probably didn't even know what they were voting on, except what they were told by leadership to vote on. A lot of them probably didn't even read it. So how they become persons with knowledge of relevant facts perplexes me.

Mr. Thompson, since you get all the hard questions, how do you respond?

MR. THOMPSON: I'll be happy to respond, Your Honor.

I think I can safely say on behalf of all the parties that we didn't mean to suggest all of those people would be witnesses or anything like that.

Under the Supreme Court's latest opinion in *Brnovich* which addressed an intentional discrimination claim and Voting Rights Act, it rejected the Cat's Paw Theory, which Your Honor may be familiar with from employment cases for determining kind of the intent of the legislature.

And so at least from my personal perspective, I think what we were trying to say there is to the extent there are intentional discrimination claims one can't just establish it by the alleged intent of a bill sponsor or a leader, or something like that.

THE COURT: So we need to get reasonable about how

many people need to be deposed. So you-all are to file amended initial disclosures and clearly delineate the Tier 1, Tier 2 individuals, for lack of a better phrase, and Tier 2 being just mere legislators who voted who didn't have anything to do with the drafting of this bill or any amendments, or anything like that.

And so those people need to be listed, if you want to list them, as a Tier 2 group so we have a better understanding of who the Tier 1 group is, because by listing everybody, and I'm not saying anybody is doing this, but somebody could be hiding a person with great knowledge of relevant facts in this laundry list of 165 or 132. So we'll have none of that.

So let's file amended initial disclosures within ten days. Exchange with each other. And then I want to see also, so file those with the court. And so --

MR. ENNIS: Your Honor, may I add one thing on that? This is Chad Ennis for Medina County.

Another thing, your clerks may have missed it in the big pile of initial disclosures they received, but there are several designations for things like "All of the witnesses that testified at the hearings for these bills."

And that is literally hundreds of people without any designation of who they are. You know, if there are specific people who testified that they are interested in calling as witnesses, I think they should just identify the people. And

we'd ask that that go into the exchange in ten days as well.

THE COURT: So, thank you, Mr. Ennis.

So let's figure out for Rule 26(a)(1) disclosure purposes the mere public speakers who attempted or did actually speak at any committee hearings for this legislation, to the extent that they are aggrieved individuals, or individuals injured by any, and who are claiming to be part of the associational standing, I could see where those have knowledge of relevant facts.

So Mr. Ennis raises a good point. Asterisk who those people are. But, yeah, a broad designation like that is -- let's even put those like into the third tier group. Put Tier 1 -- Tier 1, what I'm really interested in, is who really needs to be deposed first, because we're going to have to phase discovery here, given the large amount of folks at issue here.

And so if -- to the extent you are relying on some broad categories like that, let's put names and then better descriptors as Mr. Ennis is suggesting.

Anybody else with a good suggestion on that?

MR. MORALES DOYLE: Your Honor, I would just -- this is Sean Morales Doyle on behalf of LUPE plaintiffs.

I would just say that we did not make a broad disclosure like that, but that there are, we believe, folks who offered testimony in committee hearings on Senate Bill 1

outside of our clients and folks who would be aggrieved by the law that have relevant information, especially to the extent that the legislators, who are proponents of Senate Bill 1 relied upon or cited to facts that were put to them by folks in committee hearings in justifying their passage of this bill.

I think -- so I just want to say that I don't think -- I think that there are folks who testified at those hearings who have information relevant to the claims in our case outside of the type of information that you mentioned there.

THE COURT: And that's fair. And so those are -- you know, properly should be disclosed as 26(a)(1), but let's at least put some descriptors here so we know who we are talking about and what they said and where they said it, so we all know why they are there.

Okay. Now --

MS. OLSON: Your Honor, this is Wendy Olson on behalf of Mi Familia Vota plaintiffs.

Your direction was to do this in ten days. I'm wondering if we could have until that Monday, November 29th, because ten days is Friday, the 26th, which is the day after Thanksgiving and I know people have travel plans, but I would just make that request.

THE COURT: That's fair. The 29th it is.

Okay. With that said, I guess I was initially under the impression that we were going to be under a much more expedited schedule, but it seems that the plaintiffs are going to want to have the March primary come and go with no injunctive relief requested from this Court.

Am I correct in that understanding?

MR. SWEETEN: Your Honor, this is Patrick Sweeten with the State defendants.

I want to just say that that was an assumption upon which this schedule that we outlined, which I think is a compressed final trial schedule that we based it on, and we had discussions both -- we had two discussions I believe with all of the plaintiffs and they said as much.

And we had a discussion with the Department of Justice and they indicated it was not their intention to bring forward a preliminary injunction.

So, you know, the negotiations that took place back and forth on those issues are predicated upon that assumption. So I think I can answer that for the group because that's certainly what we were told and what we affirmed.

THE COURT: And so that's why I want to confirm this.

So again, some plaintiff groups speak up. Is that the understanding or not?

MR. MORALES DOYLE: On behalf of LUPE plaintiffs, it is correct that we are not planning to pursue preliminary

injunctive relief prior to the March primary.

I do just want to say that it is not that we would like to see the March primary come and go without relief in this case, but for a variety of reasons we think it's important that the Court have a full trial record before it is deciding these claims, and given the time frame that we're working on in this case and the amount of evidence that we've already discussed we're going to need to be compiling, that's the decision that we've made at this point.

THE COURT: So then in terms of a scheduling order, if the plaintiff groups want to develop facts about what takes place in the March primary and what issues take place with regard to the ability of your constituents to vote, I mean, that's going to be yet another round of discovery that the State defendants are going to be entitled to discover on.

And so how is it that you see a March primary, fact discovery now on the March primary, dispositive motions being filed, and then a trial date, as you're suggesting in July. How does all that happen?

MR. MORALES DOYLE: Well, Your Honor, I think it will be a whole lot of work. I think all of us have -- we have set the -- we have proposed a discovery close deadline that is after the March primary in order to allow for discovery to continue, but we have also proposed an expert discovery time line that contemplates the majority of expert discovery

happening prior to that March primary in order to not have all of this happening at the very end of the case.

I think the evidence that comes out of the March primary, of course none of us knows what it's going to be at this point, but I think we also know that how -- the evidence that comes out of the March primary is not going to be all the evidence in this case.

There's going to be probative on some points, certainly not on others, as primaries are, you know, different than general elections, so we are trying to build a plan that allows for a great deal of hopefully the majority of discovery to happen early in this case but also allows for the parties to take into account what does in fact happen in the first set of elections under SB 1 in March.

We understand that will make things very difficult for all of us, including Your Honor, after the March primary, but we think it is incredibly important that the final resolution of this case before Your Honor happens with enough time for any appeal and any further proceedings after the trial to be resolved in time for the November primary.

And in light of Supreme Court precedent about changes to elections in advance of an election -- excuse me -- the November general election, we think it is crucial that the trial happen earlier in the year so that we have time to sort everything out and come to a final resolution of this case

before November to make sure that voters in the State of Texas have their rights protected and that it's a fair election.

THE COURT: Does any other plaintiff group wish to speak in addition to the comments Mr. Morales already made?

Mr. Sweeten.

MR. SWEETEN: Yes, Your Honor.

THE COURT: So I mean, the plaintiffs are asking me to do a heck of a -- and everybody, to do a heck of a lot of work in a short period of time. I'm willing to put the effort in.

I mean, is there any dispositive motions you see that could be filed without the benefit of discovery that's just a strictly legal issue that at least we don't have everything having to be decided, argued, briefed, and ruled upon at the end?

MR. SWEETEN: Your Honor, I think so.

I think there could be some motions for summary judgment.

Let me address the overall schedule which is, you know, they have indicated and we have indicated to the Court, and this is the very reason why we don't agree to set a trial date on July 5th at this point, which is that we have agreed to a very truncated discovery process.

We think that, you know, we're going to give it our best shot. We -- you know, if we start getting a bunch of

late disclosures of fact witnesses, you know, that could change that.

I can tell you, and this is likely an issue that you're going to want to -- you know, you may want to talk to us about later, but certainly my recent discussions with the DOJ have certainly brought to question, you know, whether or not we are going to be able to make this schedule go. But that's the very reason.

We are planning to -- there is an awful lot of work. The first step is the motions to dismiss. And as the Court is saying, you know, get these complaints. Tell us what is the complaint. Well, what is the specific statutory problem?

They're apparently not going to agree to a uniformed complaint, which I think would really, you know, make this, you know, be a lot easier and increase the potential to meet this schedule.

But we think that, you know, we're hopeful we can meet this schedule. We do think that there will be some issues that may be subject to judgment as this goes along. But that's, you know, one of the reasons that we think that maybe we wait until, you know, we wait to set the trial date to see if we're actually going to be able to work through this schedule.

But you know, we're giving our best shot, based on their, you know, representation to us. There's not a

preliminary injunction, you know, proceeding. We're trying to make this work. And I think this Court is doing -- I think this is great -- a great service.

As the Court knows in our redistricting challenges, when you have multiple --

THE COURT: Let's not bring that up.

MR. SWEETEN: I was just thinking, it's been four years, I think, since I've seen you, Your Honor.

Anyway, I think strictures. I think making them plead what is their claim. Tell us what that is. And then I think, you know, following the orderly process of this case.

We'll attempt to, you know, give best efforts to that discovery schedule that we have laid out, but we do think that we may want to see how that's going to make a determination as to whether the trial date is -- you know, when that should be set.

THE COURT: Does the U.S. want to chime in on this?

MR. FREEMAN: Yes, Your Honor. Dan Freeman for the United States.

The United States agrees that this is an extremely aggressive schedule. In particular, the schedule anticipates that experts would be disclosed at the beginning of February.

Now, we stand ready to work to meet this schedule, however, this schedule is only possible if the parties agree to participate in discovery and not engage in dilatory

tactics.

And Mr. Sweeten has advised the Court, and we advised the Court in our 26(f) report that we filed last night, that the United States has already issued a request for production to the State. The State informed us at our 26(f) conference that it did not intend to produce any documents in response to that request or database extracts as the case may be.

But they at the same time refused to stipulate to an early written formal response to that request and would allow the United States to get them out of the court and to bring a motion to compel.

And those type of delays are going to prevent the parties from being able to meet the schedule and are going to prevent the parties from being able to vindicate the rights of Texas voters, as Mr. Morales Doyle represented before.

We believe this is a separate issue that is best addressed at the -- toward the conclusion of this pretrial conference, but I'm happy to address it now.

MR. SWEETEN: Well, Your Honor, if the DOJ is going to accuse me of dilatory tactics, I'd like to address that right now. May I, Your Honor?

THE COURT: No. One sec.

I think most people on the screen know me. I don't want to dwell on fights. I want to move the thing forward.

So I know you don't like the moniker, and I would

take offense if someone said that to me too, but let's just move forward.

So just like I'm trying to tell the plaintiffs, file an amended complaint, and I'm telling them, and I'm telling everybody, file amended 26(a)(1) disclosures, motions to compel, none of us have time to fight over motions to compel.

Now, if the government is going to assert -- the government -- the State defendants are going to assert legislative privilege or some other privilege, let's talk privilege logs. Have you-all talked about how you're going to do a privilege log?

MR. SWEETEN: Your Honor, to my knowledge, there's been no discussion about a privilege log with any of the parties, that I know of.

THE COURT: Is that the basis of where you think you're not going to be able to cooperate on the U.S.'s request for documents? Is that --

MR. SWEETEN: Your Honor, I thought you didn't want me to address that, but I think I need to because counsel, you know, seems to be indicating that we're saying, "We're not giving you any documents." That's not what we're saying.

What happened, Your Honor, is that on November 4th the DOJ filed a lawsuit. We received last Friday a request, not for just documents, we received a request for an entire database from the DPS, which has 29 million people

that are on there. They also asked for the --

THE COURT: One second.

The DPS, Texas Department of Public Safety?

MR. SWEETEN: Yeah. They asked for the entirety -- well, I shouldn't say the entirety. They asked for a number of data fields from DPS. They asked for the 17 million entry TEAM's database from SOS.

They have asked for two databases because -- and we're still -- we're going to have a lot of discussions about this with opposing counsel because this is a breathtaking request. The only time in the history of DPS that they have given this up was when Mr. Freeman and DOJ sued us under Section 5, which would have been the spring of 2012, and then the carryover litigation was the Section 2 litigation.

So what we're going to address, Mr. Freeman's request, which he sent last Friday, we've basically had all of -- you know, it was Friday evening. We've had all of two business days.

We've been trying to get information about those databases but it is a sweeping request made in the eleventh -- you know, after we have had multiple discussions with these plaintiffs to get a large amount of data, including data from senators, you know, politicians, federal judges, state judges. That's all on the DPS voter databases.

So we have got a lot of issues to work through, but

this was sprung upon us in a call last week when he said, "We're going to ask for the databases." And I said "No."

And, you know, we're looking and evaluating the request that we got on Friday. It is going to take experts from both of those agencies to come in and explain what would be, you know, possible, what would be, you know, a really hard lift, but that by itself, asking for database extracts, which has a long process, which I can go through --

THE COURT: No. That's okay. One second. One second.

So let me go back to the United States. What's the relevance of the data?

MR. FREEMAN: Sure, Your Honor.

SB 1 requires individuals who wish to cast a mail ballot to list their identification number on their mail ballot request, as well as their mail ballot carrier envelope.

And SB 1 requires that early voting clerks shall reject any mail ballot application that doesn't include an identification number, if that individual has been issued an identification number that does not identify the same voter identified in the applicant's application for voter registration.

Now, the problem with this is that TEAM does not necessarily contain every voter's up-to-date driver's license number. There are voters who --

THE COURT: Let's --

MR. FREEMAN: TEAM. Excuse me, Your Honor. TEAM is the state's voter registration database.

THE COURT: Thank you.

MR. FREEMAN: Now, the problem, Your Honor, is that in some cases the voter may have registered to vote soon after moving to Texas while they still had an out-of-state driver's license and listed a social security number on their voter registration application.

They then obtain a Texas driver's license. They list their Texas driver's license number on their mail ballot application as instructed, and then their application for a mail ballot will be rejected because it doesn't match what was on their voter registration application.

Now, what the United States seeks to -- and that rejection violates Section 101 of the Civil Rights Act of 1964, the materiality provision.

Now, what the United States intends to do is quite similar to what the United States did in *Texas v Holder* when the State of Texas sued the United States under Section 5 of the Voting Rights Act, and in *Veasey v Abbott*, where United States, among several private plaintiff groups sued the State under Section 2 of the Voting Rights Act.

The State has produced these database extracts twice before, in terms of DPS. In terms of voter registration

database, the State has produced that database to the United States previously outside of litigation, as it's subject to production upon demand by the Attorney General under Title 3 of the Civil Rights Act of 1964.

The State has also produced voter registration database to the United States in both of those cases.

Experts are then able to compare those two databases to determine where there are voters on the voter registration database who do not have their proper driver's license listed.

It is my understanding that there are also voters in the DPS databases who have multiple driver's license numbers listed, because it's possible to have an identification card and a driver's license over the course of your life. They will not know which one of those numbers is in the voter registration database and will be disenfranchised as a result.

It is possible that individuals who have surrendered their driver's license and no longer have that document to be able to provide that number as SB 1 requires, and they will be disenfranchised as a result.

And so the United States is asking the State to do exactly what it did twice before in litigation, once where it sued the United States, and once where the United States sued the State. Both times where the State enacted legislation that put these driver's license numbers at issue in a restriction on the right to vote.

THE COURT: So let me suggest this here.

Let me -- can the government achieve what it's attempting to achieve by merely sending out requests for admission, asking the State to admit that there are these following discrepancies that you just identified, and then sending out an interrogatory by asking them to identify how many times these kind of occurrences have occurred?

And then in the event that they refuse to do so or claim it's unduly burdensome or whatever, then you come back and asking to do -- to get the databases and do the work yourself.

Go ahead.

MR. FREEMAN: Your Honor, I'm not certain that the State would be willing or able to conduct this analysis with the sort of degree of accuracy and expertise that the experts that the United States has retained have been able to do in the past.

Courts have relied on experts retained by the United States when conducting this sort of match during a *Veasey* litigation, a voter right litigation. The State opposed an alternative algorithm for matching the voter file to DPS files. The State ultimately abandoned that algorithm, as it determined -- well, I won't speak for the State.

The State abandoned the algorithm that it had proposed, and the United States, and ultimately the court

moved forward with the analysis that the United States was able to provide.

The various claims that the State has made about the burden of this production, in fact, the State has done this before. The code has been written before.

I personally at the State's request flew down to Texas to pick up a copy of the database extract in the *Texas v Holder* litigation so that we could address security concerns the State had. The United States is happy to agree to the same types of protective orders to address the State's concerns.

We see this as critical to the United States' claims under the Civil Rights Act of 1964 and we believe that the State's immediate assertion, the burden of the request outweighs the benefit.

One, it's contrary to the spirit of Rule 26, and the committee notes to the 2015 amendment specifically said that these type of default assertions -- I mean, immediate assertions that no discovery in response to a particular request is possible because of the burden should not be allowed.

THE COURT: Okay.

MR. FREEMAN: And we're not asking the State to produce immediately. We're simply asking them to allow us to tee this up.

THE COURT: Thank you.

So at this point there's not a motion to compel before me to rule on. You-all continue to meet and confer.

I will say this, Mr. Sweeten, in light of the representations that are being made that this has happened before, any arguments of unduly burdensomeness, you're going to have a steep hill to climb to overcome that, but I'm not making any rulings.

And so, again, to the extent that you can enter into protective orders to protect the sensitivity of this information, but again this is premature for me to make any rulings. I'm not making any rulings.

MR. SWEETEN: Your Honor, let me just say. I won't argue the motion because I hear the Court.

I agree. I think right now what's happening is this issue, we're jumping the gun on this. We will have discussions with DOJ regarding this issue. I wanted to raise these concerns to the extent that they impact scheduling.

But, you know, we also just -- I want the Court to know that there is going to be a lot of interfacing with our team and experts at both of these agencies about, you know -- about these issues, and these things take time.

So we will address their discovery requests. We'll be happy to talk to DOJ about this. But overall, I think, you know, I think this is something we can deal with as this goes

along, but I wanted to flag this issue to the Court.

THE COURT: No, thank you.

So now, we still -- we walked away from privilege.

To the extent that the State is not -- is going to claim privilege to any documents, I want a privilege log. And so it's going to have to articulate clearly the authors, author, or authors, plural, the recipient, or recipients, plural.

And if the author or the recipient wasn't a legislative -- a legislator, or a legislative aid, it seems highly improbable that you can in good faith articulate legislative privilege in those kind of scenarios.

To the extent that you think you can in good faith articulate legislative privilege, I want a log, and the Bates stamp, and I will review, in camera if need be, any documents subject to any privilege.

Okay. We've covered a lot today. Hopefully we're going to move things along. I'll be very disappointed if I don't get amended complaints, folks. I don't know how to make that point anymore clear.

MR. MORALES DOYLE: Your Honor.

THE COURT: Yes.

MR. MORALES DOYLE: I do not want to necessarily represent that I'm speaking on behalf of all the plaintiffs here, although I think I may be. We hear you. We are dealing

right now with a response deadline on the motions to dismiss of this Thursday.

And so --

THE COURT: That deadline is extended for 15 days.

Hopefully that deadline will never be met and we see amended complaints well before that.

MR. MORALES DOYLE: Thank you, Your Honor.

MR. SWEETEN: Your Honor, may I get a reciprocal extension on any replies?

THE COURT: Yes.

MR. SWEETEN: Thank you, Your Honor.

I do think there was one issue that I don't know that we addressed to the Court, and that is the order with the deposition limitations. I don't know if the Court wants to entertain that at this point.

THE COURT: Let me backtrack here because I didn't finish off on trial now.

What I'm contemplating is setting the trial date for July right now, just so for purposes of my calendaring I can hold something as a placeholder that we can all try to aspire to.

But I will tell everybody that, you know, I will be reasonable to all parties in the event that circumstances don't allow us to meet that. But for a placeholder, that's what I'm going to set for now.

Now, with regard to numbers of depositions, until I see the amended initial disclosures I really can't say right now what I think is an appropriate first tier of discovery depositions. So once I get the initial disclosures, the amended initial disclosures then I will set a first round of deposition -- number of depositions to be had for the first tier of discovery.

MR. SWEETEN: Thank you, Your Honor.

And Your Honor, if I may just say, the one issue I think that we are -- you know, we want to be -- you know, alert the Court to, is the number of plaintiffs that are in this case.

There are -- I think the count -- it's in our filing, but there's something like 30 organizational plaintiffs and six individual plaintiffs. I think that's right.

We don't need -- you know, some are making ADA claims. Some are making others. We don't need a full seven hours for those folks, but we need the number that might be necessary to take those plaintiffs.

And so that was our concern with, you know, just picking a fixed number, because I think that judicial economy, you know, can be increased by, you know, taking a shorter deposition but not being constrained by, you know, this hard number, particularly when we're faced, you know, with basically the number of plaintiffs that they are asking to

limit us to. So we're more for hours than limitations but we can certainly address that down the road if the Court prefers.

THE COURT: Yeah. Continue to meet and confer on this.

I mean, I'll tell you this, plaintiff groups, I've just completed a very difficult trial on the Sutherland Springs mass shooting case. It was at least four dozen, five dozen plaintiffs with at least two dozen plaintiffs' attorneys, and they all managed to have a unified front, and so I don't understand your reluctance to an amended complaint and you-all going forward on that basis.

Mr. Morales was very articulate about why he thought that was not feasible. It sounded real great.

But honestly, Mr. Morales, as I heard it, I mean, it sounded great, you delivered it great, but it really wasn't persuasive to me about why you-all can't join together.

I think an amended omnibus complaint will make this case go much smoother for everyone involved. And so I highly recommend that after this call you-all try to get together and try to figure that out.

MR. FREEMAN: Your Honor, may I --

MR. MORALES DOYLE: Excuse me.

THE COURT: Mr. Freeman.

MR. FREEMAN: Your Honor, I was just going to ask, do you include the United States in that request, because it

would be exceedingly difficult for us to be able to confer with private plaintiffs.

THE COURT: I see that. You have a different representation to this. So I exclude the U.S. from that discussion.

MR. FREEMAN: Thank you, Your Honor.

THE COURT: Who else wanted to chime in?

MR. COX: Judge, it also implicates the issue that we do have one party, Isabel Longoria, who is both a plaintiff and a defendant in the case, and how we would manage to have a unified omnibus complaint in that respect; I'm not sure.

THE COURT: Yeah. So I'm not making any rulings. I can't force you to do that. You-all continue to talk among yourselves and see what's best.

Even if you don't do an omnibus complaint, you-all really need to treat this almost as an MDL. You need to have one or two of your group serve as the lead lawyer to speak on behalf of discovery issues and so forth. We've got to make this case more manageable, and an MDL analogy makes most sense to me.

MR. MORALES DOYLE: We will absolutely discuss with one another. I want to assure you, Your Honor, that all of plaintiffs' counsel have been in touch with one another. We are not trying to make this more complicated than it needs to be and we will discuss what you proposed.

THE COURT: Okay. What have I forgotten? Anybody want to speak up?

MR. SWEETEN: Nothing from the State, Your Honor.

MR. FREEMAN: Nothing from the United States, Your Honor.

THE COURT: So I didn't give a deadline for amended complaints.

So I guess the deadline needs to be whatever date I gave you to file the response to motion to dismiss. So you either file a response to a motion to dismiss, or you file an amended complaint, by the --

Did I say the 29th? Did I give you a date or not? I don't remember.

MR. MORALES DOYLE: You said 15 days, Your Honor, which I believe would put us at December 1st. Unless that is 15 days from today, or 15 days from the deadline.

THE COURT: Let's just make this simple.

Amended initial disclosures by everybody due by December 1.

Responses to motion to dismiss or amended complaints due by December 1st.

If there's responses to motions to dismiss, then the State has 14 days thereafter to file any reply briefs.

Was that clear enough?

MR. MORALES DOYLE: Yes, Your Honor.

MR. ENNIS: May I raise one more thing, from Medina County? This is Chad Ennis.

THE COURT: Yes.

MR. ENNIS: You mentioned, and I think we got sidetracked, was, is there a way to get rid of some of these claims, or at least deal with some of these claims that are purely legal claims?

And I think it may make sense for Your Honor to order us or get us to meet and confer on are there any of these claims that present purely legal issues that we can agree that we can brief early and get them to Your Honor and get them disposed of without the need for discovery or back and forth, and really kind of focus the case.

Obviously, we think omnibus pleadings would help a ton, but if we don't get that, at least we could try to focus this down on what are factual issues that we have to fight about and how do we get this thing ready for trial in July.

THE COURT: So I already ordered you-all to do that in my first order. It was in there in the laundry list.

Meet and confers are not a one-time occasion, so they can be continuing. And so continue to meet and confer on that and all the other issues. It would benefit us all, if we're going to be in this push to July, if we can take up some strictly legal matter.

Now, Mr. Sweeten, I'm not saying your side is being

unreasonable, but if you start arguing that, you know, everything can be disposed of by summary judgment, well, you know, that's not going to help me either.

And so, I mean, for example intentional discrimination. You can't tee that up by summary judgment without discovery, just as an example.

And so you-all continue to meet and confer to figure out what, if any, discrete issues are solely legal issues and that I can take up earlier rather than later.

MR. SWEETEN: Yes, Your Honor.

THE COURT: Anybody else?

Okay. We'll meet again.

Thank you.

(Concludes proceedings.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: 11/19/2021

/s/ Gigi Simcox
United States Court Reporter
655 East Cesar E. Chavez Boulevard
San Antonio TX 78206
Telephone: (210)244-5037