IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ANDY BROWN, in his official capacity as Travis County Judge; BRUCE ELFANT, in his official capacity as Travis County Tax Assessor-Collector and Voter Registrar; JEFF TRAVILLION, in his official capacity as Travis County Commissioner; BRIGID SHEA, in her official capacity as Travis County Commissioner; ANN HOWARD, in her official capacity as Travis County Commissioner; MARGARET GÓMEZ, in her official capacity as Travis County Commissioner, *Plaintiffs,* v. KEN PAXTON, in his official capacity as Texas Attorney General; JANE NELSON, in her official capacity as Texas Secretary of State, *Defendants.*	Case No.: 1:24-cv-001095

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The NVRA—in express terms—imposes a duty on local governments to promote voter registration for federal elections through organized voter registration drives. Texas state law recognizes and implements that federal law duty by expressly identifying the mailing of voter registration forms to eligible voters as an activity that local governments undertake to implement the NVRA. Nevertheless, Defendant Paxton has engaged in a legal and media campaign to prevent Plaintiffs from fulfilling their federal law duties and to tarnish them in the press for encouraging voter participation. Defendant Nelson has done nothing to enforce the NVRA's requirements in this regard. Plaintiffs are entitled to declaratory and injunctive relief to allow them to continue complying with their NVRA duties.

ARGUMENT

I. Plaintiffs' amended complaint moots Defendants' pre-suit notice argument.

Plaintiffs' amended complaint moots Defendants' pre-suit notice argument. For NVRA violations that occur "within 120 days before the date of an election for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation." 52 U.S.C. § 20510(b)(2). For violations that occur "within 30 days before the date of an election for Federal office," no such notice is required. *Id.* § 20510(b)(3).

Plaintiffs sent notice of the NVRA violations to the Secretary on September 17, 2024—42 days ago. Pursuant to Rule 15(a)(1)(B), Plaintiffs have filed an amended complaint as a matter of course in this matter, including setting forth allegations regarding the Secretary's receipt of notice. That amended complaint moots Defendants' argument regarding pre-suit notice. In *Foster v. Daon Corp.*, the Fifth Circuit held that a district court abused its discretion by failing to allow a plaintiff

to amend a complaint to reflect having given statutorily required pre-suit notice after originally filing the suit before the notice period had run. 713 F.2d 148, 151-52 (5th Cir. 1983). "That [plaintiff] erred in failing to give notice the first time is not a sufficient justification for denying her the opportunity to correct her error." *Id.* at 152-53. Because Rule 15 at the time did not permit amendment as of right following the filing of a responsive pleading, *id.* at 152, the Fifth Circuit considered the various factors relevant to determining whether leave to amend should be granted in concluding that the district court had abused its discretion in not permitting an amendment to cure the error. *Id.* Rule 15 now allows amendment as of right following the filing of a responsive pleading or Rule 12 motion, and Plaintiffs have availed themselves of that opportunity.[1] To the extent Plaintiffs erred in not awaiting the completion of the notice period,[2] their amendment cures that issue—a cure opportunity *Foster* compels.

Moreover, the election is now a week away—and well within the 30-day period in which no pre-suit notice is required at all—and the Secretary continues to take no action to correct the State's violation of the NVRA. Although the Secretary has indisputably had notice for more than

[1] The court thus need not consider the factors addressed by the *Foster* court in weighing whether leave should have been granted for an amendment.

[2] Plaintiffs do not believe they were required to wait 20 days before filing suit for two reasons. First, notice was futile because the State had *already sued Plaintiffs* for the precise voter registration activity Plaintiffs contend the NVRA makes them duty-bound to conduct. The pre-suit notice provision's aim of avoiding litigation between parties cannot in that circumstance be furthered where the State—the party who is to receive notice—has already commenced litigation. *See Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997) (holding that pre-suit notice under NVRA is unnecessary where it would be futile); *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014) (questioning whether futility exception is available (without deciding it is not) and distinguishing case from *Miller* on factual grounds). Second, Congress evinced an intent not to require notice at all when the election is at hand. *See* 52 U.S.C. § 20510(b)(3). Here, the pertinent deadline was the registration deadline—which is 30 days in advance of the election date. The NVRA could be interpreted to not require notice when the violation occurs within 30 days of the pertinent election deadline. A contrary interpretation would allow violators to wait out the clock if the violation relates to a pre-election deadline rather than election day itself. The court need not decide either issue, however, because the amended complaint cures any pre-suit notice failure.

20 days in advance of the filing of Plaintiffs' amended complaint, no such notice is even necessary at this point.

Defendants' pre-suit notice argument is moot.

II. The *Ex Parte Young* exception to immunity applies.

The *Ex Parte Young* exception to immunity applies and allows Plaintiffs' suit against Defendants. Defendants contend that the *Ex Parte Young* exception does not apply to Plaintiffs' claim against Defendant Paxton because (1) the complaint alleges past, not ongoing, conduct and (2) Defendants' dispute that the NVRA imposes a duty on local governments to facilitate registration. Defendants likewise contend that the *Ex Parte Young* exception does not apply to the Secretary because she has an insufficient connection to enforcement of the NVRA with respect to Defendant Paxton. These arguments are without merit.

Defendant Paxton. Defendants' arguments with respect to Plaintiffs' claim against Defendant Paxton are misplaced. First, the complaint seeks prospective relief for declaratory and injunctive relief against an ongoing course of conduct. Paxton has taken steps—including the filing of a lawsuit in state court and issuing derogatory press statements—aimed at stopping Plaintiffs from carrying out their duty under federal law to facilitate voter registration for federal elections. That lawsuit continues to this day. Defendants split hairs, citing Plaintiffs' sentence structure in their complaint (the use of "has" instead of "is" to describe Paxton's conduct), but this hypertechnical reading cannot overcome what is clearly an ongoing course of conduct. In any event, Plaintiffs' amended complaint expressly alleges an ongoing course of conduct.

Second, Plaintiffs' suit alleges a violation of federal law—the NVRA. Defendants say otherwise because they allege that local governments have no duties under the NVRA, only the State does. ECF No. 9 at 9-10. But the NVRA expressly states otherwise. It provides that "it is the

duty of the Federal, State, *and local governments* to promote the exercise of [the right to vote]." 52 U.S.C. § 20501(a)(2) (emphasis added). One of Congress's express purposes in enacting the NVRA was to "make it possible for . . . *local governments* to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." *Id.* § 20501(b)(2). To that end, States are required—pursuant to the NVRA's "Mail registration" section, *id.* § 20505— to make voter registration forms "available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs." *Id*. § 20505(b). By its express terms, the NVRA makes it a "duty" of "local governments" to "implement" the NVRA through the "distribution" of mail voter registration forms for federal elections, particularly through an "organized program" of distribution. This is *exactly* what Plaintiffs have done, and exactly the conduct Defendant Paxton has—and continues—to seek to stop. Defendants widely miss the mark in contending no federal law violation has been alleged.

Defendant Nelson. Defendants contend that Secretary Nelson has only "general enforcement duties" as the chief election official of Texas under the NVRA and thus is not a proper party for an *Ex Parte Young* suit. ECF No. 9 at 10. The Fifth Circuit has already held that states' chief election officials—who are required by the NVRA to be designated—are proper defendants in NVRA suits. In *Scott*, the court held that the NVRA's requirement that the chief election official "coordinate" the state's compliance with the NVRA "includes enforcement power." 771 F.3d at 839. This enforcement role is "ongoing," the Fifth Circuit held, and reflects Congress's desire to

have "centralization" of NVRA enforcement in a single state officer. *Id. Scott* forecloses Defendants' contention that Secretary Nelson is not a proper defendant in an NVRA suit.[3]

III. Plaintiffs have standing to bring their claims.

Plaintiffs have standing to bring their claims. Defendants raise four arguments that they claim pertain to Article III standing. All four are meritless—both because some do not relate to standing at all and because they are in any event wrong.[4]

A. Plaintiffs can sue state officials.

Plaintiffs can sue state officials. Defendants contend otherwise, asserting that "local governments lack standing to sue their parent States." ECF No. 9 at 11. But Defendants badly misstate the relevant precedent. In *Rogers v. Brockette*, the Fifth Circuit held that prior cases precluding local governments from suing state officials were not about standing at all, but rather used the word "standing" because at the time they were decided,

[3] Defendants contend that Congress did not unequivocally abrogate state sovereign immunity when it enacted the NVRA and that Congress cannot abrogate state sovereign immunity using its Article I powers. ECF No. 9 at 5-8. It is Plaintiffs' position that the Elections Clause *itself* functions to abrogate state sovereign immunity by granting Congress plenary power to control election regulations for federal elections. *See, e.g.*, *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (reasoning that, under the Elections Clause, "the Constitution primarily treats states as election administrators rather than sovereign entities). Just as the states at the Constitutional Convention agreed to forego sovereign immunity with respect to the Bankruptcy Clause of Article I, *see Central Va. Community Coll. v. Katz*, 546 U.S. 356 (2006), Plaintiffs contend that the Elections Clause is an exception to the general rule that Congress cannot abrogate state sovereign immunity using its Article I powers because the Elections Clause *itself* accomplished that abrogation. Following the *Katz* decision, the Supreme Court has however suggested that the Bankruptcy Clause is *sui generis* and may be the only Article I power for which abrogation applies. *See Allen v. Cooper*, 589 U.S. 248, 258-59 (2020). The Court did not address the Elections Clause in *Allen*, and Plaintiffs preserve their argument that the Elections Clause itself abrogates state sovereign immunity. The Court need not reach the issue, however, because the *Ex Parte Young* exception clearly applies.

[4] The standing section of Defendants' motion numbers subsections up to "5" but skips number "2," leaving four rather than five arguments.

> "standing" generally meant something somewhat different from what it means today. A party had standing or a "right to sue" if it was correct in its claim on the merits that the statutory or constitutional provision in question protected its interests; standing was not seen as a preliminary or threshold question.

588 F.2d 1057, 1070 (5th Cir. 1979). "In speaking of 'standing,' cases in the *Hunter* and *Trenton* line meant only that, on the merits, the municipality had no rights under the particular constitutional provisions it invoked." *Id.* The Fifth Circuit explained that is why *Trenton*—the main case cited by Defendants in their motion—did not address "the extent of an actual injury" or whether there was "a genuine case or controversy"—which are relevant to standing. *Id.* Instead, although the Court used the word "standing," it merely meant that there was no claim upon which relief could be granted on the merits. "We conclude that the *Hunter* and *Trenton* line of cases do not, properly speaking, deal with a municipality's standing to sue the state that created it" and "[t]herefore they do not deny [plaintiff] standing to bring this suit." *Id.* at 1071.

It is unclear why Defendants—having cited *Rogers* in their motion—present their argument as if it is about Article III standing. It is likewise unclear why they contend that *Rogers* is a "pocketsized carve out" to a rule that local governments lack standing to sue state officials. ECF No. 9 at 11. *Rogers* expressly held that this is not a standing rule at all and that the proper inquiry is merely whether the local government has a meritorious claim under the federal law invoked. As discussed *supra* Part II and *infra* Parts III.D & IV, Plaintiffs have stated a proper claim on the merits. The Court should reject Defendants' standing argument, which is expressly foreclosed by the very case they cite.

B. Plaintiffs have suffered a cognizable injury.

Plaintiffs have suffered a cognizable injury. Defendant Paxton has used the power of the State to sue Plaintiffs—under the auspices of state law—to prevent Plaintiffs from taking steps pursuant to their federal law "duty" to distribute voter registration forms for federal elections.

Defendant Paxton has likewise harassed Plaintiffs through public statements and suggested that Plaintiffs are acting in a lawless manner—including with baseless accusations that they are promoting illegal voting—by simply facilitating lawful voter registration *as is their duty under federal law*. Defendant Paxton continues to pursue his state court lawsuit to this day.

Defendants contend first that Plaintiffs' claims "merely amount to the idea that Plaintiffs do not want a state court to compel them to follow state law." ECF No. 9 at 13. Not so. Plaintiffs want this *federal court* to compel Defendants to stop interfering with Plaintiffs' *federal law duty and authority* to promote voter registration for *federal elections. See* 52 U.S.C. §§ 20501 & 20505. The NVRA is clear in that regard, but so is Texas state law, which expressly provides that county voter registrars are authorized to mail voter registration forms to households as a way to fulfill their NVRA duties. As part of the 1995 "ACT relating to implementation of the National Voter Registration Act of 1993," the Texas Legislature required the Texas Secretary of State to identify activities that county voter registrars undertake to "implement[] [] the National Voter Registration Act of 1993." Tex. Elec. Code § 19.004(a)(1)(A) & (b); *see also id.* § 20.009. Pursuant to that requirement, the Secretary promulgated a regulation titled "Voter Registration Drives Encouraged." Tex. Admin Code § 81.25. That rule provides that "[v]oter registration drive efforts include but are not limited to *mailout of applications to households*, insertion of applications into newspaper, distributing applications at public locations, and other forms of advertising." *Id.* § 81.25(b) (emphasis added).[5]

[5] Texas law provides that county voter registrars can apply for state funds to offset the cost of these NVRA implementation activities, Tex. Elec. Code § 19.004(a)(1)(A) & (b); *see also* Tex. Admin. Code § 81.25(a), but county commissioners courts are not allowed to rely upon receipt of such funds so must budget for those activities using county funds, *id.* §§ 1.014 & 19.006.

Plaintiffs are injured by Defendant Paxton's ongoing violation of the NVRA and Secretary Nelson's failure to enforce the NVRA, which places a duty—and therefore the authority—on Plaintiffs to distribute voter registration forms for federal elections. Defendants' repeated efforts to characterize this as simply a matter of state *ultra vires* law is foreclosed by the plain language of the NVRA. But it is also foreclosed by the plain language of *state law*—which confirms Plaintiffs' reading of the NVRA and expressly authorizes the activity Defendant Paxton alleges is contrary to state law.[6] In any event, Plaintiffs have alleged an injury to their rights and duties under the NVRA caused by Defendants' actions (in the case of Defendant Paxton) and inaction (in the case of Defendant Nelson).

Defendants likewise contend that Plaintiffs have not been injured because the voter registration deadline has passed for the November 2024 election and Defendant Paxton did not obtain an injunction from any court preventing Plaintiffs from completing their voter registration form mailouts. ECF No. 9 at 13-14. But Defendant Paxton's state court suit is ongoing and he has repeatedly announced his intention to continue seeking declaratory and injunctive relief in state court, including in the relevant state court of appeals. In the face of Defendant Paxton's continuing legal and press campaign, Plaintiffs are entitled to declaratory and injunctive relief making clear that they have a duty and right under the NVRA to facilitate voter registration by distributing voter registration forms for federal elections. They have alleged an ongoing injury that more than suffices to support standing.

[6] The fact that state law expressly authorizes county voter registrars to conduct "mailout of applications to households"—precisely what Plaintiffs have done—illustrates the slapdash nature of Defendants' misguided use of the state legal system to further Defendant Paxton's anti-voter crusade.

C. Plaintiffs' injuries are traceable to and redressable by Secretary Nelson.

Plaintiffs' injuries are traceable to and redressable by Secretary Nelson. Defendants contend otherwise, but Fifth Circuit precedent forecloses this argument. In *Scott*, the Louisiana Secretary of State—the chief election official designated pursuant to the NVRA's requirement—contended that plaintiff's NVRA "suit lacks redressability because neither the NVRA nor Louisiana law provides his office with the authority to enforce the NVRA." 771 F.3d at 838. The court rejected the argument, holding that the NVRA included enforcement power for the designated chief election official. *Id.* at 838-39.

Scott compels the same conclusion here. Nevertheless, Defendants contend that it is speculative that Defendant Nelson would be able to succeed—in response to a declaration and injunction by this Court in favor of Plaintiffs—in causing Defendant Paxton to cease his violations of the NVRA. Consider this argument; Defendants are alleging that it is speculative to say that Ken Paxton will comply with federal law as declared by a federal court. That is a remarkable argument. But it is not one that this Court can adopt as a basis to find Plaintiffs lack standing. Defendant Nelson has the power to issue directives, guidance, and orders consistent with this Court's declarations and injunctions, and it would disrespect federalism for this Court to conclude that it is speculative that those actions would cause compliance and thus redress Plaintiffs' injuries. Notwithstanding Defendants' remarkable argument, federal courts usually presume state officials will comply with federal law, not that they will flout it.

For much the same reason, Plaintiffs' injury is traceable to Secretary Nelson. She is the chief state official responsible for ensuring compliance with the NVRA. As Plaintiffs allege, their NVRA rights and obligations are being violated by state officials. That injury is directly traceable to Defendant Nelson's failure to take steps to bring state officials into compliance with the NVRA.

The Fifth Circuit answered the standing issue in *Scott*, and that decision is binding here and forecloses Defendants' arguments.

D. Plaintiffs have a private right of action.

Plaintiffs have a private right of action under the NVRA. Defendants contend that Plaintiffs have no private right of action under Section 10(b) of the NVRA, which is available to those aggrieved by violations of the NVRA, *see* 52 U.S.C. § 20510(b), because Defendants contend that the NVRA imposes no duty on local officials (as opposed to the Secretary of State) and because they say Plaintiffs failed to comply with the pre-suit notice requirement.

The first argument (which is not one about standing notwithstanding its characterization in Defendants' motion) ignores the plain text of the NVRA as well as state law implementing that text. Defendants repeat the same merits argument several times, but Plaintiffs do not wish to impose upon the Court with repetitive arguments. Plaintiffs thus refer the Court to the next section of this brief, *supra* Part IV, which responds to Defendants' merits arguments and shows why Plaintiffs have been aggrieved by Defendants' violation. Because Defendant Paxton has sought to interfere with Plaintiffs' ability to fulfill their NVRA duties and Defendant Nelson has done nothing to enforce the NVRA, Plaintiffs have been "aggrieved" and have a cause of action under Section 10(b) of the NVRA.

Defendants' remaining arguments (ECF No. 9 at 16) contending that Plaintiffs lack a cause of action under Section 10(b) of the NVRA are that Plaintiffs did not comply with the pre-suit notice requirement. But those arguments are mooted by Plaintiffs' amended complaint and/or because pre-suit notice would have been futile, as explained above. *See supra* Part I.

IV. Plaintiffs have stated valid claims.

Plaintiffs have stated valid claims. Repeating the same arguments from their standing arguments, Defendants claim that Plaintiffs' suit must be dismissed under Rule 12(b)(6) because they say the NVRA imposes no duty on local governments to promote voter registration

In enacting the NVRA, Congress found that "the right of citizens of the United States to vote is a fundamental right" and "it is the *duty* of . . . *local governments* to promote the exercise of that right," and thus Congress enacted the NVRA "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and "to make it possible for . . . *local governments* to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 52 U.S.C. § 20501(a)(1)-(2) & (b)(1)-(2) (emphasis added). One such provision that local governments implement is the "Mail registration" requirements Congress created in the NVRA, including the requirement that voter registration forms be used "for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs." 52 U.S.C. § 20505(b). As explained above, Texas law expressly recognizes that local governments implement these NVRA requirements through voter registration drives, which "include but are not limited to *mailout of applications to households*, insertion of applications into newspaper, distributing applications at public locations, and other forms of advertising." Tex. Admin. Code § 81.25(b) (emphasis added); *see* Tex. Elec. Code § 19.004(a)(1)(A) & (b); *see also id.* § 20.009 (requiring Secretary of State to define activities undertaken by local government officials to implement the NVRA).[7] Although Defendants say (ECF No. 9 at 16) that it is "baffling[]" that

[7] Defendants' contention that the NVRA limits the duty to promote voter registration to mailing forms only to those eligible voters who specifically request them, Mot. at 17, finds no support in the text of the NVRA nor in Texas's own state law interpreting the NVRA, which specifically

Plaintiffs have alleged they have any "duty" under the NVRA, it is Defendants' position that is baffling. The NVRA literally uses the word "duty" in relation to local governments' responsibility to facilitate voter registration in federal elections. 52 U.S.C. § 20501(a). And Texas's own state law confirms that local governments implement that federal law duty by mailing voter registration forms to households—precisely what Plaintiffs have done, what Defendant Paxton has sought—and continues to seek—to stop, and what Defendant Nelson has done nothing to protect.

Defendants also contend that Plaintiffs do not state a claim against Secretary Nelson because her NVRA enforcement duties apply only to designated voter registration agencies, of which Attorney General Paxton is not one. ECF No. 9 at 17-18. In doing so, Defendants attempt to escape the Fifth Circuit's holding in *Scott*, but nothing in *Scott* limits the Secretary's NVRA enforcement power to issuing directives to designated voter registration agencies. Rather, *Scott* recognizes that the NVRA requires that "each state *must* designate a chief elections officer, who will receive complaints about *all* violations of the NVRA." 771 F.3d at 839 (emphasis in original). As the *Scott* court noted, "the NVRA's centralization of responsibility counsels against [] buck passing." The Secretary's enforcement power includes the power to issues directives, guidance, and notices recognizing that Plaintiffs' voter registration efforts are authorized—and indeed recognized as a duty—by the NVRA and that state official should not take steps to interfere with

identifies as NVRA implementation activities local governments making registration forms available to those who have *not* requested them. *See* Tex. Admin. Code § 81.25(b). And while Defendant Paxton seems to have failed to research state law—which expressly authorizes local governments to mail voter registration forms regardless of whether eligible voters requested them—before filing his state court lawsuit, the NVRA plainly creates a federal law duty for Plaintiffs to take concrete steps to encourage voter registration in federal elections through organized voter registration drives—precisely what Plaintiffs have done.

Plaintiffs' actions in that regard. Nothing in the NVRA limits the Secretary's enforcement obligations to only designated voter registration agencies.[8]

Plaintiffs have stated a valid claim under the NVRA.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: October 29, 2024

Respectfully submitted,

DELIA GARZA*
TRAVIS COUNTY ATTORNEY
State Bar No. 24076399
P. O. Box 1748
Austin, Texas 78767
Telephone: (512) 854-9415
Facsimile: (512) 854-4808

Leslie W. Dippel
State Bar No. 00796472
Leslie.Dippel@traviscountytx.gov
Amy S. Ybarra
State Bar No. 24013573
Amy.Ybarra@traviscountytx.gov
Cynthia W. Veidt
State Bar No. 24028092
Cynthia.Veidt@traviscountytx.gov
Assistant Travis County Attorneys

BRAZIL & DUNN

/s/ Chad W. Dunn
Chad W. Dunn
Texas Bar No. 24036507
1900 Pearl Street
Austin, Texas 78705
Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

[8] In any event, Plaintiff Bruce Elfant, as the Travis County Tax Assessor-Collector and Voter Registrar, manages a designated voter registration agency and receiving documents from Defendant Nelson confirming that his actions lawfully implement the NVRA will help remedy his injuries.

K. Scott Brazil
State Bar No. 02934050
13231 Champion Forest Drive, Suite 406
Houston, Texas 77069
Telephone: (281) 580-6310
Facsimile: (281) 580-6362
scott@brazilanddunn.com

Attorneys for Defendants

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2024, I electronically filed the foregoing document with the Clerk of the United States District Court for the Western District of Texas, Austin Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

By: */s/ Chad W. Dunn*
Chad W. Dunn