IN THE UNITED STATES DISTRICT COURT
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; and **MARGARET GÓMEZ**, in her official capacity as Travis County Commissioner,
Plaintiffs,

v.

KEN PAXTON, in his official capacity as Texas Attorney General; and **JANE NELSON**, in her official capacity as Texas Secretary of State,
Defendants.

CIVIL ACTION NO. 1:24-cv-01095

DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

The State of Texas submits this Reply in Support of its Motion to Dismiss and respectfully shows the following.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Upset that the State of Texas would have the audacity to enforce its own laws, Plaintiffs filed this baseless lawsuit in a desperate attempt to usurp the authority of Texas state courts. Plaintiffs' claims are meritless, and the Court should dismiss them as a matter of law and under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

BACKGROUND

After learning of Travis County's plan to contract with a partisan data firm to collect and compile the private information of Travis County residents for the purposes of "voter outreach", the State took action. It sued Plaintiffs in state court (the State Court Lawsuit) for *ultra vires* acts and sought to invalidate the County's contract as a matter of law. To delay a state court ruling on the matter, Plaintiffs removed that case to federal court and, on the same day, filed this lawsuit. Plaintiffs claim that Texas's state court lawsuit, along with public statements and correspondence from the Attorney General's office, somehow constitute violations of the NVRA. Even more bizarre, perhaps, is Plaintiffs' contention that the Texas Secretary of State has the ability to control the actions of the Texas Attorney General—an independently-elected constitutional officer—as it pertains to the enforcement of the NVRA.

ARGUMENT

I. Plaintiffs lack standing to bring their claim.

A. Plaintiffs have not suffered an injury.

As a matter of black-letter law, Plaintiffs do not have standing to bring this suit. To have standing to sue, a plaintiff must have suffered some sort of cognizable injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 330 (2016), as revised (May 24, 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)). That injury must be "a concrete and particularized, actual or imminent

invasion of a legally protected interest." *Lujan*, 504 U.S. at 555; *Tenth St. Residential Ass'n v. City of Dallas, Tex.*, 968 F.3d 492, 499 (5th Cir. 2020).

Plaintiffs' theory of injury is vague and incomplete and does not amount to an "injury-in-fact". They contend that the Attorney General "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." Dk. 17 at 14. Plaintiffs also contend that the Attorney General has "harassed Plaintiffs through public statements and suggested that Plaintiffs are acting in a lawless manner . . . ." Dkt. 17 at 14. Each of these contentions relies on a misplaced understanding of the law. Plaintiffs incorrectly believe that the NVRA imposes a duty upon them to promote voter registrations for federal elections and that such bestows upon them carte blanche to do whatever they see fit to promote voter registrations—state law be damned. Dkt. 17 at 14. But Plaintiffs are wrong on a number of levels.

1. **Plaintiffs have no duty to indiscriminately mail out voter registration applications under the NVRA.**

Turning first to the existence of a "duty" under federal law, Plaintiffs' reading of the NVRA is clearly erroneous. The NVRA states, in relevant part, that its purpose is to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office[,]" 52 U.S.C. § 20501(b)(1), and that "it is the duty of the Federal, State, and local governments to promote the exercise" of the right to vote. *Id.* § 20201(a)(2). Plaintiffs' claim seems to be that this provision allows them to attempt to register voters in any way that they deem fit. This is not so. Were Plaintiffs to read the NVRA in its entirety, they would have seen that Congress tasked the chief State election official—here, the Texas Secretary of State—with making voter registration forms available via mail "through governmental and private entities . . . ." 52 U.S.C.

§ 20505(b). Further, the chief State election official is "responsible for coordination of State responsibilities" under the NVRA. 52 U.S.C. § 20509.

Plaintiffs' reading of the NVRA with respect to their alleged duty is in direct conflict with these other provisions. While the more general introductory provision of the NVRA does, in fact use the word "duty", 52 U.S.C. § 20501(a)(2), it is so vague that Congress chose to clarify elsewhere in the Act upon whom certain duties are actually imposed. And indeed, the Secretary of State is the party responsible for making sure voter registration applications are "available . . . through governmental and private entities[,]" thus delegating that duty to the Secretary of State—not local government officials like Plaintiffs.

Plaintiffs' reading of Section 20501(a) is therefore inconsistent with other more specific provisions of the NVRA. This Court, however, should read the provisions in NVRA to be in harmony and not in conflict. *Matter of Glenn*, 900 F.3d 187, 190 (5th Cir. 2018); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). Moreover, the specific delegation of a duty to the Secretary of State to make available voter registration applications supersedes the more general "duty" that Plaintiffs claim that Congress has imposed upon them to promote voter registration. *See* Scalia & Garner, *supra* at 183 ("If there is a conflict between a general provision and a specific provision, the specific provision prevails").

Put more succinctly, the plain text of the NVRA, read as a whole, belies Plaintiffs' argument that they have any affirmative duty to mail out voter registration applications *en masse*, using data they obtained from a partisan organization. Plaintiffs' entire theory of injury hinges on this

perceived duty, and thus, if they had no duty, they could not have suffered any injury. The Court's analysis should stop here.

2. Plaintiffs have not been injured because they completed their mass-mailing campaign.

In their response, Plaintiffs fail to point to any tangible harm that they have experienced because of the State Court Lawsuit. *See Lujan*, 504 U.S. at 560 (requiring a plaintiff to suffer an "injury in fact"). They contend that the State Court Lawsuit "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." Dkt. 17 at 15. But in doing so, Plaintiffs ignore the fact that the State Court Lawsuit does not seek any relief regarding Travis County's voter registration application mailouts. *See generally* Dkt. 14-1. Instead, the State Court Lawsuit only seeks relief insofar as it pertains to the contract that Travis County entered into without statutory authority. *Id.* Plaintiffs therefore have unsuccessfully tried to bolster their standing argument by inferring relief that the State does not seek in the State Court Lawsuit. It is also noteworthy that, despite the State Court Lawsuit, Plaintiffs have completed their mass-mailing campaign, further showing that they were not injured. Dkt. 14-5 at 1. The Court should not allow this to stand.

Plaintiffs further contend that they have been injured because Attorney General Paxton has "harassed Plaintiffs through public statements and suggested that Plaintiffs are acting in a lawless manner . . . ." Dkt. 17 at 14. But they again fail to show how Defendant Paxton's constitutionally protected public statements regarding Plaintiffs' activities have harmed them in any way. They simply make the conclusory statements that this speech has somehow harmed them—ignoring the First Amendment entirely—but fail to specify what harm has come from Defendant Paxton's statements. This contention therefore has no merit because they have not shown an injury in fact.

For the foregoing reasons, Plaintiff lack standing to sue and this Court should dismiss their claims on that basis alone.

B. Plaintiffs lack statutory standing because they did not comply with the NVRA's pre-suit notice requirements.

Though already briefed extensively, Defendants reassert and reaffirm their arguments made regarding Plaintiffs' failure to abide by the pre-suit notice requirement of the NVRA. Plaintiffs strenuously argue, at 6, that *Foster v. Daon Corp.*, 713 F.2d 148 (5th Cir. 1983), should govern this Court's analysis regarding the validity of Plaintiffs' "notice". It should not. *Foster* addressed a pre-suit notice requirement in the Texas Deceptive Trade Practices Act and Plaintiffs attempt to draw an equivalency between the DTPA and NVRA. Importantly, however, Plaintiffs' interpretation of the NVRA's pre-suit notice provision would render it moot—if Plaintiffs are allowed to amend their complaint to restart the proverbial clock on the pre-suit notice provision, such a provision would have no functional effect, thus improperly rendering it a vestigial organ of the NVRA. *See Kungys v. United States,* 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.) (addressing the statutory canon against surplusage); *Nielsen v. Preap*, 586 U.S. 392, 414 (2019) ("every word and **every** provision is to be given **effect** [and that n]one should needlessly be given an interpretation that causes it to duplicate another **provision** or to have no consequence."); *see also* Scalia & Garner *supra*, at 174. The Court should not allow them to do this and should disregard their argument.

C. Plaintiffs cannot sue their parent state in the absence of federally created statutory right.

Plaintiffs overstate the reach of *Rogers v. Brockette*. Precent has held for over a century that political subdivisions may not sue their parent states. *See*, *e.g.*, *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 188 (1923). The U.S. Supreme

Court has never overturned these cases. They remain good law. Although the Fifth Circuit clarified that doctrine in *Rogers*, it has never suggested that federal courts have subject matter jurisdiction to hear all disputes about a state's internal governance. *Rogers v. Brockette*, 588 F.2d 1057, 1062 (5th Cir. 1979). Instead, the Fifth Circuit recognizes a limited exception for when Congress grants municipalities a federal statutory right, *id.*, which Congress has not done here. *See supra* pp 2–4. Plaintiffs' confusion stems from their misconception that the NVRA grants them a duty, but that is incorrect for the reasons previously explained. The Fifth Circuit has acknowledged in subsequent cases that it found standing in *Rogers* because arguably "Congress made the district the proper body to decide some significant questions" under the federal breakfast program. *See also Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 567 (5th Cir. 2008) (describing the court's position in *Rogers* as "anomalous, if not unique"). It dismissed for lack of standing other intra-state disputes that did not meet that criterion. *Id.*at 568. This Court should do the same here.

II. Plaintiffs fail to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Despite their pleas to the contrary, Plaintiffs have failed to state a claim upon which relief can be granted. The Court should therefore dismiss their claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

A. Plaintiffs do not have a duty under federal law to mass-mail voter registration applications.

As discussed above, *see supra*, pp 2–4, Plaintiff's contention that they have a duty to mass-mail voter registration applications is entirely without merit. Their entire claim, however, is based on this premise. And since they do not have this duty, they do not have a viable claim under the NVRA. The Court should dismiss their suit.

B. Plaintiffs are not a voter registration agency.

Plaintiffs contend, in contravention to State law, that they are a voter registration agency as defined by the NVRA. This is not so. Their sole piece of evidence to support this is a presentation on the Secretary of State's website that lists "Voter Registrars" as "other designated agencies" with regard to voter registration. Dkt. 17 at 5. This argument fails for two reasons. First, in that same presentation, the Secretary of State delineates between "Voter Registration Agencies" and "other" designated agencies. *Implementing the National Voter Registration Act (NVRA): State Agencies* at 5–6, https://www.sos.state.tx.us/elections/forms/implementing-the-nvra-state-agencies.pdf. This clearly shows that Voter Registrars are not Voter Registration agencies as contemplated by the Texas Election Code. Tex. Elec. Code § 20.001. Moreover, no rule or statute designates county voter registrars or any county official as a Voter Registration Agency under the NVRA. Plaintiffs are making an inference that is clearly absent from the statute—had the Texas Legislature or the Secretary of State wished to include county officials such as the Registrar in that category, they would have done so. *See United States v. Vargas*, 74 F.4th 673, 684 (5th Cir. 2023).

C. Plaintiffs' claim against Secretary Nelson fails because the Secretary cannot control the actions of the Attorney General.

Plaintiffs fail to state a claim against the Secretary of State because no relief can be granted against the Secretary.[1] They seem to think, bizarrely, that a constitutional officer (the Secretary) has the power to control and restrain the actions of another constitutional officer (the Attorney General). This argument makes no sense. If Plaintiffs believe that Attorney General Paxton has violated the NVRA—he has not—their recourse is to sue Paxton, not to sue Nelson to force her to constrain him. And indeed they recognize that the Secretary's powers are limited to "directives,

[1] This lack of redressability also refutes Plaintiffs' Article III standing. *Lujan*, 504 U.S. at 562–63.

guidance, and notices.[;]" an act that would have no bearing on the actions of the Attorney General. Moreover, they seem to suggest that they only wish to compel Secretary Nelson to recognize the alleged authority that they have to mass-mail voter registration applications, Dkt. 17 at 5–6, which is just markedly incorrect. *See supra*, at pp. 2–4; *infra* pp 8–9. They therefore cannot compel Secretary Nelson to issue any advisory or notice that is contrary to law.

III. Plaintiffs' claims fail on the merits.

As a matter of law, Plaintiffs' claims are plainly incorrect. The fact that they do not have a duty to mass-mail registration applications notwithstanding, their reading of both the NVRA and State law are without merit. Plaintiffs' rest their entire case on one provision of the Texas Administrative Code, which says in relevant part that "[v]oter registration drive efforts include but are not limited to *mailout of applications to households* . . . ." 1 Tex. Admin. Code § 81.25. Apparently, this provision gives them to authority to indiscriminately mail out applications however and to whomever they see fit. But of course, "[W]hen a **rule** of procedure conflicts with a **statute**, the **statute** prevails . . . ." *Johnstone v. State,* 22 S.W.3d 408, 409 (Tex.2000); *see also Jackson v. State Office of Admin. Hr'gs*, 351 S.W.3d 290, 298 (Tex. 2011). And here, Plaintiffs' interpretation conflicts with the applicable statute.

Importantly, Defendants do not contend that voter registration applications cannot be mailed out to individuals. The NVRA requires that applications be made available by mail and indeed, they have. In fact, applications can be mailed to prospective voters, but only upon request. Tex. Elec. Code § 1.010(b). To the extent Plaintiffs', or any other government actor, interprets 1 Tex. Admin. Code § 81.25 to be in conflict with this provision, the Election Code prevails. It is as simple as that—ballots are available by mail, and Plaintiffs simply disagree with the policy

prescriptions of the State, and they seek judicial review to bypass the Legislature. The court should therefore stop Plaintiffs' game in its tracks and dismiss their claims wholesale.

CONCLUSION

For these reasons the Court should grant Defendant's motion to dismiss.

Dated: December 18, 2024

Respectfully submitted,

KEN PAXTON
Attorney General

BRENT WEBSTER
First Assistant Attorney General

RALPH MOLINA
Deputy First Assistant Attorney General

AUSTIN KINGHORN
Deputy Attorney General for Legal Strategy

RYAN D. WALTERS
Chief, Special Litigation Division
Tex. State Bar No. 24105085

RYAN G. KERCHER
Deputy Chief, Special Litigation Division
Tex. State Bar No. 24060998

/s/Kathleen T. Hunker
KATHLEEN T. HUNKER
Special Counsel
Tex. State Bar No. 24118415

ZACHARY L. RHINES
Special Counsel
Tex. State Bar No. 24116957

OFFICE OF THE TEXAS ATTORNEY GENERAL
Special Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel.: (512) 463-2100
Ryan.Kercher@oag.texas.gov
Kathleen.Hunker@oag.texas.gov
Zachary.Rhines@oag.texas.gov

COUNSEL FOR THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on December 18, 2024 and that all counsel of record were served by CM/ECF.

/s/Kathleen T. Hunker
KATHLEEN T. HUNKER