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

THE STATE OF TEXAS, *Plaintiff,* v. BRUCE ELFANT, in his official capacity as Travis County Tax Assessor-Collector and Voter Registrar; ANDY BROWN, in his official capacity as Travis County Judge; 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 his official capacity as Travis County Commissioner. *Defendants.*	§ § § § § § § § § § § § § § § § §	Case No. 1:24-CV-01096

STATE OF TEXAS'S EMERGENCY MOTION FOR REMAND

Our elections and our civil justice system both depend on redoubtable process. Eligible citizens registering to vote is a civic virtue, but that virtuous end does not justify unlawful means. The desire to register voters, whether for virtue or partisan gain, does not empower local officials to run roughshod over the rule of law.

The Defendants in this case, all Travis County officials, have loudly proclaimed their civic virtue while hazarding frivolous removal to avoid judicial scrutiny of their proclaimed virtue.

Defendants contracted with a partisan vendor as part of a scheme to send unsolicited voter registration applications to county residents. Defendants lack lawful authority to enter into or perform under this contract, and government officials—whether doing so directly or through a partisan vendor—sending unsolicited voter registration applications injures the State by disrupting the hierarchy of lawful authority, sowing confusion among voters, diluting lawful votes, and inviting illegal voter registration with the imprimatur of the County seal.

The State warned counties that such schemes are unlawful. Defendants acted anyway. The State sued Defendants, and when the trial court—without hearing—denied the State's motion for temporary restraining order, Defendants frivolously removed to this court to avoid the jurisdiction of the Texas Fifteenth Court of Appeals.

The Court should grant emergency consideration to this motion and swiftly remand. This Court has no jurisdiction over the State's claims, which arise entirely under state law. The Court should not indulge Defendants' cynical short-circuiting of process to avoid state court scrutiny state law violations. Finally, the Court should award the State its fees and costs for Defendants' wrongful, and frivolous, removal.

FACTUAL BACKGROUND

Defendants have taken action that is not only outside of their statutory and constitutional authority, but which actively undermines state law. On August 27, 2024, the Travis County Commissioners Court held a public meeting and approved an agenda item to contract with the company Civic Government Solutions (CGS) for "unregistered voter outreach services[.]" *See* Travis County Commissioners Court Voting Session Agenda Request for Tuesday, August 7, 2024, Travis County Clerk, https://traviscotx.portal.civicclerk.com/event/3270/files/report/14478, (last visited Sept. 4, 2024). CGS was hired to conduct services for the County that the County itself is unauthorized to perform: identify "any current Travis County resident that is at least 18 years of age, a US citizen and not already registered to vote," then "provide Travis County a list, in a Comma Separated Value format, of the resultant, Eligible Resident-Citizens and their current residence address and mailing address[.]" *See* Invitation For Bid NO. 2407-003-BB,

Travis County Purchasing Office, https://media.governmentnavigator.com/media/bid/1721843333_2024-07-24_2407-003-BB.pdf (last visited Sept. 5, 2024). When the Travis County Commissioners Court approved the agenda item at that meeting, it effectively approved a contract with a partisan vendor to conduct activities in excess of the County's statutory authority. Pl.'s Orig. Pet. 16–21.

On September 5, 2024, Texas sought a Temporary Restraining Order in state court. *See* Pl. Orig. Pet. That motion was denied on September 16, 2024.[1] Now, Defendants seek to avoid Texas pursuing further judicial review in state court by filing a baseless notice of removal to federal court.

LEGAL STANDARD

A defendant may only remove an action filed in state court to federal court if the action is one that could have originally been filed in federal court. *See* 28 U.S.C. § 1441(a). Because federal Courts have limited jurisdiction, a defendant may only remove a case that includes a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of 28 U.S.C. § 1331). "[T]he effect of removal is to deprive the state court of an action properly before it," which raises "significant federalism concerns." *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007) (quoting *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995)). Statutes that authorize removal therefore must be strictly construed, and any doubt as to the propriety of removal should be resolved in favor of remand. *See Hood ex rel. Miss. v. JP Morgan Chase & Co.*, 737 F.3d 78, 89 (5th Cir. 2013).

The removing party bears the burden of establishing jurisdiction. *See Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 417 (5th Cir. 2001). A federal court's jurisdiction is limited, and federal courts may hear only a case if it involves a question of federal law or where diversity of citizenship exists between the parties. *See* 28 U.S.C. §§ 1331, 1332. "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003). "[T]he basis upon which

[1] *See* Ex. A (E-mail from Kathryn Burnstein, Staff Atty. 419th Dist. Ct., to Emily Bratton, Legal Assist. Office of Tex. Atty. Gen. (Sep. 16, 2024, 10:40 CST)).

jurisdiction depends on must be alleged affirmatively and distinctly and cannot be established argumentatively or by mere inference." *Ill. Cent. Gulf R. Co. v. Pargas, Inc.*, 706 F.2d 633, 636 (5th Cir. 1983) (citation and internal quotation marks omitted). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

ARGUMENT & AUTHORITIES

Defendants have sought removal to federal court for one simple purpose: to insulate their illegal conduct from judicial review. This Court should not let them. Not only can Defendants identify no federal interest or question sufficient to establish this Court's jurisdiction, Defendants' removal effort undermines the principles of federalism by attempting to wrest away from Texas courts a vital question of Texas law.

Time and again, federal courts have "reiterated the need to give due regard to the rightful independence of state governments—and more particularly, to the power of the States to provide for the determination of controversies in their courts." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 389 (2016) (cleaned up). Because removal "deprive[s] the state court of an action properly before it," removal "raises significant federalism concerns" that are only overcome when the federal interest in the resolution of a case is sufficiently strong. *In re Hot-Hed Inc.*, 477 F.3d at 323. Such a federal interest exists when, on the face of a well-pleaded complaint, a claim arises under the Constitution, laws, or treaties of the United States. *Id.*

No such federal interest exists here. Here, there is only Texas' interest in maintaining the limits of the authority it has granted to its political subdivisions, ensuring the security of its elections, and preserving the jurisdiction of Texas courts to decide the questions properly reserved to them by the principles of federalism.

I. Texas Raises Only State-Law Claims; There is no Federal Question Jurisdiction.

The presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when "some substantial, disputed question of federal law" is presented on the face of the plaintiff's properly pleaded

complaint. *In re Hot-Hed Inc.*, 477 F.3d at 323; *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). No such question appears in Texas's pleading. This legal action instead involves a dispute over the internal operations of Texas and one of its political subdivisions: specifically, whether the Commissioners Court has the authority to enter into a contract with a partisan vendor for the purposes of mass mailing thousands of unsolicited voter registration forms, regardless of the recipient's eligibility.

Far from arising from federal law, Texas's cause of action stems from its power as sovereign. It is well-established in Texas that "[t]he authority vested in Texas counties—and county officials—is limited." *Yett v. Cook*, 115 Tex. 205, 220 (1926) Counties represent "a subordinate and derivative branch of state government." *Avery v. Midland Cty.*, 406 S.W.2D 422, 426 (Tex. 1966). They therefore possess only those powers conferred to them by the Texas Constitution or the Texas Legislature. *Guynes v. Galveston Cty.*, 861 S.W.2d 861, 863 (Tex. 1993). "[W]here those laws are being defied or misapplied by a local official," Texas may use an *ultra vires* suit "to reassert the control of the state," *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020) (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)), as it has done so here.

Nor can Defendants show that a federal right is "an element, and an essential one, of the plaintiff's cause of action." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995) (emphasis added) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 111 (1936)). To establish a basis for relief, Texas must show that the Commissioners Court lacked an express or implied grant of authority *under state law*. The county, after all, is a creature of the state. The federal government has no input regarding the state's allocation of power to its various branches. That Defendants raised, at the eleventh hour, a federal defense is irrelevant. *See infra*-Part II. "The [well-pleaded complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809, n. 6 (1986).

II. Defendants Fail to Show Federal Question Preemption as a Basis for Removal.

To begin, it is not sufficient for the federal question to be raised in an answer or in the petition for removal—as Defendants have done here. *Stump v. Potts*, 322 Fed. Appx. 379, 380 (5th Cir. 2009). Nor can Defendants use the federal defense of preemption to establish federal question jurisdiction authorizing removal. Indeed, "[p]reemption is normally only a defensive issue and does not authorize removal." *Casey v. Rainbow Group, Ltd.*, 109 F.3d 765 (5th Cir. 1997); *see also Fran. Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 14 (1983) ("[S]ince 1887 it has been settled law that a case may not be removed to a federal court on the basis of a federal defense, including the defense of preemption . . ."). Simply put, allowing Defendants to remove to this Court based on the defensive issue of preemption would "eviscerate . . . the well-pleaded complaint rule." *Casey*, 109 F.3d 765. This case should be remanded to state court for this reason alone.

Beyond that, Defendants point to no case law concluding the National Voter Registration Act (NVRA)[2] completely preempts purely state law ultra vires claims like those brough in this case. The "complete preemption"[3] doctrine creates a narrow exception to the well-pleaded complaint rule, allowing removal of an otherwise unremovable state court action where Congress has "so completely preempt[ed] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Johnson*, 214 F.3d at 632 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). To that end, "the driving force behind federal question preemption is that

[2] 52 U.S.C. § 20501(a).

[3] "Complete preemption," which creates federal removal jurisdiction, differs from more common "ordinary preemption" (also known as "express" or "conflict preemption"), which does not. *Johnson v. Baylor U.*, 214 F.3d 630, 632 (5th Cir. 2000); *Heimann v. National Elevator Indus. Pension Fund*, 187 F.3d 493, 499 (5th Cir. 1999) (overruled on other grounds). Yet Defendants do not argue the NRVA completely preempts Texas's purely state law claims. Rather, Defendants only claim the "Plaintiff's amended petition sets forth claims that are *expressly or impliedly preempted* by federal law." Dkt. 1 at 3 (emphasis added). But these are both forms of "ordinary preemption" defenses that do "not authorize removal to federal court." *Heimann*, 187 F.3d at 500. So Defendants offer nothing in their Notice that would be a valid basis for federal removal. Still, even if Defendants had argued "complete preemption" it fails for the reasons above.

the plaintiff has 'no state claim at all.'" *Casey*, 109 F.3d 765 (citation omitted) (emphasis in original). Yet Texas brings purely state law claims. And Defendants fail to point to any "clearly manifested congressional intent to make [Texas's] state claims removable to federal court." *Id.* Indeed, since complete preemption is "less common and more extraordinary" than ordinary preemption, the Supreme Court has found complete preemption only three times. See *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003) (indicating that the Supreme Court had found complete preemption under the Labor Management Relations Act, the Employee Retirement Income Security Act, and the National Bank Act). Aside from Texas brining purely state law claims, preemption only being raised by Defendants in their notice of removal (and even then, Defendants failing to argue "complete preemption"), Defendants give this court no reason to add the NRVA to this limited list.

III. Defendants Fail to Establish Federal Jurisdiction Under the Grable Doctrine.

Setting all that aside, Defendants cannot claim federal removal under *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (the "Grable doctrine"). Simply put, no plausible argument exists that a notice of removal designed to evade Texas state court review of a state law dispute between Texas and a political subdivision falls within the "slim category" of state law claims that raise significant federal issues.

Under the Grable doctrine, federal question jurisdiction will lie over state law claims that implicate significant federal issues. *Grable & Sons Metal Products, Inc.*, 545 U.S. at 312. In such cases, federal jurisdiction may exist if "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of State of Cal.*, 463 U.S. at 27–28.

The Supreme Court has called this category of federal question cases "special and small," *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677 (2006). To that end, the Court has directed that federal courts not treat a "federal issue" as a password opening federal courts to any state action embracing a point of federal law. *Grable & Sons Metal Products, Inc.*, 545 U.S. at 314; *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986) (holding that the "mere presence

of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"). "Instead, the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Products, Inc.*, 545 U.S. at 314.

In 2013, the Supreme Court, "[i]n an effort to bring some order to this unruly doctrine raised several Terms ago," articulated four factors that must be met for an issue of federal law to fall withing the narrow category of those conferring "Grable doctrine" federal question jurisdiction: that the federal issue be: (1) necessarily raised, (2) disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Defendants fail to show (and do not even argue) that this is one of the "slim" categories of cases where federal jurisdiction may lie under the "Grable doctrine."

Indeed, there is no "actually disputed and substantial" federal issue here. The sole issue in Grable was a dispute involving the meaning of provisions in the federal Tax Code. The meaning of the statute was in dispute and controlled the outcome of the case. Id. at 315. In other words, because construing a federal statute is the work of a federal court, *Grable* affirmed the lower court's denial of the plaintiff's Motion to Remand. That is not the case here. The conduct of the United States is not at issue here, nor is that of any federal agency. Texas does not base its claims on any federal law or regulation, nor is any such law or regulation an element of its cause of action. Rather, Texas is simply seeking to invoke its "intrinsic right to enact, interpret, and enforce its own laws," *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015), against one of its political subdivisions. That far from a federal issue.

But above all, federal jurisdiction here will disturb the balance of federal and state judicial responsibilities and dramatically shift the division of labor between the state and federal judiciaries. Texas's claims are based entirely ensuring the Texas Election Code and the Texas County Purchasing Act are not violated by a Texas county. Indeed, federal courts exercising jurisdiction

over these kinds of claims would herald "a potentially enormous shift of traditionally state cases into federal cases." *Grable & Sons Metal Products, Inc.*, 545 U.S. at 319.

Put plainly, Defendants seek to usurp Texas's well-pleaded complaint by trying to inject a federal question into a complaint devoid of any such issue. To allow this kind of procedural maneuvering would be to "federalize" run-of-the-mill ultra vires actions of States reasserting their authority over a subordinate and derivative branch of state government. Beyond the significant federalism concerns at play, such maneuvering could not be done "without disrupting Congress's intended division of labor between state and federal courts." *Gunn*, 568 U.S. at 258.

All things considered; federal question jurisdiction does not exist. And Defendants have the burden to establish that this case satisfies each of the four Grable prongs to justify removal. *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 588 (5th Cir. 2022). Since Defendants did not make a sufficient showing with respect to any of the Grable prongs, removal should be denied.

IV. Texas is Entitled to Emergency Relief and Swift Remand.

Defendants have made up removal arguments from whole cloth to buy additional time to complete their scheme absent judicial review of the State's state-law claims by state-law courts. This Court should not indulge prejudicial gamesmanship that makes a mockery of state court jurisdiction.

When defendants frivolously remove proceedings to federal court to avoid imminent and unfavorable state court rulings, federal courts have been inclined to grant plaintiffs' requests for expedited consideration of an emergency motion to remand. *See Clear Channel Commc'ns, Inc. v. Citigroup Glob. Markets, Inc.*, 541 F. Supp. 2d 874, 876 (W.D. Tex. 2008) (federal court agreed to expedited consideration of an emergency motion for remand to state court after plaintiffs argued that the notice of removal was "frivolous and was filed in bad faith to (1) avoid the effects of a temporary restraining order . . . and (2) delay or even escape the hearing on Plaintiffs' request for temporary injunction.") (quoting Plaintiffs' Amended Emergency Motion for Remand and Request for Expedited Ruling, 2008 WL 2126527).

When a federal court determines that it lacks subject-matter jurisdiction over a removed matter, "an immediate remand is required." *Miller v. Dunn*, No. 3:24-CV-1105-D, 2024 WL 2187551 at *2 (N.D. Tex. May 15, 2024) (citing 28 U.S.C. § 1447(c); *Lutostanski v. Brown*, 88 F.4th 582 (5th Cir. 2023)). And federal district courts have repeatedly responded to defendants' attempts to abuse Article III jurisdiction with a swift remand back to state court. After the defendant in *Miller* improperly removed the case to federal court one day before a scheduled TRO hearing in an ongoing suit affecting the parent-child relationship, the court granted the plaintiff's emergency motion to remand seven days later. *Id.* When local officials in Missouri removed the State's action to enjoin county face mask mandates to federal court based solely on the petition's brief reference to the Free Exercise Clause, the federal court granted the emergency motion to remand to state court just two days later. *State ex rel. Schmitt v. Page*, No. 4:21-CV-00948-SRC, 2021 WL 3286787, at *2 (E.D. Mo. Aug. 1, 2021) (quoting Fed. R. Civ. P. 1, "the Federal Rules of Civil Procedure 'should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.'"). And when a Southern Methodist University sorority sought to avoid a temporary restraining order by a state court allowing certain members to move in to its sorority house by improperly removing the proceedings to federal court, the court granted the plaintiffs' emergency motion to remand just four days after the notice of removal. *Does 1-9 v. Kappa Alpha Theta Fraternity Inc.*, No. 3:22-CV-1782, 2022 WL 18610075 (N.D. Tex. Aug. 19, 2022) (finding that the amount in controversy had not been met).

In this case, Defendants have plainly removed to avoid Texas appellate scrutiny. Travis County's removal, based on its assertion of a merits defense, is frivolous. This removal deprives the State of its chosen forum for its purely state-law claims and is a blatant attempt by Defendants to delay further judicial scrutiny of their actions. Emergency consideration of this motion and a swift remand are necessary to thwart Defendants' naked play for time and prevent further harm to the State.

V. The Court Should Award Texas Its Attorneys' Fees and Costs.

Texas is entitled to recoup its attorneys' fees and costs for Defendants' improper removal pursuant to 28 U.S.C. § 1447, which provides that a district court order remanding an improperly removed case "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Costs in excess of "ordinary litigation expenses that would have been incurred had the action remained in state court" may be imposed whenever "the court finds that removal is improper under § 1447(c)." *Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32 (5th Cir. 1997); *Howard v. St. Germain*, 599 F.3d 455, 457 (5th Cir. 2010). Attorney's fees incurred as a result of removal may be awarded "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Cap. Corp.*, 126 S. Ct. 704, 711 (2005). Although this Court "may award fees even if removal is made in subjective good faith," Defendants' conduct simultaneously lacks an objectively reasonable basis and supplies strong evidence of a subjective bad-faith intent. *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000).

"The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources." *Martin*, 126 S. Ct. at 711. "The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Id.* Here, Defendants have engaged in precisely the pattern of behavior that the fee-shifting provision of § 1447 is designed to disincentivize. As laid out above, Defendants have laid before this court a baseless removal action in a naked attempt to skirt forthcoming judicial review of their illegal conduct. A defense cannot form the basis for removal under federal question jurisdiction. *Beneficial Nat. Bank*, 539 U.S. at 6 ("As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim."). Despite this well-settled principle, Defendants nevertheless base their removal action on a defense. For this reason, and for the additional reasons describing herein why Defendants' removal is improper, the Court should award attorneys' fees.

As is true for every other aspect of litigation, removal is not a proper vehicle for a party's expression of "bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." *Hutto v. Finney*, 98 S. Ct. 2565, 2573 n.4, (1978). Nevertheless, Defendants, faced with state court appellate review, have commandeered removal as a means of evading the just administration of the law. Defendants' endgame is crystal clear—they seek to delay judicial review by the state appellate court by framing their action as a federal issue in hopes of taking action that would moot this matter. There can be no other interpretation of their actions. Moreover, Defendants lacked any objectively reasonable basis to remove the action. For that reason, Defendants' bad faith, frivolous removal action warrants attorneys' fees.

CONCLUSION

For the foregoing reasons, the State respectfully moves for emergency consideration and for immediate remand.

Date: September 17, 2024

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on September 17, 2024, and that all counsel of record were served by CM/ECF.

/s/ Ryan G. Kercher

RYAN G. KERCHER