UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC, Plaintiffs, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, Defendant.	Civil Action Case No. 1:19-cv-01063

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Table of Contents

PAGES

Table of Authorities

CASES **PAGES**

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This is a case about ensuring equal access to the franchise. Prior to Texas House Bill 1888 ("HB 1888"), Texas law provided local officials with the opportunity to do just that. The flexibility to use "mobile" or "temporary" polling places permitted local officials the option to move early voting locations throughout Texas's counties, ensuring equal opportunity to cast a ballot for segments of the populations that, because of mobility difficulties, limited access to transportation, or limited schedules, find the burden of making it to a polling place especially difficult. And not only were these locations an ideal mechanism for ensuring ready access to early voting for all voters; they were also highly cost effective, giving county clerks and election administrators the ability to serve multiple locations with the same machines and staff. In 2018 the results were a laudable success story: widespread mobile voting helped account for a drastic increase in the number of Texans who cast a ballot, including significant increases in the number of young voters.

HB 1888 ended that success story, stripping away the discretion that permitted local officials to increase voting opportunities in exchange for an inefficient uniformity sure to decrease them. The burdens of this decision will inevitably fall on those, like young voters or the elderly, who already face unique hurdles to exercising their right to vote. But these results and concerns were not a surprise when the law was passed. Indeed, they were front and center as the bill progressed into law: that HB 1888 will decreases the opportunities for youth and elderly voting in Texas is not an inadvertent side effect but one of the primary features of the law.

Plaintiffs allege that HB 1888 violates the First, Fourteenth, and Twenty-Sixth Amendments to the U.S. Constitution and have filed this lawsuit seeking to enjoin its enforcement. The Secretary, through her Motion to Dismiss, ECF No. 21, seeks summary dismissal of plaintiffs' claims. For the reasons that follow, the Secretary's Motion is ill-founded and should be denied.

First, the Secretary's argument that she is not the correct defendant in this suit is barred by directly on point Fifth Circuit precedent, given her position as Texas's chief elections official and given that Plaintiffs challenge a Texas election law. The alternative the Secretary posits—that local elections officials rule elections entirely unencumbered by the state, and that they are constrained by Texas's Election Code only when losing candidates bring elections contests—is neither plausible nor remotely supported by any authority. Her attempts to disclaim responsibility for the administration of elections is equally misplaced. The Secretary *is* the state's chief election official and is the appropriate individual to remedy Plaintiffs' harms.

Second, the Secretary's argument that sovereign immunity bars Plaintiffs' claims fails to mention that this very argument has been *rejected* by the Fifth Circuit applying the *Ex Parte Young* doctrine. The renewed argument is hardly more persuasive when recycled here. The Secretary is the correct official to remedy Plaintiffs' harms, Plaintiffs' seek prospective and injunctive relief for an ongoing violation of federal law, and the Secretary possesses significantly more than the requisite connection to enforcement here. *Ex Parte Young* applies and permits this suit to proceed.

Third, the Secretary's argument that every Plaintiff but the Texas Democratic Party ("TDP") lacks standing is not only pointless—because only one plaintiff need have standing for this action to proceed—but also incorrect as to all of the Plaintiffs. The Secretary's argument that Plaintiff Emily Gilby claims too speculative an injury ignores the allegations in the Complaint, the standard of review at the pleadings stage, and facts both inside and outside the record. Plaintiffs DCCC and DSCC also possess Article III and statutory standing to prosecute this suit under theories of both organizational and associational standing. The Secretary's half-hearted arguments to the contrary fail to withstand even cursory examination.

Finally, the Secretary argues that Plaintiffs do not state a claim for relief under each of the

three bases they allege, but the Secretary is wrong at every turn. On both their burden on the right to vote and equal protection claims, Plaintiffs have alleged sufficient facts, which must be accepted as true, to demonstrate a heavy burden on the right to vote, and this alone is fatal to the Secretary's arguments at the pleadings stage. On the Twenty-Sixth Amendment claim, too, Plaintiffs have plausibly alleged disparate impact and discriminatory intent, sustaining their burden here.

Taken together, then, the Secretary's motion fails in its entirety and should be denied.

II. STANDARD OF REVIEW

A. Motion to Dismiss Under Rule 12(b)(1)

It is, of course, axiomatic that, in ruling on the Secretary's motion to dismiss for lack of subject matter jurisdiction, this Court must accept all factual allegations in the complaint as true. *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001) (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)). The Court may consider "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id*. As to standing, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "Thus, we will not dismiss for lack of standing if we reasonably can infer from the plaintiffs' general allegations" that they have standing. *Hotze v. Burwell*, 784 F.3d 984, 992 (5th Cir. 2015).

B. Motion to Dismiss Under Rule 12(b)(6)

A court considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) must accept "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin K. Eby Const. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004). A claim should only be dismissed if a court determines that it is "beyond doubt" that the claimant cannot prove a

plausible set of facts that support the claim and would justify relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A motion to dismiss under Rule 12(b)(6) is generally disfavored and rarely granted. *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). "The court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Ironshore Europe DAC v. Schiff Hardin, L.L.P.*, 912 F.3d 759, 763 (5th Cir. 2019) (citing *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010)).

III. ARGUMENT

A. The Secretary is Texas's Chief Elections Officer and the Correct Defendant

1. The Secretary is the Proper Defendant in a Lawsuit Concerning the Facial Validity of a Texas Election Statute Under Controlling Fifth Circuit Precedent

The Secretary's first argument, that she is not the proper defendant here, may be easily set aside at the outset. It is plainly barred by controlling Fifth Circuit precedent because she is the state's chief elections officer and the statute Plaintiffs challenge here is a Texas election statute. "The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) (quoting Tex. Elec. Code § 31.001(a)); *see also United States v. Texas*, 422 F. Supp. 917, 921 (S.D. Tex. 1976) (rejecting motion to dismiss in case regarding Texas election law by Texas Secretary of State due to Secretary's position as chief elections officer and duty to maintain uniformity in application, operation, and interpretation of election laws).[1] This alone suffices to end the Secretary's argument

[1] Given that *OCA-Greater Houston* is directly on point and that the Secretary was a defendant in that proceeding, this Court should apply the doctrine of collateral estoppel to bar the Secretary from relitigating the issue of whether she is the appropriate party in a case challenging the facial

on this point.

Given its salience here, the Secretary understandably struggles to distinguish *OCA-Greater Houston*, but the effort is doomed from the outset. *OCA-Greater Houston* is precisely on point and binding in this Court. The Secretary relies on *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001), to argue that *OCA-Greater Houston* somehow does not apply because the Texas Election Code has a provision for an election contest which provides a private right of action for enforcement of the challenged statute, *see* Sec. Mot. at 6 n.2, but the argument simply proves too much. Under the Secretary's logic, the Secretary would have been the wrong party in *OCA-Greater Houston* itself, because that case, decided in 2017 (a full 16 years *after Okpalobi)*, also involved a Texas election law, 867 F.3d at 606-07, and the election code contest statute the Secretary cites as the private right of action barring a proceeding against the Secretary concerning any election law was passed in 1986. *See* Sec. Mot. at 3; Tex. Elec. Code § 221.003. Indeed, the Secretary raised *Okpalobi* before the Fifth Circuit in *OCA-Greater Houston,* and the court *rejected* its relevance for two reasons which are directly applicable here: first, "[b]y its own terms, [the challenged law] applies to every election held in the state of Texas," 867 F.3d at 613; second, "unlike in *Okpalobi*, where the defendants had no 'enforcement connection with the challenged statute,' the Texas Secretary of State is the 'chief election officer of the state' and is instructed by statute to 'obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code.'" *Id.* at 613-14. Precisely right. And equally applicable here.

validity of a Texas elections statute. *See Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 391-92 (5th Cir. 1998) (a trial court has "*broad* discretion" to apply collateral estoppel to prevent a defendant from relitigating an issue previously decided against them when "(1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine.").

It is also worth pausing for a moment to consider the sheer irrationality of what the Secretary argues for here. The logical results of her assertion would be that there is no official in Texas whom voters can sue to challenge unconstitutional laws, that Texas's election code is essentially unenforceable, and that Texas elections are, in fact, entirely unregulated. The apparent lack of restraint upon local officials urged by the Secretary here would also come as a shock to those officials themselves, who often must scramble to follow the Secretary's directives regarding the election law. *See, e.g.*, Ex. A, Texas Tribune Article, ("The county switched to the more cumbersome process after an election advisory issued by the Texas Secretary of State's Office days into the early voting period forced it to ditch its usual practice."); Ex. B, Decl. of Dana DeBeauvoir ("DeBeauvoir Decl.") ¶ 4 ("Per her authority to maintain uniformity of Texas's election laws, the Secretary is authorized to and does prepare detailed and comprehensive written directives and instructions relating to certain election laws both with and outside of Texas's Election Code, which I and other local election officials are required to follow.").[2] The world is not as the Secretary suggests: her directives and opinions are enforceable, and there can be little doubt of their practical effect on local officials.

OCA-Greater Houston also forecloses the Secretary's related cut-and-paste argument that she is not the proper party because she does not determine where voting sites are located or operate them, an argument the Secretary couches in language about redressability and Plaintiffs' injuries not being traceable to the Secretary. Sec. Mot. at 5-7. If the argument sounds familiar, there's good reason: it, too, was advanced before the Fifth Circuit. In *OCA-Greater Houston*, the Secretary similarly argued that the plaintiffs' injuries were not redressable in a suit against the Secretary

[2] All citations to exhibits herein refer to exhibits attached to the Declaration of John M. Geise in Support of Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss.

because they concerned local county officials' application of Texas election law. The Fifth Circuit soundly *rejected* that argument because the plaintiffs' challenge, if successful, would render the entire law facially invalid. 867 F.3d at 613.

So too here. Plaintiffs seek to facially invalidate a Texas election law, and, again, "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State." *Id*. Moreover, the Secretary's argument that an injunction upon her would not bind local officials is plainly not true. *See* Fed. R. Civ. P. 65(d)(2).

2. *Ex Parte Young* Applies Here

Next, the Secretary argues that the *Ex Parte Young* doctrine does not apply here, an argument based almost entirely on the ill-considered premise that the Secretary does not have a sufficient connection to the enforcement of Texas election law. Contrary to the Secretary's contention, Plaintiffs' suit fits perfectly within the *Ex Parte Young* doctrine and is therefore not barred by sovereign immunity. The *Ex Parte Young* doctrine provides an exception to sovereign immunity when the defendant enforces the challenged statute "by virtue of his office." *City of Austin v. Paxton*, 2019 WL 6520769, No. 18-50646, at *2 (5th Cir. Dec. 4, 2019). Once it is clear that the named defendant is proper, *Ex Parte Young* requires two analyses: first, a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," and second, consideration of whether the official in question "has a 'sufficient connection [to] the enforcement' of the challenged act." *Id.* at *3 (citations and quotations omitted). That analysis confirms that *Ex Parte Young* applies here.

OCA-Greater Houston forecloses the argument that the Secretary is not the proper defendant, 867 F.3d at 613, and Plaintiffs have undoubtedly "allege[d] an ongoing violation of federal law and seek[] relief properly characterized as prospective," *Paxton*, 2019 WL 6520769 at

*3. Indeed, the Secretary nowhere contends otherwise.

This leaves only the question of whether the Secretary "has a 'sufficient connection [to] the enforcement' of the challenged act," but this is not a difficult hurdle and one that is easily cleared here. To see why, one need only look to *Paxton*, on which the Secretary heavily relies to argue that she does not possess the requisite connection to enforcement. Sec. Mot. at 4-5. At least three holdings from *Paxton* itself doom the Secretary's argument. *First*, as noted below, *infra* Part III.B, Plaintiffs have standing to bring this action, and the *Paxton* court noted that "it may be the case that that an official's 'connection to [ ] enforcement' is satisfied when standing has been established." *Id.* at *7. *Second*, *Paxton* noted that the Fifth Circuit's case law requires a mere "scintilla of 'enforcement' by the relevant state official," *id.* at *6, to fulfill this prong of the *Ex Parte Young* doctrine, and the Secretary has significantly more than a "scintilla" of enforcement where Texas's election laws are concerned, as *OCA-Greater Houston* conclusively held and as this Court has implicitly found in previously reaching the merits of cases brought against the Secretary challenging Texas's election laws. *See generally Nader v. Connor*, 332 F. Supp. 2d 982 (W.D. Tex. 2004); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). *Third*, and finally, the Secretary argues that *Paxton* requires Plaintiffs to show that the Secretary is likely to enforce the statute. That is an incorrect and overbroad reading of *Paxton*'s holding, but in any event can be easily established here, as the Secretary has already issued an Election Advisory regarding the implementation of House Bill 1888, providing more than sufficient evidence of the likelihood of her enforcement. *See* Ex. C, Texas Secretary of State, Election Advisory No. 2019-20; *see also* DeBeauvoir Decl. ¶ 6.

Finally, the Secretary's argument concerning *Ex Parte Young*'s inapplicability to

mandatory injunctions is both a red herring and wrong on the law. Plaintiffs are not seeking a mandatory injunction. Plaintiffs ask for only a prohibitory injunction, requiring that the Secretary not enforce a plainly unconstitutional law, and the Secretary fails to explain how the requested injunction would be mandatory. Contrary to the Secretary's assertion, the relief requested here is, in fact, the very basis for the *Ex Parte Young* exception to Eleventh Amendment sovereign immunity, which is meant to be "a legal fiction that allows private parties to bring 'suits for injunctive or declaratory relief against individual state officials acting in violation of federal law.'" *Paxton*, 2019 WL 6520769, at *2. That is precisely what Plaintiffs request in the instant lawsuit, clearly fitting within the *Ex Parte Young* exception.

It also bears mentioning that the Secretary is entirely wrong on the law here, as *Ex Parte Young* contemplates both suits to prohibit state officials from acting in contravention of the Constitution *as well as* suits to compel the undertaking of affirmative obligations imposed by the Constitution. The cases the Secretary cites here do nothing to bolster her argument, as the Secretary merely cherry-picks language from cases that either did not involve the application of *Ex Parte Young* at all, *see Zapata v. Smith*, 437 F.2d 1024, 1025-26 (5th Cir. 1971) (reversing district court because United States not properly joined as a party); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 705 (1949) (rejecting injunction to prohibit U.S. government agency from entering into new contract on principles of sovereign immunity); *see also id*. at 704 (noting different considerations where constitutional questions are at issue, as "[u]nder our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions."), or are from the very decision for which the doctrine is named but are still not relevant to the Secretary's point, *see Ex Parte Young*, 209 U.S. 123, 159 (1908).

Looking to the case law actually on point here demonstrates that a key part of the doctrine is that "[u]nder *Ex parte Young*, 'a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law,'" *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (quoting *Quern v. Jordan*, 440 U.S. 332, 337 (1979)), and there is an abundance of cases requiring state officials to "conform their future conduct to the requirements of federal law" by undertaking affirmative obligations. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (rejecting state's assertion of sovereign immunity concerning requirement that state pay for future educational components of relief to remedy harms caused by state's constitutional violations); *Thomas ex rel. D.M.T. v. School Bd. St. Martin Parish*, 756. F.3d 380, 387-88 (5th Cir. 2014) (noting school board "remained subject to affirmative obligations" by permanent injunction issued by court in 1974 to remedy constitutional harms); *Common Cause Indiana v. Marion County Election Board*, 311 F. Supp. 3d 949, 977 (S.D. Ind. 2018), *vacated on other grounds*, 925 F.3d 928 (7th Cir. 2019) (issuing injunction requiring county election board to establish satellite early voting centers for general election).

B. Plaintiffs Have Standing to Challenge HB 1888

It is well established that only one plaintiff need have standing for a case to proceed. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53n.2 (2006). Here, *all four* Plaintiffs have sufficiently alleged concrete and particularized injuries-in-fact and otherwise satisfied their pleading requirements as to standing to defeat a motion to dismiss on those grounds.

1. Plaintiff Emily Gilby Has Standing to Challenge HB 1888

The Secretary challenges Plaintiff Emily Gilby's standing, but Ms. Gilby has alleged an injury in fact and thus has standing to challenge HB 1888. The injury-in-fact element of standing is meant "to distinguish a person with a direct stake in the outcome of a litigation—even though

small—from a person with a mere interest in the problem." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973). This element "is 'very generous' to claimants, demanding only that the claimant 'allege[] some specific, identifiable trifle of injury.'" *Cottrell v. Alcon Labs.*, 874 F.3d 154, 162 (3d Cir. 2017) (quoting *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982)) (citations omitted). Ms. Gilby alleges direct injury caused by HB 1888. *See* First Am. Compl., ECF No. 18 ("Compl.") at ¶ 18 ("Unless HB 1888 is enjoined, Southwestern University will be unable to host a temporary early voting location, making it far more difficult for Ms. Gilby . . . to cast her ballot."). This allegation, accepted as true at the pleading stage, establishes Ms. Gilby has standing to challenge HB 1888.

Notwithstanding the allegations in the Complaint, the State argues Ms. Gilby's injury is "too speculative" to support standing, but its argument hinges on the Court's acceptance of facts irreconcilable with "the complaint supplemented by undisputed facts evidenced in the record," *Den Norske Stats Oljeselskap As*, 241 F.3d at 424 (describing evidence that a court may consider when ruling on a 12(b)(1) motion). For instance, the State asserts that "Williamson County officials could choose locations convenient for [Ms. Gilby]. Perhaps they will locate a polling place near Gilby's residence, her school, or her work." Sec. Mot. at 9. This contention is *directly at odds* with the allegation in the Complaint that "Southwestern University will be unable to host a temporary early voting location" under HB 1888. Compl. at ¶ 18. Furthermore, Williamson County officials have *already* released a list of early vote locations for the Primary Election that takes place on March 3, 2020. Ex. D, Williamson County Early Voting Schedule, Primary Elections — March 3, 2020. That list does not include a location on Southwestern University's campus or in the immediate vicinity. *Id.*

Accordingly, Ms. Gilby's injury is far from speculative. In 2018, Southwestern University

hosted an early vote location, where Ms. Gilby joined roughly 50% of her classmates in casting her ballot. *See* Compl. at ¶ 18. The "undisputed evidence in the record" is that Williamson County does not plan to hold early voting at Southwestern University during the 2020 Primary Election. *See* Ex. D. If the State wishes to establish facts to contradict Ms. Gilby's allegation that HB 1888 will make it more difficult for her to vote, it may attempt to do so at trial—but the State's fanciful arguments have no place in a motion to dismiss. Although it is the responsibility of the courts to ensure that only parties with real interests at stake bring their disputes to the court's attention, that standard is amply met here.

2. Plaintiffs DSCC and DCCC Have Article III Standing

Plaintiffs DSCC and DCCC have sufficiently pled both direct organizational and associational bases that satisfy the injury-in-fact requirement for Article III standing. First, DSCC and DCCC have direct organizational standing because HB 1888 frustrates their mission of electing Democrats to the U.S. Senate and U.S. House of Representatives *and* because HB 1888 mandates they divert significant resources to counteract the unconstitutional impact of the law. *See* Compl. ¶¶ 20-23. Second, DSCC and DCCC have representative or associational standing to challenge HB 1888 on behalf of Texas's voters who intend to support Democratic candidates for Senate and the U.S. House of Representatives in the 2020 General Election and will be burdened by HB 1888, and on behalf of the Democratic candidates they have endorsed and support.

The Supreme Court has long recognized that a direct organizational injury is cognizable in two ways: (1) a diversion of organizational resources to identify or counteract the allegedly unlawful action, or (2) frustration of the organization's mission. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). And the Fifth Circuit has affirmed that "an organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's

conduct; hence, the defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp.*, 455 U.S. at 379).

DSCC and DCCC easily meet this standard. The Complaint alleges concrete and particularized facts for both DSCC and DCCC that support a perceptible impairment via a diversion-of-resources injury. This includes facts alleging both DSCC's and DCCC's missions, as well as facts describing how DSCC and DCCC must divert resources from other specific organizational priorities to address problems caused by the burdens HB 1888 imposes on Texas's voters, especially young, Democratic voters. Compl. ¶¶ 20-23.

In addition, DSCC and DCCC have representative or associational standing to challenge HB 1888 on behalf of Texas's voters who intend to support Democratic candidates for Senate and the U.S. House of Representatives in the 2020 General Election and will be burdened by HB 1888, as well as on behalf of the candidates DSCC and DCCC have endorsed and support. An organization has representative or associational standing when at least one of its members or supporters has standing, the interests at stake are germane to the organization's purpose, and neither the claim nor the relief requires participation of the organization's individual members. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006). The Supreme Court has further held that the individual participation of an organization's members is "not normally necessary when an association seeks prospective or injunctive relief for its members," *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (citation omitted), which is the relief Plaintiffs seek here.

More specifically, courts have repeatedly held that, in the voting rights context, "political parties have standing to assert, at least, the rights of its members who will vote in an upcoming election." *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) (citing *Fla. Democratic Party v. Hood*, 342 F.Supp.2d 1073, 1078-79 (N.D. Fla. 2004)). "That [i]s so even [when] the political party c[an] not identify specific voters that would be affected; it is sufficient that some inevitably would." *Id.*; *see also Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (political party had associational standing to assert the rights of its supporters who will vote in the upcoming election, despite that plaintiffs did not identify a specific voter that would be prospectively harmed; while it was impossible to determine which specific voter might be harmed, that some voters would be harmed was "inevitable"); *Bay Cty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) ("[P]olitical parties and candidates have standing to represent the rights of voters.").

Plaintiffs DSCC and DCCC are national committees of the Democratic Party, as defined by 52 U.S.C. § 30101(14), and each has the mission of electing candidates of the Democratic Party to the U.S. Senate and to the U.S. House of Representatives, respectively, including in Texas and with regard to specific races that will be on the ballot during the 2020 General Election. Compl. ¶¶ 20-23. As two of the three federally-recognized party committees of the national Democratic Party, they have representational standing to sue in the place of their voters and supporters, which include all Texas voters who intend to support Democratic candidates for Senate or the U.S. House of Representatives in the 2020 General Election. And while DSCC and DCCC are not required to identify a single voter supporter who will be impacted, *see, e.g.*, *Sandusky Cty. Democratic Party*, 387 F.3d at 574, here, Plaintiffs *have* identified a specific, impacted voter and supporter: Plaintiff Emily Gilby. Compl. ¶ 18; *see also Hancock Cty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198

(5th Cir. 2012) ("We are aware of no precedent holding that an association must set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on a lack of associational standing."). Accordingly, DSCC and DCCC have easily exceeded their burden in pleading associational standing as a political party on behalf of their voter supporters.

In addition, DSCC and DCCC have standing because the candidates they have endorsed and are organized to support have standing. In *Benkiser*, the Fifth Circuit held that because Democratic candidate Nick Lampson had standing to assert a claim, the State Party had associational standing to do so on his behalf: "Lampson's interests are fully represented by the TDP; after the primary election, a candidate steps into the shoes of his party, and their interests are identical. As well, the type of relief sought, i.e., an injunction, will inure to Lampson's benefit." 459 F.3d at 588 (citations omitted).

The Secretary's imaginative assertion that DSCC and DCCC must show HB 1888 "will be outcome determinative in any particular race" to satisfy Article III's injury-in-fact requirement is certainly interesting but has no basis in law. *See* Sec. Mot. at 11. Contrary to the Secretary's assertion, Plaintiffs are not aware of even a single case holding that a constitutional voting rights challenge must predict the loss of an upcoming election to sufficiently plead an injury in fact. The idea is more than a little startling. Moreover, the heightened standard the Secretary proposes of requiring a plaintiff in a voting rights case to predict and plead the outcoming a future election would make prospective injunctive relief in the voting rights context impossible—as the Secretary is well aware, but that is not the law and never has been, in Texas or anywhere else.

Because DSCC and DCCC plainly have direct organizational standing, and because DSCC and DCCC also have representational standing on behalf of voters who intend to support Democratic candidates for Senate or the U.S. House of Representatives in the 2020 General

Election as well as those candidates themselves, the Secretary's Motion should be denied.

3. DSCC and DCCC Have Statutory Standing Under 42 U.S.C. § 1983

The Secretary muddies the distinctions between organizational and prudential standing by focusing exclusively on whether third-party voting rights claims brought by organizations on behalf of members or supporters are cognizable under 42 U.S.C. § 1983. They are, plainly. But whether a claim is a "third-party claim" is not the legal standard for whether a party has *prudential standing* under a particular statute. DSCC and DCCC plainly meet the low bar for prudential standing under 42 U.S.C. § 1983 to seek redress for the injuries of their voter supporters and also for their direct organizational injuries, which are not third-party injuries at all.

Prudential standing is "not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Securities Indus. Ass'n.*, 479 U.S. 388, 399 (1987)). As the Supreme Court has explained, "the label 'prudential standing' [i]s misleading, for the requirement at issue is in reality tied to a particular statute," and "[t]he question is whether the statute grants the plaintiff the cause of action that he asserts." *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302 (2017). And to meet this low standard, the Supreme Court has held that it is enough that a plaintiff sues based on an interest "*arguably* within the zone" protected or regulated by the pertinent statute (or constitutional provision). *Ass'n of Data Processing Service Orgs, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added).

Here, 42 U.S.C. § 1983 confers a broad cause of action *against* "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws[.]" And the deprivation of rights, privileges, or immunities secured by the Constitution and laws alleged by Plaintiffs are those rights, privileges, or immunities guaranteed by the First, Fourteenth, and Twenty-Sixth Amendments. Compl. ¶¶ 38-57.

Instead of applying the test for prudential standing, the Secretary incorrectly reduces the test to a question of whether the claims, as applied to DSCC and DCCC, are third-party claims. They are, but that is of no moment. The Secretary is correct that any claim, not just a voting rights claim, based on the representational standing of an organization to bring suit on behalf of its members is always a third-party claim. *See* Sec. Mot. at 13-14. But representational standing is a well-settled exception to the general prohibition on third-party standing, and it is also commonly applied to organizational plaintiffs' civil rights litigation under 42 U.S.C. § 1983. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (It is "common ground that . . . organizations can assert the standing of their members."); *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010) (nonprofit had standing to assert 42 U.S.C. § 1983 claims on behalf of its members in seeking prospective declaratory and injunctive relief).[3] Moreover, courts have repeatedly held that political parties and candidates, specifically,

[3] The Secretary cites several cases that merely illustrate the general prohibition on third-party standing, but they are inapposite because they do not involve organizational standing at all, let alone the representational standing of political parties or candidates in the voting rights context. *See* Sec. Mot. at 13-14 (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) (a mother and daughter could not assert the third-party deprivation of the husband and father's constitutional rights); *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011) (a judge's secretary lacked standing to challenge the constitutionality of her judge and employer's suspension); *Conn v. Gabbert*, 526 U.S. 286, 287 (1999) (attorney lacked standing to challenge infringement of the constitutional rights of his client)). None of the cases that the Secretary cites hold that a political party lacks standing to sue on behalf of its voter supporters. *See* Sec. Mot. at 13-14. Indeed, the cases to the contrary are legion. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (Democratic Party had standing to assert the rights of members prevented from voting by imposition of a new photo ID law); *Sandusky Cty. Democratic Party*, 387 F.3d at 574; *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz.), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2019);

have representational standing to bring what are necessarily third-party voting rights claims on behalf of the voters or constituents who support them under 42 U.S.C. § 1983. *See supra* III.B.2 at 12-15. Accordingly, the Secretary's argument that DSCC and DCCC lack statutory standing under 42 U.S.C. § 1983 to sue merely because they are third-parties advancing the rights of the voters who support them necessarily and decidedly fails.

A claim based on an organization's *direct* injury vis-à-vis its frustration of mission and diversion of resources because of an unconstitutional law is *not* a third-party claim. *Cf.* Sec. Mot. at 13-14. Perhaps what the Secretary meant is not that 42 U.S.C. § 1983 prohibits third-party claims, which it clearly does not, but that a political organization's direct injury vis-à-vis its frustration of mission or diversion of resources should require a different cause of action than the voting rights claims that a political party can undeniably make on behalf of its voter supporters under 42 U.S.C. § 1983. This argument also lacks any support. Instead, the direct injuries DSCC and DCCC allege are the traceable result "of the deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws" and are, at the very least, more than "*arguably* within the zone" protected or regulated by 42 U.S.C. § 1983. *Association of Data Processing Service Organizations, Inc.*, 397 U.S. at 153 (emphasis added). And courts often find that organizations have standing under 42 U.S.C. § 1983 to bring civil rights claims based on a diversion of resources injury alone. *See, e.g.*, *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251,

Fla. Democratic Party, 215 F. Supp. 3d at 1254; *Fla. Democratic Party*, 342 F. Supp. 2d 1073, 1078-79 (N.D. Fla. 2004); *Bay Cty. Democratic Party*, 347 F. Supp. 2d at 422 (political party had standing to represent the rights of voters and third-party standing to challenge election directives issued to local elections officials as violating a federal act and Michigan law); *Northampton County Democratic Party v. Hanover Twp.*, No. CIV.A.04-CV-00643, 2004 WL 887386 at *8 (E.D. Pa. Apr. 26, 2004) (Democratic Party had standing to represent interests of the general electorate); *Smith v. Boyle*, 959 F. Supp. 982, 986 (C.D. Ill. 1997), *aff'd as modified*, 144 F.3d 1060 (7th Cir. 1998).

1258 (N.D. Ga. 2018) (plaintiffs have "organizational standing" under 42 U.S.C. § 1983 based on need to "divert personnel and resources"); *Democratic Nat'l Comm.*, 329 F. Supp. 3d at 841 (political party plaintiffs have standing based on diversion of resources required to get out the vote under challenged law). Accordingly, even if DSCC and DCCC only had direct organizational standing vis-à-vis their diversion of resources and the frustration of their missions—which is not the case here—they would still have prudential standing under 42 U.S.C. § 1983.

Because DSCC and DCCC have prudential standing to sue on behalf of their voter supporters, and because they otherwise meet the low threshold for statutory standing on the basis of their direct injuries alone, the Secretary's Motion to Dismiss should be denied.

4. Plaintiff Texas Democratic Party Has Standing to Challenge HB 1888

The Secretary is curiously silent with respect to the standing of the TDP. That silence is more than a little telling,[4] and serves as a tacit (if reluctant) admission that TDP has representative or associational standing as a membership organization to assert the voting rights of its members. And even without defined members, TDP would otherwise have representational standing to bring suit on behalf of the voters that support it as a legally-recognized political party asserting the rights of the voters that support it and its candidates. *See supra* Part III.B.2 at 12-15 (political parties and candidates have standing to represent the rights of voters); *see also* Compl. ¶ 19 ("TDP is the statewide organization representing Democratic candidates and voters throughout the State of Texas," and it has "millions of members and constituents from across Texas."); *id.* at ¶ 45 (absent relief, TDP's members and constituents will suffer an unjustified burden on their right to vote); *id.*

[4] Plaintiffs note the Secretary does not define what she means by "Committee Plaintiffs," *see* Sec. Mot. at 9-14, but even if she meant to include TDP in this category, she does not argue that TDP lacks associational standing, conceding by implication that TDP does plead that it is a member organization. *See* Sec. Mot. 10 (arguing that, "DSCC and DCCC, for example, do not describe themselves as membership organizations"). If the Secretary intended to include TDP in her arguments regarding the standing of DSCC and DCCC, her arguments fail for the same reasons.

at ¶ 57 (absent relief, TDP's "members and constituents, particularly its young members who live on and near college and university campuses that previously hosted temporary early voting locations and have been banned from so doing under HB 1888, will continue to suffer the effects of intentional and unconstitutional discrimination because of age"). And, contrary to the Secretary's assertion, the Complaint clearly and specifically alleges Ms. Gilby is among TDP's membership ranks. *Id.* at ¶ 18 (Ms. Gilby "is 22 years old and a junior at Southwestern University, where she also serves as the current President of the Southwestern University College Democrats," which is an on-campus chapter of the TDP); *cf.* Sec. Mot. at 10 (wrongly claiming Plaintiffs "do not allege that [Ms. Gilby] is currently a member of any of the Committee Plaintiffs."). The Secretary's concession (or at least, failure to challenge) that TDP at least has standing here is fatal to her Motion to Dismiss. *See Rumsfeld*, 547 U.S. at 53 n.2 (2006) (only one plaintiff need have standing for a case to proceed).

C. Plaintiffs Have Stated Plausible Claims for Relief

1. Plaintiffs Have Sufficiently Pled a Burden on Their Right to Vote

a) Burdens on Early Voting are Properly Evaluated Under the *Anderson-Burdick* Standard, Which Does Not Require That Plaintiffs Allege a Complete Deprivation of the Right to Vote

The Secretary's assertion that claims regarding early voting do not implicate the right to vote or require the use of the traditional *Anderson-Burdick* test is plainly wrong. *See* Sec. Mot. at 15-17. The Secretary cites no persuasive, much less controlling, support for this position, instead relying on a case concerning absentee ballots decided twenty years prior to *Anderson-Burdick*, and ignoring the plain fact that courts across the country have routinely evaluated claims regarding burdens on the right to vote based on limitations on early voting using the *Anderson-Burdick* standard. *See, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 429-30 (6th Cir. 2012) (applying

Anderson-Burdick to consider burden imposed by the removal of three days of early voting); *League of Women Voters of Florida, Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1209, 1215-16 (N.D. Fla. 2018) (applying *Anderson-Burdick* test in granting preliminary injunction based on holding that law prohibiting early voting locations on college campuses was an unconstitutional burden on the right to vote); *Common Cause Ind.*, 311 F. Supp. 3d at 962-66. Indeed, they have done so despite being confronted often, as here, with "the State's oft-rejected argument that, because there is no constitutional right to [early in-person] voting, [laws related to early] voting are immune to constitutional scrutiny." *Id*. at 965-66. The argument, rejected by courts across the country, is no more persuasive when rehearsed here as if newly-fashioned. With all due respect, the argument should be rejected, as it has been rejected (to counsel's knowledge) by every court to have considered it to date.

The Secretary's related contention that Plaintiffs do not allege a burden on the right to vote because they do not allege total deprivation of their right to vote can also be dismissed out of hand. *See* Sec. Mot. at 15-17. The *Anderson-Burdick* standard hardly requires the denial of the right to vote for a state election law to be unconstitutional. It instead requires the Court to "weigh 'the character and magnitude of the asserted injury to the rights … that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 789 (1983)). Under this standard, burdens falling short of a complete denial of the right to vote have not merely been found sufficient to state a claim, but sufficiently burdensome as to be unconstitutional. *See, e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (finding $1.50 poll tax violative of equal protection); *Obama for Am.*, 697 F.3d at 425; *League of Women*

Voters of Florida, Inc., 314 F. Supp. 3d at 1209; *Common Cause Ind.*, 311 F. Supp. 3d at 977.

b) Plaintiffs Have Alleged Cognizable First and Fourteenth Amendment Burdens on Their Right to Vote

The Secretary's consideration of HB 1888 under the *Anderson-Burdick* test makes two fundamental errors which are fatal to her argument at the motion to dismiss stage.

First, the Secretary ignores altogether that the severity of the injury imposed by the challenged provision—which determines the appropriate level of scrutiny—is largely a factual question, *see, e.g.*, *Ariz. Green Party v. Reagan*, 838 F.3d 983, 989 (9th Cir. 2016), and proceeds as if it is a foregone conclusion that Plaintiffs will be unable to prove that the Statute injures them severely enough to warrant anything more than "relaxed scrutiny." *See* Sec. Mot. at 17-19. Essentially, the Secretary turns the motion to dismiss standard on its head, viewing the facts in the light most favorable to *the Secretary* rather than *Plaintiffs*. *See Martin K. Eby Const. Co.*, 369 F.3d at 467. That, of course, is not the applicable standard.

Second, the Secretary's construction of the law ignores the Supreme Court's admonition that "[h]owever slight" the injury to a plaintiff's fundamental rights "may appear," to survive challenge a law must still "be justified by a relevant and legitimate state interest 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (controlling op.) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). There is no "litmus" test under which certain types of laws are immune from scrutiny; in each case, courts must make the hard judgment our Constitution demands, based on the specific injuries plaintiffs suffer as a result of the challenged law, the specific justifications offered by the State for the law, and whether the law advances those interests sufficiently to justify the injuries to the plaintiffs' rights. *Id.* at 190.

Plaintiffs have sufficiently alleged that HB 1888 will "significant[ly]" burden their right to vote and "significantly diminish[]" their ability to utilize early voting, Compl. ¶ 42, mandating

heightened scrutiny under *Anderson-Burdick*, and this alone is fatal to the Secretary's motion.

2. Plaintiffs Have Sufficiently Pled an Equal Protection Violation

a) Plaintiffs' Equal Protection Clause Claim is Also Evaluated Under the *Anderson-Burdick* Standard

While the Secretary incorrectly relies on the traditional rational basis test to evaluate Plaintiffs' equal protection claim, the *Anderson-Burdick* standard applies here, too. "When a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the "flexible standard" outlined in [*Anderson*] and [*Burdick*]." *Obama for Am.*, 697 F.3d at 429-30 (rejecting the argument that a rational basis standard of review applies to even a straightforward equal protection violation in the voting rights context); *see also Clements v. Fashing*, 457 U.S. 957, 965 (1982) (rejecting the assertion that traditional equal protection principles should automatically apply in the voting rights context "without first examining the nature of the interests that are affected and the extent of the burden").

Plaintiffs have sufficiently alleged a burden on their right to vote. *See supra* Part III.C.2(b). And it is well established that, even in the context of maintaining their equal protection claims, Plaintiffs need not allege a complete "denial" of their right to vote to allege that the right is "burdened." *See, e.g.*, *Crawford*, 553 U.S. at 191 ("However slight" the burden on the right to vote "may appear," "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'") (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)); *see also Burdick*, 504 U.S. at 439 (applying *Anderson-Burdick* despite "limited burden" imposed on voters' rights by Hawaii's prohibition on write-in voting).

b) Plaintiffs Have Plausibly Alleged Disparate Treatment

The Secretary next argues that Plaintiffs must allege intentional discrimination to support their equal protection claim. Hardly. It is by now well settled that the Equal Protection Clause

applies when, "[h]aving once granted the right to vote on equal terms, the State . . . by later arbitrary and disparate treatment, value[s] one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Plaintiffs have plausibly alleged both a burden on the right to vote, *see supra* Part III.C.2(b), and arbitrary distinctions among Texas voters based on where they live and their age, *see* Compl. ¶ 49-50 ("HB 1888 now mandates that, based on where they live, some voters . . ., especially young voters, will suffer reduced or eliminated access to the franchise."). Together, these two allegations require that the State's justifications "be examined to determine whether the challenged statutory scheme violates equal protection." *Obama for Am.*, 697 F.3d at 432. If anything, the Secretary's argument about the impact of the law goes to the question of which standard of scrutiny the Court should apply to evaluate Plaintiffs' claims. *See Burdick*, 504 U.S. at 434 ("[T]he rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which [the challenged law] burdens [voting rights]."). That argument is premature on a motion to dismiss, as it provides no basis for dismissing Plaintiffs' claims.

3. Plaintiffs Have Sufficiently Pled a Violation of the Twenty-Sixth Amendment

Finally, the Secretary's argument that HB 1888 does not violate the Twenty-Sixth Amendment, though meritless, is beside the point at the pleading stage. The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI, § 1. Plaintiffs allege that "Texas enacted HB 1888 with the intent and effect of preventing newly-enfranchised young Texans from effectively exercising their right to vote." Compl. ¶ 55. Contrary to the Secretary's assertion, these allegations are most assuredly plausible given data showing that young voters were among the populations best served by temporary early voting locations, *see* Compl. ¶ 29, the electoral outcomes that resulted from

the surge in Texas youth turnout, *see* Compl. ¶ 30, the tabling of an amendment to HB 1888 that would have maintained temporary early voting for students, among others, *see* Compl. ¶ 34-35, and the passage of HB 1888 on a largely party line vote, *see* Compl. ¶ 35.

Moreover, the cases upon which the Secretary relies do not actually support her argument that Plaintiffs have failed to state a Twenty-Sixth Amendment claim. For example, the Secretary cites *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019), a case in which the court denied plaintiffs' Twenty-Sixth Amendment claims only after trial; it did not grant summary judgment, *One Wisconsin Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 977 (W.D. Wis. 2016), or dismiss for failure to state a claim, *see One Wisconsin Inst., Inc. v. Nichol*, 155 F. Supp. 3d 898 (W.D. Wis. 2015). In *Lee v. Virginia State Board of Elections*, 843 F.3d 592, 607 (4th Cir. 2016), the Fourth Circuit affirmed the district court's judgment, which was made after a bench trial.

Plaintiffs have plausibly alleged disparate impact and discriminatory intent, which together are sufficient to sustain their Twenty-Sixth Amendment claim.

IV. CONCLUSION

For the reasons stated, Plaintiffs respectfully submit that this Court should deny the Secretary's motion to dismiss, ECF No. 21, as to all counts.

Dated: December 24, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 24, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ *John M. Geise*
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