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

ANDY BROWN, in his official capacity as Travis County Judge, BRUCE ELFANT, in his official capacity as Travis County Tax Assessor-Collector and Voter Registrar; JEFF TRAVILLION, in his official capacity as Travis County Commissioner; BRIGID SHEA, in her official capacity as Travis County Commissioner; ANN HOWARD, in her official capacity as Travis County Commissioner; 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.*	CASE NO. 1:24-cv-001095

DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Defendants, KEN PAXTON, in his official capacity as Texas Attorney General, and JANE NELSON, in her official capacity as Texas Secretary of State (hereinafter, State Defendants or State), acting by and through the Attorney General, Ken Paxton, and file this motion to dismiss.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs' claims should be dismissed as a matter of law and under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

BACKGROUND

This case represents the last vestiges of Travis County's ill-fated attempt to remove Texas's state court lawsuit to federal court. Texas first sued Travis County in state court, alleging that the County had unlawfully contracted with a partisan vendor to conduct unauthorized voter registration activities—actions that exceeded the County's statutory authority. Ex. 1 (Plaintiff's Original Verified Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, *The State of Texas v. Bruce Elfant*, *et. al.,* Cause No. D-1-GN-24-005849). Through its ultra vires claims, Texas sought to stop Travis County officials from continuing their illegal actions. *Id.*

But rather than defend its actions on the merits on state appellate review, Travis County tried a procedural dodge: removal to federal court. *See generally* Ex. 2 (Defendants' Notice of Removal, *The State of Texas v. Bruce Elfant*, *et. al.,* Cause No. 1:24-cv-01096-DII, Dkt. 1). Their rationale? The National Voter Registration Act (NVRA), they argued, mandated removal of Texas's purely state law claims. *Id.* That argument had no basis, and the federal court rightly rejected it, sending the case back to state court. Ex. 3 (Order Granting Motion for Remand, *The State of Texas v. Bruce Elfant*, *et. al.,* Cause No. 1:24-cv-01096-DII, Dkt. 23).

The same day Travis County filed for removal; it filed this lawsuit. Yet far from being a legitimate NVRA claim, the present complaint was designed to bolster Travis County's attempt at removal. In fact, the County used this lawsuit to leverage removal, implying that the existence of this lawsuit supported its basis for removal and that the two cases should be consolidated. Ex. 2.

As part of its rush to shield itself from state court oversight, this lawsuit disregards the notice provisions of the NVRA, which require plaintiffs to give proper notice before filing suit, a requirement designed to prevent the very kind of legal gamesmanship Travis County is engaging

in here. Of course, Travis County ignored these notice requirements, filing notice at the same time of the filing of this complaint. That Travis County failed to comply with the NVRA's notice provision is unsurprising: this lawsuit was never filed in good faith. Rather, it is a spin-off intended to bolster their federal removal strategy and forestall Texas's efforts to hold the county accountable for its unlawful actions.

With its removal efforts quashed and Texas's lawsuit against Travis County back in state court, this complaint is the last gasp of a failed strategy. This lawsuit isn't about advancing a real NVRA claim. It's a transparent effort to delay the inevitable: state court review of the County's unlawful actions. And it should be dismissed for the reasons below.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To avoid dismissal under Rule 12(b)(6), a plaintiff must plead sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While courts must accept all factual allegations as true, they "do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005); *see also Iqbal*, 556 U.S. at 679. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 (2009). Likewise, a court should dismiss when, based on the plaintiff's own allegations, it has alleged no cognizable claims.

ARGUMENTS & AUTHORITIES

A. Plaintiffs lack statutory standing to bring their NVRA claims because they failed to provide pre-suit notice to Texas under the NVRA's civil enforcement provision.

Pre-suit notice under the NVRA is "mandatory." *Scott v. Schedler*, 771 F.3d 831, 835 (5th Cir. 2014). And since the NVRA notice provision is nonjurisdictional, *Am. Civ. Rts. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 794 (W.D. Tex. 2015) n. 9 (W.D. Tex. 2015), when a Plaintiff fails to

satisfy it, their complaint should be dismissed under Rule 12(b)(6). *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011). Because Plaintiffs filed their notice with, not before, filing this lawsuit, their complaint should be dismissed with prejudice.

A party alleging a violation of the NVRA must first provide written notice of the violation to the state's chief election official. 52 U.S.C. § 20510(b). Only if the violation is not corrected within 90 days after receipt of notice of the violation (or within 20 days after receipt of the notice if the violation occurred within 120 days before the election for federal office) may the party aggrieved bring a civil action for declaratory and injunctive relief. 52 U.S.C. § 20510(b)(2). In other words, under the unambiguous language of the NVRA, an aggrieved person may only bring a civil action for declaratory or injunctive relief over a particular violation after providing written notice as specified in Section 20510(b)(1), and after "the violation is not corrected" within the period set forth in Section 20510(b)(2).

In the context of standing to bring a private action under 52 U.S.C. § 20510(b), failure to provide notice is "fatal." *Scott*, 771 F.3d at 836; *id.* at 835 ("No standing is. . . conferred if no proper notice is given. . . .") (quoting *Ga. St. Conf. of N.A.A.C.P. v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012)). The only exception to the notice requirement exists "[i]f the violation occurred within 30 days before the date of an election for Federal office." 52 U.S.C. § 20510(b)(3).

Importantly, "notice" under the NVRA means *pre-suit* notice. That is because the purpose of the NVRA's notice requirement is to "provide states. . . an opportunity to attempt compliance *before facing* litigation." *Scott*, 771 F.3d at 836 (quoting *Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997) (emphasis added)) (alteration in original)*; see also Nat'l Coal. For Students With Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 286 n.2 (4th Cir. 1998) ("*Before suing* for declaratory or injunctive relief under the [NVRA], a person must (in most cases) give the state's chief election official *prior* written notice of the alleged violation.") (emphasis added)).

Plaintiffs admit they failed to satisfy the NVRA's notice requirement. Dkt. 1 ¶ 78 ("Plaintiffs have *simultaneously sent notice* of these NVRA violations to [the Texas Secretary of

State] by letter dated September 17, 2024.") (emphasis added). Rather, they claim they were not required to because the "purpose of the notice requirement is to allow the State to voluntarily come into compliance without litigation," and that Defendants have "already brought litigation on the State's behalf in a manner that violates federal law." *Id.* ¶ 79–80. For these reasons, Plaintiffs argue, notice in this case was "futile." *Id.* ¶ 81. But the purpose of the NVRA notice requirement is not just to prevent litigation in a general sense. Rather, it is to allow states to come into compliance with the NVRA *before* a *state* is sued. *Scott*, 771 F.3d at 836; *see also Voice of the Experienced v. Ardoin*, No. CV 23-331-JWD-SDJ, 2024 WL 2142991, at *30 (M.D. La. May 13, 2024); *Georgia State Conference of N.A.A.C.P.*, 841 F. Supp. 2d at 1335.

Even setting that aside, this argument fails on its own terms. The only litigation Texas has initiated against Plaintiffs concerns purely state law ultra vires claims, not "federal law." Dkt. 1 ¶ 80. As a federal court just recognized, "Texas's original petition" does not raise a "federal issue." Rather, Texas's "petition *only raises an ultra vires claim that arises under Texas state law*." Ex. 3 (remand order) at 11 (emphasis added).

Last, Plaintiffs attempt to circumvent the NVRA's notice requirement by arguing—without any supporting authority—that the waiver under § 20510(b), which applies to violations within 30 days of a federal election, should instead apply to violations within 30 days of the relevant legal deadline, such as voter registration. Dkt. 1 ¶ 82. Plaintiffs also claim that because their voter registration efforts were allegedly interfered with, and the registration deadline falls less than 30 days before the filing of this lawsuit, they were excused from the NVRA's notice requirement. *Id.* ¶ 83.

The NVRA applies explicitly to all federal elections—including presidential, primary, and general elections. *See* 52 U.S.C. § 20502(1)–(2) (adopting the definitions of "election" and "Federal office" from 52 U.S.C. § 30101(1), (3)); § 30101(1) (defining "*election*" to include *general, primary, and caucus elections*); § 30101(3) (defining "*Federal office*" to include *the presidency, vice presidency, and congressional offices*).

Plaintiffs' interpretation clashes with the statute's plain language. Section 20510(b) states: "If the violation occurred within 30 days before the date of an *election for Federal office*, the aggrieved person need not provide notice. . . ." 52 U.S.C. § 20510(b). The provision unambiguously ties the waiver to the *date of the federal election* itself, not to any ancillary deadline preceding the election. *See* 52 U.S.C. § 20502(1)–(2); *id.* § 30101(1), (3); *UMG Recordings, Inc. v. Grande Communications Networks, L.L.C.*, No. 23-50162, 2024 WL 4449684, at *17 (5th Cir. Oct. 9, 2024) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.")).

Here, elections for the office of the presidency will be held on **November 5, 2024**. Plaintiffs filed this lawsuit on **September 17, 2024**—a full 49 days before the election. Because the suit was not filed within the 30-day window preceding the election, Plaintiffs needed to satisfy the NVRA's notice requirement. Their attempt to rewrite the statute to fit their timeline must be rejected, as the text offers no support for expanding the waiver beyond the 30-day period directly tied to the federal election date.

For these reasons, Plaintiffs lack statutory standing and their NVRA claims should be dismissed. *Scott*, 771 F.3d at 835–36.

B. Sovereign Immunity Bars Plaintiffs' Claims

1. The NVRA Does Not Abrogate Texas's Sovereign Immunity.

For the NVRA to abrogate Texas's sovereign immunity, Congress must have "unequivocally expresse[d] its intent to abrogate the immunity" through the text of the statute, and such an abrogation must have been "pursuant to a valid exercise of power." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (quoting *Green v. Mansour,* 474 U.S. 64, 68 (1985)). Plaintiffs cannot satisfy either component of this two-part test. Congress has not unequivocally expressed an intent to abrogate Texas's sovereignty in the text of the NVRA. Even if Congress had expressed such intent, the resulting attempt at abrogation would be an invalid exercise of its Article I power.

a. *Congress did not unequivocally abrogate Texas's sovereign immunity in the NVRA.*

"The standard for finding a congressional abrogation is stringent. Congress, this Court has often held, must make its intent to abrogate sovereign immunity unmistakably clear in the language of the statute." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 (2023) (internal quotations omitted). This stringent standard is applied "equivalently, in cases naming the federal government, States, and Indian tribes as defendants," and may be met in only two scenarios: (1) "when a statute says in so many words that it is stripping immunity from a sovereign entity," and (2) where "a statute creates a cause of action and authorizes suit against a government on that claim." *Id.* at 346–47.

For both scenarios, a clear showing of congressional intent to abrogate state sovereign immunity is found when "upon applying 'traditional' tools of statutory interpretation, Congress's abrogation of . . . sovereign immunity is 'clearly discernable' from the statute itself." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388, (2023) (quoting *F.A.A. v. Cooper*, 566 U.S. 284, 291 (2012)). Extratextual considerations, such as legislative history, "generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment[.]" *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Rather, "evidence of congressional intent must be both unequivocal and textual." *Id.* There is no requirement "that Congress use magic words" to satisfy this clear-statement rule. *Cooper*, 566 U.S. at 291. But in scenarios in which a statute arguably facially strips state immunity, "where a statute is susceptible of multiple plausible interpretations, including one preserving immunity, this Court will not consider a State to have waived its sovereign immunity." *Sossamon v. Texas*, 563 U.S. 277 (2011). "Any ambiguities in the statutory language are to be construed in favor of immunity." *Cooper*, 566 U.S. at 290. Where a statute arguably strips immunity through a cause of action, a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Dellmuth*, 491 U.S. at 231 (quoting *Atascadero State Hosp. v.*

Scanlon, 473 U.S. 234, 246 (1985)). And courts must "construe any ambiguities in the scope of a waiver [of sovereign immunity] in favor of the sovereign." *Id.* at 291.

In *Dellmuth*, the Supreme Court comprehensively applied this clear-statement standard to hold that the Education of the Handicapped Act (EHA)—a statute remarkably similar to the NVRA for purposes of sovereign immunity analysis—"does not evince an unmistakably clear intention to abrogate the States' constitutionally secured immunity from suit." *Id.* at 232. The EHA "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." *Id.* at 231. Neither does the NVRA. The "general statement of legislative purpose in the [EHA's] preamble," just like the one in the NVRA's preamble, "simply has nothing to do with the States' sovereign immunity." *Id.* The EHA provides for "judicial review for aggrieved parties," just as the NVRA creates causes of action for the Attorney General and private parties[1] under its enforcement provision. *Id.* (citing 20 U.S.C. § 1415(e)(2)); 52 U.S.C. §§ 20510(a), (b))). Both statutes "in no way intimate[] that the States' sovereign immunity is abrogated." *Id.* And given that the ambiguities in scope must be construed narrowly under this analysis, the NVRA's causes of action could not be held to apply to Plaintiffs, all of which bring suit in their official capacities as members of a political subdivision of Texas. Dkt. 1 ¶¶ 12–17.

Perhaps most importantly for this analysis, the EHA makes "frequent reference to the States," delineating for them an "important role in securing an appropriate education for handicapped children" that makes the States "logical defendants in suits alleging violations of the EHA." *Id.* at 232. As Plaintiffs themselves allege, the NVRA frequently references—and is even primarily directed at—States, imposing broad duties to facilitate voter registration by, *inter alia*, designating a chief State election official, establishing State voter registration agencies, and making registration forms available for distribution. Dkt. 1 ¶¶ 20–23, 27–33. But that such references and duties make Texas a "logical defendant[]" against Plaintiffs' alleged violations of the NVRA is merely the kind of "permissible inference" that cannot amount to "the unequivocal declaration"

[1] *See* 52 U.S.C. § 20510.

necessary to demonstrate "that Congress intended to exercise its powers of abrogation." *Dellmuth*, 491 U.S. at 232.

b. *Congress cannot validly abrogate Texas's sovereign immunity pursuant to its Article I powers.*

Even if Congress clearly abrogated Texas's sovereign immunity through the text of the NVRA, such an abrogation would not be one that is "pursuant to a valid exercise of power." *Seminole Tribe*, 517 U.S. at 58 (quoting *Green,* 474 U.S. at 68). For more than two centuries, the Supreme Court has affirmed "that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *see also Chisholm v. Georgia,* 2 U.S. 419 (1793); *Hans v. Louisiana,* 134 U.S. 1, 15 (1890). And for just as long, it has been incontrovertible "that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III." *Seminole Tribe*, 517 U.S. at 65 (citing *Marbury v. Madison,* 5 U.S. 137 (1803)). In light of this long-established precedent, "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72–73. Under this precedent, "Congress may not abrogate state sovereign immunity pursuant to its Article I powers." *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (citing *Seminole Tribe*, 517 U.S. at 72–73). The Supreme Court has reaffirmed this holding as recently as 2020. *See Allen v. Cooper*, 589 U.S. 248, 266–67 (applying *Florida Prepaid* to Article I's Intellectual Property Clause to find that it "could not provide the basis for an abrogation of sovereign immunity."). Because the NVRA was enacted pursuant to Congress' Article I Elections Clause authority, it cannot be read to abrogate Texas's sovereign immunity. *But see Pub. Int. Legal Found., Inc. v. Matthews*, 589 F. Supp. 3d 932 (C.D. Ill. 2022).

2. The Ex Parte Young Exception Does Not Apply.

Plaintiffs assert their claim under *Ex parte Young*, a narrow exception to standard sovereign immunity doctrine that is "tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 277 (1997) (quoting *Papasan v. Allain,* 478 U.S. 265, 277 (1986)). But neither of Plaintiffs' two counts for which they request relief fall within the precisely tailored bounds of *Young*.

The three elements of an *Ex parte Young* claim require Plaintiffs to (1) bring suit against state officers who are acting in their official capacities; (2) seek prospective relief to redress ongoing conduct; and (3) allege a violation of federal law. *Williams On Behalf of J.E. v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020). Plaintiffs' first claim for relief fails the second and third of those elements. According to Plaintiffs, Attorney General Paxton "*has* taken repeated actions," "*has* taken legal action," "*has* issued an advisory," and "*has* sought to frustrate" Plaintiffs' aims in alleged violation of the NVRA. Dkt. 1 ¶¶ 65–68. Each of these allegations is in the past tense; Plaintiffs identify no alleged violation of federal law that is ongoing and eligible for injunctive relief. Moreover, Plaintiffs identify no specific provision of the NVRA that any of the aforementioned actions could violate. The NVRA does not prohibit Texas from setting out, and suing to enforce, standards for voter registration. In fact, the NVRA's text explicitly grants the states broad autonomy to determine for themselves how best to carry out its provisions, stating that "notwithstanding any other Federal or State law, *in addition to any other method of voter registration provided for under State law*, each State shall establish procedures to register to vote in elections for Federal office." 52 U.S.C. § 20503(a) (emphasis added). The NVRA likewise does not prohibit a state Attorney General from sending out an advisory. Finally, Plaintiffs' *ipse dixit* assertion that Attorney General Paxton has interfered with their "duty" to mass-mail unsolicited voter registration applications is unsupportable by statutory text. The NVRA does not regulate political subdivisions, it regulates states. Defendants simply have no good faith argument that the NVRA compels them to make voter registration applications available in specific ways, even if those ways

violate state law or otherwise exceed their authority as representatives of a political subdivision of Texas.

The second count on which Plaintiffs request relief also fails to come within the narrow exception to sovereign immunity offered by *Ex Parte Young*. Under the *Young* exception, "[t]he officer sued must have some connection with the enforcement of the challenged act." *Lewis v. Scott*, 28 F.4th 659, 663 (5th Cir. 2022) (cleaned up) (citing *Ex ParteYoung*, 209 U.S. 123, 157 (1908). At a minimum, this connection requirement means that "[w]here a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, our *Young* analysis ends." *Id.* (quoting *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019)). A statutory enforcement mandate sufficient to satisfy the connection requirement under *Young* requires something "more than the general duty to see that the laws of the state are implemented." *City of Austin*, 943 F.3d at 999–1000; *Texas All. for Retired Americans v. Scott*, 28 F.4th 669, 672 (5th Cir. 2022). And a general duty to enforce Texas's election laws is precisely, and only, what Plaintiffs allege with regards to Secretary of State Nelson. Plaintiffs point to Secretary Nelson's "enforcement authority" under the NVRA (incorporated through Chapter 31 of the Texas Election Code) and obligation to facilitate local implementation of the NVRA's provisions under Section 81.25(b) of the Texas Administrative Code. Dkt. 1 ¶¶ 75, 77. The general enforcement duties of Secretary Nelson identified by Plaintiffs are insufficient to make the Secretary a proper party to suit under *Ex Parte Young*.

C. Plaintiffs Lack Standing to Bring Their Claims.

"[S]tanding is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation omitted). At the pleading stage, plaintiffs must "clearly . . . allege facts demonstrating each element" of standing. *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 338 (2016) (quotation omitted). A plaintiff must show: (1) an actual or imminent, concrete and particularized "injury-in-fact"; (2) that is fairly traceable to the challenged action of the defendant; and (3) that is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*,

504 U.S. 555, 561 (1992). Because Plaintiffs are "invoking federal jurisdiction," they "bear[] the burden of establishing these elements." *Lujan*, 504 U.S. at 561. The *Ex parte Young* analysis above "significantly overlap[s]" with the traceability and redressability analysis. *City of Austin*, 943 F.3d at 1002. The most important difference is that traceability and redressability are still required even when sovereign immunity is inapplicable. *See* U.S. Const. art. III, § 2.

Applying that standard here, Plaintiffs' claims should be dismissed. *First*, municipalities, as a rule, have no standing to sue the state that created it, and the very limited exception articulated in *Rogers v. Brockette* does not apply here since Travis County does not have federal statutory right put at risk by Texas election law. *Second*, Plaintiffs have not suffered any cognizable injury, both because their alleged injury is not concrete, and because the alleged injury does not exist. *Third*, Plaintiffs' putative injury is neither traceable to nor redressable by the Secretary of State. *Fourth*, Plaintiffs lack a private right of action under the NVRA because they have not been aggrieved by any violation of the NVRA and, even if they had been, they failed to comply with the statutory notice provision required to bring a private right of action, thus depriving them of standing.

1. Counties Cannot Sue Their Parent States

Precedent firmly establishes that local governments lack standing to sue their parent States. *See*, *e.g.*, *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923); *Town of Ball v. Rapides Par. Police Jury,* 746 F.2d 1049, 1051 n.1 (5th Cir. 1984). In *Rogers v. Brockette*, the Fifth Circuit recognized, at most, a narrow exception for claims under the Supremacy Clause vindicating a federally-created statutory right, but the Travis County Plaintiffs do not fit within the pocketsized carve out. 588 F.2d 1057 (5th Cir. 1979). There, a school district "allege[d] that Congress [] made it the proper body to decide" certain questions under the federal breakfast program but that the State had deprived the school district of that federally-conferred discretion. *Id.* at 1062. Here, in contrast, Plaintiffs admit that the NVRA explicitly designates the Secretary of State as the officer responsible for making forms available for distribution. *See* Dkt. 1 ¶ 29 (quoting 52 U.S.C. § 20505(b)). Their

objection is that the State, in *its* discretion, has chosen alternative means to distribute voter registration forms than the method Plaintiffs prefer.

The bar on political subdivisions bringing suit against their parent states applies here even though Travis County itself is not a named party. It is well understood that government officials can be a party to legal proceedings in two different capacities: an official capacity and a personal (or individual) capacity. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citing *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). In his personal capacity, a government official is treated as an individual, not as a governmental entity. *See id.* In his official capacity, on the other hand, a government official is treated as the government entity he represents. *See id.* ("[T]he real party in interest in an official-capacity suit is the governmental entity and not the named official . . . ."). Indeed, "in an official capacity claim, one can readily replace the named individual with the name of the office itself." *Cooke v. Hickenlooper*, No. 13-cv-1300, 2013 WL 6384218, at *9 (D. Colo. Nov. 27, 2013), aff'd in part sub nom. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016) (noting that "an official capacity claim brought by 'John Cooke, Sheriff of Weld County,' is actually a claim being brought by the Weld County Sheriff's Office").

Thus, an official-capacity plaintiff can assert only those rights that belong to the relevant governmental entity—and faces the same limitations the governmental entity would. *See id.; Williams v. Corbett*, 916 F. Supp. 2d 593, 598 (M.D. Pa. 2012), aff'd sub nom. *Williams v. Governor of Pa.*, 552 F. App'x 158 (3d Cir. 2014) ("[E]ven if we were to find that the Plaintiffs' official capacity claims cloaked them with the authority to litigate on behalf of the City, we would nonetheless conclude that the political subdivision standing doctrine bars the Plaintiffs' claims. It is illogical to presume that an officer suing in an official capacity on behalf of a political subdivision might have greater standing to maintain a lawsuit than would the political subdivision that official represents."); *Gregoire v. Rumsfeld*, 463 F. Supp. 2d 1209, 1223 (W.D. Wash. 2006) (holding that precedent prohibiting a state from suing without a private cause of action also prohibited a state's governor from suing in her official capacity without a private cause of action).

Because Travis County cannot sue Defendants, Plaintiffs, all of whom brought suit in their official capacities, cannot either. Their claims should fail on this ground alone.

3. Plaintiffs Have Suffered No Cognizable Injury.

It is axiomatic that for a party to have standing, that party must suffer an injury in-fact. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 330 (2016), as revised (May 24, 2016) (citing *Lujan,* 504 U.S. at 560–561). 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). Here, Plaintiffs' injury is not concrete.

Plaintiffs' claims, as misleading as they are, merely amount to the idea that Plaintiffs do not want a state court to compel them to follow state law. They claim that they have a legal obligation under the NVRA to engage in the mass-mailing of voter registration applications. Dkt. 1 ¶ 66. As discussed below, *see infra*, Section IV.D., Plaintiffs have neither the duty nor the discretion to mail applications to individuals who have not requested an application. "[I]njuries are concrete only if they bear a 'close relationship' to injuries that courts have traditionally recognized as concrete." *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 822 (5th Cir. 2022). And the State seeking otherwise valid redress for Plaintiffs' illegal actions in a jurisdictionally appropriate state court does not rise to the level of a concrete injury. *See id.*

Moreover, Plaintiffs cannot have suffered an injury because they completed their unlawful objective. On September 26, 2024, in this lawsuit's now-remanded sister case, Plaintiffs affirmatively advised the Court that "the mailing of voter registration applications for the 2024 General Election that began in June of this year is concluded." Ex. 4 at 1 (Supplemental Resp. to Remand, *The State of Texas v. Bruce Elfant, et. al.,* Cause No. 1:24-cv-01096-DII). If this statement is true and Plaintiffs have mailed all of the applications that they set out to mail to Travis County residents, then the State could not have possibly interfered in or impeded the exercise of any right that Plaintiffs think they may have. Put more succinctly, the injury of which Plaintiffs complain—

that they were being prevented from mass-mailing applications—never actually occurred. They cannot therefore have suffered any injury because they accomplished what they set out to do.

4. Plaintiffs cannot establish traceability or redressability to Secretary Nelson.

To have standing, a plaintiff must also show that their injury is traceable to the conduct of a defendant and that the injury is redressable by court order. *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42 (1976); *Lujan*, 504 U.S. at 562–63. Plaintiffs can show neither of these factors as they relate to Secretary Nelson.

Plaintiffs' claim against Secretary Nelson is that she somehow had the duty and ability to prevent the Attorney General from suing the Plaintiffs in state court for Plaintiffs' violations of state law. Dkt. 1 ¶¶ 74–84. The constitutional and legal issues with this notwithstanding, Plaintiffs have not shown (and cannot show) that Secretary Nelson engaged in any sort of conduct that led to Plaintiffs' imaginary injury, nor can an order from this Court redress that same perceived injury.

Plaintiffs could only trace their non-injury to Secretary Nelson on the theory that she had some unspecified affirmative duty to restrain the Attorney General from suing Plaintiffs. Dkt. 1 ¶¶ 74–84. As discussed below, *infra* Section IV.D., Secretary Nelson had no such affirmative duty to prevent the Attorney General from seeking redress on behalf of the State for Plaintiffs' violations of state law. The Attorney General acted independently of the Secretary of State, and thus there is no way for Plaintiffs to trace their injury to Secretary Nelson's conduct. *See Lujan*, 504 U.S. at 560 (citing *Simon*, 426 U.S. at 41–42).

Plaintiffs' claims are also not redressable by the Court. "To satisfy redressability, a plaintiff must show that 'it is *likely,* as opposed to merely *speculative*, that the injury will be redressed by a favorable decision.'" *Inclusive Communities Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). Plaintiffs seek declaratory and injunctive relief against Secretary Nelson that will "cause Defendant Nelson to enforce the NVRA against Defendant Paxton and any other state official

working in concert with him or otherwise interfering with Plaintiffs' fulfillment of their NVRA duties and responsibilities." Dkt. 1 ¶ 84. But such relief will not redress Plaintiffs' alleged injuries.

Ordering Secretary Nelson to control the actions of the Attorney General will not redress the Plaintiffs' non-injury. There is no statute or precedent, constitutional or otherwise, that permits the Secretary of State, a constitutional officer of the State of Texas, to control the actions of the Attorney General, another constitutional officer of the State of Texas. *See* Tex. Const. art. IV, § 1. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). And indeed, because the relief sought against the Secretary of State will have no effect on redressing Plaintiffs' non-injury, Plaintiffs lack standing and cannot therefore avail themselves of the Court's jurisdiction via Article III standing.

5. Plaintiffs do not have a private right of action under the NVRA.

Plaintiffs' standing argument further fails because they lack a private right of action under the NVRA. Section 10(b) of the NVRA provides a private right of action for those "aggrieved" by violations of the NVRA. 52 U.S.C. § 20510. Plaintiffs are not entitled to this private right of action for three distinct reasons. First, Plaintiffs have not been aggrieved by any violation of the NVRA. Second, Plaintiffs failed to provide notice and thus, this cause of action is unavailable to them. And third, because they did not provide notice, the notice period has not run, and Plaintiffs again fail to show the private COA is available to them.

As discussed below, *see infra*, Section IV.D., Plaintiffs have not been aggrieved by a violation of the NVRA. Their entire claim rests on the faulty contention that they have a duty to conduct indiscriminate mass mailings of voter registration applications to Travis County residents. Dkt. 1 ¶ 66. But this is untrue. The NVRA imposes a litany of duties on the Secretary of State,[2] not on county officials. *See*, *e.g.*, 52 U.S.C. § 20505(b). Because the Plaintiffs have no affirmative duty under the NVRA to participate in their unlawful actions, the Attorney General, cannot, as a

[2] The Secretary of State has consistently complied with the NVRA's mandates.

matter of law, interfere with those duties. It is therefore impossible for Plaintiffs to be "aggrieved" by a violation of the NVRA, because no such violation has taken place.

Additionally, as discussed above, Plaintiffs entirely failed to comply with the notice provision of the NVRA. *See supra*, Section IV.A. In consequence, Plaintiffs also lack standing to assert a private right of action under Section 10(b). *See Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014). Similarly, Section 10(b) requires that a state be allowed a period of 20 days[3] from the date of a party's notice of an NVRA violation to remedy that violation before a party can enforce his private right of action. 52 U.S.C. § 10(b)(2). Because notice has not been given to the State, the time period in which the State may remedy the alleged violation has not yet run, further depriving the Plaintiffs of standing to bring their private right of action. And so, for the foregoing reasons, Plaintiffs lack standing because they have not complied with the statutory prerequisites to bring a private right of action for alleged violations of the NVRA.

D. Plaintiffs' Claims Fail as a Matter of Law.

The foregoing arguments notwithstanding, Plaintiffs' claims fail as a matter of law because they have not stated a valid claim under the NVRA. The Court must therefore dismiss Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs assert that Attorney General Paxton has acted to prevent Plaintiffs from carrying out a duty under federal law and that such action is preempted by the NVRA. Dkt. 1 ¶¶ 62–73. This is plainly incorrect as a matter of law. Plaintiffs first assert, somewhat bafflingly, that they have an affirmative duty under the NVRA, to indiscriminately mail out voter applications forms *en masse* to Travis County residents. They further allege that the Attorney General is interfering with that duty. This self-serving reading of the law is overly broad and deprives the State of any discretion over its own voting laws and procedures. It further belies the plain language of the NVRA, which imposes a duty only on the Secretary of State, as the Chief Election Officer, to make applications available by mail, among other means. *See* 52 U.S.C. § 20509 (requiring the

[3] Or 90 days if the notice is sent more than 120 days prior to an election.

designation of a chief State election officer who is "responsible for coordination of State responsibilities under" the NVRA); Tex. Elec. Code § 31.001(a) ("The secretary of state is the chief election officer of the state.").

The NVRA provides that "[t]he chief State election official of a State shall make [voter registration forms] available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs." 52 U.S.C. § 20505(b). This provision does not impose a duty upon county officials—such as Plaintiffs—instead, it imposes a duty on the Texas Secretary of State to simply make voter application forms available by mail. And the Secretary of State has done just that. A county election official *must* furnish a reasonable amount of voter registration applications upon request. *See* Tex. Elec. Code § 1.010(b) ("The authority shall furnish forms in a reasonable quantity to a person *requesting* them for the purpose of submitting or filing the document or paper.") (emphasis added). Neither Defendant here contests that Travis County may mail voter registration applications to an individual upon request. In fact, this is a practice regularly undertaken by the Secretary of State.

Plaintiffs cannot therefore claim that the Attorney General is somehow interfering with a duty imposed on Defendants by federal law, because no such duty exists. That the Attorney General sought to restrain Plaintiffs from engaging in activity that violates state law is the right of the Attorney General, and Plaintiffs' cleverly disguised gripes twist the NVRA's words beyond their plain meaning.

Plaintiffs' claim against Secretary Nelson must also fail as a matter of law. They contend, *inter alia,* that Secretary Nelson had a duty to ensure that state actors comply with the NVRA, and that Secretary Nelson failed to do so. Dkt. 1 at ¶ 75 (citing *Scott v. Schedler*, 771 F.3d 831, 833 (5th Cir. 2014)). Plaintiffs' reading of *Scott* is entirely too narrow and ignores the underlying statutory framework of the NVRA.

Scott involved a case where the individual Louisiana state agencies failed to comply with the edicts of Section 7 of the NVRA. *Id.* at 833–34; 52 U.S.C. § 20507. Specifically, voter registration agencies, such as the Louisiana Department of Children and Family Services (DCFS),

are required to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" and to "ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public." 52. U.S.C. §§ 20507(a)(4)–(6). The Fifth Circuit held, in part, that the Louisiana Secretary of State was a proper party to the plaintiffs' lawsuit because he had the authority to compel the state voter registration agencies to comply with the NVRA. *Scott*, 771 F.3d at 839.

The holding in *Scott* is wholly inapplicable to Plaintiffs' case for two reasons. *First*, as discussed above, Travis County has no duty under the NVRA to mail voter registration applications *en masse*. *Second*, *Scott* relates specifically to the Secretary of State's power as it related to regulating the actions of voter registration agencies. The term "voter registration agency" is a defined term in the NVRA. *See* 52 U.S.C. § 20502(4). The Attorney General is not a voter registration agency. *See* 52 U.S.C. § 20506(a)(1) ("Each State shall designate agencies for the registration of voters in elections for Federal office."); *see also* Tex. Elec. Code § 20.001 (designating voter registration agencies in Texas). The Attorney General has no affirmative obligations to make voter registration applications available under the NVRA, and therefore, Secretary Nelson had no affirmative duty to compel him to act in a certain way. Moreover, it would be antithetical to the purpose of the justice system if the Secretary of State could somehow prevent the Attorney General for seeking relief from a jurisdictionally competent court for Plaintiffs' violations of state law. Plaintiffs' claims therefore fail as a matter of law and must be dismissed. *See Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."), abrogated by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

CONCLUSION

For the foregoing reasons, all of Plaintiffs' claims should be dismissed.

Date: October 15, 2024,

KEN PAXTON
Attorney General of Texas

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

Respectfully submitted,

/s/Ryan G. Kercher
RYAN G. KERCHER
Deputy Chief, Special Litigation Division
Texas State Bar No. 24060998

KATHLEEN T. HUNKER
Special Counsel
Texas State Bar No. 24118415

ZACHARY L. RHINES
Assistant Attorney General
Texas 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 DEFENDANTS

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(a), I hereby certify that on October 15, 2024, a true and correct copy of the above and foregoing document has been filed and served to all counsel and parties of record using the CM/ECF system.

/s/Ryan G. Kercher
RYAN G. KERCHER
Deputy Chief, Special Litigation Division