Case No. 22–30181

In the United States Court of Appeals
for the Fifth Circuit

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Remingtyn A. Williams, on behalf of themselves and all other persons similarly situated; Lauren E. Chustz, on behalf of themselves and all other persons similarly situated; Bilal Ali-Bey, on behalf of themselves and all other persons similarly situated,
Plaintiffs—Appellees

v.

Lamar A. Davis, in his official capacity as
Superintendent of the Louisiana State Police,
Defendant—Appellant

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On interlocutory appeal from the United States District Court
for the Eastern District of Louisiana, Case No. 2:21–CV–852

# Response Brief of Plaintiffs—Appellees


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**Certificate of Interested Persons, Williams et al. v. Davis, Case No. 22-30181**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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| Brian Bissell | Officer; defendant in underlying class action |
| Douglas Boudreau | Officer; defendant in underlying class action |
| Jonathan Burnette | Officer; defendant in underlying class action |
| Merlin Bush | Lieutenant; defendant in underlying class action |
| John Cabral | Officer; defendant in underlying class action |
| LaToya Cantrell | Defendant in consolidated case number 21-1079 |
| City of New Orleans | Defendant in consolidated case number 21-1079 |
| Matthew Connolly | Officer; defendant in underlying class action |
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| Michael Crawford | Defendant in consolidated case number 21-1079 |
| Jeffrey Crouch | Officer; defendant in underlying class action |
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| Demond Davis | Officer; defendant in underlying class action |
| David DeSalvo | Officer; defendant in underlying class action |
| Michael Devezin | Officer; defendant in underlying class action |
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| Wesley Humbles | Officer; defendant in underlying class action |
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| Devin Joseph | Officer; defendant in underlying class action; defendant in consolidated case number 21-1079 |
| Jamal Kendrick | Officer; defendant in underlying class action |
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| Lamont Walker | Sergeant; defendant in underlying class action |
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s/Thomas V. Burch
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## Statement Regarding Oral Argument

We respectfully request oral argument. The district court ruled that the plaintiffs have standing to sue the Superintendent and that the Superintendent is not immune from suit under the Eleventh Amendment. Now, in this interlocutory appeal of the immunity ruling under the collateral-order doctrine, the Superintendent asks this Court to rule not only on immunity, but also on standing. But the ruling on standing does not fall under the collateral-order doctrine, and the district court did not certify that ruling for interlocutory review under 28 U.S.C. § 1292. That means the only way this Court may review standing is under its pendent appellate jurisdiction. Because exercising that jurisdiction "is only proper in rare and unique circumstances,"[1] and because the inquiry for Eleventh Amendment immunity is, by contrast, "straightforward,"[2] we respectfully ask for oral argument to address any questions the Court may have about the Superintendent trying to bootstrap the standing question into this narrow interlocutory appeal on Eleventh Amendment immunity.

[1] *Escobar v. Montee*, 895 F.3d 387, 392 (5th Cir. 2018).

[2] *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

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## Statement Regarding Jurisdiction

The Superintendent moved to dismiss the plaintiffs' claims based on Eleventh Amendment immunity and lack of standing, but the district court denied his motion on March 30, 2022. ROA.1257–59. He filed a notice of interlocutory appeal challenging the immunity ruling on April 12, 2022. ROA.1294. He also, in his opening brief, challenged the district court's ruling on standing. *See, e.g.*, Opening Br. at 24. This Court has jurisdiction over the immunity challenge under the collateral-order doctrine. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Because the standing ruling is not a collateral order, and because the Superintendent did not ask the district court to certify its ruling on standing for interlocutory review under 28 U.S.C. § 1292, the only way the Court may review that ruling is by exercising its pendent appellate jurisdiction. *Swint v. Chambers County Commission*, 514 U.S. 35, 49–51 (1995). But as we address in the argument section, exercising that jurisdiction "is only proper in the rare and unique circumstances articulated by *Swint*," and we respectfully ask the Court to find that those circumstances are not present here. *See Escobar v. Montee*, 895 F.3d 387, 392 (5th Cir. 2018) (cleaned up).

## Statement of the Issues

Following a protest that was dispersed by officers with batons, tear gas, and impact projectiles, the putative class action plaintiffs (the "plaintiffs") sued the Superintendent of the Louisiana State Police in his official capacity, the Superintendent of the New Orleans Police Department in his official capacity, the Sheriff of Jefferson Parish in his official capacity, and multiple individual officers in their individual capacities. The Superintendent of the Louisiana State Police (the "Superintendent") moved to dismiss the plaintiffs' claims based on Eleventh Amendment immunity and lack of standing. But the district court denied those defenses, and the Superintendent filed this interlocutory appeal under the collateral-order doctrine challenging the court's immunity ruling. His interlocutory appeal raises two questions:

1. Did the plaintiffs satisfy the pleading requirements for the *Ex parte Young* exception to Eleventh Amendment immunity by suing the Superintendent in his official capacity, alleging an ongoing violation of federal law, and requesting prospective relief?
2. Can the Superintendent invoke this Court's pendent appellate jurisdiction to bootstrap review of the district court's ruling on standing into his interlocutory appeal of the district court's ruling on Eleventh Amendment immunity?

## Statement of the Case

**The protest.** Following George Floyd's murder, Remingtyn Williams, Lauren Chustz, Bilal Ali-Bey (collectively, the "plaintiffs") and many others gathered in New Orleans, Louisiana, to protest the mistreatment of people of color by some in law enforcement. ROA.45, 48. Their protests were peaceful—and free from altercations with the police—for the first five days. ROA.58–59. But then they marched toward the Crescent City Connection (the "CCC") on day six, planning to peacefully march across it like they had done the night before on another elevated roadway nearby. ROA.58–59.

On their way, they were met by a barricade of officers from the Louisiana State Police, the Jefferson Parish Sheriff's Office, and the New Orleans Police Department. ROA.59–60. The officers were dressed in full riot gear, holding batons and shields, and they had impact munitions and canisters of tear gas. ROA.59, 61–63. Their barricade was "backed by a convoy of police vehicles," and a police helicopter hovered overhead. ROA.59. Some of the officers on the front line had their first "riot control" training that day. ROA.59.

Blocked by these obstacles, the marchers asked the officers to let them pass and join the march, as some officers had done on previous nights. ROA.60–61, 69, 71. The officers declined, though, and a "small group" of "agitated" marchers passed

through an opening in the barricade. ROA.60–61, 69 (explaining that "some officers allowed them to pass through the police line"). When that happened, officers began firing canisters of tear gas into the crowd, giving no warning to the protestors beforehand. ROA.61–63. The officers also fired the canisters of tear gas as the crowd retreated, and they fired their impact munitions, too, hitting the marchers with foam bullets, Stinger rounds, and sponge grenades as they scrambled away. ROA.61–63, 67.

Each of the plaintiffs was directly injured by this conduct—suffering from either tear gas exposure or projectile impact. ROA.48, 61–63, 69–73. Specifically, Plaintiff Ali-Bey—a Black man—was shot in the leg with projectiles. ROA.73. Likewise, Plaintiff Williams—a Black man—was exposed to tear gas, struck once with a projectile, and struck multiple times with batons and shields. ROA.69. And Plaintiff Chustz—a White woman—was exposed to tear gas, causing ongoing irregularities with her menstrual cycle; she also sustained physical injuries when she, like hundreds of other demonstrators, ran away from the officers' use of force. ROA.72.

**The complaint.** The plaintiffs filed a class action complaint before the Honorable Greg G. Guidry in the United States District Court for the Eastern District of Louisiana. ROA.42–116. Relevant to this interlocutory appeal, the complaint named the Superintendent of the Louisiana State Police—Colonel Lamar Davis (the

"Superintendent")—as a defendant in his official capacity, alleging that he is responsible for, among other things, hiring, training, and supervising his department's officers, and creating, implementing, and monitoring his department's policies. ROA.42, 50.

That matters, according to the complaint, because officers of the Louisiana State Police were "present" at the CCC protest, "provid[ed] assistance" to the New Orleans Police Department until the protest dispersed, and "failed to intervene to protect the peaceful protestors." ROA.44, 58, 60. It matters, too, according to the complaint, because these officers' conduct was consistent with a practice of the Louisiana State Police to disproportionately use force—or disproportionately fail to intervene when force is used—against racial minorities and anyone who challenges police misconduct or racial injustice. ROA.77–82, 92–95, 112, 115.

For example, the complaint alleged that the Louisiana State Police have "a well-documented history of racism against Black people," a "years-long trend" of "openly displaying racist attitudes and behaviors," a "discriminatory" willingness to "use force on protest[s] against racial injustice and police brutality," and a tendency to "practice reasonable restraint in using force" for "protests attended by largely White attendees," even when those White attendees are breaking the law. ROA.47–48, 77–81, 92 (explaining, for example, that the Louisiana State Police did not arrive

with "riot gear, tanks, or tear gas" when an "overwhelmingly white" group of 250 demonstrators protested COVID-19 restrictions at the Governor's mansion). Likewise, the complaint alleged that a consistent failure to train and discipline officers against these behaviors has perpetuated misconduct because officers know they will face no repercussions for engaging in them. ROA.94 (explaining that the Louisiana State Police "did not have an adequate and enforceable use of force policy in place" for the CCC protest and that it has "policies, practices, or customs that enable its officers to lawlessly use excessive force against people of color"); ROA.92 ("Under Defendant L. Davis' leadership, this policy, practice and custom of using excessive force against Black people has only continued.").

At bottom, the complaint alleged that the Louisiana State Police's "pattern and practice" of violating the First, Fourth, and Fourteenth Amendment rights of people of color (and those advocating for them) has created a "chilling effect" on their right to "freely and lawfully protest without fear of police interference, harassment, intimidation or abuse." ROA.104–07, 112, 115 (explaining, for example, that the plaintiffs are "threatened with future violation of their constitutional rights due to [the Louisiana State Police's] pattern and practice of subjecting people of color and those advocating for them to excessive force"). Because of that, the complaint asked the district court to enjoin the Louisiana State Police from:

- disparately responding to protests over racial injustice and police misconduct;
- targeting Black citizens for the use of excessive force;
- failing to properly train and supervise officers regarding when they may use force;
- failing to intervene when its officers see others using excessive force; and
- continuing to implement unconstitutional crowd control policies that condone, for example, officers discharging tear gas and impact projectiles at peaceful, retreating crowds. ROA.75, 92–94, 103–07, 759–62.

**The motion to dismiss.** The Superintendent moved to dismiss the plaintiffs' complaint, arguing among other things that he is immune from suit under the Eleventh Amendment and that the plaintiffs lack standing to sue. ROA.674 ("Plaintiffs request no viable prospective relief which would trigger the *Ex parte Young* exception to sovereign immunity."); ROA.677 ("Plaintiffs do not allege any concrete or particularized future injury which may occur."). Judge Guidry denied both defenses, finding—based on the allegations in the complaint—that:

- the Louisiana State Police "were on-scene" at the CCC protest and "failed to intervene";
- the Louisiana State Police have a history of "disproportionately respond[ing]" to protests over racial injustice and police misconduct;

- the Louisiana State Police have "developed policies that encouraged the use of excessive force, or at least discouraged intervention";
- the Superintendent "has not curtailed these unconstitutional practices";
- the plaintiffs would "protest in the future" but for the Louisiana State Police's unconstitutional policies and customs; and
- the plaintiffs seek "prospective relief to address the ongoing systemic policies and customs that will lead to further harm." ROA.1257–59.

**The interlocutory appeal.** The Superintendent filed a timely notice of interlocutory appeal, stating that he would appeal "under the collateral order doctrine" the district court's decision to deny "his claim of Eleventh Amendment sovereign immunity." ROA.1294. He did not ask the district court to certify its ruling on standing for interlocutory appeal under 28 U.S.C. § 1292. ROA.33–41. But now, in this interlocutory appeal of the district court's immunity ruling, he asks this Court to review the standing ruling, too. *See, e.g.*, Opening Br. at 24.

## Standard of Review

On interlocutory appeal of a motion to dismiss like the Superintendent's, this Court accepts the plaintiffs' fact allegations as true. *Gonzales v. Dallas County, Tex.*, 249 F.3d 406, 411 (5th Cir. 2001) ("[O]n interlocutory appeal the public official must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal

issues raised by the appeal."). This Court reviews the legal issues raised by the motion to dismiss, including the issue of sovereign immunity, de novo. *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 424 (5th Cir. 2020); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 (5th Cir. 2008).

## Summary of the Argument

This Court should dismiss the Superintendent's appeal for two reasons. First, the district court correctly denied the Superintendent's sovereign immunity defense because the plaintiffs sued him in his official capacity, alleged ongoing violations of federal law, and requested prospective relief—thus satisfying *Ex parte Young*'s three pleading requirements. Second, this is not one of the "rare and unique" cases where this Court should exercise its pendent appellate jurisdiction to review the district court's ruling on standing; but if it does, it should affirm the district court's conclusion that the plaintiffs have standing to sue the Superintendent "at this time."

## I. The district court correctly denied the Superintendent's Eleventh Amendment immunity defense.

The Superintendent argues that the plaintiffs do not satisfy the *Ex parte Young* exception to Eleventh Amendment immunity and that Congress did not abrogate Eleventh Amendment immunity when creating Section 1983, thereby leaving him immune from suit under that statute. Because the district court correctly rejected each of those arguments, we respectfully ask this Court to affirm.

First, while the Eleventh Amendment generally gives state officials immunity from federal lawsuits, the Supreme Court recognized an exception in *Ex parte Young* for lawsuits (1) against official-capacity defendants (2) that seek prospective relief (3) to remedy ongoing violations of federal law. Here, the plaintiffs have satisfied those pleading requirements. To start, no one disputes that the plaintiffs have sued the Superintendent in his official capacity. On top of that, the plaintiffs allege that the Louisiana State Police and its officers follow policies, practices, and customs that authorize discriminatory conduct, including disproportionate use of excessive force against people of color and disparate responses to protests against racial injustice and police misconduct. Because those ongoing policies, practices, and customs have chilled the plaintiffs' willingness to protest against racial injustice and police misconduct going forward, the plaintiffs requested an injunction against their continued use. The plaintiffs thus satisfied the "straightforward inquiry" into whether they have sought prospective relief to remedy ongoing violations of federal law. As a result, this Court should affirm the district court's denial of the Superintendent's sovereign immunity defense.

Second, the Superintendent argues that he is immune from suit because Congress did not abrogate sovereign immunity when it created Section 1983. But his argument is contradicted by the very case that he cites for it: *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). In particular, *Will* recognizes that while Congress

did not abrogate sovereign immunity when it created Section 1983, suits that satisfy the *Ex parte Young* exception to immunity are still permissible. In short, *Will* does not support the Superintendent's position.

## II. This Court should not exercise pendent jurisdiction to review standing, but if it does, the plaintiffs have standing to sue the Superintendent.

The Superintendent did not ask the district court to certify its ruling on standing for interlocutory review, and his notice of interlocutory appeal stated only that he would be appealing the district court's immunity ruling. But now, in his opening brief, he asks this Court to review the standing ruling anyway. In fact, the Superintendent's opening brief treats standing and Eleventh Amendment immunity interchangeably, arguing that he is immune from suit because the plaintiffs lack standing to sue.

The problem with that is: Eleventh Amendment immunity and standing are distinct concepts. While a ruling on Eleventh Amendment immunity is reviewable on interlocutory appeal under the collateral-order doctrine, a ruling on standing is not. That means the *only* way this Court can review standing in this interlocutory appeal is by exercising its "carefully circumscribed" pendent jurisdiction. But exercising that jurisdiction is appropriate only in "rare" cases where the issues are "inextricably intertwined" or "necessary to ensure meaningful review" of each other. This is not one of those cases. Nevertheless, if this Court disagrees, it should still affirm the district court because the plaintiffs have standing to sue the Superintendent.

As an initial matter, standing and immunity are not "inextricably intertwined" or "necessary to ensure meaningful review" of each other because they are distinct defenses with different elements and purposes. Since a ruling on standing is not a ruling on immunity from suit, for example, it is reviewable "through the normal course of appellate review." That is why the district court reviewed these defenses separately, and that is why it is not "essential" to review standing now in this narrow interlocutory appeal. To decide otherwise will result in this Court previewing its thoughts on standing for all of the defendants who remain in front of the district court *before* the district court has an opportunity to definitively address standing itself. That would be inconsistent not only with the "carefully circumscribed" exceptions to the bar on exercising pendent jurisdiction, but also with Congress's power to define how interlocutory appeals work. Based on these considerations, we respectfully ask this Court to decline pendent jurisdiction over the district court's standing ruling.

But if this Court nevertheless decides to address standing, the plaintiffs have satisfied its requirements "at this time," as the district court reasonably found. In particular, the plaintiffs allege that the Louisiana State Police employs policies, practices, and customs that violate the plaintiffs' First, Fourth, and Fourteenth Amendment rights—which was recently evidenced, according to the plaintiffs, by its officers failing to intervene as excessive force was used against the plaintiffs at the CCC protest. That

matters because the plaintiffs have alleged that the officers' failure at that protest, combined with the discriminatory policies, practices, and customs of the Louisiana State Police, has made the plaintiffs fearful of peacefully protesting racial injustice or police misconduct in the future. Put another way, their willingness to participate in those protests has been chilled because they do not "want to run the risk of something like this happening again."

The Superintendent nevertheless argues that this case should be dismissed for lack of standing because it is no different than *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). But there, unlike here, the plaintiff did not allege that the individual officer's conduct was authorized by the city; and there, unlike here, the plaintiff did not allege that the individual officer's conduct chilled the exercise of his First Amendment rights. On top of that, the Superintendent argues that *Lyons* controls because the plaintiff there, like the plaintiffs here, was engaged in "misconduct" when excessive force was used against him. But the plaintiffs here were peacefully protesting in a manner that the state had allowed for the previous five days. And more importantly, the plaintiffs have alleged that they intend to "lawfully" protest racial injustice and police misconduct in the future but for the discriminatory policies, practices, and customs of the Louisiana State Police. The Superintendent has not contested that allegation, and he cannot ask this Court to overlook it now.

In short, *Lyons* should not control the outcome on standing here. The plaintiffs have alleged that the Louisiana State Police's policies, practices, and customs authorize its officers to engage in racially discriminatory conduct that violates their constitutional rights (as illustrated by the Louisiana State Police's failure to condemn or punish such conduct, and by its willingness to hide such conduct from the public). The plaintiffs have alleged, too, that those policies, practices, and customs have chilled their willingness to engage in peaceful protests. That is sufficient to show an injury-in-fact that is traceable to and redressable by the Louisiana State Police. As a result, the plaintiffs have standing to sue the Superintendent in this case.

## Argument

Remingtyn Williams, Lauren Chustz, and Bilal Ali-Bey (collectively, the "plaintiffs") filed a class action complaint against Colonel Lamar Davis (the "Superintendent") alleging that the Louisiana State Police disproportionately use force—and disproportionately fail to intervene when force is used—against minorities and anyone who challenges police misconduct or racial injustice. ROA.77–82, 92–95, 112, 115. The Superintendent moved to dismiss, arguing that he is immune from suit under the Eleventh Amendment and that the plaintiffs lack standing to sue. ROA.674, 677. Judge Guidry denied those defenses, finding that the plaintiffs satisfied the *Ex parte Young* exception to sovereign immunity and that they sought "prospective relief to address the ongoing systemic policies and customs" of the Louisiana State Police. ROA.1257–59. After that, the Superintendent filed a notice of interlocutory appeal under the collateral-order doctrine to challenge the district court's immunity ruling. ROA.1294. And now, in his opening brief, he has challenged the court's standing ruling as well, even though that ruling does not qualify as a collateral order that can be reviewed through interlocutory appeal. *See, e.g.*, Opening Br. at 24.

This Court should dismiss the Superintendent's appeal for two reasons. First, the plaintiffs sued the Superintendent in his official capacity, alleged an ongoing violation of federal law, and requested prospective relief, thus satisfying *Ex parte Young*'s

three pleading requirements. Second, this is not one of the "rare and unique" cases where this Court should exercise its pendent appellate jurisdiction to review standing, but if it does, the plaintiffs have standing to sue the Superintendent.

## I. The plaintiffs' complaint satisfies the *Ex parte Young* exception to sovereign immunity, and the fact that Section 1983 did not abrogate sovereign immunity is beside the point.

The plaintiffs wish to enjoin the racist policies, practices, and customs of the Louisiana State Police. *See, e.g.*, ROA.94 ("LSP's involvement in the attack on the CCC was not an anomaly, as it was undertaken pursuant to *de facto* LSP policies, practices, or customs that enable its officers to lawlessly use excessive force against people of color and those advocating for them."). To achieve that goal, the plaintiffs sued the Superintendent in his official capacity under 42 U.S.C. § 1983 "to vindicate their rights guaranteed by the First, Fourth, and Fourteenth Amendments to the United States Constitution." ROA.49. They also asked the district court to exercise supplemental jurisdiction over related state law claims under 28 U.S.C. § 1367. ROA.49.

The Superintendent moved to dismiss, arguing that the plaintiffs do not satisfy the *Ex parte Young* exception to Eleventh Amendment immunity, and that Congress did not abrogate Eleventh Amendment immunity when creating Section 1983, thus

leaving him immune from suit under that statute. Because the district court correctly rejected each of those arguments, we respectfully ask this Court to affirm.[3]

### A. The plaintiffs sued the Superintendent for prospective relief to stop ongoing violations of the federal constitution.

The Eleventh Amendment bars federal lawsuits against state officials unless those officials are sued (1) in their official capacity (2) for prospective relief (3) to remedy an ongoing violation of federal law. *See Ex parte Young*, 209 U.S. 123, 155–56 (1908). This exception to immunity "does not require an analysis of the merits of the claim." *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019). Rather, it involves "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

The Superintendent does not dispute that the plaintiffs have satisfied the first *Ex parte Young* requirement. *See* Opening Br. at 12 ("Col. Davis is named as a defendant to this lawsuit only in his *official capacity* as a State official.") (emphasis in original). Instead, mixing the immunity and standing analyses, the Superintendent argues that

[3] The Superintendent also argued that the Eleventh Amendment bars the plaintiffs from suing him in his official capacity in federal court for violating state law, but the district court did not rule on that question. The Superintendent has now raised the issue again on appeal, and we believe he is correct. *See, e.g.*, *McKinley v. Abbott*, 643 F.3d 403, 406 (5th Cir. 2011).

there is no "ongoing threat of actual or imminent injury" and that the plaintiffs seek "no viable prospective relief." *See, e.g.*, Opening Br. at 6, 11, 38. We disagree on each count.

**1. The plaintiffs alleged ongoing violations of the federal constitution.**

To defeat a motion to dismiss that raises a sovereign immunity defense, *Ex parte Young* requires plaintiffs to allege an ongoing violation of federal law. *See NiGen Biotech, LLC v. Paxton*, 804 F.3d 389, 392–95 (5th Cir. 2015). In *NiGen*, for example, the state attorney general wrote a letter to the plaintiff and the plaintiff's retailers threatening an enforcement action against the plaintiff's marketing of a dietary supplement. *Id.* at 392. When the retailers removed the supplement from their shelves, the plaintiff sued the attorney general for violating its First and Fourteenth Amendment rights, and the attorney general claimed sovereign immunity. *Id.* at 392–93. This Court rejected the defense under *Ex parte Young*, finding that the plaintiff had alleged an ongoing violation of its commercial speech rights when it alleged that the attorney general refused to justify the prior letter. *Id.* at 394–95.

Here, as in *NiGen*, the plaintiffs have alleged an ongoing violation of their First, Fourth, and Fourteenth Amendment rights. Specifically, the plaintiffs allege that the Louisiana State Police's failure to intervene during the CCC protest—a failure that it still has not justified—is one of the most recent illustrations of its:

- "well-documented history of racism against Black people";
- "years-long trend" of "openly displaying racist attitudes and behaviors";
- "policies, practices, or customs that enable its officers to lawlessly use excessive force against people of color and those advocating for them";
- "discriminatory" willingness to "use force on protest[s] against racial injustice and police brutality"; and
- disparate treatment of protests against racial injustice and police brutality when compared to protests by non-minorities. ROA.47–48, 77–81, 92, 94.

Also, this unconstitutional conduct has continued after the CCC protest, according to the plaintiffs. In particular, the plaintiffs allege that the Louisiana State Police has an "*ongoing* policy or custom of responding differently and affording less protection to a certain group of people—Black people and those protesting police brutality or racial injustice towards Black people." ROA.112 (emphasis added); *see also* ROA.92 ("Under Defendant L. Davis' leadership, this policy, practice and custom of using excessive force against Black people has only continued."). That matters because the plaintiffs allege that these policies, practices, and customs have created a "chilling effect" on their right to "freely and lawfully protest without fear of police interference, harassment, intimidation or abuse." ROA.70, 72–73, 104–07, 794 (explaining, for

example, that the plaintiffs are "threatened with future violation of their constitutional rights due to [the Louisiana State Police's] pattern and practice of subjecting people of color and those advocating for them to excessive force").

In short, the plaintiffs allege that the Louisiana State Police implemented policies, practices, and customs that violate their constitutional rights, and that those policies, practices, and customs are still in effect today—as recently evidenced by the Louisiana State Police's response to the CCC protest and its failure to justify that response. Because the plaintiffs have alleged that these ongoing policies, practices, and customs have chilled their willingness to protest against racial injustice and police misconduct, they have satisfied the "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law." *NiGen*, 804 F.3d at 395 (quoting *Verizon Md.*, 535 U.S. at 645); *see also Verizon Md.*, 535 U.S. at 645 (finding that a "prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our 'straightforward inquiry'"); *City of Austin*, 943 F.3d at 998–99 (finding that the city alleged an ongoing violation of federal law by alleging that a state housing statute was preempted by the Federal Housing Choice Voucher Program).

Even so, instead of acknowledging these "straightforward" allegations, the Superintendent argues that the plaintiffs' complaint is deficient in three other ways—

none of which affect the *Ex parte Young* analysis. Specifically, he first argues that the complaint's reference to four excessive-force lawsuits against the Louisiana State Police is inapt, pointing out that each case was ultimately dismissed. *See* Opening Br. at 32–34. He then challenges the complaint's reference to an illegal, mostly-White protest outside of the governor's mansion that the Louisiana State Police did not disperse, arguing that it is "unclear" why the Louisiana State Police should have responded to this event. *See* Opening Br. at 34. After that, he challenges the complaint's reference to any event where the Louisiana State Police used excessive force (as opposed to failing to intervene against the use of excessive force), contending that failure to intervene is the only claim raised against the Louisiana State Police in this lawsuit. *See* Opening Br. at 33. None of this helps the Superintendent's case.

First, regarding the four lawsuits, the fact that each was dismissed does not mean that the conduct underlying them was proper. In *Thomas v. Louisiana State Police*, for example, the plaintiff sued an officer for using excessive force after being tased by the officer multiple times during a traffic stop. *See* No. 18-10200, 2019 WL 2009245 at **2–3 (E.D. La. May 7, 2019). The court ultimately dismissed the plaintiff's claim not because of its merit, but because the plaintiff had not perfected service and because he had sued the officer in his official capacity for retrospective damages instead of prospective relief. *Id.* Thus, we still maintain that this case is an example of how

officers in the Louisiana State Police mistreat people of color. Regardless, whether the conduct underlying that case—or the conduct underlying any other case that the complaint referenced—was proper is beside the point for an *Ex parte Young* analysis, because that analysis does not focus on the merits of the plaintiffs' claims. *See City of Austin*, 943 F.3d at 998; *see also McCarthy v. Hawkins*, 381 F.3d 407, 416 (5th Cir. 2004) ("[A]nalyzing the applicability of the *Ex parte Young* exception should generally be a simple matter, which excludes questions regarding the validity of the plaintiff's cause of action."). The only point that matters for *Ex parte Young* is that the plaintiffs have alleged an ongoing violation of federal law, and the plaintiffs have done that here. *See* ROA. 47–48, 70, 72–73, 77–81, 92, 94, 104–07, 112, 794.[4]

Second, regarding the illegal, mostly-White protest outside the governor's mansion, the Superintendent says it is "unclear" why the Louisiana State Police "should have responded to that protest." Opening Br. at 34. But Louisiana Revised Statute §

[4] The plaintiffs are not alone in alleging that the Louisiana State Police continue to violate the constitutional rights of people of color. On June 9, 2022, the Department of Justice opened a pattern or practice investigation that will examine "whether LSP uses excessive force and whether it engages in racially discriminatory policing." *See* Dep't of Justice, Office of Public Affairs, *Justice Department Announces Investigation of the Louisiana State Police* (June 9, 2022), *available at* https://www.justice.gov/opa/pr/justice-department-announces-investigation-louisiana-state-police ("Based on an extensive review of publicly available information and information provided to us, we find significant justification to investigate whether Louisiana State Police engages in excessive force and engages in racially discriminatory policing against Black residents and other people of color.").

40:1399 requires the Louisiana State Police to "provide and maintain the security for the governor, the governor's immediate family, other persons authorized by the governor, and the governor's office and mansion, and the grounds thereof." So, the Louisiana State Police's failure to disperse that protest is another illustration of how it responds differently to protests depending on the protests' racial make-up and its cause, as the plaintiffs alleged in their complaint. ROA.80–81; *see also* ROA.112 (alleging that the Louisiana State Police maintains an "ongoing policy or custom of responding differently and affording less protection to a certain group of people—Black people and those protesting police brutality or racial injustice towards Black people").

Third, the Superintendent critiques the plaintiffs' complaint for referencing events that did not involve a claim—like the claim in this lawsuit—that the Louisiana State Police failed to intervene to prevent the use of excessive force. Opening Br. at 33. But some of the events that the complaint referenced—e.g., the Ronald Greene case—did involve a failure to intervene by officers who watched as one of their own used excessive force against a person of color. ROA.92 at n.99 (citing an article showing how Mr. Greene received no help from Louisiana State Police officers who were present while he protested his abuse in real time). Plus, some of the events that the complaint referenced—e.g., officers not being reprimanded for using racial slurs in the workplace—show an unwillingness to intervene to correct explicitly racist behavior.

ROA.92 at n.98. Regardless, even if some of the events that the complaint referenced did not involve a failure to intervene, those events still illustrate the Louisiana State Police's history of racist behavior, which directly relates to its officers' unwillingness to intervene to stop excessive force from being used against people of color. ROA.92 at n.97 (explaining how officers' implicit and explicit racial biases affect their decision making). In fact, the complaint alleged that officers—including Louisiana State Police officers—are more likely to use excessive force against minorities and anyone protesting police misconduct and racial injustice, which necessarily means that they are less likely to intervene when such force is used by others. ROA.47–48. The Superintendent never addressed that reality in his opening brief.

Finally, in critiquing the complaint's illustrations of the Louisiana State Police's ongoing constitutional violations, the Superintendent never addresses the fact that the complaint's allegations regarding ongoing violations are based on the plaintiffs' personal knowledge. *See, e.g.,* ROA.70 (explaining how Plaintiff Chustz, a White woman, moved to the front of the CCC protest because she knew that officers had a "propensity for excessive force against Black people"). The Superintendent overlooks, too, the fact that the complaint cites documentary evidence of the Louisiana State Police's history of racist conduct. *See, e.g.,* ROA.92 (citing an article that describes how racial slurs are commonplace in the Louisiana State Police; citing another article that

describes how a Louisiana State Police officer choked, tased, and dragged Ronald Greene, a Black man who died as a result of the beating; describing an incident where an officer hit a Black man 18 times with a flashlight in 24 seconds; and describing another incident where four officers bragged by text about "whoopin'" a Black man who had already surrendered). The Superintendent did not specifically address any of this in his opening brief, even though the complaint referenced the plaintiffs' personal knowledge and these events as illustrations of how the Louisiana State Police's policies, training, and supervision have been insufficient to prevent constitutional violations. *See, e.g.*, ROA.70, 94, 98–99, 104, 106–07, 113. Because these allegations are sufficient to satisfy *Ex parte Young*'s "straightforward" pleading requirement regarding ongoing violations of federal law, as the district court found, this Court should affirm. *See Verizon Md.*, 535 U.S. at 645; *NiGen*, 804 F.3d at 394–95; *City of Austin*, 943 F.3d at 998–99.

**2. The plaintiffs requested prospective relief to stop those ongoing violations.**

The Superintendent argues that the plaintiffs do not seek any "viable prospective relief," and he spends much time explaining why the plaintiffs' requests for relief under the Constitution have no merit. ROA.6, 30–31, 38. But the question under *Ex parte Young* is not whether their requested relief is viable or meritorious. Rather, the question is whether the plaintiffs requested prospective relief related to an ongoing

violation. *See City of Austin*, 943 F.3d at 998; *Air Evac EMS, Inc. v. Texas Dep't of Ins.*, 851 F.3d 507, 515–16 (5th Cir. 2017) ("It is a threshold question which, therefore, does not consider the merits of an action, focusing instead on whether the complaint makes the requisite claims against the proper parties."). On that question, the plaintiffs have satisfied *Ex parte Young*'s requirements. *See, e.g.*, *Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020).

In *Abbott*, for example, this Court found that the secretary of state was not entitled to Eleventh Amendment immunity from the plaintiff's challenge to an age restriction on absentee ballots. *Id.* at 180 ("Sovereign immunity does not bar suit against the Secretary in this case."). It did so because a potential ruling that the restriction abridged some people's right to vote "might lead to prohibiting the Secretary from using an application form that expressed an unconstitutional absentee-voting option." *Id.* Put differently, the plaintiff asked this Court to stop a state official from engaging in a practice that allegedly violated the Constitution, and this Court decided that such a request was enough to satisfy the *Ex parte Young* prospective-relief requirement. *Id.* ("It is permissible under *Ex parte Young* for a court to command a state official to do nothing more than refrain from violating federal law.").

We respectfully ask the Court to reach the same conclusion here. In particular, the plaintiffs' complaint asked the district court to enjoin the Superintendent and the

Louisiana State Police from: disparately responding to protests over racial injustice and police misconduct; targeting Black citizens for the use of excessive force; failing to properly train and supervise its officers on when they may use force; failing to intervene when its officers see other officers using excessive force; and continuing to implement unconstitutional crowd control policies that condone, for example, officers discharging tear gas and impact projectiles at peaceful, retreating crowds. ROA.75, 92–96, 103–07, 759–62. Put more succinctly, the complaint asked the district court to stop the Louisiana State Police from following policies, practices, and customs that violate the constitutional rights of people of color and those who advocate for them. *See, e.g.,* ROA.107 ("Plaintiffs and the Injunctive Relief Class are threatened with future violation of their constitutional rights due to Defendants' pattern and practice of subjecting people of color and those advocating for them to excessive force, and thus they are entitled to prospective relief.").[5]

This means that the plaintiffs, like the plaintiff in *Abbott*, are asking this Court to stop a state official from engaging in practices that allegedly violate the Constitution. Because that satisfies *Ex parte Young*'s "straightforward inquiry" into whether the

[5] The plaintiffs want the Louisiana State Police to do what many other agencies are doing in the wake of George Floyd's death: stop following policies, practices, and customs that adversely impact people of color. *See, e.g.,* Bill Chappell, *DOJ's new policy requires officers to stop others from using excessive force* (May 24, 2022), *available at* https://www.npr.org/2022/05/24/1100920286/doj-new-policy-excessive-force?.

plaintiffs' requested relief is prospective in nature, this Court should affirm the district court's denial of the Superintendent's sovereign immunity defense. *See Abbott*, 978 F.3d at 180; *see also Reed v. Goertz*, 995 F.3d 425, 429 n.2 (5th Cir. 2021) (concluding that an incarcerated person who alleged that Texas's post-conviction DNA testing statute violated the First, Fourth, Fifth, and Eighth Amendments had "asserted a claim for prospective declaratory relief" under *Ex parte Young*); *Williams on behalf of J.E. v. Reeves*, 954 F.3d 729, 738–39 (5th Cir. 2020) (concluding that the plaintiffs "may pursue prospective relief under *Ex parte Young*" because they "claim to be presently harmed" by a state constitutional provision that allegedly conflicted with the federal Readmission Act); *Freedom From Religion Found. v. Abbott*, 955 F.3d 417, 424 (5th Cir. 2020) (finding that the plaintiff's lawsuit "falls within the *Ex parte Young* exception to sovereign immunity" in part because it requested an injunction under the First Amendment that would prohibit the defendants from excluding an exhibit from the capitol grounds).[6]

[6] Regarding the Superintendent's challenge to the plaintiffs' requests for declaratory relief, Opening Br. at 35–37, we do not contest that the plaintiffs cannot (1) seek a damages award from a declaration of past harm or (2) challenge compliance with state law through a request for declaratory relief. But requesting a declaration that the Louisiana State Police's policies, practices, and customs violate the Constitution is permissible under *Ex parte Young* because, if granted, it would prevent the Louisiana State Police from following those policies, practices, and customs. *See, e.g.*, *Reed*, 995 F.3d at 429 n.2 (approving a claim for "prospective declaratory relief" under *Ex parte Young*).

### B. The plaintiffs can sue the Superintendent under Section 1983 even though Congress did not abrogate sovereign immunity when it created Section 1983.

The plaintiffs sued the Superintendent under Section 1983 for prospective relief to remedy ongoing violations of their First, Fourth, and Fourteenth Amendment rights. The Superintendent argues, though, that all of their Section 1983 claims must be dismissed because "Section 1983 does not abrogate a state's sovereign immunity" and because he "is not a 'person' amenable to suit under Section 1983." Opening Br. at 22. That argument has no merit.

To support it, the Superintendent cites *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There, the plaintiff filed a Section 1983 damages claim in state court against the Michigan Department of State Police and the Director of State Police in his official capacity, claiming that they improperly denied him a promotion. *Id.* at 60. To determine whether Congress intended to create an exception to sovereign immunity for Section 1983 damages claims against states in state courts, the Supreme Court had to decide whether a state, or a state official acting in his official capacity, is a "person" subject to suit under Section 1983. *Id.* at 60, 66. It ultimately answered the question in the negative, finding that Congress did not intend—through Section 1983—"to disregard the well-established immunity of a State from being sued without its consent." *Id.* at 66–67 ("Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not

provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.").

From that, the Superintendent jumps to the conclusion that all Section 1983 claims against him must be dismissed. Opening Br. at 23 ("The individual defendant named in *Will* was the Director of the Michigan State Police; Davis stands in an identical position. [Plaintiffs'] Section 1983 claims must therefore be dismissed."). But here, unlike in *Will*, the plaintiffs are suing the Superintendent in his official capacity under Section 1983 in federal court for prospective relief. That matters because the Supreme Court recognized in *Will* that a state official sued in his official capacity is a "person" under Section 1983 for that type of suit. *Will*, 491 U.S. at 71 n.10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State.") (cleaned up).

In sum, the Superintendent's argument is contradicted by the only case that he relied on for it, and this Court should reject it, just like the Court has already done in other cases. *See, e.g.*, *Reed*, 995 F.3d at 428, 429 n.2 (allowing a Section 1983 claim to proceed under *Ex parte Young* because it sought prospective relief against an official-

capacity state official); *NiGen*, 804 F.3d at 394–95 (acknowledging that "§ 1983 does not abrogate state sovereign immunity," yet still allowing the claim to proceed because it sought prospective relief against a state official acting in his official capacity).

## II. This Court should not exercise its pendent jurisdiction to review the district court's ruling on standing, but if it does, the plaintiffs have standing to sue the Superintendent.

The Superintendent did not ask the district court to certify its ruling on standing for interlocutory review, and his notice of interlocutory appeal stated only that he would be appealing the district court's immunity ruling. ROA.41, 1294. But now, in his opening brief, he asks this Court to review the standing ruling anyway. *See* Opening Br. at 18, 24 ("[Plaintiffs'] requests for injunctive relief fail to satisfy the basic threshold elements of standing."). In fact, the Superintendent's opening brief treats standing and Eleventh Amendment immunity interchangeably, arguing that he is immune from suit because the plaintiffs lack standing to sue. *See, e.g.*, Opening Br. at 16 ("[Plaintiffs] failed to establish standing to pursue claims for prospective relief against Col. Davis under the *Ex parte Young* exception to the State's sovereign immunity.").

The problem is that Eleventh Amendment immunity and standing are distinct concepts. A ruling on standing, for example, is not a collateral order that is subject to interlocutory review, while a ruling on Eleventh Amendment immunity is. *See Shanks v. City of Dallas*, 752 F.2d 1092, 1093, 1099 n.9 (5th Cir. 1985) (rejecting "out of

hand" an argument that the district court's ruling on standing was reviewable in an interlocutory appeal under the collateral-order doctrine); *see also Summit Medical Assocs., PC v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999) ("In contrast to the question of Eleventh Amendment immunity, however, we have held that a district court's denial of a motion to dismiss on justiciability grounds is *not* immediately appealable under the collateral order doctrine.") (emphasis in original).

That means the only way this Court can review standing now is by exercising its pendent appellate jurisdiction—a topic that the Superintendent did not address in his opening brief. *See Summit Medical Assocs.*, 180 F.3d at 1335 (explaining that the "*only*" way to review standing in an Eleventh Amendment interlocutory appeal is if standing satisfies the requirements of the pendent-jurisdiction doctrine) (emphasis in original). We respectfully ask the Court not to exercise that jurisdiction here. But, even if it does, the plaintiffs have standing to sue the Superintendent.

### A. This is not one of the "rare and unique" cases where exercising pendent jurisdiction is appropriate.

Exercising pendent appellate jurisdiction "is only proper in rare and unique circumstances." *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009). In fact, there are only two "carefully circumscribed" exceptions to the bar on using pendent appellate jurisdiction to expand an interlocutory appeal. *Escobar v. Montee*, 895 F.3d 387, 391–92 (5th Cir. 2018) (citing *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35 (1995)).

One is where review of the pendent claim is "necessary to ensure meaningful review" of the claim that was properly appealed. *Id.* The other is where the two claims are "inextricably intertwined." *Id.* (explaining that reviewing the pendent claim must be "essential"). Because neither exception applies here, and because allowing the Superintendent to bootstrap review of standing into this interlocutory appeal will negatively impact the collateral-order doctrine and the parts of this case that remain before the district court, this is not one of the "rare and unique" cases where exercising pendent jurisdiction is appropriate.

**1. Standing does not satisfy the "carefully circumscribed" exceptions to the bar on exercising pendent jurisdiction.**

The Superintendent's standing defense is neither "inextricably intertwined" with, nor "necessary to ensure meaningful review" of, his immunity defense. *See Escobar*, 895 F.3d at 391–92; *see also Summit Medical Assocs.*, 180 F.3d at 1334–36 ("[W]e may resolve the Eleventh Amendment immunity issue here without reaching the merits of standing. These issues are neither 'inextricably intertwined' nor 'necessary to ensure meaningful review' of one another."); *Freyre v. Chronister*, 910 F.3d 1371, 1379 (11th Cir. 2018) (same).

First, standing and Eleventh Amendment immunity are not inextricably intertwined because they are distinct defenses that serve different purposes and examine different facts and elements. Immunity, for instance, examines whether the plaintiff

has sued a state official in his official capacity to enjoin ongoing violations of federal law, and its purpose is to prevent the state official from facing trial if the plaintiff has not pled those basic elements. *See* ROA.1256–59. Standing, on the other hand, examines whether the plaintiff has suffered an injury-in-fact that is traceable and redressable by the defendant. *See id.* Its purpose is not to prevent the defendant from standing trial (i.e., to give that defendant immunity from suit), but to ensure that this particular plaintiff has the right to sue the defendant. *See id.*; *see also Rogers v. Brockette*, 588 F.2d 1057, 1062 (5th Cir. 1979) (noting that "a principal purpose of standing doctrine is to prevent the inappropriate party from forcing a judicial resolution of an issue").

In fact, standing, unlike immunity, is "enmeshed" with the merits of a claim for injunctive relief like the one in this case. *See Shanks*, 752 F.2d at 1099 n.9. That is why the district court reviewed the two defenses separately here, confirming that they are severable. *See* ROA.1256–59. Put another way, these defenses are not so closely related that exercising pendent jurisdiction to review standing is "essential." *Escobar*, 895 F.3d at 392 (explaining that when deciding whether to exercise its pendent jurisdiction, this Court examines whether the claims "involve *precisely* the same facts and elements," and declining pendent jurisdiction in part because the two issues raised in that case were "obviously severable" given that the district court "considered and decided them separately") (emphasis added); *Summit Medical Assocs.*, 180 F.3d at 1335

(explaining that standing and immunity are not inextricably intertwined because "we may resolve the Eleventh Amendment immunity issue here without reaching the merits of standing"); *Freyre*, 910 F.3d at 1379 ("Sheriff Chronister's argument to the contrary—that the questions are inextricably intertwined because denying Freyre standing would conclusively resolve this case—misses the mark.").

Second, reviewing standing is not necessary to ensure meaningful review of Eleventh Amendment immunity. In particular, declining pendent jurisdiction over the ruling on standing "would not force [the Superintendent] to go to trial," nor would it preclude later review of that ruling. *Escobar*, 895 F.3d at 392 n.6, 393 (citing *Gros v. City of Grand Prarie*, 209 F.3d 431, 436–37 (5th Cir. 2000)). Rather, the parties have not engaged in discovery yet, and the Superintendent would still have an opportunity to raise more defenses—including standing and immunity defenses—after discovery takes place. *See, e.g.*, ROA.1258 (finding only that the plaintiffs have standing "at this time"). Plus, because lack of standing is not an immunity from suit, the district court's ruling on standing could be effectively reviewed "through the normal course of appellate review." *Escobar*, 895 F.3d at 393. Thus, reviewing standing in this narrow interlocutory appeal is not "essential" for ensuring that the Superintendent's immunity defense receives meaningful review. *See id.* at 392–93; *see also Summit Medical Assocs.*, 180 F.3d at 1334–36 (declining pendent jurisdiction after recognizing that "the issue

of standing is not effectively unreviewable on appeal from a final judgment"); *Freyre*, 910 F.3d at 1379 ("The question is not whether deciding the pendent issue would moot the properly appealed issue, but whether 'review of the former decision is necessary to ensure meaningful review of the latter.' And that simply is not the case here.") (cleaned up).

**2. Exercising pendent jurisdiction to review standing would prematurely instruct the district court on how to decide this case and would be inconsistent with Congress's power to shape the final judgment rule.**

Exercising pendent jurisdiction over the district court's standing ruling would negatively impact this case and the final judgment rule as a whole. In particular, it would prematurely instruct the district court on how to decide this case for all of the defendants who are not participating in this appeal, and it would be inconsistent with Congress's determination of what issues may be raised on interlocutory review.

First, the Superintendent is the only defendant participating in this interlocutory appeal; multiple other defendants remain before the district court. That matters because while the district court's immunity ruling is "completely separate from the merits of the action," its standing ruling is not. *See Shanks*, 752 F.2d at 1099 n.9. ("Any examination of the standing of Shanks and McKinley to seek equitable relief *would quite clearly involve considerations that are enmeshed in the legal issues* surrounding their cause of action.") (emphasis added). That means that if this Court decides to address

standing now, it will preview for the district court at least some of its thoughts on the merits of the plaintiffs' injunctive-relief claims against all of the defendants who remain in front of the district court—*before* the district court has an opportunity to conclusively decide the merits of those claims itself.[7]

Second, we recognize that this Court has sometimes made the blanket statement that it can "first determine whether there is federal subject matter jurisdiction over the underlying case" when it has "interlocutory appellate jurisdiction to review a district court's denial of Eleventh Amendment immunity." *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002); *Whole Woman's Health*, 13 F.4th at 446 (relying on that statement to review standing in an interlocutory appeal of an Eleventh Amendment immunity ruling); *see also Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) (addressing standing in an interlocutory appeal of an Eleventh Amendment immunity ruling without analyzing its authority to do so). But unflinchingly applying that statement, without regard to the limits of pendent jurisdiction and the collateral-order doctrine, cannot be reconciled with Section 1291's final

[7] That is one reason why this case is different than a case like *Whole Woman's Health v. Jackson*, where this Court exercised its pendent appellate jurisdiction to review standing during an interlocutory review of the district court's ruling on Eleventh Amendment immunity. 13 F.4th 434, 446 (5th Cir. 2021). There, unlike here, all of the defendants were present and participating in the appeal. *Id.*; *see also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 537 (2021) (considering the private defendant's standing argument because "[i]n the briefing before us, no one contests this decision").

judgment rule as explained by the Supreme Court in *Abney v. United States*, 431 U.S. 651 (1977) and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

In *Abney*, for example, the Court decided that while it was permissible for a criminal defendant to seek interlocutory review of an adverse double-jeopardy ruling under the collateral-order doctrine, he could not bootstrap review of a ruling on the sufficiency of his indictment into that interlocutory appeal. *Abney*, 431 U.S. at 659–63. In particular, for the double-jeopardy claim, the Court pointed out that once the defense is denied in the trial court, there are "no further steps" the defendant can take to raise the defense before trial. *Id.* at 659. It pointed out, too, that the elements of the defense are "completely independent" of the merits of the charge against the defendant, and that if the defense is denied, it would be effectively unreviewable after trial because the point of the defense is to prevent the defendant from having to face trial at all. *Id.* at 659–62.

After that, the Court turned to the defendant's challenge to the sufficiency of his indictment. Unlike the double-jeopardy claim, the Court found that challenges to the sufficiency of an indictment are "plainly not 'collateral' in any sense of that term." *Id.* at 663. Rather, such challenges are related to the merits of the issues that will be decided at trial, and a trial court's ruling on them could be, if necessary, "corrected if and when a final judgment results." *Id.* In fact, the Court concluded that "such claims

are appealable *if, and only if*, they too fall within [the] collateral-order exception to the final-judgment rule." *Id.* (emphasis added). In other words, it encouraged courts to skeptically view attempts to piggyback review of a nonappealable ruling into an interlocutory review of a collateral order. *Id.* ("Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.").

That narrow approach to the final judgment rule continued in *Swint*, 514 U.S. at 37. There, the owners of a nightclub sued the city, the county commission, and several individual officers after being raided multiple times. *Id.* As relevant here, the officers moved for summary judgment based on qualified immunity, and the county commission moved for summary judgment by arguing that the sheriff who authorized the raids was an agent of the state, not the county. *Id.* at 37–38.[8] The district court denied both motions, but stated that it would reconsider the county's agency argument before jury deliberations. *Id.* at 38–39. After that, the officers filed an interlocutory appeal challenging the qualified immunity ruling, and the county appealed, too, asking the Eleventh Circuit to consider the agency ruling either through the collateral-

[8] This was, in essence, a standing defense, because the county commission was arguing that the plaintiffs' harms could not be traced to the county. *See Swint*, 514 U.S. at 37–38.

order doctrine or through pendent jurisdiction—a concept that the courts of appeals had recently begun to "endorse." *Id.* at 40, 44 n.2.

The Supreme Court ultimately determined that the Eleventh Circuit "unquestionably" had interlocutory jurisdiction over the officers' qualified immunity challenge, but that the court had no authority to sweep in review of the agency ruling raised in the county commission's appeal. *Id.* at 38, 41. To reach that conclusion, the Court first examined whether the agency ruling was reviewable as a "final" judgment under the collateral-order doctrine, finding that the answer was a "firm no." *Id.* at 41–42 (explaining that the trial court planned to reconsider the ruling before trial and that the ruling was not effectively unreviewable after trial because the county commission's agency defense was a defense to liability, not an immunity to suit). After that, the Court turned to pendent jurisdiction, finding that it did not apply, either. In particular, the Court stated that Congress controls the timing of appellate proceedings, and that Congress had implemented important restrictions impacting the availability of pendent jurisdiction in interlocutory appeals—restrictions that precluded exercising pendent jurisdiction in that case. *Id.* at 46–48.

For instance, after Congress listed three narrow categories of cases that are immediately reviewable through interlocutory appeal, it gave district courts "circum-

scribed authority to certify for immediate appeal interlocutory orders deemed pivotable and debatable." *Id.* at 46 (citing 28 U.S.C. § 1292(b)). This, according to the Court, gave district courts "first line discretion to allow interlocutory appeals." *Id.* at 47. In fact, that was "[o]f prime significance" to the Court in determining the scope of pendent jurisdiction, because it recognized that if courts of appeals could use pendent jurisdiction to review issues that are "neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined." *Id.* at 46–47 and n.5 (acknowledging that the district court had not certified interlocutory review in that case).

Plus, the Court pointed out that Congress had given *it* rulemaking authority through the Rules Enabling Act that allows it to (1) define when a judgment is final for purposes of 28 U.S.C. § 1291 and (2) create rules that expand interlocutory appeals beyond what is allowed in 28 U.S.C. § 1292. *Id.* at 48. Because of those restrictions, the Court concluded that lower courts cannot use pendent jurisdiction to expand the availability of interlocutory review on an ad hoc basis. *Id.* ("Congress has thus empowered this Court to clarify when a decision qualifies as 'final' for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis. The procedure Congress ordered for such changes, however, is not expansion by court decision, but by rulemaking under [the Rules Enabling Act].").

That means, in the end, that lower courts can use pendent jurisdiction *only* when the pendent claim is "inextricably intertwined" with, or "necessary to ensure meaningful review" of, the properly appealed claim. *Id.* at 49–51; *see also Summit Medical Assocs.*, 180 F.3d at 1335 (same). Any other approach would be inconsistent with the limitations of the final judgment rule and the collateral-order doctrine. *Swint*, 514 U.S. at 49–51 (pointing out that any other approach would allow parties to file frivolous collateral-order appeals so that they could prematurely bring "more serious, but otherwise nonappealable questions to the attention of the courts of appeals") (quoting *Abney*, 431 U.S. at 663).

At bottom, *Swint* and *Abney* show that exercising pendent jurisdiction would not be appropriate in this case. The district court found only that the plaintiffs have standing "at this time," indicating a willingness to reconsider after discovery, and it did not certify its standing ruling for interlocutory review. ROA.41, 1258. On top of that, multiple defendants who are facing the same claims from the plaintiffs are still before the district court. Because the Superintendent's standing defense is "enmeshed" with the merits of the claims they are facing, this Court would be previewing at least some of its thoughts on those merits to the district court before the district court has a chance to fully address the merits itself. ROA.41.

That is one reason why, in fact, standing does not fall under the collateral-order doctrine. And because it does not fall under that doctrine, it would have to be inextricably intertwined with immunity or necessary for meaningful review of immunity for this Court to review it through pendent jurisdiction. *See Shanks*, 752 F.2d at 1099 n.9; *Summit Medical Assocs.*, 180 F.3d at 1334–36. Because standing does not satisfy either requirement, this Court should not apply an ad hoc, blanket rule allowing it to review standing based on the idea that it is a justiciability question. Doing so would be inconsistent with *Abney*, *Swint*, and Congress's limits on what issues may be raised on interlocutory review under 28 U.S.C. § 1291, 28 U.S.C. § 1292, and the Rules Enabling Act.

If it were otherwise, the limitations of the final judgment rule and collateral-order doctrine would be meaningless for state officials who can assert immunity. *See, e.g.*, *Swint*, 514 U.S. at 48. They could file meritless immunity appeals just so they could seek premature interlocutory review of standing, allowing them to short-circuit the normal appeals process when other defendants do not enjoy that same privilege. *Id.* at 49–50; *Abney*, 431 U.S. at 663. We respectfully ask this Court to decline pendent jurisdiction over standing in this interlocutory appeal to prevent that from happening. *See Summit Medical Assocs.*, 180 F.3d at 1334–35 and n.8 (concluding that it could not

exercise pendent jurisdiction over a constitutional standing defense in an interlocutory appeal of an Eleventh Amendment ruling); *Freyre*, 910 F.3d at 1379 (declining to exercise pendent jurisdiction to review standing in an Eleventh Amendment interlocutory appeal); *see also Escobar v. Montee*, 895 F.3d 387, 392 (5th Cir. 2018) (explaining that pendent jurisdiction applies "to rulings that would not otherwise qualify for expedited consideration only where those rulings are essential to the resolution of properly appealed collateral orders") (quoting Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L.J. 511, 530 (1990)) (cleaned up).

**B. If the Court nevertheless decides to review the plaintiffs' standing, the district court correctly found that they have standing to sue the Superintendent.**

To satisfy Article III standing requirements at the pleading stage, plaintiffs must allege an "injury fairly traceable to the defendant's alleged unlawful conduct" that is "likely to be redressed by the requested relief." *Hernandez v. Cremer*, 913 F.2d 230, 233 (5th Cir. 1990). Here, the plaintiffs have done that, as the district court reasonably found. ROA.1257–58; *see also Hernandez*, 913 F.2d at 234–35; *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020).

In *Hernandez*, for example, this Court held that the plaintiff had standing to enjoin government practices that prevented him (a Puerto Rican U.S. citizen) from exer-

cising his constitutional right to travel to and from Mexico. 913 F.2d at 234–35. Specifically, immigration officials violated the plaintiff's Fifth Amendment procedural due process rights through a practice of subjecting Puerto Rican birth certificates to heightened scrutiny upon re-entry to the U.S. *Id.* at 232–33. Though the plaintiff was eventually able to enter the U.S., the Court held that there was a constitutionally cognizable threat of future due process violations. *Id.* at 234–35 In particular, the Court reasoned that there was "at the very least a reasonable expectation" the plaintiff would travel again to Mexico but for the government's discriminatory policy. *Id.* ("Indeed, Hernandez testified that he would like to return to Mexico, but did not 'want to run the risk of something like this happening again.'"). Because he might be subjected to that policy if he traveled, he had standing to seek prospective relief. *Id.* (rejecting the government's oral assurances that it had notified its border employees of proper procedures for processing travelers who claimed U.S. citizenship).

The defendants in *Hernandez* tried to avoid that conclusion by arguing—based on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)—that the plaintiff's alleged future injury was too hypothetical and speculative to confer standing. *Id.* at 233. This Court rejected that argument, reasoning that Lyons's theory of future injury, unlike Hernandez's, was contingent on him (1) again engaging in unlawful conduct (2) that might

provoke a police encounter (3) that might culminate in an officer applying the unconstitutional chokehold Lyons sought to enjoin. *Id.* at 234 (explaining that "for purposes of assessing the likelihood that [state authorities] will re-inflict a given injury, courts 'have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk ofthat injury'" (quoting *Honig v. Doe*, 484 U.S. 305, 320 (1988)). Because Hernandez's theory of future injury, unlike Lyons's, was premised on his stated desire to engage in constitutionally protected conduct, he had standing to seek an injunction against the unconstitutional practices that deterred him from traveling. *Id.* at 234–35.

Similarly, in *Speech First*, this Court recognized that an allegation of chilled speech, by itself, is a constitutionally sufficient injury. *See Speech First*, 979 F.3d at 322. Specifically, a university adopted four policies governing student speech, and a group of students challenged the policies under the First and Fourteenth Amendments, alleging that they were afraid to express contrarian views that might be deemed "offensive" or "uncivil" under the policies. *Id.* at 322–23, 326. The district court dismissed their claims, finding that they lacked standing in part because they had not presented "evidence that any University students . . . have been disciplined, sanctioned, or investigated for their speech." *Id.* at 327. But this Court reversed, finding that even though the university had not yet punished any students under the policies, it was the

students' allegation of their speech being chilled that mattered for standing purposes. *Id.* at 330–32, 336–37 (acknowledging that the students had alleged an intent to engage in speech covered by the policies, and recognizing that First Amendment claims have "unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself") (quoting *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006)); *see also Kenny v. Wilson*, 885 F.3d 280, 289–90 (4th Cir. 2018) (refusing to dismiss for lack of standing under *Lyons* because "*Lyons* did not involve a pre-enforcement challenge to a statute *or any allegation of a chilling effect on the plaintiff's exercise of his First Amendment rights*").

Like the plaintiffs in *Hernandez* and *Speech First*, the plaintiffs here seek to enjoin the Louisiana State Police from relying on unconstitutional policies, practices, and customs that chill constitutional conduct. Specifically, plaintiffs allege that the Louisiana State Police and its officers have a history of racist conduct, an unconstitutional policy, practice, and custom of disproportionately using excessive force against people of color, and an unconstitutional policy, practice, and custom of disparately responding to protests against racial injustice or police misconduct. *See, e.g.*, ROA.94 ("LSP's involvement in the attack on the CCC was not an anomaly, as it was undertaken pursuant to *de facto* LSP policies, practices, or customs that enable its officers to lawlessly use excessive force against people of color and those advocating for them.").

That matters, according to the plaintiffs, because it resulted in Louisiana State Police officers failing to intervene as excessive force was used against them while they were exercising their First Amendment rights at the CCC protest. ROA.44, 58, 60, 69, 72–73 (alleging that the officers, consistent with the policies, practices, and customs of the Louisiana State Police, watched as the plaintiffs were beaten with batons, shot with impact munitions, and doused with tear gas that imperiled the reproductive health of female protestors). That matters, too, because the officers' failure, combined with the policies, practices, and customs of the Louisiana State Police, has made the plaintiffs fearful of peacefully protesting racial injustice or police misconduct going forward. ROA.104–07, 112, 115 (explaining, for example, that those policies, practices, and customs have created a "chilling effect" on their right to "freely and lawfully protest without fear of police interference, harassment, intimidation or abuse"). Put another way, their willingness to participate in those peaceful protests has been chilled because they do not "want to run the risk of something like this happening again." *Hernandez*, 913 F.2d at 235; *see also Speech First*, 979 F.3d at 330–32, 336–37.

The Superintendent nevertheless argues—like the defendants in *Hernandez*—that this case is no different than *Lyons* and should thus be dismissed for lack of standing. *See* Opening Br. at 27–32. In particular, the Superintendent argues that *Lyons* controls because the plaintiffs here, like the plaintiff there, were engaged in "misconduct"

when force was used against them. *Id.* (arguing that the plaintiffs have no standing to seek injunctive relief because this Court would have to assume that the plaintiffs will "provoke" another encounter with the Louisiana State Police by engaging in such "misconduct" again). But here, unlike in *Lyons*, the plaintiffs were peacefully protesting in a manner that the state had allowed for the previous five days. ROA.58–59. And more importantly, the plaintiffs have alleged an intent to "lawfully" protest racial injustice and police misconduct in the future but for the discriminatory policies, practices, and customs of the Louisiana State Police. ROA.104–07, 112, 115. The Superintendent has not contested that allegation of lawful intent, and he cannot ask this Court to overlook it now. *See Speech First*, 979 F.3d at 331–32 (finding an injury-in-fact in part because the plaintiffs alleged an uncontested intent to engage in speech covered by the university's policies); *see also Gonzales v. Dallas County, Tex.*, 249 F.3d 406, 411 (5th Cir. 2001) (explaining that "on interlocutory appeal the public official must be prepared to concede the best view of the facts to the plaintiff").

Beyond that, *Lyons* is different as well because there, unlike here, the plaintiff did not allege that the individual officer's conduct was authorized by the city; and there, unlike here, the plaintiff did not allege that the individual officer's conduct chilled his willingness to exercise his First Amendment rights. *Compare Lyons*, 461 U.S. at 105–10 (faulting the plaintiff for not alleging that the city authorized its officers to

act in that way, and containing no allegations that the officer's conduct chilled speech) *with* ROA.92–95, 103–15 (alleging that the Louisiana State Police's policies, practices, and customs authorize its officers to violate the Fourth and Fourteenth Amendment rights of people of color, which chills those people's willingness to exercise their First Amendment right to protest those policies, practices, and customs). Those allegations set this case apart, showing that *Lyons* does not apply. *See Speech First*, 979 F.3d at 322 (recognizing that an allegation of chilled speech is, by itself, a constitutionally sufficient injury); *Kenny*, 885 F.3d at 289–90 (refusing to dismiss for lack of standing under *Lyons* because "*Lyons* did not involve a pre-enforcement challenge to a statute *or any allegation of a chilling effect on the plaintiff's exercise of his First Amendment rights*") (emphasis added).

In short, *Lyons* should not control the outcome on standing here. The plaintiffs have alleged that the Louisiana State Police's policies, practices, and customs authorize its officers to engage in discriminatory conduct that violates the plaintiffs' constitutional rights (as illustrated by the Louisiana State Police's failure to condemn or punish such conduct, and by its willingness to hide such conduct from the public). The plaintiffs have alleged, too, that those policies, practices, and customs have chilled their willingness to engage in peaceful, lawful protests. *See, e.g.*, ROA.94–95, 104–07, 112, 115. These allegations are sufficient to show an injury-in-fact that is traceable to

and redressable by the Louisiana State Police. In other words, as the district court found, the allegations are sufficient to show that the plaintiffs have standing to sue the Superintendent in this case. This Court should affirm. *See Hernandez*, 913 F.2d at 234–35; *Speech First*, 979 F.3d at 330–32, 336–37; *Kenny*, 885 F.3d at 289–90.

## Conclusion

The Superintendent of the New Orleans Police apologized to the peaceful protestors who were at the CCC protest after admitting "failures" in how the protest was handled. *See* ROA.44–45 and n.1. The Louisiana State Police stood by as those failures occurred, consistent with its policies, practices, and customs that condone using excessive force against people of color. On behalf of themselves and all others in Louisiana who are similarly situated, the plaintiffs have sued to stop those policies, practices, and customs, and the district court reasonably found that their case should proceed. We respectfully ask this Court to let that decision stand.

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Respectfully submitted,

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**Certificate of Service**

I, Thomas Burch, certify that I served this Response Brief on all attorneys registered in this case via the Court's ECF system on June 30, 2022. I also certify that I mailed 7 copies to the Clerk of the Court on the same date, and that I mailed 1 copy on the same date to counsel for Colonel Lamar Davis, at the following address:

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## Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,828 words, excluding the parts of the brief carved out by Fed. R. App. P. 32(f)) and 5th Cir. R. 32-2.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1, and the style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Goudy Old Style font.

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