

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS STATE LULAC, ET AL.,
Plaintiffs,

v.

BRUCE ELFANT, ET AL.,
Defendants,

AND

KEN PAXTON, ET AL.,
Intervenor-Defendants.

Case No. 1:21-cv-00546-LY

DEFENDANT-INTERVENOR KEN PAXTON'S
REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Table of Contents	i
Argument	1
I. Plaintiffs lack Article III standing	1
A. Plaintiffs lack organizational standing.	1
B. Plaintiffs lack associational standing.....	4
II. Plaintiffs lack statutory standing and third-party standing.....	5
III. SB 1111 is constitutional.....	7
A. Section 1.015(b) does not violate the First Amendment.	7
B. There is no burden on the right to vote.....	9
C. SB 1111 does not violate the Twenty-Sixth Amendment.....	10
Conclusion	10

Plaintiffs Texas State LULAC (“LULAC”) and Voto Latino have failed—in their Response in Opposition to Defendant Intervenor Ken Paxton’s Motion for Summary Judgment, ECF 156—to show any legal or factual basis to support their claims before this Court. They continue to misinterpret the contested provisions of the Texas Election Code—failing to construe it in context, with a presumption of constitutionality, and according to how the relevant agency interprets it—and ignore mitigating features that make their asserted burdens on the right to register to vote disappear.

Plaintiffs’ claims stumble at the outset because they fail to demonstrate their standing to challenge these provisions of the Texas Election Code. Plaintiffs also fail to properly invoke the First Amendment, and their claim of violation of the Twenty-Sixth Amendment fails because, among other reasons, the challenged provisions do not classify on the basis of the age of any voters.

ARGUMENT

The moving party in a summary judgment motion need only point out to the court that the nonmoving parties’ case lacks proof on a particular point. *See Celotex v. Catrett*, 477 U.S. 317, 325–26 (1986). Once that burden has been met, the nonmoving parties must come forward with persuasive evidence to sustain their claims. *See Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Plaintiffs’ claims fail as a matter of law, and they fail for lack of the requisite admissible evidence in support.

I. Plaintiffs lack Article III standing.

A. Plaintiffs lack organizational standing.

Plaintiffs maintain that they have organizational standing because they are “force[d] to divert resources from their usual activities to attempt to ameliorate the statute’s harm to their respective missions.” ECF 156 at 4. First, “[m]ere redirection of resources in response to another party’s actions does not supply standing; after all, there is ‘no legally-protected interest in *not* expending ... resources on behalf of individuals for whom [the plaintiff] ... advocates’” *League of United Latin Am. Citizens v.*

Abbott, --- F.Supp.3d ----, No. 3:21-cv-259, 2022 WL 1631301, at *5 (W.D. Tex. May 23, 2022) (three-judge court) (quoting *Ass'n for Retarded Citizens of Dall. v. Dall. Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994)). But they also fail to point to evidence that any such injury is traceable to the specific provisions of SB 1111 they challenge, or even to SB 1111 as a whole. They point to LULAC's testimony in support of this ground, ECF 156 at 4, but that testimony offers no specifics as to any particular programs it had to cut back on or initiated in response.

Although the State was required to demonstrate the absence of a genuine issue of material fact to be awarded summary judgment, there is no need to negate the elements of Plaintiffs' case to carry that burden here. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (citation omitted). Once Defendant-Intervenor satisfied its Rule 56 burden, Plaintiffs were required to identify specific evidence in the record and articulate how that evidence supports their claim. *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007). Plaintiffs cannot satisfy their burden by pointing out “some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.” *Boudreaux*, 402 F.3d at 540 (quotation omitted).

Because “not every diversion of resources to counteract the defendant’s conduct … establishes an injury in fact,” *NAAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010), and Plaintiffs have failed to show they have “diverted *significant* resources to counteract” the challenged provisions of SB 1111, *id.* at 238–39 (emphasis added), they have failed to adduce admissible evidence to show organizational standing on this ground. As explained by Intervenor-Defendants Torres and Pendley in their opposition to Plaintiffs’ motion for summary judgment, Plaintiffs only “offer vague testimony about resources being expended as a result of SB 1111, other new laws in Texas, and other laws in different states.” ECF 155 at 4; *see also id.* at 4–5 (examining specific deposition testimony and why it fails to support organizational injury). Because “Plaintiffs have not specified projects that Defendants’ [challenged actions] has compelled them to commence,” *League*, 2022 WL 1631301, at *5, nor specified

the “significant” resources it has expended in reaction to the challenged provisions, they have failed to set forth admissible evidence that could meet their burden to demonstrate standing on this basis.

LULAC also claims “organizational injury from the chilling effect that SB 1111 has on its voter registration efforts” due to potential criminal prosecution, claiming it did not have to sue the relevant prosecutors even though the named Defendants have no role in criminal prosecutions. ECF 156 at 4. Plaintiffs cite *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), for this proposition because there the Supreme Court found standing on the basis of the chilling effect of a potential prosecution under the challenged statute, even though no actors who could bring such prosecutions were named. ECF 156 at 5.

But *Driehaus* involved an enforcement scheme where the agency defendant was empowered “to subpoena witnesses and compel production of documents” and made determinations that a party violated the statute. *Driehaus*, 573 U.S. at 153. The Defendants here have no such enforcement authority. See *City of Austin v. Paxton*, 943 F.3d 993, 1000 (5th Cir. 2019) (“enforcement” defined by “compulsion or constraint”) (quoting *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010)). The *Driehaus* Court found standing because of “[t]he burdens that [the agency] proceedings” could impose on plaintiffs. *Driehaus*, 573 U.S. at 165. The Court’s finding of standing was based on “the combination of th[e] two threats” of the agency proceedings and the potential criminal prosecution “under the circumstances of th[e] case.” *Id.* at 166. Because there are no similar burdensome agency proceedings that could be initiated by county election officials against Plaintiffs, the failure to name officials with the power of criminal prosecution makes any harm from that potentiality not traceable to the existing Defendants.

Regardless, neither Plaintiff has set forth evidence that it is subject to criminal liability for advising voters—indeed, both have set forth evidence to the contrary. See ECF 141 at Appx.091 (Voto Latino Dep.) (“Q: You’re not subject to criminal liability if you speak with college students, correct,

about voter registration? A: That is correct.”); *id.* at Appx.106 (LULAC Dep.). There is therefore no evidence that either LULAC or Voto Latino is chilled in its ability to provide information, only “subjective fear,” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 418 (2013), and thus no organizational injury.

B. Plaintiffs lack associational standing.

Plaintiffs also lack associational standing. As Voto Latino has no membership, only LULAC claims standing on this basis. ECF 156 at 5–6; *see also* ECF 155 at 5 n.2.

An organization must identify “a specific member” to assert standing on its behalf, *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010), because “[a]fter all, to assess [its] power to decide a case, [the] Court must know who was injured and how.” *League*, 2022 WL 1631301, at *4. LULAC fails to name a single member who is injured by any of the challenged provisions of the Texas Election Code, introducing no evidence—such as declarations or affidavits—necessary to support its standing at this stage of litigation. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (“In response to a summary judgment motion … the plaintiff … must ‘set forth’ by affidavit or other evidence ‘specific facts’” supporting standing) (quoting Fed. R. Civ. P. 56(e)). Indeed, LULAC has disclaimed knowing of any specific member that was injured by SB 1111, ECF 138-4 at Appx.000162–64, 000173 (LULAC Dep. 24:12–20, 25:5–20; 32:10–17, 68:6–8), and did not even undertake a search until long after the filing of this lawsuit. *Id.* at Appx.000173 (LULAC Dep. 68:13–18).

LULAC invokes an exception to “the requirement of naming the affected members … where all the members of the organization are affected by the challenged activity.” ECF 156 at 5 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009)). It asserts that all of its members “are harmed by SB 1111” because it “chills the ability of the organization to speak with its members about various aspects of voter registration.” ECF 156 at 5. But this is merely a naked assertion—there is no admissible evidence Plaintiffs cite in support of this. Plaintiffs instead cite to testimony that does not

evidence harm to all of LULAC’s members, but merely a subset—students. ECF 156 at 5. Regardless, a “self-serving observation that [an organization] has expended resources to educate its members and others regarding [the challenged law does not present an injury in fact.]” *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). Desperately, Plaintiffs rely on an allegation in their Complaint as supporting this contention, ECF 156 at 6—but allegations in a complaint are not admissible evidence that can be used to fend off a motion for summary judgment. And Plaintiffs point to no evidence that all of its members desire (or provide) the information related to SB 1111—members who are already registered, or ineligible to register (because of lack of citizenship or being felons) are not harmed even under Plaintiffs’ theories.

II. Plaintiffs lack statutory standing and third-party standing.

Plaintiffs lack statutory standing. True, Section 1983 creates a cause of action for organizational plaintiffs in some circumstances. But not for organizations whose rights have not been violated, and that instead sue only to vindicate third parties’ rights. *See Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011).

The cases that Plaintiffs cite to the contrary, ECF 156 at 8, are inapposite. In *Church of Scientology Flag Service Organization v. City of Clearwater*, the Eleventh Circuit simply held that the Church of Scientology may challenge a city ordinance regulating the Church’s solicitation of funds. 2 F.3d 1514, 1519, 1525–26 (11th Cir. 1993). Conversely, the organizational plaintiffs here challenge a law that regulates third parties, not them. *Contra id.* at 1525 (“[The Church of] Scientology’s interest in avoiding challenged regulation is greater than the minimum interest in the outcome of a lawsuit required for standing.”).

The 2020 case Plaintiffs cite was reversed because “the Plaintiff’s suit [was] barred by sovereign immunity.” *Lewis v. Scott*, 28 F.4th 659, 662 (5th Cir. 2022). Since the Fifth Circuit did not reach the standing analysis, it has no precedential weight. And in the 2010 case Plaintiffs cite, the court

did not even consider statutory standing—instead considering only Article III standing because the parties did “not urge the court” to consider the “prudential limitations on standing” for claims asserted under § 1983. *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 495 (N.D. Tex. 2010).

Similarly, that courts found associational standing under Article III in Section 1983 cases, ECF 156 at 9, does not mean that statutory standing was found to exist—only that the court did not address this issue. This is because—unlike Article III standing—“statutory standing goes to whether the plaintiff has a cause of action under a particular statute, as opposed to whether the court has ‘subject-matter jurisdiction, *i.e.*, whether the court has statutory or constitutional *power* to adjudicate the case.’” *Gonzalez v. Gen. Motors, LLC*, No. EP-15-CV-00302-DCG, 2017 WL 9324466, at *3 (W.D. Tex. Nov. 7, 2017) (Guaderrama, J.) (cleaned up). “[S]tatutory standing relates to the merits of a cause of action and not subject matter jurisdiction.” *I & I Hair Corp. v. Beauty Plus Trading Co.*, No. 3:18-CV-03254-M, 2019 WL 7838077, at *2 (N.D. Tex. Sept. 13, 2019) (Lynn, C.J.). Parties may therefore waive or forfeit arguments relating to statutory standing, and courts are not required to address the issue *sua sponte*. So Plaintiffs’ citation to cases where courts allowed such suits to proceed without addressing the topic is of no help to them. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (cases that did not “squarely address[]” a legal issue are not binding “by way of stare decisis”); *Wilson v. Taylor*, 658 F.2d 1021, 1034–35 (5th Cir. 1981) (refusing to follow a Fifth Circuit opinion that conflicted with previous Supreme Court opinion that “was not called to the attention of the [first Fifth Circuit] panel”).

Plaintiffs also lack third-party standing. The 2015 case they cite explains that “[t]he Supreme Court has not looked favorably upon third-party standing.” *Guild v. Serus Techs., Inc.*, No. 1:14-cv-366-LY, 2015 WL 10818584, at *7–8 (W.D. Tex. Feb. 4, 2015) (cleaned up). To assert third-party standing, Plaintiffs must have “a close relationship to the third party,” and—crucially—there must also be

“some hindrance to the third party’s ability to protect his or her own interests.” *Alamo Forensic Servs., LLC v. Bexar Cnty.*, 861 F. App’x 564, 569 (5th Cir. 2021). Ultimately, in *Alamo Forensic Services*, the court dismissed the third-party claim since the organizational plaintiff “plead[ed] nothing to support the notion that [the third party] [was] hindered from protecting her own interests.” *Id.* at 569–70.

Here, the third parties—Texas voters—are not hindered from protecting their own interests. Plaintiffs cite no admissible evidence they have to the contrary. Indeed, several individual Texas voters are plaintiffs in challenges to Senate Bill 1 (Texas’s recent election-integrity law) and Texas’s 2021 redistricting efforts. *See generally LUPE v. Abbott*, 5:21-cv-00844-XR (W.D. Tex.); *LULAC v. Abbott*, 3:21-cv-000259-DCG-JES-CVG (W.D. Tex.). Plaintiffs know this. In fact, they are plaintiffs in both lawsuits as well. And yet they insist that there are “genuine obstacles” somehow preventing voters from challenging SB1111 but not SB1 or Texas’s most recent redistricting. In support of this, Plaintiffs cite cases holding that “minors are hindered in their ability to protect their own interests, so as to warrant third parties suing on their behalf.” ECF 156 at 7 (citing *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007); *Hutchins by Owens v. District of Columbia*, 188 F.3d 531, 548 n.14 (D.C. Cir. 1999)). But minors cannot vote, making this point is irrelevant to third-party standing here.

In their opposition to Plaintiffs’ motion for summary judgment, Intervenor-Defendants Torres and Pendley also discussed why Plaintiffs lack third-party standing, ECF 155 at 8–9, as did the State in opposition to the same motion. ECF 154-1 at 11–12. Those points need not be repeated here.

III. SB 1111 is constitutional.

A. Section 1.015(b) does not violate the First Amendment.

“As the part[ies] invoking the First Amendment’s protection,” Plaintiffs “have the burden to prove that it applies.” *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (citing *Clark v. Cnty. for Creative Non–Violence*, 468 U.S. 288, 293 n. 5 (1984)). As previously explained in great detail,

and incorporated here, this claim is based on a flawed reading of Tex. Elec. Code § 1015(b) (what Plaintiffs’ erroneously term the “Residence Restriction”), *see* ECF 138 at Page 10 of 18–Page 13 of 18; ECF 154-1 at 12–18.

Plaintiffs claim that the Secretary of State’s interpretation of Section 1015(b) is “post hoc and nonsensical.” ECF 156 at 9. But federal courts are to construe state law to avoid constitutional problems. *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (“[W]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.” (citation and internal quotation marks omitted)). They are also to defer to state rules of construction when interpreting state law; in Texas, courts “interpret a statute in a manner that renders it constitutional” whenever possible. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex.2000) (citations omitted). When a statute is subject to a facial constitutional challenge, as here, Texas courts “consider the statute as written, rather than as it operates in practice,” but they also “consider legislative history and reasonable constructions by the agency charged with implementing it.” *Id.* (citations omitted). The State has previously explained in detail the surrounding circumstances leading up to the passage of SB 1111 and incorporates that discussion here. *See* ECF 154-1 at 16–18; ECF; ECF 138 at Page 10 of 18–Page 11 of 18; *see also* Tex. Gov’t Code § 311.023 (urging courts to consider the circumstances behind legislation when interpreting statutory language).

Federal courts have recognized this as well. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (construing a town ordinance “more narrowly” in part because “[t]his narrow reading is supported by representations of counsel for the town at oral argument”); *Bellotti v. Baird*, 428 U.S. 132, 143 (1976) (noting the importance of the interpretation given by the officials charged with enforcing the statute); *Hamer v. Mussehwhite*, 376 F.2d 479, 481 (5th Cir. 1967) (deferring to the city’s interpretation of an ordinance because city officials are charged with enforcing the statute and are the ones who must apply it).

The Texas Secretary of State has the responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the Election Code, Tex. Elec. Code §§ 31.003, 31.004. County election officials look to the Secretary of State for advice and guidance on interpreting the Election Code. ECF 154-3 at Appx.400 (Real Dep. 30:6–14); Appx.369 (Hidalgo Dep. 45:18–47:6). They also refer voters with questions about Section 1.015(b) to the Secretary if needed. ECF 154-3 at Appx.373 (Hidalgo Dep. 62:16–22); Appx.440 (Dallas Dep. 138:21–139:6). The Secretary is therefore the state agency charged with “setting [Section 1.015(b)]’s machinery in motion” and “making the parts work efficiently and smoothly while they are untried and new.” *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Indeed, the Fifth Circuit has previously deferred to the Secretary’s interpretation of the Election Code on this basis. *Voting for Am., Inc.*, 732 F.3d at 387.

As Plaintiffs are making a facial challenge for their First Amendment claim, they were required to demonstrate that “a substantial number” of the applications of the challenged provision are unconstitutional in relation to its “plainly legitimate sweep.” *Voting for Am., Inc.*, 732 F.3d at 397 (citation omitted). They make no effort to do so, instead failing to cite evidence of even a single voter negatively affected by the provision.

Due to its recent vintage and the lack of problems in implementation, Texas courts have not had the opportunity to review Section 1.015(b). Rather than making an *Erie* guess, the Court should defer to the Secretary’s interpretation because it is constitutionally sound and consistent with Texas rules of statutory construction.

B. There is no burden on the right to vote.

The State and Defendant-Intervenors Torres and Pendley have previously explained why none of the challenged provisions fail the *Anderson-Burdick* balancing test applicable to election regulations, and incorporate that discussion here. *See* ECF 154-1 at 18–22; ECF 155 at 9–12. The challenged provisions merely clarified existing requirements. ECF 154-1 at 2. Plaintiffs fail to point to any

admissible evidence that any voter has been prevented from registering to vote by any of the challenged provisions of SB 1111. The speculation of Plaintiffs' expert to the contrary, *see* ECF 154-1 at 20–21, does not satisfy this burden.

Plaintiffs' failure to interpret the Texas Election Code as a whole, and consistent with the Secretary's understanding of the three challenged provisions, is wrong as a matter of law and dispositive of all claims. Most glaring is Plaintiffs' failure to recognize explicit provisions that alleviate any purported burden they allege; the State and Defendant-Intervenors Torres and Pendley have previously explained this at length and the State incorporates that briefing here. *See* ECF 155 at 9–12; 154-1 at 20–21.

C. SB 1111 does not violate the Twenty-Sixth Amendment.

The State has previously explained why no provision of SB 1111 violates the Twenty-Sixth Amendment and incorporates that briefing by reference. *See* ECF 54-1 at 22–26. The most elementary problem with this claim is that none of the challenged provisions classify “on account of age,” U.S. Const. amend. XXVI, § 1, at all. Plaintiffs' claim is best characterized as a disparate-impact claim based on a supposed effect on college students. But Plaintiffs set forth no admissible evidence on the ages of college students; even if they had such evidence that college students were overwhelmingly under the age of 21, there would still not be a viable claim on this basis. Constitutional anti-discrimination provisions prohibit intentional discrimination, not governmental acts that have a disproportionate impact on a protected class. *See Washington v. Davis*, 426 U.S. 229, 239 (1976); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). Plaintiffs point to no evidence that any provision of SB 1111 was enacted to harm voters under 21, dooming this claim.

CONCLUSION

This Court should grant summary judgment and dismiss all claims in favor of the Defendants and Defendant-Intervenors.

Dated: June 10, 2022

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Respectfully submitted.

PATRICK K. SWEETEN
Deputy Attorney General for Special Litigation
Texas Bar No. 00798537

WILLIAM T. THOMPSON
Deputy Chief, Special Litigation Unit
Texas Bar No. 24088531

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

OFFICE OF THE ATTORNEY GENERAL
SPECIAL LITIGATION UNIT
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548
Tel.: (512) 463-2100
Fax: (512) 457-4410

Counsel for Intervenor-Defendant Ken Paxton, in his official capacity as Texas Attorney General

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 10, 2022, and that all counsel of record were served by CM/ECF.

/s/ Kathleen T. Hunker
KATHLEEN T. HUNKER