YesNo. 22-50690

In the

United States Court of Appeals for the Fifth Circuit

TEXAS STATE LULAC; VOTO LATINO,
Plaintiffs-Appellees,
v.
BRUCE ELFANT, ET AL.,
Defendants,
v.
LUPE C. TORRES, IN HER OFFICIAL CAPACITY AS THE MEDINA COUNTY ELECTIONS ADMINISTRATOR; TERRIE PENDLEY, IN HER OFFICIAL CAPACITY AS THE REAL COUNTY TAX ASSESSOR-COLLECTOR; KEN PAXTON, TEXAS ATTORNEY GENERAL,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas
(No. 1:21-cv-00546-LY)

BRIEF OF APPELLEES

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September 26, 2022

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CERTIFICATE OF INTERESTED PERSONS

1. In the district court, this case is captioned as *Texas State LULAC v. Elfant*, No. 1:21-cv-00546-LY. In this Court, it is captioned as *Texas State LULAC v. Paxton*, No. 22-50690.

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

3. Counsel for Plaintiffs-Appellees further certify under Federal Rule of Civil Procedure 26.1 that no organizational plaintiff has any parent corporation and no publicly held corporation owns 10% or more of stock in any organizational plaintiff.

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Dated: September 26, 2022

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STATEMENT REGARDING ORAL ARGUMENT

Appellees take no position on oral argument but note that the Court has already set oral argument for October 6, 2022.

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INTRODUCTION

All parties to this appeal agree that voters in Texas must register at their "residence," which is to say their "domicile . . . one's home and fixed place of habitation to which one intends to return after any temporary absence." Tex. Elec. Code § 1.015(a). Appellees have never challenged that commonsense requirement and the district court's injunction does nothing to imperil it. This case instead concerns recently enacted Senate Bill 1111 ("SB 1111"), which injects confusing and unnecessary restrictions on *where*—and even *whether*—some Texans may claim a lawful residency to vote. Because those changes harm Appellees Voto Latino's and Texas State LULAC's ("LULAC") efforts to register voters across Texas, they filed suit against six county election officials to enjoin operation of the law in some of Texas's largest counties.

Three provisions are at issue, each of which the district court correctly found unconstitutional, at least in part. First, SB 1111 bars a person from "establish[ing] residence for the purpose of influencing the outcome of a certain election." Tex. Elec. Code § 1.015(b) ("Residence Restriction"). On its face, this law prohibits Texans from registering at an address if they moved there to engage in constitutionally-protected speech—even when that address reflects their "home and fixed place of habitation." *Id.* § 1.015(a). County defendants repeatedly acknowledged they do not understand the precise contours of the activity that the

law reaches with the term "influencing the outcome of a certain election" but admit that, at minimum, it applies to acts like voting, running for office, and volunteering for a political campaign. *Id.* § 1.015(b). The district court found this vagueness hinders Appellees' voter registration efforts given the risk of criminal liability for misadvising voters.

SB 1111's second challenged provision requires voters to register only at the residence they "inhabit . . . at the time of designation" and "intend[] to remain [at]." *Id.* § 1.015(d) ("Temporary Relocation Provision"). Texans who have temporarily relocated for any reason—for work, school, or family obligations—cannot register at their domicile because, by definition, they do not "inhabit" it at "the time of designation," nor do they "intend to remain" at a residence they have temporarily left. Like the Residence Restriction, the Temporary Relocation Provision chills Appellees' voter registration efforts by injecting confusion and uncertainty into the voter registration process and, by its plain terms, leaving many Texans without *any* acceptable residence to register to vote—creating what the district court called "a man without a country." ROA.1936.

Finally, SB 1111 imposes a burdensome verification requirement on voters registered at non-residential addresses who update their voter registrations with a valid address. *See* Tex. Elec. Code §§ 15.051(a), 15.053(a), 15.054 (the "PO Box Provision"). The Secretary of State's designee ("Secretary") *conceded* the law serves

no purpose when applied in this context; thus, the PO Box Provision could not survive any level of constitutional scrutiny.

Appellants have little to say in defense of these provisions *as written*, instead offering implausible interpretations that the district court rightly rejected. The Attorney General's reading of the Residence Restriction is so far-fetched that even his co-appellants refuse to join that argument. Br. 38 n.15. As to the PO Box Provision, Appellants ignore the Secretary's concession that the provision, as applied to voters who provide a residential address, serves no purpose.

Voto Latino and LULAC sued to enjoin these provisions, alleging that "by injecting confusion and uncertainty into the registration process, SB 1111 injures organizations like Plaintiffs that devote time and resources to registering voters—including and especially young voters." ROA.1174. As the district court found, and unrefuted record evidence established, these provisions directly harm Appellees in two distinct ways. *First*, they chill Appellees' ability to encourage and advise Texans on how to register to vote, particularly in view of the credible risk of prosecution to both registrants and Appellees under Texas law. While the Attorney General freely misinterprets several of these provisions here, Appellees have no such luxury—misinterpreting these provisions places them in jeopardy of violating the law by misadvising someone to register where they may not lawfully do so. *Second*, the challenged provisions force Appellees to divert resources away from specific

programs central to their missions.

With little to say on the merits, Appellants—the Attorney General and election officials in Medina and Real Counties—insist that—unconstitutionality aside—SB 1111 is harmless. But unrefuted testimony revealed the law is already discouraging Texans from registering to vote. ROA.910-11. And despite largely staking their appeal on the point, Appellants offer no basis to overturn the district court's finding that Appellees have Article III standing. Their arguments misconstrue the governing standards for challenges to laws that chill protected speech and ignore record evidence that Appellees diverted significant resources in direct response to SB 1111. Similarly, they are wrong that Appellees lack statutory standing—Voto Latino and LULAC may sue under 42 U.S.C. § 1983 to vindicate *their own* injuries—including the harm to their First Amendment rights—caused by SB 1111. This Court should affirm.

JURISDICTIONAL STATEMENT

This court has jurisdiction to review the final judgment entered in this case. 28 U.S.C. § 1291; *see* September 20, 2022 Order, No. 22-50690; September 21, 2022 Joint Notice, No. 22-50690.

ISSUES PRESENTED

1. Whether the district court properly found that Plaintiffs had Article III and statutory standing to enjoin SB 1111 based on unrefuted evidence that the law

forced Plaintiffs to divert resources and chilled Plaintiffs' speech regarding voter registration.

2. Whether the district court erred in finding that the Residence Restriction, which prohibits establishing residence for the purpose of influencing the outcome of an election, is unconstitutional.

3. Whether the district court erred in finding that the Temporary Relocation Provision—which prohibits Texans from designating a previous residence as their registration address unless they "inhabit[] the place at the time of designation," leaving students and other Texans who have relocated temporarily "without a country" in which to register—is unconstitutional.

4. Whether the district court erred in finding that the PO Box Provision is unconstitutional because it imposes a documentary evidence requirement—for certain voters who seek to provide a new residential address—which the Secretary of State's Office admitted serves no purpose.

STATEMENT OF THE CASE

I. Factual Background

A. SB 1111 creates new barriers to establishing residency and voting in Texas.

1. The Residence Restriction prohibits Texans from establishing residency for voting purposes in places where they have moved to engage in political activity.

SB 1111 first amends the Election Code's definition of "residence" to add that "[a] person may not establish residence for the purpose of influencing the outcome of a certain election." ROA.1166. The code already provided that a person's residence is their "domicile" and "home and fixed place of habitation," but now forbids that the same person from establishing such a residence "for the purpose of influencing" an election. Tex. Elec. Code § 1.015(a), (b); *see also* Br. for Intervenor-Defs.-Appellants' ("Br.") at 8 (admitting "existing law already made it a crime to register using a false address."). Substituting § 1.015(a)'s definition of "residence" into the Residence Restriction creates the following rule in Texas:

> A person may not establish [*domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence*] for the purpose of influencing the outcome of a certain election.

The term "influencing the outcome of a certain election" is undefined, but unrefuted testimony from defendant county officials confirmed it includes acts such as voting, running for office, and volunteering or donating to a political campaign. ROA.1347; ROA.1353-54; ROA.1405. At the same time, county officials admit that

they do not understand the scope of the term "influencing the outcome of a certain election" and cannot advise potential registrants on its meaning. ROA.1281, ROA.1308-09; ROA.1332-33; ROA.1371; ROA.1376.

2. The Temporary Relocation Provision bars Texans away from home temporarily from registering at their true residence.

SB 1111 further restricts where Texans may register to vote by adding a new subsection in the definition of "residence," providing that a "person may not designate a previous residence as a home and fixed place of habitation unless the person inhabits the place at the time of designation and intends to remain." ROA.1166. Before the enactment of this provision, Texas law already provided that a person "does not acquire a residence in a place to which the person has come for temporary purposes only and without the intention of making that place the person's home." Tex. Elec. Code § 1.015(d). Thus, Texas law now prohibits voters not only from registering at a place they do not "inhabit[]" at "the time of designation," but also prohibits them from registering at a place that they have "come for temporary purposes only." *Id*. § 1.015(d), (f).

As the district court found, this creates a scenario in which many voters will find themselves as a "man without a country." ROA.1936. For example, a college student in Austin wishing to register at their parents' home in Amarillo may do so only if they "inhabit" their parents' home and "intends to remain" there "at the time

of designation"—neither of which can be true if they are temporarily away at school. *Id.* § 1.015(f). Likewise, they may only register using their school address in Austin if they have "the intention of making that place [their] home" and have not moved there "for temporary purposes only," but of course most students are only at their school address temporarily. *Id.* § 1.015(c), (d), (f). The same problem faces Texans who have temporarily relocated for work, school, or family obligations, leaving them without a residence at which they may now lawfully register to vote. Not surprisingly, county registrars repeatedly testified that they find this provision "vague" and "confusing," ROA.1363-67, and that they are unable to explain its meaning to voters, *id*.; *see also* ROA.1334-35; ROA.1297.

3. The PO Box Provision makes it more difficult for some voters to confirm their registration status.

Texas law allows county registrars to request that voters confirm their residence address if they do not appear to reside at the address listed on their voter registration. Tex. Elec. Code § 15.051(a). Before SB 1111, Texas used a single confirmation notice form for all voters whose registration addresses appeared not to correspond to their actual residence. ROA.1423-24. These forms required voters to supply "all of the information that a person must include in an application to register to vote," but did not require any documentary proof of residence. ROA.1435-36.

Texas continues to use a modified version of this confirmation notice and accepts changes of address without documentary evidence in most instances, with

one critical exception: under SB 1111, voters whose addresses appear to be commercial post office boxes or a "similar location that does not correspond to a residence" must complete a separate form that requires submission of "evidence of the voter's residence address." Tex. Elec. Code §§ 15.051(a), 15.053(a)(3). The "voter's residence may be documented by providing a photocopy" of one of several forms of identification. *Id.* § 15.054. The Secretary of State's designee conceded he did not know why proof of residence was required in such instances. ROA.1430. All other voters, including those whose addresses do not appear to correspond to their actual residences, still receive confirmation notices but are not required to submit any proof of residence. ROA.1425-26; ROA.1433-34.

B. SB 1111 chills Voto Latino and LULAC's voter registration efforts and requires them to divert resources from other programs.

Voto Latino and LULAC are organizations committed to registering voters across Texas, particularly Latino and young voters. SB 1111 impairs these efforts, which are central to the organizations' missions, both by chilling their speech and requiring them to divert resources from other specific core programs.

1. Voto Latino and LULAC each share the mission of increasing political participation among Latinos and helping to register voters.

LULAC is the oldest and largest Latino civil rights organization in the United States. LULAC is a membership organization that was founded with the mission of protecting the civil rights of Latinos, including voting rights. ROA.1267. LULAC

engages in voter registration, voter education, and other activities and programs designed to increase voter turnout among its members and their communities. ROA.1269.

Voto Latino is a nonprofit, social welfare organization that engages, educates, and empowers Latino communities across the United States, working to ensure that Latino voters are enfranchised and included in the democratic process. ROA.1251. Voto Latino expends significant resources to register and mobilize thousands of Latino voters each election cycle, including nearly 5.6 million Latino voters in Texas. ROA.1252-53. Voto Latino mobilizes voters in Texas through statewide voter registration initiatives, as well as peer-to-peer and digital voter education and get-out-the-vote campaigns. *See* ROA.1263.

2. SB 1111 chills Appellees' voter registration efforts by subjecting them to criminal liability for misadvising voters.

SB 1111 impairs Appellees' voter registration activities by limiting their ability to advise and register prospective voters. That chill is caused both by the risk of prosecution to registrants—"because [Appellees] know that Texas [] prosecutes people who accidentally may not understand the law," ROA.1265—and to LULAC and Voto Latino themselves, because it is a crime in Texas to "request[], command[], coerce[], or attempt[] to induce another person to make a false statement on a registration application." Tex. Elec. Code § 13.007(a)(2). Indeed, risk of criminal prosecution inheres at every stage of the registration process, including when a voter

completes a registration, ROA.1527; casts a ballot, Tex. Elec. Code § 64.012(a); *id*. at § 276.018; or aids someone in either of these activities, ROA.1917.

The chill SB 1111 imposes on Appellees is heightened because, as the district court found, "the State [of Texas] has publicly declared one of its key priorities to be 'to investigate and prosecute the increasing allegations of voter fraud to ensure election integrity within Texas.'" ROA.1917. These efforts have included 534 fraud offenses against 155 individuals that have been "successfully prosecuted," with 510 additional offenses "currently pending prosecution" and 386 under "active election fraud investigations.'" *Id*. The Attorney General's designee confirmed his office prosecutes people for making false statements on voter registration forms. ROA.1441. And each of the county defendants below acknowledged that claiming an improper residence on a voter registration form is unlawful. *See* ROA.1314-15; ROA.1357-58; ROA.1372-73; ROA.1343-44; ROA.1288; ROA.137-39; ROA.1379-80; ROA.1386-87; ROA.1392-94; ROA.1439-41.

The confusion SB 1111's provisions create and the fear of criminal liability for misinterpreting those provisions tangibly impact Appellees' ability to engage in their mission-critical voter registration and education efforts. The individuals Voto Latino seeks to register are "disproportionally young people," ROA.1255, many of whom are registering to vote for the first time. But as Voto Latino's President testified, SB 1111's lack of clarity "makes it difficult for us to be able to have

conversations of enfranchisement for our community." ROA.1254. Because of SB 1111, groups like Voto Latino "don't have accurate information" to assure registrants "they will not be on the wrong side of the law" if they register, and "that impacts [Voto Latino's] ability to speak to them freely." ROA.1256; *see also* ROA.1257 ("[W]e can't in good heart give someone erroneous information if they, in fact, may be penalized . . . . [It] affect[s] [] our ability to communicate with our audience.").

3. SB 1111 forces Appellees to divert resources away from other critical programs central to their missions.

SB 1111 has also forced both Voto Latino and LULAC to divert resources away from other critical activities, including voter registration efforts in other states, funding scholarships, and pursuing policy goals. LULAC declined to fund immigration reform and criminal justice reform programs this year to focus on educating voters about SB 1111's requirements. ROA.1278-79. LULAC's president testified that, due to SB 1111, LULAC is expending funds "that we would have usually sent somewhere else" such as "on scholarships or educational programs or other areas" related to the organization's mission. ROA.1270. LULAC will be forced to rework information it provides to candidates, voters, and campaign workers due to SB 1111 and is already "having to spend more money on our voter registration and get out the vote efforts" than in the past. ROA.1268-70 ("We're looking at the first time we're going to be spending over maybe $1 million to $2 million in Texas

to deal with the issues and the residency requirements and advising students"). It will also have to change the information it supplies at voter registration drives to inform individuals of SB 1111's new requirements and has had to retrain deputy voter registrars. ROA.1277.

Similarly, Voto Latino engages in voter registration drives throughout the country to further its mission of mobilizing Latino voters. ROA.1251. But due to the need to educate voters about SB 1111, Voto Latino has diverted funding away from its efforts in other states to focus on Texas. ROA.1263. As a result, Voto Latino had to shut down its voter registration program in Colorado—the first time it was not able to run a voter registration drive there in over a decade. ROA.1258, 1259, 1263. It also had to retool its strategy and communications in Texas, and it will have to retrain volunteers. As a result of this diversion of time and funds, Voto Latino dropped the number of low propensity voters it plans to reach in Texas by 25 percent. ROA.1259.

II. Procedural Background

A. Voto Latino and LULAC file suit.

Voto Latino and LULAC filed suit "to protect both their rights and the rights of their members and constituents." ROA1175. They alleged that "by injecting confusion and uncertainty into the registration process, SB 1111 injures organizations like Plaintiffs that devote time and resources to registering voters—

including and especially young voters." ROA1174. The Complaint further alleged that SB 1111 "burden[ed] the abilities of lawful voters to cast their ballots and make their voices heard." ROA1173-74. The Complaint named county election officials in Travis, Bexar, Harris, Dallas, El Paso, and Hidalgo Counties as defendants. Real and Medina Counties (collectively, with the six counties above, "County Defendants"), as well as Attorney General Ken Paxton, were granted intervention. ROA.258; ROA.443-46.

After discovery, the parties filed cross motions for summary judgment. The court issued its memorandum opinion on August 2, 2022 and entered final judgment the same day. ROA.1907.

B. The district court's order enjoining SB 1111.

In a thorough and comprehensive order, Judge Yeakel granted in part and denied in part Appellees' motion for summary judgment. ROA.2165-92

The district court first found that both LULAC and Voto Latino established Article III standing in two ways: through unrefuted testimony that SB 1111 chills their ability to engage potential voters and requires them to divert resources from other programs. ROA.2171-76. As to the latter injury, the court found that both Appellees identified "specific projects" they had to divert resources from, and that this diversion was "traceable" to the County Defendants' responsibility to review voter registration applications in conformity with SB 1111. ROA.2171-72. Judge

Yeakel noted that Voto Latino had to close its voter-registration drive in Colorado as a result of SB 1111, and also that LULAC had to "withhold[] money from three separate programs" and "for the first time" spend over $1 million to counteract the effects of SB 1111. ROA.2172-73.

The court also found that Appellees independently established Article III standing through unrefuted testimony that SB 1111 chilled their speech. ROA.2174-75. Judge Yeakel credited testimony from Voto Latino's President and Co-Founder that the group cannot communicate freely with those they seek to register due to concern they will misadvise them on the law. *Id.* Similarly, he credited testimony from LULAC's President that SB 1111 chills the voter registration effort of the group's members, particularly in view of the criminal penalties associated with registration violations. *Id.* He concluded that Appellees "have articulated two distinct harms that satisfy all three irreducible elements of constitutional standing." ROA.2176.

The court also found that Appellees established statutory standing because they "personally suffered a direct harm that is redressable under Section 1983." ROA.2176, ROA.1979. Specifically, the court held that Appellees' injury "implicates their own constitutional rights, enforceable under Section 1983," because "subsumed in Plaintiffs' cause here are two direct harms, not only to Plaintiffs' pocketbooks, but also to Plaintiffs' First-Amendment right to advise

voters without threat of prosecution." ROA.2178.

The district court then turned to the merits and enjoined the Residence Restriction and Temporary Relocation Provision in full and the PO Box Provision in part.

Judge Yeakel held that the Residence Restriction was unconstitutionally vague and overbroad because it "hinders Plaintiffs' ability to advise prospective voters" and "restricts a person's ability to move and to vote, if the person moves 'for the purpose' of voting or of otherwise 'influencing' the outcome of an election." ROA.2188. The court rejected the Attorney General's view that the provision applied only to those registering at false addresses, finding it at odds with the plain text: it is simply "not what the Residence Provision says." ROA.2187. Because it found that the "Residence Provision is unconstitutionally vague and overbroad, barring conduct that is squarely protected by the First Amendment," the court next considered whether the "severe restriction on the right to vote" was "narrowly drawn to advance a state interest of compelling importance." ROA.2189 (quotation omitted). The court held that the "Residence Provision is not [] narrowly drawn, and there is no way to construe the provision in a way that avoids constitutional scrutiny without making unwarranted assumptions about its intended scope," thus it "fails any degree of constitutional scrutiny." *Id*.

Next, Judge Yeakel found that the Temporary Relocation Provision "renders

some Texans without *any* residence," while also confusing election officials. ROA.2191. For example, "a college student cannot acquire a residence in the college town where they will study only 'temporar[il]y' nor can the student designate as a residence the home town they have stopped 'inhabit[ing],' albeit temporarily." ROA.2190. The court relied upon unrefuted testimony from the County Defendants about their confusion over where to register college students and determined that the "court is likewise unable to discern where college students should register as the Temporary-Relocation Provision is written. And the possible repercussions are not just complete disenfranchisement, but also criminal liability." ROA.2191. Judge Yeakel concluded that the "Temporary-Relocation Provision does not overcome any degree of constitutional scrutiny." *Id*.

Finally, the district court largely upheld the PO Box Provision but found that the Appellants offered "no justification for requiring identification from Texans who *change* their address" from a non-residential address, such as a PO box, to a valid residential address. ROA.2185. The court stressed that the Secretary of State's designee *conceded* that there was no reason to demand proof of residence from a person who now lives at a valid residential address, simply because their registration previously listed a non-residence. ROA.1430. Judge Yeakel found that the State's interests did not justify this additional requirement for individuals in these circumstances. ROA.2185-86.

The district court permanently enjoined Defendants from enforcing the Residence Restriction and Temporary Relocation Provision, and from enforcing the PO Box Provision to the extent it requires "evidence of the voter's residence address as required by Section 15.054" even when the registrar no longer has reason to believe "the voter's residence address is a commercial post office box or similar location that does not correspond to a residence." ROA.2191.

SUMMARY OF ARGUMENT

I. Judge Yeakel correctly found that Voto Latino and LULAC each have Article III standing to challenge SB 1111 because (1) the law's vague provisions chill their First Amendment right to engage in voter registration activities and (2) the record established each Appellee diverted sizeable funds from other specific programs in direct response to SB 1111.

On the first point, Appellants do not dispute that Voto Latino and LULAC regularly engage in voter registration and education efforts, or that such efforts constitute protected speech. SB 1111's vague and confusing provisions create a credible risk that Appellees will face prosecution if they guess wrong about the meaning of these provisions while engaged in these efforts. *See* Tex. Elec. Code § 13.007(a)(2); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). Appellants fail to present any evidence contradicting the presumption of a credible prosecution threat that exists in this First Amendment context. *See Susan B.*

Anthony List v. Driehaus, 573 U.S. 149 (2014).

Voto Latino and LULAC also each have standing because record evidence shows they diverted resources from specific programs in response to SB 1111. *See Tenth St. Residential Ass'n v. City of Dallas*, 968 F.3d 492, 500 (5th Cir. 2020). Appellants selectively quote the record to suggest Appellees diverted resources in response to SB 1111 *and* other voting laws Texas passed after the 2020 elections. But that is wrong. The record clearly shows these diversions were a *direct* response to SB 1111 and Judge Yeakel did not clearly err in reaching the same conclusion. Even if that were not so, Appellants are not entitled to summary judgment in their favor on standing because they have merely identified a triable issue of fact.

Finally, Appellees have statutory standing because they seek redress for their own injuries. ROA.1920 (emphasis added). The district court concluded, and record evidence again confirms, that each provision chills Appellees' voter registration efforts and forces them to divert resources. They are entitled to redress as to each provision.

II. On the merits, the district court correctly found the Residence Restriction unconstitutionally vague. Extensive testimony confirmed that it bars a person from registering to vote at their actual residence if they moved there to engage in protected speech. At the same time, uniform testimony from county officials—including at least one Appellant—confirmed that the scope of protected speech

subject to this restriction is not at all clear. That vagueness chills Appellees from engaging in efforts to advise and register prospective voters. The Attorney General insists that the statute merely prohibits a person from registering to vote using a "false address." But that reading is contrary to fundamental principles of statutory interpretation under Texas law and finds no support in the text. *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993). Indeed, Appellants admit that the Texas Election Code "*already* made it a crime to register using a false address." Br. 8. Presumably for those reasons, the Attorney General's two co-appellants do not join the Attorney General's argument. Br. 38, n.15.

III. The district court was likewise correct that the Temporary Relocation Provision fails constitutional scrutiny. By forbidding a person from registering at a residence they do not "inhabit[] . . . at the time of designation and intend[] to remain," it bars a person from registering at their true domicile if they are temporarily away from it, including for school, work, or any other reason. *See* Tex. Elec. Code § 1.015(f). Because existing law bars the same person from registering at the place they are temporarily located, *see id.* § 1.015(c)-(d), the Temporary Relocation Provision "creates a 'man without a country,'" leaving many Texans without *anywhere* they can lawfully register to vote. ROA.1936.

IV. Finally, the district court also correctly found the PO Box Provision unconstitutional to the extent it requires proof of residence from voters who cure

invalid registrations with proper residential addresses, for good reason—Texas law permits all other voters updating the residential address on their registration to do so without documentation. The Secretary conceded no purpose is served by the documentation requirement and agreed that providing a residential address alone should be enough to correct the voter's registration. ROA.1430-33. Appellants offer no reason to lift the district court's injunction on this pointlessly burdensome provision.

STANDARD OF REVIEW

"On summary judgment . . . questions of law are reviewed *de novo*, while questions of fact are reviewed for clear error." *Anne Harding v. Cnty. of Dallas*, Texas, 948 F.3d 302, 306-07 (5th Cir. 2020). "A finding is clearly erroneous if the 'reviewing court is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). "By contrast, a finding is not clearly erroneous simply because the reviewing court 'is convinced that it would have decided the case differently.'" *Id.*

ARGUMENT

I. The district court correctly held that Appellees have standing.

A. Appellees satisfy Article III's standing requirements.

1. SB 1111 chills Appellees' protected First Amendment activities.

Appellees have standing to challenge SB 1111 because the law's confusing and uncertain terms chill their First Amendment right to advise and register potential voters. It is settled law that "[a] plaintiff bringing such a challenge need not have experienced 'an actual arrest, prosecution, or other enforcement action' to establish standing." *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021). Instead, plaintiffs need only demonstrate that (1) they intend to engage in protected expression; (2) that Defendants' enforcement of the challenged policy chills that expression; and (3) that the threat of future enforcement is substantial. *Id.* Appellees easily satisfy these requirements.

First, Voto Latino and LULAC regularly engage in efforts to encourage and help citizens register to vote as part of their respective missions of mobilizing Latino voters. ROA.1251; ROA.1269. Appellants do not dispute that the First Amendment protects these activities, nor could they. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 389 (5th Cir. 2013) (holding "some voter registration activities involve speech—'urging' citizens to register; 'distributing' voter registration forms; 'helping' voters

fill out their forms; and 'asking' for information to verify that registrations were processed successfully").

Second, SB 1111 chills this protected expression by injecting confusion and uncertainty into the voter registration process, putting Appellees at credible risk of criminal prosecution for attempting to register citizens to vote who may be ineligible under SB 1111. As Voto Latino President Teresa Kumar testified, "[t]he totality of what [SB 1111] says makes it very difficult for us to be able to communicate . . . with our constituents and our potential registered voters on where they can establish residency . . . because we know that Texas also prosecutes people who accidentally may not understand the law." ROA.1264-65. Ms. Kumar added:

> Our job is to provide [potential voters] with accurate information. So [when] we don't have accurate information where they will not be on the wrong side of the law, that impacts our ability to speak to them freely . . . It's that we can't in good heart give someone erroneous information if they, in fact, may be penalized and on the wrong side of the law . . . So we have an effect in our ability to actually communicate with our audience because we just the – the law seems to be not clear and it hurts our ability to communicate directly.

ROA.1256-57; *see also* ROA.1260-61 ("If we can't speak freely to our audience on their rights and where they can register, where they do not fall afoul of the law, it . . . makes it difficult for us to be able to engage in our primary purpose of" voter enfranchisement.); ROA.1271-72 (discussing the chilling effect on LULAC's voter registration efforts because "they might be committing a crime if they get a college student . . . to register to vote").

Third, the threat that Appellees will be prosecuted for misadvising registrants is credible. In a pre-enforcement freedom-of-expression challenge such as this, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Barilla*, 13 F.4th at 432; *Speech First, Inc. v. Fenves*, 979 F.3d 319, 335 (5th Cir. 2020) (same); *see also Babbitt* 442 U.S. at 302 (same). SB 1111 imposes dizzying new voter registration requirements, as evinced by testimony from the Harris County Election Administrator that at least one person told her that he "did not register to vote because of SB-1111" and its confusing modification of residency rules. ROA.910-11. It is in turn a crime under Texas law to help someone register to vote in violation of those confusing new requirements. Tex. Elec. Code § 13.007(a)(2). These statutes are not "moribund" and the record contains no compelling contrary evidence. In fact, the record shows that the Attorney General has publicly declared that one of his key priorities is "to investigate and prosecute the increasing allegations of voter fraud to ensure election integrity," and he has brought hundreds of election-related prosecutions with hundreds more pending. ROA.1917.[1]

[1] The Attorney General argues he "cannot currently initiate criminal prosecution [under the election code] absent a request for assistance from a district attorney," Br. 30, but tellingly points to no "compelling contrary evidence" in the record showing that no county will allow the Attorney General to investigate such violations. *Barilla*, 13 F.4th at 432. Nor has the Attorney General himself—never mind any of Texas's district attorneys—disclaimed any intent to prosecute violations of SB 1111.

Appellants fail to identify any compelling evidence to rebut the presumption of a credible threat of prosecution. Instead, they principally assert that Appellees' harms are not traceable to the election administrators named as defendants in this case, and that they should have instead sued "the district or county attorneys who could actually prosecute them." Br. 27. Settled law forecloses this argument. In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), the Supreme Court held that political advocacy groups properly named election officials—rather than prosecutors—as defendants in a challenge to an election statute whose potential enforcement allegedly chilled their First Amendment rights. Plaintiffs' alleged injury was traceable to the election officials who were obligated under state law to "refer" violations of the law to local prosecutors. *Id.* at 153. As Judge Yeakel noted, the same is true here: Texas law obligates the County Defendants to refer allegations of unlawful voter registration to local prosecutors, as well as the Attorney General and Secretary of State. *See* Tex. Elec. Code § 15.028. Appellants are wrong that this referral obligation "does not extend to those who allegedly encourage voter fraud" because County Defendants are required to submit to prosecutors "an affidavit stating the relevant facts" of the alleged unlawful registration. *Id*.

Appellants' remaining counterarguments are unavailing and ignore the governing standard. They contend that no credible threat exists if prosecutors retain discretion to refrain from bringing charges, or if the plaintiffs fail to "identify any

prosecutor who would prosecute them." Br. 27-28. These arguments are citation-free for a reason. In a First Amendment pre-enforcement challenge the threat of enforcement is presumed—it is "latent in the existence of the statute," *Speech First*, 979 F.3d at 336—as such, the existence of prosecutorial discretion, the identity of prosecutors, and the Attorney General's purported need to obtain "a request for assistance" from the local prosecutor before prosecuting violations of the Texas Election Code are irrelevant, Br. 30. Moreover, the Attorney General can initiate a prosecution without a "request for assistance" so long as he ultimately obtains "the consent and [a] deputization order of a local prosecutor," *State v. Stephens*, Nos. PD-1032-20, PD-1033-20, 2021 WL 5917198, at *10 (Tex. Ct. Crim. App. Dec. 15, 2021). Thus, the Attorney General's intent to vigorously prosecute election offenses is relevant, credible evidence of the threat Appellees face.

Appellants also misstate the law in suggesting that criminal penalties apply only to conduct by voters, not organizations who procure registrations. Br. 29. That is simply wrong. *See* Tex. Elec. Code § 13.007(a)(2) (making it a criminal offense to "request[ ], command[ ], coerce[ ], or attempt[ ] to induce another person to make a false statement on a registration application"). Nor is there merit to Appellants' contention that Appellees have not shown that they intend to encourage "false voter-registration applications." Br. 29. The record is clear that they regularly engage in voter registration efforts, particularly among communities mostly likely to be

affected by SB 1111, creating a credible risk that they will procure registrations that run afoul of the law's unclear requirements. ROA.1251; ROA.1269.

Finally, Appellants assert that the Complaint alleged a First Amendment injury only as to the Residence Restriction, and as such this injury cannot provide standing to challenge the Temporary Relocation and PO Box provisions. Br. 26. But it is the record evidence—not the allegations in the Complaint—that determine whether Appellees have demonstrated standing at summary judgment. *See Lujan v. Defendes. of Wildlife*, 504 U.S. 555, 561 (1992). Appellees' representatives testified in discovery that "the *totality*" of SB 1111—not just the Residence Restriction—is what "makes it very difficult for [them] to communicate" with potential voters. ROA.1264; *see also, e.g.*, ROA.1254-55 (explaining how Temporary Relocation Provision will chill Voto Latino's registration efforts because they cannot "affirmatively state that [college students are] not going to be on the wrong side of the law if they register to vote on campus. We don't know that because it is not clear."); ROA.1271-72 (Temporary Relocation Provision will have a "chilling effect" on LULAC's voter registration drives because "when they go out and register voters . . . they might be committing a crime if they get a college student from Laredo to register to vote at UT in Austin and he never gave us his Laredo residency . . . ."). Plaintiffs accordingly argued that they have standing because the challenged

provisions of SB 1111—not just the Residence Restriction—chilled their speech. ROA.1152-53; ROA.1814. Judge Yeakel agreed. ROA.1916.[2]

2. SB 1111 forces Appellees to divert resources from routine and mission-critical activities.

Voto Latino and LULAC also have standing because SB 1111 perceptibly impairs their missions by forcing them to divert resources from other core initiatives. "The Supreme Court has recognized that when an organization's ability to pursue its mission is 'perceptibly impaired' because it has 'diverted significant resources to counteract the defendant's conduct,' it has suffered an injury under Article III." *Tenth St. Residential Ass'n*, 968 F.3d at 500 (quoting *NAACP. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010)). Plaintiffs can demonstrate standing based on diverted resources by, *inter alia*, identifying "specific projects [they] had to put on hold." *Id.*

Judge Yeakel found that both Appellees diverted funding away from specific projects toward efforts to educate voters about SB 1111. ROA.1914. Voto Latino was forced to cancel its voter registration efforts in Colorado, leaving the organization without the ability to run a voter-registration drive in that state for the

[2] Because Judge Yeakel held that each challenged provision of SB 1111 chills Appellees' First Amendment rights, there is no merit to Appellants' contention that the district court's injunction is overbroad. Br. 45. In any event, the Fifth Circuit has treated challenges to election law claims, whether they are rooted in the First Amendment alone or in tandem with the Fourteenth Amendment, as indistinguishable under the *Anderson-Burdick* framework. *See Steen*, 732 F.3d at 388.

first time since 2010. ROA.1914; ROA.1258, ROA.1259, ROA.1263. LULAC was similarly forced to defund its immigration-reform and criminal-justice reform initiatives, and also diverted funding from its annual scholarship programs. ROA.1914; ROA.1278-79. Appellants presented no contrary evidence.

Appellants distort the record, however, to argue that Voto Latino and LULAC lack standing because they diverted these resources to combat *both* SB 1111 and SB 1, a separate election law in Texas enacted in 2021. Br. 22. While they quote testimony from Voto Latino's corporate representative that the organization's decision to close its Colorado program was caused by "SB 1111 and all the other laws that came into effect," Br. 24 (quoting ROA.1258), Voto Latino's representative clarified later in the deposition that this program was closed due to SB 1111 "specifically." ROA.1263 ("Q: But what specific projects or activities has Voto Latino needed to divert resources from *because of SB 1111*? A: Mm-hmm. Specifically, well, two. One is reducing the amount of voter contact and outreach . . . and the other has been shutting down the Colorado program for 2022.") (emphasis added). Judge Yeakel credited this testimony and Appellants have not shown his decision to do so was clearly erroneous.

LULAC's representative, too, clarified that resources were diverted because of SB 1111, specifically. *E.g.*, ROA.1269 ("[W]e're going to be spending over maybe $1 to $2 million in Texas to deal with the issues *and the residency*

requirements.") (emphasis added). And even if Appellants were correct that Voto Latino and LULAC diverted these resources in a combined response to SB 1111 and SB 1 without providing the exact amount of resources diverted by SB 1111, Appellees still have standing because "[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd* 553 U.S. 181 (2008); *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (same).[3]

There is also no merit to Appellants' argument that Voto Latino and LULAC lack standing because they routinely engage in voter education efforts. Br. 24-25. Even if Appellees already engage in these efforts to some degree, the fact that they were forced to dismantle *other* core initiatives in a manner that perceptibly impaired their missions is sufficient to show standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)—the seminal Supreme Court case on diversion of resources standing—held that an organization was injured when it was forced to divert resources away from "its efforts to assist equal access to housing through counseling and other referral services" toward investigating the defendant's "racially

[3] Even if Appellants were correct that Appellees failed to disaggregate resources diverted due to SB 1 and SB 1111—and that such a failure was legally relevant—Appellants would not be entitled to summary judgment on the issue of standing because they have merely identified a triable issue of material fact.

discriminatory steering practices," even though the group's activities already included "the investigation and referral of complaints concerning housing discrimination." *Id.* at 368, 379; *see also Common Cause Ind. v. Lawson*, 937 F.3d 944, 954 (7th Cir. 2019) (noting the Supreme Court has recognized standing where an organization's "ability to do work *within* its core mission" was impaired).

Similarly, this Court held in *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) that a non-profit organization whose primary mission of voter outreach and civic education suffered an injury due to the "*additional* time and effort spent explaining the [challenged] provisions at issue to limited English proficient voters," which "frustrate[d] and complicate[d] its routine community outreach activities." And the Eleventh Circuit's decision in *Browning*—which this Court has cited favorably, *see City of Kyle*, 626 F.3d at 239—held that an organization was injured when it diverted resources toward educating voters about a voter registration statute that "would otherwise be spent" on *other* specific voter education activities. 522 F.3d at 1166.

The cases cited by Appellants are easily distinguishable. In *NTEU v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995), the court found that the organization's injury was insufficient because the challenged law did not subject the organization to any operational costs "beyond those normally expended" as part of its "ordinary program." Appellants' reliance on *City of Kyle* and *Defense Distributed v. United*

States Department of State also fails because, in both cases, the plaintiffs relied *solely* on evidence of their "routine activities" to show impairment without "identify[ing] 'specific projects that [it] had to put on hold or otherwise curtail in order to respond to' the defendant's conduct." *Def. Distrib. v. Dep't of State*, No. 1:15-CV-372-RP, 2018 WL 3614221, at *4 (W.D. Tex. July 27, 2018) (quoting *City of Kyle*, 626 F.3d at 238). In contrast, Appellees were forced to divert resources to address the negative impacts of SB 1111 to the detriment of other specific core programs, impairing their organizational missions.[4]

B. Appellees have statutory standing.

Judge Yeakel correctly held that Appellees have statutory standing. Statutory standing turns on "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*,

[4] While the district court correctly held that Appellees have Article III standing in their own right, it erred in holding that LULAC lacks associational standing. LULAC presented unrefuted evidence that SB 1111 injures its members, which include members of collegiate chapters and members under the age of 18 who are registering to vote for the first time. ROA.1271-72. Standing must be proven with "the manner and degree of evidence required at the successive stages of litigation," and LULAC carried this burden at summary judgment through testimony regarding its injured members that "for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561. It is not until "the *final* stage" that "those facts (if controverted) must be supported adequately by the evidence adduced a trial." *Id.*; *see City of Kyle*, 626 F.3d at 236, 237 (holding no associational standing where plaintiff failed to identify a specific injured member "*after a bench trial*"). Because Judge Yeakel's conclusion that LULAC "lack[s] an associational injury" is premature, Appellants are not entitled to summary judgment even if this Court finds that Appellees failed to establish organizational standing.

572 U.S. 118, 127-28 n.4 (2014). Section 1983 provides a cause of action for injured parties against any state actor who causes "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. As Judge Yeakel correctly noted, Voto Latino and LULAC "have personally suffered a *direct* harm that is redressable under Section 1983." ROA.2179. "Subsumed in Plaintiffs' cause here are two direct harms, not only to Plaintiffs' pocketbooks, but also to Plaintiffs' First-Amendment right to advise voters without threat of prosecution." ROA.2178; *see also Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013) (noting doctors have "first-party standing" under Section 1983 to "challenge laws limiting abortion when . . . penalties for violation of the laws are visited on the doctors" and rejecting argument that section 1983 did not "create[] a cause of action for abortion providers or clinics"); *Nnebe v. Daus*, 644 F.3d 147, 156-57 (2d Cir. 2011) ("[N]othing prevents an organization from bringing a § 1983 suit on its own behalf so long as it can independently satisfy the requirements of Article III standing as enumerated in *Lujan*.").

There is accordingly no merit to Appellants' assertion that Voto Latino and LULAC "claim[] an injury based on the violation of a third party's rights." Br. 31. Both organizations seek redress for a violation of their *own* rights because SB 1111 chills their ability to engage in voter registration efforts. And as Appellees argued and demonstrated below, those First Amendment injuries are not limited to the

Residence Restriction. *See supra* at 28-29; ROA.1264 (testifying that "the *totality*" of SB 1111—not just the Residence Restriction—is what "makes it very difficult for [them] to communicate" with potential voters); *see also, e.g.*, ROA.1254-55; ROA.1271-72 (Voto Latino and LULAC's corporate representatives testifying to the chilling effect of the Temporary Relocation Provision). Nor was Judge Yeakel's analysis of the chilling effect imposed on Appellees by SB 1111 limited to the Residence Restriction. ROA.1916. Appellees' own constitutional injuries are thus sufficient to confer statutory standing under Section 1983.

Finally, Appellees' diversion-of-resources injuries are also sufficient to confer statutory standing. Indeed, it is well-established that an organization forced to divert resources due to a violation of federal law can bring a Section 1983 claim to enjoin it. *See*, *e.g.*, *Havens Realty Corp.*, 455 U.S. at 378-79 (organization suffering a diversion-of-resources injury has statutory standing to challenge those practices under Section 812(a) of the Fair Housing Act); *Scott v. Schedler*, 771 F.3d 831, 835-37 (5th Cir. 2014) (organization suffering a diversion-of-resources injury has statutory standing to challenge violation of National Voter Registration Act); *see also Nnebe*, 644 F.3d at 156-57; *Doe #1 v. Trump*, 984 F.3d 848 (9th Cir. 2020), *vacated on other grounds sub nom. Doe #1 v. Biden*, 2 F.4th 1284 (9th Cir. 2021); *Ne. Ohio Coal. v. Husted*, 831 F.3d 686 (6th Cir. 2016); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 304-06 (3d. Cir. 2014); *Fla. State Conf. of NAACP*, 522 F.3d at

1166. Because the record shows Voto Latino and LULAC are injured by each of the challenged provisions, Section 1983 is an appropriate vehicle to advance their claims.

II. The district court correctly held that the Residence Restriction violates the First Amendment.

A. The Residence Restriction prohibits any person from establishing residence for the purpose of engaging in political activity.

The Residence Restriction prohibits a person from establishing residency in Texas if they do so to engage in political activity, regardless of where they actually live. The law provides that a person may not "establish a residence for the purpose of influencing the outcome of a certain election." Tex. Elec. Code § 1.105(b). Residence, in turn, "means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence." *Id.* § 1.015(a). Read together, these provisions provide that a "person may not establish [*one's home and fixed place of habitation to which one intends to return after any temporary absence*] for the purposes of influencing the outcome of a certain election." *Id*. § 1.105(b). Although the Residence Restriction fails to define the scope of the term "for the purpose of influencing the outcome of an election," Defendants testified that such activities include voting, running for office, volunteering for political campaigns, and donating to political campaigns. ROA.827-28; ROA.1347; ROA.1353-54; ROA.1405.

The Attorney General contends this provision merely "requires someone to register using their actual residence—not a false address aimed at influencing an election," Br. 39, but as Judge Yeakel correctly found, "that is not what the Residence Provision says." ROA.2187. The provision plainly proscribes "establish[ing] residence"—where someone *truly* lives—to engage in political activity, *see* Tex. Elec. Code § 1.015(a), and says nothing about *fraudulently* establishing residency or claiming residency at a *false* address. The district court was not alone in rejecting the Attorney General's contrived interpretation—County Defendants below testified that they read the provision to restrict political activity *where a person actually lives*. *See, e.g.*, ROA.1355-56, 1374, 1383, 1390-91.

The Attorney General's reading of the Residence Restriction is so unpersuasive that even his two co-Appellants—county election officials tasked with administering the law—cannot bring themselves to adopt it. *See* Br. 38 n.15. Their testimony further undercuts the Attorney General's position here. Mr. Torres testified that to "establish residence" means "that they reside in – at the residence," ROA.1390-91, and Ms. Pendley agreed that to "[e]stablish residence means your residence, where you live at," ROA.1383. Even the Secretary admitted the Legislature "could have" drafted the provision to say: "A person may not establish residence *at a place that is not their residence* for the purpose of influencing the outcome of a certain election." ROA.1406-07 (emphasis added). But it plainly did

not do so—the provision's text instead punishes establishing a *true* domicile if done for the purpose of influencing an election.

With no textual explanation for his view, the Attorney General insists his reading is what was intended by the Legislature. Br. 38-41. But Texas law is clear that courts "must seek the intent of the legislature as found in the plain and common meaning of the words and terms used." *Monsanto Co.*, 865 S.W.2d at 939. Here, the statute's words do not restrict the reach of the Residence Restriction to false claims of residency and courts may not graft language into the statute—Texas courts "presume the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *Cadena Com. USA Corp. v. TABC*, 518 S.W.3d 318, 325-26 (Tex. 2017) (internal quotation marks omitted).

Appellants' *admission* that the Texas Election Code "already made it a crime to register using a false address," Br. 8, further undercuts the Attorney General's implausible reading because "if a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 176 (2012); *see Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978) (courts must presume that "the

Legislature did not intend to do a useless thing by putting a meaningless provision in a statute"). Because the Attorney General's interpretation renders another provision of the law redundant, "the reading may be presumed implausible." Scalia & Garner, *supra*, at 174.

Despite the lack of textual support for his view, the Attorney General chides the district court for not deferring to the Secretary of State's reading of the statute. *See* Br. 40. But no deference is owed to the Secretary's litigation-driven interpretation of the Residence Restriction, which was offered only in ad hoc deposition testimony. Texas law is clear that the deference owed to an agency's interpretation of a statute only "applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions in [informal] documents." *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006). The "interpretation" advanced by the Attorney General was not included in the Secretary's guidance about SB 1111, ROA.782-85; ROA.1528-44, and appears for the first (and only) time in the deposition of the Secretary's designee. ROA.1403-04. Regardless, the witness's stray comments about the meaning of the Residence Restriction are not entitled to deference in any form because they "contradict[] the plain language of the statute." *R.R. Comm'n of Tex.as v. Tex. Citizens for a Safe*

Future & Clean Water, 336 SW3d 619, 625 (Tex. 2011); *Fiess*, 202 S.W.3d at 747 (holding "an agency's opinion cannot change plain language" of a statute).[5]

For that same reason, the Court need not entertain the Attorney General's request to invoke the constitutional avoidance canon. *See* Br. 40-41. While courts sometimes confront thorny interpretive questions that can be resolved by invoking that canon, the text here is not complicated or ambiguous. And "the canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001); *see also Paxton v. Longoria*, 646 S.W.3d 532, 539 (Tex. 2022) (similar rule under Texas law). "Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings v. Rodriguez,* 138 S. Ct. 830, 843 (2018); *see also Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir. 1978) ("we cannot judicially rewrite the Texas statutes"), *aff'd*, 445 U.S. 308 (1980).

[5] Even if the Attorney General or Secretary presented an interpretation plausible enough to warrant deference, such deference would be diminished here by the State's *repeated* disclaimer of its own role in enforcing Texas election laws. Indeed, the Secretary has argued to *this Court* that because "Texas voter registration is the [county] registrar's domain," "the [county] registrars—and not the Secretary—choose how and whether to enforce" registration requirements. *See*, *e.g.*, Br. of Def.-App. Tex. Sec'y of State at 4, 21, *Tex. Democratic Party v. Hughs*, No. 20-50667 (5th Cir. Dec. 26, 2020). The County Defendants made clear that they read the statute to apply to people seeking to establish residency *where they actually live*, *see supra* at 36, but at the same time do not know how to apply the law, *see infra* at 41-43.

B. The Residence Restriction is unconstitutionally vague.

The Residence Restriction's prohibition on establishing residence "for the purpose of influencing the outcome of a certain election" plainly violates the First Amendment. The First Amendment prohibits vague speech regulations. *SEIU v. City of Houston*, 595 F.3d 588, 596-97 (5th Cir. 2010). "The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. Am. C.L. Union*, 521 U.S. 844, 871-72 (1997); *see also Grayned v. City of Rockford*, 408 U.S. 104, 109 ("[W]here a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms.") (quotations omitted). And such a chilling effect is exacerbated by the potential for "criminal sanctions [that] may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno,* 521 U.S. at 872. This Court has accordingly emphasized that "[r]egulation of speech must be through laws whose prohibitions are clear." *SEIU*, 595 F.3d at 596.

In evaluating vagueness, this Court must consider (1) whether the law "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and (2) "whether the law provides explicit standards for those applying them to avoid arbitrary and discriminatory applications." *Roark v. Hardee LP v. City of Austin*, 522 F.3d 533, 551 (5th Cir.

2008) (quoting *Grayned*, 408 U.S. at 108-09). And "a more stringent vagueness test should apply where a law 'threatens to inhibit the exercise of constitutionally protected rights.'" *Roark,* 522 F.3d at 552 (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982)).

The Residence Restriction is unconstitutionally vague because it prohibits establishing residence "for the purpose of influencing the outcome of a certain election," but provides no definition of "influencing the outcome of an election." The County Defendants—who process registration applications in Texas's largest counties—consistently testified that they do not understand the Residence Restriction's prohibition on "establish[ing] residence for the purpose of influencing the outcome of a certain election":

- "To influence an outcome of a certain election, that can take many different forms . . . so it's really hard to pinpoint exactly what this is – this is addressing." ROA.1283-84;

- "I don't understand what ["for the purpose of"] means in reference to this – taken in the whole context of the overall sentence. Q: And is the same true for influencing the outcome of a certain election? A: Yes." ROA.1342;

- "Q: Do you think it's clear how your office is supposed to apply the term 'establish residence' within the context of the residence restriction? A: In the context of this residence restriction, no." ROA.1311.

As the Director of Voter Registration for Travis County testified, "it's hard to determine" what is proscribed "with th[e] language" in the Residence Restriction. ROA.1282-84; *see also* ROA.1286 (testifying that the Residence Restriction is

"unclear"); ROA.1312 (("Q. You don't think it's clear from the language in the bill what the meaning of the term 'influencing the outcome of a certain election' is?" . . . A. "No. I think it, depending on the situation or context, could have multiple meanings or interpretations.").

These same county officials also testified that they are unable to answer questions about the provision due to its vagueness. *E.g.*, ROA.1281; ROA.1308-09; ROA.1332-33; ROA.1371; ROA.1376. For example, the Dallas County Election Administrator explained that if he was asked to "explain 'for the purposes of influencing election,' we don't really know what that means. We don't know how to further explain that." ROA.1340; *see also* ROA.1341 ("If asked a question [about the Residence Restriction], I don't know how quite to answer that question to a voter."). The Bexar County Elections Administrator likewise acknowledged she "wouldn't know" how to answer a voter's question about what it means to influence an election. ROA.1371. Even the Attorney General's co-appellant—Real County Tax Assessor-Collector Terrie Pendley—admitted she "really can't tell" what that term means. ROA.1385. Indeed, the record uniformly reflects that the County Defendants find the Residence Restriction vague and difficult to understand:

- "Q. Do you feel like you have enough information about the changes made by Senate Bill 1111 to the Texas Election Code to give [voters] any other answer [than to refer to the text]? A. Not that I would be comfortable with, no. Q. Why not? A. Because . . . The definitions – they are vague. They mean different things to different people, and because it is not so specific,

I don't feel like I am really able to give them the information that they would need from – from my standpoint, from our office." ROA.1366;

- "Q. … [I]f a voter came in and they had a question about what establishing residence for the purpose of influencing the outcome of a certain election meant, you don't feel like you have enough information to answer that question for them; is that right? A. That is correct." ROA.1285.

The Attorney General offers no response to this widespread confusion among officials tasked with administering voter registration in Texas. Ordinary citizens—and those organizations (like Appellees) who engage in voter registration efforts and encourage and advise citizens on registering to vote—cannot be expected to fare any better. *See Roark*, 522 F.3d at 551 (statutes are vague where they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited") (quoting *Grayned,* 408 U.S. at 108-09).

This vagueness directly harms Appellees. As Judge Yeakel found, it "hinders Plaintiffs' ability to advise prospective voters about the[ir] rights and liabilities." ROA.2188. Unrebutted evidence supported that finding. *See* ROA.1254; *see also* ROA.1260 (describing the "chilling effect" SB 1111 has on Voto Latino's "ability to speak to voters"). It also deters political expression and chills Appellees' speech by placing them at risk of prosecution for misadvising registrants—it is illegal in Texas for a person to "request[], command[], coerce[], or attempt[] to induce another person to make a false statement on a registration application." Tex. Elec. Code § 13.007(a)(2); *id.* §§ 64.012, 276.018. And the County Defendants themselves have

a statutory duty to report to the Attorney General, Secretary of State, and district attorney whenever "a person who is not eligible to vote registered to vote or voted in an election." *Id.* § 15.028. By adding confusion and risk of criminal liability to the registration process, the restriction interferes with Plaintiffs' abilities to encourage and support voter registration and to register voters—activity protected by the First Amendment. *See Steen*, 732 F.3d at 390.[6]

The Attorney General provides no explanation whatsoever as to what the statute means by "influence an election." Br. 39. While the Secretary claims that the term is limited to voting, ROA.827, this interpretation warrants no deference because it contradicts the statute's plain language and was not rendered in a formal opinion. *See supra* 38-39. Indeed, the Secretary admitted that there many ways in which one can influence the outcome of an election. ROA.827 ("Q: It's your view that a person can only influence the outcome of an election by registering to vote? A: Well, that's the most direct way. They could also block walk or, you know, donate money to candidates.").

C. The Residence Restriction is unconstitutionally overbroad.

The Residence Restriction is also an overbroad speech restriction that violates

[6] The Residence Restriction is unlike the law at issue in *Steen*, which regulated "the receipt and delivery of completed voter-registration applications" and did not "restrict or regulate who can advocate pro-voter-registration messages, the manner in which they may do so, or any communicative conduct." 732 F.3d at 391.

the First Amendment rights of Texas voters. First Amendment overbreadth doctrine "permits a litigant to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 210 (5th Cir. 2011). A statute is unconstitutionally overbroad "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Serafine v. Branaman*, 810 F.3d 354, 364 (5th Cir. 2016) (quotation omitted). In other words, the State may not "proscribe unprotected content"—i.e., registering to vote using a false address—"through a regulation that simultaneously encompasses a substantial amount of protected content." *Seals v. McBee*, 898 F.3d 587, 596 (5th Cir. 2018).

The Residence Restriction does just that. It "directly regulates core political speech" of those who seek to establish residence using their true domicile. *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 207 (1999) (Thomas, J., concurring) (collecting cases); *Steen*, 732 F.3d at 391 (describing voter registration as speech). Similarly, the Residence Restriction is a content-based speech regulation because it singles out and bans political speech—and only political speech—as a reason for establishing residence in Texas. No other category of speech is targeted for similar disfavored treatment. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S.

Ct. 1464, 1472 (2022) (holding a law that "single[s] out specific subject matter for differential treatment" is a content-based restriction, "even if it does not discriminate among viewpoints within that subject matter.") (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015)).

There is no dispute that influencing the outcome of an election includes a broad range of political acts, including voting, running for office, and donating to or volunteering for a political campaign. *See supra* at 41. These acts necessarily involve key elements of political speech, including "the expression of a desire for political change" and "a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (holding ban on paying circulators unconstitutionally restricted core political speech). Seeking to influence the outcome of an election includes acts intended to "secure political change, and the First Amendment, by way of the Fourteenth Amendment, guards against the State's efforts to restrict free discussions about matters of public concern." *Buckley*, 525 U.S. at 211 (Thomas, J., concurring). Such "regulations of core political speech" are "presumptively invalid" and subject to strict scrutiny. *Id.* at 208 (finding restrictions on political speech "plainly impose a severe burden.") (Thomas, J., concurring).

The Residence Restriction's prohibition on protected expression cannot satisfy any degree of constitutional scrutiny, let alone the strict scrutiny required here. Appellants previously suggested the Residence Restriction serves the State's

interests in "preventing fraud, maintaining election uniformity, facilitating election administration, and avoiding unfair election impacts," ROA.1522-23; but even assuming these interests are compelling, a sweeping ban on a wide range of political expression—here, "influencing the outcome of a certain election"—is not narrowly tailored to achieve them. *See* ROA.1283-84; ROA.1347; ROA.1353-54; ROA.1405 (Defendants admitting there are multiple ways a person can influence an election outcome).

III. The district court correctly held that the Temporary Relocation Provision is unconstitutional.

Texas law already required citizens to register at their "home and fixed place of habitation," Tex. Elec. Code § 1.015(a), and further clarified that a "person does not acquire a residence in a place to which [they] ha[ve] come for temporary purposes only," *id.* § 1.015(c). Appellees, again, have no qualm with these commonsense provisions, which make clear that a person must register where they live.

The Temporary Relocation Provision disrupts this sensible framework by leaving some voters with nowhere they can lawfully register at all, even if they are true residents. It states that a "person may not designate a previous residence as a home and fixed place of habitation unless the person inhabits the place at the time of designation and intends to remain." *Id.* § 1.015(f). This creates a double bind—some Texans spend extended periods away from their homes on a temporary basis,

including for school, work opportunities, or familial obligations. These would-be voters cannot register at their home while temporarily away from it because, by definition, they do not "inhabit[] the place at the time of designation and intend[] to remain there." *Id*. At the same time, these voters cannot register at temporary abodes that they do not consider their "home and fixed place of habitation to which [they] intend[] to return after any temporary absence," *Id.* § 1.015(a); *see also id.* § 1.015(c)-(d). As Judge Yeakel explained, the Temporary Relocation Provision "creates a 'man without a country,'" ROA.2190, leaving certain Texas voters "without *any* residence" acceptable for registration. ROA.2191. Appellees, in turn, are chilled from advising Texans on where to register—or even assisting voters who relocated temporarily to register—for fear that they will advise them to use a statutorily-invalid residence. ROA.1254-57; ROA.1260. Judge Yeakel correctly concluded the Temporary Relocation Provision could "not overcome any degree of constitutional scrutiny." ROA.2191.

The County Defendants agreed that this provision confuses where individuals who have relocated temporarily—like college students, for example—may claim residence. El Paso County's Election Administrator explained the provision is "vague" and "confusing," and further stated that she did not feel "able to really give [students] the information that they would need" to determine where to register. ROA.1363-64; ROA.1366. Dallas County's Elections Administrator testified that

even after receiving the Secretary's advisory on SB 1111, he still "think[s] there's [] some confusion about some of the language, especially as it relates to student voters and their residency." ROA.1334. Thus, he is "not entirely clear on how to answer the questions posed to [Dallas County] by some student voters." ROA.1335; *see also* ROA.1335-36; ROA.1297; ROA.1315.

Tellingly, the Appellants again offer no defense of the provision's constitutionality other than to misread it. They insist no students are left "without a country," because a "college student who intends to return to his parents' home does not need to designate a '*previous* residence' as his residence under section 1.1015(f)." Br. 42 (emphasis in brief). That simply ignores the plain text of the statute, which requires that, when designating a residence, the registrant "*inhabits* the place at *the time of designation* and *intends to remain there*." Tex. Elec. Code § 1.015(f) (emphases added). A Texan temporarily away from home, such as a student away living in a dormitory, does not "inhabit" their family home "at the time of designation" or "intend to remain there"—a person plainly cannot "inhabit" or "remain" at a place they are away from. *Id.* As the district court concluded, this catch-22 imposes a "severe, if not insurmountable" burden for certain Texans. ROA.2190 (internal quotation marks omitted). Appellants nowhere identify what purpose this sweeping serves, particularly given that pre-existing Texas law sensibly required registrants to enroll at their domicile.

Appellants' reference to *Willet v. Cole*, 249 S.W.3d 585, 588 (Tex. App. 2008) is therefore beside the point. That decision did nothing more than restate § 1.015(c)'s existing rule that a "person does not forfeit residency by leaving the person's home for temporary purposes only." *Id.* (citing Tex. Elec. Code § 1.015(c)). That was well and good before the enactment of SB 1111, when a person could register at their true residence even while temporarily away from it. The problem *now* is that the Temporary Relocation Provision requires a registrant to "inhabit" and "intend to remain" at their residence at the time they designate it on a registration form, which is naturally not possible for those temporarily away from it. Appellants' reference to the Restatement is irrelevant for the same reason. Texas law was *previously* consistent with the Restatement's "presumption that students lack the intention to leave their parents' domicile permanently while they study at a university," and thus could claim residence there while temporarily away at school. *Restatement (Third) of Conflict of Laws* § 2.06 (2021); *see also* Tex. Elec. Code § 1.015(c). But, again, the Temporary Relocation Provision upset this state of affairs by requiring students (and others) to actually "inhabit" and "intend to remain" at the residence they designate.

Unable to clearly explain *where* a temporarily relocated Texan may register to vote in a manner consistent with the Temporarily Relocation Provision and § 1.015, Appellants grasp at the idea that SB 1111 *might* make it easier for students

to register by permitting them to choose either a family or school address, though they "are aware of no case from the Texas Supreme Court" establishing as much. Br. 42-43. This argument, like each before it, simply ignores the Temporary Relocation Provision's command that registrants contemporaneously "inhabit" the residence they choose to designate. For the same reason, the Court need not credit Appellants' drive-by request to once more invoke the constitutional avoidance canon. *Id.* at 42. Like the Residence Restriction before it, Appellants' reading of the Temporary Relocation Provision is at war with the statutes' plain language. *See Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 494; *Longoria*, 646 S.W.3d at 539. A court may not salvage a provision's constitutionality by rewriting it. *See Jennings*, 138 S. Ct. at 843; *Vance*, 587 F.2d at 172.

There is no merit to Appellants' contention that the district court's injunction against the Temporary Relocation Provision should have been limited to "college students living away from home" and "United States Senators." Br. 46-47. Judge Yeakel's finding that "the law leaves some Texans without *any* residence," ROA.1937, was not limited to those two groups and the law plainly governs all Texans who spend temporary periods away from their homes, including those who travel for work, school, or familial obligations. *See supra* at 47-48; ROA.772 (noting allegations of harm to "transient workers"); ROA.1740-43 (similar). Moreover, the injunction redresses harm to *Appellees*, who seek to advise and register Texans of

many stripes—not just college students. ROA.1251-52; ROA.1276-77; *see also* ROA.1181 (explaining that "college students *and other Texans who have temporarily relocated*—whether for educational, *employment, or other reasons*—cannot register using a home address that they do not actively 'inhabit' when they register to vote[.]" (emphases added)).[7]

IV. The district court correctly held that the P.O. Box Provision is unconstitutional when applied to voters who register with a residential address.

The PO Box Provision unjustifiably burdens voters who cure their registrations by supplying valid residential addresses after previously registering to vote at a "commercial post office box or similar location that does not correspond to a residence." Tex. Elec. Code § 15.051(a). Before SB 1111, these voters could cure an improper registrations by simply supplying a valid residential address; but now these individuals must submit "evidence of [their] residence"—requiring them to photocopy a form of identification, complete and sign the form with a wet signature,

[7] Nor have Appellants demonstrated that the district court's remedy was overbroad because it enjoined § 1.015(f) in full, including its prohibition on "establish[ing] a residence at any place the person has not inhabited." Br. 42-43. That argument is academic—as explained, Texas law defines a residence as a registrant's "domicile, that is, one's home and fixed place of habitation," Tex. Elec. Code § 1.015(a), which plainly excludes a home a person has "not inhabited" *id.* § 1.015(f). Appellees have never argued otherwise. Regardless, Appellants cite no authority that courts must excise *specific sentences* from otherwise unconstitutional subsections, particularly where all that remains is surplusage. The district court's injunction was thus not an abuse of discretion. *See Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021).

and submit the documentation and completed form to a registrar, *id.* § 15.053(a)—to avoid being placed on the suspense list. *Id.* § 15.053(a)(3). All other voters may provide new registration addresses without any proof of residence. ROA.1429.

Appellants' brief merely handwaves at a general interest in fraud prevention but fails to explain how singling out and requiring some voters (but not others) to provide documentary evidence of their residence advances that interest. *See Crawford*, 553 U.S. at 191 (holding all burdens, "[h]owever slight . . . must be justified by relevant and legitimate state interests sufficiently weight to justify the limitation." (cleaned up)). Indeed, the Secretary admitted that the PO Box Provision serves no purpose when a voter supplies a valid residential address. He explained that he did not "know why we can't use [the new form] as a change of address form. If they're not still claiming to live at the [non-residential address], then I think we should maybe use this as a change of address form," which would not require proof of residence. ROA.1430-33.

The Attorney General ignores the Secretary's concession, quibbling instead that suspended voters may still vote by complying with statutory cure provisions if they later vote in person. Br. 37. That does not vindicate the burdensome application of the provision correctly enjoined by this Court. The State must explain what "interests make it necessary to burden the plaintiff's rights" to begin with. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Crawford*, 553 U.S. at 191. The Secretary

conceded there is no reason to treat individuals offering valid residential addresses differently based on their *prior* registration addresses. Because the "State provides no legitimate interest to justify [the law's] burden," *Common Cause/N.Y. v. Brehm*, 432 F. Supp. 3d 285, 314 (S.D.N.Y. 2020), it is unconstitutionally burdensome.

Appellants' reliance on *Crawford* is misplaced. They cite a *concurrence* to suggest that the Court may not consider the burden to discrete groups of voters, but the controlling opinion they bypassed says just the opposite: "[t]he burdens that are relevant . . . are those imposed on persons who are eligible to vote *but do not possess a current photo identification* that complies with [the law]." *Crawford,* 553 U.S. at 198 (emphasis added). Six justices in *Crawford* agreed that when evaluating burdens, courts should consider the law's impact on subgroups for whom the burden is more severe. *Id*. at 199-203 (plurality op.); *id*. at 212-23, 237 (Souter, J., dissenting); *id*. at 237 (Breyer, J., dissenting). In other words, "[d]isparate impact matters under *Anderson-Burdick*." *League of Women Voters of Fla.*, *Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1217 (N.D. Fla. 2018). Because the Secretary *conceded* the provision served no state interest whatsoever, the district court correctly invalidated the PO Box Provision based on the burden it imposed on voters who would be forced to present documentary evidence of their residence, even while providing a proper residential address. ROA.2185-86.

CONCLUSION

The Court should affirm the district court's order granting in part Plaintiff-Appellee's motion for summary judgment.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for the Plaintiffs-Appellees are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

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