No. 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; AND KEN PAXTON, TEXAS ATTORNEY GENERAL,
Intervenor Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Texas, Austin Division

BRIEF FOR INTERVENOR DEFENDANTS-APPELLANTS

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Certificate of Interested Persons

No. 22-50690

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; and Ken Paxton, Texas Attorney General,
Intervenor Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Benjamin D. Wilson
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Statement Regarding Oral Argument

This Court has set oral argument for October 6, 2022.

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Introduction

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). At the same time, "[c]ommon sense, as well as constitutional law, compels the conclusion that the government must play an active role in structuring elections," which are enormously complex logistical affairs. *Id.* Inevitably, any such regulation will impact some voters more than others. *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 198-200 (2008) (plurality op.). Nevertheless, because "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown*, 415 U.S. 724, 730 (1974), such burdens do not run afoul of the Constitution so long as they are "ordinary and widespread . . . such as those requiring 'nominal effort' of everyone." *Crawford*, 553 U.S. at 205 (Scalia J., concurring) (citation omitted).

Senate Bill 1111 is entirely in keeping with these constitutional norms. One of a number of election bills passed by the Texas Legislature in 2021, S.B. 1111 reinforces a fundamental state policy: that people should vote where they live. This policy—which the district court agreed was legitimate—helps not just to combat voter fraud but also to ensure that voters get the right ballot. S.B. 1111 seeks to further that policy by (1) requiring voters who register using commercial P.O. boxes to confirm their residences, (2) reinforcing existing prohibitions against listing a false residence to influence an election, and (3) clarifying where individuals who live in a temporary residence should vote.

Nevertheless, without even waiting to see if their members would be affected by these commonsense provisions, LULAC and Voto Latino brought this suit to declare them facially unconstitutional. Even the district court agreed that Plaintiffs had failed to show that any Texas voters had been harmed by the laws. Nevertheless, the district court allowed Plaintiffs to proceed on the theories (1) that they had diverted resources to respond to the series of voting laws passed in Texas and other States following the 2020 election—one of which was S.B. 1111—and (2) that S.B. 1111 chilled their speech.

Because Plaintiffs failed to identify which funds (if any) were spent to address S.B. 1111, they have failed to establish standing based on diversion of resources. And their allegations of a chilling effect are conjecture at best. They thus lack standing—a "bedrock requirement" to invoke the jurisdiction of the federal courts. *Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) (en banc)Moreover, because Plaintiffs cannot vote, they cannot show that they have statutory standing under section 1983 because they have no First, Fourteenth, or Twenty-Sixth Amendment right to vote that could be injured. And even if they had such an injury, Plaintiffs did not establish that the challenged provisions of S.B. 1111 violate the Constitution in light of their role in serving Texas's "indisputably . . . compelling interest in preserving the integrity of [its] election process." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 234 (5th Cir. 2020).

Statement of Jurisdiction

Plaintiffs purported to invoke the district court's jurisdiction under 28 U.S.C. § 1331.

This Court has jurisdiction over an appeal from the district court's grant of summary judgment under 28 U.S.C.§ 1291. The district court issued a final judgment on August 2, 2022. ROA.1939-40. Appellants filed a timely notice of appeal on August 4, 2022, ROA.1941-44, and sought a stay pending appeal from the district court on August 8, ROA.1945-1961. When the district court did not grant such a stay by August 12, appellants sought relief from this Court on August 15. Intervenor Defendants-Appellants' Opposed Motion for a Stay Pending Appeal and for an Administrative Stay, *Texas State LULAC et al. v. Paxton et al.*, No. 22-50690 (5th Cir. Aug. 15, 2022). This Court granted a temporary administrative stay on August 26, 2022. ROA.2037-38.

Appellants' filing of a notice of appeal had the effect of vesting jurisdiction in this Court and divesting the district court of jurisdiction except for certain, limited matters. *See Clower v. Wells Fargo Bank, N.A.*, 381 F. App'x 450, 451 (5th Cir. 2010) (per curiam) (quoting *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982) (per curiam)). This Court exercised that jurisdiction when it granted a stay. ROA.2039-40; *see In re Corrugated Container Antitrust Litig.*, 687 F.2d 52, 54 (5th Cir. 1982) ("We assumed appellate jurisdiction over this case in issuing earlier order."). Because defendants at that time had not filed any post-judgment motion, this Court had jurisdiction when it issued the stay. *See Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604, 610 (6th Cir. 2004) ((concluding the "notice of appeal was effective on the day that it was filed, given that the judgment had been entered and that no motions that automatically toll the time to file a notice of appeal were pending").

On August 30, 2022, after this Court granted relief to appellants, defendants who had opposed the motion for a stay, ROA.1966-71, filed a document styled a Motion for Reconsideration And/Or Clarification of the Court's August 2, 2022 Order and Judgment, *Texas State LULAC et al. v. Elfant et al.*, No. 1:21-cv-00546 (W.D. Tex. Aug. 30, 2022), ECF 184. In it, defendants did *not* ask the trial court to change its judgment, only to "remove" from its order "discussion of *Monell* [*v. New York City Department of Services*, 436 U.S. 658 (1978)] and to instead reflect the Court's determination that the County Defendants are enjoined under *Ex parte Young*, 209 U.S. 123, 160 (1908)." *Id.* at 2.

Even if defendants' motion could have divested this Court of jurisdiction, *Ross v. Marshall*, 426 F.3d 745, 752 (5th Cir. 2005), it did not because, at a minimum, it is not a proper Rule 59 motion. Their motion expressly reflects that defendants seek a change to the district court's order (ECF 171)—*not* its final judgment (ECF 172). And it states that the defendants' "requested relief [would] not change the substance of the ultimate relief awarded to Plaintiffs." Motion, *supra*, at 2. Because "appellate courts review judgments, not opinions," *U.S. v. Fletcher ex rel Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015), defendants' request had no impact on this Court's jurisdiction.

If the Court disagrees (or is dubitante), the appropriate remedy would be to stay or abate the appeal to allow the district court to rule on defendants' request without lifting the administrative stay. *Katerinos v. U.S. Dep't of Treasury*, 368 F.3d 733, 738 (7th Cir. 2004) (collecting authority). On August 2, there was indisputably an appealable, final judgment, ROA.1939-40. And the same was true when this Court entered an administrative stay. ROA.2037-38.

The district court's judgment threatened to cause confusion in Texas's ongoing election for the reasons that appellants explained in their motions for a stay in the district court and in this Court. ROA.1945-1961; Motion for a Stay Pending Appeal, *supra*. To send this case back now—six weeks later—without keeping this Court's stay in place will only add to that confusion in violation of *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam), and its progeny.

Issues Presented

1. Whether Plaintiffs, who could not point to a single voter who has been harmed by the challenged provisions of S.B. 1111 and who did not show that they were required to divert resources because of those specific provisions, lack Article III and statutory standing to seek an injunction declaring them facially invalid.
2. Whether the P.O-box provision, the residence provision, and the temporary-relocation provision, which ensure that people vote where they live, are consistent with the First or Fourteenth Amendments to the United States Constitution.
3. Whether the district court's injunction is facially overbroad in light of the injuries that the district court concluded support standing, and the constitutional violation that it found justified relief.

STATEMENT OF THE CASE

I. Senate Bill 1111

The 2020 election was unprecedented on multiple dimensions, including in the challenges poses by the COVID-19 pandemic, in the volume of litigation it spawned,[1] and in the number of election-law changes it inspired. Indeed, according to the National Conference of State Legislatures, "[a]ll 50 states . . . introduced election-related bills [last] year." *2021 Election Enactments*, NCSL, https://www.ncsl.org/research/elections-and-campaigns/2021-election-enactments.aspx. Whether any one of these changes are for the better is a matter of significant dispute.[2] But it is indisputable that there have been many of them.

Texas was among those States who responded to problems highlighted in the 2020 election by passing legislation aimed at increasing election integrity. In its regular session alone, the Texas Legislature passed over a dozen election-related laws addressing everything from contracts for voting systems to consequences for failure by early voting clerks to post their voting rosters.[3] S.B. 1111, which became law on September 1, 2021, was one of them. Act of May 27, 2021, 87th Leg., R.S., ch. 869,

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[1] *See* Sam Gringlas, et al., *Step Aside Election 2000: This Year's Election May be the Most Litigated Yet*, NPR (Sept. 22, 2000), https://tinyurl.com/yb5dk4fe.

[2] *Compare, e.g.*, *Voting Laws Roundup December 2021*, Brennan Center, https://tinyurl.com/2p84x4af (Jan. 12, 2022); *Heritage Foundation Launches Election Integrity Scorecard Ranking States on Election Laws*, Heritage Foundation (Dec. 14, 2021), https://tinyurl.com/2p9bc4mc.

[3] *See, e.g.*, Keith Ingram, *Election Advisory No. 2021-09*, Tex. Sec'y of State (July 30, 2021), https://www.sos.state.tx.us/elections/laws/advisory2021-09.shtml.

2021 Tex. Sess. Law Serv. 2142. S.B. 1111 made three changes to the Texas Election Code's provisions regarding residency that are relevant here.

A. The P.O.-box provision

As an initial matter, S.B. 1111 revised how election officials deal with registration at addresses that do not correspond with physical residences, including commercial post-office boxes. The bill's sponsor explained that this bill was proposed because, for example, "4,800 voters registered at private UPS store P.O. boxes in Houston." ROA.780. Because there is "no way anyone can fit into a 2x3 inch post office box," the concern was that these individuals are not voting, consistent with longstanding Texas policy, where they actually live. ROA.780-81.

To ensure that voters are casting ballots where they reside, Texas law has for some time permitted a voter registrar to seek confirmation of a voter's residence if the registrar had reason to believe it differed from the address listed in his registration records. Tex. Elec. Code § 15.051(a) (2020). Such confirmation was to be provided on a pre-printed form, which could be returned in a postage pre-paid envelope. *Id.* § 15.052(b). A voter who failed to respond was placed on the "suspense list": the voter could still vote by regular ballot provided he submitted a statement of residence that satisfies Texas Election Code section 63.0011. *Id.* §§ 15.081(a)(1), 15.112.

S.B. 1111 modified these provisions—some of which have existed since the mid-1990s—to require a registrar to seek confirmation from a voter if the "registrar has reason to believe that a voter's current residence is different from that indicated on the registration records, or that the voter's residence address is a commercial post office box or similar location that does not correspond to a residence." *Id.*

§ 15.051(a). S.B. 1111 requires such a voter to "submit to the registrar a written, signed response to the notice that confirms the voter's current residence." *Id.* § 15.053(a). The voter must also submit documentation of his residence or an affidavit that the voter's residence has no address. *Id.* § 15.054. Voters have a variety of options for acceptable documentation, including a photocopy of a driver's license, concealed carry permit, or utility bill (among others). *Id.* § 15.054(a). A voter who fails to comply with the P.O.-box provision is placed on the suspense list but may still vote by regular ballot so long as he or she submits a statement of residence as described above when voting. *Id.* §§ 15.081(a)(1), 15.112.

B. The residence provision

In addition to requiring a voter to confirm where he lives, S.B. 1111 also reinforces existing law that the voter cannot seek to establish a residence where he does *not* live in order to change the outcome of an election. *Id.* § 1.015(b). Although existing law already made it a crime to register using a false address, *id.* § 13.001(a)(5), there have been multiple documented instances in recent years indicating that these laws were insufficient. For example, "as many as 10 people registered to vote at a roadway inn" to alter the outcome of an election in a road utility district in Montgomery County. ROA.825. Similarly, in Loving County, "they've got 32 more registered voters than they have inhabitants." ROA.836. Although rare, this phenomenon results because, though Texas has a large aggregate voting population, its

substantial geographic size results in jurisdictions where even a handful of votes can turn the outcome of a local election.[4]

To add additional protections against such fraud, ROA.825-26, S.B. 1111 amended Texas Election Code section 1.015(b) to provide that "[a] person may not establish residence for the purpose of influencing the outcome of a certain election." Consistent with the history of this provision and his role in interpreting Texas election law, *id.* §§ 31.003, .004, the Texas Secretary of State has interpreted this provision to prohibit a voter from registering using an address where the voter does not reside to influence an election. ROA.824-31 As the Secretary of State has further explained, the residence provision applies to registering to vote—not any number of other constitutionally protected activities such as canvassing, campaigning, or running for office. ROA.824-31.

C. The temporary-relocation provision

Finally, S.B. 1111 clarifies where a person who temporarily relocates may register to vote. Specifically, S.B. 1111 added subsection (f) to Texas Election Code section 1.015, which provides a person may not (1) "establish a residence at any place the person has not inhabited," and (2) "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." Like the residency provision, the temporary-relocation

[4] In total, Texas has a voting population of over 17 million people in nearly 10,000 precincts. *See January 2022 voter Registration Figures*, Tex. Sec'y of State, https://www.sos.state.tx.us/elections/historical/jan2022.shtml. There are, however, entire counties with fewer than 500 people. *Id.*

provision prevents individuals from registering to vote somewhere they do not reside—such as a hotel.

II. Procedural History

A. Plaintiffs brought this suit challenging S.B. 1111 on June 22, 2021—more than two months before S.B. 1111 even became effective. ROA.13. Plaintiffs are two organizations who claim as their mission the promotion of voter education, registration, and turnout in the Latino community. ROA.31-32. Asserting S.B. 1111 hinders their mission, they sought to enjoin the voter registrars in six of Texas's 254 counties from enforcing the law. ROA.33-34. Plaintiffs alleged that (1) the residence provision violates the First Amendment by chilling political speech, and (2) all three provisions unduly burden the right of all Texans to vote in violation of the First, Fourteenth, and Twenty-Sixth Amendments. ROA.39-45.

Texas's Attorney General intervened to defend the constitutionality of S.B. 1111, and local election officials in Medina and Real Counties intervened to protect their interests in registering people to vote where they live. ROA.443-46. Following discovery, Plaintiffs and Intervenors filed cross-motions for summary judgment. ROA.758-1557. The six local defendants generally took no position on the merits of S.B. 1111. ROA.1908.

B. On August 2, the district court granted in part and denied in part the parties' motions for summary judgment. ROA.1937-38. But the result of the district court's decision was to largely grant the Plaintiffs' motion for summary judgment. ROA.1908-1938. It determined that Plaintiffs lacked associational standing because they could not show a single voter—let alone any of their members—who had been

harmed by S.B. 1111. ROA.1912-13. But it found that Plaintiffs had organizational standing because they (1) had diverted resources to counteract S.B. 1111's effects, and (2) experienced a subjective chill to their speech. ROA.1913-18. The court next concluded that Plaintiffs *lacked* statutory standing to sue on behalf of their members under 42 U.S.C. § 1983 but could proceed based on their organizational injuries. ROA.1918-20.

On the merits, the court *first* concluded that the P.O.-box provision was generally constitutional because it was a reasonable way to further Texas's legitimate interests in ensuring that voters received the right ballot and preventing voter-registration fraud. ROA.1927-31. The court, however, determined it was *unreasonable* to require documentation if an individual registered using a commercial P.O. box but responded to the confirmation request by providing a residential address. ROA.1931-32. In such instances, the court thought, the confirmation response should function as a change-of-address form (which does not require additional documentation). ROA.1931-32.

Second, the court held that the residence provision was overbroad, vague, and burdensome. ROA.1932-35. The district court rejected the Secretary of State's construction, which would have limited the provision to voters who listed a false residence. ROA.1934. Instead, the court insisted the provision prohibited establishing a true residence for purposes of influencing an election, which could prohibit constitutionally protected activity—for example, moving to run for office. ROA.1934-35. Having interpreted the residence provision far more broadly than the state officer charged with interpreting the State's election law, the court then unsurprisingly

concluded the residence provision severely burdened the right to vote and was unjustified by the State's asserted interests. ROA.1935.

Third, the court held that the temporary-relocation provision was unconstitutional under the First and Fourteenth Amendments because college students might not have a place to vote. ROA.1936-37.[5] Specifically, the court believed subsection (f) prohibited college students from registering at their parents' home (where they did not physically reside), but that subsection (d) prohibited them from registering at school (where they did not intend to permanently remain). ROA.1936-37. The district court, however, did not find any violation of the Twenty-Sixth Amendment. ROA.1936-37. [6] It again ignored the Secretary of State's construction of the statute, which makes clear that college students may register to vote either at their parents' home or where they attend college. ROA.838-39.

Thus, the court enjoined defendants from enforcing the residence (section 1.015(b)) and temporary-relocation provisions (section 1.015(f)) in their entirety. ROA.1937-38. It also enjoined defendants from enforcing the P.O.-box provision (section 15.053(a)) against voters who provide a residential address upon request. ROA.1937-38.

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[5] The district court also mentioned United States Senators. ROA.1936. However, its reasoning is primarily limited to college students. And there is no indication that Plaintiffs have the authority (or interest) to represent the interests of either of Texas's Senators.

[6] Because Plaintiffs have not cross-appealed that conclusion, and the time to do so has now lapsed, Appellants do not discuss this claim here.

C. Intervenors appealed and subsequently sought a stay pending appeal from the district court by August 12. ROA.1945-61. Because the district court failed to rule on that motion, Intervenors filed a motion requesting a stay pending appeal in this Court on August 15. Motion for a Stay Pending Appeal, *supra*. A motions panel of this Court granted an administrative stay on August 26, and subsequently expedited this appeal. ROA.2039-40.

Summary of the Argument

I. The district court's judgment in favor of Plaintiffs was improper because Plaintiffs, who are not voters, lack both Article III and statutory standing to bring claims that their (non-existent) right to vote has been impaired. Because Plaintiffs failed to identify any member of either of their organizations who had been affected by any of the provisions they have challenged here, ROA.1912-13, they must show an injury *to the organization* either in the form of diverted resources or chilled speech. They have shown neither.

First, Plaintiffs have failed to show that defendants' enforcement of S.B. 1111 (if any), "significantly and 'perceptibly impaired'" their ability to pursue their mission, resulting in a "drain" on their resources and a harm to them *as organizations*. *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). The district court concluded that Plaintiffs had satisfied this standard by showing that they had canceled programs in order to fund voter education in Texas because of S.B. 1111. ROA.1914-16. But voter education is what Plaintiffs do, and they cannot establish standing based on performing their ordinary activities. Moreover, Plaintiffs have never sought to show that this diversion was specific to S.B. 1111—as opposed to S.B. 1 (another

Texas election law not implicated in this matter), alleged voter suppression efforts more generally, or even laws passed by other states.

Second, Plaintiffs have not shown any chilling effect on their speech. At the outset, Plaintiffs only alleged that their organizations' speech has been chilled as to the residence provision. ROA.39-41. As a result, assuming such injury exists, it would not support a claim against the P.O-box provision or temporary-relocation provisions. Moreover, they have not shown any such injury—but only hypothesized what might happen if they were to aid and abet some unidentified voter in knowingly or intentionally submitting a fraudulent registration form. Such unadulterated speculation is insufficient to confer standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). And as even the district court recognized, Plaintiffs' "theories appear to be in tension" because they "argue both that S.B. 1111 has compelled Plaintiffs to po[ur] money into voter education and that S.B. 1111 has deterred Plaintiffs from educating voters." ROA.1913.

Plaintiffs likewise lack statutory standing. A plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Conn v. Gabbert*, 526 U.S. 286, 292-93 (1999). But Plaintiffs—as organizations—cannot vote and so cannot assert the rights of voters. *Contra* ROA.39. And, as even the district court recognized, Plaintiffs have identified no members or constituents impacted by S.B. 1111. ROA.41. Even their allegations of chilled speech are insufficient because they allege that their expression is chilled only through their "members and constituents." ROA.41. Because Plaintiffs do not seek

to vindicate their own rights, they lack statutory standing. *Vote.Org v. Callanen*, 39 F.4th 297, 303 (5th Cir. 2022).

II. On the merits, the district court erred in holding that the P.O.-box provision, the residence provision, and the temporary-relocation provision violate the First and Fourteenth Amendments. Because S.B. 1111 imposes "reasonable, nondiscriminatory" regulations on voter registration—and not "severe restrictions" on the right to vote, "the State's important regulatory interests are generally sufficient to justify" them. *Burdick*, 504 U.S. at 434. The district court's contrary conclusion is based on numerous analytical flaws, many of which imposed a narrow-tailoring burden that applies only to "severe" voting restrictions.

The district court erred at the outset in analyzing the P.O.-box provision because it overstated the burden the restriction imposes. Specifically, contrary to the district court's analysis, this provision does not actually prevent anyone from voting. It requires a voter either to provide the necessary documentation when he confirms his residence *or* submit an appropriate statement of residence at the appropriate polling place. Tex. Elec. Code §§ 15.081(a)(1), 15.112, 63.0011. Such a minor inconvenience is more than justified by the State's interests, which the district court recognized was legitimate, "that Texans vote where they live." ROA.1930.

The district court also ignored fundamental rules of statutory interpretation in analyzing the residence provision and the temporary-relocation provision. Specifically, it gave both provisions an interpretation broader than they can reasonably bear by ignoring both the Secretary of State's interpretation of the law and principles of constitutional avoidance. The residence provision simply prohibits individuals from

registering to vote at a location where they do not actually reside for purposes of influencing the outcome of an election. ROA.825-26. A person may establish any residence they choose, so long as he or she actually resides there. Because the "risk of voter fraud [is] real" and "could affect the outcome of a close election," the State has a compelling interest in deterring such fraud that more than justifies the residency provision. *Crawford*, 553 U.S. at 195-96.

The temporary-relocation provision too passes constitutional scrutiny. Because it allows an individual to register to vote wherever he or she resides—but not at a previous residence or a temporary residence—it does not burden the right to vote at all. As the Secretary of State's representative explained, contrary to the district court's conclusion, it does not create a college student without a country. A college student who considers his hometown his home may still register at his parents address because that remains his residence. But a college student who considers his college town his new residence may register to vote there instead.

III. Even if the district court were right on the merits, its injunction is fatally flawed. It is black letter law that a federal court cannot enjoin the enforcement of a law that a plaintiff lacks standing to challenge. *California v. Texas*, 141 S. Ct. 2104, 2116 (2021). Moreover, the federal court's order must be no broader than the constitutional violation that it seeks to remedy. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Brown v. Plata*, 563 U.S. 493, 531 (2011). The district court's order enjoins the residency provision based on testimony that it could impede candidates for office who may move to run in a different district. ROA.1933-34. And it enjoins the temporary-relocation provision based on how the district court thinks that it

affects college students. ROA.1936-37. Assuming those effects were adequately shown (and they were not), they would not justify an injunction against either provision *in their entirety*.

Standard of Review

This Court "review[s] a district court's grant of summary judgment *de novo*, applying the same standards as the district court." *Kirchner v. Deutsche Bank Nat'l Tr. Co.*, 896 F.3d 337, 339 (5th Cir. 2018) (per curiam). "Summary judgment 'is appropriate only if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

This Court "review[s] permanent injunctions for abuse of discretion, but any issue of law underlying that decision is reviewed *de novo*." *Fam. Rehab., Inc. v. Becerra*, 16 F.4th 1202, 1204 (5th Cir. 2021) (citing *BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers – Transp. Div.*, 973 F.3d 326, 333–34 (5th Cir. 2020)).

Argument

I. Plaintiffs Lack Article III and Statutory Standing.

As a threshold matter, the district court's judgment in favor of Plaintiffs was improper because they failed to demonstrate even the most fundamental element of standing: a cognizable injury in fact.[7] "Article III specifies that the judicial power of

[7] The record indicates that the original defendants were largely aligned with the Plaintiffs—or at least did not defend S.B. 1111, ROA.1908. As a result, the case may also have lacked adversity at the time it was filed. *See, e.g.*, *United States v. Windsor*,

the United States extends only to 'Cases' and 'Controversies.'" *Vote.Org*, 39 F.4th at 303 (quoting U.S. CONST. art. III, § 2). "[I]n the absence of standing, the court has no 'power to declare the law.'" *In re Gee*, 941 F.3d 153, 161 (5th Cir. 2019) (per curiam). Moreover, even if Plaintiffs had satisfied this constitutional minimum, they lack statutory standing, which "turns on 'whether a legislatively conferred cause of action encompasses a particular plaintiff's claim.'" *Vote.Org*, 39 F.4th at 304 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-128 n.4 (2014)).

A. Plaintiffs lack Article III standing.

To establish standing under Article III, Plaintiffs must prove that (1) they have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, which is (2) fairly traceable to the enforcement of the specific challenged provision, and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also California*, 141 S. Ct. at 2115, 2119. At summary judgment, individual plaintiffs are required to come forward with specific evidence demonstrating each of these elements. *Lujan*, 504 U.S. at 561.

Because Plaintiffs do not contend that they are "the object of the government action or inaction [they] challenge[]," standing is "substantially more difficult to establish." *Id.* at 562 (quotation omitted). Plaintiffs have two avenues to meet their

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570 U.S. 744, 760 (2013); *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). That is, however, difficult to assess on this record, and the Court need not reach it as a cognizable injury was also absent.

burden: (1) associational or (2) organizational. *See City of Kyle*, 626 F.3d at 237-38. For associational standing, the organization must show (1) that its members would independently have standing; (2) that the interests the organization is protecting "are germane to the purpose of the organization"; and (3) that "neither the claim asserted nor the relief requested requires participation of individual members." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006). Organizational standing requires that the organizational plaintiff establish injury *to itself*, causation, and redressability. *City of Kyle*, 626 F.3d at 238.

The district court correctly rejected Plaintiffs' claims of associational standing. ROA.1912-13. But the district court erred when it held that Plaintiffs satisfied Article III's standing requirements both through a "diversion of resources," ROA.1913-16, and based on a chilling effect on their speech, ROA.1916-18.

1. Plaintiffs have failed to demonstrate Article III standing through an injury to their members (or any other Texas voter).

Plaintiffs failed to show associational standing through their members because they failed to show that one of their members would have standing to sue individually. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Indeed, there must be "evidence in the record showing that a *specific* member" was injured by defendants' challenged conduct. *City of Kyle*, 626 F.3d at 237; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (requiring organizations to "identify members who have suffered the requisite harm"). "Member" in this context is a term of art, requiring the organization to show certain "indicia of membership." *Hunt*, 432 U.S. at 344. The person whose purported injury is alleged to support

associational standing must be among those who "elect leadership, serve as the organization's leadership, and finance the organization's activities." *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 344 n.9 (5th Cir. 2012).

Here, because Plaintiffs chose to sue before the law even went into effect, they were unable to identify any voters—let alone any members—who were injured by S.B. 1111's common sense provisions. When LULAC's representative was asked if he had "seen any examples" of the organization's members being unable to register to vote, his only response was "[t]he bills just passed this last session so it's too early." ROA.949; *see also* ROA.939-40. Voto Latino's representative admitted that it does not *have* members—let alone a member that was injured. ROA.1019-20. Indeed, when asked whether, "[s]itting here today," she was "aware of any specific examples of a constituent of Voto Latino, who decided not to register or vote on account of [S.B.] 1111," Voto Latino's representative confirmed—twice: "Not that I'm aware of." ROA.1047.

Because Plaintiffs cannot point to specific members with individual standing, their claims cannot proceed on this basis. *See Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.); *Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008). But the district court declined to dismiss this case based on its conclusion that Plaintiffs adequately demonstrated (1) that they diverted resources to address an unspecified collection of election-related laws that included S.B. 1111, and (2) that their speech was chilled by potential criminal penalties associated with violations of Texas election law. ROA.1913-18. The district court erred on both counts.

2. Plaintiffs have failed to demonstrate organizational standing through diversion of resources.

To establish organizational standing on a diversion of resources theory, Plaintiffs must show that defendants' enforcement of S.B. 1111, "significantly and 'perceptibly impaired'" their ability to pursue their mission, resulting in a "drain" on their resources. *City of Kyle*, 626 F.3d at 238. Such an injury must be "concrete and demonstrable." *Id.* "Mere redirection of resources" is not sufficient, as "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*, No. 3:21-CV-259-DCG-JES-JVB, 2022 WL 1631301, at *5 (W.D. Tex. May 23, 2022) (quoting *Ass'n for Retarded Citizens v. Dall. Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994)); *see also, e.g.*, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017).

Moreover, an organization's decision to divert resources "must . . . be in response to a reasonably certain injury imposed by the challenged law." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). In other words, a diversion of resources exists only if the plaintiff "would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). A diversion of resources injury must therefore be cognizable, certainly impending, and caused by the specific provision that the Plaintiffs are challenging. *California*, 141 S. Ct. at 2115, 2119. Otherwise, Plaintiffs could "manufacture standing merely by inflicting harm

on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

Plaintiffs fail this test. Although they have offered corporate testimony that they have diverted resources in response to changes in election laws in 2021, there were many such changes. *Supra* I & n.3. Plaintiffs' evidence is insufficiently specific to tie the diversion of resources to the defendants' challenged conduct. Moreover, Plaintiffs failed to demonstrate that their conduct is different from their ordinary activities in educating voters.

a. As an initial matter, Plaintiffs have not identified resources specifically diverted to counteract anything related to the three specific provisions of S.B. 1111 that they allege are unconstitutional—as opposed to counteracting other laws. LULAC's representative described how it diverted resources from immigration and criminal-justice reform efforts to deal with alleged "voter suppression efforts" in Texas, ROA.1278, but could not identify what portion of those resources (if any) went to counteract S.B. 1111—let alone to counteract *these defendants'* efforts to enforce the law (assuming any such efforts existed). ROA.1278-79. Voto Latino's representative did not even identify what portion of the alleged diversion resulted from changes to the law *in Texas.* ROA.1025. Because Plaintiffs could not point to a drain on their resources attributable to the challenged provisions alone, they lacked standing. *California*, 141 S. Ct. at 2115, 2119.

The district court erred in concluding that Plaintiffs have standing because LULAC "has declined to fund federal-immigration reform and criminal-justice-reform programs this year and also diverted funding away from its annual scholarship

programs in order to educate members about S.B. 1111's requirements." ROA.1914. LULAC's representative consistently testified that the organization diverted resources because of "the impact of the [alleged] voter suppression bills of S.B. 1111 and S.B. 1 together because they're really combined." ROA.939. Indeed, when asked specifically whether LULAC was doing this "because of S.B. 1111 and only because of S.B. 1111," LULAC's representative testified that "it's also not only S.B. 1111, but S.B. 1, both." ROA.951. And when asked if he could disaggregate the diversion of resources caused by S.B. 1111 from those caused by S.B. 1, LULAC's representative conceded that "[i]t's hard to say . . . it's going to be a combined effort because [of] both bills," ROA.951, and explained that it was "[n]ot at this point" possible to say which law caused LULAC to divert what amount of funds, ROA.951.[8] On its face, LULAC's injury could thus have been caused by seeking to counteract any of Texas's dozen other election laws passed in 2021, Election Advisory, *supra* n.3. This includes most prominently Texas's omnibus election bill known as S.B. 1, Texas Election Integrity Act of 2021, 87th Leg., 2d C.S., ch. 1, 2021 Tex. Sess. Law Serv. 3783, which LULAC has challenged in a separate lawsuit. *See LULAC Texas v. Scott*, No. 1:21-cv-0786-XR (W.D. Tex. filed Sept. 7, 2021).

The district court likewise erred in concluding that Voto Latino had standing because it "has funded in-state voter-registration efforts at the expense of out-of-state efforts" and that "[t]his will be the first year since 2010 that Voto Latino will

[8] The district court seemed to recognize as much when it concluded that "LULAC is . . . 'spending over maybe $1 million to $2 million in Texas' *to counteract election laws like S.B. 1111.*" ROA.1914. (emphasis added).

be unable to run a voter-registration drive in Colorado." ROA.1914. Voto Latino's representative testified that this was "[a]s a result of S.B. 1111 and all the other laws that came into effect post-January." ROA.1258. At least LULAC limited its resource-diversion claims to laws in Texas: Voto Latino's representative testified that it "shut down [its] Colorado program" because of "the laws that were passed in the state of Texas *and others.*" ROA.1025 (emphasis added) As discussed above (at 6), there were election-related bills proposed in all 50 States last year. Voto Latino could have sought to counteract *at least* those passed in Georgia and Arizona as well as laws in Texas other than S.B. 1111. *About*, Voto Latino, https://votolatino.org/about/. Yet it made no effort to disaggregate which of its allegedly diverted resources went to counteracting laws in this State—let alone this law.

This type of general assertion that some resources have been diverted is insufficient under this Court's cases, which recognizes that "[n]ot every diversion of resources to counteract the defendant's conduct . . . establishes injury in fact." *City of Kyle*, 626 F.3d at 238. Again, Plaintiffs must show that the defendants' efforts to enforce the challenged provisions of S.B. 1111—not a combination of S.B. 1111, S.B. 1, the dozen or so other new laws in Texas, or the hundreds of laws that may have been passed in other States—"significantly and 'perceptibly impaired'" their ability to pursue their mission, leading to a "drain" on their resources." *Id.*; *California*, 141 S. Ct. at 2115, 2119. Because Plaintiffs have failed to do so, their resource-diversion theory fails to establish standing.

b. Plaintiffs' resource diversion theory also fails to establish standing because they did not show how any efforts they may have made to counteract S.B. 1111 differ

from their routine activities to educate individuals regarding state election laws. ROA.32-33; *Ass'n for Retarded Citizens*, 19 F.3d at 244; *Def. Distributed v. U.S. Dep't of State*, No. 1:15-CV-372-RP, 2018 WL 3614221, at *4 (W.D. Tex. July 27, 2018). LULAC describes its mission as "participat[ing] in civic engagement activities such as voter registration, voter education, and voter turnout efforts," ROA.32; Voto Latino describes its mission as "educat[ing], register[ing], mobiliz[ing], and turn[ing] out Latinx voters" in the Hispanic community. ROA.32-33. S.B. 1111's challenged provisions are in no way inconsistent with that. Indeed, Plaintiffs' testimony suggests that, at most, they had to change the content of their answers in response to questions from voters, ROA.1258-59, candidates, ROA.1268-69, or volunteers, ROA.1277. Plaintiffs' "self-serving observation that [they have] expended resources to educate [their] members and others regarding [S.B. 1111] does not present an injury in fact" because there is no evidence that S.B. 1111 has subjected them to "operational costs beyond those normally expended to review, challenge, and educate the public" about voting legislation. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). Absent such evidence, "any resources" the organization "used to counteract"—or changes to resource allocation as a result of—the defendant's conduct "were a self-inflicted budgetary choice." *Elec. Privacy Info. Ctr.*, 878 F.3d at 379.

Put another way, Plaintiffs' mission to explain what Texas law requires will have to account for the challenged provisions of S.B. 1111. But Plaintiffs have not shown it to be contrary to Plaintiffs' mission—or Plaintiffs would presumably have been able to show an impacted member, or at least some impacted individual. Where, as

here, the government's conduct "does not directly conflict with [an] organization's mission," it is unlikely to be sufficient to establish an injury in fact. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996). Rather, "[i]f a defendant's conduct does not conflict directly with an organization's stated goals, it is entirely speculative whether the defendant's conduct is impeding the organization's activities." *Id.* Plaintiffs have not shown this case to be an exception.

3. Plaintiffs have failed to demonstrate standing through a chilling effect.

The district court also erroneously concluded that Plaintiffs suffered an injury because S.B. 1111 chilled their speech regarding how to advise voters. ROA.1916-18. As an initial matter, "standing is not dispensed in gross." *In re Gee*, 941 F.3d at 160 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). "To the contrary, 'a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 544 U.S. 724, 734 (1996)); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Plaintiffs brought a First Amendment challenge only to the residence provision and only alleged harm to themselves as to that provision, ROA.39-44, so Plaintiffs could only possibly have demonstrated standing though a chilling effect as to the residence provision. To the extent the district court held otherwise, it committed legal error.[9]

[9] The district court did not disaggregate Plaintiffs' claims at all when it determined that they had standing. ROA.1918. Instead, it simply concluded that

To establish standing under a chilled-speech theory, Plaintiffs must demonstrate that their desired speech is "arguably proscribed" by the challenged statute. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014). Moreover, because "standing cannot be conferred by a self-inflicted injury," *Zimmerman*, 881 F.3d at 389, assuming that Plaintiffs have shown that uncertainty about the law has changed what they plan to say, "the change in plans must still be in response to a reasonably certain injury imposed by the challenged law." *Id.* at 390.

a. Plaintiffs have chosen to proceed on a theory that they face criminal prosecution should they give bad advice about how to comply with the residence provision. ROA.1152-53. This fails at the outset because Plaintiffs sued the wrong parties. They sued election administrators—not the district or county attorneys who could actually prosecute them. *See* Tex. Const. art. V, § 21. The district court ignored this problem, reasoning that election administrators are obliged to make a report to a district or county attorney when an ineligible person registers or votes. ROA.1918 (citing Tex. Elec. Code § 15.028). But this reporting obligation does not extend to those who allegedly encourage voter fraud. Tex. Elec. Code § 15.028. Moreover, such a report is neither necessary nor sufficient for a district attorney to prosecute a violation of the election code in any event. *See, e.g.*, *Crutsinger v. State*, 206 S.W.3d 607, 612 (Tex. Crim. App. 2006) (discussing factors involved in prosecutorial discretion). Because district attorneys or county prosecutors—and not election administrators—

"Plaintiffs have articulated two distinct harms that satisfy all three irreducible elements of constitutional standing." ROA.1918.

would have to prosecute violations of the election code, enjoining election administrators rather than prosecutors does not redress the injury Plaintiffs claim to suffer. Therefore, they lack standing. *Okpalobi*, 244 F.3d at 426 (collecting authority).

b. Assuming that Plaintiffs have sued the correct parties, "to confer standing, allegations of chilled speech or 'self-censorship must arise from a fear of prosecution that is not "imaginary or wholly speculative."'" *Zimmerman*, 881 F.3d at 390 (quoting *Ctr. for Individual Freedom v. Carmouche*, 448 F.3d 655, 660 (5th Cir. 2006)). But Plaintiffs did not identify any prosecutor who would prosecute them for violating the residency provision—let alone sue anyone who actually has the power to prosecute them for violations of the residency provision. Even if they had, showing a defendant has mere authority to prosecute a crime does not establish standing. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1299-300 (11th Cir. 2019) (en banc) (applying *Okpalobi*, 244 F.3d at 426).

Indeed, Plaintiffs have not even shown how S.B. 1111 creates any criminal penalties for Plaintiffs' speech: as described below (at 39-40), the state officer charged with interpreting the Election Code (and whose interpretation prosecutors would presumptively follow) has already said that the residency provision is far narrower than the Plaintiffs or the district court suggest. Moreover, to create criminal liability, Plaintiffs and the district court point to statutes regarding illegal voting and fraudulent registration. ROA.1917 (addressing Tex. Elec. Code §§ 64.012, 276.018).[10] But those statutes criminalize the knowing and intentional conduct of *the voter*, Tex.

[10] The district court cited section 276.012 but quoted section 276.018.

Elec. Code §§ 64.012, 276.018, and Plaintiffs are not voters. Although "helping someone to commit a crime is a crime" in Texas, ROA.1917, criminal liability attaches only if Plaintiffs *intend* to promote the commission of a crime by encouraging or aiding another in the offense, Tex. Penal Code § 7.02(a)(2). Plaintiffs presented no evidence that they intend to encourage voters to (knowingly) vote illegally or submit false voter-registration applications—and presumably do not intend to do so. Rather, Plaintiffs' representatives testified only to their own confusion about the law. *E.g.*, ROA.1254; ROA.1260-61; ROA.1269-72.

c. Instead, Plaintiffs rely on one long chain of speculation: to run a risk of criminal liability, Plaintiffs must encourage or assist a voter in violating the law; the voter must then knowingly or intentionally cast an illegal ballot or submit a false registration form; the voter registrar must then discover this and notify the local prosecutor of the voter's conduct; and the local prosecutor must discover Plaintiffs relationship with the voter and decide to prosecute them—nonprofit organizations—for aiding and abetting illegal voting by giving bad advice.[11] Such a "highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410. That is particularly true as it involves the independent actions of third parties (voters and prosecutors) that are not before

[11] To satisfy the other elements of standing, this might not even be sufficient. After all, Plaintiffs named as defendants the voting registrars of only six counties. ROA.1908. For Plaintiffs to have satisfied the other two elements of standing, all of this has to happen in one of those six counties—otherwise, the elements of causation and redressability will not be met. *Lujan*, 504 U.S. at 560-61.

the Court, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976), and some actions that may be unlawful, *Los Angeles v. Lyons*, 461 U.S. 95, 105-07 (1983).

The district court's apparent reliance on statements made on the Office of the Attorney General's website—reflecting its commitment to reducing election fraud—was legal error. ROA.1917. The Attorney General cannot currently initiate criminal prosecution absent a request for assistance from a district attorney, *State v. Stephens*, Nos. PD-1032-20 & 1033-20, 2021 WL 5917198, at *1 (Tex. Crim. App. Dec. 15, 2021), and there is no evidence such a request is in the offing. Moreover, nothing that the district court pointed to concerning the Attorney General indicates an intent to prosecute Plaintiffs (or anyone else) for misunderstanding the law.

Stripped of this speculation, Plaintiffs have demonstrated (at most) a subjective chill, which is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). The district court erred in holding otherwise.

B. Plaintiffs lack statutory standing.

In addition to lacking Article III standing, Plaintiffs also lack statutory standing under section 1983 to raise free-speech and right-to-vote claims that do not belong to them. *Vote.Org*, 39 F.4th at 304. Because the district court concluded that Plaintiffs lack third-party standing to sue on behalf of their members, ROA.1919-20, Plaintiffs can complain only of direct injuries to themselves. But Plaintiffs are not required to comply with any of the challenged provisions of S.B. 1111—and so lack statutory standing to complain of them.

As a general rule, a plaintiff "must assert his own legal rights and interests, not those of third parties." *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988). Section 1983 is no exception: it provides a cause of action only when the plaintiff suffers "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. It does not provide a cause of action to plaintiffs claiming an injury based on the violation of a third party's rights. Thus, "like all persons who claim a deprivation of constitutional rights," Plaintiffs were "required to prove some violation of [their] personal rights." *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986). When "[t]he alleged rights at issue" belong to a third party, rather than the plaintiff, that plaintiff lacks statutory standing, regardless of whether the plaintiff was injured. *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011). As the Supreme Court has explained, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Conn*, 526 U.S. at 292-93.

This Court recently held similar plaintiffs were unlikely to prevail in a case involving an organization bringing claims that voting rules "unlawfully infringe[] Texans' right to vote." *Vote.Org*, 39 F.4th at 304. In *Vote.Org*, this Court explained that the textual argument that section 1983 does not allow an organization to vindicate a third party's rights "is powerful" and that "this court's precedents may preclude § 1983 actions premised on injuries to third parties." *Id.* at 305 & n.4.

So too here. S.B. 1111 impacts where an individual may register to vote. Thus, any section 1983 claim would run to affected *voters*—not *Plaintiffs*. *See, e.g.*, *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 390 (5th Cir. 2013). Accordingly, section 1983

does not allow Plaintiffs, who are not "the party injured," to sue on free-speech and right-to-vote claims that do not belong to them. *Vote.Org*, 39 F.4th at 304 (emphasis in original).[12]

II. S.B. 1111 is Constitutional.

Because "[e]very decision that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than for others," the Supreme Court has developed a balancing test for challenges—like those presented here—to time, place, or manner restrictions regarding voting. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016). Under that test, courts "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Steen*, 732 F.3d at 387 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Then, courts "must identify and evaluate the precise interest put forward by the State as justifications for the burden imposed by its rule." *Id.* (quoting *Anderson*, 460 U.S. at 789). Finally, courts weigh the "character and magnitude of the asserted injury" against the "precise interests put forward by the State," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 387-88 (quoting *Burdick*, 504 U.S. at 434 (1992)).

[12] At most, Plaintiffs could assert First Amendment injuries they claim they suffer because of the residence provision. ROA.41-42. For the reasons discussed above (at 18-30), those injuries do not exist. But Plaintiffs did not plead—much less prove—that they have suffered any other First Amendment injuries. ROA.1920-21. Thus, any such claim has long been waived. *See* Fed. R. Civ. P. 8(a).

State actions that impose a "severe" burden on the right to vote are closely scrutinized. *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 789). "Lesser burdens, however, trigger less exacting review." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Courts are careful when identifying the nature of the state action because "[t]o deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny"—an outcome "[t]he Constitution does not require." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). Moreover, courts examine this question by considering voters *as a group*—not on a "voter-by-voter examination of the burdens." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in the judgment). "Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless." *Id.* When a state election law imposes only "reasonable, nondiscriminatory restrictions" upon the rights of voters *as a group*, "the state's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788.

In this instance, the district court started by overstating the burdens on voting created by S.B. 1111, largely by misinterpreting state law and by applying a "case-by-case approach" towards examining burdens that the Supreme Court has rejected. *Crawford*, 553 U.S. at 208. None of the challenged provisions of S.B. 1111 itself "abridge[s]" the right to vote or the right to vote of any voter—let alone any identifiable class of voters or voters as a whole—because none "creates a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the *status quo*." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 192 (5th Cir. 2020). Instead, because the challenged provisions of S.B. 1111 impose only "reasonable,

nondiscriminatory restrictions" on *where* a particular voter may register to vote, the State's "important regulatory interests" are sufficient to justify each of the challenged provisions. *Burdick*, 504 U.S. at 434.

A. The P.O.-box provision is constitutional.

That P.O.-box provision easily satisfies the *Anderson-Burdick* balancing test. It states that: "if the voter's residence address is a commercial post office box or similar location that does not correspond to a residence, evidence of the voter's residence address as required by Section 15.054 or an indication that the voter is exempt from those requirements" shall be submitted by the voter to the registrar. Tex. Elec. Code § 15.053(a). A voter's "[r]esidence address" is the street address "that correspond[s] to a person's residence," and a voter's "residence" is his "domicile." *Id.* §§ 1.005(17), .015(a). Under section 15.054, a voter may provide a photocopy of a variety of documents including a driver's license, a concealed handgun license, or a utility bill. *Id.* § 15.054(a).

1. The Supreme Court has already held that imposing an identification requirement like the P.O.-box provision may "impose[] some burdens on voters that other methods of identification do not share," but a "[b]urden[] of that sort arising from life's vagaries . . . are neither so serious nor so frequent as to raise any question about the constitutionality" of such a requirement. *Crawford*, 553 U.S. at 197. Moreover, providing another alternative—such as a "right to cast a provisional ballot"—"provides an adequate remedy for problems of that character." *Id.* at 197-98. There is such an adequate remedy here: even a voter who chooses not—or is unable—to provide the necessary documentation in response to the voter registrar's

confirmation request may still vote: he is placed on the "suspense list" and may vote provided that he submits a statement of residence that satisfies Texas Election Code section 63.0011. Tex. Elec. Code §§ 15.081(a)(1), 15.112. Thus, standing alone, the P.O.-box provision does not prevent anyone from voting or impose any sort of penalty for registering using a P.O. box.[13]

2. The district court correctly recognized that the P.O-box provision furthers important State interests by "making sure that people vote where they live," ensuring that voters get the right ballots, and in "preventing fraud." ROA.1930-31; ROA.1935. As the Supreme Court has noted, "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 U.S. at 196. And as the district court recognized, the potential for registration fraud in this context is high: individuals can obtain P.O. boxes anywhere, can obtain multiple P.O. boxes, and can even manage them online. ROA.1930. The district court therefore correctly explained that, as a general matter, requiring those individuals who register with P.O. boxes to document their residence poses only a reasonable, nondiscriminatory burden on voting that is justified by Texas's interests. ROA.1931.

Even apart from fraud, Texas "indisputably has a compelling interest in preserving the integrity"—and efficiency—"of its election process." *Eu*, 489 U.S. at 231. Here, the P.O.-box provision also ensures that a voter gets the correct ballot, which

[13] For this reason, the Plaintiffs' theory of standing based on a fear of criminal prosecution is particularly inapt for this claim. *Supra* I.A.3.

in Texas is a significant concern. In a given election year, Texans can be required to separately elect five statewide elected officers, three members of the State's Supreme Court, three members of the State's Court of Criminal Appeals, representatives to the state and federal legislatures, local judges, local criminal and civil district attorneys, a county attorney, water boards, school boards, and utility districts, among others.[14]

Even a nationwide election can come down to a few votes. *Bush v. Gore*, 531 U.S. 98, 100 (2000) (per curiam). As the relevant electorate becomes smaller, it becomes even more important to ensure that only voters who are entitled to vote receive ballots. For example, in *Willet v. Cole*, the margin that decided a city council seat was a single vote; the principle that governed the decision was that "a person does not acquire residency in a place to which the person has come solely for temporary purposes." *Willet v. Cole*, 249 S.W.3d 585, 588 (Tex. App.—Waco 2008, no pet.); *see also, e.g.*, *Medrano v. Gleinser*, 769 S.W.2d 687, 687-88 (Tex. App.—Corpus Christi-Edinburg 1989, no pet.) (addressing an election challenge for County Commissioner of Precinct 1 in Goliad County, Texas, which was decided "by a margin of one vote").

Requiring a voter either to register using their actual residence or providing documentation of residence is a reasonable way to ensure voters receive the correct ballot without severely burdening even most voters who register using a P.O. box.

[14] For an example of the ballot for only *state* officers, *see* https://www.sos.state.tx.us/elections/forms/2022-sample-ballot-general-election-nov-8.pdf.

ROA.1930-31. Indeed, even the district court agreed in the mine-run of cases. ROA.1930-31. Because *Anderson-Burdick* does not contemplate a review of the burden on individual voters, that should have been the end of it. *Crawford*, 553 U.S. at 198-99.

3. The district court nevertheless went on to evaluate whether the law imposes an improper burden by requiring documentation from individuals who provide a residential address after receiving a confirmation request from a registrar when such documentation would not have been necessary had the same voter submitted a change of address form. ROA.1931-32. The court found providing documentation of residence too burdensome in those limited circumstances. ROA.1931-32.

This was error for at least three reasons. *First*, to the extent the district court's reasoning was based on a concern that such voters would be unable to vote, ROA.1932, it was based on a misinterpretation of Texas law. A voter who does not provide appropriate documentation when he confirms his address is placed on the suspense list, together with voters whose renewal certificates were returned to the registrar as undeliverable and those who were excused or disqualified from jury service because they were not a resident of the county. Tex. Elec. Code §§ 15.081 (a)(2). Such an individual may still vote provided he submits an appropriate statement of residence at his polling location. *Id.* §§ 15.081(a)(1), 15.112, 63.0011. That statement of residence is then used to update his address in the registrar's system, and he is removed from the suspense list. *Voter Registration*, Texas Secretary of State, https://www.sos.state.tx.us/elections/vr/index.shtml#46. But at all times, "[a]n

individual on the suspense list is still a registered voter and has the same rights as a non-suspense list voter." *Id.*

Second, the district court's analysis was, in effect, a narrow-tailoring analysis that does not apply absent a severe burden. *Crawford*, 553 U.S. at 198-99; *id. at* 208 (Scalia, J., concurring). *Third*, the district court improperly conflated the consequence of failing to comply—being placed on the suspense list—with the burden of complying. *Id.* at 193. Because the burden of complying is minimal and fully justified by the State's interests in deterring fraud and ensuring voters get access to the correct ballot, the P.O.-box provision does not place an unconstitutional burden on the right to vote.

B. The residence provision is constitutional.

The district court next erred in concluding that the residence provision is unconstitutional. ROA.1932-35.[15] The residence provision provides that "[a] person may not establish residence for the purpose of influencing the outcome of a certain election." Tex. Elec. Code § 1.015(b). In turn, a "residence" is a "domicile"—"one's home and fixed place of habitation to which one intends to return after any temporary absence." *Id.* § 1.015(a). Although the opinion is unclear whether the district court invalidated this provision based on a burden to speech or the vote, neither is correct.

[15] Intervenors Torres and Pendley agree the district court erred, because it lacked jurisdiction to rule on the merits of any of Plaintiffs' claims, including the residence provision. *See supra* I. They, however, take no position regarding the interpretation of the residence provision.

1. The district court's error started when it misinterpreted the residence provision. In construing a statute, Texas courts seek "to determine and give effect to the Legislature's intent," *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003), by looking at the act "as a whole" rather than "isolated portions of it," *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018). Moreover, Texas courts must—"if possible"—interpret a statute "in a manner that avoids constitutional infirmity." *Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998); Tex. Gov't Code § 311.021(1).

Here, when section 1.015 is read as a whole, the residence provision requires someone to register using their actual residence—not a false address aimed at influencing an election. Subsection (a) provides that a "residence" is a "domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence." Tex. Elec. Code § 1.015(a). Subsection (b), the residence provision challenged here, provides that "[a] person may not establish residence for the purpose of influencing the outcome of a certain election." *Id.* § 1.015(b). Taken together, a person may establish any residence he chooses—so long as his intent in doing so is to make that residence his fixed place of habitation. As the Secretary of State's representative explained, an individual thus runs afoul of subsection (b) *only* if he seeks to establish a residence to influence an election *without* making it his home. ROA.826.

That is, the residence provision "means that a person can't claim a residence that's not their residence address for the purpose of influencing the outcome of a particular election." ROA.825. A person "can't register to vote and thereby, quote,

establish a residence where they don't actually live just so that they can vote in a particular election and influence the outcome." ROA.826. This type of conduct is no hypothetical problem; the Secretary of State's representative testified to multiple instances of multiple individuals registering to vote at a hotel or an apartment complex while maintaining a separate residence for purposes of influencing a local election. ROA.825-26.

Rather than accept this limiting construction, the district court interpreted the residence provision as broadly as possible, to include "bar[ring] prospective voters from establishing a [residence] . . . for obviously permitted purposes such as voting, volunteering with a political campaign, or running for an elected office." ROA.1933. This was error: in a pre-enforcement challenge like this one, the Secretary is due some deference as the state official charged with interpreting Texas's election code in the absence of a judicial ruling. *See R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628-29 (Tex. 2011); Tex. Elec. Code §§ 31.003, .004.

Moreover, "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *see also Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 753-54 (5th Cir. 2008) ("'[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of'" the legislature (alteration in original) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))). Texas courts, like federal courts, apply

this principle. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). And it is particularly true in the First Amendment context, where "[i]t has long been" the case "that in determining a facial challenge to a statute, if it be readily susceptible to a narrowing construction that would make it constitutional, it will be upheld." *United States v. Richards*, 755 F.3d 269, 276 (5th Cir. 2014) (cleaned up).

2. Properly construed, this statute easily passes *Anderson-Burdick* for many of the same reasons—specifically as a reasonable step to prevent voter fraud. Indeed, Plaintiffs have offered no evidence that the residence provision, when properly interpreted, abridges anyone's speech or right to vote. Subsection (b) does not penalize speech, and despite months of discovery, Plaintiffs failed to identify any individual who did not register to vote because of this provision. ROA.938; ROA.1047. Nor have Plaintiffs been able to identify legal support for a right to vote from a fabricated residence, or factual support that any Texas prosecutor would bring criminal charges against someone who *actually moves* to run for office, campaign, or volunteer. For good reason: registrars do not inquire into voters' motives when they process voter-registration applications. ROA.1658. The district court's holding that the residence provision is unconstitutional depends on an overbroad interpretation that reflects neither the law nor the evidence offered by Plaintiffs.

C. The temporary-relocation provision is constitutional.

Finally, the district court erred in concluding that the temporary-relocation provision is facially unconstitutional. ROA.1936-37. As relevant here, section 1.015(f) prohibits a voter from "designat[ing] 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." Tex. Elec. Code § 1.015(f). The district court believed this created a "man without a country," mainly because college students living on campus cannot register using their parents' home, which they do not "inhabit[]." ROA.1936. Again, this takes subsection 1.015(f) out of context: Texas has long had the generally applicable rule that "[a] person does not forfeit residency by leaving the person's home for temporary purposes only." *Willet*, 249 S.W.3d at 588. A college student who intends to return to his parents' home does not need to designate a "*previous* residence" as his residence under section 1.015(f) (emphasis added).

Such a student never loses his residence at his parents' home under Texas Election Code section 1.015(c). Unless and until that individual establishes a new residence—a new "home and fixed place of habitation to which [he] intends to return after any temporary absence," Tex. Elec. Code . § 1.015(a)—his hometown remains his residence, *id.* § 1.015(c), and subsection (f) is not implicated. And a person who establishes a new residence may simply register at that new residence.

Far from creating an unconstitutional burden to vote, this rule is entirely consistent with how the law has long treated college students. The "task of ascertaining the domicile of college students who are over the age of majority has proved troublesome for courts," but many States have adopted a "presumption that students lack the intention to leave their parents' domicile permanently while they study at a university." *Restatement (Third) of Conflict of Laws* § 2.06 (2021).

If anything, S.B. 1111 appears to have made the process *easier* for university students to register at their place of study. Although the issue has rarely arisen, there is caselaw suggesting that under Texas common law, a university student remains

domiciled at his parents' resident unless he becomes a "bona fide resident" somewhere else. Although Appellants are aware of no case from the Texas Supreme Court resolving the question, *see Slusher v. Streater*, 896 S.W.2d 239, 244-45 (Tex. App.—Houston [1st Dist.] 1995, no pet.)—that process could prove less than straightforward, *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964). But as the Secretary of State's representative testified, section 1.015 effectively allows college students to decide where they reside for purposes of voting. ROA.838-39. If they intend to return to their parents' home, they may remain registered there. ROA.839. If they consider their new home to be their college town, then they may register there. ROA.839.

Rather than adopt this straightforward interpretation—an individual has one residence until they establish a new one—the district court believed that the temporary-relocation provision makes it literally impossible for some individuals to establish a residence to register to vote. ROA.1936-37. That is incorrect for the reasons described above. It also ignores principles of constitutional avoidance. *E.g.*, *Quick*, 7 S.W.3d at 115; *Hersh*, 553 F.3d at 753-54. Because subsection (f) does not interfere with that choice and does not prevent anyone from registering to vote, it places no burden on the right to vote whatsoever—let alone an unconstitutional one. And, again, Plaintiffs have failed to identify any voter who has actually been adversely impacted by the temporary-relocation provision.

III. The District Court's Facial Invalidation of the Challenged Provisions was Improper.

At the minimum, the district court's injunction is overbroad for at least two reasons. First, because Plaintiffs have at most demonstrated standing and plead a cause

of action for their First Amendment injuries, an injunction that goes beyond addressing those injuries exceeds the court's jurisdiction. Second, as to the temporary-relocation provision, the district court identified a limited class of individuals who may be burdened by it—specifically college students and United States Senators. ROA.1936-37. But it nonetheless erroneously enjoined the entire provision in full.

A. The district court's injunction is overbroad because it remedied injuries for which Plaintiffs lack standing and have not asserted a cause of action.

"[T]he scope of injunctive relief is dictated by the extent of the violation established." *Califano*, 442 U.S. at 702. Thus, "[t]he district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004). "Where a court enters an injunction that exceeds the scope of available judicial review, [the] injunction is necessarily overbroad because it exceeds the extent of the violation established." *Id.* at 819 (citing *Califano*, 442 U.S. at 702). "[W]hen crafting an injunction, district courts are guided by the Supreme Court's instruction that the scope of injunctive relief is dictated by the extent of the violation established." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 478 n.39 (5th Cir. 2020).

The district court enjoined defendants "from enforcing Texas Election Code Sections 101.5(b) and (f)" completely and enjoined them from "enforcing Texas Election Code Section 15.053(a) 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.1938. Thus, it enjoined the residence provision and the temporary-relocation provision in their entirety and partially enjoined the P.O.-box provision. ROA.1938.

The district court's injunction here is overbroad, and so at a minimum must be narrowed. *First*, Plaintiffs cannot obtain an injunction where they lack standing. *California*, 141 S. Ct. at 2115, 2119. But the only harms that the district court erroneously concluded that Plaintiffs suffer are a based on a diversion of resources and an alleged chill of their speech. ROA.1913. Rather than broadly enjoining provisions of S.B. 1111, the district court could—and should—have entered an injunction to remedy only those discrete harms.

Second, Plaintiffs only brought a First Amendment challenge on their own behalf to the residence provision. ROA.42-43. By contrast, Plaintiffs' allegations concerning the P.O.-box provision and the temporary-relocation provision concern only harms to voters. ROA.42-43. But Plaintiffs lack associational standing, lack organizational standing through their members, and alleged no harm to themselves as organizations because of the P.O.-box or temporary-relocation provisions; instead, they say those provisions place an undue burden on voters' right to vote. ROA.42-43.

The district court's injunction is therefore a mismatch with both Plaintiffs' claims and their theory of injury; because Plaintiffs cannot register to vote and did not contend that either the P.O.-box or temporary-relocation provisions harm them (as opposed to burdening voters), the injunction "exceeds the scope of [Plaintiffs'] harm," is overbroad, and must be vacated. *OCA-Greater Houst. v. Texas*, 867 F.3d

604, 616 (5th Cir. 2017) (citing *Meltzer v. Bd. of Pub. Instruction of Orange Cnty.*, 548 F.2d 559, 568 (5th Cir. 1977), *on reh'g*, 577 F.2d 311 (5th Cir. 1978)). This conclusion flows not just from the limitations of Article III but from "the established principle of equity that 'in considering whether to grant injunctive relief a court should impose upon a defendant no restriction greater than necessary to protect the plaintiff from the injury of which he complains.'" *Meltzer*, 548 F.2d at 568 (quoting *United States v. Hunter*, 459 F.2d 205, 219 (4th Cir. 1972) (citing *McClintock on Equity* § 146 (2d ed. 1948)).

B. The injunction is overbroad as to the temporary-relocation provision because it exceeds the limited violation identified.

In addition to a mismatch between the district court's order and its findings regarding Plaintiffs' standing, there is also a disconnect between the harms the district court identified as flowing from the temporary-relocation provision and the district court's sweeping invalidation of it. Because States have considerable leeway in regulating elections, courts may not facially enjoin an election law that has a "plainly legitimate sweep." *Crawford*, 553 U.S. at 202; *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Here, the district court identified only two groups of people allegedly impacted by the temporary-relocation provision: (1) college students living away from home and (2) United States Senators. ROA.1936. Because this provision does not affect most Texans—or even most of Texas's 17 million registered voters—a facial injunction was improper. *Crawford*, 553 U.S. at 202.

Any remedy issued by the district court must be "limited to the inadequacy that produced the injury in fact," *Lewis*, 518 U.S. at 357, and "should be no more

burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011). "Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 174, 139 (1996) (per curiam). As Texas law presumes that statutes are severable, Tex. Gov't Code § 311.032, the district court should have enjoined only those aspects and applications that it thought Plaintiffs established were unconstitutional, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006). Instead, the district court enjoined the entirety of subsection (f), including the first sentence that prohibits a person from establishing a residence at any place they have not inhabited, which no one has asserted is unconstitutional. At a minimum, this Court should limit the scope of the injunction to remedy only the violation and harm Plaintiffs have identified.

Conclusion

The Court should reverse the judgment of the district court.

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On September 15, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,646 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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