UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VOTE.ORG,

Plaintiff,

v.

JACQUELYN CALLANEN, in her official capacity as the Bexar County Elections Administrator; BRUCE ELFANT, in his official capacity as the Travis County Tax Assessor-Collector; REMI GARZA, in his official capacity as the Cameron County Elections Administrator; MICHAEL SCARPELLO, in his official capacity as the Dallas County Elections Administrator,

Defendants,

and

KEN PAXTON, in his official capacity as Attorney General of Texas, and LUPE C. TORRES, in his official capacity as Medina County Elections Administrator, TERRIE PENDLEY, in her official capacity as Real County Tax Assessor-Collector,

Intervenor-Defendants.

Civil Action

Case No. 5:21-cv-649-JKP-HJB

PLAINTIFF VOTE.ORG'S CONSOLIDATED OPPOSITION TO DEFENDANT REMI GARZA, AND INTERVENOR-DEFENDANTS KEN PAXTON, LUPE TORRES, AND TERRIE PENDLEY'S MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiff Vote.org opposes the motions for summary judgment filed by Intervenor-Defendant Ken Paxton (the "State") and Defendant Remi Garza, ECF No. 108 (the "Paxton/Garza Mot."), and by Intervenor-Defendants Lupe C. Torres and Terrie Pendley, ECF No. 109 (the "Torres/Pendley Mot.") (collectively with the State and Garza, "Defendants").[1]

RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS[2]

1. Vote.org admits that the facts contained in Paragraph 1 are undisputed.

2. Vote.org denies that Texas has adopted policies aimed at ensuring eligible voters have both easy access to application forms and the means of submitting them. Texas offers eligible voters various ways to obtain a registration application, but they do not ensure easy access or submission. Pl.'s App. at 43 (Bryant Rep. at 5). The remaining facts in Paragraph 2 are undisputed.

3. Vote.org disputes Defendants' allegation that the State ensures access to registration application forms. Texas offers eligible voters various ways to obtain registration applications, but they do not ensure that voters can access those means. *id.*, Defs.' App. at 2. The remaining facts in Paragraph 3 are undisputed.

4. Vote.org denies that the facts in Paragraph 4 are undisputed. Texas's voter registration program has not proven successful; on the contrary, the state ranks 50th in the 2020

[1] Vote.org also objects to the State's motion because it exceeds the appropriate scope of the State's participation in this matter under 28 U.S.C. § 2403(b). As Vote.org has argued in prior motions, the State's intervention under section 2403(b) is limited to defending the constitutionality of the challenged statute. *E.g.*, Vote.org's Opp'n to Intervenor Texas Att'y Gen. Ken Paxton's Mot. to Dismiss & J. on the Pleadings at 3-4, ECF No. 56; Vote.org's Mot. for a Protective Order, ECF No. 62; Vote.org's Renewed Mot. for a Protective Order and Opp'n to the State's Mot. to Compel at 2, ECF No. 99. Therefore, the Court should deny as improper the portion of the State's motion that seeks dismissal of Vote.org's claim under the Civil Rights Act.

[2] The State and Garza filed a Statement of Undisputed Material Facts which Torres and Pendley incorporated by reference to their motion. *See* Torres/Pendley Mot. at 1.

Cost of Voting in the American States Index, which is informed primarily by costs related to registration. Pl.'s App. at 42-43 (Bryant Rep. at 4-5). Furthermore, Defendants' claim that 97 percent of eligible residents in Travis County are registered is not supported by any admissible or credible evidence. *See infra* at C.

5. Vote.org disputes Defendants' allegation that the Texas Election Code had a longstanding requirement that registration applications submitted by mail have an "original, wet signature." *See* Defs.' Mot. at 2-3. Before HB 3107, the Texas Election Code only required that an application "be in writing and signed by the applicant. *See id*.; *see also Stringer v. Pablos*, 320 F. Supp. 3d 862, 896 (W.D. Tex. 2018) (noting, pre-HB 3107, "there is nothing in [Texas election] law that precludes the use of . . . electronic signatures), *rev'd and remanded on other grounds sub. nom* Stringer v. Whitley, 942 F.3d 715 (5th Cir. 2019); Order at 2, *Tex. Democratic Party v. Hughs*, 5:20-cv-00008-OLG, ECF No. 29 (W.D. Tex. July 28, 2020) (finding, pre-HB 3107, no indication that the "wet signature rule has been in place for years" and noting that "the codified signature requirement . . . makes no mention of an original wet ink signature."). The remaining facts in Paragraph 5 are undisputed.

6. Vote.org denies that the facts in Paragraph 6 are undisputed. When SB 910 was adopted, the legislature and Secretary of State were "less than clear" with their language. Pl.'s App. 142 (Ingram Dep. 95:2-14). Only Dallas and Bexar Counties testified that the Secretary's training gave any specific instruction regarding "a wet ink signature." Defs.' App. at 509 (Lopez Dep. 104:8-22). Cameron County was unsure whether the Secretary's training instructed officials that applications were required to have an "original signature" or merely a "signature." *Id.* at 371 (Garza Dep. 147:11-17). Finally, the facts in Paragraph 6 are not material. Any purported doubts

about the interpretation of SB 910 or the Secretary's awareness of county officials' interpretations of SB 910 are irrelevant to the claims in this lawsuit.

7. Vote.org disputes Defendants' allegation that *only* a physical signature guarantees that registrants attest to meeting the qualifications to vote. Under Texas law, an electronic signature carries the same weight and legal authority as a "physical" or wet-ink signature. *E.g.*, Tex. Admin. Code § 81.58(a)-(b) (authorizing election officials to capture voters' electronic signatures for election day rosters); Tex. Bus. & Com. Code § 322.007(a), (d) (recognizing that a signature "may not be denied legal effect . . . solely because it is in electronic form" and stating, "[i]f a law requires a signature, an electronic signature satisfies the law."); Tex. Elec. Code § 20.066(a)(2) (requiring state agency to inform voter registration applicants that their "electronic signature provided to the department will be used for submitting the applicant's voter registration application."). The remaining allegations in Paragraph 7 are undisputed.

8. Vote.org denies that the facts contained in Paragraph 8 are undisputed. Vote.org did not believe "it had found a loophole to circumvent Texas's refusal to adopt online voter registration." Paxton/Garza Mot. at 4. *See* Defs.' App. at 72-73 (Hailey Dep. 72:25-74:4), 258-59 (Elfant Dep. 143:5-145:13). Rather, after a close read of the relevant statutes, Vote.org believed it could offer a means for voters to submit registration applications via fax and then send "copies" of the applications via mail within four days. *See id.*; Tex. Elec. Code. § 13.143(d-2). The remaining facts in Paragraph 8 are undisputed.

9. Vote.org disputes any suggestion that the number of counties it approached has been withheld; it has simply not been able to confirm the number of counties it visited in 2018. Pl.'s App. at 117 (Hailey Dep. 78:5-79:2). The remaining facts in Paragraph 9 are undisputed.

10. Vote.org denies the allegation that it did not disclose that its web application produced electronic signatures on registration applications. Vote.org explained the web application's functionality and procedure for uploading signatures in its meetings with the counties. Defs.' App. at 257 (Elfant Dep. 143:5-144:20), 302 (Elfant Dep. 317:10-318:2), 498 (Lopez Dep. 58:10-59:1). The remaining facts in Paragraph 10 are not material because the views of a Dallas County employee regarding the legality of Vote.org's web application in 2018 are not relevant to this case, nor is the fact that Vote.org did not seek the Secretary's approval because Texas has a decentralized election administration structure in which county registrars, not the Secretary, enforce the registration requirement. *See infra* at 31-32.

11. Vote.org disputes Defendants' allegation that it ran into technical problems that "compromised users' registration applications." Vote.org's web application experienced "very few" technical issues with the first batch of applications received after the 2018 launch, but after being notified, Vote.org immediately fixed those issues and those applications were resubmitted and accepted for registration. Pl.'s App. at 98 (Elfant Dep. 147:7-148:3); *see also* Defs.' App. at 260, 263 (Elfant Dep. 149:3-16, 162:5-163:18). Additionally, Vote.org disputes the allegation that it failed to transfer any registration applications, let alone 259 in Dallas County. The testimony that Defendants cite for this proposition is inconclusive at best. First, Dallas County's representative, Rivelino Lopez, admitted that the county received all of the applications in question. Defs.' App. at 511 – 513 (Lopez Dep. 111:17-113:11). Although he later claimed that some applications may not have arrived, he also explained that the "state said . . . not to do this" and the Dallas County elections administrator may have instructed Vote.org "that was the end of the process." *Id*. (Lopez Dep. 118:19-119:11). Thus, even if Dallas County's records were conclusive (they are not) and Mr. Lopez's testimony was not conflicting and speculative (it is), the

very testimony Defendants cite suggests that it was the State's interference, and not a technical defect in Vote.org's web application, that would have potentially halted the flow of faxed voter registration applications. Finally, this statement is not material because it concerns missing fax applications, and has nothing to do with the use of, or justification for, wet signatures.

12. Vote.org denies that the facts contained in Defendants' Paragraph 12 are undisputed. Vote.org did not believe or have reason to suspect that registration applications submitted through its web application would be subject to rejection and therefore did not inform its users otherwise. *Id.* at 77 (Hailey Dep. 92:14-93:11). Vote.org's application was available only to residents in counties that had agreed to participate in its pilot program and accept registration applications prepared and signed using the web application. *See id.* Finally, the facts in Paragraph 12 are not material. The mechanics of Vote.org's initial rollout of its web application's e-sign tool in 2018 are not relevant to the claims before the Court.

13. Vote.org denies any suggestion that the voter registration applications submitted using its technology failed to comply with the Election Code. At the time, no provision of the Election Code required applicants to sign their voter registration forms with a wet signature. *See supra* ¶ 5. Vote.org does not dispute the remaining facts contained in Paragraph 13 but denies that they are material.

14. Vote.org denies the allegation that the Secretary's consultation with county election administrators reflected the proper application of the registration law. At the time, no provision of the Election Code required voter registration applicants to sign their application forms with a wet signature. *See supra* ¶ 5. The remaining facts in Paragraph 14 are undisputed.

15. Vote.org admits that the facts in Paragraph 15 are undisputed.

16. Vote.org disputes the allegation that Section 14 of HB 3107 did not make any substantive changes to Texas election law. Before HB 3107, the Texas Election Code stated only that an application must be "signed by the applicant," Tex. Elec. Code § 13.002(b), and did not require a wet signature. *See supra* ¶ 5. Section 14 of HB 3107 added a new requirement that applications submitted via fax must be followed by the original application, rather than a copy, containing the registrant's original, wet signature. *See* HB 3107, 87th Leg., Reg. Sess. (Tex. 2021).

17. Vote.org denies that the facts contained in Defendants' Paragraph 17 are undisputed. Before HB 3107, the Texas Election Code only required that an application delivered via personal delivery, mail, or fax be "in writing and signed by the applicant." Tex. Elec. Code § 13.002; *supra* ¶ 5. HB 3107 created a new requirement that applications submitted via fax must now be followed by the original application, not a copy, with the registrant's original, wet signature. Tex. Elec. Code § 13.143(d-2). Furthermore, only SB 910, not HB 3107, added the option for election officials to set an applicant's registration date as the date they faxed their application to the voter registrar. (*Compare* SB 910, *with* HB 3107).

18. Vote.org denies that the facts in Paragraph 18 are undisputed. Vote.org brought suit against the four counties where the e-sign tool for its web application was introduced. Defs.' App. at 110 (Hailey Dep. 223:5-16). Its "biggest injury" is its inability to "serve[] voters [in] the most streamlined way possible." *Id.* at 81 (Hailey Dep. 108:9–109:11). Vote.org's injuries are not confined to 2018's operating expenses, *see id.* at 81-82 (Hailey Dep. 108:9-111:21); *id.* at 128 (Hailey Dep. 295:23-296:23), rather, Vote.org is injured by its inability to advance its mission through the use of its e-sign tool in Texas, and the diversion of staff and volunteer time and other resources to devise other time-intensive and less efficient methods of helping the communities it serves to engage in the political process. *See id.* at 81-82 (Hailey Dep. 108:9-111:21). Vote.org's

injuries are continuous and ongoing so long as it is unable to use its e-sign technology in Texas. *See id.* at 81-82- (Hailey Dep. 108:9-113:1); *see also id.* at 128 (Hailey Dep. 295:23-296:23. Vote.org admits that its e-sign tool has been turned off in Texas since October 2018. *Id.* at 88 (Hailey Dep. 134:4-16).

19. Vote.org denies that the allegations in Paragraph 19 are material. Vote.org is not required to quantify its diversion of resources to establish any element of its claims.

ARGUMENT

On each of the three grounds for summary judgment advanced in their motions—standing, the First and Fourteenth Amendments to the U.S. Constitution, and the Civil Rights Act—Defendants consistently misconstrue or ignore the relevant facts and law, and thus fail to show that they are entitled to judgment as a matter of law.

Regarding standing, Defendants' backwards-looking analysis fundamentally misunderstands the continuing nature of Vote.org's injury and the prospective relief it seeks in this action. Vote.org has organizational standing to bring its claims because (a) its ongoing diversion of resources in response to the Wet Signature Rule is a cognizable injury and (b) this injury is caused by Defendants' rejection of voter registration applications for lack of a wet signature, as required by Section 14 of HB 3107. Vote.org also has statutory standing to bring its claims under the Civil Rights Act and under 42 U.S.C. § 1983. And to the extent prudential considerations are even applicable, the exception to the limitation on third-party standing applies because Vote.org's interest is inextricably bound to its future users' interest in exercising their right to vote, and Vote.org is just as effective in litigating that interest as would be the voters themselves.

As for Vote.org's constitutional claim, Defendants ignore precedent and attempt to minimize the Wet Signature Rule's consequences while asserting justifications for requiring

signatures *in general*, but not the more specific *wet signature* requirement in HB 3107. It is undisputed that the Wet Signature Rule's requirements implicate and burden the right to vote, regardless of the availability of other, more difficult methods of registering. These burdens are unconstitutional because the State cannot identify a sufficient interest to justify them, especially given that this lawsuit challenges only the requirement that a registrant's signature be in *wet ink*—not that a signature be provided at all.

Finally, in response to Vote.org's claim under the Materiality Provision of the Civil Rights Act, Defendants double down on their failed theories that Vote.org lacks a private right of action and must allege racial discrimination in order to bring an actionable claim. This Court already rejected these arguments. Order Denying Att'y Gen. Paxton's Mot. to Dismiss ("Order Denying Paxton Mot. to Dismiss"), ECF No. 70. In the alternative, Defendants argue that *signatures* are material—again ignoring that this lawsuit concerns only whether signatures must be applied with wet ink as opposed to an uploaded image—and that the Wet Signature Rule does not deny registrants of the right to vote because of an undefined opportunity for them to cure the lack of a wet signature. This unspecified cure procedure does not change the fact that prospective registrants must either sign their applications forms with a wet signature or risk rejection, nor does it absolve Defendants from complying with the Civil Rights Act. Texas cannot lawfully reject registration applications under the Wet Signature Rule unless the lack of a *wet* signature is material to determining applicants' eligibility to vote—and Defendants' arguments confirm that it is not.

For these reasons, and as explained in more detail below, Defendants' motions for summary judgment should be denied.

A. Vote.org has organizational standing.

At the outset, Defendants' motions highlight a fundamental misunderstanding of the applicable standards for establishing Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S.

555 (1992) sets out the modern framework, which requires, first, that a plaintiff have an "injury-in-fact"—a concrete and particularized injury that is actual and imminent, not conjectural or hypothetical. 504 U.S. at 560. Second, that injury must be fairly traceable to the defendants' actions. *Id*. And third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id*. at 561. Vote.org satisfies each requirement. It developed a web application with an e-sign tool that allows prospective registrants to upload images of their signatures into a voter registration form using a smartphone. All parties agree that HB 3107 precludes county registrars from accepting such applications, and the challenged provision was drafted specifically to prevent the use of Vote.org's e-sign tool. The county registrars have confirmed that they will enforce HB 3107 and reject any applications with imaged signatures. And Vote.org has (and will continue to) divert resources in response. Article III standing requires nothing more.

1. Vote.org's lawsuit seeks prospective, injunctive relief to remedy an ongoing and future injury.

Defendants attempt to inject irrelevant issues into the standing analysis by conflating past and future injury. While Vote.org first discontinued use of its e-sign tool in Texas in 2018—following the Secretary's announcement suggesting (falsely) that all applications require a wet signature—the tool remains disabled to this day. Pl.'s App. at 118 (Hailey Dep. 83:20-84:2); Defs.' App. at 70 (Hailey Dep. 62:14-19). And not just because of the 2018 events, but also because Texas law (HB 3107) expressly prohibits election officials from accepting copies of faxed application forms affixed with imaged signatures. Indeed, the Secretary's Office has admitted that it drafted this provision for the Legislature to prevent usage of Vote.org's e-sign tool, which means the law was enacted specifically with intent to impair Vote.org's activities. Pl.'s App. at 143 (Ingram Dep. 102:3-14, 103:13-104:8).

The resulting injury should come as no surprise: rather than advance its voter mobilization goals by using its technology (the e-sign tool), Vote.org must divert its limited resources to developing more time-intensive and less efficient strategies and programs to engage new voters. Vote.org's CEO explained this pivot during her testimony, and detailed how the additional time that Vote.org's staff must spend to find alternative printing options for users and develop remedial plans to advance their voter registration goals in Texas diverts resources away from activities in other states. *See*, *e.g.*, Defs.' App. at 84-85 (Hailey Dep. 121:7–123:18) (discussing impact of Wet Signature Rule on nationwide and Texas operations with limited staff), 89-90 (Hailey Dep. 139:5-142:4, 297:23-299:9) (discussing reallocation of staff time from other nationwide programs to combat Wet Signature Rule).

These concrete and palpable injuries, moreover, bear no resemblance to the claims in *City of Kyle*, where organizational plaintiffs failed to identify any perceptible change to their routine activities to establish standing for their challenge to a city's zoning and subdivision ordinances. *See NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). Here, Vote.org did not just alter its routine activities, it was forced to shelve one of its key initiatives altogether and must continue to devise new methods of ensuring that the communities it serves are able to register to vote. As long as HB 3107 is enforced, and county registrars continue to reject applications with imaged signatures, Vote.org cannot use its e-sign tool in Texas.

Defendants refute none of this. They acknowledge that "an organization can establish an injury in fact by showing that the challenged law conflicts with the organization's mission and 'perceptibly impar[s]' its activities," Paxton/Garza Mot. at 11; they recognize that Vote.org has kept its web application turned off "in compliance with current voter registration law in Texas," *id*. at 12; and they admit that Texas law currently prohibits the use of Vote.org's e-sign tool on

voter registration applications. Yet Defendants ask the Court to focus its injury analysis on a single moment in time (the fall of 2018) and ignore everything else that came after—including the current (and future) impairment of Vote.org's mission and diversion of resources that result from restrictions on the use of its web application. Their backwards-looking analysis misapplies the law and ignores undisputed facts, all of which point in one direction: Vote.org has suffered a concrete and ongoing injury.

2. Vote.org's injuries are caused by and traceable to the county registrars' ongoing enforcement of the Wet Signature Rule.

Article III standing "requires a causal connection between the plaintiff's injury and the defendant's challenged conduct," but it need not rise to proximate cause. *Glen v. Am. Airlines, Inc.*, 7 F.4th 331, 335 (5th Cir. 2021); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). Nor does standing "require the challenged action to be the sole or even immediate cause of the injury." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018); *Earl v. Boeing Co.*, 339 F.R.D. 391, 418 n. 10 (E.D. Tex. 2021) (quoting *Sierra Club* and holding that "[a]n Article III causal link may be less than 'direct and perceptible' at this stage so long as the allegations forming the connection are 'true and capable of proof at trial.'" (internal citation omitted)). It is enough that a plaintiff's injury is "connected with the conduct about which he complains." *Glen*, 7 F.4th at 335 (cleaned up).

Defendants' theory of causation is incompatible with these standards. By attempting to connect Vote.org's injury to the Secretary's 2018 announcement, they assume that the presence of *any* other contributing factor breaks the causal chain for Article III standing. That is not the law. "It suffices for the purposes of standing to note that there is evidence suggesting that the [defendant]'s actions have at least contributed" to Vote.org's injury. *Kleinman v. City of Austin*, No. 1:15-cv-497-RP, 2017 WL 3585792, at *3 (W.D. Tex. Aug. 18, 2017). While the Secretary's

announcement may at one point have caused Vote.org to divert resources, the State has since confirmed that the Secretary does not enforce the law and his guidance is not binding on county registrars. *See infra*, at B(2)(ii). Meanwhile, it is undisputed that the county registrars' enforcement of HB 3107 will prevent Vote.org from using its e-sign tool, which causes harm to the organization.

Defendants also misconstrue the nature of that injury. Vote.org's diversion of resources is not an isolated event that occurred once in 2018, as demonstrated by testimony from Vote.org CEO Andrea Hailey. While Ms. Hailey discussed the impact of the Secretary's 2018 announcement—the portion of her testimony that Defendants selectively cite—she also explained the root of Vote.org's current and future injury: its diversion of staff and volunteer time towards finding other ways to help engage prospective voters in Texas without full use of its web application, and the impact of these efforts on the organization's other programs nationwide. *See*, *e.g.*, Defs.' App. at 84-85 (Hailey Dep. 121:7–123:18) (discussing impact of Wet Signature Rule on nationwide and Texas operations with limited staff), 89-90 (Hailey Dep. 139:5-142:4) (discussing reallocation of staff time from other nationwide programs to combat Wet Signature Rule), 128-29 (Hailey Dep. 297:23-299) (same). Notably, at least one county registrar has confirmed that he would have accepted applications signed with Vote.org's e-sign tool but for HB 3107's prohibition. Pl.'s App. at 89 (Elfant Dep. 67:10-20). Vote.org plainly satisfies the causation requirement.

3. Defendants' remaining arguments raise irrelevant objections that do not implicate Vote.org's Article III standing.

Defendants' remaining objections to standing complain about the absence of a detailed financial breakdown of expenditures and offer revisionist history of the 2018 web application launch, neither of which have any merit. The first argument can be easily discarded because the

diversion of staff time and organizational resources need not be quantified; "[t]he fact that the added cost has not been estimated and may be slight does not affect standing." *Mi Familia Vota v. Abbott*, 497 F. Supp. 3d 195, 208 (W.D. Tex. 2020) (quoting *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007)); *Richardson v. Tex. Sec'y of State*, 485 F. Supp. 3d 744, 765 (W.D. Tex. 2020) ("[T]here is no requirement that a Plaintiff must quantify a specific monetary cost in order to satisfy the injury in fact requirement."), *rev'd on other grounds sub nom. Richardson v. Flores*, 28 F.4th 649 (5th Cir. 2022). And Defendants' attempt to draw conclusions from changes in Vote.org's aggregate nationwide expenditures is just bad math. *See* Paxton/Garza Mot. at 13. A diversion of resources contemplates an internal shift in the way an organization spends its finite time, money, or other non-monetary resources. A decrease in its total aggregate expenditures says nothing about how those resources are allocated, and Defendants' observation that Vote.org's aggregate, nationwide spending may have decreased since 2018 is meaningless. Besides, it is settled that the diversions of resources contemplated by the standing doctrine are not limited to monetary costs, but also includes the use of human resources that are not quantifiable. *See, e.g., Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014) (finding NAACP established standing even if employee "had spent none of the NAACP's money" because the employee "devoted his time to the [voter registration] drives."); *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840, 854 (W.D. Tex. 2019) (finding community organization established standing because defendants' actions had "forced [the organization] to cancel initiatives . . . it would otherwise spearhead").

Defendants' final objection to standing asserts that Vote.org's injuries are self-inflicted, revealing yet again their misunderstanding of the Article III causation requirements. *See supra* at A(2). That argument not only lacks merit for the reasons explained above, *see id.*, but it is also

misleading. Before the Legislature enacted HB 3107, no provision of the Election Code required a wet signature on voter registration applications. Two different courts in this district reached the same conclusion. *See Stringer*, 320 F. Supp. 3d at 896 (noting, pre-HB 3107, "there is nothing in Texas [election] law that precludes the use of . . . electronic signatures); Order at 2, *Tex. Democratic Party v. Hughs*, 5:20-cv-00008-OLG, ECF No. 29 (W.D. Tex. July 28, 2020) (finding, pre-HB 3107, no indication that the "wet signature rule has been in place for years" and that "the codified signature requirement . . . makes no mention of an original wet ink signature."). That is why the Secretary drafted HB 3107 to insert a wet signature requirement, for the specific purpose of denying Vote.org the ability to use its e-sign tool. Pl.'s App. at 143 (Ingram Dep. 102:3-14). It also explains why Defendants did not cite any authority (not even the Election Code itself) to support their claim that Vote.org's web application violated the law. *See* Paxton/Garza Mot. at 13. Applications created with the e-sign tool became unlawful only because the Secretary and the Legislature made it so when they devised and enacted the Wet Signature Rule, in violation of the federal Constitution and the Civil Rights Act.[3] Vote.org, therefore, has standing to pursue these claims.

B. Vote.org has "statutory standing" to assert a claim under Section 1983.

Defendants' prudential arguments fail on several fronts. As a threshold matter, the Supreme Court has recognized on multiple occasions that federal courts have a "virtually unflagging"

[3] The State complains that Vote.org did not seek guidance from the Secretary before launching its web application, but recently argued before the Fifth Circuit that, "Texas voter registration is the [county] registrar's domain," meaning that "the [county] registrars—and not the Secretary—choose how and whether to enforce the written signature requirement." Brief of Defendant-Appellant Texas Secretary of State at 4, 21, *Texas Democratic Party v. Hughs*, No. 20-50667 (5th Cir. Oct. 26, 2020). And the Fifth Circuit agreed. *Texas Democratic Party v. Hughs*, No. 20-50683, 2021 WL 1826760 (5th Cir. May 7, 2021) ("The Secretary plays no role."). Thus, consulting the Secretary would have made little sense given the county registrars' sole authority to determine whether to accept voter registration applications with imaged signatures.

obligation to hear and decide cases within their jurisdiction. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). In *Lexmark*, the Court recognized that this principle was "in some tension with" the prudential standing doctrine, holding that courts "cannot limit a cause of action that Congress has created merely because 'prudence' dictates." 572 U.S. at 128. *Accord Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat'l Ass'n*, 758 F.3d 592, 603 n.34 (5th Cir. 2014) ("[T]he continued vitality of prudential 'standing' is now uncertain in the wake of the Supreme Court's recent decision in" *Lexmark*); *White Oak Realty, L.L.C. v. U.S. Army Corp of Eng'rs*, No. 13-cv-4761, 2014 WL 4387317, at *6 (E.D. La. Sept. 4, 2014) ("The Supreme Court's recent decision in *Lexmark* appears to have severed the legs from the doctrine of prudential standing."); *Texas v. United States*, 524 F. Supp. 3d 598, 630 (S.D. Tex. 2021) ("Having concluded that Texas has standing to sue, the Court simply cannot refrain from exercising its jurisdiction over the controversy with the United States here.").

In any event, even assuming prudential standing has survived *Lexmark* and its progeny, whatever is left of that doctrine would not apply here for two independent reasons. *First*, prudential considerations must yield to statutory language that indicates or provides a broad right of action. Here, the Materiality Provision confers a cause of action on any "party aggrieved"—language the Supreme Court has held typifies waiver of prudential standing requirements. And Section 1983 provides a cause of action for violation of rights created by the Constitution or federal law. As such, a plaintiff suing under these provisions need only demonstrate that its interests fall within the "zone of interests" contemplated by the statute—a requirement Vote.org has met. *Second*, Vote.org's claims satisfy the exception to third-party standing.

1. Prudential considerations do not apply to claims brought under Section 1983 and the Materiality Provision.

The text of Section 10101 reveals Congress's intent to abrogate any prudential limitations to asserting a cause of action. Subsection (d) provides federal district courts with jurisdiction regardless of whether "the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." 52 U.S.C. § 10101(d). Typically, the use of the term "aggrieved person" or "party aggrieved" indicates Congress's intent "to extend standing under the [statute] to the maximum allowable under the Constitution," and therefore to abrogate any prudential standing limitations. *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 363 (5th Cir. 1999); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998) ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested.").

Prudential limitations are also inappropriate here given the breadth of Section 1983. "For very broad statutory rights like the [Administrative Procedure Act (APA)], an injury in fact and inclusion in the zone of interests can add up to a right of action, even if prudential standing limits would have blocked it." *Collins v. Mnuchin*, 938 F.3d 553, 575 (5th Cir. 2019), *aff'd in part, vacated in part, and rev'd in part on other grounds sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021). Like the APA, Section 1983 affords broad statutory rights, conferring a cause of action for deprivations of "*any* rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (emphasis added); *see, e.g.*, *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) ("A broad construction of § 1983 is compelled by the statutory language"). Therefore, it should be sufficient for a plaintiff asserting a Section 1983 claim to establish "an injury in fact and inclusion in the zone of interests." *Collins*, 938 F.3d at 575.

Whether the plaintiff's interests "fall within the zone of interests protected" by the statute under which the claim is brought is not a question of standing, but rather a matter of statutory interpretation to determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark*, 572 U.S. at 126-27. This requirement is "lenient" and "not especially demanding"; in fact, it "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id*. at 130 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)) (cleaned up); *Simmons v. UBS Fin. Servs.*, 972 F.3d 664, 666 (5th Cir. 2020) ("[A]nyone 'with an interest arguably sought to be protected by the statute' can head to federal court." (quoting *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011)); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 ("[W]e have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff.").

Here, Vote.org falls within the requisite zone of interests because it has been harmed by the Wet Signature Rule, *cf. Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds* 502 U.S. 1068 (1992) ("[I]f a corporation can suffer harm from discrimination, it has standing to litigate that harm."), and because Vote.org's mission is to increase voter turnout and advance voting rights. For example, in *White Glove Staffing, Inc. v. Methodist Hosps. of Dall.*, 947 F.3d 301 (5th Cir. 2020), the Fifth Circuit found that a corporation fell within the zone of interests of 42 U.S.C. § 1981, which prohibits race discrimination in contracts, even though it had no "corporate racial identity" and the challenged discrimination was against not the corporation itself but an employee whom the corporation had sent to work for the defendant. 947 F.3d at 306, 307. Like the plaintiff in *White Glove*, Vote.org has suffered injury as

a result of the violation of statutory rights of those with whom it is connected in the exercise of those rights.

2. Even if prudential standing applied, Vote.org's claims fall within the exception to limitations on "third-party standing."

Even if the Court finds that prudential considerations are relevant, it should conclude that an exception applies. "The limitation on 'third-party standing' is not a constitutional mandate, but is merely a 'salutary rule of self-restraint.'" *Richardson*, 485 F. Supp. 3d at 773 (quoting *Craig v. Boren*, 429 U.S. 190, 193 (1976)), *rev'd on other grounds* 978 F.3d 220 (5th Cir. 2020). As a result, it should "not be applied where its underlying justifications are absent." *Id*. (quoting *Singleton v. Wulff*, 428 U.S. 106, 114 (1976)). To determine whether those justifications are present, courts conduct a two-part inquiry: (1) will adjudication of the rights be unnecessary, because "in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not"; and (2) will the litigant be the "most effective advocate[] of those rights" before the court? *Singleton*, 428 U.S. 113-14.

The first inquiry is satisfied where, for example, "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," because "the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." *Id*. at 114-15. The second inquiry supports third-party standing when "the relationship between the litigant and the third party" is "such that the former is fully, or very nearly, as effective a proponent of the right as the latter," *id*. at 115, or where "there is some genuine obstacle to" the third party's assertion of the right. *Id*. at 116.

In conducting this analysis, two decisions by federal courts in this State are informative: *Richardson* and *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, No. 3:08-CV-0546-D, 2008 WL 5191935 (N.D. Tex. Dec. 11, 2008), both of

which held that organizational plaintiffs fell within the exception to the limitation on third-party standing. Like the instant case, the *Richardson* plaintiff asserted a voting rights claim under 42 U.S.C. § 1983. The defendants argued that the plaintiff, as an organization, "do[es] not have voting rights" and therefore could state no cause of action under Section 1983 "claiming an injury based on the violation of a third party's rights." *Richardson*, 485 F. Supp. 3d at 772. The court rejected this argument because the organization was an "effective party to challenge" voting requirements "on behalf of disabled Texans who are disproportionately more likely to be affected" by the requirements, and it had a "close relationship" with the third parties. *Id*. at 773. The court then observed that there "may be practical obstacles" preventing "certain voters from vindicating their rights" which were at issue in the case because it was "not *necessarily* apparent that many individual voters who *may* be impacted by the [challenged requirement] would have Article III standing." *Id*. Ultimately, the court concluded that preventing the plaintiff "from asserting its claims would not serve the purposes of the prudential rule against third-party standing." *Id*. at 773.

In *Inclusive Communities Project*, a non-profit organization sued a Texas state agency under a various statutes, including 42 U.S.C. §§ 1982 and 1983. 2008 WL 5191935, at *1. Though the plaintiff's claims "implicate[d] its African-American *clients*' right to be free of race discrimination in housing opportunities," the court found that "[t]he limitation on 'third-party standing'" did not bar the organization's ability to pursue those claims. *Id*. at *6 (emphasis added). The court then examined the "principles that animate the rule against third-party standing" discussed in *Singleton*. *Id*. at *7. It found that barring the organization from asserting the Section 1982 and 1983 rights of its clients "would not serve the purposes" of that rule because the organization had a close relationship with its clients and was an "integral part of its clients' exercise of their equal housing-related rights," and the organization would "be as effective as its clients in

advocating their rights" in light of "its own organizational purpose." *Id*.

The facts here mirror those in *Richardson* and *Inclusive Communities Project*. Under the first *Singleton* factor, there would be no "unnecessary or undesired adjudication of rights" because the right to vote "is inextricably bound up" with Vote.org's mission. *See Inclusive Cmtys. Project*, 2008 WL 5191935, at *7. Just as in *Inclusive Communities Project*, a decision in Vote.org's favor would vindicate its potential users' constitutional and statutory rights. *See id*.

The second *Singleton* factor is also met: Vote.org would be as effective as the voters it serves in advocating their rights. Vote.org has the largest nonprofit, nonpartisan registration and get-out-the-vote technology platform in America, and is explicitly committed to protecting the ability to vote of historically underserved voters of color and underrepresented young voters. *See* Defs.' App. at 63 (Hailey Dep. 34:1-5). And like the plaintiff in *Inclusive Communities Project*, "[t]he instant lawsuit is completely consistent with [Vote.org's] mission." *Inclusive Cmtys. Project*, 2008 WL 5191935, at *7. In short, Vote.org's claims are "central to [its] purpose, and this is not a case in which the organizational plaintiff is unlikely to vigorously advocate for the rights asserted." *Richardson*, 485 F. Supp. 3d. at 774 (citing *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982) ("When a corporation meets the constitutional test of standing . . . prudential considerations should not prohibit its asserting that defendants, on racial grounds, are frustrating specific acts of the sort which the corporation was founded to accomplish.")). *Accord Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849 (W.D. Tex. 2020), *rev'd on other grounds and remanded*, 860 F. App'x 874 (5th Cir. 2021) (rejecting argument that organizational plaintiffs "do not have standing to sue for 'third parties' under Section 1983").[4]

[4] Defendants' effort to distinguish *Hughs*, 474 F. Supp. 3d 849 (W.D. Tex. 2020), *rev'd on other grounds and remanded*, 860 F. App'x 874 (5th Cir. 2021), on the grounds that it referred only to

Finally, the potential registrants that Vote.org serves have "some hindrance" in asserting their rights. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). To satisfy this factor, the "hindrance" in question need not operate as a total bar to the assertion of the right. *See Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (finding that a chilling effect, a desire for privacy, or "imminent mootness" would satisfy the requirement). Here, as in *Richardson*, only a fraction of impacted, potential registrants would be able to assert their own rights. 485 F. Supp. 3d at 774. If a registrant managed to overcome the burdens imposed by the Wet Signature Rule, Defendants would argue that they lacked standing. Paxton/Garza Mot. at 11. And if they failed, Defendants would likely accuse them of asserting a "self-inflicted" injury for attempting to register through unlawful means. *Id.* at 13-14; c*f. Libertarian Party of Ohio*, 462 F.3d at 592 ("A party is not required to intentionally forfeit its place in the political arena in order to challenge an election law."). Furthermore, the registrants most likely to be impacted by the Wet Signature Rule—young, low-income, and minority registrants, Pl.'s App. at 52-54 (Bryant Rep. 14-16)—are the least likely to be able to bear the temporal and financial costs of litigation. *See Powers*, 499 U.S. at 415 ("[T]here exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation."). Accordingly, "[t]he reality is that" few individuals affected would have the resources necessary to "set in motion the arduous process needed to vindicate [their] own rights." *Id*.

Defendants' arguments and authority do not sufficiently grapple with these principles and

---

associational standing, Paxton/Garza Mot. at 15, misstates the court's reasoning which explicitly stated otherwise: "The same facts that establish *organizational* and associational standing . . . also demonstrate standing to sue for voting rights violations under 52 U.S.C. § 10101(a)(2)(B), using 42 U.S.C. § 1983 as a vehicle for remedial relief. . . . Plaintiffs are entitled to seek relief under § 1983, *on behalf of themselves* and their members, for alleged violations of 52 U.S.C. § 10101(a)(2)(B)." 474 F. Supp. 3d at 859 (emphasis added). *Hughs* is therefore not distinguishable on the grounds that it concerned only associational standing.

thus are unpersuasive. For example, Defendants overstate the ruling in *Danos v. Jones*, 652 F.3d 577 (5th Cir. 2011) to argue that a "plaintiff lacks statutory standing, regardless of whether the plaintiff has suffered his own injury" when the plaintiff asserts the rights of a third party. Paxton/Garza Mot. at 14. But *Danos* is inapplicable here because its legal reasoning rested on a different statute, not Section 1983. Notably, the *Danos* plaintiff asserted only one argument regarding the *Singleton* analysis: that there was "some hindrance" for the right-holder to assert his right. 652 F.3d at 582. By contrast, Vote.org here meets all *Singleton* factors. *Danos* also observed that permitting the suit to continue would frustrate Congress's decision to "limit appellate review to the judicial conference, and thereby to deprive the federal courts of jurisdiction." *Id*. In stark contrast to *Danos*, Congress has not taken affirmative steps to "deprive the federal courts of jurisdiction" over the kind of claims Vote.org brings; on the contrary, it has affirmatively created that jurisdiction. *See, e.g.*, 52 U.S.C. § 10101(d).

Defendants' other authority stands for the unremarkable proposition that Section 1983 plaintiffs—like all plaintiffs—must establish that they suffered some personal injury; no authority Defendants cite suggests that the plaintiffs themselves must suffer the constitutional violation. In *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986), the court found that the daughter of a man shot by police had met the requirements for Article III standing and could sustain a Section 1983 claim, while the man's wife could not, because only the former had "made the *proof of personal loss* required"—*i.e.*, a showing of Article III injury—while the latter did not. *Id*. at 1161 (emphasis added); *see also*, *e.g.*, *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011) (finding that *Article III standing* to challenge one provision of statute did not afford *Article III standing* to challenge a different provision); *League of Women Voters of Nassau Cnty. v. Nassau Cnty. Bd. of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984) (finding no *Article III* associational

standing for organization where organization itself suffered no injury); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002) (rejecting, in redistricting litigation, argument on merits of equal protection claim that greater difficulty by Democratic Party in recruiting candidates supported cause of action).

Warth v. Seldin, 422 U.S. 490 (1975) is also unavailing. Quite contrary to Defendants' position, *Warth* explained that "[w]hen a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." 422 U.S. at 505. The Court held only that a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention." *Id*. at 508.

Furthermore, the Court in *Warth* acknowledged that it "has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights," but the plaintiffs before the Court were not permitted to do so because they neither were "subject to [the] zoning practices" nor had any relationship with those whose rights were directly affected. *Id*. at 510. The opposite is true here. The Wet Signature Rule was concocted specifically to prevent the use of Vote.org's web application and interfere with Vote.org's activities. Pl.'s App. at 143 (Ingram Dep. 102:3-14, 103:13-104:8). And, in contrast to *Warth*, Vote.org itself has been injured by the Wet Signature Rule and has a direct relationship with those who use its web application, whereas the petitioners in *Warth* shared only an "incidental congruity of interest" with those whose rights they sought to assert. 422 U.S. at 510. Thus, even assuming the prudential standing requirements apply to this lawsuit, Vote.org meets that test as well.

C. The Wet Signature Rule unconstitutionally burdens the right to vote.

Defendants implicitly acknowledge that the Wet Signature Rule burdens voters. It forces prospective registrants (particularly those who do not own printers) to make time-intensive arrangements or rely on direct assistance from third parties to register. Paxton/Garza Mot. at 1-2. What could have been accomplished with just a smartphone now requires that prospective voters either find a place to print their application form—at home or through a third party that offers access to a printer (sometimes for a fee)—or travel to a county registrar's office, a State agency, or a voter registration drive that will provide and accept applications, or make arrangements with their county officials to drop off and pick up their applications, assuming their local officials even offer such services. The "alternative options" that Defendants present do not eliminate the burden on the right to vote, but effectively illustrate just how the Wet Signature Rule imposes additional time and transportation costs to the registration process. Pl.'s App. at 46 (Bryant Rep. 8). Because these burdens are not met by a sufficiently weighty state interest in obtaining *wet ink*—as opposed to imaged—signatures, the Wet Signature Rule is unconstitutional.

1. The Wet Signature Rule, like all registration restrictions, implicates the right to vote.

Apart from re-litigating Vote.org's standing to assert constitutional claims—based on arguments this Court has rejected and which Vote.org has already refuted, *e.g.*, *Vote.org v. Callanen*, No. SA21CV00649JKPHJB, 2021 WL 5987152, at *2-3 (W.D. Tex. Dec. 17, 2021)—Defendants' motion bypasses longstanding, binding precedent and denies that the Wet Signature Rule implicates the right to vote because Texans have alternative methods of registering. The problem with this theory is that this Court—among others—has already rejected it. *See Mi Familia Vota v. Abbott*, 497 F. Supp. 3d 195, 219 (W.D. Tex. 2020) (holding that alternate means of registering to vote do not "eliminate or render harmless" the burdens imposed by a challenged

restriction (quoting *Deerfield Med. Ctr. v. Cty. of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B. 1981)); *Tex. League of United Latin Am. Citizens v. Abbott*, 493 F. Supp. 3d 548, 583 (W.D. Tex. 2020), *vacated* No. 20-50867, 2021 WL 1446828 (5th Cir. Feb. 22, 2021) (similar). *Cf. Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575, 620 (D.N.J. 2009) ("Although minority voters may escape suppression efforts by utilizing alternative voting procedures, the choice of whether to do so or to exercise their right to vote in the traditional manner by visiting the polls on Election Day must be theirs, and theirs alone."). And the Supreme Court has instructed that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

While Defendants cite *McDonald v. Board of Education Commissioners of Chicago*, 394 U.S. 802 (1969), and a motions panel ruling in *Texas Democratic Party v. Abbott* ("*TDP I"*), 961 F.3d 389, 404 (5th Cir. 2020) to advance their radical theory, they motion omit important context that explains why those decisions are neither binding nor persuasive. First, *McDonald* predates *Anderson*, *Burdick*, *Crawford*, and their progeny—all subsequent Supreme Court cases that reject the litmus-test approach that the Defendants say *McDonald* requires. Furthermore, *McDonald* was an appeal from a summary judgment decision, and as the Court emphasized, at that stage in the proceedings there still was "nothing in the record to indicate that the [challenged] statutory scheme ha[d] an impact on appellants' ability to exercise the fundamental right to vote." *McDonald*, 394 U.S. at 807. In other words, and as the Supreme Court has since made clear, "the Court's disposition of the claims in *McDonald* rested on failure of proof." *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974). When plaintiffs presented such evidence in a later absentee voting case, the Court reached the opposite conclusion. *See O'Brien*, 414 U.S. at 530. In this case, Vote.org has advanced

significant evidence establishing that the statutory scheme at issue here *does* have an impact on the ability to vote.

As for *TDP I*, the Fifth Circuit later disavowed that motions panel ruling precisely because of its questionable application of *McDonald*. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 193-94 (5th Cir. 2020) ("*TDP II*"). In *TDP II*, the court stated, "[w]e have uncertainties about *McDonald* . . . [w]e therefore use our authority as the panel resolving the merits to declare that the ***holdings in [the TDP I] opinion as to McDonald are not precedent***." *Id*. at 194 (emphasis added). The court was rightfully skeptical of the motions panel's reasoning—which Defendants rely on here—for the same reason other courts have not followed it: "the Supreme Court [has] interpreted a post-*McDonald* limitation on absentee voting as potentially violative of equal protection even though, like the statute in *McDonald*, it left open other options for voting." *Id*. at 193. That is consistent with settled precedent addressing constitutional challenges to voting restrictions and finding that the availability of other methods of voting does not eliminate the burden caused by any particular restriction. *Mi Familia Vota*, 497 F. Supp. 3d at 219; *Tex. League of United Latin Am. Citizens*, 493 F. Supp. 3d at 583; *Democratic Nat'l Comm.*, 671 F. Supp. 2d at 620.

Defendants' mention none of this; instead, they misleadingly invite the Court to view *McDonald* and *TDP I* as controlling authority. They are not—as clarified by subsequent rulings from both courts—and Defendants are incorrect to argue that "the same reasoning applies here." Paxton/Garza Mot. at 18; *see TDP II*, 978 F.3d at 193-94. There is no serious dispute that the Wet Signature Rule implicates the right to vote.

2. The *Anderson-Burdick* test requires the Court to determine whether the State's interests make it necessary to burden the right to vote, and the Wet Signature Rule fails under this standard.

The logistical hurdles required to comply with the Wet Signature Rule as described above, *see supra* at 24, are all burdens that must be justified by a sufficiently weight state interest.

Vote.org has presented unrefuted evidence and testimony establishing that the Wet Signature Rule "increases the costs of registering to vote . . . [by] adding unnecessary resource-intensive steps to the registration process." Pl.'s App. at 40 (Bryant Rep. at 2). Defendants' arguments misapply the governing standard, asking the Court to effectively disregard these burdens as miniscule and accept the State's interests sufficient on their face.

But rather than simply declare a burden as "minimal" and the State's regulatory interests as "generally sufficient," Paxton/Garza Mot. at 18, *Anderson-Burdick* requires that courts "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments," and then "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789; *see also Bergland v. Harris*, 767 F.2d 1551, 1553 (11th Cir. 1985) (same). "In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. The Supreme Court has emphasized that "there is 'no substitute for the hard judgments that must be made'" in adjudicating voting rights claims. *Id.* at 789-90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

What is more, heightened scrutiny applies to classifications that burden fundamental rights, including the right to vote. *See Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."). This aspect of the Equal Protection Clause requires a heightened justification for laws that burden only some citizens' exercise of voting rights, even if the lines are drawn based on categories (such as

wealth or the payment of a tax) that would in other contexts be subject only to rational basis review. *See id.,* 383 U.S. at 669. In this way, the Equal Protection and First Amendment bases for *Anderson-Burdick* are not distinct; each is grounded in the fundamental nature of the right to vote, which justifies subjecting electoral regulations to a higher level of constitutional scrutiny than most other governmental regulations. As demonstrated in Vote.org's Motion for Summary Judgment ("Pl.'s Mot. for Summ. J."), ECF No. 111, the Wet Signature Rule fails this test.

i. There is no dispute that the Wet Signature Rule burdens the right to vote.

Defendants' attempt to downplay the burdens imposed by the Wet Signature Rule rests on multiple legal and factual errors. They argue that voters are not "categorically burdened" by the Rule, and they point to the Supreme Court's decision in *Crawford* to suggest that the Court analyzed "the magnitude of burdens . . . categorically" without considering "the peculiar circumstances of individual voters or candidates," Paxton/Garza Mot. at 18. That is false. For one, Defendants fail to disclose that their argument quotes from a *concurrence*. *See id*. (quoting *Crawford*, 553 U.S. at 206 (Scalia, J., concurring)).

The controlling opinion that they bypassed says just the opposite: when assessing the burden that a photo identification law imposed on voters, the Supreme Court did not assess the impact on all voters, but instead stated, "[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). And six justices in *Crawford* agreed that when evaluating burdens, courts should consider the law's impact on identifiable 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).

What this means is that the burdens imposed on certain categories of voters who will be uniquely impacted by the Wet Signature Rule are critical to the Court's analysis. This includes prospective registrants who do not own printers; young adults, who are least likely to be registered and more likely to be smartphone dependent compared to the rest of the electorate; low-income voters who are also more likely to be smartphone dependent, less likely to have computers or other devices that would allow them to print application forms, and less likely to be contacted by voter mobilization organizations; and minority voters who share similar characteristics. Pl.'s App (Bryant Rep. at 6-7, 9, 11-16). Defendants' assertion that 97 percent of voting age citizens in Travis County are registered misses the point. Paxton/Garza Mot. at 19. Perhaps it is no coincidence that Travis County did not previously apply a wet signature requirement and accepted voter registration applications with imaged signatures until HB 3107 was enacted. Defs.' App. at 322 (Elfant Dep. 400:9-21).[5] Regardless, it is the *unregistered* citizens who will bear the brunt of the Wet Signature Rule; among that group, young voters and minorities are overrepresented. *See* Pl.'s App. at 54 (Bryant Rep. at 16).

The burdens at issue may not impact all voters universally, to be sure, but they are far from "miniscule." According to the U.S. Census Bureau's American Community Survey, 26 percent of Cameron County residents are entirely smartphone dependent. *Id*. at 51 (Bryant Rep. at 13). In

[5] Furthermore, this registration statistic is not evidence and no one seems to be able to pinpoint where it came from. The only thing Defendants cite in support is an October 13, 2020, tweet from Travis County, which itself provided no support. *See* Defs.' App. at 329, 425:16-427:9. Defendant Elfant testified that the 97 percent figure was based on data from an unknown year of the American Community Survey, which was apparently corroborated by Elfant's "friend," and an unnamed individual at the University of Texas. *See id.* Even if the statistic were correct, it would only reflect Travis County's registration rates as of 2020 or earlier—well before the Wet Signature Rule was codified through HB 3107.

some counties in western and southern Texas, nearly 60 percent of households rely solely on smartphones and own no other computing devices like laptops or desktops, making it less likely that they will be equipped to print application forms at home. *Id*. Even assuming some individuals can print their application forms at work or school, those who work in blue collar, manual, or hourly wage jobs may not have similar access to a third-party's printer; the same is true for unemployed or retired individuals. *Id*. at 50 (Bryant Rep. at 12). For these prospective registrants, among others, the burden caused by the Wet Signature Rule is not insignificant; and that is precisely what makes this unnecessary restriction so pernicious—it imposes the greatest burdens on those who are least equipped to overcome them: low propensity, young, inexperienced, and minority voters. *See generally id*. at 42-58 (Bryant Rep. at 4-20).

Defendants' objections to Dr. Bryant's findings further reveal their misunderstanding of the Wet Signature Rule's impact. They suggest that her analysis "only assessed the burden under the fax provision of HB 3107" and did not account for the several other ways that individuals may register to vote. Paxton/Garza Mot. at 19-20. But they ignore the fact that other methods of registering to vote require prospective registrants who do not own printers to "obtain [forms] from an application distribution site such as the county 'Voter Registrar office, libraries, government offices, or high schools.'" Order Denying Paxton Mot. to Dismiss at 3. As Dr. Bryant explained, this requirement "adds both time and transportation costs," to a registration process that could just as easily have been completed with a smartphone. Pl.'s App. at 46 (Bryant Rep. at 8); *see also* Order Denying Paxton Mot. to Dismiss at 4 (noting that if the Rule is enjoined, "prospective registrants will again be allowed to register to vote without having to print the form or travel to an application distribution site" and "[t]he most a registrant will need is their mobile phone, a scrap of paper, and a pen."). That voters without printers must pursue other "resource-intensive"

alternatives to register does not mitigate the burden—that *is* the burden. *See* Pl.'s App. at 40 (Bryant Rep. at 2).

In response to these irrefutable facts, Defendants provide no evidence or contrary expert analysis, but instead offer several mischaracterizations of the record. They assert, for instance, that HB 3107 enlarges procedures available for voter registration by including a fax option; this misstates the plain language of the bill itself and contradicts Defendants' earlier concession that voters have been able to submit their registration applications by fax since at least 2013. *Compare* Paxton/Garza Mot. at 19, *with id*. at 2-3. As far as registration is concerned, HB 3107 did not enlarge anything. It *narrowed* SB 910's fax submission procedures by mandating that the applicant provide "a copy of the *original* registration application *containing the voter's original signature*." *See* 2021 Tex. Sess. Law Serv. Ch. 711 (H.B. 3107) (amendments emphasized). Next, Defendants claim that any burden on the right to vote is caused by Vote.org—a statement that on its face reveals its absurdity. It is undisputed that a wet signature requirement forces voters to take additional resource-intensive steps to complete the registration process, which burdens the right to vote. *E.g.*, Pl.'s App. at 40 (Bryant Rep. at 2). The mechanics of Vote.org's previous roll-out of its web application is irrelevant to the burden analysis.

To make matters worse, Defendants' discussion of Vote.org's 2018 rollout is inaccurate. Contrary to Defendants' accusations, Vote.org approached various counties before launching its web application to ensure that the county officials would be able to accept the applications. *E.g*., Pl.'s App. at 117 (Hailey Dep. 78:5-79:2); Defs.' App. at 511 – 513. No one avoided or "refused" to seek clarification from the Secretary as Defendants suggest, nor is it clear what additional consultation with the Secretary would have resolved. The State has argued repeatedly that Texas has a decentralized election structure: the Secretary "does not control registrars' application

decisions" and "cannot coerce local officials into following Section 13.002." Sec'y of State's Mot. to Dismiss at 3, *Tex. Democratic Party v. Hughs*, No. 5:20-cv-00008-OLG, ECF No. 13 (W.D. Tex. Feb. 28, 2020). The State has maintained these arguments to successfully obtain dismissal on sovereign immunity grounds of other lawsuits against the Secretary challenging various provisions of the Election Code. As a result of those decisions, the State has argued that "even if the Secretary had issued a directive to local officials, it would not have bound them." *Id*. To now suggest that Vote.org acted nefariously by seeking approval from the very county officials that the State has claimed are solely responsible for voter registration—rather than from the Secretary himself—is a strange turn of events.

In sum, Defendants offer no meaningful rebuttal to the burdens imposed by the Wet Signature Rule. They cite inapposite rulings and even a concurring opinion while evading binding authority that undermines their arguments; they mischaracterize HB 3107's amendments to the Election Code; and they make allegations that contradict positions the State has argued before other courts in this district and the Fifth Circuit in seeking dismissal of voting rights lawsuits. Under the governing standards and the undisputed factual record, there is no question that the Wet Signature Rule burdens the right to vote.

ii. Defendants do not identify any state interest that justifies the Wet Signature Rule.

Just as Defendants fail to grapple with even the most obvious consequences of the Wet Signature Rule, they assume incorrectly that any antifraud-related justification will suffice. But their refusal to distinguish between the State's interest in requiring signatures generally—which Vote.org does not challenge—and the interest in demanding that those signatures be entered in wet ink, is a fatal error. Under the *Anderson-Burdick* test, the "Court must not only determine the legitimacy and strength" of Defendants' asserted interests, but "it also must consider the extent to

which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. "[E]ven when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318-19 (11th Cir. 2019). In other words, the question before the Court is not whether a signature on a voter registration application is necessary, but rather the State's justification for demanding that signatures must be entered in *wet ink* for some subset of voters, and the extent to which the State's justification makes it necessary to require *wet ink* signatures.

Defendants offer various irrelevant observations that make little attempt to connect their purported State interests with the Wet Signature Rule. For one, their unsupported claim that a signature "helps maintain accurate voter rolls and combat the use of fraudulent signatures," Paxton/Garza Mot. at 21, is both irrelevant—because Vote.org is not seeking to eliminate the signature requirement—and false, as demonstrated by the testimony of county registrars who admitted that they do not inspect or compare signatures before adding individuals to the voter rolls; they spend mere "seconds" confirming simply that a signature is present. *E.g.*, Defs.' App. at 361 (Garza Dep. 107:17-108:1), 373 (Garza Dep. 156:15-19); Pl.'s App. at 169 (Pendley Dep. 85:18-86:9); *id.* at 85 (Callanen Dep. 158:15-159:6). Defendants also emphasize that the Election Code allows officials to compare a voter's signature on a mail-in ballot envelope with the signature on their ballot application, Paxton/Garza Mot. at 22; but again, this fails to explain the need for a *wet* signature on *voter registration* applications. While the State may prefer that county officials use voter registration signatures for verifying absentee ballots, it has also made clear that this advice is not binding. *See supra* at A.2. And because Defendants offer no evidence to support the improbable assertion that wet ink signatures increase voter confidence, the Court should disregard

this unfounded claim.[6] *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 226 (5th Cir. 2016) ("Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment.").

The closest Defendants come to explaining the wet signature requirement is their purported desire to gather "good exemplars" of voters' signatures for future hypothetical indictments and investigations. Put differently, Defendants suggest that a wet ink signature might be beneficial if a prospective registrant becomes eligible to vote by mail, and a mail ballot issued to the registrant becomes the subject of a fraud investigation, and election or law enforcement officials attempt to uncover the fraud by comparing signatures, and rather than comparing the signature on the ballot envelope to the signature on the voter's mail ballot application, the investigators look to the signature on the voter's registration application form. The string of what-ifs that would have to materialize in this scenario illustrates why Defendants' purported interest is purely hypothetical and cannot justify any burden on the right to vote. *See*, *e.g.*, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593 (6th Cir. 2006) (rejecting state's proffered "generalized and hypothetical interests" as insufficient to justify burden); *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 732 n.12 (9th Cir. 2015) (expressing doubt that a court "may consider hypothetical rationales for a state's election law" in *Anderson-Burdick* analysis).

Even if the Court were to indulge this unlikely story, Defendants cannot explain why an imaged signature would not suffice. Several county registrars admitted that the wet signatures on paper applications are eventually stored as images. Defs.' App. at 165 (Callanen Dep. 83:8-13), 240-41 (Elfant Dep. 72:18-74:4, 74:14-75:10), 544 (Scarpello Dep. 104:2-16). That means any signature comparison that may occur in a later investigation would not rely on an inspection of

[6] *See also* Bryant Rep. at 20 (stating wet signature does not make voter rolls more accurate).

wet signatures on paper; rather, local officials would review *images* of the respective signatures. *See id.* at 557 (Scarpello Dep. 153:17-154:3), 178-79 (Callanen Dep. 134:16-136:6, 140:1-12), 286 (Elfant Dep. at 253:10-16); Pl.'s App. at 193 (Torres Dep. 75:6-22). Furthermore, Defendants' purported concerns about the legibility of imaged signatures are manufactured from an isolated incident that was quickly resolved four years ago. The image quality issues from 2018 were limited to the first few applications, and Vote.org addressed the issue almost immediately. Defs.' App. at 260 (Elfant Dep. 149:3-16, 150:18-21), 105-06 (Hailey Dep. 205:13-207:9); Pl.'s Supp. App. at 1 - 6. There is no meaningful distinction between a signature entered in wet ink and an imaged signature uploaded digitally.

Finally, Defendants misstate the law and mischaracterize Vote.org's allegations in suggesting that voter registration applications submitted solely by mail also require a wet signature. Paxton/Garza Mot. at 24. Apart from HB 3107's recent amendment to the procedures for submitting applications by fax, no other provision of the Election Code requires a wet signature on a voter registration application. Two different courts in this district have reached the same conclusion. *See Stringer*, 320 F. Supp. 3d at 896 (noting, pre-HB 3107, "there is nothing in Texas [election] law that precludes the use of . . . electronic signatures); Order at 2, *Tex. Democratic Party v. Hughs*, 5:20-cv-00008-OLG, ECF No. 29 (W.D. Tex. July 28, 2020) (finding, pre-HB 3107, no indication that the "wet signature rule has been in place for years" and that "the codified signature requirement . . . makes no mention of an original wet ink signature."). Meanwhile, Defendants cite only deposition testimony but no actual law to support their dubious legal conclusion. Paxton/Garza Mot. at 24.

In any event, Vote.org's Complaint challenges the Wet Signature Rule "as it appears in Section 14 of HB 3107 . . . and any other provisions requiring a voter to sign an application form

with an original, wet signature in order to register to vote," Compl. at 13, ECF No. 1, meaning that its claims and request for injunctive relief would also extend to Defendants' imaginary law. And even if the Complaint did not include such allegations, the presence of other unchallenged provisions of the Election Code that burden voters does not help Defendants' cause under the *Anderson-Burdick* analysis. The fact remains that Defendants have offered no cogent explanation for the Wet Signature Rule, much less a state interest that justifies the burden imposed on voters.

D. Vote.org can enforce the Materiality Provision, which bars the Wet Signature Rule.

As this Court has already held, "Defendants' arguments . . . that [the Materiality Provision] does not allow a private right of action and an organization cannot allege personal injury under § 1983 have been rejected by this District and the Eleventh Circuit." *Vote.org*, 2021 WL 5987152, at *3 (citing *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d. 849, 858-860 (W.D. Tex. 2020), *rev'd on other grounds*, 860 F. App'x 874 (5th Cir. 2021)); *see also Schwier v. Cox*, 340 F.3d 1284, 1294-1297 (11th Cir. 2003)). Defendants provide no reason for this Court to change course.

1. The Materiality Provision evinces a congressional intent to create a private right enforceable through 42 U.S.C. § 1983.

As before, Defendants dispute in vain Congress's plain intent to afford a private right and remedy, both under an implied private right of action and through Section 1983. "The question whether a statutory violation may be enforced through Section 1983 is a different inquiry from that involved in determining whether a private right of action can be implied from a particular statute" but both require a determination of "whether Congress intended to create a federal right." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Id*. at 284.

Here, that intent is discernable in the "rights-creating" language of the Materiality Provision. *Accord United States v. Manning*, 215 F. Supp. 272, 287 (W.D. La. 1963) ("[T]he [Civil

Rights] Act is designed to assure the right to vote of electors who are 'qualified under State law' to vote"). Specifically, it provides: "No person acting under color of law shall . . . deny the *right of any individual* to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting . . . ." 52 U.S.C. § 10101(a)(2)(B) (emphasis added).[7] This provision directly parallels the language in § 601 of Title VI, 42 U.S.C. §2000d, and in Title IX, 20 U.S.C. § 1681, which the Supreme Court has held creates a private right of action. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979). Title VI's dictate that "*No person* in the United States *shall* . . . be subjected to discrimination" and Title IX's "*No person* in the United States *shall*, on the basis of sex, . . . be subjected to discrimination," are quintessential examples of "explicit 'right- or duty-creating language" that imply Congressional intent "to create a private right of action." *Gonzaga Univ*, 536 U.S. at 273 n.3 (quoting *Cannon*, 441 U.S. at 690, n.13).

To be sure, there is no requirement that "rights-creating" language mirror the "no person" phrasing or use the passive voice. For example, the Fifth Circuit has held that the Medicaid Act's language—using neither the "no person" language nor the passive voice, but rather directly addressing the state—created an enforceable, individual right. *E.g.*, *S.D. ex Rel. Dickson v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004) (finding that provision stating "[a] State Plan must provide for making medical assistance available . . . to all individuals [who meet eligibility criteria]" was "precisely the sort of 'rights-creating' language identified in *Gonzaga*"). Accordingly, it is no

[7] Defendants suggest that the Materiality Provision's reference to "the right of any individual to vote" refers to a right created under state, not federal, law because of the subsequent reference to State qualifications to vote. Torres/Pendley Mot. at 5. This approach is contrary to settled law, which establishes that the right to vote is established under the federal Constitution. *E.g.*, *United States v. Classic*, 313 U.S. 299, 315 (1941). Likewise, the right to be free from disenfranchisement due to noncompliance with non-material requirements arises under federal law—the Materiality Provision—notwithstanding the State's ability to set its own eligibility criteria.

answer to say that the Materiality Provision "describes and proscribes inappropriate conduct by public officials," Torres/Pendley Mot. at 5; though "[t]he subject of the sentence is the person acting under color of state law, . . . the focus of the text is nonetheless the protection of each individual's right to vote." *Schwier*, 340 F.3d at 1296.

The Materiality Provision also stands in stark contrast to statutes that have been held *not* to evince "rights-creating" language, like the Family Educational Rights and Privacy Act of 1974 ("FERPA"), and § 602 of Title VI (in contrast to § 601). Unlike the Materiality Provision, FERPA creates no "individual entitlement": its "provisions speak only to the Secretary of Education, directing that '[n]o funds shall be made available'" to institutions which have a "prohibited 'policy or practice,'" and its "nondisclosure provisions . . . speak only in terms of institutional policy and practice, not individual instances of disclosure." *Gonzaga*, 536 U.S. at 287. Similarly, § 602 "authorizes federal agencies 'to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). This language is "twice removed from the individuals who will ultimately benefit from [the statute's] protection" because it "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating." *Id*. at 289. By contrast, the Materiality Provision speaks directly to "the right of any individual to vote in any election," and bars any "person acting under color of law" from infringing upon that right in a particular way. 52 U.S.C. § 10101(a)(2)(B). In short, the provision is "phrased in terms of the persons benefited" rather than "institutional policy and practice," a hallmark of "right-creating language." *Gonzaga*, 536 U.S. at 287-88.

Furthermore, 52 U.S.C. § 10101(d) invests district courts with jurisdiction over claims brought under the section "without regard to whether the party aggrieved shall have exhausted any

administrative or other remedies that may be provided by law." 52 U.S.C. § 10101(d). By using the term "the party aggrieved," rather than "the United States" or "the Attorney General," the statutory text reveals a contemplation of private enforcement. Similarly, if Congress intended *only* for the Attorney General to enforce the statute, there would be no need to release a "party aggrieved" from exhaustion requirements, as those do not apply to the Attorney General. *See Schwier*, 340 F.3d at 1296; 52 U.S.C. § 10101(c). The plain text of the statute thus reveals that the Materiality Provision creates and protects a federal right.

2. The legislative history of the Civil Rights Act further supports an implied right of action.

The legislative history of the Materiality Provision also reveal congressional intent to create a private remedy, evidenced by its subsequent reenactment of the statute. *See Silva-Trevino v. Holder*, 742 F.3d 197, 202 (5th Cir. 2014) ("It hardly seems unreasonable to abide by this assumption here, as Congress has had numerous opportunities to make any desired changes."). Notably, each of Congress's prior reenactments of the statute occurred during a period in which the availability of the private right of action remained uncontroversial. *See, e.g.*, *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958) (finding that private plaintiffs, asserting claim under 42 U.S.C. § 1983 to enforce Section 10101 had "stated a cause of action warranting relief"); *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) (ordering relief to private parties bringing suit under Section 10101); *Coal. for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090, 1094 (2d Cir. 1974) (similar); *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000) (similar).[8]

[8] As before, Defendants' authority putatively holding to the contrary is unpersuasive, failing to engage meaningfully in an analysis of the Materiality Provision's text, history, or purpose. *See* Vote.org's Opp'n to Intervenor Tex. Att'y Gen. Ken Paxton's Mot. to Dismiss & J. on the Pleadings, ECF No. 56; *McKay v. Thompson*, 226 F.3d 752, 756 (asserting, without analyzing availability of private right of action, that Materiality Provision is "enforceable by the Attorney General, not by private citizens"); *Mixon v. Ohio*, 193 F.3d 389, 406 n.12 (6th Cir. 1999)

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009). And here, robust evidence supports that conclusion. Discussion of the 1957 amendment in committee described the provision as an *additional* means of securing the right to vote. The Judiciary Committee explained that the bill's purpose was "to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States," H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1966 (emphasis added), and acknowledged that "section 1983 . . . has been used [by individuals] to enforce . . . section [10101]," *id.*, *reprinted in* 1957 U.S.C.C.A.N. at 1977. The U.S. Attorney General's testimony confirmed this: "We are not taking away the right of the individual to start his own action . . . . Under the laws amended if this program passes, *private parties will retain the right they have now to sue in their own name*." *Civil Rights Act of 1957: Hearings on S. 83, an amendment to S. 83, S. 427, S. 428, S. 429, S. 468, S. 500, S. 501, S. 502, S. 504, S. 505, S. 508, S. 509, S. 510, S. Con. Res. 5 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong. 73, 203, 1; 60-61, 67-73 (1957) (statement and

(addressing availability of private right of action in one sentence in footnote); *Cartagena v. Crew*, No. 1:96-cv-3399, 1996 WL 524394, at *3 n.8 (E.D.N.Y. Sept. 5, 1996) (same); *Hayden v. Pataki*, No. 00 CIV. 8586 (LMM), 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004) (conducting no independent analysis and failing to address *Schwier*); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004) (dedicating only one sentence to considering availability of private right of action); *Spivey v. Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998) (same); *McKay v. Altobello*, No. CIV. A. 96-3458, 1996 WL 635987, at *2 (E.D. La. Oct. 31, 1996) (conclusorily asserting that provision is "enforceable only by the Attorney General, not impliedly, by private persons"); *Willing v. Lake Orion Cmty. Sch. Bd. of Trs.*, 924 F. Supp. 815, 820 (E.D. Mich. 1996) (addressing availability of private right of action in only two sentences); *Good v. Roy*, 459 F. Supp. 403, 405–06 (D. Kan. 1978) (resting entire analysis on availability of enforcement by Attorney General).

testimony of the Hon. Herbert Brownell, Jr., Attorney General of the United States) (emphasis added).

3. Enforcement by the Attorney General does not foreclose a private right of action.

The County Defendants separately argue that Vote.org cannot enforce the Materiality Provision through Section 1983 on the grounds that the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Torres/Pendley Mot. at 6 (citing *Sandoval*, 532 U.S. at 290). Not so. Because the statute confers an individual right, *see supra* at C.1, Defendants can only prevail "by showing that Congress specifically foreclosed a remedy under § 1983," either through "specific evidence from the statute itself" or "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Gonzaga*, 536 U.S. at 285 n.4 (internal quotation omitted). Defendants cannot point to any "specific evidence from the statute itself," so instead they rely on the latter possibility. But the mere availability of enforcement by the Attorney General is neither "comprehensive" nor "incompatible with individual enforcement."

As the Supreme Court explained, what is pertinent is not the availability of some other remedy by itself, but whether Congress established a "more restrictive" remedy. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015) (observing that agency enforcement precluded equitable relief *only* "when combined with the judicially unadministrable nature of" the statute's text); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) ("We have found § 1983 unavailable to remedy violations of federal statutory rights in two cases . . . . Both of those decisions rested upon the existence of more restrictive remedies provided in the violated statute itself."). For example, in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), the Supreme Court found that Title IX was enforceable through Section 1983, despite the existence of

other enforcement mechanisms, including enforcement by the federal government and by individuals through an implied cause of action. In so holding, *Fitzgerald* recognized that a private cause of action and an action through Section 1983 can co-exist with federal government enforcement and emphasized that Title IX had "no administrative exhaustion requirement and no notice provisions." 555 U.S. at 255.

No exhaustion requirements or "more restrictive" enforcement scheme exists here; all Defendants have pointed to is the fact that the Attorney General may file suit to enforce the statute. As in *Fitzgerald*—and in contrast to *Sandoval*—aggrieved parties can "file directly in court" without any preconditions or exhaustion requirements. *Id*.; 52 U.S.C. § 10101(d) (explicitly waiving any requirement of "exhaustion of other remedies" for a "party aggrieved" to bring suit). This is hardly the "incompatib[ibility] with individual enforcement" required under *Gonzaga*. 536 U.S. at 285 n.4. Adopting Defendants' argument and finding that the Materiality Provision cannot be enforced through Section 1983 would be a significant departure from controlling precedent.

E. The Wet Signature Rule violates the Materiality Provision.

Defendants' motions confirm that the instrument that one uses to enter their signature on a voter registration application form—whether by wet ink or digitally through a smartphone—is not "material" in determining that individual's qualifications to vote. *See* Pl.'s Mot. for Summ. J. at 8-13. They concede that wet signatures have no function in the registration process, *id*. at 10, they accept thousands of imaged signatures submitted through DPS, *id*. at 11, and they offer no credible reason to believe that a wet signature reduces fraud any more so than an imaged signature, *id*. at 12.[9] For these reasons, the failure to accept voter registration applications signed with imaged

[9] Moreover, even if the Wet Signature Rule did have some function in later fraud prosecutions, that does not render it "material" for the purposes of the Materiality Provision.

signatures violates the Materiality Provision.

1. A *wet* signature is not "material in determining" whether a person is qualified to vote.

Similar to the arguments raised in response to Vote.org's *Anderson-Burdick* claim, Defendants once again fail to distinguish between a general signature requirement and the specific rule mandating that the signatures be entered in wet ink. Vote.org challenges only the latter, and Defendants' rationalizations are unconvincing. At best, they support the conclusion that a signature can be used in determining a voter's qualifications, but Defendants fail to explain why a *wet signature* is more material than an imaged one. After all, both a wet ink and an imaged signature serve to "confirm[] to the appropriate officials that the applicant's information is accurate." Torres/Pendley Mot. at 9.[10]

Defendants also assume incorrectly that a vague interest in fraud prevention absolves them of liability under the Materiality Provision. *Id*. at 9. But preventing fraud is not the same thing as determining qualifications to vote and does not render a wet signature material. *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006) (finding that role of mandatory disclosure of social security number in preventing "fraud" did not render requirement material); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006) (following *Schwier* to find that requirement's function of preventing fraud did not render requirement "material"). *See also* Pl.'s Mot. for Summ. J. at 11-12.

Regardless, the county registrars have admitted that they do not use any signature to check for "fraud" during the registration process. *E.g.*, Pl.'s App. at 178-79 (Scarpello Dep. 84:3-85:1), 166 (Pendley Dep. 70:14-18, 71:18-21); *see also* Pl.'s Mot. for Summ. J. at 12. Instead, *other*

[10] Defendants only assert that "[a] signature" performs this function, not that it is unique to wet signatures. *Id*.

county officials may use the registration signature as one among other exemplars when reviewing mail-in ballots. Pl.'s Mot. for Summ. J. at 12. And even then, they use *scanned* versions of the registration signatures, not the original "wet" signature. *Id*. Nor have Defendants adduced any credible evidence that a wet signature is less conducive to fraud than is an imaged one. *Id*. On the contrary, county registrars testified that they are aware of no instances in which an imaged signature was used fraudulently on a registration application. *Id*.; Pl.'s App. at 133 (Ingram Dep. 218:13-219:5), 170 (Pendley Dep. 103:1-12, 104:2-12), 196 (Torres Dep. 98:10-13, 98:21-99:8).

Defendants also suggest that a handful of errors during the initial implementation of Vote.org's e-sign program in 2018 "illustrates the problems caused by signature duplicates and images." Torres/Pendley Mot. at 10. This is not an accurate representation of the facts in the record. For example, Defendant Elfant testified that there was a "technical issue" which was soon resolved, at which point "the images were clearer" and "basically did look like . . . any other image [of a signature] that we would have," Pl.'s App. at 99 (Elfant Dep. 149:3-16), *i.e.*, a "clear, legible signature." *Id.* (Elfant Dep. 150:18-21); *see also* Defs.' App. at 105-06 (Hailey Dep. 205:13-207:9); Pl.'s Supp. App. at 1 - 6. He also testified that he could not differentiate between a wet signature and an imaged one from Vote.org's web application. *Id.* at 269 (Elfant Dep. 188:8-15). In any event, a brief instance of quickly resolved technical issues in 2018 is unrelated to whether requiring a wet signature now and in the *future* is material in determining a registrant's eligibility.

Defendants adduce one further rationale equally lacking in merit: they suggest that a wet signature is material because "refusing to sign . . . disqualifie[s] [a registrant] from registering to vote." Paxton/Garza Mot. at 25. If Defendants mean to refer to the legal requirements to vote, they are wrong. Texas law does not require a wet signature as a qualification for voting. *See* Tex. Elec. Code § 11.002 (enumerating eligibility criteria for voting, which does not include any signature).

To the extent Defendants mean that a registrant's failure to use a wet signature precludes them from registering entirely, this does not undercut but instead supports Vote.org's claim because it is an admission that the Wet Signature Rule deprives non-compliant individuals of the right to vote.

The cases Defendants cite, moreover, are inapposite. *Organization for Black Struggle v. Ashcroft*, which addressed the Materiality Provision argument only in passing, concerned a requirement that a voter affirm their mailing address and residential address "by either checking a box or filling out an address field" when casting absentee ballots. No. 2:20-CV-04184-BCW, 2021 WL 1318011, at *4 (W.D. Mo. Mar. 9, 2021). Those facts bear little resemblance to the Wet Signature Rule. While one may argue that a voter's residence is material to determining their eligibility, the instrument with which a voter enters their signature is not. *See Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006) (suggesting that "the color of ink to use in filling out the form" is not material).

In *Howlette v. City of Richmond*, 485 F. Supp. 17, 22-23 (E.D. Va. 1978), another out-of-circuit district court decision, a court found that "the requirement of individual notarization of each signature on a petition seeking a referendum [was] material," reasoning that the requirement ensured "the City will not be forced to undertake the substantial preparation and expense of conducting a referendum unless the requisite number of qualified City voters have actually signed the petitions, and have done so only after exercising due deliberation." But its analysis was flawed because the Materiality Provision does not protect municipalities from the "expenses" of elections, nor does it allow state officials to impose additional hurdles merely to ensure that voters exercise the amount of "deliberation" officials deem appropriate. *See id*. The Materiality Provision eliminates the practice of demanding "unnecessary information for voter registration." *Schwier*,

340 F.3d at 1294. In that sense, *Howlette's* and Defendants' reasoning share the same flaw: they focus on the purported benefits of the challenged rule but make no serious attempt to connect their requirements to voter qualifications. *See* Schwier, 340 F.3d at 1297 (finding omission immaterial where requirement was unrelated to legal qualifications to vote under state law).

2. Enforcement of the Wet Signature Rule results in a denial of the right to vote.

Having failed to explain why the Wet Signature Rule is material, Defendants assert that there is no denial of the right to vote because "the registrant is given the chance to correct the signature defect." Paxton/Garza Mot. at 25. Tellingly, they do not point to a single provision in the Election Code that confers a right to cure; do not explain whether this right extends beyond the registration deadline; nor do they even contend that every county registrar is *required* to provide a cure opportunity. Their sole authority in support of this position is a mandate from over a half-century ago requiring that errors or omissions in registration applications be "specifically pointed out and explained to [a registrant] by the registrar. . . ." *United States v. Ward*, 345 F.2d 857, 862 (5th Cir. 1965). This does not mean that the opportunity to cure is a cure-all.

The undisputed facts also establish that registration applications containing an "imaged" signature are treated as if they were not signed at all and are deemed incomplete. *E.g.*, Pl.'s App. at 89 (Elfant Dep. 67:6-20), 201 (Callanen Resp. to Pl.'s Interrogs. No. 1). If a registrant does not address the "deficiency"—*i.e.*, provide a wet signature—then the application is denied. *E.g.*, Defs.' App. 265 (Elfant Dep. 172:5-19), 190-91(Callanen Dep. 184:15-185:13). In no event would a voter be registered (under the fax procedure) without submitting an application with a wet signature. For those who used Vote.org's web application because they could not print out the application and sign it, the distinction between "incomplete" and "rejected" is one without a difference: ultimately,

their application is rejected, and they are denied the right to vote, because of a non-material omission.

Were the Court to adopt Defendants' logic, states could impose any type of immaterial requirement on the voting process and evade the Civil Rights Act by purporting to offer voters a second opportunity to complete its obstacle course. And even a discriminatory literacy test would survive so long as election officials allowed voters multiple tries to pass it. Of course, that would render the materiality provision meaningless, which is why the statute's plain text provides no exemption for "curable" errors or omissions. The Court should therefore reject Defendants' argument on its face.

3. Vote.org need not establish racial discrimination.

Finally, in rejecting the State's Motion to Dismiss, ECF 53, this Court previously held that a Materiality Provision claim does not require proof of racial discrimination. *Vote.org*, 2021 WL 5987152, at *5 ("[T]he Court does not find support for Defendants' contention that Plaintiff's [Materiality Provision] claim fails because it does not allege racial discrimination."). Torres' and Pendley's Motion repeats this argument but makes no effort to address the flaws that the Court identified, nor do they cite any new authority or textual support.

The plain language of the Materiality Provision makes no reference at all to race, or even discrimination more broadly. Instead, it provides that "no person acting under color of law" may disenfranchise "*any* individual" on technical grounds. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Injecting a requirement to show racial discrimination would render the word "any" meaningless. *Young v. UPS, Inc.*, 135 S. Ct. 1338, 1352 (2015) ("We have long held that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause is rendered superfluous, void, or insignificant." (quotations omitted)). Furthermore, because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there,"

it would be inappropriate for this Court to insert an additional barrier to enforcement that Congress elected not to include in the first instance. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Defendants' heavy reliance on *Broyles v. Texas*, 618 F. Supp. 2d 661 (S.D. Tex. 2009), remains misplaced. As this Court previously explained, that decision "relies on *Kirksey v. City of Jackson*, 663 F.2d 659, 664 (5th Cir. 1981), for the proposition that 'only racially motivated deprivations of rights' are actionable under the Materiality Provision. But *Kirksey*, and *City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980), upon which *Kirksey* relies, address § 2 of the Voting Rights Act of 1965 (VRA) (previously 42 U.S.C. § 1973, now 52 U.S.C. § 10301), not the Civil Rights Act of 1964 (CRA) (previously 42 U.S.C. § 1971, now 52 U.S.C. § 10101)." *Vote.org*, 2021 WL 5987152, at *5. *Broyles*' unelaborated imposition of the elements of a VRA claim onto the Materiality Provision is fatally flawed because the VRA prohibits discrimination in voting "on account of race or color" whereas the Materiality Provision prohibits interfering with the right of "any individual." The distinction between "[t]he plain language of the sections, 'on account of race or color' (§ 1973 / § 10301) and 'any individual' (§ 1971 / § 10101) are strong indicators of the persons the section[s] intended to protect." *Id*. at *6.

Unable to identify any statutory language supporting their position, Defendants insist that without a racial discrimination requirement, the Materiality Provision is unconstitutional because it would exceed congressional power to regulate elections under the Fifteenth Amendment. Torres/Pendley Mot. at 8. That is incorrect. Congress may choose to address problems of discrimination in voting even if its solutions encompass more than those problems. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("Congress' [sic] power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights

guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."). It is no surprise, then, that Courts have repeatedly rejected Defendants' argument that Congress's power to legislate on elections is limited to preventing intentional racial discrimination. *Major v. Treen*, 574 F. Supp. 325, 344 (E.D. La. 1983) (finding amendment to Voting Rights Act abolishing intentional race discrimination requirement was constitutional); *Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984) (same), *aff'd sub nom. Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984)

Here, Congress has elected to address "a somewhat broader swath of conduct" than that prohibited by the Fourteenth or Fifteenth Amendments: "requiring unnecessary information for voter registration," *Schwier*, 340 F.3d at 1294. Such practices were often employed with a racially neutral patina to *evade* prohibitions on intentional discrimination. To accomplish its purpose, Congress reasonably prohibited *all* denials of the right to vote for immaterial errors or omissions on application forms.

CONCLUSION

For all the foregoing reasons, Defendants' motions for summary judgment should be denied and Vote.org's motion for summary judgment should be granted.

Dated: April 29, 2022

Respectfully submitted,

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta*
Joshua L. Harris*
Noah B. Baron*
Alexander F. Atkins*
Meaghan M. Mixon*
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
unkwonta@elias.law
jharris@elias.law
nbaron@elias.law
aatkins@elias.law
mmixon@elias.law

John R. Hardin
Texas State Bar No. 24012784
PERKINS COIE LLP
500 North Akard Street, Suite 3300
Dallas, Texas 75201-3347
Telephone: (214) 965-7700
Facsimile: (214) 965-7799
johnhardin@perkinscoie.com

Counsel for Plaintiff Vote.org
*Admitted *Pro Hac Vice*