

**IN THE UNITED STATES DISTRICT COURT
FOR THE 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 No. 5:21-CV-00649-JKP-HJB

**INTERVENOR-DEFENDANTS LUPE TORRES' AND TERRIE PENDLEY'S
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
PROCEDURAL HISTORY.....	1
STATEMENT OF THE ISSUES.....	2
STANDARD OF REVIEW	2
ARGUMENT & AUTHORITIES	2
I. PLAINTIFF CANNOT ESTABLISH A VIOLATION OF ITS RIGHTS UNDER SECTION 1971	2
A. Section 1971 Does Not Provide a Private Cause of Action for Plaintiff	3
B. Plaintiff Has Not Claimed the Racial Discrimination Required to State a Claim Under Section 1971	7
C. The Signature Requirement for Registration Applications Is Material Under Section 1971.....	9
D. The Lack of Proper Signature Does Not Deny Voters the Right to Vote.....	11
CONCLUSION.....	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page(s):</u>
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	4, 5, 6
<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969).....	7
<i>Alsbrook v. City of Maumelle</i> , 184 F.3d 999 (8th Cir. 1999)	6
<i>Broyles v. Tex.</i> , 618 F. Supp. 2d 661 (S.D. Tex. 2009), <i>aff'd</i> , 381 Fed. App'x 370 (5th Cir. 2010).....	7
<i>Cartagena v. Crew</i> , No. 1:96-cv-3399, 1996 U.S. Dist. LEXIS 20178 (E.D.N.Y. Sept. 5, 1996)	4
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	8
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980).....	7
<i>Conservation Force v. Delta Air Lines, Inc.</i> , 190 F. Supp. 3d 606 (N.D. Tex. 2016), <i>aff'd</i> , 682 Fed. App'x 310 (5th Cir. 2017).....	5, 6
<i>Cort v. Ash</i> , 422 U.S. 66 (1975).....	4
<i>Davis v. Chevron U.S.A., Inc.</i> , 14 F.3d 1082 (5th Cir. 1994)	2
<i>Diaz v. Cobb</i> , 435 F. Supp. 2d 1206 (S.D. Fla. 2006)	9
<i>Gilmore v. Amityville Union Free Sch. Dist.</i> , 305 F. Supp. 2d 271 (E.D.N.Y. March 2, 2004).....	3
<i>Gonzaga Univ. v. Doe</i> , 536 U.S. 273 (2002).....	5, 6

<i>Good v. Roy</i> , 459 F. Supp. 403 (D. Kan. 1978).....	4
<i>Gunn v. Minton</i> , 568 U.S. 251 (2013).....	8
<i>Hayden v. Pataki</i> , No. 00-CV-8586, 2004 U.S. Dist. LEXIS 10863 (S.D.N.Y. June 14, 2004)	3
<i>Howlette v. City of Richmond</i> , 485 F. Supp. 17 (E.D. Va. 1978)	9
<i>Ind. Democratic Party v. Rokita</i> , 458 F. Supp. 2d 775 (S.D. Ind. 2006).....	7
<i>J.I. Case Co. v. Borak</i> , 377 U.S. 426 (1964).....	4
<i>Kokkonen v. Guardian Life Ins. Co. of Am.</i> , 511 U.S. 375 (1994).....	8
<i>Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson</i> , 501 U.S. 350 (1991).....	4
<i>Logan v. U.S. Bank Nat'l Ass 'n</i> , 722 F.3d 1163 (9th Cir. 2013)	5
<i>McKay v. Altobello</i> , No. 2:96-cv-3458, 1996 U.S. Dist. LEXIS 16651 (E.D. La. Oct. 31, 1996)	4
<i>McKay v. Thompson</i> , 226 F.3d 752 (6th Cir. 20000)	3
<i>McNutt v. General Motors Acceptance Corp.</i> , 298 U.S. 178 (1936).....	8
<i>Mixon v. Ohio</i> , 193 F.3d 389 (6th Cir. 1999)	3
<i>Org. for Black Struggle v. Ashcroft</i> , No. 2:20-CV-04184-BCW, 2021 U.S. Dist. LEXIS 70673 (W.D. Mo. March 9, 2021)	9
<i>Royal v. CCC&R Tres Arboles, L.L.C.</i> , 736 F.3d 396 (5th Cir. 2013)	2

<i>Schwier v. Cox</i> , 340 F.3d 1284 (11th Cir. 2003)	4, 6
<i>Spivey v. Ohio</i> , 999 F. Supp. 987 (N.D. Ohio 1998).....	4
<i>Stokes v. Sw. Airlines</i> , 887 F.3d 199 (5th Cir. 2018)	5
<i>Touche Ross & Co. v. Redington</i> , 442 U.S. 560 (1979).....	4
<i>Turner v. Bank of North-America</i> , 4 U.S. 8 (1799).....	8
<i>United States v. Ward</i> , 345 F.2d 857 (5th Cir. 1965)	13
<i>Willing v. Lake Orion Cnty. Sch. Bd. of Trustees</i> , 924 F. Supp. 815 (E.D. Mich. 1996).....	4
<i>Ziglar v. Abbasi</i> , 137 S.Ct. 1843 (2017).....	4, 7
<u>Constitutional Provisions:</u>	
U.S. Const. amend. XV.....	8
<u>Statutes, Codes & Rules:</u>	
42 U.S.C.	
§ 1971.....	7
52 U.S.C.	
§ 10101(a)(2)(B)	2, 5
§ 10101(c)	3
§ 10101(g).....	6
Tex. Elec. Code	
§ 13.002.....	11
§ 13.038.....	12
§ 13.041.....	12
§ 13.073.....	11
§ 20.001.....	13
§ 20.031.....	13

§ 20.032.....	13
§ 20.035.....	13
Fed. R. Civ. P. 56(a)	2

STATEMENT OF FACTS

Intervenor-Defendants Lupe Torres and Terrie Pendley incorporate by reference the Statement of Grounds and Undisputed Facts at pages 1-8 of the Motion for Summary Judgment filed by Intervenor-Defendant Ken Paxton as if fully set forth herein.

PROCEDURAL HISTORY

On July 8, 2021, Plaintiff filed a Complaint for Declaratory and Injunctive Relief against Defendants 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, and Michael Scarpello, in his official capacity as the Dallas County Elections Administrator. ECF No. 1. On August 30, 2021, Intervenor-Defendants Lupe Torres, in his official capacity as the Medina County Elections Administrator, and Terrie Pendley, in her official capacity as the Real County Tax Assessor-Collector, filed a Motion to Intervene as a defendant. ECF No. 26. On September 2, 2021, Ken Paxton, in his official capacity as Attorney General of Texas, filed a Motion to Intervene as a defendant. ECF No. 27. On September 7, 2021, Defendants Callanen, Elfant, and Scarpello each filed an Answer. ECF. No. 28-30. Also on September 7, 2021, Defendant Garza filed a Motion to Dismiss. ECF No. 31. The Court granted the two motions to intervene on October 22, 2021. The Court denied Defendant Garza's motion to dismiss on October 27, 2021. ECF. No. 49. On November 9, 2021, Intervenor-Defendant Paxton filed a Motion to Dismiss and for Judgment on the Pleadings in which the County Intervenor-Defendants joined. ECF No. 53, 65. The Court denied Intervenor-Defendants' motion to dismiss on December 17, 2021. ECF. No. 70. Discovery has since taken place and the case is presently ripe for summary judgment.

STATEMENT OF THE ISSUES

1. Whether Section 1971 of the Civil Rights Act provides Plaintiff with a cause of action when its complaint fails to allege racial discrimination.
2. Whether the requirement that a registrant who faxed a voter registration application to the county voter registrar must then mail the form containing an original signature to the voter registrar offends the materiality provision of Section 1971.

STANDARD OF REVIEW

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact is one that could affect the outcome of the action. *Royal v. CCC&R Tres Arboles, L.L.C.*, 736 F.3d 396, 400 (5th Cir. 2013). A mere scintilla of evidence is insufficient to defeat a motion for summary judgment. *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994).

ARGUMENT & AUTHORITIES

I. PLAINTIFF CANNOT ESTABLISH A VIOLATION OF ITS RIGHTS UNDER SECTION 1971

Both on its pleadings and at summary judgment, Plaintiff fails to establish a claim under Section 1971 of the Civil Rights Act of 1964, codified at 52 U.S.C. § 10101(a)(2)(B). The section's "materiality provision" states that:

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, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B). Intervenor-Defendants Lupe Torres, in his official capacity as Medina County Elections Administrator and Terrie Pendley, in her official capacity as Real

County Tax Assessor-Collector, respectfully request that the Court reconsider its prior determination that Plaintiff stated a claim under this section. Congress did not place a private cause of action within Section 1971, and even if it did, Plaintiff's Complaint lacks any allegation of racial discrimination. *See* ECF No. 63, at 6–10; ECF No. 53, at 10–14. Alternatively, Intervenor-Defendants contend that judgment as a matter of law is proper for two reasons. First, requiring a signature on a voter registration application is material to determining an applicant's qualifications to vote under Texas law. Second, no person is denied the right to vote for having improperly signed his or her application; instead, the applicant is given the opportunity to cure the deficiency.

A. Section 1971 Does Not Provide a Private Cause of Action for Plaintiff

When Congress enacted Section 1971, it provided a cause of action for the “Attorney General,” not for private plaintiffs. 52 U.S.C. § 10101(c). This stands in contrast with Section 1983 of the Civil Rights Act of 1871, for example, in which Congress expressly granted a cause of action to private individuals. Given the absence of such a grant in Section 1971, Plaintiff relies instead on an implied cause of action. Such a tactic, however, has been rejected repeatedly by courts throughout the country. *See, e.g., McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (“Section 1971 is enforceable by the Attorney General, not by private citizens.”); *Mixon v. Ohio*, 193 F.3d 389, 406 n.12 (6th Cir. 1999) (“Section 1971 . . . is not part of the enforcement provisions of the Voting Rights Act and only the Attorney General can bring a cause of action under this section.”); *Hayden v. Pataki*, No. 00-CV-8586, 2004 U.S. Dist. LEXIS 10863, at *16 (S.D.N.Y. June 14, 2004) (“this section does not provide for a private right of action and is only enforceable by the United States in an action brought by the Attorney General.”); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. March 2, 2004) (“1971 does

not provide for a private right of action by individuals.”). *See also Spivey v. Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998); *McKay v. Altobello*, No. 2:96-cv-3458, 1996 U.S. Dist. LEXIS 16651, at *4 (E.D. La. Oct. 31, 1996); *Cartagena v. Crew*, No. 1:96-cv-3399, 1996 U.S. Dist. LEXIS 20178, at *12 n.8 (E.D.N.Y. Sept. 5, 1996); *Willing v. Lake Orion Cmty. Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996); *Good v. Roy*, 459 F. Supp. 403, 405–06 (D. Kan. 1978). But see *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (allowing a private cause of action, but only through Section 1983).

The distinction is crucial, as the Supreme Court has emphasized that “private rights of action to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979), which found that available remedies were only those “that Congress enacted into law”). Unless Congress expresses a clear intent, “a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Id.* at 286–87. Instead, “[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” *Id.* at 286. It is true that in the 1960s, courts took a somewhat looser approach to this issue, assuming it proper to “provide such remedies as are necessary to make effective” a statute’s purpose. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). However, the Court promptly abandoned this understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975). Since discarding *Borak*’s “ancien regime,” *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1855 (2017) (explaining the Court’s evolution away from *Borak*’s view), the Court “has not returned to it.” *Sandoval*, 532 U.S. at 287. *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment) (“Raising up causes of action where a statute has not created them may be a proper

function for common-law courts, but not for federal tribunals.”). The Fifth Circuit has clearly rejected reliance “on pre-*Sandoval* reasoning” as well. *Stokes v. Sw. Airlines*, 887 F.3d 199, 205 (5th Cir. 2018).

Section 1971 indicates no intent by Congress to create either a private right or a private remedy. Instead, it provides that “[n]o person acting under the color of law” shall deny an individual’s right to vote. This language both describes and proscribes inappropriate conduct by public officials, and the Supreme Court has been clear that “[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.” *Sandoval*, 532 U.S. at 289 (citation omitted). Here, Section 1971 “is framed in terms of the obligations imposed on the regulated party,” the public official. *Logan v. U.S. Bank Nat’l Ass’n*, 722 F.3d 1163, 1171 (9th Cir. 2013) (explaining why the statute at issue did not create a private right of action). The voters mentioned in Section 1971, by contrast, are “referenced only as an object of that obligation.” *Id*; *see also Conservation Force v. Delta Air Lines, Inc.*, 190 F. Supp. 3d 606, 616 (N.D. Tex. 2016), *aff’d*, 682 Fed. App’x 310 (5th Cir. 2017) (holding that under *Sandoval*, the Air Carrier Access Act does not imply a private right of action). In short, Congress did not supply Plaintiff in “clear and unambiguous terms”—or in any terms—with a private cause of action in Section 1971. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

The Court has also emphasized the importance of “rights-creating” language.” *Sandoval*, 532 U.S. at 288. Section 1971 contains no rights-creating language despite its reference to “the right of any individual to vote in any election.” 52 U.S.C. § 10101(a)(2)(B). Instead, Section 1971 refers to a right already created “under Texas law.” *Id*. Even if Section 1971 were interpreted as referring to a federal right (for example, the Fifteenth Amendment’s voting guarantees), it would

still lack rights-creating language. Without “clear and unambiguous” rights-creating language, Section 1971 does not provide Plaintiff with a private cause of action.

Plaintiff’s attempt to wield Section 1971 in the same manner it might utilize Section 1983 must fail. The Supreme Court has held that the “express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” *Sandoval*, 532 U.S. at 290. Here, Section 1971 contains a full remedial regime deliberately quite unlike that created by Section 1983, and “[c]ourts should presume that Congress intended that the enforcement mechanism provided in the statute be exclusive.” *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999). For example, Section 1971 includes the ability to request a case be heard by a three-judge panel at the district court, and Section 1983 does not. *See* 52 U.S.C. § 10101(g). Plaintiff is therefore precluded from using Section 1971 as if it were another statute.

The principal modern case to cast doubt on Plaintiff’s inability to find an implied private cause of action within Section 1971 is *Schwier v. Cox* from the Eleventh Circuit. 340 F.3d 1284 (11th Cir. 2003). However, *Schwier* does not adequately address *Sandoval*—the Supreme Court’s articulation of the issue—and instead dismisses with a passing “see also” reference. *Schwier* also emphasizes legislative history, whereas the Fifth Circuit has communicated that “[l]egislative history and contemporaneous legal context [should be] eschewed in favor of plain language interpretation.” *Conservation Force v. Delta Air Lines, Inc.*, 190 F. Supp. 3d 606, 615 (N.D. Tex. 2016), *aff’d*, 682 F. App’x 310, 311 (5th Cir. 2017) (per curiam) (affirming “[e]ssentially for the reasons stated in the district court’s comprehensive and well-reasoned opinion”). Section 1971’s plain language does not create a federal right. *See Gonzaga Univ.*, 536 U.S. at 290. Instead, it references a preexisting right.

Schwier also relies on a case from the pre-*Sandoval* “ancien régime” of implied causes of action, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). However, it is no longer the courts’ role to “provide such remedies as” it deems “necessary to make a statute’s purpose effective.” *Id.* (internal quotation marks omitted), as *Schwier* and *Allen* attempted to undertake. Instead, the Court has abandoned *Allen*’s reasoning in favor of “a far more cautious course...when deciding whether to recognize an implied cause of action.” *Ziglar*, 137 S. Ct. at 1848. Reliance on *Schwier* and *Allen* is therefore misguided.

B. Plaintiff Has Not Claimed the Racial Discrimination Required to State a Claim Under Section 1971

Even assuming that a private cause of action is embedded in Section 1971, “only racially motivated deprivations of rights are actionable under 42 U.S.C. § 1971.” *Broyles v. Tex.*, 618 F. Supp. 2d 661, 697 (S.D. Tex. 2009), *aff’d*, 381 Fed. App’x 370 (5th Cir. 2010). This is because “well-settled law establishes that § 1971 was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements.” *Id.* (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006)). “The Fifth Circuit reasoned that § 1971 is ‘coterminous with the Fifteenth Amendment,’ and . . . ‘was intended to have an effect no different from that of the Fifteenth Amendment itself.’” *Broyles*, 618 F. Supp. at 697 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980)). However, Plaintiff’s Complaint lacks any allegation of racial motivation behind HB 3107 or the signature rule it clarified. In fact, the Complaint’s sole reference to race exists in its description of Plaintiff’s *own* mission: “to support low-propensity voters, including racial and ethnic minorities and younger voters who tend to have lower voter-turnout rates.” ECF No. 1 at 5. Rather than alleging racial discrimination, Plaintiff argues that HB 3107 inhibits voters who lack access to a printer—voters in rural Texas, for example. This is false, but even if it were true, Section 1971 is not actionable based on a lack of

access to technology. Plaintiff made no attempt in its briefing in response to the motion to dismiss to argue that a Section 1971 claim is actionable absent a claim of racial discrimination; its Complaint remains facially defective.

Plaintiff's intimation that Section 1971 allows a claim absent an allegation of racial discrimination also runs afoul of constitutional principles. Congress' authority to protect voting and other rights under Section 5 of the Fourteenth Amendment must be exercised with congruence and proportionality to the harm prohibited. *City of Boerne v. Flores*, 521 U.S. 507 (1997). This is because “[f]ederal courts are courts of limited jurisdiction,’ possessing ‘only that power authorized by Constitution and statute.’” *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). “It is [therefore] to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen*, 511 U.S. at 377 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936) and *Turner v. Bank of North-America*, 4 U.S. 8 (1799)). Here, Section 1971 was passed pursuant to the Fifteenth Amendment, which reads, “The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude . . . The Congress shall have the power to enforce this article by appropriate legislation.” U.S. Const. amend. XV (emphasis added). A reading of Section 1971 that allows claims lacking racial discrimination allegations would not be congruous or proportional to addressing Fifteenth Amendment harms. Therefore, such a reading is unconstitutional, and such a Complaint fails to state a claim upon which this Court may grant relief. Plaintiff's neglect of *Broyles*' textually grounded analysis of Section 1971's relationship to the Fifteenth Amendment is harmful to its case.

C. The Signature Requirement for Registration Applications Is Material Under Section 1971

Even if Plaintiff's claim could overcome its lack of a racial discrimination allegation, it still fails because requiring a signature on a voter registration application is material to determining an applicant's qualifications under Texas law. Courts have repudiated the notion that a signature requirement for absentee ballot applications is immaterial to determining a voter's eligibility. *Org. for Black Struggle v. Ashcroft*, No. 2:20-CV-04184-BCW, 2021 U.S. Dist. LEXIS 70673, at *12-13 (W.D. Mo. March 9, 2021); *Howlette v. City of Richmond*, 485 F. Supp. 17, 22-23 (E.D. Va. 1978). Furthermore, even the requirement that a petition for a referendum be signed in front of a notary has been ruled material under Section 1971 because it "impresses upon the signers of the petitions the seriousness of the act of signing a petition for a referendum." *Howlette*, 485 F. Supp. at 22-23. *See also Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1211 (S.D. Fla. 2006) (holding material under Section 1971 the requirement that an applicant check boxes to confirm citizenship, felon, and mental incapacitation status).

There are multiple reasons a signature requirement is material to the determination of an applicant's qualifications to vote. For instance, the governmental interest in the prevention of fraud requires that election administrators have a means to verify that a voter is indeed the person he or she claims to be. Paxton App.¹ at 415-16, Ingram Dep. at 159:2-161:8. A signature also confirms to the appropriate officials that the applicant's information is accurate. *Id.* Both the Secretary of State's representative and county officials deposed in the case gave testimony to this effect regarding the use of signatures. *See* Paxton App. at 173, Callanen Dep. at 113:12-114:10; Paxton App. at 416, 420, 422, Ingram Dep. at 161:3-8, 179:14-20, 188:7-18; Paxton App. at 539-

¹ The Attorney General has filed a Motion for Summary Judgment in this case and attached an Appendix ("Paxton App.").

40, Scarpello Dep. at 84:3–85:1. Accepting Plaintiff’s argument that signature requirements are immaterial would make it difficult to draw a line with respect to the importance of any signature, even an electronic or imaged one.

To the extent Plaintiff argues that HB 3107’s requirement that a voter registration application contain the applicant’s original signature rather than an image of a signature creates a distinction that is not material, Plaintiff’s own program illustrates the problems caused by signature duplicates and images. Paxton App. Ex. C, at 4, Voter Registration Application from Cameron County; Paxton App. at 71-72, Hailey Dep. 68:4–71:19; Paxton App. at 262-63, Elfant Dep. 160:2–161:21; Paxton App. at 184-85, Callanen Dep. at 160:17–161:21; Paxton App. at 498, 512, Lopez Dep. at 58:15–60:8, 113:22–114:7; Paxton App. 370, Garza Dep. at 142:4–14. In numerous instances, the Plaintiff’s program made it impossible to see the signature in the image to be able to compare it to a written signature. *See id.* The Travis County Tax Assessor-Collector’s office, which had been working with Plaintiff to facilitate the fax transmissions, informed Plaintiff that many of the signatures being received were “poor . . . , some blank, and some blacked out” and that “[t]his is a real problem and [the office is] concerned about proceeding until this is cleared up.” Paxton App. Ex. D, at 5, Travis County Emails; Paxton App. at 262-63, Elfant Dep. at 160:2–161:21. Each Defendant in this case found image quality to be a problem that required them to inform voter registration applicants of the deficiency and required the applicants to mail a corrected paper application that included an original signature. The signature requirement is material. Plaintiff’s avoidance of meeting the Secretary of State about its program and certain counties’ refusals to accept Plaintiff’s tool further belie claims of the signature requirement’s immateriality. Paxton App. at 74, 77, 86-87, 98, Hailey Dep. at 80:4–10, 92:11–24; 129:24–131:7, 177:5–12; *see also* Paxton App. at 500, 509, 511, Lopez Dep. at 65:1–66:8, 102:21–103:21, 110:18–111:1

(testimony that Plaintiff's ends were illegal, made the deponent uncomfortable, and might result in disenfranchising voters).

When the Texas legislature allowed the submission of applications by facsimile in 2013, there was no doubt that the original wet signature would still be required under Tex. Elec. Code § 13.002. *See* Paxton App. at 209, Callanen Dep. at 257:6–8. The faxed image was never intended to replace the original signature for authentication purposes, and the Secretary of State is unaware of any county making such an interpretation before Plaintiff's program was introduced in 2018. The four County Defendants have testified similarly. Paxton App. at 165-66, 213-14, Callanen Dep. at 82:14–83:14, 87:5–10, 276:19–277:3; Paxton App. at 500, 508, Lopez Dep. at 65:1–66:8, 97:7–98:1; Paxton App. at 291-92, Elfant Dep. at 276:16–277:21. Travis County was the only county to accept solely imaged signatures, and did so for a short period in 2018 at the urging of Vote.org and based on an interpretation by the Travis County Tax Assessor-Collector's office. Paxton App. at 292, Elfant Dep. at 277:22–279:5. This one-time interpretation which was prompted by Plaintiff itself cannot demonstrate that the wet signature rule is “immaterial” under Section 1971.

D. The Lack of Proper Signature Does Not Deny Voters the Right to Vote

Lastly, the challenged provision does not deny any person the right to vote. When a prospective voter submits a registration application with an imaged signature, which has never been a permissible procedure under the Texas Election Code, the prospective voter is sent a notice of incomplete and is permitted to resubmit the application with a valid signature and become properly registered. Tex. Elec. Code § 13.073; Paxton App. at 426, Ingram Dep. at 202:13–203:1; Paxton App. at 206, Callanen Dep. at 248:3–7; Paxton App. at 514-15, Lopez Dep. at 124:17–125:7.; Paxton App. Ex. F at 11-14, Vote.org email to users. Plaintiff acknowledged this procedure

in its notice to users who had used its web application to attempt registration, and it told the users “Vote.org is truly, deeply, sorry for this inconvenience,” which Plaintiff caused by misrepresenting election procedures to its users. Paxton App. Ex. F at 11-14, Vote.org email to users; Paxton App. at 137, Hailey Dep. at 330:17–22, 332:10–333:19. Further, as stated previously, because Plaintiff is an artificial entity that does not possess a right to vote in any election, there can be no denial of a right that does not exist.

To facilitate the easy process of voting, Texas has adopted a number of policies to ensure voters have both access to application forms and a means of submitting them. Paxton App. 199 – 203, Callanen Dep. at 217:2–233:8. For instance, the State permits counties to appoint deputy voter registrars both to distribute application forms to their communities, and even to accept those forms on the county’s behalf. Tex. Elec. Code §§ 13.038, 13.041. *See* Paxton App. 161-62, Callanen Dep. at 68:6–69:12. Travis County, for example, has 2,500 deputy registrars working to register voters. Paxton App. at 326, Elfant Dep. at 414:14–21. These trained volunteers will go to coffee shops, movie theaters, local events, and “anywhere where there’s more than a few people gathered” to register voters. Paxton App. at 326, 328, Elfant Dep. at 421:20–21, 424:3–22. The State also ensures that potential voters have access to application forms on their own. The Secretary of State provides access to the form online, and also mails forms to potential voters postage-paid. Request for Voter *Registration Applications*, Texas Secretary of State, <https://www.sos.state.tx.us/elections/voter/reqvr.shtml> (last visited March 24, 2022); Paxton App. Ex. A at 1, Texas Voter Registration Application; Paxton App. Ex. B at 2, Screenshot from sos.state.tx.us. Additionally, designated registration agencies such as libraries, marriage offices, and the Department of Public Safety (DPS) must provide the application form whenever they

initiate or renew the agency's services and assist applicants with the form. *See*. Tex. Elec. Code § 20.001, § 20.031, § 20.032, 20.035.

Moreover, the Fifth Circuit, in a case under Section 1971 in which a finding of racial discrimination was upheld, held that the voter registrar may nevertheless require a signature of the applicant and allow the signature to be corrected if it contains some defect, but that the registrar is entitled to reject an application if the applicant refuses to sign. *United States v. Ward*, 345 F.2d 857, 862 (5th Cir. 1965). To the extent a prospective voter would refuse to make the registration application amenable to Texas's common sense, fraud prevention mechanism for signature matching, the person is not qualified under state law to cast a ballot. *See id.* For these reasons, Plaintiff fails to carry its burden at the summary judgment stage with evidence demonstrating a violation of Section 1971.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants Torres and Pendley request that this Court grant their Motion for Summary Judgment and enter a final judgment dismissing Plaintiff's claims with prejudice.

Respectfully submitted,

/s/Munera Al-Fuhaid
ROBERT HENNEKE
Texas Bar No. 24046058
rhenneke@texaspolicy.com
CHANCE WELDON
Texas Bar No. 24076767
cweldon@texaspolicy.com
MUNERA AL-FUHAID
Texas Bar No. 24094501
mal-fuhaid@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION

901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

*Attorneys for Intervenor-Defendants Lupe Torres
and Terrie Pendley*

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2022, I electronically filed the foregoing document with the Clerk of the Court for the Western District of Texas by using the CM/ECF system, which will serve a copy of same on all counsel of record.

/s/Munera Al-Fuhaid
MUNERA AL-FUHAID