No. 22-50690

In the United States Court of Appeals for the Fifth Circuit

TEXAS STATE LULAC; VOTO LATINO,
Plaintiffs-Appellees,

v.

BRUCE ELFANT; ET AL.,
Defendants,

v.

LUPE C. TORRES, IN HER OFFICIAL CAPACITY AS THE MEDINA COUNTY ELECTIONS ADMINISTRATOR; TERRIE PENDLEY, IN HER OFFICIAL CAPACITY AS THE REAL COUNTY TAX ASSESSOR-COLLECTOR; AND KEN PAXTON, TEXAS ATTORNEY GENERAL,
Intervenor Defendants-Appellants.

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

INTERVENOR DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

Plaintiffs' response only underscores why their claims are premature and the district court's order is inappropriate. When asked to identify a single member whose right to vote had been abridged by the challenged provisions of S.B. 1111, Plaintiffs demurred on the ground that they were looking for such individuals. App.237-38, 346. Now, they defend the district court's jurisdiction based on organizational standing—a theory one of their representatives expressly disclaimed. App.242. At the same time, they ask the Court (at 7) to reject the Secretary of State's interpretation of one of the challenged provisions because he offered it during the course of this litigation rather than through a formal process—a process the Secretary never had the chance to complete as a result of Plaintiffs' rush to the courthouse without waiting to see if anyone was even injured. This Court should reject Plaintiffs' assertions and either grant a stay pending appeal or carry the motion with the case and leave the administrative stay granted on Friday, August 26, 2022, in place.

ARGUMENT

I. Intervenors Are Likely to Succeed on the Merits.

A. Plaintiffs lack Article III and statutory standing.

1. Diversion injury

Plaintiffs have not shown standing because they did not prove that they were forced to divert resources to counteract *S.B. 1111*'s provisions *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th

Cir. 2010). As Intervenors explained (at 8), Plaintiffs' evidence, which lumps together numerous statutes passed both in Texas and elsewhere, is too vague to establish an injury due to S.B. 1111 and fails to show S.B. 1111 requires them to engage in activities other than those they routinely undertake—voter registration and education. Plaintiffs respond (at 16-17) by cherry-picking portions of their organizational representatives' testimony. This fails to satisfy their burden.

First, read in context, neither of Plaintiffs' witnesses identified resources diverted specifically because of the challenged provisions of S.B. 1111. *California v. Texas*, 141 S. Ct. 2104, 2119 (2021). Voto Latino's representative testified that Voto Latino ended a Colorado program "[a]s a result of S.B. 1111 and all the other laws that came into effect," App.559, including "in the State of Texas and others." App.560; *see also* App.327. Similarly, the LULAC representative testified that LULAC "reduce[d]" programs regarding criminal-justice and immigration reform because of "not only S.B. 1111, but S.B. 1, both." App.580. He could not—and did not attempt to—identify costs of S.B. 1111 because, in his view, "they're really combined." App.569, *see also* App.580.

Second, Plaintiffs offered no evidence of what activities their resources are being diverted *to*, other than the voter registration and education activities they already undertake. App.559-60, 570, 578. But "an organization does not suffer an injury in fact where it expends resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015) (cleaned up). And as this Court has held, testimony that a challenged action "really takes away

from [an organization's] activities in other areas," such as "being able to do outreach and education," is too conjectural and hypothetical to demonstrate a cognizable injury. *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000). Plaintiffs have failed to prove "more than simply a setback" to their "abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Advising individuals with P.O. boxes to submit documentation of residence and helping voters figure out where to register to vote is not a frustration of Plaintiffs' purpose but a fulfillment of it. And because "examining and communicating about developments" in the law do not differ from Plaintiffs' routine activities, there is no injury. *City of Kyle*, 626 F.3d at 238; *see also Nat'l Ass'n for Latino Cmty. Asset Builders v. Consumer Fin. Prot. Bureau*, No. 20-CV-3122 (APM), 2022 WL 136794, at *3 (D.D.C. Jan. 14, 2022).

2. First Amendment injury

Plaintiffs next claim (at 17-18) that their speech is chilled because they face criminal prosecution by unidentified district attorneys if they inadvertently give bad advice about the residence provision. To prove an injury under this theory, Plaintiffs must show "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and "a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). Moreover, that likelihood of future enforcement must be "substantial." *California*, 141 S. Ct. at 2114. Plaintiffs failed to prove either. Nor have they shown the other requirements of standing.

a. Plaintiffs have not shown an injury arising from the residence provision, Tex. Elec. Code § 1.015(b)—the only provision for which Plaintiffs asserted this theory in the district court, App.13-16. The residence provision does not apply to Plaintiffs and does not contain any criminal penalties. Plaintiffs therefore argue that they seek to engage in conduct that amounts to "knowingly or intentionally . . . request[ing], command[ing], coerce[ing], or attempt[ing] to induce another person to make a false statement on a registration application" under Texas Election Code section 13.007(a)(2). Resp. 18. But Plaintiffs' representatives testified only to confusion about the law—not a desire to knowingly and intentionally encourage people to violate it. *See, e.g.*, App.555, 561-62, 570-73. Plaintiffs' proposed speech does not violate the statute they identify.

Plaintiffs have also not shown a "credible threat of prosecution." *Susan B. Anthony*, 573 U.S. at 159. They have not identified a single prosecutor who has indicated they intend to prosecute Plaintiffs under section 13.007(a)(2) for misdescribing the residence provision due to confusion. The district court concluded that the Attorney General's stated commitment to reducing election fraud on his website meant he would seek to prosecute Plaintiffs. App.1093. But the Attorney General cannot currently initiate criminal prosecution absent a request for assistance from a district attorney, *State v. Stephens*, Nos. PD-1032-20 & 1033-20, 2021 WL 5917198, at *1 (Tex. Crim. App. Dec. 15, 2021), and there is no evidence such a request is in the offing. Moreover, nothing on the cited webpage indicates an intent to prosecute Plaintiffs (or anyone else) for misunderstanding the law. Thus, even under the district court's reasoning Plaintiffs face no credible threat of prosecution.

b. Plaintiffs' reliance on section 13.007(a)(2) also creates a problem of traceability and redressability. *California*, 141 S. Ct. at 2113. They sued election administrators—not the district or county attorneys who could actually prosecute them. *See* Tex. Const. art. V, § 21. The district court ignored this problem, reasoning that election administrators are obliged to make a report to a district or county attorney when an ineligible person registers or votes. App.1094 (citing Tex. Elec. Code § 15.028). But this reporting obligation does not extend to those who allegedly encourage voter fraud, and such a report is neither necessary nor sufficient for a district attorney to prosecute. *See, e.g.*, *Crutsinger v. State*, 206 S.W.3d 607, 612 (Tex. Crim. App. 2006) (discussing factors involved in prosecutorial discretion). By failing to sue anyone who prosecutes violations of section 13.007(a)(2), Plaintiffs' standing fails the traceability and redressability prongs, too.

3. Statutory standing

Finally, Plaintiffs do not have statutory standing under section 1983. Plaintiffs fail to cite, much less distinguish, this Court's holding in *Vote.Org v. Callanen*, 39 F.4th 297, 304-05 (5th Cir. 2022), that section 1983 does not permit organizations to bring suit for injuries to third parties. Thus, to the extent Plaintiffs complain about injuries to others—their ability to register, to vote, and to speak—Plaintiffs lack statutory standing under section 1983.

That leaves only Plaintiffs' claimed First Amendment injury to themselves regarding the residence provision. Plaintiffs belatedly assert (at 19) that the temporary-relocation provision injures their First Amendment free-speech rights. But their complaint did not allege, App.13-16, and the district court did not rule that

the temporary-relocation provision violated Plaintiffs' free-speech rights, App.1112-13. Such a theory is thus waived. *See* Fed. R. Civ. P. 8(a) (requiring claims to be pleaded). And as described above, Plaintiffs have also not proven they are substantially certain to suffer a First Amendment injury.

B. Plaintiffs have not proven that S.B. 1111 violates the Constitution.

Plaintiffs' lack of standing is reason enough to stay the district court's order pending appeal. But their claims are also likely to fail on the merits because the challenged provisions of S.B. 1111 impose only "reasonable, nondiscriminatory restrictions" on voting, which the State's "important regulatory interests" are sufficient to justify. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Plaintiffs' contrary arguments are without merit.

1. P.O.-box provision

Plaintiffs' main argument (at 15) about the P.O.-box provision—a provision the district court found constitutional in most circumstances, App.1103-07—is that the Texas Secretary of State did not think it was necessary in a small slice of circumstances. That is not the constitutional test. *Burdick*, 504 U.S. at 434. Here, the district court agreed that asking individuals who register with a P.O. box to provide documentation of residence upon request was constitutional as a general matter given the States' interests in election integrity and ensuring voters get the right ballot. App.1107.

It is not "quibbling," as Plaintiffs claim (at 15), to point out that the district court's perception of the burden—disenfranchisement—was wrong. The type of "narrowly tailored" analysis that Plaintiffs demand is required only when a facially

neutral law places "severe" burdens on voting. *Burdick*, 504 U.S. at 434. There is no such burden: voters who fail to comply with the P.O.-box provision can still vote. Tex. Elec. Code §§ 15.081(a)(1), 15.112, 63.0011. Moreover, because the burden of compliance is minimal, that some subset of individuals may have marginal difficulty in complying does not render the law unconstitutional. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200-03 (2008) (plurality op.).

Plaintiffs make a half-hearted attempt (at 15) to compare the burden in this case to that in *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020). But in *Fish*, the law required every new voter to provide documentary proof of citizenship before they could register to vote, *id.* at 1112, and the plaintiffs put on evidence of over 31,000 applicants who had been denied registration, *id.* at 1127-28. That is not comparable to the law here (documentation of residence for P.O.-box users) or the facts (no evidence of harm). The P.O.-box provision is not an unconstitutional burden.

2. Residence provision

The residence provision, properly interpreted, is also constitutional because it is not vague, overbroad, or a restriction on core political speech.[1] *Contra* Resp. 5-11. Read in context, section 1.015 merely requires that an individual intend to make the residence his home and fixed place of habitation before registering to vote. Tex. Elec. Code § 1.015(a). There are no adverse legal consequences for someone who, in fact, seeks to change address. If his intent, however, is not to establish his home and fixed place of habitation, but instead to influence an election (and presumably return to his

[1] That Intervenors Torres and Pendley take no position regarding this issue does not render the Attorney General's position incorrect. *Contra* Resp. 2.

actual home afterward), then the residence provision prohibits him from establishing a false residence for purposes of voting. *Id.* § 1.015(b).

Plaintiffs' constitutional claims regarding the residence provision thus depend on adopting an expansive interpretation of section 1.015(b) that is contrary to the interpretation of the Secretary of State, App.123-30; the requirement that statutes be construed as a whole, *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018); and the canon of constitutional avoidance, *Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex. 1998); Tex. Gov't Code § 311.021(1). Plaintiffs seem (at 6-7) to argue that the Court should nonetheless adopt it because to do otherwise would render the provision surplusage. But the Supreme Court of Texas has recently confirmed that that canon is not the unwavering demand that Plaintiffs' argument requires. *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 579-83 (Tex. 2022). The Court should adopt the interpretation offered by the Secretary and conclude there is no constitutional violation.

Moreover, despite citing several election officials who did not understand the statute, Resp. 7-8, Plaintiffs did not provide evidence of prosecutors who intended to prosecute Plaintiffs for misunderstanding the residence provisions or individuals who were prevented from registering to vote because of the residence provision. *See* App. 237-38, 346. Plaintiffs' fears about the residence provision have not materialized in the year since it went to effect.

3. Temporary-relocation provision

Finally, Plaintiffs' response fails to rebut that on its face, the temporary-relocation provision's requirement that someone who seeks to establish a new

residence actually "inhabit" that residence applies only when an individual seeks to designate a "*previous* residence" as his home. Tex. Elec. Code § 1.015(f) (emphasis added). Thus, as the Secretary has explained, because temporarily leaving one's home does not result in losing one's residence, *id.* § 1.015(c), college students who intend to return home never lose their residence in their hometown and, thus, have no need to designate a "previous residence" as their home under subsection (f). Their hometown is their *current* residence.

Plaintiffs assert (at 13) that leaving one's home, even temporarily, renders that home a "previous residence." But that is unsupported by the statute: unless and until that individual establishes a new residence—a new "home and fixed place of habitation to which [he] intends to return after any temporary absence" *id.* § 1.015(a)—his hometown remains his residence, *id.* § 1.015(c), and there is no need to comply with subsection (f).

Moving past the plain text of the statute, Plaintiffs claim (at 12) that "unrebutted expert testimony" showed that college students will be left without a home for voting purposes. But Plaintiffs' "expert" did not purport to be an expert in the law, App.496-97, and did not consider the entirety of section 1.015, App.532-35. Regardless, courts—not experts—decide the meaning of the law. *See Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997); *Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1128-29 (11th Cir. 2018).

Even so, the injunction is overbroad. Mot. 17. Plaintiffs admit that they did not challenge the constitutionality of the first sentence in subsection (f) that "[a] person may not establish a residence at any place the person has not inhabited." Resp. 14.

And yet the district court enjoined it. App.1114. At a minimum, that portion of the injunction is unlawful. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996).

II. The Remaining Stay Factors Favor a Stay.

Plaintiffs' response also fails to rebut Intervenors' arguments (at 18-19) that the injunction risks irreparable harm, there is no risk of harm to Plaintiffs, and the public interest favors a stay. Plaintiffs insist (at 20-21) that there will be no confusion as election day approaches, but they do not deny that there are now two sets of laws that will be applied in Texas depending on a voter's county of residence. Registrars in Travis, Harris, and El Paso counties must comply with the injunction, but registrars in Collin, Galveston, and Lubbock counties do not. If anything, this exacerbates Plaintiffs' asserted concerns about confusion over what the law requires for voters who are changing or have changed addresses.

Plaintiffs also counter (at 21) that they will suffer an irreparable injury to their speech rights. But, as discussed above (at 3-5), Plaintiffs have not established any such injury. Moreover, Plaintiffs do not have a First Amendment interest in knowingly encouraging voter fraud. *See* Tex. Elec. Code § 13.007(a)(2).

Conclusion

The Court should stay the district court's injunction pending appeal.

Respectfully submitted.

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On August 29, 2022, this document was transmitted to the Clerk of the Court and served via CM/ECF on all registered counsel. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Lanora C. Pettit
Lanora C. Pettit

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This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2594 words, excluding the parts of the motion exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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