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

REPLY BRIEF FOR INTERVENOR DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiffs' case reflects a mismatch among the claims they brought, the evidence they adduced to attempt to show injury, the relief they obtained, and from whom. Because they lack associational standing and have not in any event identified a single actual voter that has been harmed by S.B. 1111, they must proceed, if at all, based on the injuries they have suffered as organizations. But Plaintiffs' theories of organizational standing fail at every turn. Plaintiffs' testimony shows that they have diverted resources because of some combination of S.B. 1, other voting laws passed in Texas, voting laws passed in other States, and S.B. 1111. And they have no inkling what portion of those resources may have been diverted *because* of S.B. 1111. For all their testimony shows, they might have engaged in the same course of conduct if S.B. 1111 did not exist at all. That is insufficient to establish standing based on a diversion of resources.

Plaintiffs likewise fail to show a chilling effect on their own speech. Indeed, they have only even alleged such a chilling effect arising from to the residence provision, and they cannot obtain relief based on alleged burdens on the right to vote because they do not vote. Moreover, because District Attorneys rather than election administrators enforce the criminal laws about which they complain, Plaintiffs have sued the wrong parties to remedy any chilling effect. And in any event the chain of inferences that links them to any potential prosecution is too long and too speculative to show a cognizable injury to their speech. For example, Plaintiffs rely mostly on Texas Election Code section 13.007—a statute they do not challenge—to argue they will be prosecuted if a college student lies on a registration application because of their

inadvertent bad advice about S.B. 111; but they never explain that a violation of that statute must be made "knowingly" or "intentionally." And they have failed to show they have statutory standing for good measure.

On the merits, S.B. 1111 easily passes constitutional muster. It reinforces a fundamental state policy: that people should vote where they live. This policy—which the district court agreed was legitimate—helps not just to combat voter fraud but also to ensure that voters get the right ballot. S.B. 1111 seeks to further that policy by (1) requiring voters who register using commercial P.O. boxes to confirm their residences, (2) reinforcing existing prohibitions against listing a false residence to influence an election, and (3) clarifying where individuals who live in a temporary residence should vote. These requirements further the important state interest in making sure that voters vote where they live, and burdens the right to vote little, if at all.

This Court should reverse the judgment of the district court.

ARGUMENT

I. Plaintiffs Lack Article III and Statutory Standing.

A. Plaintiffs lack Article III standing.

To establish standing under Article III, Plaintiffs must prove that (1) they have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, which is (2) fairly traceable to the enforcement of the specific challenged provision, and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because the district court found that they lack associational standing, Plaintiffs must

proceed on theories of harm to themselves. It is axiomatic that "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *see also Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 544 U.S. 724, 734 (1996)). They have failed to do so.[1]

Plaintiffs' "theories [of standing] appear to be in tension" because they "argue both that S.B. 1111 has compelled Plaintiffs to po[ur] money into voter education and that S.B. 1111 has deterred Plaintiffs' from educating voters." ROA.1913.

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

To show organizational standing through a diversion of resources, Plaintiffs must show that defendants' enforcement of S.B. 1111, "significantly and 'perceptibly impaired'" their ability to pursue their mission, resulting in a "drain" on their resources. *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Circ. 2010). Moreover, the diversion of resources must have been necessary and "in response to a reasonably certain injury imposed by the challenged law," *Zimmerman v. City of Austin*, 881 F.3d

[1] Plaintiffs suggest (at 32 n.4) that the district court erred when it concluded that LULAC lacks associational standing. But "arguments raised in a perfunctory manner, such as in a footnote, are waived." *OOGC Am., L.L.C. v. Chesapeake Expl., L.L.C.*, 975 F.3d 449, 456 n.10 (5th Cir. 2020) (quoting *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 345, F.3d 347, 356 n.7 (5th Cir. 2003)) *see Ctr. for Biological Diversity v. United States EPA*, 937 F.3d 533, 542 (5th Cir. 2019) ("Arguments in favor of standing, like all arguments in favor of jurisdiction, can be forfeited or waived."). Because Plaintiffs have waived that argument, they must show standing, if at all, as organizations.

378, 390 (5th Cir. 2018), not simply "a self-inflicted budgetary choice," *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017). And the expenditure needs to not be part of an organization's usual educational operations. *See Nat'l Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (1995). As Appellants explained in their opening brief (at 21-26) the district court erred when it concluded that Plaintiffs had demonstrated organizational standing through a diversion of resources. Their theory is beset by several problems.

1. As an initial matter, Plaintiffs did not show their alleged diversion-of-resources injury was caused by S.B. 1111. Plaintiffs' witnesses testified that they were diverting resources not based on S.B. 1111 but on "S.B. 1111 and S.B. 1 together," ROA.939, and "all the other laws that came into effect post-January," ROA.1258. Neither LULAC nor Voto Latino's representatives could disaggregate the diversion of resources from S.B. 1111 from the effects of S.B. 1, other voting laws passed in Texas, or even other voting laws passed in other states. ROA.951; ROA.1025.

This is facially insufficient. "Not every diversion of resources to counteract the defendant's conduct . . . establishes an injury in fact." *City of Kyle*, 626 F.3d at 238. Instead, enforcement of *S.B. 1111* must "significantly and 'perceptibly impair[]'" their ability to pursue their mission and drain their resources. *Id.* (citation omitted). But based on Plaintiffs' testimony, they might have engaged in precisely the same conduct—or at least made the same expenditures—if only S.B. 1, the dozen other new Texas election laws, or new laws in other States were passed. Defendants do not know what portion, if any, of their resources were designated to countering the effects of S.B. 1111 that they find objectionable—probably because its existence, at

most, changes the content of the voter education materials Plaintiffs would have published anyway. ROA.951; ROA.1025. Plaintiffs cannot demonstrate standing by alleging that S.B. 1111 has significantly and perceptibly impacted their mission when they cannot offer even conjecture about how many resources S.B. 1111 has caused them to divert.

Plaintiffs' three counterarguments are unavailing. *First*, they contend (at 29) that "Appellants distort the record" in making this argument. But even the testimony that Plaintiffs cite is in relation to "Texas and the other voter registration efforts that are—[alleged] suppression efforts that are happening at state levels." ROA.1034. Indeed, the portion of testimony from LULAC's representative on which Plaintiffs rely began with his statement that "[t]he difference has been the impact of the [alleged] voter suppression bills of S.B. 1111 and S.B. 1 together because they're really combined." ROA.939-40.

Second, Plaintiffs' take the position (at 30) that they need not quantify their costs. Appellants do not dispute that Plaintiffs need not calculate their harm with mathematical precision, or that their harm need not be large. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017). But Plaintiffs must show that they "diverted significant resources to counteract the defendant's conduct"—not some other law or action not before the Court. *City of Kyle*, 626 F.3d at 238. That is, Plaintiffs' problem is not that they have failed to adequately quantify their costs, but that by testifying that their expenditures responded to numerous new voting laws both in Texas and elsewhere, they have failed to show that they have taken any action because of S.B. 1111. Even the district court recognized that, for example, "LULAC is

. . . 'spending over maybe $1 million to $2 million in Texas' *to counteract election laws like S.B. 1111.*" ROA.1914. (emphasis added). But counteracting laws *like* S.B. 1111 does not demonstrate standing to challenge S.B. 1111 itself.

Third, Plaintiffs fall back to argue (at 19, 30 n.3) that, at most, there is a triable issue of material fact concerning whether they have shown standing through a diversion of resources. Of course, if there is a genuine dispute of material fact, the district court's grant of summary judgment was improper and must be reversed. *See* Fed. R. Civ. P. 56(a).

2. Even if Plaintiffs had shown they diverted funds to Texas because of S.B. 1111, they failed to show that diversion was necessary to avoid "a reasonably certain injury imposed [on them or their mission] by the challenged law." *Zimmerman*, 881 F.3d at 390. Absent that evidence, Plaintiffs simply made a budgetary choice that was a self-inflicted injury, unlike when parties regulated by a challenged statute must change their behavior to comply with the law.

3. Plaintiffs cannot demonstrate standing through diversion of resources because the expenditures are no different than Plaintiffs' ordinary activities. As organizations that engage in voter registration and education, Plaintiffs must routinely update materials, including to reflect new registration and voting dates and any changes in state election laws. Accordingly, Plaintiffs' "self-serving observation that [they have] expended resources to educate [their] members and others regarding [the challenged law] does not present an injury in fact." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995); *see El Paso County v. Trump*, 982 F.3d 332, 343-44 (5th Cir. 2020) ("[T]he organization's reaction to the allegedly unlawful

conduct must differ from its routine activities."). Where, as here, "the government's conduct does not directly conflict with [an] organization's mission," it is unlikely to be sufficient to establish an injury in fact. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996).

Plaintiffs' citations (at 30-31) to *Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 (1982), and *OCA-Greater Houston*, 867 F.3d at 610, are not to the contrary. In neither case did the plaintiffs rely on changes in the content of literature that plaintiffs would have published regardless of the challenged law to establish standing. Instead, the plaintiffs showed that they engaged in some activity in which they would not have otherwise engaged. In *OCA* the plaintiffs had also at least identified individuals who had been harmed by the law at issue. 867 F.3d at 608-09. Thus neither case supports the district court's finding that Plaintiffs had standing based on a diversion of resources.

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

Plaintiffs' response fails to adequately address at least four reasons why they failed to show standing through a chilling effect. *First*, except as to the residence provision, their claims are not based on an alleged chilling effect on their free-speech rights, but rather are based on the rights of voters. But because Plaintiffs are not voters, they cannot establish harm as voters. *Second*, they have sued election administrators that do not enforce the State's criminal statutes. *Third*, even assuming those problems did not exist, their fear of prosecution is entirely speculative. *Fourth*,

Plaintiffs fail to identify *any* individual who has in-fact been harmed by S.B. 1111 or imminently will be harmed.

1. Assuming Plaintiffs have shown that their organizations suffer harms because of an alleged chilling effect brought about by S.B. 1111, they nonetheless cannot explain how that shows standing for their claims that S.B. 1111 burdens the right to *vote*. ROA.42-44 (claims alleging "Undue Burden on the Right to Vote" and "Denial or Abridgment of the Right to Vote on Account of Age").[2]. Indeed, Plaintiffs only retort is to refer (at 27) to *Lujan*, 504 U.S. at 561, which they say establishes that "it is the record evidence—not the allegations in the complaint—that determine whether [they] have demonstrated standing at summary judgment." Although true, that misses the point: without the ability to vote, neither LULAC nor Voto Latino's right to vote can be burdened. Thus—without the ability to assert the harms of their members via associational standing—they cannot establish any harm sufficient to demonstrate standing and cannot trace the harm they allege to the statute. *California v. Texas*, 141 S. Ct. 2104, 2115, 2119 (2021).

2. Plaintiffs have not sued the proper parties based on their asserted fear of criminal prosecution—district or county attorneys who could, even hypothetically, prosecute them. *See* Tex. Const. art. V, § 21. Instead, Plaintiffs sued election administrators who are "powerless to enforce [S.B. 1111] against the[m]," *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc). Indeed, election administrators only

[2] As explained in Appellants' opening brief (at 12), the district court did not find any violation of the Twenty-Sixth Amendment (Count III) in any event. ROA.1936-1937.

have an obligation to report when an ineligible person registers to vote or votes; they do not have reporting responsibilities relating to Plaintiffs. Tex. Elec. Code § 15.028.

Plaintiffs contend (at 25) that *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) resolves this issue in their favor. Not so. Although the plaintiffs in *Susan B. Anthony List* sued the Ohio Elections Commission, *id.* at 154, that is because the relevant statute required "a panel of at least three Commission members" to "hold an expedited hearing, generally within two business days, to determine whether" probable cause existed that "the alleged violation occurred." *Id.* at 152-53 (citation omitted). The Commission had authority to "subpoena witnesses and compel production of documents." *Id.* at 153. And under the Ohio statute, the Commission could then either "refer the matter to the relevant county prosecutor" or "simply issue a reprimand" itself. *Id.* That Susan B. Anthony List could sue because it (and an intervenor) had already been subject to enforcement proceedings and the Ohio Election Commission could itself impose both onerous, expedited process and its own punishment is unsurprising. *See id.* at 164-167.[3]

Nothing like that exists here: the election administrators could only send an affidavit about "a person who is not eligible to vote" or who improperly registered or voted to "the attorney general, the secretary of state, and the county of district attorney having jurisdiction in the territory covered by the election." Tex. Elec. Code § 15.028. Just as in *Okpalobi*, Plaintiffs' argument "confuses the *statute's* [alleged]

[3] The same is true of this Court's opinion in *Speech First, Inc. v. Fenves*, 979 F.3d 319, 323 (5th Cir. 2020), where the plaintiffs filed suit against the president of the University that enforced its own speech policies.

immediate coercive effect on" them "with any coercive effect that might be applied by the *defendants*—that is" the election administrators they sued. *Okpalobi*, 244 F.3d at 426.

3. Past these basic deficiencies, Plaintiffs still have failed to comply with this Court's instruction that "to confer standing, allegations of chilled speech or 'self-censorship must arise from a fear of prosecution that is not "imaginary or wholly speculative."'" *Zimmerman*, 881 F.3d at 390 (quoting *Ctr. for Individual Freedom v. Carmouche*, 448 F.3d 655, 660 (5th Cir. 2006)). Indeed, Voto Latino admitted that it is not subject to criminal liability for speaking about voter registration. ROA.1025. Plaintiffs make three responses; none has merit.

First, Plaintiffs suggest they do not need to make such a showing, because of a presumption that a threat of prosecution is credible. But Plaintiffs rely (at 24) on cases where the challenged statute either restricted plaintiffs' speech or imposed penalties for speech. *See Susan B. Anthony List*, 573 U.S. at 152; *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301-03 (1979); *Barilla v. City of Houston*, 13 F.4th 427, 429, 432 (5th Cir. 2021); *Speech First, Inc.*, 979 F.3d at 323-26. That is not this case. S.B. 1111 does not restrict Plaintiffs' speech or impose penalties for their speech. Instead, Plaintiffs' chilling theory is premised on a provision that they do not challenge and that defendants do not enforce—Texas Election Code section 13.007—and on the possibility that they may be prosecuted for "attempt[ing] to induce another person to make a false statement on a registration application" based on a misunderstanding of S.B. 1111.

Second, Plaintiffs claim (at 22-23) to be confused about what S.B. 1111 requires, but they have never suggested that they intend to "knowingly or intentionally" cause someone to make a false statement on a voting application or vote illegally—as they must to be subject prosecution. Tex. Elec. Code § 13.007(a). *Id.* Nor have they plead, testified, or otherwise shown that they have or intend to "knowingly or intentionally . . . request[], command[], or attempt[] to induce another person to make a false statement on a registration application." *Id.* § 13.007(a)(2).

At most, Plaintiffs assert (at 26-27) that they "regularly engage in voter registration efforts," and thus face a "a credible risk that they will procure registrations that run afoul of the law's [allegedly] unclear requirements." But they still say nothing about violating the statute knowingly or intentionally. Thus, their subjective fear that a long and conjectural chain of circumstances might arise where they could be prosecuted based on "the decisions of independent actors" remains insufficient to establish a justiciable injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, 418 (2013); *see also Laird v. Tatum*, 408 U.S. 1, 13-14 (1972); *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011).

4. Plaintiffs' contend (at 24), that at least one voter did not register to vote because of S.B. 1111, but that is unsupported by the record. To the contrary, the Harris County Election Administrator repeatedly testified that she did not even know if anyone had been placed on the Suspense List (which does not by itself prevent anyone from voting) because of S.B. 1111. ROA.909 (Q: "You're not aware of anyone who, on account of SB-1111, has been added to the Harris County Elections Administrator's Suspense List?" A: "Correct."); ROA.910 (Q: "As you sit here, are you

aware of any voter in Harris County who did not vote on account of SB-1111?" A: "No.").

The Harris County Elections Administrator subsequently claimed to have been told by "[a] photographer who came to take my photo" that "because of the new provisions with SB-1111 and his residence" "he was confused as to whether or not it counted as a commercial residence, [and] that he no longer intended to register to vote in Harris County." ROA.910. But the same witness did not recall that person's name, when he came to take the picture, if the photographer ultimately registered to vote in Harris County, whether the photographer was a resident of Harris County, or whether that photographer was even a resident of Texas. ROA.910-11. That a photographer who might or might not have ultimately registered to vote and who might or might not even live in Texas made passing comments to Harris County's Election Administrator is inadmissible hearsay and does not show that S.B. 1111 is harming Texas voters.

In a recent similar challenge, this Court explained that pre-enforcement overbreadth challenges are disfavored. *See NetChoice, L.L.C. v. Paxton*, No. 21-51178, 2022 WL 4285917, at *4 (5th Cir. Sept. 16, 2022). In this context, "[i]nvalidate-the-law-now, discover-how-it-works-later judging is particularly troublesome for reviewing state laws, as it deprives 'state courts [of] the opportunity to construe a law to avoid constitutional infirmities.'" *Id.* at *5 (quoting *New York v. Ferber*, 458 U.S. 747, 768 (1982)). Yet that is just what Plaintiffs ask this Court to do here—though they have not identified a single individual who has in fact been harmed by S.B. 1111 or will be harmed by S.B. 1111.

B. Plaintiffs lack statutory standing.

As Appellants explained (at 30-32), not only do Plaintiffs lack Article III standing, they also lack statutory standing under section 1983. Plaintiffs fall outside of "the class of plaintiffs whom Congress has authorized to sue" under that statute, *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014), because they have not suffered the alleged "deprivation of any rights . . . secured by the Constitution and laws," 42 U.S.C. § 1983. "[A] person's right to vote is individual and personal in nature," and thus Plaintiffs, as organizations, lack any such voting rights. *Cf. Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quotation marks omitted). Furthermore, Plaintiffs cannot base their section 1983 claims on the constitutional rights of third-party Texas voters. *See Conn v. Gabbert*, 526 U.S. 286, 292 (1999) (holding an attorney "clearly had no standing to raise the alleged infringement" of his client's "right to have her attorney present outside the jury room" in his section 1983 action).

Plaintiffs wisely disavow (at 33), and thus have waived, their previous argument that they have third-party standing to bring section 1983 claims on behalf of others. ROA.1759; *see also United States v. Fernandez*, -- F.4th --, 2022 WL 4091411, at *5 (5th Cir. 2022). But Plaintiffs continue to insist (at 33-34) that they have statutory standing based on diversion-of-resources and First Amendment injuries. They are wrong on both counts.

First, even assuming Plaintiffs proved they suffered an Article III diversion-of-resources injury—which they did not, *see supra* Part I.A.1—that is not a substitute for showing a constitutional injury that can give rise to a cognizable section 1983

claim (as even the district court recognized, ROA.2178). "[L]ike all persons who claim a deprivation of constitutional rights" and file suit under section 1983, Plaintiffs "were required to prove some violation of their personal rights." *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986). Without a constitutional injury, Plaintiffs lack standing to assert a constitutional claim, regardless of whether they suffered an injury-in-fact. *See id.* at 1160-61 (concluding that a bystander who needed therapy following a police shoot-out lacked a cause of action under section 1983 because she did not suffer the alleged excessive force); *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011) (concluding plaintiff who lacked the alleged constitutional right "lacks standing to pursue th[e] constitutional claim"). That Plaintiffs disregard *Coons* and *Danos* in favor of cases that are inapposite,[4] or that this Court has already rejected as unpersuasive, does not demonstrate otherwise. *See Vote.org v. Callanen*, 39 F.4th 297, 305 (5th Cir. 2022) (citing *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011)). Such argument is without merit.

[4] *See* Pls' Br. at 33-34 (collecting cases); *Havens Realty Corp*, 455 U.S. at 372-73 (recognizing that the Fair Housing Act extended statutory standing to anyone who has an Article III injury); *Scott v. Schedler*, 771 F.3d 831, 835-37 (5th Cir. 2014) (discussing a statutory notice requirement and Article III injury, not statutory standing); *Doe #1 v. Trump*, 984 F.3d 848, 862 (9th Cir. 2020) (declining to address potential statutory standing issue sua sponte), *vacated sub nom. Doe #1 v. Biden*, 2 F.4th 1284 (9th Cir. 2021); *Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 692 (6th Cir. 2016) (discussing attorneys' fees); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 303-04 (3d Cir. 2014) (Ambro, J., concurring) (addressing Article III standing); *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (same); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 787, 794-95 (7th Cir. 2013) (recognizing abortion doctors have "first-party standing" when the challenged statute regulates their conduct and imposes penalties on them).

Second, Plaintiffs failed to prove they suffered a First Amendment injury, *see supra* Part I.A.2, but even if they did, that would only give them standing to assert that S.B. 1111 deprives them of their free-speech rights. It would not give them standing to bring a section 1983 claim that S.B. 1111 unconstitutionally burdens the voting rights of third parties. *See* Defs.' Br. at 31-32. Accordingly, Plaintiffs would, at the very most, only have statutory standing to assert their claim that the residence provision is vague and overbroad. ROA.39-42,1130-41. Because Plaintiffs challenge the P.O.-box and temporary-relocation provision only on the basis that those provisions unduly the burden the right to vote, especially the rights of young voters, ROA.42-44, 1143-51, they would still lack statutory standing to bring those claims.

II. S.B. 1111 is Constitutional.

The P.O.-box provision, the residence provision, and the temporary relocation provision are constitutional. Under the *Anderson-Burdick* test, courts "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Then, courts "must identify and evaluate the precise interest put forward by the State as justifications for the burden imposed by its rule." *Id.* (quoting *Anderson*, 460 U.S. at 789). Finally, courts weigh the "character and magnitude of the asserted injury" against the "precise interests put forward by the State," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 387-88 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (5th Cir. 1992)). The challenged provisions of S.B. 1111 place, at most,

a minimal burden on the right to vote and are thus subject to reasonableness review—a form of review that even the district court found satisfied by the State's interest in ensuring people vote where they live.

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

The State has a straightforward justification for the P.O.-box provision, as the district court recognized. It "make[s] sure that people vote where they live," that voters get the right ballot, and "prevent[s] fraud." ROA.1930-31; ROA.1935. And as the district court explained, the potential for registration fraud in this context is high: individuals can obtain P.O. boxes anywhere, can obtain multiple P.O. boxes, and can even manage them online. ROA.1930. This is no idle concern; S.B. 1111's sponsor explained that "4,800 voters registered at private UPS store P.O. boxes in Houston." ROA.780. As Appellants explained in their opening brief (at 36), these interests are particularly strong in Texas, which contains many small jurisdictions where even a handful of votes may decide an election. *See Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 196 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.").

What's more: the burden placed on a voter is slight. As Plaintiffs now concede (at 52-53), an individual who does not comply with the P.O-box provision is placed on the suspense list but may nonetheless vote by regular ballot provided he submits a statement of residence that satisfies Texas Election Code section 63.0011. Tex. Elec. Code §§ 15.081(a)(1), 15.112; *see also* ROA.1542.

Because the State has a compelling interest and no voter—even one who completely ignores the P.O.-box provision—is prevented from voting, the P.O.-box provision satisfies the *Anderson-Burdick* test. That should be the end of the matter.

Plaintiffs pivot (at 53-54) to analyzing—as the district court did—a subset of individuals who might fail to comply with the verification requirements of the P.O.-box provision but who nonetheless subsequently supply a valid residential address. The crux of Plaintiffs' argument is (at 54) that "courts should consider the law's impact on subgroups for whom the burden is more severe." As they put it, citing an out-of-circuit district court opinion—"[d]isparate impact matters under *Anderson-Burdick*." *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018).

This Court's precedent is to the contrary. Only two years ago, it rejected that argument. "[T]he severity analysis" in *Crawford* "is not limited to the impact that a law has on a small number of voters." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 236 (5th Cir. 2020). "For instance, *Crawford*'s three concurring Justices concluded that 'our precedents refute the view that individual impacts are relevant to determining the severity of the burden' that a voting law imposes." *Id.* (quoting *Crawford*, 553 U.S. at 205 (2008) (Scalia, J., concurring). Likewise, "[t]hough *Crawford*'s three-Justice plurality did not go as far as the three-Justice concurrence, it too examined the burden on 'most voters.'" *Id.* (quoting *Crawford*, 553 U.S. at 198). If this Court "were '[t]o deem ordinary and widespread burdens like these severe' based solely on their impact on a small number of voters, [it] 'would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and

equitable elections, and compel federal courts to rewrite state electoral codes.'" *Id.* (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)).

Thus, this Court has squarely rejected the Plaintiffs' contention on appeal—and the district court's reasoning below. The district court erred in even partially enjoining the P.O.-box provision.

B. The residence provision is constitutional.

Plaintiffs launch a bevy of arguments in support of their contention that the residence provision is unconstitutional.[5] They assert (at 35-39) that the residence provision prohibits constitutionally protected activity like running for office or volunteering with a political campaign. Plaintiffs next assert (at 40-44) that the residence provision is unconstitutionally vague. Finally, Plaintiffs assert (at 44-47) that the residence provision is unconstitutionally overbroad.

At the outset, Plaintiffs' theories are once again in tension. For example, they contend (at 36) that the residency provision plainly restricts a whole host of political activity, and (at 38-39) that it is so straightforward that there is no room for deference to the Secretary of State's interpretation or the canon of constitutional avoidance. But, at the same time, they contend that the residence provision is so vague that no

[5] That Intervenors Torres and Pendley take no position regarding the residence provision does not render the Attorney General's position incorrect. *Contra* Pls.' Br. at 3. A registration application does not ask a person their purpose in registering, and the residence provision does not affect county officials' registration duties. ROA.1527, 1684. In contrast, the interpretation of the other challenged provisions affects officials, because they send address confirmation forms when voters use a P.O. box and tell college students they can vote using their parents' address or college address. ROA.1550, 1689, 1694, 1776.

election administrator can understand it and the provision is unconstitutional. Plaintiffs cannot have it both ways.

1. Read in context, the residence provision simply requires someone to register using their actual residence—rather than a false one aimed at influencing an election. Subsection (a) provides that a "residence" is a "domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence." Tex. Elec. Code § 1.015(a). Subsection (b), the residence provision challenged here, provides that "[a] person may not establish residence for the purpose of influencing the outcome of a certain election." *Id.* § 1.015(b). Taken together, a person may establish any residence he chooses—so long as his intent in doing so is to make that residence his fixed place of habitation. An individual who moves for the purpose of influencing an election—without intending to establish a home or fixed place of habitation—thus violates the statue.

As Appellants explained in their opening brief (at 8-9), experience had proven that the existing laws preventing individuals from registering to vote at places they did not live were insufficient. It should come as no surprise then that the Texas legislature would take additional action, particularly in the context of a session of the legislature where it made many changes to the State's voting laws. *Cf. Yates v. United States*, 574 U.S. 528, 562 (2015) (Kagan, J., dissenting) ("The presence of" overlapping statutory provisions "may have reflected belt-and-suspenders caution."); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 344 (7th Cir. 2017) (en banc) ("Congress may certainly choose to use both a belt and suspenders to achieve its

objectives."). The Secretary of State's interpretation confirms as much. ROA. 825-26.

Plaintiffs complain (at 38) that the Secretary did not offer sufficiently formal guidance to receive deference. Of course, Plaintiffs filed this suit before S.B. 1111 was effective and before the relevant guidance could be issued. In any event, the Secretary of State's website confirms that "[w]hile SB-1111 modifies the definition of 'residence' under the Election Code, it does not alter the actions of a voter registrar upon receiving and reviewing a voter registration application." ROA.908. And defendants in this litigation confirmed that S.B. 1111 has not changed their procedures, past altering some of the forms that they use. *E.g.*, ROA.907-08.

Moreover, Plaintiffs' theory that the residence provision sweeps broadly to cover making political donations, moving to run for office, or volunteering for a political campaign is unsupported by either the text of the provision, its context, or Plaintiffs' own theory. Text and context make clear that the legislature aimed at preventing individuals from voting at places where they do not reside to influence an election, Tex. Elec. Code § 1.015, not from preventing voters or other individuals from participating in the political process. Again, the Secretary of State's interpretation confirms as much. ROA.827. So does the fact that Plaintiffs have sued election administrators, who, under Plaintiffs own theory may make reports for false statements on applications to register to vote. Tex. Elec. Code § 13.007. Election administrators' role in voter registration has nothing to do with micromanaging the behavior Plaintiffs hypothesize may be covered such canvassing, campaigning, or making political donations.

At a minimum, the Court should construe the provision to avoid constitutional doubt and make clear that it covers registering to vote where an individual does not reside, but not the full range of behavior that Plaintiffs speculate that it might cover. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). This is especially true here, where Plaintiffs have launched a facial constitutional challenge before any Texas court has even had the opportunity to interpret the residence provision—or S.B. 1111 more generally. *Netchoice*, 2022 WL 4285917, at *5.

2. Equally without merit is Plaintiffs' assertion (at 40-44) that the residence provision is unconstitutionally vague. A "statute is not unconstitutionally vague merely because" there is "uncertainty about its application to the facts of [a] case." *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. 1980). Courts exist, in part, because all laws "are considered as more or less obscure and equivocal" until ruled upon in litigation. The Federalist No. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961). If a statute were unconstitutionally vague simply because "two lawyers may read [it] differently," no statute would pass constitutional muster. *Nautilus Ins. Co. v. Int'l House of Pancakes, Inc.*, 622 F. Supp. 2d 470, 481 (S.D. Tex. 2009). Instead, the Constitution is satisfied so long as the "core of prohibited activity is defined." *Ford Motor Co.*, 264 F.3d at 509.

The residence provision easily meets this test, notwithstanding the testimony from defendants who declined to defend S.B. 1111 on the merits. Other than revising forms, S.B. 1111 does not require election administrators to change their practices.

ROA.907-08. And the Secretary of State, who is charged with interpreting the election code, Tex. Elec. Code §§ 31.003, .004, has provided guidance that make clear "SB-1111 does not alter the actions of a voter registrar upon receiving and reviewing a voter registration application." ROA.908; *see also* Election Advisory No. 2021-10, Tex. Sec'y of State, https://www.sos.state.tx.us/elections/laws/advisory2021-10.shtml. That Plaintiffs have failed to identify any individual who did not register to vote because of this provision, ROA.938; ROA.1047, only buttresses this conclusion.

3. Plaintiffs contend (at 44-47) that the residency provision is overbroad. But that conclusion turns entirely on the idea that the residency provision regulates a broad array of conduct rather than registering to vote. Because it does not, *supra* Part II.B.2, it is not overbroad compared to its plainly legitimate sweep.

C. The temporary-relocation provision is constitutional.

Finally, as Appellants explained in their opening brief (at 41-43) the temporary-relocation provision also imposes (at most) a minimal burden on voting because it allows college students and similarly situated individuals to vote where they reside. ROA.838-39. An individual who is temporarily away from his residence has not established a new residence, and so may register at that location. *Willet v. Cole*, 249 S.W.3d 585, 588 (Tex. App.—Waco 2008, no pet.).

Plaintiffs' entire argument turns on an atextual reading of the statute and a mistaken definition of inhabit. Section 1.015(f) prohibits a voter from "designat[ing] a previous residence as a home and fixed place of habitation unless the person inhabits the place at the time of designation and intends to remain." Tex. Elec. Code § 1.015(f). By referring to a "previous residence," the statute's text assumes that the

previous residence is no longer the individual's current residence. But, again, "[a] person does not forfeit residency by leaving the person's home for temporary purposes only." *Willet*, 249 S.W.3d at 588. And so, for example, a college student who intends to return to his parent's home does not need to designate "a previous residence" for purposes of the temporary-relocation provision because he never established a new residence. The statute is just not implicated. By the same token, one who does not intend to return may simply establish a new residence where he lives, and the temporary-relocation provision is satisfied.

The definition of "inhabit" buttresses Appellants' reading. "Inhabit" means "to live or reside in." Inhabit, The American Heritage Dictionary of the English Language, 902 (5th ed. 2016). It may also mean "[t]o dwell in; to occupy permanently or habitually as a residence." Inhabit, Black's Law Dictionary (11th ed. 2019). As anyone who has traveled on vacation can attest, an individual may still "inhabit"—that is, "occupy permanently"—a residence that he is temporarily away from. Plaintiffs and the district court thus erred in asserting that the temporary-residence provision creates individuals who cannot register to vote because those individuals do not inhabit their residence.[6]

[6] The district court's injunction is overbroad and at a minimum should be narrowed for the reasons stated (at 43-47) in Appellants' opening brief.

Conclusion

The Court should reverse the judgment of the district court.

Respectfully Submitted.

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Certificate of Service

On September 30, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,473 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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