**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

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|---|---|---|
| VOTE.ORG,<br>*Plaintiff*, | § | |
| v. | § | CIVIL ACTION NO. 5:21-cv-00649 |
| 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 theDallas County Elections Administrator,<br>*Defendants,* | § | |
| And | § | |
| KEN PAXTON, in his official capacity as the Attorney General of Texas, LUPE C. TORRES, in his official capacity as Medina County Elections Administrator, and TERRIE PENDLEY, in her official capacity as Real County Tax Assessor-Collector,<br>*Intervenor-Defendants*. | § | |



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**DEFENDANT-INTERVENORS AND DEFENDANT REMI GARZA'S CONSOLIDATED REPLY IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT**

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Defendant-Intervenors Ken Paxton, Lupe Torres, Terrie Pendley, and Defendant Remi Garza (collectively, Defendants) jointly file this Reply in Support of each of their Motions for Summary Judgment, ECF 108, 109, and will respectfully show the Court as follows:

## INTRODUCTION

The Consolidated Response to both of the defendant-side Motions for Summary Judgment pending before the Court shows that Plaintiff is unable to carry its summary-judgment burden on any of the issues identified in the motions. Plaintiff cannot demonstrate standing because it does not have sufficient evidence creating a genuine issue of material fact as to its injury in fact, its self-inflicted harm, or its invalid third-party claims. Even if the Court finds standing, Plaintiff also presented insufficient evidence as to whether voters' rights are violated under the Constitution or the Civil Rights Act because the alleged burden, if any, is substantially outweighed by multiple compelling state interests, Plaintiff has no cause of action under Section 1971, and (assuming a right of action exists) the challenged law does not violate the Materiality Provision. The Court should grant both Motions for Summary Judgment.



## ARGUMENT

### I. Plaintiff lacks standing because it has suffered no concrete and particularized injuries that are fairly traceable to Defendants' conduct, and which would be redressed by a favorable decision.

Plaintiff's Response to Defendants' Motion for Summary Judgment merely repeats the same standing arguments made in Plaintiff's Motion for Summary Judgment. ECF 111 at 11–13; ECF 128 18–24. Defendants responded to these arguments in Defendants' Response to Plaintiff's Motion for Summary Judgment, which is adopted and incorporated by reference. ECF 124 at 11–20. For the sake of brevity, Defendants will address the claim that the Secretary enacted HB 3107 specifically to deprive Plaintiff from the use of its e-signature tool. ECF 128 at 19. Every time Plaintiff repeats this inaccurate claim it grows more bombastic, with the most recent iteration ascribing legislative intent to the

Secretary's actions. *Id.*

There is no basis for finding that HB 3107 was "enacted specifically with intent to impair Vote.org's activities." ECF 128 at 19. Keith Ingram testified that he sent draft HB 3107 language on behalf of the Secretary's Office to the Texas Legislative Council. Ingram Dep. at 98:2–18, Appx. 400, ECF 108-1 at 404. Ingram testified that he was unsure how different the language used by the Texas Legislative Council was from the draft language he submitted. *Id.* at 98:20-99:10. He testified that the reason for the requested change was "[t]o make it very clear that you couldn't use a copy of a voter registration application. They needed to have the original voter registration application arrive within the four days so the voter could be registered." *Id.* at 99:18–100:6. Ingram further testified the motivation for the change was both Plaintiff's "misunderstanding of Texas law" and because an Assistant County Attorney had advised Defendant Elfant to accept applications without a wet signature because "she just assumed the law must have changed when she saw 'copy' in this provision." *Id.* at 102:3–105:18, Appx. 401–02, ECF 108-1 at 405–06. The Legislature considered, debated, amended, and obtained public comment on HB 3107. It passed unanimously. Resp. Appx. 59–61, ECF 125-1. It could not have been meant specifically to prevent Plaintiff from using its e-sign tool because it had ceased using the tool back in 2018; instead, as Ingram testified, it was merely intended to clarify the already existing law.



**Prudential and Statutory Standing**

In addition to Article III standing, the Supreme Court has previously recognized the following three types of judicially self-imposed limitations: "[(1)] the general prohibition on a litigant's raising another person's legal rights[;] [(2)] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches[;] and [(3)] the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004), *abrogated by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572

U.S. 118 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Collectively, these judicially self-imposed limits have been referred to by the misnomer "prudential standing." *Lexmark Int'l*, 572 U.S. at 127 (quoting *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–676 (2013)).

In *Lexmark*, a unanimous opinion, the Supreme Court clarified that the prohibition on generalized grievances is not a matter of prudential standing, but instead is merely another way of identifying analyzing the "injury-in-fact" requirement of Article III standing. *Id.* at 127 n.3. *Lexmark* clarified that the zone-of-interests requirement is not a matter of prudential standing, but instead one of statutory standing. *Id.* at 127 ("Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."). *Lexmark* did not change the "prudential standing" doctrine generally prohibiting third-party standing or *jus tertii*. *Id.* at n.3.



**A. Plaintiff should not be permitted sue on behalf of eligible Texas voters because it does not have a close relationship with them and there is no genuine obstacle preventing them from protecting their own interests.**

Ordinarily, a litigant cannot raise the legal rights of another person. *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *Superior MRI Services, Inc. v. All. Healthcare Services, Inc.*, 778 F.3d 502, 506 (5th Cir. 2015) (recognizing that *Lexmark* did not change the prudential requirement that a party must assert its own rights). However, the prohibition on third-party standing is not absolute. *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004). A litigant has third-party standing to sue on behalf of a third party if: (1) the litigant has a close relationship with the third party; and (2) there is a genuine obstacle to the third party's ability to protect their interests. *Powers*, 499 U.S. at 411. The Supreme Court "[has] not looked favorably upon third-party standing." *Kowalski*, 543 U.S. at 130 (denying third-party standing to attorney seeking to litigate right of client); *Conn v. Gabbert*, 526 U.S. 286, 292–93 (1999) (same); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988) (alumni, football players, and cheerleaders lacked third-party standing to assert claims of university).

**1. Plaintiff does not have a close relationship with eligible Texas voters.**

A litigant has a close relationship with a third-party whose rights it seeks to assert if their "enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" and "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton v. Wulff*, 428 U.S. 106, 114–15 (1976). If the litigant and the third party have a close relationship and the litigant is a part of the third party's exercise of the right, then the court's "construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." *Id.* at 114-15.

In *Richardson*, this Court held that the Coalition of Texans with Disabilities (CTD) had third-party standing to challenge the signature-comparison procedures for mail-in ballots "on behalf of disabled Texans who are disproportionately more likely to be affected by the signature-comparison processes." *Richardson v. Tex. Sec'y of State*, 485 F. Supp. 3d 744, 773 (W.D. Tex. 2020), *rev'd in part, vacated in part sub nom. Richardson v. Flores*, 28 F.4th 649 (5th Cir. 2022). CTD's mission was "to advocate for [disabled individuals'] rights to access" and part of that work included efforts to protect "the rights of all Texans with disabilities to participate fully in the voting process." *Id.* This Court determined that there was a close relationship between CTD and disabled Texas voters because the evidentiary record showed "specific evidence regarding multiple members of the organization who intend to vote by mail but expect to have difficulties complying with the existing signature-comparison procedures due to their disabilities." *Id.* This Court ultimately concluded that CTD's claims were central to its organizational purpose, and it was likely to vigorously advocate for the rights asserted. *Id.* at 774.

Similarly, in *Inclusive Communities*, a district court held that the Inclusive Communities Project (ICP) had third-party standing to sue, on behalf of its African-American clients, the Texas Department of Housing and Community Affairs for considering race when allocating Section 8 tax credits. *Inclusive Cmties. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs.*, No. CIV.A.3:08-CV-0546-D, 2008 WL 5191935,

at *7 (N.D. Tex. Dec. 11, 2008). The district court found that ICP had "a close, essentially representative relationship with its [African-American] clients." *Id.* "It acts like their agent in locating integrated rental housing, and, at times, negotiating housing terms. ICP is therefore an integral part of its clients' exercise of their equal housing-related rights." *Id.* The district court determined that the "representative, advocacy-based relationship" between ICP and its clients dispenses with any implication that the suit involved an unnecessary or undesired adjudication of third-party rights. *Id.* Finally, the district court concluded that the suit was completely consistent with ICP's mission and its advocacy-based relationship with its clients, so the organization was likely to vigorously advocate for the rights asserted. *Id.*

Conversely, Plaintiff has not and cannot show a close relationship with all eligible Texas voters. Plaintiff's Complaint asserts third-party standing on behalf of every single eligible Texas voter. *See* ECF 1 at ¶¶ 40 ("enforcement of the Wet Signature Rule will deprive Texans– including the voters Plaintiff helps register"), 45 ("yet another logistical hurdle that eligible Texans must navigate"), 47 ("the burden it imposes on voters—including the voters that Plaintiff helps register"). Plaintiff seemingly contends that it has a close relationship with approximately 17 million registered Texas voters, as well as an unknown number of unregistered eligible voters, because it helped an unknown number of them register to vote.[1] *Id.* This is distinguishable from *Richardson*, where the CTD only sought to vindicate the third-party rights of disabled Texas voters, and *Inclusive Communities*, where ICP only sought to vindicate the rights of its African American clients. Both CTD and ICP asserted third-party standing solely on behalf of their **members**, whereas Plaintiff asserts third-party standing on behalf of **all** eligible Texas voters, "including the voters [it] helps register." ECF 1 at ¶¶ 40, 47. Plaintiff



[1] Plaintiff's CEO admitted that the organization does not know how many of its users successfully registered to vote. Hailey Dep. 311:5-315:5, Appx. 132-33, ECF 108-1 at 136–37 (admitting that the organization's public statements are false, that it only tracks the number of users who "start" the registration process, and that it does not track whether users successfully register to vote).

has provided no evidence, argument, or legal authority showing it has any relationship, much less a close relationship with all eligible users.

Plaintiff doesn't even have a close relationship with the Texans it helped register to vote. Plaintiff's third-party standing claim is premised on it helping some eligible Texans register to vote. ECF 1 at ¶¶ 40, 47. Plaintiff's Complaint claims at least six separate times that it either "helps" or "assists" with registering voters. ECF 1 at ¶¶ 10, 17, 18, 27 40, 47. But, Plaintiff's CEO was adamant at her deposition that the organization **does not** "help" or "assist" with registering voters. *See, e.g.*, Appx. 104, ECF 108-1 at 77, 74:17 ("Vote.org doesn't register voters."), 309:21-25, Appx. 131, ECF 108-1 at 135 ("Vote.org doesn't assist people in registering to vote."), ECF 108-1 at 135–40 (17-page deposition exchange where Plaintiff's CEO repeatedly insists Vote.org neither helps nor assists with registering voters). Instead, she explained that Vote.org "built a tool" that is just "sitting there" so users can "register themselves."[2] 325:5-15, Appx. 135, ECF 108-1 at 139. Plaintiff cannot have a close relationship with "those it helps register" while simultaneously denying that it helps anyone register.

Even if a relationship exists between Plaintiff and all eligible Texas voters, there is no evidence that they share the same goals. *Richardson* and *Inclusive Communities* both involved organizations whose main goal was advocacy on behalf of their members. Plaintiff has presented no evidence that its main goal is advocating for the rights of eligible voters; on the contrary, it describes itself not as an advocacy organization, but as a voter registration and get-out-the-vote technology platform. ECF 1 at ¶ 17. Moreover, ICP and CTD both presented direct evidence to the court showing that their members **wanted** them to advocate on behalf of their rights. Plaintiff has produced no similar evidence. It



[2] *But see Craig v. Boren*, 429 U.S. 190, 195 (1976) (collecting cases); *United States v. Coil*, 442 F.3d 912, 915 n.2 (5th Cir. 2006) ("The Supreme Court has consistently upheld the standing of vendors to challenge the constitutionality of statutes on their customers' behalf where those statutes are directed at the activity of the vendors."). On the other hand, vendor standing is uncertain when materials are provided free-of-charge on the Internet. *Def. Distributed v. U.S. Dep't of State*, 121 F. Supp. 3d 680, 697 (W.D. Tex. 2015), *aff'd sub nom. Def. Distributed v. United States Dep't of State*, 838 F.3d 451 (5th Cir. 2016) (noting that "it is not at all clear that distribution of information for free via the Internet constitutes a commercial transaction" for the purposes of third-party vendor standing).

cannot cite to anywhere in the evidentiary record where an eligible Texas voter even expressed opposition to the wet signature rule. This Court should find that Plaintiff lacks third-party standing because it cannot show a close relationship with eligible Texas voters.

**2. There is no genuine obstacle to eligible Texas voters' ability to protect their own interests.**

If a genuine obstacle prevents the third party from asserting the right, then his absence from court "loses its tendency to suggest that his right is not truly at stake, or truly important to him." *Singleton*, 428 U.S. at 116. "Something more than a hypothetical hindrance is required" to show that there is a genuine obstacle to the third party's ability to protect its own interests. *Pharm'y Buying Ass'n, Inc. v. Sebelius*, 906 F. Supp. 2d 604, 616–17 (W.D. Tex. 2012) (citing *Miller v. Albright*, 523 U.S. 420, 448 (1998) (noting petitioner had not shown "substantial hindrance" or "genuine obstacle" to third party's ability to assert their own claim).

A claim of hindrance is rebutted by the participation of the third-party as a plaintiff. *Id.* (no third-party standing on behalf of Medicaid recipients when recipients were participating as plaintiffs); *see also* e.g., *Equal Access for El Paso, Inc. v. Hawkins*, 428 F. Supp. 2d 585, 606 (W.D. Tex. 2006), *rev'd on other grounds*, 509 F.3d 697 (5th Cir. 2007) (same); *Def. Distributed*, 121 F. Supp. 3d at 697 (same).

In *Hughs*, the same attorneys representing Plaintiff challenged the wet signature rule on behalf of the Texas Democratic Party, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee (Democrats). *Texas Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 855 (W.D. Tex. 2020), *rev'd and remanded*, 860 F. App'x 874 (5th Cir. 2021). The Democrats "expended resources to promote and employ" Plaintiff's e-sign tool. *Id.* The district court found that the Democrats had organizational, associational, and third party standing on behalf of their eligible voting members to challenge the wet signature rule. *Id.* On appeal, the Fifth Circuit concluded that the Court had no jurisdiction because they sued the wrong defendant. *Hughs*, 860 F. App'x at 879.

Plaintiff's third-party hindrance claims are conclusively rebutted by the fact that their own

attorneys previously brought the same suit challenging the wet signature rule on behalf of Democrats, which included eligible voter associational members. *Id.* This strongly suggests that the absence of eligible Texas voters from this suit is not because of any hindrance, but instead because their voting rights are not at stake and the wet signature rule is not something that is truly important to them. *Singleton*, 428 U.S. at 116. No further analysis is necessary.

**B. Plaintiff lacks statutory standing because it is not within the zone of interests, as its alleged injuries were not proximately caused by violations of the statute.**

An organizational plaintiff has statutory standing if it: (1) falls within a statute's "zone of interests" and (2) its alleged injuries were "proximately caused by violations of the statute."[3] *Lexmark Int'l*, 572 U.S. at 129. "Whether a plaintiff comes within the zone of interests is an issue that requires [courts] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* at 127 (internal quotation marks and citation omitted). "[T]he breadth of the zone of interests [of a given statute] varies according to the provisions of law at issue[.]" *Id.* at 130 (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). The test is "not especially demanding." *Id.* at 130. It "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* (internal quotation marks and citation omitted).



In *White Glove*, the Fifth Circuit considered whether a company, White Glove, that provided staffing to a client under a prospective contract, had statutory standing to sue when a client, Methodist Hospitals, purportedly racially discriminated against the provided staff member and terminated its prospective contract with White Glove. W*hite Glove Staffing, Inc. v. Methodist Hosps. of Dall.*, 947 F.3d 301, 304 (5th Cir. 2020). White Glove alleged a violation of § 1981 against Methodist; however,

[3] For the sake of brevity, Defendant-Intervenors and Defendant Garza adopt by reference their prior injury and causation arguments relating to Article III standing, which apply equally here. ECF 123-1 at 11–20.

Methodist argued that only the individual staff member, not White Glove, had standing to sue. *Id.* Applying the "zone of interests" test to determine whether White Glove possessed standing, the Fifth Circuit first looked to the language of § 1981. *Id.* at 307. Section 1981 states: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981. The Fifth Circuit ultimately found that White Glove satisfied the "zone of interests" test, specifically finding that Methodist allegedly "impinged on its right to contract" and that its claim was not "so marginally related to or inconsistent with the purposes implicit in § 1981 that it cannot be reasonably assumed that Congress authorized White Glove to sue." *Id.* at 307-08 (citing *Lexmark*, 572 U.S. at 130).

Plaintiff has previously raised the same arguments, so for the sake of brevity, Defendants adopt and incorporate by reference Defendants Motions to Dismiss which address these arguments. ECF 31 pp. 2–4; ECF 53 pp. 9–10; ECF 63 pp. 5–6. In any event, *White Glove* is inapplicable here because it involved an entirely different statute and the right to "contract," which is categorically different than the right to vote. Plaintiff has not and cannot identify a case where an organization had statutory standing to assert a voting rights solely in an **organizational** capacity.



## II. Plaintiff's claims of disparate treatment, raised for the first time in its Response, are barred.

Paragraph 36 of the Complaint alleges:

> For some eligible Texans, the burdens caused by the Wet Signature Rule will be insurmountable. In order to register under the Wet Signature Rule, a voter needs access to a printer to print and sign an application. If the voter lacks access to a printer, then they must wait for local officials or another third party to provide a physical copy of the form for them to sign. For many voters—such as [(1)] those whose local officials choose not to distribute applications, [(2)] who do not have access to registrar's offices due to lack of transportation, or [(3)] who live in rural areas outside the reach of third-party organizations—these options are insufficient and create unnecessary barriers to the franchise.

Compl. for Declaratory & Injunctive Relief ¶ 36, ECF 1. The Complaint therefore asserts that the following groups of voters who lack access to a printer are the only ones on whose harm Plaintiff bases the claims in this lawsuit: (1) voters whose local officials choose not to distribute applications; (2) voters who lack transportation; and (3) rural voters. Not only has Plaintiff produced no evidence that any voter falling into these categories is actually harmed by not being able to use the e-sign tool (an expert's conclusory assertions do not suffice), but Plaintiff also attempts to assert **new** categories of voters facing harm in their Response to Defendants Paxton and Garza's Motion for Summary Judgment. Pl.'s Consolidated Opp'n to Def.'s Mots. for Summ. J. at 29, ECF 128. Specifically, Plaintiff appears to rely on its expert's opinion as evidence that younger voters, renters, minorities, and low-income voters face a disparate burden as a result of the wet signature rule. *Id.*

The Court may not consider claims that are not included in the live complaint but raised for the first time in response to a motion for summary judgment—such claims "are not properly before the court." *Cutrera v. Bd. of Supervisors*, 429 F.3d 108, 113 (5th Cir. 2005) (*citing Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990)). Plaintiff was required to file any amended or supplemental pleadings no later than November 29, 2021, and its failure to amend to include these claims means that they are now barred. ECF 64 at 2; *see Cutrera*, 429 F.3d at 113. Plaintiff's choice to assert these claims after the close of discovery and without amending or supplementing its pleadings is a surprise and materially prejudices the ability of Defendant-Intervenors and Defendant Garza to defend themselves. The Court should disregard all of Plaintiff's statements regarding a disparate impact on any category of voter not included in the Complaint because Plaintiff has failed to produce evidence connected to any of these groups identified in its complaint. *See Cutera*, 429 F.3d at 113. The Court is not required to analyze the question of whether these groups are harmed and need not proceed any further—summary judgment is proper on this ground alone. *See id.*

## III. No evidence supports the finding of an unconstitutional burden on affected voters.

Plaintiff has not met its burden to establish the existence of a genuine issue of material fact as to whether HB 3107 causes it to suffer an unconstitutional burden under the *Anderson-Burdick* rubric. Defendants have suggested that there is no burden on the right to vote in this case because Plaintiff itself is not a Texas voter and it concedes that it is not acting on behalf of any members of its organization. Nobody is suggesting that the wet signature rule has no discernible effect on the voting population in the abstract, but the Court has no concrete evidence before it to establish what burden voters may face. Defendants are entitled to summary judgment because, even considering the burden in the abstract, Plaintiff does now show that it is so severely burdensome as to be unjustified by any state interest in ensuring fair and secure elections.



### A. Since the inception of voter registration in Texas, the Election Code has always required a registration application "in writing and signed by the applicant."

In 1965, the Texas Constitution was amended to remove poll taxes and require the legislature to instead provide for voter registration for all eligible voters. Tex. Const. art. VI, §§ 2, 4. By 1972, all eligible voters were permitted to apply to register to vote either "in person or by mail." Act of May 31, 1971, 62nd Leg., R.S., ch. 827 (S.B. 51), § 3, 1971 Tex. Gen. Laws 2509, 2510 (formerly codified at Tex. Elec. Code Ann., art. 5.13a). Absent physical disability or illiteracy, the law stated that the "application shall be signed by the applicant or his agent." *Id.* at 2511. An applicant's effective registration date was 30 days after the date their application was received by the registrar. *Id.* at 2527. (formerly codified at Tex. Elec. Code Ann. art. 5.11a). By 1984, registrars were deemed to have received an application submitted by mail on the day that it was postmarked. Act of May 12, 1983, 68th Leg., R.S., ch. 226 (H.B. 1111), § 1, 1983 Tex. Gen. Laws 959 (formerly codified at Tex. Elec. Code Ann. art. 5.13a). When SB 910 passed in 2013 to permit fax transmission to guarantee an earlier effective date, the counties uniformly understood this provision to require the hard copy be signed with wet ink. Act of May 27, 2013, 83rd Leg., R.S., ch. 1178 (S.B. 910), § 3, 2013 Tex. Gen. Laws 2923,

2923–24; *see* Lopez Dep. at 104:8–22, Appx. 509; Appx. 292, 277:16–21; Callanen Dep. at Appx. 165, 82:14–83:14, 87:5–10, Appx. 165–66; Appx. 500, 65:1–66:8; Appx. 508, 97:7–98:1; Nagy Dep. at 276:16–277:14, Appx. 291–92; Garza Dep. 147:11–148:17, 155:5–21, Appx. 371, 373. Plaintiff is wrong to say that Travis County "did not previously apply a wet signature requirement," ECF 128 p. 29, because Defendant Bruce Elfant and his representative testified that accepting imaged signatures in 2018 was a "policy change" from how the office had previously processed registrations. Appx. 291, 276:16–277:2; Appx. 332, 438:5–9.

The Texas Legislature adopted what is known today as Section 13.002 in 1985, which provides that "[a] registration application must be in writing and signed by the applicant." Tex. Elec. Code § 13.002. Act of May 13, 1985, 69th Leg., R.S., ch. 211, Sec. 1, § 13.002(b), 1985 Tex. Gen. Laws 802, 815. The Court must give this statute its original meaning as of the time the statute was enacted—that only a person's written signature satisfies the requirement. *See VIA Metro. Transit v. Meck*, 620 S.W.3d 356, 369 n.15 (Tex. 2020) (citing *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)). This statute could not have meant that electronic or imaged signatures were permissible when this legislation was passed in 1985 because the internet did not exist, and this Court should not subscribe to Plaintiff's new meaning suggesting that this statute always allowed electronic signing. *See id.*; *see also* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts, 78, 82–83 (West 1st Ed. 2012) ("When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of the first two branches of government—elected legislators and . . . elected executive officials and their delegates."). The Sixth Circuit refused to re-write Ohio's election code for essentially the same reasons when it reversed a district court injunction that had mandated acceptance of electronic signatures in the candidate-petitioning process. *See Thompson v. Dewine*, 976 F.3d 610, 620 (6th Cir. 2020). Even when pandemic conditions made collecting physical signatures much more burdensome, the *Thompson* court

found that *Anderson-Burdick* scrutiny did not compel the use of electronic signature collection in contravention of the statutory language. *Id.*. The Court should apply this reasoning to its burden analysis in this case to find that the original meaning controls.

The Court observed in *Stringer v. Pablos* that no provision of the Texas Election Code expressly prohibits the use of electronic signatures in Texas's electoral process. 320 F. Supp. 3d 862, 896–97 (W.D. Tex. 2018), *rev'd & remanded Stringer v. Whitley*, 942 F.3d 715 (5th Cir. 2019). But *Stringer* concerned the right to automatic voter registration when changing the voter's address for purposes of online driver-license renewal under both the National Voter Registration Act (NVRA) and the Texas Election Code. *Id.* at 868. The Court made a similar observation in deciding *TDP v. Hughs*, but that case was not decided with the benefit of full discovery and was ultimately dismissed for lack of jurisdiction. 860 F. App'x 874, 879 (5th Cir. 2021). Also unclear is whether the Court was provided a full history of the wet signature rule in either of these cases. Although the Court observed that some Texas statutes expressly permit the use of electronic signatures in agency transactions or under the Business and Commerce Code,[4] those provisions are unrelated to the registration requirements passed in the Texas Legislature that have existed, in one form or another, since at least 1972, and there is no federal law, such as the NVRA, prohibiting a wet signature requirement. *Stringer*, 320 F. Supp. 3d at 896–97; *see* Act of May 31, 1971, 62nd Leg., R.S., ch. 827, § 3 (S.B. 51), 1971 Tex. Gen. Laws 2509, 2510 (formerly codified at Tex. Elec. Code Ann., art. 5.13a).



The inapposite reasoning from the *Stringer* and *TDP* decisions should not be applied to undermine Texas's democratically enacted laws. *Cf. Wisc. Cent. Ltd.*, 138 S. Ct. at 2074 ("Congress

[4] Texas passed HB 2278 in 2007, which adopted the Uniform Electronic Transactions Act (UETA). Act of May 15, 2007, 80th Leg., R.S., ch. 885, § 2.01, 2007 Tex. Gen. Laws 1905, 2001 (codified at Tex. Bus. & Com. Code ch. 322). Section 322.007 of this act states that a "signature may not be denied legal effect or enforceability solely because it is in electronic form." Tex. Bus. & Com. Code § 322.007(b). Section 322.005 provides, however, that "this chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means." *Id.* § 322.005(b). Accordingly, the Legislature did not intend to adopt universal online voter registration by adopting the UETA.

alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law."). The Court should reject the call to alter the original meaning of Texas's duly enacted laws.

### B. Plaintiff does not carry its summary-judgment burden with competent evidence.

Even if this Court finds that Plaintiff has standing and may validly assert the voting rights of unidentified parties not before the Court, Plaintiff has not responded with competent summary-judgment evidence to create a genuine issue of material fact as to the actual burden allegedly faced by voters. Plaintiff wants the Court to disregard the Supreme Court's holding in *McDonald v. Board of Education Commissioners* because, it argues, the holding centered around a failure of proof regarding the burden on the voters' rights, but the case is highly analogous to these proceedings for that very reason. *See* ECF 128 p. 25 (citing *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974); 394 U.S. 802, 807 (1969)). Just as the plaintiffs in *McDonald* failed to demonstrate that they were "absolutely prohibited from exercising the franchise," Plaintiff here has no evidence that the Texans on whose behalf it brings suit have no other means of registering to vote than relying on Plaintiff's technology. *See* 394 U.S. at 810.



There is no competent summary-judgment evidence that any person who used Plaintiff's application was unable to register to vote for lack of access to a printer or mail, nor is there evidence that any person will be unable to register in the future. Further, Plaintiff does not dispute that Texans may receive postage-paid registration applications in the mail upon request to the Secretary of State or the county registrar. ECF 128 ¶ 3; Appx. 2. In light of this concession, Plaintiff is wrong to say that any Texan faces a transportation burden in trying to register to vote when they can simply use their smartphones to call the county or the Secretary and ask for an application. *See* ECF 128 p. 30 (citing Bryant Rep. at 8). Dr. Bryant's concession that it is easier to locate a printer than it is to locate a fax machine undermines the whole premise of Plaintiff's position in this case—that any voter must be

allowed to submit their signature electronically when registering to vote through fax. ECF 1 ¶ 5; Appx. 475, 151:7–11. Because Plaintiff's claims suffer the same failure of proof that was dispositive in *McDonald*, summary judgment in favor of Defendants is proper. *See* 394 U.S. at 810. And *O'Brien* is distinguishable from the present case because the pretrial inmates who sued in that case were totally denied the ability to vote under a New York statute—circumstances that were not present in *McDonald*. *See* 414 U.S. at 529–30.

The expert conclusions of Dr. Lisa Bryant regarding supposed burden on the voters are not admissible summary-judgment evidence entitling Plaintiff to relief for all of the reasons articulated in Defendant Paxton's Motion to Exclude Expert Testimony and Defendants' Response to Plaintiff's Motion for Summary Judgment. ECF 102; ECF 124 pp. 21–23. Defendant Paxton reasserts this Motion to Exclude by this Reply brief pursuant to the Court's Order of March 30, 2022. ECF 106 p. 3. Though an expert affidavit may be permissible in the summary-judgment process, the Court should refuse to give any weight to evidence that would not be admissible at trial and expert opinion alone is generally an insufficient basis for establishing a material fact. *See* Fed. R. Civ. P. 56(c)(2); *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198, 204 (5th Cir. 1995) ("Indeed, the Supreme Court has observed that it is not error for the factfinder to reject expert opinion evidence, even if uncontroverted.") (citing *Sartar v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627–28 (1944)).[5] Further, in considering an expert's conclusions, the materials must be "rigorously" scrutinized to confirm that the evidence is indeed helpful to the trier of fact under Fed. R. Evid. 702. *See* 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 2722, Westlaw (4th ed. database



[5] *See also Butts v. Southworth*, 402 F. Supp. 680, 683 (W.D. Pa. 1975) (granting defendant school official summary judgment in Section 1983 lawsuit over plaintiff's expert testimony that constituted nothing more than "generalized observation[.]"); *Duplan Corp. v. Deering Milliken, Inc.*, 370 F. Supp. 769, 786 (D.S.C. 1973) ("The absence of actual fact proof is not met by the presence of expert speculations no matter how voluminous.").

updated April 2022) (citing Edward Brunet, The Use and Misuse of Expert Testimony in Summary Judgment, 22 U.C. Davis L. Rev. 93, 95 (1988)).

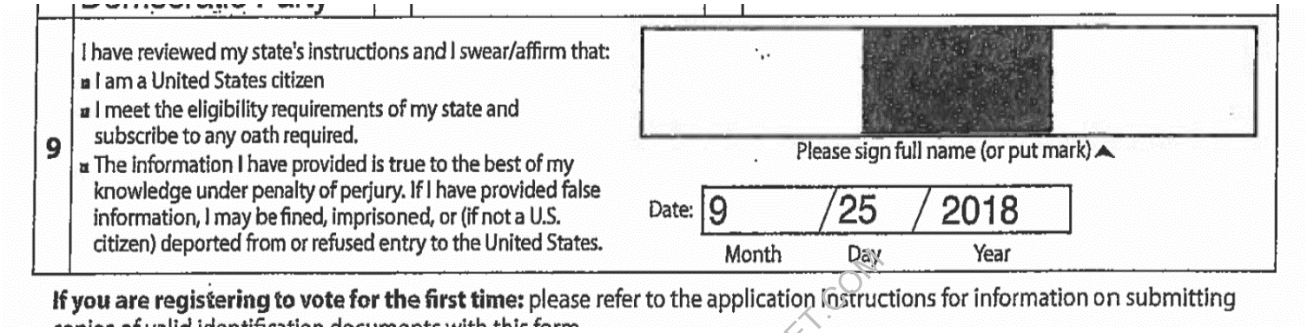
Summary judgment in Defendants' favor is proper because Plaintiff cannot rely on the generic conclusions based on the descriptive statistical methodology Dr. Bryant employs. Again, no part of her testimony establishes that any of the vaguely described categories of voters were unable to register to vote or complained of significant burdens in the process. *E.g.*, Appx. 475–76 , 151:1–157:2. As stated in the Motion to Exclude and Defendants' Response to Plaintiff's Motion for Summary Judgment, these generalized observations and conclusory opinions are insufficient to create a material dispute of fact as to whether any voter faces a burden because of the wet signature rule. *See Lebron v. Sec'y of Fla. Dep't of Child. & Fams.*, 772 F.3d 1352, 1368–69 (11th Cir. 2014) (citing *Increase Minority Participation by Affirmative Change Today of Nw. Fla., Inc. v. Firestone*, 893 F.2d 1189, 1192, 1195 (11th Cir. 1990)) (a political scientist was correctly excluded from testifying as an expert in statistics); *Corpus Christi Oil & Gas Co.*, 71 F.3d at 204; *Butts v. Southworth*, 402 F. Supp. 680, 683 (W.D. Pa. 1975).



### C. Defendants established that several weighty state interests are served by the wet signature rule.

Finally, even if this Court concludes that Plaintiff has sufficiently established a burden on Texas voters' fundamental rights, that burden easily survives *Anderson-Burdick* scrutiny because Texas's interests in running fair and secure elections outweigh the reasonable, nondiscriminatory burden imposed. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 235–36 (5th Cir. 2020). Now that Plaintiff admits it takes no issue with the requirement of a signature in registering to vote, the issue is whether the **means** of giving the signature is constitutionally permissible. ECF 128 p. 32. If nothing else, Texas has an interest in ensuring that signatures provided are at least **visible**. Contrary to Plaintiff's assertions that County Defendants do not inspect signatures before adding the voter to the rolls, every single County Defendant testified that when it received applications transmitted through Plaintiff's application, visibility issues with the signatures prevented their processing. ECF 108 ¶ 11; Appx. 4;

Appx. 71–72, 68:4–71:19, Appx. 98, 174:20–175:6; Appx. 262–63, 160:2–161:21; Appx. 370, 142:4–14; Appx. 497, 56:16–20; Appx. 498, 58:15–60:8; Appx. 512, 113:22–114:17. Signatures were "poor . . ., some blank, and some blacked out," causing a "real problem" for the counties trying to process these applications. Appx. 5; Appx. 262–63 160:2–161:21. The image below is one example of Plaintiff's software failures:




From Resp. Appx. 15, ECF 125-1 (more examples at pp. 11–45).

Plaintiff's attempt to excuse its disruption to thousands of Texans' registrations as an "isolated incident" is empty—there is no guarantee that these failures will not reoccur if this Court enjoins the Counties from refusing to accept these illegible signatures since Plaintiff still needs to "fix" its application. Appx. 72, 71:20–72:8. Calling this an "isolated incident" is also misleading; Plaintiff did it four times—in Travis, Bexar, Dallas, and Cameron Counties.

When an imaged signature is of such poor quality that the county cannot tell if a signature is actually present, the state's interest in election security and fraud prevention is best served by requiring a wet signature in writing, without passing it through an out-of-state, third-party intermediary with broken software. *See Richardson*, 978 F.3d at 238 (citing *Crawford*, 553 U.S. at 239 (Breyer, J., dissenting)). Surely common sense also suggests that Texas's interest in maintaining accurate voting rolls is best served if registrars can actually observe the signatures Plaintiffs do not dispute are required. *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). The Court should grant Defendants' Motions for Summary Judgment because Plaintiff fails to establish a constitutional harm.

## IV. Plaintiff's authorities fail to show that Congress created a private cause of action under § 1971 of the Civil Rights Act.

Plaintiff cannot establish a valid § 1971 claim for the simple reason that a private organization may not sue in federal district court to enforce § 1971 of the Civil Rights Act. The Court should decline Plaintiff's invitation to conclude otherwise based on a framework that predates and contradicts the precedent established by the Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See* Pl.'s Consolidated Opp'n to Def. Garza and Int.-Defs.' Mots. for Summ. J. at 46-52, ECF 128.

When it enacted § 1971, Congress designed the statute to be enforced by the Attorney General:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), **the Attorney General may institute for the United States, or in the name of the United States, a civil action** or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.

52 U.S.C. § 10101(c) (emphasis added). Congress thus did not expressly create a private right of action.

Nor did Congress create an implied private right of action or a private remedy. *See* Paxton Mot. to Dismiss and for J. on the Pleadings at 11–14, ECF 53; Cty. Int.-Defs.' Mot. For Summ. J. at 9–10, ECF 109; *see also Dekom v. New York*, No. 12-CV-1318(JS)(ARL), 2013 U.S. Dist. LEXIS 85360, at *62 (E.D.N.Y. June 8, 2013) ("[T]he weight of authority suggests that there is no private right of action under Section 1971."). Plaintiff argues otherwise, focusing, in part, on the statute's inclusion of the word "right." ECF 128. at 37. But § 1971 does not contain any "rights-**creating** language." *See Sandoval*, 532 U.S. at 291 (emphasis added). That is because "[t]he right of any individual to vote in any election" that is described in § 1971, 5 U.S.C. § 10101(a)(2)(B), is a right created by state law. What the Constitution requires is that "when a state . . . has provided that its representatives be elected, 'a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.'" *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982) (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). Accordingly, § 1971 recognizes a state-created right to

vote and the federal right to vote on an equal basis with other citizens; it does not create a right, much less a right that can be enforced by private litigants. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) ("[I]f Congress wishes to create new rights…it must do so in clear and unambiguous terms[.]").

The congressional creation of an express means of enforcing §1971—suits brought by the Attorney General—further indicates that Congress did not intend to create the additional remedy of a private cause of action implicitly. *See Sandoval*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). Congress thus included no discernible private right or private remedy within the text or structure of § 1971, so that ends the analysis: Plaintiff may not maintain a private cause of action. This Court cannot create a private right of action by judicial fiat, but rather the decision as to whether to make a statute enforceable via private civil lawsuits rests with Congress. *See id.* at 286–89 (holding that the Court must interpret the statute Congress has passed," in accordance with the "text and structure of the statute," and if this interpretive inquiry "reveals no congressional intent to create a private right of action," then the analysis ends, because "a cause of action does not exist and courts may not create one"); *Delancey v. City of Austin*, 570 F.3d 590, 593 (5th Cir. 2009) ("Congress may choose to confer individual rights subject to private enforcement, but to do so the statute must 'speak with a clear voice' and 'unambiguous[ly]' confer those rights.") (citing *Gonzaga*, 536 U.S. at 280). "If the statute does not itself so provide, a private cause of action will not be created through judicial mandate." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017).



## V. Section 1971 does not provide a cause of action to any party to challenge a statute in the absence of an allegation of racial discrimination.

Section 1971 confers no right of action upon any party to challenge a statute on grounds other than racial discrimination. In urging the Court to conclude otherwise, Plaintiff glosses over the plain text of § 1971, the Fifteenth Amendment (in which § 1971 is rooted), and the holding in *Broyles v. Texas*, 618 F. Supp. 2d 661 (S.D. Tex. 2009). "[W]ell-settled law establishes that § 1971 was enacted

pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements," so § 1971 must be congruent and proportional to addressing Fifteenth Amendment harms. *Id.* at 697 (citing *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006)). The Fifteenth Amendment provides:

> Sec. 1. **The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude**[.]
> Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. am. XV (emphasis added). Accordingly, § 1971 focuses on preventing racial discrimination, providing, in pertinent part:

> (a) ***Race, color, or previous condition not to affect right to vote;*** uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; . . .
> (2) No person acting under color of law shall …
> (B) 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) (emphasis added). Plaintiffs focus myopically—and improperly—on subsection (B), disregarding the cardinal rule of statutory interpretation that words must be construed "within the broader statutory context." *Abramski v. United States*, 573 U.S. 169, 179 n.6 (2014).



In light of this context, the Court should reconsider the import of *Broyles* and conclude that "only racially motivated deprivations of rights are actionable under [Section] 1971." 618 F. Supp. 2d at 697 (citing *Kirksey v. City of Jackson*, 663 F.2d 659, 664-65 (5th Cir. 1981)). If the Court correctly follows *Broyles*, then Plaintiff's claim "fails as a matter of law" because the Complaint does not allege that HB 3107 is a racially motivated infringement upon any citizen's right to vote. ECF. No. 1 at 10-11; *see Broyles*, 618 F. Supp. 2d at 697. And Plaintiff cannot remedy this oversight by adding allegations in its Opposition to Summary Judgment, because the Fifth Circuit prohibits such gamesmanship. *See* ECF No. 128 at 31, 39–40. This circuit's "precedent precludes a plaintiff from advancing a new claim

or reframing a previously presented one in response to a motion for summary judgment." *Pittman v. U.S. Bank NA*, 840 F. App'x 788, 789–90 (5th Cir. 2021); *see also United States ex rel. DeKort v. Integrated Coast Guard Sys.*, 475 F. App'x 521, 522 (5th Cir. 2012) ("We also conclude that the district court did not err in denying [Plaintiff's] motion for partial summary judgment because he attempted to raise a new claim, not asserted in his … complaint.").

## VI. A wet signature is material to determining whether a person is qualified to vote.

The statutorily required signature—a wet signature or DPS-witness signature—has a determinative role in the registration process.[6] Both affirm that an applicant is qualified to vote and are thus material under § 1971. A wet signature is more reliable than an imaged one because it confirms to the State, in a way that an imaged signature and an online registration program cannot, that the applicant has read, understood, and attested that he or she has met voter qualifications required by Texas law. Firsthand accounts and judgment of the voter registrars support this. *See* Appx. 173, Callanen Dep. at 113:12–114:10; s*ee also* Appx. 4, Ex. C, Vote.org's Voter Registration App. Plaintiffs offer multiple reasons that a wet signature is not material. As discussed below, all fail.



First, although Plaintiff minimizes accounts of poor-quality imaged signatures and the need to replace them, in truth it is difficult to overstate just how poor the quality of an imaged signature is liable to be. *Id.*; *see also* Appx. 5, Ex. D, Travis County Emails; Appx. 262–63, Elfant Dep. at 160:2–161:21. Second, and perhaps more importantly, Plaintiff glosses over the material role that attestation plays in determining a voter's qualifications. ECF 128 pp. 53–55. For example, the application form that Plaintiff's program submits to the voter registrar contains no Texas-specific language that presents the State's requirements an applicant must meet in order to vote. It does not present the State's age,

[6] In defending Texas's law, Defendants were necessarily referring to the statutorily required signature—a wet signature or DPS-witness signature—in their motion, making Plaintiff's suggestion that Defendants did not specifically defend the wet signature requirement specious. To ensure there is no misunderstanding, Defendants will use the terms "wet signature" and "DPS-witnessed signature" here. This section will discuss both in detail.

citizenship, felony status, capacity, and geographic requirements. Appx. 4. The State thus is unable to confirm that the applicant who electronically signed that form has knowingly attested to those requirements in the first place. The State's physical form, by contrast, contains a list of Texas's voting requirements "right above the signature box." Appx. 1, Ex. A, Tex. Voter Registration App.; *see also* Appx. 419, Ingram Dep. at 176:17–177:6; Appx. 415–17, Ingram Dep. at 159:1–165:5. The three main requirements listed track the statutory language of Tex. Elec. Code § 13.002(c)(3)–(6), namely that the applicant (1) is a citizen and resident of the United States, (2) is not a felon or has completed the punishment for any felony, and (3) has the requisite mental capacity. A wet signature upon this form confirms that the one who signed it has knowingly attested to those requirements.

Third, Plaintiff does not address the importance of the criminal penalties included in the material attestation process. The official form designed by the Secretary of State contains the additional element of "impress[ing] upon the signers . . . the seriousness of the act of signing" by making them aware of the criminal penalties for providing false information. *See Howlette v. City of Richmond*, 485 F. Supp. 17, 22–23 (E.D. Va. 1978). The official form, which applicants sign by hand, includes the statement, "I understand that giving false information to procure a voter registration is perjury and a crime under state and federal law." Appx. 1; Appx. 415, Ingram Dep. at 159:7–13, 160:5–22; Tex. Elec. Code § 13.122(a)(1). If a registrar is unable to determine whether an electronic signature represents an applicant's knowledge of criminal penalties, he or she is unable to determine whether an applicant has properly, in full knowledge attested to the State's voter qualifications. That the wet signature helps impart the full extent of criminal liability riding on the voter's qualifications only bolsters the rule's materiality.

Fourth, Plaintiff argues that "preventing fraud is not the same thing as determining qualifications to vote." ECF 128 p. 53. In truth, fraud is inexorably linked with materiality. Although the primary purpose of the wet signature rule is to confirm the applicant's qualifications, fraud and

materiality are not two separate issues, as Plaintiff contends. A registrar cannot "determin[e] whether [an] individual is qualified under State law to vote" if that individual applicant has committed fraud in attesting his or her voter qualifications. 52 U.S.C. § 10101(a)(2)(B). Neither registrars' use of wet signatures to detect fraud, nor the volume of defects discovered, bears on whether the legislature has the authority to establish a fraud prevention technique to affirm that its substantive voting criteria have been met, *see Brnovich*, 141 S. Ct. at 2340 ("the prevention of fraud . . . is an entirely legitimate state interest"), or on that technique's materiality under § 1971. Actual instances of fraud are not required to assert that interest, *see Crawford*, 553 U.S. at 195–97, and any relative lack of instances only highlights the registrars' increased concern when they temporarily used the online program. *See* Appx. 5; Appx. 262–63, 160:2–161:21.

Fifth, Plaintiff minimizes the holdings of relevant case law. With respect to *Howlette*, Plaintiff's critique of the case is misguided. The court did not mistakenly construe the Materiality Provision as protecting municipalities from election expenses, or as allowing state officials to impose hurdles for the purpose of ensuring enough voter deliberation. ECF 128 p. 45; *see* 485 F. Supp. 17, 23 ("In short, the individual notarization requirement protects the City and its citizens against both fraud and caprice."). The *Howlette* court instead considered Virginia's notary requirement material because of its unique ability for "assuring the genuineness of signatures" and "preventing voter fraud." *Libertarian Party of Va. v. Davis*, 766 F.2d 865, 869 (4th Cir. 1985) (building upon *Howlette* and upholding a witness requirement for petitions for ballot access). The *Howlette* court only incidentally prevented the costs of an insecure and thereby unnecessary referendum. *See* 485 F. Supp. at 23. The instant case is also distinguishable from *Schwier v. Cox*, 412 F. Supp. 2d 1266, (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006) and its progeny, to which Plaintiff refers. *Schwier* held that a social security number, independent information protected by the Privacy Act, was not material to determining whether an applicant is qualified to vote. *Id.* By contrast, a wet signature is not independent, protected information;

it is only a method of directly authenticating attestation to the proper voter qualifications themselves. There is also no federal law preventing states from requiring signatures. *See id.*

Finally, the wet-signature rule is not rendered superfluous by DPS's procedures contrary to Plaintiff's contentions. Instead, DPS's procedures underscore the importance of the rule's robust ability to verify voter qualifications. When a voter registers through DPS, he or she appears before State personnel with identification documents in hand. Appx. 466, Bryant Dep. at 114:4–11. The State official then reads to him or her the eligibility statements required by law—those that appear on the State's application form, which requires a wet signature—and after the voter attests to the information, has them physically sign an electronic note pad, which captures the signature for transmittal. Appx. 418, Ingram Dep. at 172:3–11. Texas therefore has the same, if not greater, assurance that voters are notified of the eligibility requirements and understand the consequences of tendering false information, as applicants would be attesting to their eligibility with the personification of the law staring at them. Appx. 466, Bryant Dep. at 114:1–11.



## VII. Enforcement of the Wet Signature Rule Does Not Result in Deprivation of the Right to Vote.

Plaintiff suggests that there is not "a single provision in the Election Code that confers a right to cure" and that any cure opportunity that is provided is a discretionary practice of county registrars. ECF 128 p. 46. This is false: the Texas Election Code clearly provides a right to cure. Section 13.073(b) mandates that "[i]f the rejection [of a registration application] is for incompleteness, the registrar **shall** return the application to the applicant for completion and resubmission." (emphasis added). Moreover, the registrar must act promptly to notify the applicant. *See id.* 13.073(a), (b) (requiring written notice within two days of the rejection or immediate notice if rejecting an in-person application). The Election Code is also clear about the applicant's timeline for such cure: the applicant has ten days from receiving notice of rejection, which occurs within two days of actual rejection, to cure his or her application, and the original date of submission is maintained. *Id.* § 13.073(c). This

comports with Fifth Circuit precedent. *See United States v. Ward*, 345 F.2d 857, 862 (5th Cir. 1965) (requiring that errors or omissions in registration applications be "specifically pointed out and explained to [a registrant] by the registrar").

Because wet signatures (and DPS-witnessed signatures) are uniquely suited to allow the State to confirm a voter's qualifications, rejection for lack of such signature is no more a denial of the right to vote than would be rejection based on any other failure to attest to one's qualifications. There is thus no meaningful difference between Plaintiff's critique of the wet signature rule and a critique about any signature requirement whatsoever. If the requirements on the application form are valid conditions that do not deprive anyone of the right to vote, then requiring attestation to them—in a manner the State can confirm—also does not deny any person the right to vote. The rule does not simply tack on an opportunity to cure to exonerate it from unlawfulness, an argument for which no legal grounding is offered. In reality, the rule never denied anyone the right to vote, and its opportunity to cure further ensures it will not do so. That is why Plaintiff has neither provided a single instance of deprivation, nor provided statistics suggesting any deprivation due to the rule. ECF 128 pp. 46–47. Moreover, the State's myriad other policies promoting and fostering the right to vote further undermine allegations of voting deprivation. *See* Tex. Elec. Code §§ 13.038, 13.041; Appx. 161–62, Callanen Dep. at 68:6–69:12; Appx. 326, Elfant Dep. at 414:14–21; Appx. 328, 421:20–21, 424:3–22 (applications are distributed "anywhere where there's more than a few people gathered," and accepted by additional 2,500 deputy registrars); Appx. 2, Ex. B, screenshot from sos.state.tx.us (access to application forms is provided online and by mail postage-paid).



## CONCLUSION

For the foregoing reasons, Intervenor-Defendants and Defendant Garza respectfully ask that their Motion for Summary Judgment be granted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 6, 2022 a true and correct copy of the foregoing document has been sent by electronic notification to all counsel of record through ECF by the United States District Court, Western District of Texas, San Antonio Division.

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