UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VOTE.ORG, *Plaintiff*,	§	
v.	§	CIVIL ACTION NO. 5:21-cv-00649
JACUELYN CALLANEN, in her official capacity as the Bexar County Elections Administrator; BRUCE ELFANT, in his official capacity as the Travis County Tax Assessor-Collector; REMI GARZA, in his official capacity as the Cameron County Elections Administrator; MICHAEL SCARPELLO, in his official capacity as the Dallas County Elections Administrator, *Defendants,*	§	
And	§	
KEN PAXTON, in his official capacity as 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, *Intervenor-Defendants.*	§	

INTERVENOR-DEFENDANTS KEN PAXTON, LUPE C. TORRES, AND TERRIE PENDLEY'S MOTION FOR STAY PENDING APPEAL

TO THE HONORABLE JUDGE JASON K. PULLIAM:

Intervenor-Defendants Ken Paxton, Lupe C. Torres, and Terrie Pendley, in their official capacities, (collectively, Intervenors) file this Motion to Stay the Court's Memorandum Opinion and Order, and Final Judgment, ECF 144–45, and the Court's permanent injunction included therein, (the Permanent Injunction) pending appeal or, alternatively, request an order suspending the issued injunction pending appeal pursuant to Fed. R. App. P. 8(a).

The Court's opinion rewrites a provision of the Texas Election Code by enjoining its enforcement and declaring it unconstitutional and illegal under Section 1971 of the Civil Rights Act.[1] The ruling implicates novel and serious legal questions, which Intervenors respectfully assert have been wrongly decided but on which Intervenors have also raised substantial arguments on the merits, and a stay pending appeal is warranted to permit the Fifth Circuit to assess the merits of this Court's novel rulings. A stay is also supported by the widely recognized principle that enjoining a constitutional state election law inflicts irreparable harm on the State, and that the public's interest is aligned with the State's interest and harm. Plaintiff, in contrast, will not be irreparably harmed if a stay is granted, given that it suffers no harm to a personal voting right in any theory of this case and voters have several options to register to vote other than via facsimile. No individual voter is a party to this suit, thus the balance of equities weighs against disrupting election procedures in Defendants' and Intervenors' counties and causing confusion in other Texas counties in consideration of the slight harm, if any, to Plaintiff's outreach operations. For all these reasons, as further set forth below, a temporary stay while the Fifth Circuit considers the merits of this Court's Permanent Injunction is warranted.

BACKGROUND

Plaintiff sued a select group of county election officials seeking to enjoin Texas Election Code § 13.143(d-2), which provides that when a voter submits a registration application via facsimile, the voter must submit the original hard copy of the application with the voter's original signature within four days for the registration to be effective. Ken Paxton, Lupe C. Torres, and Terrie Pendley, in their official capacities as the Attorney General of Texas, Medina County Election Administrator, and Real County Tax Assessor-Collector, respectively, intervened in this suit to defend the statute. After the

[1] 52 U.S.C. § 10101(a)(2). The specific provision Plaintiff asserts its claim under is referred to as the "Materiality Provision."

Court denied motions to dismiss brought by Intervenors, the parties conducted extensive, and often contentious, discovery on a compressed timeline. The Court denied Intervenors' Motions for Summary Judgment and granted Plaintiff's Motion for Summary Judgment, enjoining the requirement under Section 13.143(d-2) that registrants must submit the original copy of the application with the registrant's original signature for the facsimile application to be effective. ECF 144 at p. 37.

On June 17, 2022, Intervenors Paxton, Torres, and Pendley filed a notice of appeal, ECF 146, and now respectfully request that the Court stay its injunction pending appeal. In light of the disruption and confusion that the Permanent Injunction will cause to the State's election processes, Intervenors request that the Court issue a ruling on this motion as expeditiously as possible, and no later than June 27, 2022, so that in the event of a denial, Intervenors may file any appropriate motion for relief in the Fifth Circuit.

ARGUMENT

I. Legal Standard

Before seeking relief from the Fifth Circuit, a party must ordinarily file a motion for stay in the district court seeking a stay of a judgment or order pending appeal or seeking an order suspending an injunction while an appeal is pending. Fed. R. App. P. 8(a)(1). "The Supreme Court has repeatedly stated that a four-factor test governs a court's consideration of a motion for stay pending appeal: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 360 (5th Cir. 2013) (per curiam) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). The Fifth Circuit "has refused to apply these factors in a rigid, mechanical fashion," and has "held that the movant 'need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs

heavily in favor of granting the stay,'" as opposed to demonstrating a likelihood of success on the merits. *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (per curiam) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). A stay is especially warranted when existing case law does not provide clarity or guidance in resolving the serious legal questions involved. *See Texas v. Ysleta Del Sur Pueblo*, No. EP-17-CV-179-PRM, 2019 WL 5589051, at **1–2 (W.D. Tex. March 28, 2019) (district court granting stay given serious legal question raised and lack of clarity or guidance from existing caselaw). A stay pending appeal "simply suspend[s] judicial alteration of the status quo," so as to allow appellate courts to bring "considered judgment" to the matter before them and "responsibly fulfill their role in the judicial process." *Nken*, 556 U.S. at 427, 429 (internal quotation marks omitted).

Similarly, Federal Rule of Civil Procedure 62(d) provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction." Fed. R. Civ. P. 62(d). The same four factors delineated above are considered when determining whether to suspend an injunction while an appeal is pending from the final judgement granting the injunction. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 734 F.3d 406, 410 (5th Cir. 2013).

II. A stay pending appeal is warranted given the serious, novel legal questions at issue in this case that have never been considered by the Fifth Circuit.

A. Intervenors have raised serious legal questions that merit a stay pending appeal.

Intervenors, through motions to dismiss and in seeking summary judgment, presented a substantial case on the merits regarding the serious legal questions of standing and federal voting rights. Standing questions go to the heart of whether this Court had subject matter jurisdiction to consider Plaintiff's claims at all. Intervenors also demonstrated a likelihood of success on the merits regarding Plaintiff's Section 1971 and constitutional claims. Although the Court wrongly rejected these arguments, it is noteworthy that neither the Court nor any party to this case has identified any

governing case law under Section 1971, or under *Anderson-Burdick* constitutional scrutiny, holding that States must allow voters to register via digital signatures. Therefore, given the novel nature of Plaintiff's claims and the substantial support for Intervenors' arguments, the Fifth Circuit should have an opportunity to consider these issues before the injunction is implemented. Intervenors' significant jurisdictional and merits arguments raise serious legal questions that support staying this Court's permanent injunction pending appeal.

1. *Standing*

The Court has not resolved whether Plaintiff presented any evidence of standing to bring this suit, instead relying solely on its earlier-determined finding at the motion-to-dismiss stage and refusing to consider further argument on the topic. ECF 144 at p. 6; *but see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411–12 (2013) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)) (holding that mere **allegations** of injury are insufficient to establish standing; instead, a plaintiff has the burden to establish evidence of "specific facts" as to all elements of standing). Importantly, Plaintiff did not establish sufficient evidence at the summary-judgment phase on every standing element under the traditional *Lujan* test. *See El Paso County v. Trump*, 982 F.3d 332, 343 (5th Cir. 2020), *cert. denied sub nom. El Paso County v. Biden*, 141 S. Ct. 2885 (2021), *reh'g denied*, 142 S. Ct. 51 (2021). As a plaintiff asserting organizational standing, Plaintiff was required to establish, through credible evidence, that it diverted its resources to counteract the effects of the wet signature rule, and it did not do so at the summary-judgment stage.

This Court also never addressed the important issues Intervenors asserted as to whether Plaintiff satisfied prudential considerations regarding standing on behalf of third parties not before the Court—specifically, Texas voters. *See Lexmark Int'l v. Static Control Components, Inc.*, 572 U.S. 118, 127 & n.3 (2014). Plaintiff failed to establish that it satisfies the applicable tests to sue on behalf of third parties who are not members of its organization and the Court therefore lacked a sufficient basis

to determine that its exercise of jurisdiction over a case lacking any actual voters as parties was proper. *See* ECF 132 at pp. 4–5.

Further, the Court did not give due weight to the fact that *Plaintiff* caused voter disenfranchisement through its disruption of election procedures and misrepresentations to county officials; those costs to the organization were the result of a self-inflicted injury. *See Fair Elections v. Husted*, 770 F.3d 456, 458–59 (6th Cir. 2014); *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) (no standing when injury is self-inflicted.). Ultimately, the Court assumed Plaintiff's standing in the absence of supporting evidence and Intervenors respectfully ask for a stay so that the Court of Appeals may more definitely resolve these important jurisdictional issues.

2. *Section 1971*

A ruling that Section 1971 mandates that States permit online voter registration through demonstrably faulty, third-party software would have sweeping ramifications for election and constitutional law that warrants further exposition through the legislative process. The Court held that the requirement that a signature be in writing, as opposed to applied digitally, is not material to determining whether the voter is a qualified voter under Section 1971.

In issuing the Permanent Injunction, the Court holds that no matter how many times an image of the voter's signature is filtered through some other third-party technological medium, the State violates Section 1971 by requiring the registrant to verify the application by sending the original application with a signature attesting the registrant meets the qualifications to vote before the registration can become effective. And the Court puts undue importance on the undisputed fact that signatures are not intensely scrutinized at the registration phase by the Secretary of State or county election officials, ignoring the testimony and documentary evidence concerning the importance of the State controlling the technology that captures signatures to ensure uniformity in application and

enforcement of its election laws at *later stages* of the voting process, not to mention if investigation of voter fraud becomes necessary.

The State's requirements easily satisfy Section 1971's Materiality Provision, and are not the type of unreasonable or arbitrary requirements that courts have found to be immaterial. *See Org. for Black Struggle v. Ashcroft*, No. 2:20-CV-04184-BCW, 2021 WL 1318011, at *5 (W.D. Mo. March 9, 2021) (signature is not immaterial to voter qualification); *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006); *Howlette v. City of Richmond*, 485 F. Supp. 17, 22–23 (E.D. Va. 1978), *aff'd*, 580 F.2d 704 (4th Cir. 1978) (signature-before-notary requirement impresses upon the signatory the importance of voting for referendum).

For these reasons and those more fully set out in Intervenors' prior briefing, the Court erred in its analysis of Plaintiff's Section 1971 claims. Intervenors presented a substantial case that the wet signature rule satisfies Section 1971 and respectfully seek a stay of the Permanent Injunction so that the Court of Appeals may decide whether Section 1971 mandates online voter registration in Texas.

3. *First & Fourteenth Amendment Claims*

Despite Plaintiff's lack of evidence that any individual voter is burdened by the wet signature rule, and even though the Court already decided the law would be enjoined under Section 1971, the Court nevertheless enjoins Defendants from carrying out its requirements as an unconstitutional burden under the well-known *Anderson-Burdick* standard. In doing so the Court undervalues weighty state interests in ensuring the fair and secure operation of its elections as against the, at most, minor inconvenience that an exceedingly small class of voters may theoretically face under the wet signature rule. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 235–36 (5th Cir. 2020) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008)). Furthermore, the Court did not explain how the requirement could burden the right at all, given that the facsimile option is an expansion of registration options. *See Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 144 (5th Cir. 2020) ("Indeed,

one strains to see how [the proclamation] burdens voting at all" seeing how it "is part of the Governor's expansion of opportunities to cast an absentee ballot in Texas well beyond the stricter confines of the Election Code."). The Court also disregarded the institutional concerns that arise when it uses injunctive relief to rewrite the Election Code to allow electronic signatures when statutory language clearly calls for original signatures. *See Thompson v. Dewine*, 976 F.3d 610, 620 (6th Cir. 2020); *Esshaki v. Whitmer*, 813 F. App'x 170, 172 (6th Cir. 2020) (citing *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)).

For these reasons and those more fully set out in Intervenors' prior briefing, the Court erred in its analysis of Plaintiff's First and Fourteenth Amendment claims.

B. Intervenors will be irreparably injured absent a stay.

Enjoining state officials from carrying out validly enacted, constitutional laws governing elections imposes irreparable harm. *Cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). And it is one of the most fundamental obligations of the State to enact clear and uniform laws for voting to ensure "fair and honest" elections, to bring "order, rather than chaos, [to] the democratic process[]," and ultimately to allow the vote to be fully realized. *Storer v. Brown*, 415 U.S. 724, 730 (1974). The Permanent Injunction threatens to upset those crucial interests and therefore should be stayed pending appeal.

C. The balance of equities weighs in favor of granting a stay.

A stay merely maintains the status quo and will not harm Plaintiff. The harm identified by Plaintiff is no more than being unable to use its specific type of registration technology, which has *never* been legal in Texas, as an allegedly more convenient tool for achieving its national voter registration goals. In the one instance in which Plaintiff's application was live, things went terribly

awry. Thus, there is no guarantee that voters would even want to use Plaintiff's platform or be able to do so, since Intervenors proved it to be a less-than-reliable mechanism for applying to register to vote. ECF 108 ¶¶ 9–12. Further, **zero** Texas voters have come forward to express support for Plaintiff's web application during this lawsuit. Whatever this interest of Plaintiff's may be, it must give way to the irreparable harm the Permanent Injunction inflicts on the public interest in the integrity of the ballot. *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (When the State seeks a stay pending appeal, "its interest and harm merge with that of the public.") (citing *Nken*, 556 U.S. at 435).

CONCLUSION & RELIEF REQUESTED

Intervenors have raised substantive and meritorious issues with this Court's Permanent Injunction that encompass serious legal questions. The Fifth Circuit should be provided an opportunity to review the merits of this Court's decision before Texas's law is permanently enjoined and the state—and corresponding public interest—irreparably harmed. For the foregoing reasons, Intervenors respectfully request that the Court grant this motion by 5:00 PM, June 27, 2022.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Plaintiff via email on June 17th, 2022, and counsel indicated that it is opposed to this motion. I attempted to confer with all remaining Defendants via email on June 17th, 2022, but I did not receive a response as to whether any are opposed to the motion.

/s/ Cory A. Scanlon
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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 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.

/s/ Cory A. Scanlon
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