No. 22-50536

In the United States Court of Appeals for the Fifth Circuit

VOTE.ORG,

Plaintiff-Appellee

v.

JACQUELYN CALLANEN, ET AL.,

Defendants

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

Intervenor Defendants-Appellants

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

REPLY IN SUPPORT OF MOTION TO STAY INJUNCTION PENDING APPEAL

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INTRODUCTION

The Texas Election Code's wet signature requirement serves the interests of voters and the State alike. It is one modest component of the Legislature's recent expansion of methods to submit registration forms. And it ensures that an applicant is qualified to vote and that a quality exemplar of his signature is readily available. Plaintiff derides this commonsense measure as not just unconstitutional but "pointless." Resp. 3. The record below reflects just the opposite: in 2018, plaintiff's "pilot program" web app launch was saddled with such persistent technical difficulties that voters' registrations were placed at risk. That alone was reason for the Legislature to adopt HB 3107 and clarify the process by which voters may submit, and counties may accept, faxed voter registration forms.

This Court does not lightly cast aside state statutes governing the administration of a State's elections. Plaintiff offers no reason to expect that the Court will do so at the conclusion of this appeal. To avoid widespread confusion across the State in the interim, the district court's permanent injunction should be stayed.

ARGUMENT

I. Defendants Are Likely to Succeed on the Merits.

A. Plaintiff lacks standing to defend the interests of Texas voters.

As Defendants explained in their motion to stay (at 8-10), as a general rule, a plaintiff "must assert his own legal rights and interests, not those of third parties." *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988). Section 1983 is no exception: it provides a cause of action only when the *plaintiff* has

suffered "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. It does not provide a cause of action to plaintiffs claiming an injury based on the violation of a third party's rights. *See, e.g.*, *Conn v. Gabbert*, 526 U.S. 286, 290 (1999).

Plaintiff responds in two ways. First, plaintiff insists (at 17) that because Defendants "do not dispute" that plaintiff has established an Article III injury, there are no barriers to the Court's consideration of plaintiff's section 1983 claims. Not so. Defendants made no such concessions in their motion to stay, and Defendants have vigorously contested plaintiff's organizational standing. *See, e.g.*, ECF No. 108 at 10-14; ECF No. 124 at 5-14; *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) (explaining independent judicial obligation to assess standing). More broadly, even to the extent plaintiff has suffered an injury as an *organization*, that injury does not—and cannot—confer plaintiff with a *personal* constitutional or section 1971 claim. Plaintiff is an artificial entity without members. Mot. 4. It has not been denied the right to vote or the ability to exercise its First or Fourteenth Amendment rights. Unsurprisingly, plaintiff did not identify a single precedent from this Court allowing a plaintiff like Vote.org to pursue a section 1983 claim in this novel context.

As a backstop, plaintiff claims (at 17-18) that it has a "close relation" to "voters whose rights have been infringed" and there is "some hindrance" to those voters' ability to bring suit. The record belies those assertions: plaintiff's CEO disclaimed any close connection to Texas voters. Mot. 10. And plaintiff's hindrance argument ignores that voters frequently assert claims challenging provisions of the Texas

Election Code. Indeed, some of the same attorneys representing plaintiff in this suit have already challenged the wet signature requirement on behalf of the Texas Democratic Party, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee, who "expended resources to promote and employ" plaintiff's web app. *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). And this Court routinely considers challenges to election laws brought by individual plaintiffs. *E.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020).

The Court is likely to conclude that plaintiff cannot press either of its claims challenging the wet signature requirement. A stay should issue on this basis alone.

B. Plaintiff is unlikely to prevail on its section 1971 claim.

1. "[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). For the reasons Defendants noted in their stay motion (at 10-12), Congress did not do so when it enacted section 1971. Plaintiff attempts to show that "Congress intended to create a federal right," *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002), with reference to section 1971's language concerning "the right of any individual to vote." Resp. 8 (quoting 52 U.S.C. § 10101(a)(2)(B)). But section 1971 refers to a right already granted "under [Texas] law." *Id.* And even if section 1971 were interpreted to refer to a federal right (for example, the Fifteenth Amendment's voting guarantees), it would still lack "clear and unambiguous" rights-creating language. *Gonzaga Univ.*, 536 U.S. at 290.

Plaintiff also maintains (at 8) that section 1971 claims may be brought through section 1983. But plaintiff ignores that section 1971 provides a detailed remedial scheme inconsistent with section 1983 suits. For example, procedural protections like the ability to request a three-judge district court in section 1971 suits, *see* 52 U.S.C. § 10101(g), are not available under section 1983. "Courts should presume that Congress intended that the enforcement mechanism provided in the statute be exclusive." *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999) (en banc).

2. The district court's section 1971 analysis was also flawed because it departed from "[w]ell-settled law establish[ing] that § 1971 was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements." *Broyles v. Texas*, 618 F. Supp. 2d 661, 697 (S.D. Tex. 2009) (Rosenthal, J.); Mot. 12. Plaintiff's primary defense of the district court's analysis is that section 10101(a)(2)(B) makes no mention of race. That is inaccurate. Section 10101(a) expressly references "[r]ace, color, or previous condition not to affect right to vote." 52 U.S.C. § 10101(a). Plaintiff's narrow focus on the language in section 10101(a)(2)(B) to the exclusion of the statutory text framing that language violates longstanding rules of statutory construction. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

3. On the merits, the wet signature requirement is "material." The State's approved registration form lists Texas's voting requirements above the signature box. ECF No. 108-1 at 3. It also includes the following statement: "I understand that giving false information to procure a voter registration is perjury and a crime under state and federal law." ECF No. 108-1 at 3; *see also* Plaintiff's Appx. 146-47; Tex.

Elec. Code § 13.122(a)(1). A wet signature thus signals that the applicant has read, understood, and attested that he has met the voter qualifications required by Texas law. *See* 52 U.S.C. § 10101(a)(2)(B); *see, e.g.*, *Org. for Black Struggle v. Ashcroft*, No. 2:20-CV-04184-BCW, 2021 WL 1318011, at *5 (W.D. Mo. March 9, 2021) (finding that a signature is material to determining a voter's qualification). Plaintiff's reliance (at 5) on the Third Circuit's decision in *Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir. 2022), is unhelpful because it concerned a voter's failure to date a ballot envelope. It did not speak to a State's signature verification requirements.

Moreover, the purported concessions from some county defendants that the wet signature requirement "serves no purposes related to determining a registrant's qualifications to vote," Resp. 4, are not binding on the Attorney General or the intervenor-defendant counties. And those statements are not reflective of the Texas Legislature's purpose in enacting the law, nor can they be squared with the Secretary of State's testimony that the wet signature requirement provides important assurances about the voter's qualifications. Plaintiff's Appx. 146-47. Nor is the wet signature rule rendered superfluous because Texas allows other forms of voter registration. Instead, those methods *reinforce* the importance of the wet signature requirement. For example, when a voter registers to vote through the Department of Public Safety, he appears before state personnel with identification documents in hand. ECF No. 108-1 at 470. State officials then read the Election Code's eligibility statements, and after the voter attests to the information, the voter physically signs an electronic note pad, which captures the signature for transmittal. ECF No. 108-1 at 422. By contrast, plaintiff's app allows users to "upload[] an image of their original

signature" onto the app's "e-sign tool" before it is sent to the country registrar. Resp. 2. That process, unlike the processes set out in the Election Code, does not provide sufficient indicia that a voter has attested that he is qualified to vote—or that he has even seen, let alone understood, what those qualifications are.

Plaintiff also calls the State's ten-day cure process "beside the point." Resp. 6-7 (citing Tex. Elec. Code § 13.073(b)). To the contrary, this Court recently held that whether a right to vote has been "denied" depends on whether the would-be voter has been "in fact absolutely prohibited from voting." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 188 (5th Cir. 2020) (citation omitted)). Under HB 3107, the ability to submit a registration form via fax transmission has not been "absolutely prohibited"; at most, it may require a cure process for some voters.

Although plaintiff disclaims that this suit challenges signature requirements as a general matter, it is difficult to envision any signature requirement that would be "material" under plaintiff's reading of the statute. *E.g.*, Resp. 6 (arguing that complying with fraud prevention measures is not "material"). It is unlikely that the Court will ultimately adopt such a restrictive construction of section 1971. At a bare minimum, Defendants have "presented a substantial case on the merits" on all of these issues. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020); *contra* Resp. 19. Plaintiff takes the remarkable position that this appeal does not involve a "serious legal question." Resp. 19. That assertion cannot be squared with plaintiff's concession (at 8-9) that the circuits are split on the question of whether section 1971 authorizes private causes of action at all. As Defendants emphasized in their motion (at 13), a stay pending appeal is warranted to allow this Court to carefully address the

district court's novel determinations in this regard, some of which involve matters of first impression in this Circuit.

C. Plaintiff is unlikely to prevail on its *Anderson-Burdick* claim.

The district court's holding that the wet signature requirement violates the First and Fourteenth Amendments is also likely to be reversed. Any burden that the requirement imposes on voters is *de minimis*, and the State's interests in the requirement are compelling. Mot. 14-17.

1. To overcome those fatal flaws in its *Anderson-Burdick* claim, plaintiff refashions the record. It claims that "undisputed evidence demonstrates that the Rule burdens voters." Resp. 11-12. But the only purported evidence that plaintiff cites is hotly disputed testimony from plaintiff's own expert witness, whom Defendants sought to exclude entirely from the district court's consideration. The parties' summary judgment filings reflect that registering to vote in Texas is easy, and registering via fax is just one method among many that a voter might choose from. For example, roughly 97% of people of voting age are registered to vote in Travis County, ECF No. 108-1 at 333, and Bexar County utilizes some 2,000 deputy registrars to assist in the County's voter registration efforts, *id.* at 205-06.

Thus, if anything is undisputed, it is that there are "numerous ways Texans" can register to vote. *Texas League of United Latin American Citizens v. Hughs*, 978 F.3d 136, 145 (5th Cir. 2020) ("*LULAC*"). Plaintiff asserts that *LULAC* is distinguishable because "the Legislature acted in 2021 to restrict access to a registration method established in 2013 without any lawful rationale." Resp. 13. As explained above, however, Texas had a perfectly lawful rationale for enacting HB

3107: avoiding voter confusion and potential disenfranchisement of hundreds of voters.

In that regard, HB 3107 was a "cleanup" measure. Mot. 3. Multiple county officials testified that they have always known that the Election Code requires a wet signature for faxed applications. ECF No. 108 at 9 (collecting examples). Indeed, a Dallas County official testified that the Secretary of State offered training for ten years specifically instructing counties that voters must "produce the original application with a wet ink signature." ECF No. 108-1 at 513-14. HB 3107 was thus not a new restriction on a method of voter registration. It was instead a necessary clarification precipitated by plaintiff's ill-conceived 2018 efforts to stretch the Election Code beyond its limits.

2. The wet signature requirement serves multiple state interests. For example, early voting ballot boards and signature verification committees might compare a voter's wet signature with later signatures the voter provided if the authenticity of the registration or corresponding ballot is in question. Tex. Elec. Code § 87.027. And registration files with county officials are also subject to inspection by Texas authorities investigating election-related offenses concerning signature misappropriation. *E.g.*, Defendants' Exhibit B at 179-80. Plaintiff and the district court dismiss this evidence on the basis that "[a]t no time is an original, wet signature used to conduct a voter fraud investigation." Resp. 14 (quoting Exhibit C at 33). That statement is belied by the district court's separate finding that investigatory officials use "a scanned image of the registration signatures." Exhibit C at 21. The State had a reasonable basis to think that those images would be superior to the types of picture

images gathered by third-party web apps. After all, many of the voters who used plaintiff's web app in 2018 lacked signatures that could be used for the purposes identified above and set out in the Election Code. *See, e.g.*, ECF No. 132 at 19 (example of plaintiff's software failures). The State has a compelling interest in ensuring that it has broad access to information that may deter and detect fraud. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021). The wet signature requirement furthers that interest.

II. The Other Factors Favor 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). "This injunction strikes at the core of Texas's regulation of voting" and therefore constitutes an irreparable injury. *Tex. Democratic Party*, 961 F.3d at 411.

Plaintiff brushes aside Defendants' concerns about inconsistent applications of the Election Code across Texas, reasoning the Secretary of State can simply issue guidance to election officials to follow the district court's injunction. Resp. 20. That suggestion is unserious for two reasons: first, the injunction below is deeply flawed and likely to be reversed. It makes little sense for the Secretary to instruct election officials who were not parties to this suit to voluntarily comply with an injunction that contravenes the Election Code itself. More importantly, the Secretary can only issue *guidance*. *See* Tex. Elec. Code § 31.004(a), (b). Any such guidance would not

bind counties, and thus, the risk of haphazard enforcement of the Code persists absent a stay from this Court.

Finally, plaintiff does not address Defendants' point that the status quo has been in place for years. As demonstrated above, every county official has (or should have) long understood that a wet signature is required for faxed applications. That status quo should remain in place throughout the pendency of this appeal. *E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021).

Conclusion

The district court's injunction should be stayed pending appeal.

Respectfully submitted.

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Certificate of Service

On June 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 reply complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,591 words, excluding the parts of the document exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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