UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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| VOTE.ORG,<br><br>*Plaintiff*<br><br>v.<br><br>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 the Dallas County Elections Administrator,<br><br>*Defendants.* | § | Civil Action No. 5:21-cv-649-JKP-HJB |



**TEXAS ATTORNEY GENERAL KEN PAXTON'S MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(c)**

## INTRODUCTION

Plaintiff Vote.org, an internet company promoting a smartphone app meant to process voter registration applications, asks the Court to enjoin recently enacted legislation in Texas clarifying when an original signature is required on a voter's application. House Bill 3107 (HB 3107) allows voters to submit a registration application through telephonic facsimile machine. *See* Tex. Elec. Code § 13.143(d-2). The new legislation clarifies that the registration is effective when the voter mails the original application form with the original signature. *See id.* Defendant-Intervenor Ken Paxton, in his official capacity as Attorney General of Texas (OAG), files this Motion to Dismiss and for Judgment on the Pleadings to defend the constitutionality of this duly enacted legislation from Plaintiff's jurisdictionally flawed attack. Plaintiff cannot establish standing to maintain this suit—it has no personal stake in the exercise of the franchise and it can allege no unconstitutional harm stemming from the County Defendants'[1] enforcement of HB 3107.



Moreover, each of Plaintiff's claims fails individually. Plaintiff cannot prevail on Count I because it does not have a private cause of action and because it does not allege that HB 3107 was racially motivated. Count II should be dismissed because HB 3107 is constitutional. It imposes, at most, a minimal burden on voters but advances weighty state interests in protecting the franchise. Additionally, while the law and our Constitution protect the rights of voters to register and cast a ballot, these guarantees do not afford Plaintiff's organization a right to suspend the signature requirement so that it may use its preferred technology in facilitating the registration of others.

For the reasons explained below, OAG respectfully requests that the Court dismiss Plaintiff's claims. *See* Fed. R. Civ. P. 12(b)(1), (c).

[1] For the sake of brevity, this term will refer collectively to County Defendants 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; and Michael Scarpello, in his official capacity as the Dallas County Elections Administrator.

## ARGUMENT

### I. Legal Standard

#### A. Rule 12(b)(1)

Federal Rule of Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When the court lacks the statutory or constitutional power to adjudicate a claim, the claim is properly dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). The party asserting jurisdiction bears the burden of proving jurisdiction exists. *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014). If there is no subject-matter jurisdiction, the claim must be dismissed. Fed. R. Civ. P. 12(h)(3); *see also Home Builders Ass'n, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).



#### B. Rule 12(c)

Federal Rule of Procedure 12(c) allows a party to "move for judgment on the pleadings." Fed. R. Civ. P. 12(c). A court may hear a party's motion for judgment on the pleadings after the pleadings are closed. Fed. R. Civ. P. 12(c). The standard for deciding a Rule 12(c) motion is the same as the standard for evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Vanderbrook v. Unitrin Preferred Ins. Co.*, 495 F.3d 191, 205 (5th Cir. 2007); *Martin v. City of Jersey Village*, No. 4:10-CV-2070, 2010 WL 5092811, at *1 (S.D. Tex. Dec. 7, 2010).

When considering a Rule 12(b)(6) motion to dismiss, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

## II. Plaintiff does not have Article III standing as to any defendant.

Plaintiff cannot establish standing to sue any defendant because it is a corporate party whose personal voting rights are not at stake and because a court order that affects only a limited slate of County Defendants will not redress a statewide harm. Because Plaintiff seeks prospective relief, it must establish an "imminent" future injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted). Allegations of "an imminent injury" must be "[p]laintiff-specific." *Stringer v. Whitley,* 942 F.3d 715, 722 (5th Cir. 2019). "[F]uture injury to others is irrelevant; plaintiffs seeking injunctive relief must show a continuing or threatened future injury to themselves." *Id.* at 721.



The fundamental flaw in Plaintiff's suit is that it depends on an allegation that the constitutional rights of third parties not before the Court are violated. "A claim of injury generally is too conjectural or hypothetical to confer standing when the injury's existence depends on the decisions of third parties not before the court." *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009). Plaintiff's theory of standing depends on speculation because it presupposes, without corroboration, that a voter in Texas will attempt to use Plaintiff's mobile phone app rather than visit a local governmental office, mail in a voter registration form, or register at the time of driver-license renewal, and that voters reside in areas where these alternatives are not easily available. *See* ECF 1 ¶ 18; *Little*, 575 F.3d at 540. This level of speculation is not enough to confer standing.

### A. Plaintiff does not have organizational standing because it is not injured.

An organization lacks organizational standing unless it satisfies the same Article III requirements applicable to individuals: injury in fact, causation, and redressability. *See NAACP v. City*

*of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (citing *Lujan*, 504 U.S. at 560–61). In an appropriate case, an organization can establish an injury in fact by showing that the challenged law conflicts with the organization's mission and "perceptibly impair[s]" its activities. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

If an organization avoids the impairment of its activities by spending additional resources to combat the effects of the challenged law, then the "drain on the organization's resources" may constitute an injury in fact. *Id.*; *see City of Kyle*, 626 F.3d at 238. But if the alleged effect of the challenged law on the plaintiff's activities would not qualify as an injury in fact, the plaintiff's reaction to the challenged law cannot qualify either. *See Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017) ("[A]ny resources [the organizational plaintiff] used to counteract the lack of a privacy impact assessment—an assessment in which it has no cognizable interest—were a self-inflicted budgetary choice that cannot qualify as an injury in fact." (quotation omitted)). That is because a plaintiff "cannot manufacture standing by choosing to make expenditures based on" an alleged harm that does not itself qualify as an injury in fact. *Clapper*, 568 U.S. at 402.



Here, Plaintiff fails on both theories. It has not plausibly alleged that HB 3107 causes a cognizable injury in fact. And the reactions to HB 3107 do not qualify either.

**1. Plaintiff has not plausibly alleged impairment of its activities or direct conflict with its mission.**

To establish standing under an impairment theory, Plaintiff must plausibly allege both that HB 3107 makes its "*activities* more difficult" and that there is "a direct conflict between the defendant's conduct and the organization's *mission*." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996); *see also id.* at 1429 (requiring that the "action challenged" be "at loggerheads with the [plaintiff's] stated mission"). Plaintiff has not done so here. As a result, "it is entirely speculative whether the defendant's conduct is impeding the organization's activities." *Id.* at 1430.

Plaintiff does not allege that HB 3107 prohibits its activities. Nor could it. The statute does not prohibit working to assist voters in the registration process or "support[ing] low-propensity voters." ECF 1 ¶ 17. The Complaint admits that voters can register if they have a printer or if they retrieve an application from their local government officials; the voter can then either hand deliver their application or mail it to the local registrar. *See id.* ¶¶ 36, 45. Contrary to Plaintiff's assertions, common sense suggests a voter need not wait for an election official to personally deliver the voter a registration application if the voter lacks a printer. *See id.* ¶ 36. Plaintiff offers no reasons for why it cannot direct its outreach programs to facilitating these mechanisms in a way that complies with state law, but merely makes ungrounded assertions that it should be entitled to utilize any technology it wants in registering voters. *See id.* ¶¶ 18–20.

Recognizing this, Plaintiff instead relies on the contention that HB 3107 "prevent[s] Vote.org from making **full use** of one of its most effective tools: the e-signature function of its voter registration web application." ECF 1 ¶ 20 (emphasis added); *accord id.* ¶¶ 18, 19. But there is no "direct conflict" between HB 3107 and Plaintiff's mission. *Nat'l Treasury Emps. Union*, 101 F.3d at 1430.

In *National Treasury Employees Union*, a public-sector union wanted to challenge the Line Item Veto Act. *Id.* But the union's "mission [wa]s to obtain improved worker conditions—a mission not necessarily inconsistent with the Line Item Veto Act." *Id.* Thus, the union rested its standing on the possibility the President would use his line-item veto authority to affect benefits for government workers. The court found no standing: "For a myriad of reasons, a given President may be disinclined to exercise the item veto power as to government employee benefits." *Id.* Such a speculative possibility could not be an injury in fact. *See Clapper*, 568 U.S. at 409.

The same is true here. HB 3107 is not in "direct conflict" with Plaintiff's mission of voter outreach. Plaintiff does not allege that any of the voters it assists are unable to register. Indeed, Plaintiff conspicuously fails to allege that HB 3107 will cause it to be unable to help any prospective Texas

voter to register. Thus, Plaintiff cannot establish that the statute impairs its organizational activities or directly conflicts with its mission.

**2. Plaintiff cannot establish standing based on diversion of resources.**

Plaintiff cannot claim standing based on a diversion of resources. ECF 1 ¶ 17–20, 26–27, 36. "Not every diversion of resources to counteract the defendant's conduct . . . establishes an injury in fact." *City of Kyle*, at 626 F.3d at 238. The Fifth Circuit explained in *City of Kyle* that a redirection of resources involving litigation or legal counseling in response to the need to comply with the law is not necessarily sufficient to establish an injury in fact and, therefore, standing. *Id.* (citing *La. ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000); *Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994)). Showing that an organization has suffered a "drain on resources" is sufficient to establish standing when an organization's staff has "stopped everything else" in order to "counter defendant's conduct." *ACORN*, 211 F.3d at 305 (quoting *Alexander v. Riga*, 208 F.3d 419, 427 (3rd Cir. 2000)).

Plaintiff's allegation that it could not make "full use" of an e-signature registration tool that it "invested significant resources in developing and launching" does not establish an injury in fact under these principles. ECF 1 ¶ 18; *see City of Kyle*, at 626 F.3d at 238. First, the tangential impact HB 3107 is alleged to have on Plaintiff does not rise to the level of a "drain on resources" the Fifth Circuit has articulated is necessary to establish organizational standing. ECF 1 ¶ 20 (stating that Plaintiff cannot make "full use" of the registration tool, which leads to use of "more expensive (and less effective) means of achieving its voter registration goals in the State."); *see City of Kyle*, at 626 F.3d at 238. Second, Plaintiff has "not identified any specific projects that [it] had to put on hold or otherwise curtail in order to respond to" HB 3107. *See City of Kyle*, 626 F.3d at 238. Vague references to the effect on "general nationwide operations" and "programs in other states" do not suffice. ECF 1 ¶ 20.

Moreover, the alleged effects of HB 3107 on Plaintiff's activities are not injuries in fact, so Plaintiff's reactions are not either. As discussed above, a plaintiff "cannot manufacture standing by choosing to make expenditures based on" an alleged harm that is not itself an injury in fact. *Clapper*, 568 U.S. at 402. That general principle applies with equal force to organizational standing. In *National Treasury Employees Union*, because the possibility that the President would line-item veto benefits for government workers was not an injury in fact, the union's reaction to that possibility was also not an injury in fact. 101 F.3d at 1430. "Absent a direct conflict between [the union's] mission and the Line Item Veto Act, we are unsure whether [the union's] additional expenditure of funds is truly necessary to improve the working conditions of government workers or rather is unnecessary alarmism constituting a self-inflicted injury." *Id.* Likewise, Plaintiff's inability to have its software tool work in the precise manner it would prefer does not constitute a legally cognizable injury. Accordingly, Plaintiff has failed to demonstrate organizational standing.



**B. Plaintiff does not have associational standing because it lacks members.**

To the extent Plaintiff seeks to establish standing as an association acting on behalf of individual members, that claim also fails to establish subject-matter jurisdiction in this Court. An association or organization claiming to act on behalf of others must satisfy the three part test articulated in *Lujan* to establish standing. *City of Kyle*, 626 F.3d at 237. Thus, Plaintiff must "identify members who have suffered the requisite harm" to establish injury in fact. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009*); see also City of Kyle*, 626 F.3d at 237 (requiring evidence of "a specific member"). Plaintiff does not describe itself as a membership organization, ECF 1 ¶¶ 17–20, and not having members is fatal to associational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977) (requiring "indicia of membership in an organization" for associational standing); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267–68 (D.C. Cir. 2002) (holding a city could not assert associational standing because it did not have members). Plaintiff may work on behalf of individual

voters, but beneficiaries of a plaintiff's services do not qualify as members for associational standing. *See Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1010 n.4 (6th Cir. 2006) ("[T]he Northeast Ohio Coalition for the Homeless apparently seeks to assert a form of representational standing never recognized by any court—standing on behalf of the group served by the organization."); *id.* at 1013 (McKeague, J., concurring). Absent plausible allegations that HB 3107 will lead to the rejection of registration applications from identified members, Plaintiff cannot establish associational standing.

### C. Plaintiff cannot show statutory standing because artificial entities do not have voting rights.

Even if Plaintiff had Article III standing, it would lack statutory standing. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014). Section 1983 provides a cause of action only when *the plaintiff* suffers "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 Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) ("[L]ike all persons who claim a deprivation of constitutional rights, [plaintiffs] were required to prove some violation of their personal rights.").



Section 1983 "incorporates, but without exceptions, the Court's 'prudential' principle that the plaintiff may not assert the rights of third parties." David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45. When "[t]he alleged rights at issue" belong to a third party, rather than the plaintiff, the plaintiff lacks statutory standing, regardless of whether the plaintiff has suffered his own injury. *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011); *see also Conn v. Gabbert*, 526 U.S. 286, 292–93 (1999) (holding that a lawyer "clearly had no standing" to bring a § 1983 claim for an injury he suffered as a result of "the alleged infringement of the rights of his client" because a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

Here, all of Plaintiff's claims depend on the right to vote. ECF 1 ¶¶ 25, 29, 35–36. But Plaintiff is an artificial entity without voting rights. Plaintiff claims it suffered injury in having to expend resources to comply with the law, but this is injury is different in kind from that necessary to establish standing in a voting rights case. "[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Nat'l Federation of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)); *cf. Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002) ("It goes without saying that political parties, although the principal players in the political process, do not have the right to vote."). Plaintiff is necessarily asserting the rights of third parties and therefore cannot sue under § 1983. Because this follows from the statute itself, Plaintiff cannot invoke any prudential exceptions. *See Warth v. Seldin*, 422 U.S. 490, 514 (1975).



## III. Plaintiff's claims fail as a matter of law.

### A. Plaintiff's Section 1971 claim should be dismissed.

In Count I, Plaintiff contends that requiring a signature on a voter's registration violates Section 1971 of the Civil Rights Act. This claim should be dismissed because Section 1971 cannot be enforced as a private right of action, even under Section 1983. The statute contains no indication that Congress intended to create either a private right or a private remedy, and the detailed remedial scheme Congress did provide is at odds with the enforcement procedures set out in Section 1983. However, even if there was a private cause of action, Plaintiff's claim would still fail because only racially motivated deprivations of rights are actionable under Section 1971. *Broyles v. Tex.*, 618 F. Supp. 2d 661, 697 (S.D. Tex. 2009), *aff'd*, 381 Fed. Appx. 370 (5th Cir. 2010). But Plaintiff makes no allegations to that effect. The only reference to race contained in the Complaint concerns the actions taken by Plaintiff, not the State. Plaintiff therefore has failed to plead an element necessary for its claim to

proceed. The claim fails as a matter of law.

**1. Plaintiff has not asserted an actionable claim under Section 1971.**

Plaintiff has not met the necessary pleading requirements to qualify for relief for its Section 1971 clam. "[W]ell-settled law establishes that § 1971 was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements." *Broyles v. Tex.*, 618 F. Supp. 2d 661, 697 (S.D. Tex. 2009) (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006)). Accordingly, "only racially motivated deprivations of rights are actionable under 42 U.S.C. § 1971." *Id.* Plaintiff's Complaint, however, contains no allegations that HB 3107 (or the signature rule it clarified) was racially motivated. It only references race one time and that is in the context of describing Plaintiff's mission. *See* ECF 1 ¶ 17 (stating that Plaintiff works "to support low-propensity voters, including racial and ethnic minorities and younger voters who tend to have lower voter-turnout rates"). Instead, Plaintiff argues that HB 3107 poses an obstacle to voters who lack access to a printer, particularly if they live in a rural community or if their local officials choose not to distribute applications. Even if this allegation was true—and it is not—the conduct would not be actionable under Section 1971. *See Kirksey v. City of Jackson*, 663 F.2d 659, 664 (5th Cir. 1981) (requiring discriminatory intent). The claim should be dismissed.



**2. There is no private cause of action under Section 1971**

The failure to identify actionable conduct under Section 1971 is but one of multiple deficiencies dooming Plaintiff's claim. The claim also fails because Section 1971 does not create a private cause of action. Congress created a cause of action in Section 1971 for "the Attorney General," not private plaintiffs. 52 U.S.C. § 10101(c). Plaintiff presumably relies on an implied cause of action, but that does not work either. As many courts recognize, Section 1971 did not create an implied cause of action. *See, e.g.*, *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) ("Section 1971 is enforceable by the Attorney General, not by private citizens."); *Mixon v. State of Ohio*, 193 F.3d 389, 406 n.12 (6th

Cir. 1999); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004); *Spivey v. State of Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998); *McKay v. Altobello*, No. 2:96-cv-3458, 1996 WL 635987, at *2 (E.D. La. Oct. 31, 1996); *Cartagena v. Crew*, No. 1:96-cv-3399, 1996 WL 524394, at *3 n.8 (E.D.N.Y. Sept. 5, 1996); W*illing v. Lake Orion Cmty. Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996); *Good v. Roy*, 459 F. Supp. 403, 405–06 (D. Kan. 1978); *but see Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (permitting plaintiff to bring a private cause of action via Section 1983).

This authority is in keeping with the modern approach to implied causes of action. In *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), the Supreme Court rejected the looser approach to implying causes of action prevalent in the 1960s. Today, "private rights of action to enforce federal law must be created by Congress." *Id.* at 286. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* Unless Congress expresses that intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87. To be sure, federal courts have not always followed that strict approach. There was a time when federal courts "assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). However, that time has passed. Since jettisoning the "*ancien regime*," *id.* at 1855, the Supreme Court has "not returned to it." *Sandoval*, 532 U.S. at 287; *see also Stokes v. Sw. Airlines*, 887 F.3d 199, 205 (5th Cir. 2018) (rejecting reliance "on pre-*Sandoval* reasoning").

Yet, Section 1971 contains no indication of an intent to create a private right, much less a private remedy. The statute's text is focused on the local official it regulates, not individual voters. *See* 52 U.S.C. § 10101(a)(2) ("No person acting under color of law shall . . . ."). "Statutes that focus on the

person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289 (quotation omitted). Section 1971 "is framed in terms of the obligations imposed on the regulated party" (the local official) while voters are "referenced only as an object of that obligation." *Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1171 (9th Cir. 2013); *see also Conservation Force v. Delta Air Lines, Inc.*, 190 F. Supp. 3d 606, 616 (N.D. Tex. 2016), *aff'd*, 682 F. App'x 310 (5th Cir. 2017) (holding that under *Sandoval*, the Air Carrier Access Act does not imply a private right of action).

Indeed, although Section 1971 refers to "the right of any individual to vote in any election," 52 U.S.C. § 10101(a)(2)(B), it does not contain any "'rights-creating' language." *Sandoval*, 532 U.S. at 288. The right to vote to which Section 1971 refers is based on rights created by virtue of *state* law. *See, e.g.*, *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). Even if Section 1971 referred to federal rights created elsewhere, *see, e.g.*, U.S. Const. amend. XV, such a reference would not transform Section 1971 itself into a rights-creating provision. Thus, Section 1971 does not create a federal right "in clear and unambiguous terms," *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002), meaning that Plaintiffs cannot bring a private cause of action.



Additionally, Section 1971 does not create private remedies. It instead authorizes the Attorney General to bring suit. *See* 52 U.S.C. § 10101(c). Plaintiff attempts to get around this limitation by dressing up their Section 1971 claim in the trappings of Section 1983, but this does not work. Congress provided a detailed remedial scheme in Section 1971 that is inconsistent with Section 1983 suits. For example, procedural protections like the ability to request a three-judge district court in Section 1971 suits are not available under Section 1983. *See* 52 U.S.C. § 10101(g). "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); *see also Sandoval*, 532 U.S. at 290 ("The

express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

The main case holding otherwise, *Schwier v. Cox*, does not grapple with *Sandoval* and makes other errors besides. 340 F.3d 1284, 1297 (11th Cir. 2003). First, the *Schwier* court limited its *Sandoval* analysis to a "see also" citation and emphasized legislative history. *See* 340 F.3d at 1295–96. But as Judge Lynn has explained, *Sandoval* requires that "[l]egislative history and contemporaneous legal context [be] eschewed in favor of plain language interpretation." *Conservation Force v. Delta Air Lines, Inc.*, 190 F. Supp. 3d 606, 615 (N.D. Tex. 2016), *aff'd*, 682 F. App'x 310, 311 (5th Cir. 2017) (per curiam) (affirming "[e]ssentially for the reasons stated in the district court's comprehensive and well-reasoned opinion"). And plain language of Section 1971 does not create a federal right. *See Gonzaga Univ.*, 536 U.S. at 290. Section 1971 at most references a preexisting right, which is not "'rights-creating' language." *See Sandoval*, 532 U.S. at 288–90.



Second, *Schwier* relies on the repudiated reasoning from *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). *See Schwier*, 340 F.3d at 1294. *Allen* exemplifies the methodology the Supreme Court has abandoned in favor of "a far more cautious course before finding implied causes of action." *Ziglar*, 137 S. Ct. at 1855. It is thus no longer the courts' job to "provide such remedies as" it deems "necessary to make effective a statute's purpose effective," *id.* (internal quotation marks omitted), as the court in *Allen* and *Schwier* sought to accomplish. The very premise off which *Allen*, *Schwier*, and *Schwier's* progeny builds their findings is in error. *See*, *e.g.*, *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 859 (W.D. Tex. 2020), *rev'd and remanded*, 860 F. App'x 874 (5th Cir. 2021).

### B. HB 3107 is constitutional under *Anderson-Burdick*

The crux of Plaintiff's claim in Count II is that asking a voter to put pen to paper when registering to vote is simply too much under our Constitution and that voters have a fundamental right to sign their applications electronically. Neither case law nor common experience supports that

view. Requiring an ink signature is not a "new" phenomenon the State of Texas invented on its own. People are asked to physically sign documents to accomplish a myriad of everyday tasks, including by this Court.[2] It is not a serious inconvenience. *See Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (holding that a system analyzing voters' signatures imposed "only a minimal burden"). Moreover, the requirement advances weighty state interests that more than outweigh any *de minimis* burden experienced by voters. The rule is therefore constitutional under the *Anderson-Burdick* rubric.

**1. Any burden imposed on voters is minimal if that.**

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). For this reason, the Supreme Court has implemented a sliding-scale framework that governs the level of scrutiny applied to "constitutional challenges to specific provisions of a State's election laws" under "the First and Fourteenth Amendments." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 234 (5th Cir. 2020) (cleaned up) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983)).



The framework has three parts but effectively it requires courts to balance "the character and magnitude of the asserted injury" to the rights the plaintiff seeks to vindicate against "the precise interests put forward by the State as justifications" for the challenged rule, all while taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). When a state election law imposes only

[2] The United States District Court for the Western District of Texas requires that any pleading or motion that adds or seeks to add a new party must be filed traditionally, which includes an original signature. *See* United States District Court, Western District of Tex., Administrative Policies & Procedures for Electronic Filing in Civil & Criminal Cases §5(a), *available at* https://bit.ly/3GONQDJ.

"reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the state's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788. The State, after all, has considerable power "to engage in 'substantial regulation of elections" to ensure that elections are well run. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013) (quoting *Storer*, 415 U.S. at 730).

In this case, the challenged law, HB 3107, does not encroach on the right to vote whatsoever, and even if it did, the law survives *Anderson-Burdick* review because any burden is miniscule. The Constitution does not include a freestanding right to for individuals to register to vote in whatever manner they or Plaintiff deem most convenient. When considering a challenge to the limited availability of absentee ballots, the Supreme Court distinguished "the right to vote" from the "claimed right to receive absentee ballots." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). It concluded that the plaintiffs' inability to vote by mail did not implicate the right to vote because it did not "preclude[] [the plaintiffs] from voting" via other methods. *Id.* at 808. The same reasoning applies here, as Texas provides voters with multiple methods by which to register. Registering to vote via a telephonic facsimile machine is but one.



As per the Election Code, any "person desiring to register to vote" can submit his or her application to the county registrar by personal delivery, by mail, or by fax machine. Tex. Elec. Code § 13.002(a). If the person needs assistance, the applicant has the option of appointing an agent to submit the application on his behalf pursuant to § 13.003. Further, the Election Code designates certain government offices to act as "voter registration agencies," including the Department of Public Safety (DPS), the Health and Human Services Commission, and public libraries. *Id.* § 20.001. Each of these offices "shall provide a voter registration application form to each" qualified individual "in connection with the person's application for initial services" and "any recertification, renewal, or change of address, unless the person declines in writing." *Id.* at § 20.031. If the voter utilizes the

service, then the office "shall deliver to the voter registrar . . . each completed registration application." *Id.* § 20.35.

Because the challenged statute does not affect voters' numerous other options for registering to vote it does not affect the "right to vote," only the "claimed right" to utilize a specific web application developed by Plaintiff. *See McDonald*, 394 U.S. at 807. Indeed, if anything, HB 3107 helps *expand* voters' ability to register. The fax machine option only exists because Texas recognizes that voters may need to register or update their information close to an election deadline. The State therefore allows voters to submit their application in a way that avoids any incidental delays, before expecting voters to complete the remaining registration requirement—i.e., providing a wet signature. *See* Tex. Elec. Code § 13.143 (measuring a registration's effective date from the date the transmission is received by the registrar). Accordingly, the challenged provision represents a limited exception to the default rule that individuals, not utilizing the services of a voter registration agency, provide their original signature at the time they initially submit their application. It is an accommodation, not a restriction.



However, even if this Court disagreed, there is no reason to suspect that voters will be unable to register to vote. Signature requirements are a familiar aspect of modern life that Texans are well equipped to navigate, especially in light of the numerous application methods Texas affords voters. The most Plaintiff offers to the contrary is an improbable hypothetical where a voter not only lacks a printer, but also has no access to the registrar's office and lives in an area where local officials and third-party organizations refuse to distribute ballots. But even accepting those facts as true, the voter would still have the option of visiting the Secretary of State's website and requesting a postage-page application be sent to the voter's residence, among other options. *See Request for Voter Registration Applications*, TEXAS SECRETARY OF STATE, https://www.sos.state.tx.us/elections/voter/reqvr.shtml (last visited Nov. 5, 2021).

Also, Plaintiffs conflate the *burden of complying* and the *consequence of not complying*. Under *Anderson-Burdick*, the former matters; the latter does not. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (lead opinion) (analyzing the burden on voters of obtaining identification rather than the consequence of attempting to vote without identification); *id.* at 209 (Scalia, J., concurring in the judgment) (same). That is why the Supreme Court has always analyzed "the magnitude of burdens . . . categorically and [has] not consider[ed] the peculiar circumstances of individual voters or candidates." *Id.* at 206. To the extent HB 3107 imposes a burden, that burden is uniform and *de minimis*: to register to vote, one must physically sign the application. It poses no real barrier to an individual who wants to vote.

**2. The State's interests more than justify the supposed burden placed on voters.**

Because HB 3107 imposes only minimal, non-discriminatory burdens if any, the statute is subject to relaxed scrutiny. *See Burdick*, 504 U.S. at 434. Texas therefore need only point to a "legitimate state interest[]" to justify HB 3107 under the *Anderson-Burdick* test. *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 184 (5th Cir. 1996). Texas meets this requirement easily, as the weighty and compelling interests advanced by this rule justify HB 3107 under any level of scrutiny.



First, HB 3107 helps maintain accurate voting rolls and combat fraud. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021).

> One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.

*Id.* Inaccuracies in voter registration are a serious problem: "It has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate." *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). "Any corruption in voter registration affects a state's paramount obligation to ensure the integrity of the voting process and threatens the

public's right to democratic government." *Steen*, 732 F.3d at 394. Accordingly, Texas has a weighty "interest in preventing voter registration fraud," *id.* at 394–95, and other inaccuracy-causing conduct.

Requiring an original signature is a stronger and more certain method to guarantee the signature's authenticity—and thereby, the applicant's identity—than an electronic signature. That is so because it is harder to forge an individual's handwritten signature than it is to copy a previously-executed electronic signature or to use software to generate such a signature. Requiring a signature also impresses upon the applicant the importance of providing accurate information. And because a signature could be used against a fraudster, HB 3107 both deters fraud and assists law enforcement in detecting and prosecuting that fraud.

Plaintiff argues that the use of electronic signatures by DPS somehow invalidates the interest explained above. *See* ECF 1 ¶¶ 7–8, 32–35. But the argument is plainly erroneous because it fails to recognize the glaring reason why the safeguards implemented in these two circumstances differ. When someone registers through DPS, the applicant appears in person and has with him documentation that verifies his identity. The pertinent employee can readily determine that the applicants are who they say they are. The same is not true when an applicant registers via fax machine, much less a web application where a third party submits the application on the applicant's behalf.



Second, Texas has an interest in maintaining the solemnity of voter registration. The right to vote has been called "sacred." *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 701 (1819); *Save Our Aquifer v. City of San Antonio*, 237 F. Supp. 2d 721, 727 (W.D. Tex. 2002). The exercise of a sacred right should be undertaken seriously, not casually. The State's signature requirement helps impress upon would-be voters the serious nature of the rights and obligations connected to voting. People are accustomed to important events requiring signatures. An application for a marriage license must be signed in person. *See* Tex. Fam. Code § 2.002(5). Purchasing a home often requires in-person signatures, and the same is true for consenting to a medical procedure. Requiring that kind of signature

sets the activity apart from routine events, such as online transactions that require only an electronic "signature" like clicking "I agree" to various unread terms and conditions.

In light of these interests, HB 3107 is constitutional under the *Anderson-Burdick* framework. Plaintiff's claim that the wet-signature requirement violates the First and Fourteenth Amendments clearly lacks merit. The Court should enter judgment on the pleadings and dismiss that claim.

## CONCLUSION

For each of the foregoing reasons, Plaintiff's claims should be dismissed.

Date: November 9, 2021

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 9, 2021 a true and correct copy of the foregoing document has been sent by electronic notification through ECF by the United States District Court, Western District of Texas, San Antonio Division, to:

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