UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VOTE.ORG,

Plaintiff,

v.

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,

Defendants,

and

KEN PAXTON, in his official capacity as Attorney General of Texas,

Intervenor-Defendant.

Civil Action

Case No. 5:21-cv-649-JKP-HJB

PLAINTIFF VOTE.ORG'S OPPOSITION TO INTERVENOR TEXAS ATTORNEY GENERAL KEN PAXTON'S MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

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TO THE HONORABLE JASON PULLIAM:

Plaintiff Vote.org ("Vote.org" or "Plaintiff"), by and through its undersigned counsel, files this response to the Motion to Dismiss and Motion for Judgment on the Pleadings filed by Intervenor-Defendant Texas Attorney General Ken Paxton (the "Attorney General"). *See* Tex. Att'y Gen. Ken Paxton's Mot. to Dismiss & for Judgment on the Pleadings ("Mot."), ECF No. 53.

INTRODUCTION

The Attorney General attacks Vote.org's standing and ability to challenge a voter registration requirement—the Wet Signature Rule, H.B. 3107 § 14, 87th Leg., Reg. Sess. (Tex. 2021) (amending Tex. Elec. Code § 13.143(d-2))—that violates the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), imposes an unconstitutional burden on Texans' right to vote in violation of the First and Fourteenth Amendments, and forces Vote.org to divert resources to counteract the law's harmful impact on Vote.org's voter registration program. But even a cursory examination of the Attorney General's reasoning—and the authority that he cites to support it—demonstrates that his motion lacks merit. Vote.org has standing to assert its causes of action and has stated plausible claims for relief.

As a threshold matter, the Attorney General's attacks on Vote.org's standing and cause of action brought under the Materiality Provision are barred by 28 U.S.C. § 2403(b), which limits the State's participation in these proceedings to defending the *constitutionality* of the Wet Signature Rule, meaning that the Attorney General should be heard to weigh in only on Vote.org's constitutional claim. In any event, this Court already rejected the Attorney General's standing argument. Less than a month ago, this Court entered an order denying Defendant Remi Garza's motion to dismiss, which advanced many of the same arguments that the Attorney General now recycles. And the Attorney General's argument that organizational standing cannot sustain

constitutional claims under Section 1983 has also been previously contemplated and roundly rejected by courts in this district and beyond.

Similarly unsustainable is the Attorney General's argument that Vote.org's claim under the Materiality Provision fails as a matter of law because Vote.org did not allege racial discrimination. The text of the provision imposes no such requirement, and the precedent upon which the Attorney General relies pertains to a different provision entirely. As for the Attorney General's contention that the Materiality Provision confers no private right of action, it is squarely at odds with congressional intent, the parallel language between the Materiality Provision and other statutes recognized as containing private rights of action, and courts' repeated recognition of private rights of action under the Civil Rights Act, including an opinion from another court in this district which previously rejected the Attorney General's exact argument. *See Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 856 (W.D. Tex. 2020), *rev'd on other grounds*, 860 F. App'x 874 (5th Cir. 2021). Thus, the Attorney General's attacks on Vote.org's statutory claim—even if they were properly before the court (and they are not)—are unfounded.

As for the Attorney General's defense of the Wet Signature Rule's constitutionality (and attack on Vote.org's *Anderson-Burdick* claim), it simply assumes that the law poses no burden, ignoring the reality that millions of Texans do not own printers or are unable to easily travel to sign voter registration forms in person. Significantly more Texans, however, own smart phones, and many were able to use them to complete their registration forms using Vote.org's registration web application, before the Wet Signature Rule was imposed. Complaint ("Compl.") ¶¶ 17, 19, ECF No. 1. In any event, it would be procedurally improper to accept the Attorney General's version of the facts over Vote.org's at this stage in the proceedings. Finally, the Attorney General's implausible justifications for the Rule—including a supposed interest in preventing voter fraud,

and, remarkably, maintaining the "solemnity of voter registration"—are not only similarly premature, they also fail to establish an adequate state interest under *Anderson-Burdick* and ultimately reenforce that the Rule is immaterial to voter eligibility and plainly violates Section 10101 of the Civil Rights Act.

ARGUMENT

I. The Attorney General's motion is improper under 28 U.S.C. § 2403(b).

The Attorney General's motion to dismiss and for judgment on the pleadings is improper because he advances arguments far beyond the limited scope of issues permitted under 28 U.S.C. § 2403(b), which provides the basis for the State's participation in this action.

Under Section 2403(b), a State may intervene in certain cases only "for presentation of evidence, if evidence is otherwise admissible in the case, and *for argument on the question of constitutionality*." 28 U.S.C. § 2403(b) (emphasis added). As such, an intervening State's participation under Section 2403(b) cannot exceed the scope of defending the law's constitutionality. *See, e.g.*, *Nash v. Chandler*, 848 F.2d 567, 574 (5th Cir. 1988) (explaining that Section 2403(b) permits the State to intervene "solely for the purpose of defending the constitutionality of a state statute"); *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982) ("The scope of this statutory intervention is limited to presenting evidence and arguments in support of the constitutionality of the statute.").

True to Section 2403's plain text, when States have intervened under that statute, courts have rejected their participation in motions practice that goes beyond the limited issue of a challenged statute's constitutionality. *See, e.g.*, *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 411 F.3d 777, 796–97 (6th Cir. 2005) (declining to review preliminary injunction order where constitutionality of statute was not at issue); *Blair v. Shanahan*, 38 F.3d 1514, 1522 (9th

Cir. 1994) (finding that Section 2403(b) "does not allow a State standing to participate in a motion where questions of constitutionality are not among the issues argued").

Here, the Attorney General's entire motion to dismiss and much of his motion for judgment on the pleadings are unrelated to the Wet Signature Rule's constitutionality. The arguments that he advances in support of his motion to dismiss are premised entirely on standing grounds—a quintessential procedural issue unrelated to the merits—and therefore barred by Section 2403(b). *See Freedom from Religion Found. v. Cong. of U.S.*, No. 07-cv-356-SM, 2008 WL 3287225, at *8 (D.N.H. Aug. 7, 2008) (declining to hear intervening state's arguments on court's jurisdiction and plaintiffs' standing). And Section 2403(b) similarly bars several of the Attorney General's arguments in support of his motion for judgment on the pleadings that addresses Vote.org's statutory, rather than constitutional, claim. The Attorney General's motion to dismiss and most of his motion for judgment on the pleadings should be denied on this basis alone.

II. Vote.org has standing.

A. This Court has already held that Vote.org has suffered an injury sufficient to confer Article III standing.

Even assuming Section 2403(b) permits the Attorney General to challenge Vote.org's standing, this Court has already held that Vote.org has sufficiently alleged an injury in fact, Order Denying Mot. to Dismiss ("Order") 5, ECF No. 49—which is the same (and only) element of Article III standing that the Attorney General challenges here. Mot. 4-8; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). [1] It is well settled that an organization can satisfy the injury

[1] Though the Attorney General also asserts that "a court order that affects only a limited slate of County Defendants will not redress a statewide harm," Mot. 4, such a threadbare assertion is insufficient to raise a challenge to redressability. *United States v. Green*, 964 F.2d 365, 371 (5th Cir. 1992) (noting that the failure to provide legal or factual analysis constitutes waiver of an issue). In any event, Vote.org filed suit against the registrars of the four counties in which Vote.org

requirement "by alleging that it must divert resources from its usual activities in order to lessen the challenged restriction's harm to its mission." *Lewis v. Hughs*, 475 F. Supp. 3d 597, 612 (W.D. Tex. 2020) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). And as this Court explained, Vote.org "sufficiently alleges its injury in fact is the additional time, effort, and money expended to 'redesign its Texas voter registration programs.'" Order 3 (quoting Compl. ¶ 20).

Without acknowledging the Court's prior order, the Attorney General advances various arguments that are irreconcilable with the Court's holding and meritless on their own terms. First, the Attorney General contends that Vote.org has not "plausibly allege[d]" that "HB 3107 makes its activities more difficult." Mot. 5 (emphasis omitted). But that is untrue. Again, as this Court has already found, "Plaintiff's complaint sufficiently alleges its injury in fact is the additional time, effort, and money expended to 'redesign its Texas voter registration programs.'" Order 3 (quoting Compl. ¶ 20). Because Vote.org had to expend those resources, it also had to divert resources from both national operations and operations in other states and had to employ new tactics and use new, "less effective," tools to "achiev[e] its voter registration goals" in Texas. Compl. ¶ 20.

The Attorney General also claims that there is no "direct conflict between the defendant's conduct and the organization's mission." Mot. 5 (emphasis omitted) (quotation omitted). Again, this is inaccurate. As the Complaint alleges, Vote.org's mission to register voters and engage in get-out-the-vote efforts is undermined by the Wet Signature Rule because it creates an unnecessary hurdle for eligible Texans to register and, therefore, to vote. *See* Compl. ¶ 36. And the Wet Signature Rule further conflicts with Vote.org's mission to "use technology to simplify political engagement, increase voter turnout, and strengthen American democracy" because it "effectively

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introduced the e-signature function of its web application. Compl. ¶ 18. An injunction against these county registrars will redress Vote.org's injuries.

ended Vote.org's use of the e-signature function included in its voter registration web application" and forced Vote.org to use more expensive and less effective tools to "achiev[e] its voter registration goals." *Id.* ¶¶ 17, 19–20.

To suggest otherwise, the Attorney General relies upon out-of-circuit precedent that has no factual parallel to this case. *See* Mot. 6 (citing *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996)). While the court in *National Treasury Employees Union* found that "speculative conclusion[s]" about the implementation of a challenged statute were insufficient to create conflict with a union's mission, 101 F.3d at 1430, here the Wet Signature Rule has *already* frustrated Plaintiff's mission and will continue to do so in the future. *See, e.g.*, Compl. ¶¶ 19-20, 36. The Attorney General is wrong to suggest that a plaintiff must allege that a law "*prohibits* its activities" to establish this element of standing, nor is it required to "identif[y] any specific projects that [it] had to put on hold or otherwise curtail in order to respond to" the law's restrictions. Mot. 6-7 (emphasis added) (quoting *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010)).

In fact, the Fifth Circuit has previously rejected the Attorney General's exact reasoning, explaining that the very quoted remark the Attorney General uses "was not a heightening of the *Lujan* standard, but an example of how to satisfy it by pointing to a non-litigation-related expense." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017). Fifth Circuit precedent requires only that a plaintiff show that it diverted resources to "counteract the defendant's conduct," which "'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources . . . .'" *City of Kyle*, 626 F.3d at 238. Vote.org has done that.

Organizational plaintiffs, furthermore, are not required show that their "staff has 'stopped everything else' in order to 'counter defendant's conduct.'" Mot. 7 (quoting *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000)). The language that the Attorney General

relies upon in *LeBlanc* was merely providing an example, from a decision in another circuit, of an instance where a plaintiff had established standing on a diversion of resources theory—it was not articulating a required baseline. *See* 211 F.3d at 305. Indeed, the Fifth Circuit has reaffirmed that an organizational plaintiff's injury "need not be substantial" or even "measure more than an 'identifiable trifle.'" *OCA-Greater Houston*, 867 F.3d at 612 (quoting *ACORN*, 178 F.3d at 358).

Finally, the Attorney General's assertion that "the alleged effects of HB 3107 on Plaintiff's activities are not injuries in fact" is divorced from reality. Mot. 8. The Wet Signature Rule precluded Vote.org from using the e-signature function it created for use in Texas. Compl. ¶ 27. Not only that, the diversion of resources caused by the effective termination of Vote.org's e-signature function *itself* is an injury. The existence of other limitations on organizational standing—such as insufficient diversion of resources "based on hypothetical future harm that is not certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013)—does not undermine any of Vote.org's stated injuries. Vote.org has pleaded sufficient facts to demonstrate an injury in fact, as this Court has already held. The Court should adopt the same reasoning here.

B. The Attorney General's theory of statutory standing contradicts established precedent.

The Attorney General also advances the radical theory that a plaintiff cannot assert organizational standing in claims arising under 42 U.S.C. § 1983. As an initial matter, courts within this Circuit have explicitly rejected this argument, recognizing that organizational plaintiffs "have standing to sue for voting rights violations using Section 1983." *Tex. All. for Retired Ams. v. Hughs*, 489 F. Supp. 3d 667, 685 (S.D. Tex. 2020).

Accordingly, courts—including in the Western District of Texas—routinely recognize that plaintiffs have organizational standing to bring Section 1983 claims based on diversions of resources. *See, e.g.*, *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 856 (W.D. Tex. 2020),

rev'd on other grounds, 860 F. App'x 874 (5th Cir. 2021); *Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1258 (N.D. Ga. 2018); *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affs.*, 749 F. Supp. 2d 486, 496 (N.D. Tex. 2010). And in *OCA-Greater Houston*, the Fifth Circuit found that plaintiffs had organizational standing to challenge a law under Section 208 of the Voting Rights Act, *see* 867 F.3d at 612, a claim they asserted both directly and through Section 1983. *See OCA-Greater Houston v. Texas*, No. 1:15-CV-00679-RP, 2016 WL 9651777, at *1 (W.D. Tex. Aug. 12, 2016).

The Attorney General's reliance on *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986), is of no help to him either. There, the court considered whether a man's wife and daughter could recover under Section 1983 for the violation of the man's rights. *Id*. It held that the daughter could recover because she "made the proof of personal loss required" but the wife did not. *Id*. at 1161. *Coon* did not upend organizational standing.; indeed, to the extent *Coon* is relevant, it supports Vote.org's standing because it too has shown the requisite "personal harm." The rest of the Attorney General's cases similarly do not concern organizations or their standing to assert claims under Section 1983.

III. Vote.org has stated a cause of action under the Materiality Provision.

A plain reading of the Materiality Provision's text establishes that, to state a claim under 52 U.S.C. § 10101(a)(2)(B), a plaintiff must show: (1) the defendant was "acting under color of law"; (2) the defendant "den[ied] the right to vote" to "any individual"; (3) "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting"; and (4) the "error or omission is not material in determining whether such individual is qualified under State law to vote in such election." *Id*. Vote.org pleaded sufficient facts to establish these elements—something the Attorney General does not, and cannot, dispute. *See* Mot. 11.

While the Attorney General argues that Vote.org must demonstrate racial discrimination, the text of the Materiality Provision says no such thing. On the contrary, it provides that "no person acting under color of law" may disenfranchise "*any* individual" on technical grounds. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Injecting a requirement to show racial discrimination would render the word "any" meaningless. *Young v. UPS, Inc.*, 135 S. Ct. 1338, 1352 (2015) ("We have long held that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause is rendered superfluous, void, or insignificant." (quotations omitted)). Furthermore, because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," it would be inappropriate for this Court to insert an additional barrier to enforcement that Congress elected not to include in the first instance. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Finding no racial discrimination requirement in the Materiality Provision itself, the Attorney General invokes precedent addressing other statutory provisions not at issue in this lawsuit. Mot. 11. For example, he suggests that *Kirksey v. City of Jackson*, 663 F.2d 659 (5th Cir. 1981), requires discriminatory intent for Materiality Provision claims, Mot. 11, but *Kirksey* involved Section 2 of the Voting Rights Act, not the Materiality Provision. *Id*. at 664. And *Kirksey* relied on *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which was similarly concerned only with Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. *Id*. at 58-69, 60–61. Thus, neither case can provide support for the Attorney General's position.[2]

[2] The only other authority the Attorney General cites is the district court opinion in *Broyles v. Texas*, 618 F. Supp. 2d 661 (S.D. Tex. 2009). That case did concern the Materiality Provision but the district court's analysis is deeply flawed. It conducted no serious analysis of the Materiality Provision itself. *Id*. at 697. Instead, it simply cited *Kirksey* to conclude that an allegation of racial discrimination is required for a Materiality Provision claim. But as discussed, neither *Kirksey* nor *Bolden* stands for that proposition. And without *Broyles*' rote quotation from those cases, there is nothing left to support its holding. The Court should not follow it.

A more appropriate comparator to the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), is the provision situated immediately above it in the U.S. Code: 52 U.S.C. § 10101(a)(2)(A), which requires that the same "standards, practices, or procedures" be applied to all persons "within the same county, parish, or other similar political subdivision" who are qualified to vote. Like the Materiality Provision, it applies to any "person acting under color of law" and makes no explicit mention of any race discrimination requirement. At least one court has held that Section 10101(a)(2)(A) has no race discrimination requirement. *See Frazier v. Callicutt*, 383 F. Supp. 15, 20 (N.D. Miss. 1974) ("[I]n a proper case, [Section 10101(a)(2)(A)] may be applied to prohibit discrimination on non-racial as well as racial grounds."). If the Court reaches this argument—which is, as discussed, outside the proper scope of the Attorney General's participation here—it should give effect to the plain language of the Materiality Provision and similarly reject the Attorney General's attempt to impose a racial discrimination requirement here.

IV. Private plaintiffs may enforce the Materiality Provision.

Courts have long recognized that Materiality Provision can be enforced by private parties. *See, e.g.*, *Hughs*, 474 F. Supp. 3d at 858 (finding implied right of action and collecting cases). While the Attorney General attempts to reverse this trend, his argument misreads the statute, legislative history, and precedent. To determine whether the Materiality Provision confers an implied right of action the court must "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." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The search "for Congress's intent" begins "with the text and structure" of the statute. *Id.* at 288. Critical to this textual analysis is the statutory presence of "rights-creating" language, defined as language aimed at protecting individuals from harm, rather than text whose focus is the restriction of government power. *Id.* at 288–89.

A. The Materiality Provision confers an implied private right of action.

The Materiality Provision explicitly creates private rights and duties, providing: "No person acting under color of law shall . . . 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 . . . ." 52 U.S.C. § 10101(a)(2)(B). This provision directly parallels the language in Title VI and Title IX, which the Supreme Court has held creates a private right of action. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979).

As the Court has explained, Title VI's dictate that "*No person* in the United States *shall* . . . be subjected to discrimination" and Title IX's "*No person* in the United States *shall*, on the basis of sex, . . . be subjected to discrimination," are quintessential examples of "explicit 'right- or duty-creating language" that imply Congressional intent "to create a private right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3-4 (2002) (quoting *Cannon*, 441 U.S. at 690-93, n.13). That is so because Title VI and Title IX set out to protect *individuals* from government encroachment, rather than simply define the boundaries of government action. The Materiality Provision does the same thing: it aims to protect individuals from disenfranchisement. Given the parallels between the Materiality Provision and Title VI and in Title IX, "[i]t is immediately clear that the 'rights-creating' language so critical to the Court's analysis in" prior cases is present here. *Sandoval*, 532 U.S. at 288.

Other statutory provisions suggest a congressional intent to afford a private right of action. For example, Congress later added language to another section in the same title to give both "the Attorney General *or an aggrieved person*" certain remedies when bringing suit "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302(a), (c) (emphasis added). The Materiality Provision is one such statute, covered by Section 10302,

and therefore enforceable by private parties. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 680 (1966) (Black, J., dissenting) (providing Section 10101(a), which includes the Materiality Provision, as an example of "definitive legislation to protect Fourteenth Amendment rights"); *Anderson v. Courson*, 203 F. Supp. 806, 811 (M.D. Ga. 1962) (describing Section 10101(a) as "appropriate enforcement legislation" pursuant to the Fourteenth and Fifteenth Amendments).

Other textual clues point to the same conclusion. *See, e.g.*, 52 U.S.C. § 10310(e) (awarding attorneys fees to "the prevailing party, *other than the United States*," in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment" (emphasis added)). It would be very odd for Congress to provide a remedy to persons other than the Attorney General if those persons could not bring an action in the first place. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope." (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989))).

For these reasons, several courts have already recognized the existence of a private right of action to enforce the Materiality Provision. Indeed, another court in this district recently explained in *Hughs* that the "weight of relevant authority supports the conclusion that [p]laintiffs have a private right of action to sue for violations under [the Materiality Provision]." 474 F. Supp. 3d at 859. And the Eleventh Circuit's decision in *Schwier v. Cox* engaged in a lengthy review of the provision's text, history, and purpose in reaching the same conclusion. *See* 340 F.3d 1284, 1296–97 (11th Cir. 2003). The cases the Attorney General cites to the contrary do not consider any of the above; instead, they assert that there is no private right of action with little or no analysis. For example, *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), did not analyze the availability of a private right of action at all; it merely asserted its conclusion that the Materiality Provision "is

enforceable by the Attorney General, not by private citizens." *Id*. at 756.[3] Instead of looking to a handful of cases that assume their own conclusions, this Court should rely on the thoughtful consideration of the issue in *Schwier* and *Hughs*.

In sum, the text, history, and precedent speak as one: the Materiality Provision creates an implied private right of action.

B. Congress intended to confer a private cause of action.

The Materiality Provision's long history of private enforcement further demonstrates Congress's intent to create a private right of action. Before Section 10101 was expanded to allow the Attorney General to enforce it, private individuals routinely sued under the statute to protect their voting rights. *See, e.g.*, *Smith v. Allwright*, 321 U.S. 649, 651 (1944); *Chapman v. King*, 154 F.2d 460, 464 (5th Cir. 1946); *Mitchell v. Wright*, 154 F.2d 924, 926 (5th Cir. 1946); *Rice v. Elmore*, 165 F.2d 387, 392 (4th Cir. 1947); *Hughs*, 474 F. Supp. 3d at 858; *see also Schwier*, 340 F.3d at 1295 (noting that from 1871 until 1957, private individuals "could and did enforce the provisions of § [10101] under § 1983").

There is robust evidence that Congress was aware of this legal landscape and intended to adopt it. Discussion of the 1957 amendment in committee described the provision as an *additional* means of securing the right to vote. The Judiciary Committee explained that the bill's purpose was

[3] The remaining cases the Attorney General cites are similarly perfunctory in their analysis. *See Mixon v. Ohio*, 193 F.3d 389, 406 n.12 (6th Cir. 1999) (addressing availability of private right of action in one sentence in footnote); *Cartagena v. Crew*, No. 1:96-cv-3399, 1996 WL 524394, at *3 n.8 (E.D.N.Y. Sept. 5, 1996) (same); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004) (dedicating only one sentence to considering availability of private right of action); *Spivey v. Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998) (same); *McKay v. Altobello*, No. CIV. A. 96-3458, 1996 WL 635987, at *2 (E.D. La. Oct. 31, 1996) (conclusorily asserting that provision is "enforceable only by the Attorney General, not impliedly, by private persons"); *Willing v. Lake Orion Cmty. Sch. Bd. of Trs.*, 924 F. Supp. 815, 820 (E.D. Mich. 1996) (addressing availability of private right of action in only two sentences).

"to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States," H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1966 (emphasis added), and acknowledged that "[s]ection 1983 . . . has been used [by individuals] to enforce . . . section [10101]," H.R. Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1977. The U.S. Attorney General's testimony confirmed this: "We are not taking away the right of the individual to start his own action . . . . Under the laws amended if this program passes, *private parties will retain the right they have now to sue in their own name*." *Civil Rights Act of 1957: Hearings on S. 83, an amendment to S. 83, S. 427, S. 428, S. 429, S. 468, S. 500, S. 501, S. 502, S. 504, S. 505, S. 508, S. 509, S. 510, S. Con. Res. 5 Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary*, 85th Cong. 73, 203, 1; 60-61, 67-73 (1957) (statement and testimony of the Hon. Herbert Brownell, Jr., Attorney General of the United States) (emphasis added).

Congress's intent is further evidenced by the subsequent reenactment of the statute. *See Silva-Trevino v. Holder*, 742 F.3d 197, 202 (5th Cir. 2014) ("It hardly seems unreasonable to abide by this assumption here, as Congress has had numerous opportunities to make any desired changes."). Notably, each of Congress prior reenactments of the statute occurred during a period in which the availability of the private right of action remained uncontroversial. *See, e.g.*, *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958) (finding that private plaintiffs, asserting claim under 42 U.S.C. § 1983 to enforce Section 10101 had "stated a cause of action warranting relief"); *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) (ordering relief to private parties bringing suit under Section 10101); *Coal. for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090, 1094 (2d Cir. 1974) (similar); *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000) (similar). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that

interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). These reenactments eliminate any doubt about the availability of a private right of action.

In sum, it must be presumed that Congress was aware of the state of the law permitting private individuals to sue under Section 10101 and acceded to it when it added the provision empowering the Attorney General to enforce it. That provision was designed to supplement—not supplant—the statute's private enforcement mechanism.

V. The Wet Signature Rule unconstitutionally burdens the right to vote.

The motion for judgment on the pleadings as to Vote.org's constitutional claims should also be denied. Indeed, the Attorney General's inability to present a plausible rationale for the Wet Signature Rule confirms that the requirement is not only immaterial to determining whether an individual is qualified to vote, 52 U.S.C. § 10101(a)(2)(B), but also unconstitutional.

In assessing claims that a law imposes an undue burden on the right to vote in violation of the Constitution, courts must weigh "the character and magnitude of the asserted injury" against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 789). Even slight burdens on the right to vote "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation,'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008), and no matter the magnitude of the burden the Court must take "into consideration 'the extent to which [the State's] interests make it necessary to burden the plaintiff's rights,'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

The Wet Signature Rule burdens the right to vote because it threatens citizens with disenfranchisement for failure to print and sign voter registration applications with "wet" ink. HB

3107, 87th Leg. Sess. § 14 (amending Tex. Elec. Code § 13.143(d-2)). That the burden may not impact every voter does not eliminate the State's obligation to identify an interest sufficient to justify the restriction. *See, e.g.*, *Crawford*, 553 U.S. at 198 ("The burdens that are relevant to the issue before us are those imposed on persons who . . . do not possess a current photo identification that complies with the [voter ID law]. The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute . . ."); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (holding that disqualification of provisional ballots that constituted less than 0.3 percent of total votes inflicted "substantial" burden on voters); *Ga. Coal. for the People's Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1346 (S.D. Ga. 2016) (finding severe burden where 3,141 individuals were ineligible to register).

The Attorney General contends that there is no burden at all because "Texas provides voters with multiple methods by which to register." Mot. 16. This argument fails for several reasons. First, the precedent he cites, *McDonald v. Board of Election Comm'rs of Chi.*, 394 U.S. 802 (1969), predates *Anderson-Burdick*, which is now the applicable test. Under *Anderson-Burdick*, there is no "litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters." *Crawford*, 553 U.S. at 191. Indeed, even after considering all of the various factors necessary, "the results [of that analysis] will not be automatic . . . there is 'no substitute for the hard judgments that must be made.'" *Anderson*, 460 U.S. at 789. Adopting the Attorney General's position—that *any* avenue left open to vote precludes any finding of a burden—would turn this controlling precedent on its head.

But even if *McDonald* were relevant, it still does not support the Attorney General's position. As a threshold matter, far from endorsing any of the categorical statements that the Attorney General suggests, *McDonald* turned on a "failure of proof." *Fla. State Conf. of*

N.A.A.C.P. v. Lee, No. 4:21CV187-MW/MAF, 2021 WL 4818913, at *13-14 (N.D. Fla. Oct. 8, 2021) (quoting *O'Brien v. Skinner,* 414 U.S. 524, 525 (1974)). Furthermore, unlike the absentee ballots in *McDonald*, which, according to the Court, were "designed to make voting *more available* to some groups who cannot easily get to the polls," 394 U.S. at 807 (emphasis added), this case involves restrictions on voter registration—a formal prerequisite to voting in Texas—and therefore necessarily implicates the right to vote, *see, e.g.*, *Stringer v. Pablos*, No. SA-16-CV-257-OG, 2020 WL 532937, at *7 (W.D. Tex. Jan. 30, 2020) (explaining that the "restriction on voter registration" at issue there "imposes a burden on the fundamental right to vote"); *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993) (holding plaintiff's right to vote was "substantially burdened" by state voter registration law).

Because Texas has imposed a burden on the right to vote, the State must assert an accompanying interest sufficient to justify the Wet Signature Rule. What the Attorney General offers up—(1) "maintain[ing] accurate voting rolls and combat[ing] fraud," Mot. 18, and (2) "maintaining the solemnity of voter registration," *id*. at 19—lacks merit because the Wet Signature Rule does not actually serve any fraud prevention purpose, and the solemnity of voter registration is not a legitimate state interest, *see, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) (finding that state's "arguments . . . do not warrant dismissal" because court "struggle[d] to understand how [the challenged] regime . . . advances" state's putative interest).

In fact, even Texas does not insist on a "wet" signature for voter registration in all circumstances. When Texans complete their voter registration applications at Department of Public Safety ("DPS") offices, the state is perfectly happy to accept imaged or electronic signatures. Compl. ¶¶ 8, 32-35, 39; *see also Stringer*, 320 F. Supp. 3d 862, 873, 895-96 (W.D. Tex. 2018), *rev'd on other grounds sub nom. Stringer v. Whitley*, 942 F.3d 715 (5th Cir. 2019).

The Attorney General points to the fact that prospective voters registering with DPS must prove their identity in person, Mot. 19, but this is a distinction without a difference because—as the State admitted in prior litigation—it does not use the *wet* signatures required by the new law to verify an applicant's identity. In fact, the state does not use the "wet" signature *for any purpose at all* during the registration process. *Stringer*, 320 F. Supp. 3d at 873-74.

Electronic signatures, moreover, are widely accepted in Texas for all kinds of purposes—including not just voting, but also other areas with significant and substantial legal ramifications—without any apparent concern that doing so could result in potential fraud. The Texas Administrative Code "authorizes election officials to capture voters' signatures using electronic devices for election day signature rosters. . . ." Compl. ¶ 31. Texas state law provides that "a signature may not be denied legal effect or enforceability solely because it is in electronic form" and that "[i]f a law requires a signature, an electronic signature satisfies the law." Tex. Bus. & Com. Code §§ 322.007(a), (d). If electronic signatures were as conducive to fraud as the Attorney General claims, Texas law would not go out of its way to ensure those signatures are given legal effect.

Similarly, the Attorney General has not identified, and Vote.org has not located, any authority that has recognized the need to "maintain[] the solemnity of voter registration" as a permissible state interest that can justify burdens on the right to vote. Not only is it entirely speculative and abstract, but the Attorney General has not offered even a reasoned explanation of why *in actuality*, rather than in his own imagination, a wet signature is more "solemn" than an imaged one. *Cf. Soltysik*, 910 F.3d at 448. Indeed, Texas permits the use of electronic signatures in other "solemn" occasions such as executing an advance health directive, Tex. Health & Safety Code § 166.011; signing a divorce decree, *Bartee v. Bartee*, No. 11-18-00017-CV, 2020 WL

524909, at *3 (Tex. Ct. App. Jan. 31, 2020) (describing use of electronic signature on final divorce decree); and closing on real property. Tex. Prop. Code § 12.0013.

Though the Attorney General claims that this purported interest arises from the fact that the right to vote is "sacred," it would be perverse to invoke the sanctity of the vote as justification for making that sacred right *harder* to exercise. *Cf. Save Our Aquifer v. City of San Antonio*, 237 F. Supp. 2d 721, 727 (W.D. Tex. 2002) (describing loss of the "sacred" right to vote as "clearly . . . irreparable").

All burdens on the right to vote, however slight, must be met by "relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (internal quotation omitted). The proffered interests here do not meet this standard because they are neither "relevant" nor "legitimate." Plaintiffs, therefore, have sufficiently alleged that the Wet Signature Rule imposes an unconstitutional burden on the right to vote.

CONCLUSION

For these reasons, the Court should deny the Attorney General's motion to dismiss and motion for judgment on the pleadings.

Dated: November 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule CV-7(D)(3), counsel for Plaintiffs certify that this opposition brief does not exceed 20 pages, exclusive of the caption, the signature block, any certificate, and any accompanying documents.

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