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.*	§	Civil Action No. 5:21-cv-649-JKP-HJB

TEXAS ATTORNEY GENERAL KEN PAXTON'S REPLY IN SUPPORT OF 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 seeks to overturn Texas's statutory requirement that a prospective voter apply a signature to the registration application that is required when a facsimile registration is transmitted to the relevant County authority. Not only does Plaintiff's Complaint for Declaratory and Injunctive Relief, ECF 1, (Complaint) fail to establish Plaintiff's standing to challenge the registration requirements, Plaintiff's claims fail on their merits because Plaintiff does not articulate any burden on the right to vote as a matter of law and because Plaintiff failed to state a cause of action under Section 1971.

In response to Intervenor Defendant Ken Paxton's (OAG's) Motion to Dismiss and for Judgment on the Pleadings, ECF 53 (Motion), Plaintiff takes the novel and incorrect view that the Court should ignore defects in subject-matter jurisdiction if they are asserted by an intervenor. ECF 56 at 3–4. Further, the Response argues that requiring a signature on the registration application is an unconstitutional burden on the right to vote, ECF 56 at 15–19, a position the Fifth Circuit squarely rejected just last year. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 238 (5th Cir. 2020) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 239 (2008) (Breyer, J., dissenting)). Lastly, the Response neglects the fact that Section 1971 was enacted pursuant to Fifteenth Amendment and therefore requires Plaintiff to allege a racial motivation to state a claim.

The Motion should be granted, and Plaintiff's claims dismissed, because the Court lacks subject-matter jurisdiction to hear Plaintiff's claims and, alternatively, the Complaint fails to state a claim for which relief may be granted.

ARGUMENT

I. OAG May Raise Standing and Statutory Arguments as an Intervenor-Defendant.

The question of whether a statute is constitutional cannot be divorced from the question of whether Plaintiff has standing to bring its claims. Plaintiff asserts that under Section 2403(b), OAG

may not raise arguments challenging Plaintiff's standing—which Plaintiff inaccurately frames as a "quintessentially procedural issue"—or the viability of Plaintiff's statutory claims. ECF 56 at 3–4. But the Court placed no limits on the arguments that OAG may raise when the Court granted the Attorney General's motion to intervene. And Plaintiff ignores that federal courts have an independent obligation to confirm their own jurisdiction. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir. 2001) (noting that "federal courts must address jurisdictional questions whenever they are raised and must consider jurisdiction *sua sponte* if not raised by the parties."); *Miller v. Hughs*, 471 F. Supp. 3d 768, 775 (W.D. Tex. 2020) ("Because standing is an essential component of federal subject-matter jurisdiction, the lack of standing can be raised at any time by a party or by the court."). Thus, even under Plaintiff's unduly narrow reading of Section 2403(b), the Court must consider whether Plaintiff has standing to pursue its claims.

To reach its untenable conclusion that this Court should ignore jurisdictional flaws in a complaint when an intervenor raises them, Plaintiff distorts the holding of several cases. For example, Plaintiff relies (at 3) on *Nash v. Chandler*, 848 F.2d 567, 574 (5th Cir. 1988), but *Nash* does not say that the State is **only** allowed to intervene for the purpose of defending the constitutionality of a statute; instead, the Court was describing the posture of the case and held that the State could not be held liable by virtue of its intervention, but the Court did not hold that an intervenor is barred from challenging subject-matter jurisdiction. *Id.* at 574. The holding of *Vietnamese Fishermen's Ass'n v. Knights of the KKK* also does not prohibit the intervenor from challenging the standing of the plaintiff to bring suit, as the statement in footnote 17 of that opinion is dicta. 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982).

The Court should also consider OAG's arguments in support of the dismissal of Plaintiff's claim under Section 1971 of the Civil Rights Act. ECF 53 at 10–14. Enforcement of a State's election laws is in the public interest. *See, e.g.*, *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam).

A ruling enjoining HB 3107 because it violates the Civil Rights Act would have the same practical effect as a ruling enjoining HB 3107 as unconstitutional. Further, treating compliance with Section 1971 as severable from the question of the HB 3107's compliance with the Constitution is incorrect because Section 1971 is enforcement legislation pursuant to the Fifteenth Amendment. *See Kirksey v. City of Jackson, Miss.*, 663 F.2d 659, 664–65 (5th Cir. 1981). OAG's ability to defend HB 3107 would thus be improperly hampered if the Court did not allow OAG to defend the statute against all efforts to enjoin its enforcement. And Plaintiff's reasoning could even extend to precluding OAG from defending HB 3107 against Plaintiff's constitutional claims, because those claims are being brought through the statutory mechanism that Congress provided in Section 1983. ECF 1 ¶ 12. If accepted, Plaintiff's theory would lead to the impermissible result of allowing its case to go forward when the Court lacks subject-matter jurisdiction. The Court need not and should not adopt such a cramped role for an intervenor-defendant under Section 2403(b).

II. Plaintiff Lacks Article III Standing.

A. Plaintiff does not plausibly allege an injury in fact.

The Court should not find that its prior order regarding the *associational* standing arguments made by Defendant Remi Garza preclude OAG from arguing that Plaintiff lacks *organizational* standing. *See* ECF 49 at 2. Although the Court found that Plaintiff's assertions regarding organizational standing were sufficient to plausibly allege an injury in fact under *Lujan*, those allegations were essentially unchallenged in Defendant Garza's Motion, which appear to challenge traceability as it concerns voters in Cameron County. *See* ECF 31 ¶ 5.5. OAG therefore respectfully requests the Court reconsider its injury-in-fact ruling based on OAG's analysis challenging Plaintiff's allegations of fiscal injury. *See* ECF 53 at 4–8.

For instance, reliance on the Fifth Circuit's standing analysis in *OCA-Greater Houston v. Texas* is misplaced because that case hinged on the effect on OCA's members, who were "deterred from

voting," requiring greater expenses related to community outreach to prevent this deterrence. 867 F.3d 604, 610 (5th Cir. 2017). These circumstances are easily distinguishable from Plaintiff's allegations, which involve the incidental expense a corporation must undertake to comply with state law. *See* ECF 1 ¶ 20 (alleging Vote.org cannot make "full use" of its web registration app). Even if the showing necessary for an injury in fact is slight, "[n]ot every diversion of resources to counteract the defendant's conduct . . . establishes an injury in fact." *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). In *City of Kyle*, the Fifth Circuit found that the mere expense related to an organization's response to changes in the law is insufficient to establish standing because the actions are no different from the organization's routine activities. *Id.* (citing *La. ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000)). As a voter outreach organization, it stands to reason that Plaintiff is constantly responding to developments in state election law, and the impact of HB 3107 is no different. *See id.* Plaintiff does not have organizational standing.

B. Section 1983 requires the violation of a personal constitutional right for standing.

Plaintiff does not allege that it personally suffered the invasion of a constitutionally protected interest and the allegation that Plaintiff possesses statutory standing by virtue of a diversion of resources is unfounded. The Court should not rely on *Tex. All. for Retired Ams. v. Hughs* for standing purposes because the court's holding in that case was premised on the associational standing the organization derived from its identified members.[1] *See* 489 F. Supp. 3d 667, 685 (S.D. Tex. 2020) ("Having found that Organizational Plaintiffs have adequately pled associational standing, the Secretary's argument [regarding statutory standing under Section 1983] lacks merit."). Plaintiff's citation to *Tex. Democratic Party v. Hughs*, which was overturned on appeal, similarly misses the mark

[1] OAG does not concede that associational standing also allows an organization statutory standing under Section 1983 and only cites the decisions in this section to illustrate that Plaintiff's theory of standing is even further divorced from the constitutional rights it seeks to vindicate than in the context of an organization suing on behalf of its members.

on Section 1983 standing involving a party whose personal constitutional rights are not violated. 474 F. Supp. 3d 849, 856 (W.D. Tex. 2020), *rev'd*, 860 F. App'x 874 (5th Cir. 2021) [hereinafter *TDP*]. *TDP* found that organizations could establish standing on behalf of their members who suffered an alleged constitutional harm, not that Section 1983 standing was proper for injuries to the organization itself. *Id.*; *see also Veasey v. Perry*, 29 F. Supp. 3d 896, 907 (S.D. Tex. 2014) ("As observed, however, **associational** standing allows enforcement of the individual member's rights.") (emphasis added). This argument thus depends on Plaintiff asserting that its **members** suffer a harm of constitutional proportions, which it has not done, and whatever the impact of HB 3107 on Vote.org's finances, these harms are not actionable under Section 1983 because Plaintiff does not allege that it has members and there is no harm to personal voting rights, since Plaintiff is an artificial organization that does not vote. *See Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986); *see also League of Women Voters of Nassau Cty. v. Nassau Cty. Bd. of Sup'rs*, 737 F.2d 155, 160 (2d Cir. 1984) (holding that organization does not have standing to sue under Section 1983 for violations of the personal constitutional rights of others). Accordingly, Plaintiff has no standing under Section 1983 to assert constitutional claims.

III. Plaintiff's Claims Should Be Dismissed Under Rule 12(c).

A. Section 1971 does not allow nondiscriminatory voter-eligibility statutes to be struck.

Plaintiff cites no authority for the proposition that 52 U.S.C. § 10101(a)(2)(B) claims are actionable in the absence of a claim of racial discrimination and it makes no attempt to distinguish *Broyles v. Texas*'s holding regarding this requirement. *See* 618 F. Supp. 2d 661, 697 (S.D. Tex. 2009), *aff'd*, 381 F. App'x 370 (5th Cir. 2010). Plaintiff attempts to textually attack *Broyles*'s analysis as "deeply flawed," but it does not address the textually-grounded reasoning of that case—Section 1971 is enforcement legislation pursuant to the Fifteenth Amendment, which reads, "The right of citizens of the United States to vote shall not be denied or abridged . . . by any State **on account of race, color, or previous condition of servitude** [and] The Congress shall have power to enforce this article by

appropriate legislation." U.S. Const. amd XV (emphasis added); *see also Broyles*, 618 F. Supp. 2d at 697 ("only racially motivated deprivations of rights are actionable under 42 U.S.C. § 1971"). If the text of Section 1971 must be given a plain reading, so too must the Fifteenth Amendment under which it was passed. *See Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). This reasoning comports with the restraint required by federal courts of limited constitutional jurisdiction, and Plaintiff presents an incomplete picture of the governing law by ignoring *Broyles*'s reasoning. *See* 618 F. Supp. 2d at 697; *cf., e.g., Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)) ("'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute'").[2] Therefore, Plaintiff fails to state a claim for relief under Section 1971 for lack of an allegation of racial discrimination.

B. Section 1971 does not confer a private cause of action.

As OAG explained in the Motion, the question of whether a federal statute creates a private cause of action is answered according to the rule articulated by the Supreme Court's *Sandoval* decision, not cases predating this analysis, and the answer is that Section 1971 does not confer a private right of action. ECF 53 at pp. 11–14; *see also Dekom v. New York*, No. 12-CV-1318 (JS)(ARL), 2013 WL 3095010, at *18 (E.D.N.Y. June 18, 2013) ("the weight of authority suggests that there is no private right of action under Section 1971"). Plaintiff's approach brushes this important precedent to the side, opening its argument on this point by citing the outdated methodology the Supreme Court used in

[2] The sole district court case that Plaintiff cites in support of its nonracial theory of recovery does not grapple with the constitutional grounding articulated in *Broyles* and strongly suggests that the state's classifications, while not explicitly racial, were a form of *de facto* racial classification. *Frazier v. Callicutt*, 383 F. Supp. 15, 18, 20 (N.D. Miss. 1974) ("This is such a proper case, if for no other reason than the fact that all discriminatees here have been shown to be members of a minority community, and precisely the minority community which the Fifteenth Amendment and the Civil Rights Act of 1964 were primarily designed to protect.").

Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979). ECF 56 at 11. As articulated by Plaintiff, the language of Titles VI and IX does not parallel the language in 52 U.S.C. § 10101(a)(2)(B) because Titles VI and IX contain language in which the subject of the prohibition is the individual protected from discrimination whereas the subject of § 10101(a)(2) is the person regulated—i.e., "No person acting under color of law shall . . ."—this is not the "rights-creating language" necessary to establish a private cause of action. *See Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001); *see also Logan v. U.S. Bank N.A.*, 722 F.3d 1163, 1171 (9th Cir. 2013) (finding no private right of action when the provision "is framed in terms of the obligations imposed on the regulated party").

Plaintiff claims that "Courts have long recognized that [the] Materiality Provision can be enforced by private parties," and cites to the overturned decision in *TDP* as support, but this approach again disregards the change in statutory reasoning mandated by *Sandoval* and is incorrect for additional reasons. ECF 56 at 10 (citing 474 F. Supp. 3d at 858). First, many of the cases cited on page 858 of the *TDP* opinion for this proposition did not rely upon Section 1971(a)(2)(B). *Compare* 52 U.S.C. § 10101(a)(2)(B), *with Smith v. Allwright*, 321 U.S. 649, 651 (1944); *Bell v. Southwell*, 376 F.2d 659, 660–61 (5th Cir. 1967), *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958), *Mitchell v. Wright*, 154 F.2d 924, 925 (5th Cir. 1946), *and Chapman v. King*, 154 F.2d 460, 461 (5th Cir. 1946). Indeed, the provision did not even exist until 1964, long after Plaintiffs' main cases were decided. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 101(a), 78 Stat. 241. The 1957 legislative history upon which *TDP* relies, and which Plaintiff cites, is irrelevant for the same reason. *See* ECF 56 at 14.

Second, none of those cases considered whether there was a private cause of action. It seems the issue was never raised, perhaps because each plaintiff had other claims that might have supported the same relief. *See Reddix*, 252 F.2d at 933–34; *Bell*, 376 F.2d at 660; *Mitchell*, 154 F.2d at 925; *Chapman*, 154 F.2d at 461. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004) (quotation omitted). Decisions that "never squarely addressed the issue," but "at most assumed" an answer, are not binding "by way of stare decisis." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). Third, even if those cases were on point, they would no longer be binding. *Sandoval* refused to "revert . . . to the understanding of private causes of action that held sway 40 years ago." 532 U.S. at 287. This Court should decline the same invitation.

The approach embraced by the Eleventh Circuit in *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), should not be followed by this Court essentially for all the reasons articulated in the Motion. ECF 53 at 10, 13–14; *see Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999) (en banc) ("enforcement mechanism provided in the statute [is] exclusive"); *cf. Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (FERPA creates no federal right enforceable under § 1983). Further, an approach faithful to *Sandoval* would supplant any justification in the "legislative history and contemporaneous legal context" with the plain language interpretation of Section 1971's text, which *Schwier* does not do. *See 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). Plaintiff's citation to other federal election provisions unrelated to Section 1971, ECF 56 at 11–12, should be disregarded as attempts to divert the Court's attention from the textual analysis *Sandoval* mandates.

C. Requiring a signature is material to establishing eligibility to vote.

If Plaintiff's argument is that the requirement of signing the registration application is immaterial, one might ponder whether even an electronic signature, or *any* signature, should be required. ECF 1 ¶¶ 38–39. Courts addressing this issue have rejected the argument that a signature requirement is immaterial to determining the voter's qualification under Section 1971. *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020); *Howlette v. City of Richmond, Va.*, 485 F. Supp. 17, 22–23 (E.D. Va. 1978) (signature-before-notary requirement is material under Section 1971 because it "impresses upon the signers of the petitions the seriousness of the act of signing a petition

for a referendum"); *see also Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1211 (S.D. Fla. 2006) (requirement to check boxes regarding felon, citizen, and mental-incapacitation status is material under materiality provision). Assuming without conceding that Plaintiff has standing or a private right of action under Section 1971, its claims would fall well short of violating Section 1971 for immateriality because signature requirements are crucial for determining the voter's eligibility to vote and for fraud-prevention purposes, as further discussed in the next section.

D. HB 3107 is constitutional under *Anderson-Burdick*.

Plaintiff has no response to OAG's argument that it suffers no burden on its fundamental right to vote (because it does not have one) and instead makes its argument in the abstract. Plaintiff's claimed right is not the fundamental right to vote but the claimed right to less costly technological means for conducting its outreach operations that are not currently contemplated under the Texas Election Code, on which it bases its standing arguments. *See* ECF 1 ¶ 20. Burdens on this claimed right are not of constitutional import. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 185 (5th Cir. 2020) (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969)). Plaintiff has no constitutional right subject to a burden and its claim therefore fails at step one of the *Anderson-Burdick* test.[3]

When statutes that are duly enacted by the Texas Legislature require physical signatures as a part of the electoral process, federal courts err under *Anderson-Burdick* if they rewrite those statutes to compel allowance of signatures by electronic means, even in the midst of a global pandemic. *See*

[3] The test 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 v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983)). When a state election law imposes only "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.

Thompson v. Dewine, 976 F.3d 610, 620 (6th Cir. 2020); *Esshaki v. Whitmer*, 813 F. App'x 170, 172 (6th Cir. 2020) (citing *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)). And the Fifth Circuit has recently found that a statutory scheme allowing for the comparison of a voter's signature on the carrier envelope for a mail-in ballot against a voter's signature on the mail-in ballot application passes the constitutional test under *Anderson-Burdick*. *Richardson*, 978 F.3d at 238 (citing *Crawford*, 553 U.S. at 239 (Breyer, J., dissenting)). *Richardson* further notes that both the opinion for the court and Justice Breyer's dissent in *Crawford* agree that a "requirement that voters 'sign their names so their *signatures can be compared with those on file*'" and the counting of "a provisional ballot . . . if the state 'determines that his *signature matches the one on his voter registration form*'" are not unconstitutionally burdensome. *Id.* (quoting *Crawford*, 553 U.S. at 197 (plurality op.), 239 (Breyer, J., dissenting)). If the signature comparison scheme is constitutional, it stands to reason that requiring a signature at the time of registration—in the first instance—is also constitutional because the burden is nondiscriminatory and minimal, and the requirement serves the important regulatory interests of the State in preventing fraud in the electoral process. *See id.* at 239–40.

Richardson also confirmed the Supreme Court's holding in *Crawford* that analysis of whether *any* potential plaintiff faces a severe burden is improper under *Anderson-Burdick*. *Id.* at 235–36 (citing *Crawford*, 553 U.S. at 197). Thus, whether any individual voter faces particular difficulty in accessing a printer or utilizing the mail (assuming Plaintiff could sue on behalf of such a voter, which it has not established) is not the proper burden analysis for the purposes of *Anderson-Burdick*. *See id.*

CONCLUSION

For each of the foregoing reasons and those stated in OAG's Motion, Plaintiff's claims should be dismissed.

Date: December 7, 2021

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 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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