CAUSE NO. 202157207-7

TEXAS STATE CONFERENCE OF THE NAACP, COMMON CAUSE TEXAS, DANYAHEL NORRIS, HYUN JA NORMAN, FREDDY BLANCO; MARY FLOOD NUGENT, and PRISCILLA BLOOMQUIST, *Plaintiffs*, v. GREG ABBOTT, in his official capacity as the Governor of Texas; JOHN or JANE DOE, in his or her official capacity as the Secretary of State of Texas; JOE ESPARZA, in his official capacity as the Deputy Secretary of State of Texas; KEN PAXTON, in his official capacity as the Attorney General of Texas, *Defendants*.	§	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 189th JUDICIAL DISTRICT

MEMORANDUM IN SUPPORT OF
REPUBLICAN COMMITTEES' MOTION TO DISMISS UNDER RULE 91a

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INTRODUCTION

The Texas Election Integrity Protection Act of 2021 ("SB 1")[1] is a commonsense and constitutional statute enacted "to prevent fraud in the electoral process," promote "voter access," "increas[e] the stability of constitutional democracy," and make "the conduct of elections . . . uniform and consistent throughout this state." SB 1 §§ 1.03, 1.04. Plaintiffs nonetheless allege that SB 1 violates the Texas Constitution because it forecloses certain idiosyncratic methods of voting that Harris County and Travis County chose to make available during the unprecedented global COVID-19 pandemic in 2020. In other words, Plaintiffs now claim a right—enshrined in the Texas Constitution—to require the State to extend statewide and to provide in perpetuity the special voting rules adopted in only two counties in response to last year's public health crisis.

Unsurprisingly, each of Plaintiffs' eight counts fails plausibly to plead such a constitutional right. Plaintiffs' discriminatory intent claim in Count I fails to plead facts sufficient to overcome the presumption that the Legislature enacted SB 1 in good faith and without invidious bias, much less to prove discriminatory impact and purpose. Plaintiffs' unconstitutional burden claims in Counts II, IV, V, and VII fail to plead *any* cognizable burden on voters or to defeat the State's ample justifications for SB 1. And Plaintiffs' due process (Count III), free speech (Count VI), and novel "cumulative" violations (Count VIII) claims all contravene the governing law.

"[A] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 922 (Tex. 2020). Plaintiffs' claims have "no basis in law," so the Court should dismiss the Original Petition with prejudice and decline Plaintiffs' invitation to invalidate the action of the people's elected representatives. Tex. R. Civ. P. 91a.1.

[1] Acts 2021, 87th Leg., 2nd C.S., ch. 1 (S.B. 1), eff. Dec. 2, 2021.

BACKGROUND

I. THE 2020 ELECTION

As Plaintiffs extensively plead, the 2020 election was unprecedented due to the COVID-19 pandemic and the attendant health and safety crisis in Texas and throughout the world. Pet. ¶¶ 2–3, 86–92. Governor Abbott and Secretary of State Hughs orchestrated a statewide response to the pandemic to ensure that all Texans would have the opportunity to vote safely and securely in the 2020 election. For example, Governor Abbott extended the early-voting period ahead of the November general election and allowed counties to accept hand-delivery of mail-in ballots before Election Day. *See* Proclamation of Gov. Greg Abbott, No. 41-3752, 45 Tex. Reg. 5456, 5457 (July 27, 2020). The Secretary of State, moreover, provided detailed guidance to local officials regarding administration of the election during the pandemic. *See* Tex. Sec'y of State, *COVID-19 Resources for Election Officials*, https://www.sos.state.tx.us/elections/covid/index.shtml (last updated July 27, 2020).

Despite the proactive and successful statewide response, Harris County election officials opted to go even further, implementing methods of voting not authorized in Texas election law or Governor Abbott's July 2020 Proclamation. Harris County election officials mailed mail-in ballot applications to all registered voters over the age of 65, set up "drive-thru" voting locations, required some early-voting locations to remain open overnight, and established multiple "ballot drop box sites" where voters could return their mail-in ballots. Pet. ¶¶ 89–92.

Harris County's adoption of these methods of voting was idiosyncratic and controversial. Indeed, Harris County was the only county in Texas to offer drive-thru voting, and that method prompted legal challenges. *See, e.g.*, *In re Hotze*, 610 S.W.3d 909 (Tex. 2020). Harris County was also the only county to mail mail-in ballot applications without a request from the voter and to offer overnight early voting. *See* Pet. ¶¶ 89–92.

Harris County initially "established twelve drop box sites for voters to deposit mail-in ballots for the general election," and Travis County similarly "established four drop box locations." *Id.* ¶ 90. Governor Abbott then clarified that counties could establish a ballot drop-off site in only a single location. *See* Proclamation of Gov. Greg Abbott, No. 41-3772, 45 Tex. Reg. 7080, 7081 (Oct. 1, 2020). The U.S. Court of Appeals for the Fifth Circuit and the Texas Supreme Court upheld the Governor's action. *See Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020); *Abbott*, 610 S.W.3d at 923. Harris County and Travis County each maintained one drop box location for the 2020 general election, and no other county chose to offer a drop box location. *See* Pet. ¶ 90.

II. SB 1 AND PLAINTIFFS' ORIGINAL PETITION

In March 2021, Governor Abbott announced that he had "made election integrity an emergency item this session" of the Legislature, noting that, "[i]n the 2020 election, we witnessed actions throughout our state that could risk the integrity of our elections and enable voter fraud." *Governor Abbott Prioritizes Election Integrity this Legislative Session*, WBAP, Mar. 15, 2021, https://www.wbap.com/2021/03/15/governor-abbott-prioritizes-election-integrity-this-legislative-session. Two initial election reform bills, SB 7 and HB 6, were introduced in March 2021. Pet. ¶ 97. After two months of consideration and multiple public hearings, the Senate passed SB 7; however, Democratic legislators walked off the floor of the House to deny passage to SB 7 on the final day of the regular session. *See id.* ¶ 110. Governor Abbott commenced an emergency session to consider the legislation, but Democratic House members again broke quorum, this time by leaving the state. *See id.* ¶ 114. Governor Abbott soon after commenced a second emergency session, during which the legislation—now called SB 1—finally passed. *Id.* ¶¶ 115, 119. Governor Abbott signed the bill into law on September 7, 2021. *Id.* ¶ 119.

Plaintiffs filed this lawsuit the same day. Plaintiffs' eight counts variously challenge several provisions of SB 1. *See id.* ¶¶ 143–191.

Poll Watchers. Plaintiffs challenge the following provisions related to poll watchers:

- Section 4.01(g), which protects poll watchers from arbitrary removal from the polling place, *see id.* ¶ 156;
- Section 4.06(g), which in accordance with pre-SB 1 law makes it a Class A misdemeanor for an election judge "knowingly" to refuse to accept a properly credentialed poll watcher for service, *see id.* ¶ 155;
- Section 4.07(e), which guarantees poll watchers' right of "free movement where election activity is occurring," *see id.* ¶ 152;
- Section 4.09, which again in accordance with pre-SB 1 law makes it a Class A misdemeanor for an election judge "knowingly" to prevent a poll watcher from observing an activity or procedure the watcher is entitled to observe, *see id.* ¶ 154;
- Section 6.01(e), which grants poll watchers a right to observe "any activity" related to certain voter assistance, *see id.* ¶ 153; and
- Section 8.01, which creates a civil remedy against election officials who violate the Election Code, *see id.* ¶ 157.

Election Officials' Solicitation Of Submission Of Application. Plaintiffs challenge the provisions of section 7.04 that prohibit election officials from "knowingly" soliciting submission of a mail-in ballot application from a person who did not request one, distributing a mail-in ballot application to a person who did not request one unless authorized by law, or authorizing expenditure of public funds to facilitate third-party distribution of a mail-in ballot application by mail to a person who did not request one. *See id.* ¶¶ 160–161.

Mail-In Ballot Applications And Matching. Plaintiffs challenge various provisions that require mail-in ballot applications to have the same identifying information as voter registration applications, require election officials to reject non-matching applications, and provide applicants notice of a non-match and an opportunity to cure (sections 5.02, 5.03, 5.07, and 5.10). *See id.* ¶ 167. Plaintiffs also challenge various provisions that require completed mail-in ballot envelopes to have the same identifying information as voter registration applications, require rejection of non-matching ballots, and provide individuals notice of a non-match and an opportunity to cure (sections 5.08, 5.10, 5.12, and 5.13). *See id.* ¶ 168.

Voter Assistants. Plaintiffs challenge provisions that require individuals providing voters certain types of assistance to complete a short form (sections 6.01, 6.03, 6.05) and that update the oath for individuals assisting voters (section 6.04). *See id.* ¶¶ 180–182.

Standard Statewide Procedures. Plaintiffs challenge provisions that expand and standardize early voting hours across the state while prohibiting overnight voting (sections 3.09 and 3.10), that permit curbside voting for certain voters but not all voters (sections 3.04, 3.12, 3.13), and prohibit drop boxes (section 4.12). *See id.* ¶¶ 189–191.

Because Plaintiffs have failed adequately to allege any cognizable challenge against any provision of SB 1, Intervenors the Harris County Republican Party, Dallas County Republican Party, National Republican Senatorial Committee, and National Republican Congressional Committee ("Republican Committees") bring this motion to dismiss under Texas Rule of Civil Procedure 91a.

STANDARD OF REVIEW

Rule 91a of the Texas Rules of Civil Procedure authorizes dismissal of lawsuits that have "no basis in law or fact." Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the

claimant to the relief sought." *Id.* "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.*

A cause of action has no basis in law under Rule 91a if the plaintiff alleges insufficient facts "to demonstrate a viable, legally cognizable right to relief." *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). Courts have "likened the standard for addressing a Rule 91a motion to the standard for addressing a motion under Federal Rule of Civil Procedure 12(b)(6), which allows dismissal if a plaintiff fails 'to state a claim upon which relief can be granted.'" *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 186 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Wooley v. Schaffer*, 447 S.W.3d 71, 75–76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)). The petition thus must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* Although "all well-pleaded facts" must be "taken as true," "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (cleaned up); *see also Auzenne v. Great Lakes Reinsurance, PLC*, 497 S.W.3d 35, 39 n.2 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("While Rule 91a requires courts to take all factual allegations in the pleadings as true, legal conclusions need not be taken as true.").

ARGUMENT

The Court should dismiss the Original Petition because Plaintiffs' allegations do not "demonstrate" a single "viable, legally cognizable right to relief" on any of the eight counts they purport to bring against SB 1. *Guillory*, 470 S.W.3d at 240.

I. PLAINTIFFS FAIL TO STATE A DISCRIMINATORY INTENT CLAIM (COUNT I).

Texas courts "presume that public officials act in good faith and without invidious bias in formulating policy" and enacting legislation. *Abbott*, 610 S.W.3d at 923; *see also Abbott v. Perez*,

138 S. Ct. 2305, 2324 (2018); *Miller v. Johnson*, 515 U.S. 900, 915 (1995).[2] A plaintiff alleging that the Legislature has enacted a law with discriminatory intent carries a heavy burden. *See Abbott*, 610 S.W.3d at 923. Such a plaintiff must prove *both* that the challenged law imposes a cognizable disparate impact on members of a protected class and that "the measure was adopted *because* of, and not merely in spite of, its disparate impact on the affected class." *Id.* (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (emphasis in original); *see also DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1915–16 (2020) (resolving a claim of intentional discrimination at the motion-to-dismiss stage).

Plaintiffs' discriminatory intent claim, Count I, fails at the threshold because Plaintiffs' allegations fail to demonstrate either a cognizable "disparate impact" or a discriminatory purpose. *Abbott*, 610 S.W.3d at 923. Each failure is fatal to Count I.

A. Plaintiffs Fail to Allege a Cognizable Disparate Impact.

Plaintiffs' theory of disparate impact is that SB 1 "curtail[s] methods of voting used by Black, Hispanic, and Asian voters that helped increase their political power during the 2020 elections" and will purportedly "make it more difficult for these voters to vote by mail, to vote early, and to deliver their ballots, and will make it harder for assistants to help limited-English speaking voters cast ballots." Pet. ¶ 219. But for at least four reasons, Plaintiffs have failed adequately to plead that any provision of SB 1 results in a disparate impact on any protected class.

First, Plaintiffs cannot show that SB 1's ban on the idiosyncratic "methods of voting" made available during the "2020 elections," *id.*—such as Harris County's automatic mailing of mail-in ballot applications to some registered voters, drive-thru voting, or overnight early voting or Harris

[2] As Plaintiffs have conceded, for purposes of Count I, the Texas Constitution is "coextensive with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." Pet. ¶ 214; *see also Abbott*, 610 S.W.3d at 923 n.14.

County's and Travis County's provision of drop boxes—will have any impact *at all*, let alone a disparate impact on a protected class. No county in Texas was constitutionally required to offer those methods in 2020, as Plaintiffs acknowledge with their pleading that counties had a "choice" whether to do so, *id.* ¶ 90, and it is baldly speculative at best to suggest any county would offer them in the future but for enactment of SB 1. Indeed, even Plaintiffs acknowledge that Harris County and Travis County were the lone counties to adopt any of those methods in 2020, and that those counties did so only in response to the unprecedented COVID-19 pandemic. *Id.* ¶ 88; *see also id.* ¶¶ 2–3, 86–92. Whether any county would adopt such measures in the future—and whether the public-health situation would justify such measures—are matters of pure speculation. *See, e.g.*, *Walls v. City of Petersburg*, 895 F.2d 188, 191 (4th Cir. 1990) ("Speculation as to the potential for disparate impact cannot serve as evidence of such impact itself."); *People First of Ala. v. Merrill*, 479 F. Supp. 3d 1200, 1207–08 (N.D. Ala. 2020) (dismissing a COVID-19 challenge to election laws seven months before the next election as "simply too speculative"). In light of these unknowns, Plaintiffs cannot show that SB 1's ban on these methods of voting will have an impact on *any* voter, let alone a disparate impact on a protected class of voters.

Second, because of the COVID-19 pandemic, the 2020 election provides no baseline to determine whether SB 1 will impose a disparate impact on any class of voters. Plaintiffs hang their hat on the increased voter turnout in 2020 and their speculation that turnout will decrease in future elections due to SB 1. *See* Pet. ¶¶ 87–94. But according to Plaintiffs' own allegations, voter turnout increased across Texas in 2020, not merely in Harris County and Travis County where idiosyncratic methods of voting were permitted, and Harris County's voter turnout rate was the same as the statewide rate. *See, e.g.*, *id.* ¶ 87. This suggests that some cause other than the novel methods of voting Plaintiffs seek to constitutionalize drove the increase in voter turnout in 2020.

In all events, even in non-pandemic times, the U.S. Supreme Court has cautioned against drawing extrapolations from the results or turnout of a single election year. *See Thornburg v. Gingles*, 478 U.S. 30, 74–77 (1986); *North Carolina v. League of Women Voters of N. Carolina*, 574 U.S. 927, 135 S. Ct. 6, 7 (2014) (Ginsburg, J., dissenting) (noting that turnout can be "highly sensitive to factors likely to vary from election to election"). This caution is especially warranted here, where the two elections Plaintiffs point to occurred during a pandemic year, and one was a low-turnout July 2020 primary runoff election in which only the Democratic Party had competitive statewide races. *See* Harris Cnty. Election Division, Election Results, https://www.harrisvotes.com/ElectionResults?lang=en-US. Plaintiffs' effort to constitutionalize a statewide right to idiosyncratic methods of voting used only in one or two counties during a single pandemic year fundamentally fails.

Third, in all events, the challenged provisions are not sufficiently burdensome on voters to establish a cognizable disparate impact. A disparate impact must have some "practical significance" to be actionable. *See, e.g.*, *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 964 n.11 (9th Cir. 2021); *Brnovich v. Democratic Nat'l Committee*, 141 S. Ct. 2321, 2358 n.4 (2021) (Kagan, J., dissenting) (acknowledging that there are some disparities that, "even if statistically meaningful, [are] just too trivial for the legal system to care about"); *see also Abbott*, 610 S.W.3d at 923 ("[N]o county in Texas is just like any other, so it is impossible for any statewide voting regulation to identically impact all voters across county lines."). Here, SB 1's ban on idiosyncratic and uncommon methods of voting—*i.e.*, automatically mailed mail-in ballot applications, drive-thru voting, overnight early voting, and drop boxes—and requirement that voter assistants fill out a short form and take an updated oath do not impose any cognizable burden on voters. *See infra* Part II.A. Any disparities resulting from their

implementation thus lack the "practical significance" to establish a cognizable disparate impact. *Sw. Fair Hous. Council*, 17 F.4th at 964 n.11.

Fourth, Plaintiffs' own factual allegations actually *foreclose* their contention that SB 1 will result in a disparate impact. Plaintiffs' only factual allegations supporting the alleged disparate impact are (1) that 56% of the voters who used extended early voting hours in the Democratic Party-focused July 2020 primary runoff election in Harris County were minorities and (2) that 53% of voters who used drive-thru voting during the November 2020 general election in Harris County were minorities. Pet. ¶¶ 91, 92. Plaintiffs do not allege any racial disparities in the use of drop boxes in the two counties that offered them in 2020. *See id.* ¶ 90. But Plaintiffs also allege that minorities make up more than 70% of the Harris County population, *id.* ¶ 82, so the 53% and 56% figures Plaintiffs cite do not reveal any meaningful disparity between minority and non-minority voters. *See, e.g.*, *Brnovich*, 141 S. Ct. at 2339 ("The size of any disparity matters," and "[w]hat are at bottom very small differences should not be artificially magnified.").

Because Plaintiffs have failed to plead a cognizable disparate impact, the Court should dismiss Count I. *Abbott*, 610 S.W.3d at 923.

B. Plaintiffs Fail to Allege the Texas Legislature Acted With Discriminatory Purpose.

Count I also fails for the independent reason that Plaintiffs have not plausibly alleged that the Legislature enacted SB 1 with a discriminatory purpose. *Abbott*, 610 S.W.3d at 923. In fact, Plaintiffs utterly fail to substantiate their accusations of racist intent with factual allegations. Their conclusory allegations of racist intent do not "unlock the doors of discovery," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and Plaintiffs may not conduct "a fishing expedition for unspecified evidence" into legislative intent via "discovery," *Wesley v. Collins*, 791 F.2d 1255, 1262-63 (6th Cir. 1986); *see also Univ. of Texas M.D. Anderson Cancer Ctr. v. Eltonsy*, 451 S.W.3d 478, 484

(Tex. App.—Houston [14th Dist.] 2014, no pet.) ("conclusory assertion[s]" of discrimination are insufficient to state a claim). Plaintiffs do not carry their heavy burden to allege facts sufficient to show the "legislature as a whole" acted for a discriminatory purpose, *Brnovich*, 141 S. Ct. at 2350, much less to overcome the presumption that the Legislature "act[ed] in good faith and without invidious bias in" enacting SB 1, *Abbott*, 610 S.W.3d at 923.

Indeed, Plaintiffs "d[o] not identify [racist] statements" made by any legislator who voted for SB 1, let alone by the entire body of the Texas legislature. *DHS*, 140 S. Ct. at 1916 (cleaned up); *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (considering "contemporary statements" of officials). Plaintiffs thus resort to stitching together a panoply of circumstantial allegations and implications, which individually and collectively fail to plead discriminatory purpose.

First, Plaintiffs note that legislators debating an early version of the bill used the phrase "'preserving the purity of the ballot,'" Pet. ¶ 220, but that phrase is a *mandate* of the Texas Constitution, *see* Tex. Const. art. IV, § 4 ("the Legislature shall . . . preserve the purity of the ballot box"), that the Texas Supreme Court relied upon in upholding election rules just last year, *see Abbott*, 610 S.W.3d at 922. A legislator's recitation of his constitutional duty to uphold election integrity in Texas does not suggest, let alone establish, discriminatory intent. The fact that past officials invoked that phrase decades ago, *see* Pet. ¶ 202, is simply too remote in time to condemn the current Legislature or "governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). This Court "cannot accept official actions taken long ago" by someone else "as evidence of current intent" by the Legislature as a whole today. *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987).

Second, Plaintiffs point to the contentious legislative history and allege that the Legislature departed "from the normal procedural sequence" in enacting SB 1. *Arlington Heights*, 429 U.S. at 267; Pet. ¶ 220. But "procedural violations do not demonstrate invidious intent of their own accord." *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cty. Texas*, 6 F.4th 633, 640 (5th Cir. 2021); *see also Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1326 (11th Cir. 2021) (truncated debate, use of cloture, party-line vote, and lack of support from black legislators were not indicative of discriminatory intent). Rather, procedural violations "must have occurred in a context that suggests the decision-makers were willing to deviate from established procedures *in order to accomplish a discriminatory goal*." *Rollerson*, 6 F.4th at 640 (emphasis added). Thus, "fail[ure] to follow the proper procedures against all individuals," when such conduct is not "targeted to any identifiable minority group," is not indicative of discriminatory intent. *Rollerson v. Port Freeport*, No. 3:18-CV-00235, 2019 WL 4394584, at *8 (S.D. Tex. Sept. 13, 2019), *aff'd*, 6 F.4th 633 (5th Cir. 2021).

Plaintiffs offer no factual allegations that the Legislature deviated from established procedures to accomplish a discriminatory goal or in a way that targeted a minority group. For example, Plaintiffs allude to "actions behind closed doors" and "bad faith negotiations." Pet. ¶ 220. But these purely subjective descriptions of events do not indicate departures from "established procedures." *Rollerson*, 6 F.4th at 640. Indeed, private meetings and decisions among legislators are a regular part of the legislative process and not at all out of the ordinary. And those unsatisfied with the results of legislative negotiations can always claim "bad faith," so such an allegation cannot demonstrate "a discriminatory goal," *id.*, or "target[ing] [of] any identifiable minority group," *Rollerson*, 2019 WL 4394584, at *8. Ultimately, Plaintiffs seek to elevate minor process objections that are common in legislative practice to the status of "radical

departures from normal procedures," but their minor objections do not suggest a discriminatory purpose. *Veasey v. Abbott*, 830 F.3d 216, 237 (5th Cir. 2016) (en banc).

In fact, Plaintiffs' own pleading demonstrates that the Legislature engaged in robust process around SB 1 and the predecessor bills. SB 1's proponents accommodated hundreds of people seeking to testify about the legislation (*e.g.*, Pet. ¶ 112) and considered dozens of amendments on the floor (*e.g.*, *id.* ¶ 118). Taken as a whole, Plaintiffs' allegations indicate a contentious process resulting from the determined views of SB 1's proponents and opponents, but they are devoid of any allegations showing that the Legislature acted with a discriminatory purpose. *See Brnovich*, 141 S. Ct. at 2350.

Third, Plaintiffs also mention that the Legislature did not conduct a racial impact analysis, *see* Pet. ¶ 220, but they do not allege that such an analysis is part of the Legislature's "normal procedural sequence." *Arlington Heights*, 429 U.S. at 267. A racial impact analysis was especially unwarranted here, as there was insufficient information regarding past and future usage of the methods of voting at issue (*e.g.*, drive-thru and overnight voting), *see supra* Part I.A, and no reasonable risk that any challenged provision would impact the right to vote (*e.g.*, requiring assistants to fill out a form). *See infra* Part II.A. And while legislators and witnesses *who opposed SB 1* testified to their belief of a potential disparate impact, *see* Pet. ¶ 124, SB 1's proponents were not required to believe or accept these implausible arguments and predictions.

Fourth, Plaintiffs allege that "legislators shepherded to final passage a Bill that they know will disenfranchise the votes of Black, Hispanic, and Asian voters, in addition to elderly and disabled voters." Pet. ¶ 220. This allegation of "know[ledge]" of SB 1's purported effects is puzzling given Plaintiffs' complaint that the Legislature did not conduct a racial impact analysis. *See id.* Regardless, mere "awareness" or knowledge of a disparate impact does not establish

discriminatory purpose. *Feeney*, 442 U.S. at 279. Rather, Plaintiffs must plausibly allege that the Legislature enacted SB 1 "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" a protected class of voters. *See id.* They have wholly failed to do so.

Fifth, Plaintiffs allege that minority legislators were excluded from "participating in key aspects of the legislative process." *Id.* ¶ 220. But Plaintiffs erroneously conflate a partisan issue with a racial one. For example, Plaintiffs identify two instances where minority members of conference committees were allegedly denied timely access to legislative drafts. *See id.* ¶¶ 106, 129. Because they do not allege that *only* minority members were denied access, it is reasonable to conclude that all of the Democratic members were denied access. These allegations, assuming their truth, are not indicative of discriminatory intent because "partisan motives are not the same as racial motives." *Brnovich*, 141 S. Ct. at 2349. Plaintiffs' claim that "calling for the arrest of mostly minority legislators who left the Capitol protest" is likewise off the mark. Pet. ¶ 220. Plaintiffs admit that "all but four House Democrats" left the State to deny the House a quorum, *see id.* ¶ 133, and do not allege that calls for their arrest were limited to only those House Democrats who were minorities.

Finally, Plaintiffs ask the Court to draw an inference of discriminatory purpose from the allegation that "[l]egislators have repeatedly cited voter fraud as the predominant reason for enacting SB 1, despite absolutely no evidence of widespread voter fraud and virtually no evidence of even minor voting irregularities in Texas." *Id.* ¶ 221. But as the U.S. Supreme Court recently made clear, a state may enact laws to *prevent* fraud *before* it occurs—and doing so does not evince a discriminatory purpose. Indeed, because "[f]raud is a real risk," a state may act prophylactically to prevent fraud "without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct. at 2347–48. And, in all events, Plaintiffs completely ignore another stated purpose of

SB 1: that "the conduct of elections be uniform and consistent throughout this state." SB 1 § 1.04. Plaintiffs make no allegation that this purpose is invalid or somehow evinces a discriminatory purpose. *See* Pet. ¶ 221. The Court should dismiss Count I.

II. PLAINTIFFS FAIL TO ALLEGE AN UNCONSTITUTIONAL BURDEN ON THE RIGHT TO VOTE (COUNTS II, IV, V, VII, VIII).

Counts II, IV, V, and VII each fail "to demonstrate a viable, legally cognizable" unconstitutional burden claim and therefore should be dismissed. *Guillory*, 470 S.W.3d at 240. Plaintiffs' unconstitutional burden claims are governed by the *Anderson*/*Burdick*[3] framework, which requires courts to weigh the burden on voting rights (if any) imposed by the challenged law against the State's interests in and justifications for the law. *See Abbott*, 610 S.W.3d at 919. Only "severe" burdens are subject to strict scrutiny. *Id.* A "reasonable, nondiscriminatory restriction[]," on the other hand, is "presumed valid" and will be upheld if it "is a reasonable way" of furthering "a legitimate interest." *Id.* at 920 (cleaned up). This "less searching review" is closely akin to rational-basis review. *See id.* at 920, 922; *see also Richardson v. Texas Sec'y of State*, 978 F.3d 220, 241 & n.39 (5th Cir. 2020). Additionally, in a facial constitutional challenge to a statute, the plaintiff bears the heavy burden that "the statute *always* operates unconstitutionally." *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 753 (Tex. 2020) (emphasis added); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) (a "challenger must establish that no set of circumstances exists under which the [statute] would be valid").

Plaintiffs claim that all of the provisions of SB 1 they challenge—provisions relating to poll watchers (Count II), election officials soliciting and distributing mail-in ballot applications (Count IV), voter assistants (Count V), mail-in ballots applications and matching (Count VII), and

[3] *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); *State v. Hodges*, 92 S.W.3d 489, 496, 501–02 (Tex. 2002).

standard statewide procedures (referred to in Count VIII)—are facially unconstitutional. But each of these claims fails for at least three reasons. *First*, Plaintiffs have not even attempted to plead that any of the challenged provisions imposes burdens on "most voters," as *Anderson/Burdick* requires. *Abbott*, 610 S.W.3d at 921. *Second*, the challenged provisions, in fact, do not impose any burdens on voters, let alone "a significant increase over the usual burdens of voting" as required to make out a constitutional claim. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008). *Third*, the challenged provisions are more than amply justified by the State's interests in "decreas[ing] the opportunity for fraud," "increas[ing] confidence in electoral integrity," and "promot[ing] uniformity of elections" statewide. *Abbott*, 610 S.W.3d at 922.

A. Plaintiffs Have Not Alleged That The Challenged Provisions of SB 1 Unconstitutionally Burden Most Voters.

As both the U.S. Supreme Court and the Texas Supreme Court have made clear, the *Anderson/Burdick* framework requires a showing that the challenged law places an unconstitutional burden on "most voters," and is not satisfied by a showing that the law imposes a greater burden on some voters than others. *Abbott*, 610 S.W.3d at 921. Thus, in *Crawford*, the U.S. Supreme Court upheld a voter identification requirement where its effects on "most voters" in the state was minimal, despite acknowledging that "a somewhat heavier burden may be placed on a limited number of persons." *Crawford*, 533 U.S. at 198–99; *see also id.* at 204–06 (Scalia, J., concurring) (the only relevant burdens are those that affect voters "categorically" and not "special burden[s] on some voters"); *Abbott*, 610 S.W.3d at 921; *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1261 (11th Cir. 2020) (quoting *Crawford*, 553 U.S. at 205 (Scalia, J., concurring)).

This requirement makes perfect sense. Assessing "ordinary and widespread burdens . . . based solely on their impact on a small number of voters" would "subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections,

and compel . . . courts to rewrite state electoral codes." *Richardson*, 978 F.3d at 236 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)). Moreover, without this requirement, *Anderson/Burdick* could provide a detour around the discriminatory purpose prong of an equal protection claim. *See supra* Part I.

Plaintiffs' claim fails at the threshold under *Anderson*/*Burdick* because the Original Petition lacks any allegations that the challenged provisions impose material burdens on "most voters." *Abbott*, 610 S.W.3d at 921 (quoting *Crawford*, 553 U.S. at 198–99). Instead, Plaintiffs focus their allegations on the burdens allegedly imposed on subgroups of voters. *See* Pet. ¶¶ 227–29 (allegations of voters affected by misconduct of a poll watcher); 246–47, 263–67 (allegations of voters eligible to vote by mail); 250–51 (allegations of voters eligible for assistance); 270 (allegations of voters in counties that might have offered "alternative" voting methods and who would vote by such methods). While Plaintiffs' subgroup approach is fatal in itself, it is certainly insufficient in light of their facial challenge. *See* Pet., Prayer for Relief ¶¶ (ii), (vi). "A facial challenge must fail where," as here, "the statute has a 'plainly legitimate sweep.'" *Crawford*, 553 U.S. at 202; *EBS Sols.*, 601 S.W.3d at 753. A court may not invalidate an election law as to "*all* voters" simply because it allegedly "imposes 'excessively burdensome requirements' on *some* voters." *Brakebill v. Jaeger*, 905 F.3d 553, 558 (8th Cir. 2018); *see also EBS Sols.*, 601 S.W.3d at 753 (facial challenges fail unless the challenged provisions "always operate unconstitutionally").

B. The Challenged Provisions Do Not Impose A Cognizable Burden On Voters.

Even if Plaintiffs' subgroup allegations could survive at the threshold, Plaintiffs would still fail to plead cognizable claims under *Anderson/Burdick* because the challenged provisions do not impose unconstitutional burdens on any voter or group of voters. Laws pass muster under the *Anderson*/*Burdick* framework when the burden they impose on voters is not sufficiently weighty

to violate the Constitution. *See Abbott*, 610 S.W.3d at 920–22. This can occur when the challenged law imposes "reasonable, nondiscriminatory restrictions" on voters, *id.* at 920 (citation omitted), or when the burdens imposed do not amount to "a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198; *see also Abbott*, 610 S.W.3d at 922. In *Crawford*, for example, the plaintiffs challenged Indiana's requirement that voters present a photo ID before voting. *See* 553 U.S. at 185. The Supreme Court recognized that the law required those who did not already have a photo ID to bear "the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph." *Id.* at 198. The Court concluded, however, that such inconvenience "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.*

Likewise, in *Abbott*, the Texas Supreme Court held that requiring voters who want to personally deliver their mail-in ballots before Election Day to do so at a single location in their county of residence did not impose any cognizable burden on the right to vote. *See* 610 S.W.3d at 922. That some such voters "may face a lengthy round trip and have to wait in line" amounted to nothing more than the "usual burdens of voting" and did not "cast any constitutional doubt on an otherwise nondiscriminatory voting regulation." *Id.* The Court also noted that "mail-in voters who wish to avoid the lines and the crowds are free to put their ballots in the mail or to drop off their ballot at one of many available locations on election day." *Id.*

Similarly here, none of the SB 1 provisions that Plaintiffs challenge impose a cognizable burden on the right to vote. *First*, SB 1's additional protections for poll watchers, *see* Pet., Count II, ¶¶ 227–29 (citing SB 1 §§ 4.01, 4.06, 4.07, 4.09, and 6.01(e)), do not at all affect a voter's right and ability to cast a ballot, let alone burden voters. These provisions simply clarify that poll watchers are entitled to effectively observe proceedings at a polling place and may not be denied

this right except in certain circumstances. Moreover, Plaintiffs do not challenge Texas's pre-SB 1 poll watcher laws, so their legal burden is to show that the new SB 1 protections for poll watchers' activities somehow amount to "a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

The best Plaintiffs can muster is to speculate that SB 1's new protections for poll watchers will "increase the likelihood" that poll watchers will engage in conduct that makes voters "feel uncomfortable or intimidated" and that they will "deter election officials from taking action to protect voters" from such conduct. *Id.* ¶¶ 227, 229. But in fact, one of the sections of SB 1 that Plaintiffs challenge, 4.06, requires poll watchers to swear an oath that they will *not* "disrupt the voting process or harass voters." SB 1 § 4.06(h). Moreover, under SB 1 and existing Texas law, a poll watcher is prohibited from "interfer[ing] in the orderly conduct of an election," Tex. Elec. Code § 33.0015, "may not be present at the voting station when a voter is preparing the voter's ballot or is being assisted by a person of the voter's choice," and may not "converse with a voter" about any topic or "communicate in any manner with a voter regarding the election." *Id.* §§ 33.057(b), 33.058(a). And, of course, the entire Penal Code applies to poll watchers' conduct. *See, e.g.*, Tex. Penal Code § 42.01 (disorderly conduct).

Plaintiffs take issue with the fact that a presiding judge's substantial authority to maintain order at the polling place, *see* Tex. Elec. Code § 32.075(a)–(c), does not extend to removing a poll watcher for violations of election laws that the judge or other official did not witness, *see* Pet. ¶ 228 (citing SB 1 § 4.01). But even in those circumstances, a presiding judge may ask law enforcement to remove a poll watcher, and the presiding judge may unilaterally have a poll watcher removed for violations of the Penal Code. *See* SB 1 § 4.01 (Tex. Elec. Code § 32.075(g), (h)). Thus, the presiding judge wields sweeping authority to remove poll watchers for *any* improper

conduct witnessed by an election judge or clerk, to ask law enforcement to remove a poll watcher, or to remove a poll watcher for violations of the Penal Code. Plaintiffs cannot show that SB 1's clarifications regarding presiding judges' removal authority and additional protections for poll watchers burden voters at all, let alone in all circumstances.

Second, SB 1's prohibitions on public officials soliciting submission of a mail-in ballot application, or distributing such an application, to a person who did not request it, Pet., Count IV, ¶¶ 246–47 (citing SB 1 § 7.04 (Tex. Elec. Code § 276.016)), also do not impose any legally significant burden on voters. As an initial matter, "the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail," *Abbott*, 610 S.W.3d at 919 n.9 (collecting cases), much less Plaintiffs' claimed right to receive unrequested mail-ballot applications from public officials. And, because mail-in voting "*lower[s]* barriers to casting ballots" compared to the usual practice of in-person voting, reasonable limits on its practice cannot be said to burden the right to vote at all. *Id.* at 918. Any burden associated with having to request one's own mail-ballot application, or receive an application from someone besides a public official, is certainly less severe than the burdens found to be non-cognizable in *Crawford* and *Abbott*. And while Organizational Plaintiffs complain that these restrictions will impact their "community gatherings" and other programmatic activities, that impact does not burden their members' right to vote. Pet. ¶¶ 246–47.

Third, SB 1's provisions requiring voter assistants to complete and submit basic forms and affirm compliance with the law, Pet., Count V, ¶¶ 250–51 (citing SB 1 §§ 6.01, 6.03, 6.04, and 6.05), do not affect, let alone burden, the right to vote. These provisions do not impose any obligations on voters and are part of a process that "*lower[s]*" the usual burdens of voting by allowing eligible voters to obtain assistance in casting a ballot. *Abbott*, 610 S.W.3d at 918.

Plaintiffs claim that these provisions will "deter" people from providing assistance. Pet. ¶ 250. But these provisions do not add to assistants' existing legal obligations; they simply require the submission of basic information and, for assistants who help a voter complete her ballot, affirmation that assistance will be provided in accordance with the law. Requiring an assistant to swear he did not "pressure or coerce" a voter to choose him as an assistant does not prevent anyone from answering questions "about the voting process" or informing voters of their "right to assistance" or advising voters to "accept help if they need it." Pet. ¶ 251. Moreover, insufficient "encourage[ment]" is plainly not a cognizable burden on the right to vote. *Id.* And the speculative event that the challenged provisions might deter some people from serving as assistants will not leave any voter without assistance at the polling place: Texas law requires election officers to provide assistance upon a voter's request. Tex. Elec. Code § 64.032(a).

Fourth, Plaintiffs do not allege that SB 1's requirements that voters submit accurate and matching identifying information on their voter registration applications, mail-in ballot applications, and mail-in ballot envelopes burden voters. *See* Pet., Count VII (citing SB 1 §§ 5.02, 5.03, 5.07, 5.08, 5.10, 5.12, and 5.13). Nor could they, as regulations on mail voting do not implicate the right to vote and are part of a process that "*lower[s]*" the usual burdens of voting for qualified voters. *Abbott*, 610 S.W.3d at 918, 919 n.9. And, of course, providing an accurate ID number or social security number on a form is certainly less burdensome than having to procure and produce a photo identification, which was upheld in *Crawford*. *See* 553 U.S. at 198–99.

Instead, Plaintiffs allege that the cure process for submissions with incorrect or missing numbers is flawed. *See* Pet. ¶ 264. But once again, the cure process is a regulation on mail voting, which does not implicate the right to vote and lowers the usual burdens on voters. *See Abbott*, 610 S.W.3d at 918, 919 n.9; *Crawford*, 553 U.S. at 198–99. Nonetheless, SB 1's cure process—itself

not constitutionally required—is robust. SB 1 requires election officials to notify voters if their applications or ballots were rejected, provide information on how to correct or add the required information, and allow voters to cure any errors, for a period of six days after Election Day for rejected ballots. *See* SB 1, §§ 5.07 (Tex. Elec. Code § 86.001(f-1)); 5.12 (Tex. Elec. Code § 87.0271(b)-(c)). Plaintiffs prognosticate that some voters might submit their applications too close to the deadline to take advantage of the cure procedures, Pet. ¶ 265, but such voters can mail their applications "in plenty of time before" the deadline "to eliminate the chance of untimely delivery." *Abbott*, 610 S.W.3d at 921. Moreover, the State is not required "to foresee and eliminate every possible contingency that might prevent a given voter" from timely submitting an application or curing a defective application or ballot envelope. *Id.* "Among 'life's vagaries' are many risks of this kind, which 'are neither so serious nor so frequent as to raise any question about the constitutionality' of a voting regulation." *Id.* (quoting *Crawford*, 553 U.S. at 197–98).

Fifth, SB 1's standardization of statewide procedures, *see* Pet. ¶ 270; Prayer for Relief ¶ (ii) (citing SB 1 §§ 3.04, 3.09, 3.10, 3.12, 3.13, and 4.12), does not impose burdens on the right to vote. Plaintiffs allege only generally that these provisions "violate Plaintiffs' constitutional rights" and ask the Court to declare that they violate "the fundamental right to vote." Pet. ¶ 270, Prayer for Relief ¶ (ii). But they offer no factual allegations to support their claim. Because this Court need not accept factually unsupported legal conclusions, Plaintiffs' claim fails. *Weizhong*, 468 S.W.3d at 186. In any event, there can be no serious objection that these provisions, which *restore* pre-pandemic Texas law and statewide uniformity on drive-thru voting, overnight early voting, and drop boxes are anything but "reasonable, nondiscriminatory" election rules. *Abbott*, 610 S.W.3d at 920. The challenged provisions do not burden the right to vote, especially in light of

the many options voters have to cast a ballot. *See id.* at 922. Plaintiffs' unconstitutional burden claims fail.

C. The Challenged Provisions Promote Legitimate State Interests.

That the challenged provisions do not impose a cognizable burden on any voter is sufficient to demonstrate their constitutionality under the *Anderson*/*Burdick* framework. *See Abbott*, 610 S.W.3d at 921–22. But if more were somehow needed, the provisions pass constitutional muster for the additional reason that they are amply justified by at least three "legitima[te]" and "unquestionably relevant" interests. *Crawford*, 553 U.S. at 191.

First, they promote the State's important interest in "deterring and detecting voter fraud" and preventing ballot tampering. *Crawford*, 553 U.S. at 191. Numerous courts have recognized the legitimacy of states' concerns about voter fraud, including in the context of absentee voting. *See, e.g.*, *Crawford*, 553 U.S. at 195–96 (explaining history of in-person and absentee fraud "demonstrate[s] that not only is the risk of voter fraud real but that it could affect the outcome of a close election"); *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting.").

Plaintiffs maintain that Texas's interest in preventing voter fraud must be pretextual because, in their view, there is insufficient proof of voter fraud occurring in Texas. Pet. ¶ 5. But voter fraud has occurred in Texas[4] and elsewhere and is, of course, notoriously "difficult to detect and prosecute." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 396 (5th Cir. 2020). In all events, the Legislature need not wait for voter fraud to be uncovered or to reach some critical threshold in

[4] *See, e.g.*, Press Release, Tex. Att'y Gen., *AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme* (Sept. 24, 2020), https://texasattorneygeneral.gov/news/releases/ag-paxton-announces-joint-prosecution-gregg-county-organized-election-fraud-mail-balloting-scheme.

Texas before enacting reasonable prophylactic measures designed to prevent such fraud. Nor need the Legislature "show specific local evidence of fraud in order to justify preventive measures," *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013), or "prove the efficacy of the regulation with evidence in court." *Abbott*, 610 S.W.3d at 922. "[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S.Ct. at 2348.

Second, and equally important, the challenged provisions "promote[] uniformity of elections and increase[] confidence in electoral integrity." *Abbott*, 610 S.W.3d at 922. "[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). Indeed, in the words of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker, "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud." Report of the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 18 (Sept. 2005).

Third, the challenged provisions promote the State's interest in making "the conduct of elections . . . uniform and consistent throughout this state." SB 1 § 1.04; *see also Abbott*, 610 S.W.3d at 922.

Each of the challenged provisions is "rationally related" to these legitimate interests. *Abbott*, 610 S.W.3d at 922. In the first place, the Texas Supreme Court already has recognized that the presence of poll watchers in the polling place "increases confidence in electoral integrity" and "plausibly promotes uniformity in elections." *Id.* Moreover, there can be no dispute that poll

watchers help deter fraud, since their very purpose is "to observe and report on irregularities in the conduct of any election." SB 1 § 4.02 (Tex. Elec. Code § 33.0015); *see also Ohio Republican Party v. Brunner*, No. 2:08-CV-00913, 2008 WL 4445193, at *4 (S.D. Ohio Sept. 29, 2008) (presence of election observers "safeguard[s] voter confidence in the integrity and legitimacy of representative government" and "provide[s] minimal safeguards to deter or detect fraud and voter intimidation").

SB 1's provisions on election officials soliciting submission of or distributing mail-in ballot applications likewise are rationally related to the State's interests. Those provisions "decrease[] the opportunity for fraud" by limiting the submission and distribution of mail-in ballot applications to registered voters who want them, increase "confidence in electoral integrity" by ensuring that election officials distribute mail-in ballot applications only to registered voters who request them, and "promote[] uniformity of elections" by creating a single statewide rule for all election officials in Texas. *Abbott*, 601 S.W.3d at 922.

SB 1's requirements that voters submit accurate and complete information on voter registration applications, mail-in ballot applications, and mail-in ballot envelopes (SB 1 §§ 5.02, 5.03, 5.07, 5.08, 5.10, 5.12, 5.13, and 7.04) obviously "decrease the opportunity for fraud in the submission or collection of mail-in ballots." *Id.* The requirements also "increase confidence in election integrity" by guaranteeing the validity and legality of mail-in ballots submitted to and counted by election officials and "promote[] uniformity in elections" statewide. *Id.*

SB 1's requirements that voter assistants complete a form and swear an oath (SB 1 §§ 6.01, 6.03, 6.04, and 6.05) deter fraud by unscrupulous individuals and against vulnerable voters in need of assistance. Those requirements also "promote[] uniformity" across Texas's 254 counties and "increase[] confidence in electoral integrity," *id.*, by ensuring compliance with Texas's laws

governing voting assistance, *see* Tex. Elec. Code §§ 64.036(a) (prohibition on assistance of ineligible voters, marking a ballot in a way other than the voter directs, suggesting how the voter should vote, and providing assistance to a voter who has not requested it); 64.032(c) (limits on who may serve as an assistant); SB 1 § 6.06 (Tex. Elec. Code § 86.0105(a)) (prohibition on receiving compensation for assisting mail-in voter). And the provisions create a paper trail of voter-assistance activities in connection with a given election, which again "increases confidence in electoral integrity." *Abbott*, 601 S.W.3d at 922.

Finally, SB 1's statewide standardization of rules on drive-thru voting, overnight early voting, and drop boxes (SB 1 §§ 3.04, 3.09, 3.10, 3.12, 3.13, and 4.12) obviously promotes the State's interest in "uniformity of elections." *Id.* Moreover, by reasonably limiting the hours and places where early voting occurs, these provisions ensure that early voting locations "can be properly staffed by poll watchers" and thereby "decrease[] the opportunity for fraud." *Id.* And they "increase confidence in election integrity" by restoring Texas's pre-pandemic election rules and practices. *Id.*

Plaintiffs have failed plausibly to allege any unconstitutional burden claim, and the Court should dismiss Counts II, IV, V, VII, and VIII.

III. SB 1'S ENHANCED PROTECTIONS FOR POLL WATCHERS ARE NOT UNCONSTITUTIONALLY VAGUE (COUNT III).

The Court should dismiss Count III because Plaintiffs have not pled facts sufficient to carry their heavy burden to prove that SB 1's enhanced protections for poll watchers are "impermissibly vague in all of [their] applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates., Inc.*, 455 U.S. 489, 495 (1982). The due process void-for-vagueness doctrine has never required "perfect clarity and precise guidance" in statutory text. *Ex parte Ellis*, 309 S.W.3d 71, 86 (Tex. Crim. App. 2010). "Many perfectly constitutional statutes use imprecise terms," *Sessions v.*

Dimaya, 138 S. Ct. 1204, 1214 (2018), and "due process does not require 'impossible standards' of clarity," *Kolender v. Lawson*, 461 U.S. 352, 361 (1983); *see also Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."). Due process requires only that a statute provide an ordinary person "fair notice" of the prohibited conduct. *See Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989); *Duncantell v. State*, 230 S.W.3d 835, 845 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) ("A criminal statute need not be mathematically precise; it need only give fair warning, in light of common understanding and practices."). "A statute satisfies vagueness requirements if the statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018) (citation omitted). A scienter requirement in the statute can also "alleviate vagueness concerns." *State v. Doyal*, 589 S.W.3d 136, 146 (Tex. Crim. App. 2019), *reh'g denied* (June 5, 2019).

Where, as here, Plaintiffs bring a facial vagueness challenge that does not involve "constitutionally protected conduct," they face the heavy burden of showing the challenged provisions are "impermissibly vague in all of [their] applications." *Hoffman Estates*, 455 U.S. at 495. Moreover, "[i]n the context of pre-enforcement review . . . examining facial vagueness is often difficult, perhaps impossible, because facts are generally scarce." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 547 (5th Cir. 2008). That is why vagueness claims should ordinarily be made in the context of a defense to criminal prosecution. *See Burson v. Freeman*, 504 U.S. 191, 210 n.13 (1992); *see also Schirmer v. Edwards*, 2 F.3d 117, 124 (5th Cir. 1993). In such circumstances, the court could adopt a "limiting construction rather than a facial invalidation." *Burson*, 504 U.S. at 210 n.13.

Unsurprisingly in light of this governing law, Plaintiffs fail to plead any cognizable vagueness challenge in SB 1. *First*, Plaintiffs challenge section 4.06, which prohibits an election judge from "intentionally and knowingly refus[ing] to accept a watcher for service when acceptance is required by this section." Pet. ¶ 238; SB 1 § 4.06 (amending Tex. Elec. Code § 33.051). Plaintiffs do not allege that the statutory terms fail to provide "fair notice" of the prohibited conduct. *See Bynum*, 767 S.W.2d at 773. Nor could they, since section 4.06 contains a scienter requirement and plainly spells out how to determine when a poll watcher is authorized to serve. *See* SB 1 § 4.06. Plaintiffs' real complaint appears to be that, in their view, section 4.06 overlaps with section 33.061 of the Texas Election Code. But section 33.061 does not address "accept[ing] a watcher for service," Tex. Elec. Code § 33.061, and an overlap in statutory provisions does not render them vague.

Second, Plaintiffs challenge section 4.09, which, far from being unconstitutionally vague, provides additional clarification to existing law. Pet. ¶ 240. Section 4.09 amends section 33.061(a) of the Election Code, which prohibits an election judge from "knowingly prevent[ing] a watcher from observing" an "activity" at a polling place. Section 4.09 clarifies this preexisting obligation by stating that the law prohibits only actions that deprive the watcher of the ability to observe activities that the official "knows the watcher is entitled to observe" and giving examples of such prohibited actions, such as "obstruct[ing]" a poll watcher's view and "distanc[ing]" the poll watcher from an activity "in a manner that would make observation not reasonably effective." SB 1 § 4.09. Thus, contrary to Plaintiffs' contention, section 4.09 does not prevent election officials from taking action "to protect election officials and voters" from improper poll watcher conduct, Pet. ¶ 240, and amply clarifies that "reasonably effective" refers to poll watchers' observation of activities the official "knows the watcher is entitled to observe." SB 1 § 4.09.

The remaining provisions that Plaintiffs challenge subject violators only to civil penalties and not criminal prosecution. "Courts demand less precision of statutes that impose only civil penalties than of criminal statutes because their consequences are less severe," *Comm'n for Law. Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998), and Plaintiffs have not plausibly pled that any of these provisions is vague.

Third, Plaintiffs selectively misquote section 4.07, claiming that its prohibition on denying poll watchers "free movement" may "encompass conduct and activity that have nothing to do with any legitimate purpose of the law" and "implies that poll watchers may be anywhere in a polling location and that election officials may not ask watchers to move." Pet. ¶ 239. But, in accordance with preexisting Texas law, section 4.07 prohibits denying "free movement *where election activity is occurring within the location at which the watcher is serving*." SB 1 § 4.07 (emphasis added); Tex. Elec. Code § 33.056(a) ("[A] watcher is entitled to observe any activity conducted at the location at which the watcher is serving."). It therefore authorizes election officials to remove poll watchers from any area where election activity is not occurring and any location where the watcher is not serving. *See* SB 1 § 4.07. And, as explained, SB 1 requires poll watchers to swear an oath that they will *not* "disrupt the voting process or harass voters," SB 1 § 4.06(h), and Texas law further allows the presiding judge to effectuate removal of poll watchers who violate the Penal Code or "interfere in the orderly conduct of an election." Tex. Elec. Code § 33.0015.

Fourth, Plaintiffs claim that Section 6.01 is vague because it permits poll watchers to observe "any activity" related to voter assistance. Pet. ¶ 241; SB 1 § 6.01 (amending Tex. Elec. Code § 64.009). But Plaintiffs' description of section 6.01 is incomplete. Section 64.009 of the Election Code, which section 6.01 amends, applies only to assistance for voters who are physically unable to enter the polling place (*i.e.*, curbside voting). Plaintiffs challenge section 64.009's new

subsection (e), which states: "*Except as provided by Section 33.057*, a poll watcher is entitled to observe any activity conducted under this section." (emphasis added). Under section 33.057, a poll watcher may observe an election officer's provision of voter assistance but may not be present at the voting station when the voter is preparing his or her ballot or is being assisted by an assistant of the voter's choice. Thus, Plaintiffs' claim that the phrase "any activity" "provides poll watchers with license to hover over and shadow the entire assistance process" is patently false. Pet. ¶ 241. Section 6.01 simply extends existing rules governing poll watchers' observations of voter assistance—which Plaintiffs do not allege are vague—to curbside voting.

Finally, Plaintiffs challenge section 4.01, which states: "A presiding judge may not have a watcher duly accepted for service . . . removed from the polling place for violating a provision of this code or any other provision of law relating to the conduct of elections, other than a violation of the Penal Code, unless the violation was observed by an election judge or clerk." Pet. ¶ 242; SB 1 § 4.01 (Tex. Elec. Code § 32.075(g)). Plaintiffs worry that election judges may not be able to remove poll watchers where it is unclear whether the behavior violates the Election Code or other provision of law relating to the conduct of elections. Pet. ¶ 242. This fear is misplaced. Section 4.01 does not purport to restrict the bases for a poll watcher's removal to violations of election law. A presiding judge could seek removal for violating election law, violating the Penal Code, "breach of the peace," or "violation of law." Tex. Elec. Code § 32.075(g)(h). The provision simply requires that, *if* a presiding judge removes a poll watcher for a violation of election law, he or another election judge or clerk must have witnessed the behavior. In any event, the behavior described by Plaintiffs—such as hovering over and standing extremely close to voters—could constitute "interfere[ence] in the orderly conduct of an election" and subject the watcher to removal for violating the Election Code. Tex. Elec. Code § 33.0015. There will of course be close cases,

but election judges face that same situation under existing provisions. *See* Tex. Elec. Code § 33.061(a) (election judge may not "knowingly prevent a watcher from observing an activity or procedure"). The prospect of some close cases does not render the statute "impermissibly vague" in all applications. *Hoffman Estates*, 455 U.S. at 495.

Because the challenged provisions provide "fair notice" to election judges of their legal obligations and are not "impermissibly vague" in all applications, Plaintiffs' due process challenge fails as a matter of law, and the Court should dismiss Count III. *Id.* at 495, 498.

IV. SB 1'S VOTER ASSISTANCE PROVISIONS DO NOT VIOLATE PLAINTIFFS' RIGHTS OF FREE SPEECH AND ASSOCIATION (COUNT VI).

Count VI fails to state a cognizable free speech and association claim and should be dismissed. Count VI takes aim at SB 1's requirements that voter assistants complete a form and swear an oath (sections 6.01, 6.03, 6.04, 6.05). But *none* of those provisions infringes on protected speech, and Plaintiffs do not plausibly allege otherwise. Rather, they attempt to plead two types of free speech and association claims, but both attempts fail.

First, Plaintiffs allege that SB 1's requirements that voter assistants complete simple forms (sections 6.01, 6.03, and 6.05) will make it "more difficult" to assist voters and "dissuade" people from becoming assistants. Pet. ¶ 259 (citing SB 1 §§ 6.01, 6.03, and 6.05). Plaintiffs claim that such a result is of constitutional concern on the theory that "[a]ssisting a voter who cannot vote without assistance is protected speech" because "such assistance is intended to convey a particularized message about voting by helping voters navigate a process that would otherwise be inaccessible to them." *Id.* ¶ 257.

These allegations fail to state a cognizable claim for relief. As an initial matter, in asserting that the challenged provisions do not satisfy strict scrutiny, *see id.* ¶ 261, Plaintiffs misstate the governing standard. Election rules that implicate protected speech are subject to the

Anderson/*Burdick* test and not automatically subject to strict scrutiny. *See Voting for Am., Inc.*, 732 F.3d at 387; *Hodges*, 92 S.W.3d at 496. Under that framework, courts must first determine if an election rule imposes a cognizable burden on protected speech and associational rights. If the burden is slight, the State need only show that the rule is "rationally related" to its "legitimate interests." *Abbott*, 610 S.W.3d at 922. Only severe burdens are subject to strict scrutiny. *See id.*

Plaintiffs' claim fails at the threshold because assisting voters is not protected speech, and, therefore, the challenged provisions do not implicate constitutional rights. As the Fifth Circuit has explained, "not every procedural limit on election-related conduct automatically runs afoul of the First Amendment." *Voting for Am., Inc.*, 732 F.3d at 392. To be actionable, "[t]he challenged law must restrict political discussion or burden the exchange of ideas," not merely regulate conduct. *Id.* (emphasis omitted). "As the party invoking the First Amendment's protection, [Plaintiffs] have the burden to prove that it applies." *Id.* at 388 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984)); *see also Rankin v. Texas Dep't of Pub. Safety*, No. 13-15-00065-CV, 2016 WL 3136279, at *5 (Tex. App.—Corpus Christi June 2, 2016, no pet.) (mem. op.).

The Supreme Court repeatedly has held that the First Amendment does not protect all conduct, but only conduct that is "inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006); *see also Texas v. Johnson*, 491 U.S. 397, 404 (1989). To determine whether conduct possesses sufficient "communicative elements" to warrant First Amendment protection, courts examine whether the conduct shows an intent "to convey a particular[] message" and whether "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (internal quotation marks and citation omitted); *see also Ex parte Flores*, 483 S.W.3d 632, 639 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Thus, "non-expressive conduct does not acquire First Amendment protection whenever it is

combined with another activity that involves protected speech." *Voting for Am., Inc.*, 732 F.3d at 389 (citing *Clark*, 468 U.S. at 297–98; *Rumsfeld*, 547 U.S. 66; *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Instead, a court must "analyze" each "discrete step[]" of electoral activity to determine whether it qualifies for free speech protections. *Id.* at 388.

As at least one Texas court has made clear, "[p]roviding special assistance to disabled or illiterate voters is a privilege which is conferred by statute" and not an exercise of the assistant's "protected speech." *Guerrero v. State*, 820 S.W.2d 378, 382 (Tex. App.—Corpus Christi 1991, pet. ref'd). "The assistance must be given in the manner prescribed by the statute, and it is meant to be mechanical only." *Id.* Assisting voters in completing their ballots and transporting them to the polls do not "inherently express[]" anything. *Voting for Am., Inc.*, 732 F.3d at 389; *see also Rumsfeld*, 547 U.S. at 66; *O'Brien*, 391 U.S. at 376. There is no "likelihood," great or otherwise, that someone observing a person assisting a voter would understand the person to be conveying *any* "particularized message." *Johnson*, 491 U.S. at 404. An observer is more likely to conclude that the person is providing assistance at the voter's request than to understand that conduct to "convey a particularized message about voting." Pet. ¶ 257. While an assistant might view his or her own activities as conveying a particular message, "[c]onduct does not become speech for First Amendment purposes merely because the person engaging in the conduct intends to express an idea." *Voting for Am., Inc.*, 732 F.3d at 388; *see also O'Brien*, 391 U.S. at 376.

Nor does voter assistance constitute "core political speech" simply because it is related to the voting process. Pet. ¶ 258. "[N]on-expressive conduct does not acquire First Amendment protection whenever it is combined with another activity that involves protected speech." *Voting for Am., Inc.*, 732 F.3d at 389. After all, "[i]f combining speech and conduct were enough to create

expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Rumsfeld*, 547 U.S. at 66.

Yet even if one assumes *arguendo* that assisting voters could constitute protected speech (it couldn't), the challenged provisions do not burden that speech. None of the challenged provisions restricts individuals from providing assistance in any way. Sections 6.01, 6.03, and 6.05 require individuals who transport seven or more voters needing curbside assistance to a polling place or who assist voters in accordance with the Texas Election Code to complete and submit a short informational form. Plaintiffs do not dispute the relevancy of the information requested and do not explain how fulfilling this requirement is burdensome. They merely assert that it will make assistance "more difficult" and will "dissuade" people from providing assistance. Pet. ¶ 259. This Court is not required to accept such a conclusory allegation. *Weizhong*, 468 S.W.3d at 186.

Second, Plaintiffs take aim at the updated oath required by section 6.04, which requires the assistant to swear that she "did not pressure or coerce the voter into choosing [her] to provide assistance." SB 1 § 6.04. Plaintiffs object that the term "pressure" is broad and may encompass Plaintiff Norman's activities, which include "holding up signs and instructing fellow congregation members to seek out her assistance." Pet. ¶ 260. But making oneself available for assistance and broadcasting that fact to others does not plausibly constitute "pressure" for purposes of the oath. In any event, the alleged impact on Plaintiff Norman's specific activities is woefully insufficient to support Plaintiffs' facial challenge to section 6.04. *EBS Sols.*, 601 S.W.3d at 753.

Finally, even assuming further that these provisions could burden protected speech (they couldn't), they are amply justified by Texas's legitimate interests in protecting the integrity of

voter assistance. *See supra* Part II.B. Thus, Plaintiffs fail to state a cognizable claim under the *Anderson*/*Burdick* framework. Accordingly, Count VI should be dismissed.

V. PLAINTIFFS' NOVEL "CUMULATIVE" CLAIM HAS NO BASIS IN LAW (COUNT VIII).

Finally, the Court should dismiss Count VIII because Plaintiffs' novel allegations that the challenged provisions "cumulative[ly]" violate the Texas Constitution, Pet. ¶ 270, fail "to demonstrate a viable, legally cognizable right to relief." *Guillory*, 470 S.W.3d at 240. Indeed, Count VIII should be dismissed for the simple reason that it is "duplicative" of the other counts. *See, e.g.*, *Texas Dep't of Pub. Safety v. Salazar*, No. 03-11-00478-CV, 2013 WL 5878905, at *9 (Tex. App.—Austin Oct. 31, 2013, pet. denied) (mem. op.). Moreover, in all events, Plaintiffs fail to plead any factual allegations to support this claim. For example, Plaintiffs allege no facts supporting their conclusory allegation that the additional protections for poll watchers contribute to a violation of Plaintiffs' right to free speech. *See* Pet. ¶ 271. Count VIII simply states a new legal conclusion—a "cumulative" violation of the Texas Constitution—without alleging facts supporting this novel claim for relief. *See Weizhong*, 468 S.W.3d at 186 (legal conclusions unsupported by factual allegations do not adequately state a claim for relief).

CONCLUSION

The Court should dismiss the Original Petition with prejudice.

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Respectfully submitted,

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