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CAUSE NO. 2021-57207

TEXAS STATE CONFERENCE OF THE NAACP, *et al.*,	§	
	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	HARRIS COUNTY TEXAS
v.	§	
GREG ABBOTT, in his official capacity as the Governor of Texas, *et al.*,	§	189th JUDICIAL DISTRICT
	§	
Defendant.	§	

PLAINTIFFS' OPPOSITION TO THE REPUBLICAN COMMITTEES' MOTION TO DISMISS UNDER RULE 91a

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I. INTRODUCTION

The Republican Committees' ("Intervenors") Rule 91a Motion to Dismiss should not be considered by this Court because it is procedurally improper. First, Intervenors' Motion argues that the Petition fails to provide fair notice of Plaintiffs' claims to Defendants, even though Defendants themselves did not make that argument in their own Rule 91a Motion. Second, the Motion is untimely because it was filed substantially later than 60 days after the Petition was served on Defendants. Apart from these procedural defects, the Motion should be summarily denied because it relies on evidence outside of the Petition, asks the Court to draw inferences in Intervenors' favor, which is forbidden under Rule 91a, and disregards the inferences that must be drawn in favor of Plaintiffs.

Intervenors repeatedly attempt to downplay the significance of the facts pleaded in Plaintiffs' Petition, referring to harms alleged as "minor" or "suggesting" an alternative reading of the facts. Intervenors have cited no case—and Plaintiffs are not aware of any—where a Rule 91a dismissal was based on the weighing of the evidence as Intervenors' Motion calls for. Rather, Texas courts have uniformly applied the Rule through the prism of Texas's notice pleading regimen akin "to a plea to the jurisdiction," *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724–25 (Tex. 2016), not, as Intervenors would have it, an evaluation of the substantive strength of Plaintiffs' case. Intervenors' Motion takes Rule 91a to places it has never been before, and this Court should not go there. Intervenors' Motion must be denied.

II. THE GOVERNING LEGAL STANDARD

Rule 91a allows a party to move to dismiss a cause of action "on the grounds that it has no basis in law or fact." The standard set by the rule is high:

> 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. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

TEX. R. CIV. P. 91a.1. "The court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." TEX. R. CIV. P. 91a.6. This "limits the scope of the court's factual inquiry" to the plaintiff's pleading and its pleading exhibits. *Bethel v. Quilling, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 655 (Tex. 2020). In evaluating the sufficiency of the pleading under Rule 91a, this Court must only "apply the fair notice pleading standard applicable in Texas to determine whether the allegations of the petition are sufficient to allege a cause of action." *Id.*; *Aguilar v. Morales*, 545 S. W. 3d 670, 677 (Tex. App.—El Paso 2017, pet. denied); *Bart Turner & Assocs. v. Krenke*, No. 13-2921, 2014 WL 1315896, at *5 (N.D. Tex. Mar. 31, 2014) ("[T]he standard for pleading in Texas is still fair notice," but that "fair notice must now be judged in the context of Rule 91a.").

The fair notice standard requires only that plaintiffs provide "a short statement of the cause of action sufficient to give fair notice of the claim involved." TEX. R. CIV. P. 47A. Under the fair notice standard, "a plaintiff sufficiently pleads a cause of action when the elements of the claim and the relief sought may be discerned from the pleadings alone." *Brumley v. McDuff*, No. 19-0365, 2021 WL 400548, at *4 (Tex. Feb. 5, 2021). A complaint is sufficient where, as here, the pleading rests on whether it "gives fair and adequate notice of the facts upon which the pleader bases his claim." *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 536 (Tex. 2013). The dismissal grounds under Rule 91a "have been analogized to a plea to the jurisdiction, which

requires a court to determine whether the pleading allege facts as demonstrating jurisdiction." *Sanchez*, 494 S.W. 3d at 724–25.[1]

III. STATEMENT OF PROCEDURAL HISTORY

On September 7, 2021, Plaintiffs filed their Petition for relief alleging that numerous provisions of the omnibus voter suppression law SB 1 violate the Texas Constitution. In particular, the Petition challenges Sections 4.01(g), 4.06(g), 4.07(e), 4.09, 6.01(e), and 8.01 (the "poll watcher provisions"); Section 7.04 (the "application solicitation and distribution" provision); Sections 5.02, 5.03, 5.07, 5.08, 5.10, 5.12, and 5.13 (the "mail-ballot application exact match" provisions); Sections 6.01, 6.03, 6.04, and 6.05 (the "voter assistant" provisions); and Sections 3.04, 3.09, 3.10, 3.12, 3.13, and 4.12 (the "alternative voting" provisions). Pet. ¶¶ 213–73. The Petition alleges claims under Article I of the Texas Constitution's strict prohibition of intentional discrimination based on race and its protections around the right to vote, right to free speech, and right to procedural due process. *See id.* Defendants were served with the Petition on September 15 and timely filed their Answer on October 8. Defendants then filed a Rule 91a Motion on November 15, largely raising issues as to proper parties and sovereign immunity, and Plaintiffs filed their opposition on December 13. Defendants did not request argument and instead marked the motion

[1] Although some courts have likened the motions to dismiss under Rule 91a to the motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure, *see, e.g.*, *Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 186 (Tex. App.—Houston [14th Dist.] 2015, pet. denied), the Texas Supreme Court has not applied the "plausibility" standard applicable to Rule 12(b)(6) motions as set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544 (2007) to Rule 91a motions. *See, e.g.*, *In re Facebook, Inc.*, 625 S.W.3d 80, 84 (Tex. 2021); *Sanchez*, 494 S.W. 3d at 724–25. Rather, Texas courts have acknowledged similarities between the federal rule and Rule 91a, but have proceeded to emphasize that they are applying the fair notice standard, implying that there is some difference. *See, e.g.*, *Wooley v. Schaffer*, 447 S.W.3d 71, 84 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Bart Turner*, 2014 WL 1315896 at *5. The issue is academic, because even if the "plausibility" standard applied, here, Plaintiffs' Petition easily meets it.

for submission on December 20, 2021, leaving the Court just 10 days to rule on the motion within the statutory 45-day limitation. No ruling has yet issued.

Intervenors filed their Petition for Intervention on October 26, in which they asserted that intervention was "essential to effectively protect the [Republican Committees'] interest" because the action could change the results of elections directly impacting the Republican Committees, their candidates and voters. Pet. Intervention ¶ 17. They further stated that intervention would not "complicate the case by excessively multiplying the issues" and that they would not "raise any new claims or introduce any factual evidence that was not already relevant to the existing claims." *Id.* at ¶ 16. They also asserted a general denial to the allegations made in the Petition under Rule 92,[2] and asserted affirmative defenses. *Id.* at ¶¶ 18–22.

Despite Intervenors' representation that they would not raise any new claims, on December 22, they filed a Rule 91a Motion both repeating arguments that had been made in Defendants' November 15 Rule 91a Motion and raising new arguments, including introducing improper factual disputes. Intervenors' Motion comes more than 90 days after Defendants were served with the Petition, and raises for the first time a litany of alternative facts and merits-based arguments that are entirely inappropriate for resolution by way of a Rule 91a Motion.

IV. INTERVENORS' MOTION IS IMPROPER AND SHOULD BE DENIED.

A. Intervenors have no right to file this Motion, as Defendants have waived the right to argue that the Petition failed to provide them with adequate notice of Plaintiffs' claims and the time to do so has run out.

Motions under Rule 91a must be "filed within 60 days after the first pleading containing the challenged cause of action is served on the movant." TEX. R. CIV. P. 91a.3. Such motions are "intended to be asserted and determined soon after the filing of the case." *Gonzales v. Dallas*

[2] Rule 92 provides, "[a] general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue."

County Appraisal District, No. 13-1658, 2015 WL 3866530, at *5 (Tex. App.—Dallas June 23, 2015, no pet.). Here, Defendants in this case timely filed a Rule 91a Motion which did not raise any issues pertaining to the adequacy of notice of the claims asserted by Plaintiffs in the Petition. It would seem, at best, incongruous for Intervenors to bring a motion wholly based on whether the Petition gives Defendants fair notice of the claims, when Defendants had that opportunity and elected not to do so. It is irrelevant whether Intervenors believe Defendants had fair notice of the claims, and for that reason alone, the Motion should be denied.

Assuming, however, that Intervenors can bring this Rule 91a Motion, the language and spirit of the Rule and the Texas Rules of Civil Procedure as a whole suggest that the time Intervenors had to file the Motion to the Petition cannot be longer than the time given to the party with whose interests they are aligned, *i.e.*, the Defendants. The Texas Rules of Civil Procedure hold intervenors to the same standards and timelines as all other parties. TEX. R. CIV. P. 61 (all rules of pleading "apply equally . . . to intervenors").

Here, the Petition was filed on September 7, 2021 and service was effectuated on Defendants on September 15. This timeline necessitated the filing of any Rule 91a Motions to occur on or before November 15. Yet Intervenors did not file until more than a month later on December 22—more than 90 days after Defendants had been served with the Petition and more than 100 days after the Petition had been filed.

Further, although the right of intervention in Texas state court is an equitable one that permits parties to "intervene voluntarily in the litigation of others" at any time during the proceedings, it cannot be used as a vehicle to "delay the case or otherwise prejudice the existing litigants." *Highlands Ins. Co. v. Lumbermen's Mut. Cas. Co.*, 794 S.W.2d 600, 601 (Tex. App.—Austin 1990, no writ); *see also Muller v. Stewart Title Guar. Co.*, 525 S.W.3d 859, 874 (Tex.

App.—Houston [14th Dist.] 2017, no pet.) (struck intervention as prejudicial because it would cause undue delay).

Finally, even were this Court to allow Intervenors to file a Rule 91a Motion and to rule that such Motion was not triggered by the date of service of the Petition on Defendants, it would still leave open the issue of what date triggered Intervenors' Rule 91a deadline. A more logical construction of the Rule would be that the 60-day timeline was triggered from at least the date of service on Defendants or the date the Petition was filed, the points at which there is constructive notice to the world. That is particularly so here, where the Court can take judicial notice that the filing of this action was well-publicized.[3] Intervenors have carefully avoided disclosing the date when they became aware of this litigation, and we are confident that they will not deny it was several days, if not several weeks, before they filed their extensive Intervention Petition. There is a clear inference that they waited longer than 60 days after having actual notice of the Petition to

[3] Under Texas Rules of Evidence Rule 201, the Court "may judicially notice a fact that is not subject to reasonable dispute" when that fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Tex. Rules Evid. 201(b)(2). Intervenors had knowledge of Plaintiffs' Petition prior to October 26, 2021. First, Plaintiffs' Petition was widely covered by Texas news sources at the time of the filing. *See, e.g.*, Alexa Ura, *Gov. Greg Abbot Signs Texas Voting Bill Into Law, Overcoming Democratic Quorum Breaks*, THE TEXAS TRIBUNE, Sept. 7, 2021, https://www.texastribune.org/2021/09/01/texas-voting-bill-greg-abbott/ (describing this lawsuit "filed in state district court in Harris County," which "raises claims that the law runs afoul of the the [sic] Texas Constitution"). Second, Defendants are each publicly endorsed by Intervenors. *See, e.g., Greg Abbot, Republican Primary Candidate for Governor*, DALLAS COUNTY REPUBLICAN PARTY, https://dallasgop.org/candidate-information-07/greg-abbott?send_to=%2 Fcandidate-directory-by-contest (Dallas County Republican Party webpage endorsing Defendant Abbott) *and Ken Paxton, Republican Primary Candidate for Attorney General*, DALLAS COUNTY REPUBLICAN PARTY, https://dallasgop.org/candidate-information-09/ken-paxton?send_to=%2 Fcandidate-directory-by-contest (Dallas County Republican Party webpage endorsing Defendant Paxton). Plaintiffs emphasize that their request that the Court take judicial notice of these facts for the limited purpose of adjudicating the timeliness of Intervenors' filing is not contrary to Rule 91a's prohibition as to the introduction of evidence outside the pleadings, as that prohibition is focused on adjudication of the "factual inquiry" into the allegations in the challenged pleading. *See generally Bethel*, 595 S.W. 3d at 654–56.

file this Motion. Under any circumstances, the Motion is untimely and should be denied for that reason.

B. The Motion improperly relies on facts outside of the Petition.

Intervenors repeatedly ignore Rule 91a's clear admonition against the use of outside evidence by introducing extraneous allegations throughout their Motion to challenge the facts in the Petition. The Court should strike and not consider these improper extra-record facts from Intervenors' Motion.

For example, Intervenors directly cite to the Secretary's COVID-19 resources providing "detailed guidance to local officials regarding administration of the election during the pandemic." Intervenors' Br. at 2. They cite to a news article published on WBAP titled "Governor Abbott Prioritizes Election Integrity this Legislative Session." *Id.* at 3. They go on to link to a press release from the Attorney General's office announcing prosecution of election fraud. *Id.* at 23 n.4. Ignoring the four corners of Plaintiffs' Petition, Intervenors also cite to a report by the Carter-Baker Commission. *Id.* at 24. Such evidence cannot be considered on a Rule 91a motion. *See San Jacinto River Auth. v. Brocker*, No. 14-18-517, 2021 WL 5117889, at *6 (Tex. App.—Houston 14th Dist. Nov. 4, 2021, no pet. h.) (declining to consider information from web pages in a 91a motion). The Court should strike Intervenors' extraneous evidence and reject their arguments relying upon that evidence, including arguments related to the state's justifications behind the enactment of SB 1.

V. THE PETITION PROVIDES FAIR NOTICE OF THE CAUSES OF ACTION WITH ADEQUATE BASES IN LAW AND FACT.

A. Count I of the Petition provides fair notice of an intentional discrimination claim with an adequate basis in law and fact.

Article I, Section 3 of the Texas Constitution is coextensive with the Equal Protection Clause of the Fourteenth Amendment, *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 923

(Tex. 2020), in that both "safeguard against invidious discrimination between classes of persons." *Richards v. LULAC*, 868 S.W.2d 306, 312 (Tex. 1993). Texas courts apply the federal analytical approach to discriminatory intent claims under the Fourteenth Amendment of the United States Constitution, as set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977), to similar claims brought under Article I, Section 3 of the Texas Constitution. *Abbott*, 610 S.W.3d at 923 and n.14; *Bell v. Low Income Women*, 95 S.W.3d 253, 266 (Tex. 2002). Following this precedent, although a plaintiff alleging discriminatory intent bears the burden of overcoming the presumption that the State did not act with such intent, *Abbott*, 610 S.W.3d at 923, "'[r]acial discrimination need only be one purpose, and not even a primary purpose,' of an official action for a violation to occur." *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (en banc) (quoting *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009)).

"Legislative motivation or intent is a paradigmatic fact question." *Veasey*, 830 F.3d at 230 (quoting *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000)). In *Arlington Heights*, the United States Supreme Court indicated, as more fully discussed below, that, in some cases, "impact may be an important starting point" in assessing discriminatory intent. 429 U.S. at 266. It then "set out five non-exhaustive factors to determine whether a particular decision was made with a discriminatory purpose, and courts must perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Veasey*, 830 F.3d at 230–31 (citing *Arlington Heights*, 429 U.S. at 266–68). "Those factors include: (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporary statements by members of the decision-making body." *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989) (citing *Arlington Heights*, 429 U.S. at 267–68). The Court in

Arlington Heights stressed that not all of these factors need be present—or are even likely to be present—in every case. 429 U.S. at 231–32.

Because the analysis is fact-intensive and based on the record as a whole, it is ill-suited for resolution on a preliminary motion prior to discovery, or even at the summary judgment stage. Ultimately, this Court will assess each factor individually and collectively to determine whether Plaintiffs have proved intentional discrimination. Plaintiffs need not prove all of the *Arlington Heights* elements to prove a discriminatory intent claim. For present purposes, however, the allegations in the Petition must be accepted as true, viewed in the light most favorable to Plaintiffs. By taking facts out of context from the Petition and positing alternative factual explanations, Intervenors ignore entirely the dictates of Rule 91a.

1. The Petition makes sufficiently specific allegations of Plaintiffs' intentional discrimination claim.

From its introductory paragraphs through the assertion of the claims, the Petition alleges that the provisions of SB 1, "individually and collectively," will adversely impact Texas's communities of color, and "[t]his is precisely what the legislature intended." Pet. ¶ 17; *see also id.* at ¶¶ 11–16. The provisions that collectively give rise to a violation of the provisions of the Texas Constitution include those expanding powers for partisan poll watchers, *id.* at ¶¶ 143–57; banning election officials' solicitation and distribution of vote-by-mail applications, *id.* at ¶¶ 158–61; rejecting vote-by-mail applications and ballots that do not exactly match voter registration applications, *id.* at ¶¶ 162–69; additional requirements for voter assistants, *id.* at ¶¶ 170–82; and restricting and/or limiting lawful methods of voting, including early voting, overnight voting, drop box voting, and drive-thru voting, *id.* at ¶¶ 183–91. These allegations in and of themselves are enough to provide Defendants with notice of the intentional discrimination claim.

However, as will be discussed further below, the Petition contains much more. It describes the expected discriminatory impact; it sets forth a detailed explanation of the unusual procedural history that led to the passage of SB 1; it alleges that the purported justifications for SB 1 were tenuous and pretextual. All of these averments provide a solid basis for fair inferences to be drawn in favor of Plaintiffs—as dictated by Rule 91a—that SB 1 was passed with discriminatory intent.

Intervenors never confront the whole of Plaintiffs' discriminatory intent claim in their brief, because they cannot come close to demonstrating that it is a "baseless" claim under Rule 91a. Rather they attempt to nit-pick individual factual allegations, asking this Court to reject the actual allegations and instead accept Intervenors' version of the events. Rule 91a does not allow such factfinding. For that reason alone, the Motion must be denied. Nevertheless, Plaintiffs will proceed to address Intervenors' separate arguments.

2. Plaintiffs sufficiently plead impact.

Intervenors first argue that the Petition does not "allege a cognizable disparate impact." Intervenors' Br. at 7–10. At the outset, Intervenors' argument stems from the incorrect legal premise that Plaintiffs *must* provide proof of disparate impact to support their intent claim as to every provision of SB 1. *Id.* That is not the law. Rather, *Arlington Heights* makes it plain that discriminatory impact[4] "may" be "an important starting point" in a discriminatory intent claim. *Arlington Heights*, 429 U.S. at 266. Here, the Petition makes multiple allegations of discriminatory impact, from which reasonable inferences can be drawn that voters of color will be harmed more than white voters by the implementation of SB 1.

First, the Petition is explicit that "SB 1 is specifically aimed at curtailing methods of voting used by Black, Hispanic, and Asian voters that helped increase their political power during the

[4] The Court in *Arlington Heights* never uses the phrase "disparate impact."

2020 elections" and "will make it more difficult for these voters to vote. . . ." Pet. ¶ 219. The Petition states in no uncertain terms: "Viewed individually or collectively, these provisions of SB 1 gravely threaten the fundamental right to vote of all Texans, but they will hit hardest in communities of color." *Id.* at ¶ 17.

If more is needed, as to each of the challenged provisions in SB 1, the Petition sets forth facts from which it can be inferred that the burdens on the right to vote would likely fall more heavily on voters of color than on white voters. As to the partisan poll watchers, the Petition recounts specific and recent incidents of intimidation of voters of color at the polls which are part and parcel of a long—and, again, recent—history of discrimination against voters of color. Pet. ¶¶ 11, 25, 34, 45, 192–94. For example, the Petition cites to the fact that partisan poll watcher provisions, designed "to impact voters of color," "will allow poll watchers to engage in even more intimidating conduct toward Texas NAACP members." *Id.* at ¶ 25. From this, it can be inferred that SB1's easing of the statutory restrictions and regulations on the powers of partisan poll watchers within polling places is likely to impact voters of color more harshly than white voters.

As to the alternative voting provisions, the Petition specifically avers that the use of drop boxes, establishment of drive-thru voting sites, distribution of vote-by-mail applications to all those age 65 and older, and implementation of extended hours were used in Harris County in 2020 more than in any other county, resulting in the highest turnout in more than 30 years, and that Harris County has one of the largest populations of voters of color. Pet. ¶¶ 16, 24, 28, 130, 217. The Petition cites statistics showing that minority voters used the alternative methods of voting that would be banned by SB 1 at a higher rate than white voters—nearly 56% of extended early voters and 53% of drive-thru voters were minorities—illustrating how people of color are likely to be disproportionately impacted by SB 1's restrictions on these voting methods. *Id.* at ¶ 91. The

Court can infer from this that there will be a greater impact on the voters of Harris County—as well as voters of color—than in other, less diverse, counties in Texas. As to the voter assistance provisions, the Petition specifically describes that many of the voters who need assistance are voters of color for whom English is a second language. *Id.* at ¶ 14. From this, the inference can be made that the voter assistance provisions will have a greater negative impact on voters of color than on other voters. And the Petition alleges that the limitation in hours for Sunday early voting will have an adverse effect on the Souls to the Polls a program typically for Black voters organized by Black churches—from this fact, the Court can draw a fair inference that Black voters will be more heavily burdened than others. *Id.* at ¶¶ 16, 24, 28, 130. At this stage of the proceedings, Plaintiffs' discriminatory intent claim, based on these averments of impact and the fair inferences to be drawn from them, is sufficient, and cannot be considered "baseless," which is what Rule 91a is all about. The fact and expert witness support with which Plaintiffs will prove these facts must await discovery and trial.

Next, Intervenors' assertion that "the challenged provisions are not sufficiently burdensome on voters to establish a cognizable disparate impact," Intervenors' Br. at 9, is not cognizable under the strict standards of Rule 91a because this is not the stage of proceedings at which the Court may assess the sufficiency of the burden on voters. Plaintiffs' allegations to that effect must be accepted as true.

Intervenors posit a series of arguments that do not go to the facial validity of the claim, but rather to the ultimate merits which cannot be adjudged until after a full hearing of all the evidence. For example, whether the provision of alternative methods of voting was a one-time occurrence in 2020 because of the pandemic, Intervenors' Br. at 8, whether any county in Texas was required to offer these methods in 2020, and whether turnout of minority voters will decrease in Texas are

arguments based on extra-record suppositions and, in any event, go to the weight of the evidence as to the magnitude of the impact on voters, which may not be assessed on this Motion.

Intervenors also posit alternative readings of the Petition, theorizing for example, that because "Harris County's voter turnout rate was the same as the statewide rate," "[t]his suggests that some cause other than" the alternative voting methods drove the increase. Intervenors' Br. at 8. But the Court does not and cannot weigh evidence on a Rule 91a motion. Whatever weight the Court gives any of these arguments must await another day. At this stage, Intervenors are not entitled to any inferences in their favor from the facts alleged in the Petition; only Plaintiffs are.

Similarly, Intervenors argue that cases "caution[] against drawing extrapolations from the results or turnout of a single election year," and dispute the weight to be given to elections referred to in the Petition. Intervenors' Br. at 9. But the Court does not and cannot weigh evidence on a 91a motion; whatever weight this Court decides to give any of the facts pled must await another day.[5]

Finally, Intervenors argue that the Petition's averment that the majority of voters who availed themselves of drive-thru and extended hours voting in Harris County in 2020 were voters of color "do[es] not reveal any meaningful disparity between minority and non-minority voters," because the Plaintiffs' Petition avers that there is a higher percentage of the total population of persons of color in Harris County, than of persons of color who voted by drive-thru or during extended hours. Intervenors' Br. at 10. However, the comparison of the total population demographics with the percentage of voters who voted by these alternative means who were

[5] Tellingly, none of the cases cited by Intervenors addressed a Rule 91a motion, or even a motion to dismiss. Rather, Intervenors' cases dealt with specific, very different, issues following a trial or similar evidentiary hearing. *Thornburg v. Gingles*, 478 U.S. 30 (1986), discussed the specific way to prove a vote dilution case under Section 2 of the Voting Rights Act after trial, and Justice Ginsburg's dissent in *North Carolina v. League of Women Voters*, 574 U.S. 927, at *6–7 (2014) was in the context of construing the evidence adduced at a hearing on a motion for a preliminary injunction.

persons of color does not answer the question as to disparate impact without more analysis and information such as, for example, the demographics of the turnout for the election as a whole. At this stage of the case, however, the inferences from the evidence must be drawn in Plaintiffs' favor, not in favor of the Intervenors on their Rule 91a.

Further, whether the impact has "practical significance," or is "too trivial," is not a matter for this Court to decide on this Motion. Intervenors' Br. at 9. Indeed, the cases cited by Intervenors on this issue, *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District,* 17 F.4th 950, 964 n. 11 (9th Cir. 2021) *and Brnovich v. Democratic National Committee*, 141 S.Ct. 2321, 2358 n.4 (2021) (Kagan, J. dissenting), were decided on summary judgment and after a ten-day trial, respectively, not on the equivalent to a motion to dismiss, let alone Texas' stricter Rule 91a. Intervenors also cite to *Abbott v. Anti-Defamation League*, 610 S.W.3d at 911, which was decided after an evidentiary hearing on a motion for a temporary injunction. Although Intervenors may believe that SB 1 does "not impose any cognizable burden on voters," Intervenors' Br. at 9, the Petition avers otherwise, and those well-pled allegations must be accepted at this stage.

3. The Petition pleads other relevant facts supporting discriminatory intent.

Intervenors advance a litany of arguments that attempt—unsuccessfully—to undermine Plaintiffs' allegations about the remaining *Arlington Heights* factors. Each of Intervenors' arguments fail.

As to the legislature's motivation in enacting the offending provisions of SB 1, the Petition alleges with specificity how SB 1's enactment came on the heels of a massive demographic change over the past decade, mostly concentrated in the State's five most ethnically and racially diverse counties, and a successful 2020 election in which more Black and Hispanic voters were able to cast ballots despite the unprecedented and deadly pandemic. *Id.* at ¶¶ 2, 81. When SB 1 was

enacted, the 2020 Census results revealed that the State had added nearly four million residents of color and that Harris County became even more diverse with a 43.7% Hispanic, 20% Black, 28.7% white, and 7% Asian population. *Id.* In 2020, in the midst of the coronavirus pandemic, Harris County implemented a series of measures to make it easier for voters to cast their ballots, including but not limited to establishing ten drive-thru voting sites; extending early voting hours on certain days leading up to the election; implementing twenty-four hour voting at eight polling locations, including at the Texas Medical Center where shift workers and medical staff who were working overtime or irregular hours—and disproportionately people of color—could access the ballot; and installing multiple drop box sites that permitted voter to returning absentee ballots via drop box. *Id.* at ¶¶ 3, 92–94. It was no accident, the Petition alleges, that after an extremely successful election that saw unprecedented turnout levels, the Texas Legislature enacted SB 1, which targets the very methods of voting that permitted counties like Harris to alleviate the substantial burdens faced by minority voters. *Id.* at ¶ 17.

The Petition recounts, again in detail, a plethora of additional facts from which inferences of discriminatory intent could be drawn. These include the legislature's awareness of—and purposeful refusal to acknowledge—an abundance of information as to the potential for discriminatory impact on voters of color if SB 1 were passed, *id.* at ¶¶ 124, 125, 126, 220; the extraordinary deviations from standard procedures, including rushed processes, insufficient time provided to study amendments to the legislation, and the exclusion of Black and Latinx legislators from conferences, *id.* at ¶¶ 7, 8, 9, 10, 129; the use of the phrase, "purity of the ballot," which has historic lineage as a justification for racially discriminatory voting laws including a prior version of SB 1, *id.* at ¶¶ 97, 202–03; and the pretextual nature of the justifications provided by the proponents of SB 1 to justify its passage, *id.* at ¶¶ 4–5, 95–96. Count I of the Petition concludes

by alleging that SB 1, as a whole, was "enacted with the purpose of discriminating based on race or ethnicity" to make it "harder for Black, Hispanic, and Asian voters, as well as other minorities to vote." *Id.* at ¶ 222.

Despite these specific allegations, Intervenors argue that the Petition is insufficient because it fails to "identify [racist] statements" made by any legislator who voted for SB 1. Intervenors' Br. at 11.[6] But identifying specific racist statements made by legislators is not a requirement for alleging a discriminatory intent claim. *Veasey*, 830 F.3d at 235 ("In this day and age we rarely have legislators announcing an intent to discriminate based upon race . . . ."); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 725 (S.D. Tex. 2017) ("[T]he plaintiffs' burden does not require them to show that individual legislators' subjective personal racism . . . was the motive for proposing, supporting, or enacting legislation").

Intervenors also improperly—and in any event ineffectively—attempt to dispute the intent behind the use of the term "purity of the ballot box." Intervenors argue that the use of the phrase "preserving the purity of the ballot" in an earlier version of what became SB 1 is simply a "legislator's recitation of his constitutional duty to uphold election integrity" and the fact that officials invoked that phrase in the past in support of discriminatory actions is not relevant to today. Intervenors' Br. at 11. But the Petition does not rely on that fact for the purpose of imputing legislative intent from past conduct. Rather, the inference Plaintiffs seek to draw from this fact is

[6] Intervenors' reliance on *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986), for the assertion that Plaintiffs seek to "unlock the doors of discovery" and go on a "fishing expedition," Intervenors' Br. at 10, is inapposite. Unlike here, the plaintiff in *Collins* did not raise any reasonable inference that a statute was enacted with discriminatory intent. Similarly, Intervenors' reliance on *University of Texas M.D. Anderson Cancer Center v. Eltonsy*, 451 S.W.3d 478, 485 (Tex. App.—Houston [14th Dist.] 2014, no pet.), Intervenors' Br. at 10, is inapposite because there the plaintiff made only conclusory allegations of discrimination based on sex and did not plead in accordance with the specific statutory requirements.

that the phrase is an historic dog whistle for racial discrimination and was being used to justify the need for SB 1's passage. Pet. ¶¶ 202–03. That the term falls within the Texas Constitution does make its use nondiscriminatory. It is also telling that, after being called on it, the drafters of SB 1 removed that language from the final bill.

Deviations from regular procedures may provide strong evidence of discriminatory intent. *See Veasey*, 830 F.3d at 236-37.[7] The Petition describes in painstaking detail the dizzying extent of SB 1's wayward legislative process. *See* Pet. ¶¶ 97–119. Although Intervenors implicitly admit that the Legislature "departed 'from the normal procedural sequence,'" they characterize the deviations as "minor." Intervenors' Br. at 12. That, of course, is for the Court to decide at the appropriate stage, not on a Rule 91a motion.

In this context, the other arguments Intervenors make in connection with the deviation from procedure point can be easily dispatched. Relying on *Rollerson v. Brazos River Harbor Navigation District*, 6 F.4th 633, 640 (5th Cir. 2021), Intervenors argue that the Petition does not plead that the Legislature deviated from procedure to "accomplish a discriminatory goal." Intervenors' Br. at 12. But that is not what *Rollerson* said. There, the Fifth Circuit explained that "procedural violations do not demonstrate invidious intent of their own accord," *Rollerson*, 6 F.4th at 640, and that "they must have occurred in a context that suggest the decision-makers were willing to deviate

[7] The discussion in *Veasey* as to the *Arlington Heights* factors was in the context of a review of a post-trial record, where the court was considering whether to remand a finding of discriminatory intent that had been based on consideration of some evidence that the Fifth Circuit, sitting en banc, found not relevant. The standard the court applied in determining whether "the record permits only one resolution of the factual issue," *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982), was applied in *Veasey*, 830 F.3d at 235. As described above, many of the facts found by the *Veasey* court as sufficiently supportive of a finding of intent to permit a remand, rather than require a reversal of the discriminatory intent claim, are virtually identical to the facts as pled in this case. A finding that there could be more than one resolution of the case, requiring a remand, precludes Intervenors' Rule 91a motion, which cannot be granted unless the cause of action "has no basis in fact [and] no reasonable person could believe the facts pleaded." TEX. R. CIV. P. 91a.1.

from established procedures in order to accomplish a discriminatory goal," *id.*, citing to *Veasey*, which had repeatedly declared that "context matters." *Veasey*, 830 F.3d at 236-37. In *Rollerson*, the plaintiff had failed to tie the defendants' action "to any specific event or circumstance that is indicative of discriminatory intent," *i.e.,* "that tend to exclude . . . benign purposes." 6 F.4th at 641. Not so here, where the Petition squarely places the procedural violations in a context that allows for the inference of discriminatory intent. The Petition clearly alleges that SB 1 was enacted immediately following an election with unprecedented voter turnout, particularly for voters of color, *see* Pet. ¶¶ 86–96, and that SB 1 was designed specifically to *reverse* that trend by targeting the very voting methods and procedures that enabled record turnout. *Id*. at ¶ 219. Further, the Petition alleges that the additional requirements for absentee ballots, the limitation on Sunday voting, and the increased potential for intimidation of voters due to the poll watcher provisions will have a particular impact on voters of color. *Id*. at ¶¶ 16, 25, 34, 30, 39, 130. This is the "context" in which SB 1 was passed, which Intervenors refuse to acknowledge and inexplicably argue is not detailed in the Petition.

Intervenors argue that the Legislature's decision to forgo any racial impact analysis is not a procedural abnormality, and that alternatively such an analysis was not warranted. Intervenors' Br. at 13. The Petition alleges, and Intervenors do not dispute, that the Texas Legislature received an avalanche of messages from constituents and legislators of color pleading with it to conduct a racial impact analysis in light of SB 1's "likely [negative] impacts on minority voters." Pet. ¶¶ 124, 126. Months later, after fielding numerous questions about whether the proponents of SB 1 had considered the impact of SB 1 on voters of color, legislators replied by noting that they "were not advised or had not looked at this issue." *Id*. at ¶ 125 (internal quotation omitted). Intervenors' argument that no racial impact analysis was warranted is a factual dispute that relies upon

purported evidence outside the Petition. That is directly at odds with the allegations of the Petition, which must be construed in a light most favorable to Plaintiffs. Pet. ¶¶ 124, 126 (explaining that the Legislature was well aware of the need for a racial impact analysis).

Intervenors concoct a Kafkaesque argument that the Legislature could not have known that SB 1 would disenfranchise voters of color because it did not conduct a racial impact analysis. *See* Intervenors' Br. at 14. As explained above, the Petition alleges that the Legislature was bombarded with constituent feedback explaining that SB 1 would disparately impact voters of color and that it *purposefully* refused to conduct a racial impact analysis for that very reason. *See* Pet. ¶¶ 124, 126, 220. The Legislature cannot ignore feedback that a bill disparately impacts minority voters and then cite that purported ignorance as evidence that it did not act with discriminatory intent. *Veasey*, 830 F.3d at 236. Further, Intervenors' assertion that Plaintiffs failed to 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" is simply untrue. Intervenors' Br. at 14. That is precisely what the Petition alleges. *See* Pet. ¶¶ 17, 220.

Intervenors also take aim at the Petition's allegations that the Legislature excluded minority lawmakers from the legislative process, arguing that the Petition does not allege that "only minority members were denied access," and that "it is reasonable to conclude that all of the Democratic members were denied access." Intervenors' Br. at 14. Once again, Intervenors are wrong: the Petition alleges *exactly* that. *See* Pet. ¶ 129 ("Over the course of the ten-day Conference Committee process, it became clear that only members of color on the Conference Committee were not privy to the Committee's discussions and had not even seen what was going to be in the final Conference Committee Report."). More fundamentally, the relevance of this fact, as part of the greater scheme of things, is for the Court to assess on the merits, not on a Rule 91a motion.

Intervenors argue that no inference of discriminatory intent may be drawn from the Legislature's justification of SB 1 as necessary to prevent fraud or promote election integrity and uniformity. Intervenors' Br. at 14–15. Intervenors distort Plaintiffs' allegations. The Petition is clear that these facts illustrate that these justifications were pretextual because they were made without any legitimate evidentiary support. Pet. ¶¶ 5, 95–96. And the tenuousness of the Legislature's justification of a law may provide significant support for an ultimate finding of discriminatory intent. *Veasey*, 830 F.3d at 236–37. As the Fifth Circuit, sitting en banc, explained in language that describes precisely the facts pleaded by Plaintiffs here:

> The district court also heard evidence that SB 14 is only tenuously related to the legislature's stated purpose of preventing voter fraud.
>
> * * *
>
> . . . [T]here is evidence that could support a finding that the Legislature's race-neutral reason of ballot integrity offered by the State is pretextual.
>
> * * *
>
> The Legislature is entitled to set whatever priorities it wishes. Yet, one might expect that when the Legislature places a bill on an expedited schedule and subjects it to such an extraordinary degree of procedural irregularities, . . . such a bill would address a problem of great magnitude.

Id. at 238.

Rather than illustrate the factual insufficiencies in the Petition, Intervenors' Motion brings to light the ample facts supporting a more-than-reasonable inference that the Texas Legislature was motivated by a discriminatory purpose in enacting SB 1.

B. Counts II, IV, V, VII, and VIII of the Petition provide fair notice of right to vote claims with an adequate basis in law and fact.

In Counts II, IV, V, VII, and VIII of the Petition, Plaintiffs have alleged in detail how the challenged provisions—individually and together—will substantially burden the right to vote of

Plaintiffs' members and Plaintiff voters. The facts as alleged must be accepted as true, and all fair inferences must be drawn in Plaintiffs' favor. Intervenors' arguments to the contrary, predicated as they are on their view of the magnitude of the alleged burdens, cannot be disposed of by way of a Rule 91a motion. In any event, the burdens as pled are significant, discriminatory, and alleged in more than sufficient detail to provide notice to Defendants of the claims.

1. Right to vote claims are rarely adjudicated by way of motion to dismiss.

The right to vote is protected by Article I, Section 3 of the Texas Constitution. *See State v. Hodges*, 92 S.W.3d 489, 496, 501–02 (2002). When considering a burden on the right to vote, Texas courts utilize the *Anderson-Burdick* framework applied to federal constitutional claims, "'first consider[ing] the character and magnitude of the asserted injury to [voting] rights,' and then balanc[ing] the purported injury against the 'interests put forward by the State as justifications for the burden imposed by its rule.'" *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 919 (Tex. 2020) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). This test is a "flexible" sliding scale, in which the rigorousness of the court's inquiry increases with the severity of the burden, ranging from rational basis for "reasonable, nondiscriminatory restrictions" to strict scrutiny for "severe" impediments on the right to vote. *Id.* at 919–20. Restrictions that are "neither severe nor minimal" trigger a flexible analysis, wherein "the burden on plaintiffs' rights must be weighed against the state's asserted interest and chosen means of pursuing it." *Texas All. for Retired Ams. v. Hughs*, 489 F. Supp. 3d 667, 686 (S.D. Tex. 2020) (citations omitted). Where, as here, Plaintiffs have reasonably alleged that a challenged practice imposes a burden on the right to vote and is not sufficiently justified by the state's interest, the allegations are sufficient to survive a motion to dismiss. *Id.*

For these reasons, and in particular because of the need for the court to assess the magnitude of the claimed burden, right to vote claims are not often susceptible to disposition without an

evidentiary hearing. *See, e.g., Harding v. Cty. of Dallas*, No. 15-131, 2015 WL 11121002, at *1 (N.D. Tex. May 28, 2015) (concluding that a voting rights challenge should not "be dismissed on the pleadings alone" and noting that "although Rule 12(b)(6) dismissals are certainly possible in voting rights cases, the typical case . . . is permitted to move past the pleadings stage to an exploration of the merits."); *see also Georgia St. Conf. of NAACP v. Fayette County Bd. of Comm'rs*, 775 F.3d 1336, 1348 (11th Cir. 2015) (recognizing pretrial resolution of voting rights cases "presents particular challenges due to the fact-driven nature of the legal tests").

In this context, Intervenors' repeated invocation of *Crawford* and *Abbott* to suggest the burdens imposed on voters by SB 1 are "less severe" and "less burdensome" than the policies considered in those cases misses the point. Intervenors' Br. at 20–21. Neither *Crawford* nor *Abbott* was resolved at the motion to dismiss stage. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (resolved at summary judgment stage, following discovery and a "comprehensive 70-page opinion" by the district court); *Anti-Defamation League Austin*, 610 S.W.3d 911 at 916 (resolved at temporary injunction stage, applying a summary judgment standard). Whether the provisions of SB 1, individually or together, are more or less burdensome than voting restrictions upheld elsewhere is a question of fact. Plaintiffs must be allowed to develop and present the evidence and expert analysis that will support their well-pled allegations. To the extent factual disputes exist here, they cannot be resolved on a Rule 91a motion.

2. Plaintiffs sufficiently plead the burden imposed on voters by the challenged provisions.

Intervenors allege that Plaintiffs' claims fail under *Anderson-Burdick* because they do not plead that the challenged portions of SB 1 "impose material burdens on 'most voters.'" Intervenors' Br. at 16 (quoting *Abbott*, 610 S.W.3d at 921) (emphasis added). But Intervenors misread the law at issue and distort the facts as pled.

Neither *Crawford* nor *Abbott* announced a bright-line rule under which voting rights regulations are only cognizable under *Anderson-Burdick* if they affect "most voters," let alone "all." Intervenors' Br. at 16. As the plurality in *Crawford* acknowledged: "In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters." *Crawford*, 553 U.S. at 191. In other words, that a law burdens only some voters is not in and of itself indicative of whether it constitutes an unconstitutional burden on the right to vote. Instead, the Court's holding in *Crawford* was based on a lack of evidence after a full hearing, leading the Court to find that Indiana's voter identification did not represent a "significant increase over the usual burdens of voting" for "most voters," and that "*on the basis of the record* that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on *any* class of voters." *Crawford*, 553 U.S. at 198, 202 (emphasis added).

Abbott echoed this point, noting that concern about a "small class of voters" did not render the October Proclamation unconstitutional as a matter of law—not because any burden on this small class of voters would be permissible, but because "*on the basis of the evidence in the record* it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Abbott*, 610 S.W.3d at 922 (quoting *Crawford*, 553 U.S. at 199) (emphasis added). Despite Intervenors' best efforts to suggest otherwise, neither *Crawford* nor *Abbott* created a new test under which a voting restriction can be deemed burdensome under *Anderson-Burdick* only if it affects most voters. Instead, what *Crawford* and *Abbott* suggest most powerfully is that analyzing a right to vote claim under the *Anderson-Burdick* framework requires an evidentiary record, underscoring the inappropriateness of Intervenors' arguments at this stage.

In any event, even if Intervenors were right as to the standard, Plaintiffs have plainly pled that the provisions at issue do not merely burden "a limited number of persons." Intervenors' Br. at 16. Instead, they specifically allege the ways in which the challenged provisions affect all Texas voters in some ways and all Texas voters who rely on the particular means of voting, while noting the ways in which they will disproportionately—though not exclusively—impact voters of color. *See* Pet. ¶¶ 10, 17 ("[T]hese provisions of SB 1 gravely threaten the fundamental right to vote of all Texans.") (emphasis added). The Petition avers that: (1) the poll watcher provisions "will deter election officials from taking action to protect voters from conduct that will make voters" (not just, but particularly, voters of color) "feel uncomfortable or intimidated, or otherwise deter them from voting," Pet. ¶ 228; (2) the restrictions on solicitation and distribution of vote-by-mail applications, it is alleged, will burden all "eligible voters" who "may not be able to vote by mail" if they are not solicited by election officials at community gatherings, and voters who rely on the pick-up of applications at any number of places and events, *id.* ¶ 247; (3) the restrictions on assistants will burden the elderly and physically disabled and those who need language assistance, and impermissibly burdens "voters' right to vote," *id.* ¶¶ 250–51; and (4) the match requirement for voting by mail threatens the vote of "eligible mail-in voters," *id*. ¶¶ 265–68.

3. Intervenors ignore the cumulative burden of SB 1 and Count VIII pleads a cognizable claim to that effect.

Further, while Intervenors attempt to attack each of these provisions singularly, they fail to consider the impact of these provisions when taken together, as pled expressly in Count VIII of the Petition. Each of the challenged provisions hampers a voter's ability to cast a ballot; taken together they make every step of the voting process more difficult and make every voting method less accessible. This is yet another reason why Intervenors' argument that "[t]he challenged provisions do not burden the right to vote, especially in light of the many options voters have to

cast a ballot" is unavailing. Intervenors' Br. at 22–23. SB 1 makes nearly all of these options more difficult. A voter who attempts to vote in person must risk increased poll watcher intimidation, Pet. ¶¶ 152–57, and compromised voter assistance, *id.* at ¶¶ 180–82, and can no longer access drive-thru voting if needed, *id.* at ¶ 191. A voter who needs to vote early will now encounter fewer early voting hours and fewer early voting days. *Id.* at ¶ 189. A voter who instead attempts to vote by mail can no longer rely on solicitation and distribution of vote-by-mail applications from election officials, *id.* at ¶¶ 160–61, must risk the erroneous rejection of his application and/or ballot, *id.* at ¶¶ 167–68, and can no longer deliver his ballot by drop box. Pet. ¶ 190. Each of these individual provisions impermissibly burden the right to vote, and collectively they make voting—at any time, in any place, by any method—more difficult.

Intervenors challenge the legal basis for the cumulative burden claim. However, several federal courts, applying the standards followed by Texas in right to vote cases, have recognized that cumulative effects of an election law can *collectively* have the overall effect of burdening the right to vote. *See* Order, *Georgia St. Conf. of NAACP, et al., v. Raffensperger*, No. 21-01259, slip op. at 4 n. 8, (N.D. Ga. Dec. 9, 2021) ECF No. 64 ("State Defendants . . . analyze[] the challenged provisions out of context and do[] not account for Plaintiffs' contention that the challenged provisions also collectively violate the law."); *id.* at 25 (declining to dismiss plaintiffs' claims that "the individual provisions of SB 202, as well as their collective effect, impose "substantial burdens on Georgia's voters"); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 732 (M.D. Tenn. 2019) ("[T]he plaintiffs have demonstrated that these aspects of the Act, functioning together, create a cumulative burden that is even more difficult to justify as a constitutional matter."). *See North Carolina St. Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016).

The gravamen of Count VIII is that SB 1, when viewed as a whole, intentionally and impermissibly increases the burden of voting for all Texans, and particularly for voters of color. *See* Pet. ¶¶ 270–71. The Petition alleges that the 2020 elections continued the trend of increased participation by voters of color in Texas's elections. *See id.* at ¶¶ 2–3, 16–17, 24–33, 86–94. Following this, Texas changed its election laws—using irregular and discriminatory procedures—to target and eliminate the very methods of voting that had worked so well in 2020. *See id.* at ¶¶ 4–17, 97–119, 219–20. The Petition alleges 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." *Id.* at ¶ 220. Because of this, the Petition alleges that "the challenged provisions of SB 1, collectively, impermissibly burden [plaintiffs'] right to vote; fail to provide Plaintiffs and Organizational Plaintiffs' members adequate due process under Article 1, Section 19; and deprive Plaintiffs and Organizational Plaintiffs' members of their rights to free speech, expression, and association under Article I, Section 8 of the Texas Constitution." *Id.* at ¶ 271. Intervenors' assertion that "Plaintiffs fail to plead any factual allegations to support Count VIII" is therefore wrong. And any disagreement as to those facts is inappropriate for a motion under Rule 91a.

4. Each individual burden is sufficiently pled.

If more is necessary, Plaintiffs briefly respond to the points made about the burdens pled as to the individually challenged provisions of SB 1.

Burden of Poll Watcher Provisions: Plaintiffs specifically allege that SB 1's poll watcher provisions give poll watchers increased license to engage in conduct that will make voters feel uncomfortable or intimidated and limit election judges' ability to protect voters from such conduct, thereby significantly burdening the right to vote. Pet. ¶¶ 227–29. Intervenors suggest this harm is merely speculative, Intervenors' Br. at 19, apparently in the sense that it has not yet occurred.

Under that theory, of course, no plaintiff could ever sue to stop conduct that threatens to result in voter intimidation. Here, Plaintiffs have pled specific facts to substantiate their fears, including the decades-long—and recent—history of poll watcher intimidation in Texas that has disproportionately affected voters of color and the well-documented evidence that such intimidation continued into the 2020 election. Pet. ¶¶ 192–194(a)-(g).

Intervenors' argument that other provisions of the Election Code may protect voters from unscrupulous poll watchers is immaterial: SB 1's provisions, regardless of what is found elsewhere in the Code, serve to empower poll watchers at the expense of protecting voters, thus subjecting voters to the burden of increased harassment and intimidation at the polls. In any event, the Petition adequately pleads this aspect of the right to vote claim, and Defendants have been provided fair notice of this claim.

Burden of Restrictions on Solicitation and Distribution of Vote-by-Mail Applications: The restrictions on the solicitation and distribution of vote-by-mail applications in SB 1 significantly burden the right to vote by prohibiting election officials from providing basic support to absentee voters in the complex vote-by-mail process. Pet. ¶¶ 246–47. Intervenors contend that "the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail." Intervenors' Br. at 20 (relying on *Abbott*, 610 S.W.3d at 919 n.9). There, the Court applied *Anderson-Burdick* standards to a claim that the Governor's limitation on drop boxes for delivery of mail ballots during the pandemic violated the right to vote. In applying *Anderson-Burdick*, the Court questioned whether any right to vote claim could be brought on the issue, because of cases that had indicated that there was no constitutional right to vote by absentee ballot. *Abbott*, 610 S.W. 3d at 919. The Court did not reach this issue, because the parties had agreed that *Anderson-Burdick* controlled the case. *Id.*

Here, Intervenors do not expressly contend that Plaintiffs cannot assert an *Anderson-Burdick* claim as a matter of law relating to burdens placed on voting by mail. They appear to argue, as did the defendants in *Abbott*, that this is a factor to be considered under *Anderson-Burdick*. But even if Intervenors' papers could be construed as arguing against any right to vote claim that pertains to voting by mail or any alternative means of voting, they would be wrong. Indeed, this precise argument was recently rejected on a motion to dismiss made by similar intervenors in a case challenging Georgia's recently-enacted law, SB 202, that places restrictions on voting by mail. *See Georgia St. Conf.*, ECF Doc. No. 64 at -28.[8]

Courts have routinely adjudicated *Anderson-Burdick* claims based on burdens placed on voting by mail. The availability of other options of voting might be taken into account by the Court in assessing the magnitude of the burden, but it does not obviate the necessity of allowing this case to proceed to the merits. In turn, this Court's assessment of the magnitude of the burden,

[8] *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), one of the cases cited in the footnote in *Abbott* upon which Intervenors rely, has repeatedly been limited to its facts by the Supreme Court. *See Goosby v. Osser*, 409 U.S. 512, 521 (1973) (declining to follow *McDonald*); *O'Brien v. Skinner*, 4414 U.S. 524, 529, 531 (1971) (again declining to follow *McDonald* and holding that it "rested on failure of proof" rather than absence of a right of equal protection); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (abandoning *McDonald*'s reasoning and finding that minor party voters had a right to vote absentee in their primary where that right had been extended to major party voters, notwithstanding that minor party voters had the alternative option to vote in-person).

Moreover, *McDonald* was decided before *Anderson v. Celebrezze* and presumes a world where courts may apply only either a strict scrutiny or rational basis test). *See McDonald*, 394 U.S. at 809 (discussing only a rational basis test). But the subsequent development of the *Anderson-Burdick* framework rejected *McDonald'*s dichotomy, creating the intermediate range of burden, which federal courts have applied in adjudicating *Anderson-Burdick* challenges to restrictions on alternative methods of voting. *See, e.g.*, *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012) (applying moderate standard of judicial review to challenge to state law that provided fewer days to vote early in-person than provided to military voters); *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020) (applying moderate standard to claim brought by voter jailed after absentee ballot application deadline had passed).

after a full evidentiary hearing, will affect the standard that will be applied by this Court, which is how the Court treated the issue in *Abbott*. 610 S.W.3d at 919. There, the Court assessed the magnitude of the alleged burden as de minimis and subjected the plaintiffs' claims to a low level of scrutiny. 610 S.W. 3d at 919–22. But it did so only after an evidentiary hearing on the plaintiffs' request for a temporary injunction, not on the basis of a Rule 91a motion. 610 S.W. 3d at 916.

Burden of Restrictions on Voter Assistants: Plaintiffs have also alleged that SB 1's restrictions on voter assistants subject assistants to cumbersome requirements and an intimidating oath to be made under penalty of perjury, which will discourage voter assistants from volunteering for such work and prevent voters from accessing the assistance they are owed under law. Pet. ¶¶ 250–51. Intervenors claim that these restrictions "do not affect, let alone burden, the right to vote." Intervenors' Br. at 20. But the Petition avers otherwise and must be given full credit. Indeed, as further pled, Texas is notorious for its extreme prosecution of even the most minimal mistakes in the voting process. Pet. ¶¶ 95–96, 201. The fair inference, which this Court must accord Plaintiffs, is that Texas's well-known penchant for investigating and prosecuting even minor election law violations will discourage voter assistants from doing their job. It is for this Court to assess the magnitude of that burden after an evidentiary hearing, not on a Rule 91a Motion.

Burden of Rejection of Mail-In Ballot Applications: Intervenors claim Plaintiffs "do not allege" that SB 1's new matching requirements for mail-in ballot applications burden the right to vote. Intervenors' Br. at 21. But Plaintiffs do just that in Count VII, alleging that these restrictions "unlawfully and unconstitutionally burden the right to vote," Pet. ¶ 263, by subjecting voters to complex matching requirements and flawed cure processes that will leave some without a clear way to cure their properly submitted vote-by-mail applications and ballots. *Id.* at ¶¶ 264–67. Intervenors' suggestion that voters should be able to mail their applications early to avoid total

disenfranchisement, Intervenors' Br. at 22, raises a factual question as to the magnitude of the burden that cannot be resolved at this stage, especially in light of Plaintiffs' allegations to the contrary. Once again, Intervenors' invocation of *Abbott* as support for the proposition that regulations on mail voting do not implicate the right to vote is misplaced for the reasons stated above.

5. Plaintiffs allege that the challenged provisions do not promote legitimate state interests.

Intervenors contend that any burden imposed by SB 1's provisions is "amply justified" by the state's interests in deterring voter fraud, increasing confidence in election integrity, and promoting election uniformity. Intervenors' Br. at 23–26. This, too, is a classic factual dispute that cannot be resolved on a Rule 91a Motion but requires factfinding after a trial. Specifically, this Court must assess the magnitude of the burdens alleged and then decide what standard to apply—from rational basis on the low end to strict scrutiny on the high end—to the State's alleged justification. Mere invocation of "fraud prevention" and "increase[ing] confidence in election integrity" and "promot[ing] uniformity in elections" is not enough at this stage of the case. Intervenors' Br. at 25. As the Fifth Circuit has noted, "*Crawford* established that preventing voter fraud and safeguarding voter confidence are legitimate and important state interests. . . . '[*Crawford*] does not mean, however, that the State can, by merely asserting an interest in preventing voter fraud, establish that that interest outweighs a significant burden on voters.'" *Veasey*, 830 F.3d at 274-75 (quoting *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 547 (6th Cir. 2014)). Moreover, the Petition repeatedly avers not only that no legitimate state interests justify the significant burdens created by SB 1's provisions, but that the purported justifications are pretextual. Pet. ¶¶ 5, 221, 230, 244, 248, 252, 268, 272. These issues cannot be adjudicated on a Rule 91a motion.

C. Count III of the Petition provides fair notice that Plaintiffs are challenging portions of SB1 on the grounds that it is impermissibly vague.

Article 1, Section 19 of the Texas Constitution provides "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, expect by the due course of the law of the land." "Due course" has been interpreted by the Texas Supreme Court to be coextensive with the United State Constitution's Due Process Clause under which vague or unclear laws, whether criminal or civil, that violate due process cannot be enforced. *Texas Antiquities Comm. v. Dallas Cty. Cmty. Coll. Dist.*, 554 S.W.2d 924, 928 (Tex. 1977) ("We adhere to the settled principle that statutory delegations of power may not be accomplished by language so broad and vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'") (plurality opinion) (citation omitted).

A statute is unconstitutionally vague where, as here, "it fails to give fair notice of what conduct may be punished, forcing people to guess at the statute's meaning, and threatening to trap the innocent," or "invites arbitrary and discriminatory enforcement by failing to establish guidelines for those charged with enforcing the law, allow[ing] policemen, prosecutors, and juries to pursue their personal predilections." *Comm'n for Law. Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998) (citations omitted). Laws that impose criminal penalties require higher levels of drafting clarity. *Id.*

The Petition contains a multitude of allegations that Sections 4.01(g), 4.06(g), 4.07(e), 4.09, 6.01(e) are unconstitutionally vague. The Petition brings claims on behalf of three election judges, each of whom alleges that poll watcher statutes are difficult to understand and prevent them from knowing what conduct is or is not prohibited by the statute. For example, Plaintiff Blanco "believes that the language in Sections 4.07(e) (denying "free movement"), 4.09 (taking "any action"), and 6.01(e) (authorizing watchers to "observe any activity" during curbside voting)

"are vague" and that "these provisions will prevent his ability do his job." Pet. ¶¶ 59–60. Plaintiff Nugent "finds the provisions of SB 1 governing poll watchers to be vague." *id.* at ¶ 65, as she does not know whether asking poll watchers to sit instead of stand "would qualify 'as an action' that denies them 'free movement,' as used in the provisions of SB 1." *Id.* Plaintiff Bloomquist "is concerned that SB 1's vague language will prevent her and other judges from being able to control the polling place and provide a safe and comfortable environment for voting." Pet. ¶ 72.

These Plaintiffs' averments are reinforced by other parts of the Petition. Section 4.06 imposes criminal penalties on election judges if they "knowingly refuse[] to accept a watcher for service." The Petition alleges that it is unclear what it means to "knowingly refuse[] to accept a watcher for service" because the statute curbs the discretion bestowed by other statutes on election judges to control the polling place. This conflict between exercising control over the polling and facing criminal liability for refusing to accept a watcher creates confusion around whether election judges even have the power to "remove disruptive and improper poll watchers against their fear of being charged with a Class A misdemeanor." Pet. ¶ 238. Unable to dispute that the Plaintiffs so plead, Intervenors resort to making a merits argument that "an overlap in statutory provisions does not render them vague." Intervenors' Br. at 28. That merits argument does not warrant dismissal under Rule 91a.

Section 4.09 makes it a Class A misdemeanor to "knowingly prevent a watcher from observing an activity or procedure." The Petition alleges that this section contains vague and undefined terms, such as "any action" and "observation not reasonably effective," terms that are not defined. *See* Pet. ¶¶ 59, 240. Intervenors argue that this provision is sufficiently clear because it somehow clarifies Section 33.061(a), which prohibits an election judge from "knowingly prevent[ing] a watcher from observing" an "activity" at a polling place. Intervenors' Br. at 28. But

Intervenors' argument entirely misses the point: Intervenors do not grapple with the terms "any action" and "observation not reasonably effective" that Plaintiffs allege are vague. *Id.* And intervenors do not—and cannot—dispute that Plaintiffs have so pled.

Section 4.07 prohibits an election judge from "den[ying] free movement where election activity is occurring within the location at which the watcher is serving," but Section 4.07 does not define what it means for an election judge to "deny free movement." Plaintiff Bloomquist explains that "she interprets 'free movement' as a watcher's ability to observe within the polling place without coming too close to voters or making them feel uncomfortable." Pet. ¶¶ 65, 73. Plaintiff Bloomquist does not know, from the face of the statute, whether "asking a poll watcher to stop hovering over a voter would qualify as 'an action' or fall under denying them 'free movement.'" *Id.* at ¶ 73. Further, "free movement" could be interpreted to allow poll watchers to move anywhere in a polling location, and does not specify that the "free movement" must be related to their duties as poll watchers. *Id.* at ¶ 239. Plaintiff Blanco states the same. *Id.* at ¶ 59. Intervenors' sole argument for dismissal is that the clause "where election activity is occurring within the location at which the watcher is serving" somehow resolves these ambiguities. Intervenors' Br. at 29. Not so. The phrase "election activity" is vague as well, and Intervenors cannot point to this phrase as resolving all ambiguity of "free movement."

Section 4.01(g) states that 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." As the Petition explains, Section 4.01(g) does not explain what entails a "violation" in the context of this provision. Pet. ¶ 242. Plaintiffs' Blanco, Nugent, and Bloomquist have all alleged that it is part of their duty to create a

comfortable environment for voting, and that part of that duty is ensuring that poll watchers do not hover over voters, stand extremely close to voters, or talk loudly in a polling place. *See id.* at ¶¶ 64, 75, 70, 73, 242. This provision creates uncertainty whether election judges will be able to remove poll watchers who engage in those activities without being subject to civil liability because it is unclear whether those activities are "violations" of the election code. *Id*. at ¶ 242. Intervenors admit that it is unclear whether these activities violate the election code. Intervenors' Br. at 30 (noting that its possible—but not certain—that "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."). Yet Intervenors nevertheless argue that Plaintiffs' "fear [of civil penalties] is misplaced." *Id.* That conclusory opinion is not enough to assert that Plaintiffs' claim has no basis in law or fact.

Section 6.01(e) grants poll watchers the right to observe "any activity" related to voter assistance, including when an assistant drives seven or more voters to the polls or when an assistant provides in-person assistance to a voter who is either physically disabled or cannot see and/or read the language on the ballot. This section is vague because it does not define what "any activity" means—for example, it is unclear whether "any activity" might include hovering over and shadowing the voter assistance process or other activity that intimidates or otherwise makes voters uncomfortable. Pet. ¶ 59. Intervenors also imply that Plaintiffs selectively quoted the statute or were not aware of its contents. Intervenors' Br. at 29. That accusation is baseless. The Petition clearly acknowledges that this provision applies to curbside voting provisions, Pet. ¶ 153, but even so Intervenors fail to clarify why the phrase "any activity" is less vague even if it applies to curbside voting. The same concerns about poll watchers hovering over voters and making them

uncomfortable applies equally inside the polling place as it does outside. Intervenors' arguments for dismissal must fail.

D. Count VI of the Petition provides fair notice of free speech and association claims with an adequate basis in law and fact.

Count VI of the Petition alleges that sections 6.01, 6.03, 6.04, and 6.05 of SB 1 contravene Article 1, Section 8 of the Texas Constitution by violating the free speech and associational rights of voter assistants. Pet. ¶¶ 253–61. Intervenors' primary legal argument—that the challenged provisions do not implicate the First Amendment—is wrong as a matter of law. Intervenors' remaining arguments raise factual merits disputes inappropriate for this stage of litigation.

Article 1, Section 8 of the Texas Constitution provides "[e]very person shall be at liberty to speak, write or publish his opinions on any subject . . . ." The Texas Supreme Court has construed Article 1, Section 8 to be at least coextensive with the First Amendment to the United States Constitution. *See Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002), *aff'd in part, rev'd in part*, 153 S.W.3d 50 (Tex. 2004); *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992). The First Amendment protects "core political speech," described as "interactive communication concerning political change . . . ." *Meyer v. Grant*, 486 U.S. 414, 422 (1988). "When a law burdens core political speech, [the Supreme Court] applies 'exacting scrutiny,' and [it] uphold[s] the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). The Supreme Court has repeatedly struck down laws that "restrict political expression" by "limit[ing] the number of voices who will convey [plaintiffs'] message and the hours they can speak and, therefore, limit[ing] the size of the audience they can reach." *Meyer*, 486 U.S. at 422–23. The Fifth Circuit has thus explained that "the primary act of simply encouraging citizens to vote constitutes core speech and would be protected under the First

Amendment. State restrictions on this activity would be analyzed under the lens of strict scrutiny . . . ." *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 897 (5th Cir. 2012).

The Petition contains numerous allegations that Sections 6.01, 6.03, 6.04, and 6.05 of SB 1 impermissibly restrict core political speech. For example, Plaintiff Norman believes "that it is her civic duty to help others access the franchise." Pet. ¶ 46. Norman volunteers as a voter assistant during elections to express and advance that belief. *See id*. at ¶ 47. Norman alleges that Sections 6.01, 6.03, 6.04, and 6.05, which require that voter assistants fill out additional, burdensome forms, and which threaten potential civil and *criminal* penalties, will "chill her" and other voter assistants' abilities "to help[] voters who need such language assistance to vote. *Id.* at ¶¶ 47–53, 259–60. Among other things, Norman alleges that she "is accustomed to having to convince Korean American voters to accept the help that they are guaranteed under law." *Id*. at ¶ 52. She alleges that Section 6.04's oath provision, which requires her to swear, under penalty of perjury, that she will not "pressure" a voter to accept her assistance, will dissuade her from assisting Korean voters who need language assistance because "she fears that she will [be] punished for engaging in th[ose] conversations." *Id*.

Further, Norman alleges that "she regularly transports multiple voters who need language assistance to the polls and she expects she may have to transport curbside voters in the years to come." *Id*. at ¶ 53. She alleges that Sections 6.01, 6.03, and 6.05's administrative requirements—including a requirement that she state whether she has provided in-person assistance at the polls and that election officials must make the form available to certain state officials—"will chill her ability to drive voters and help them at the polls for fear that she may be investigated or held accountable for statements about the voter's eligibility to receive assistance." *Id*. These allegations, among others, are more than enough to state a valid claim that SB 1 violates the First Amendment.

Intervenors argue that Sections 6.01, 6.03, 6.04, and 6.05 of SB 1 do not implicate the First Amendment because "the challenged provisions do not implicate constitutional rights." Intervenors' Br. at 32. To support this argument, Intervenors rely primarily[9] on *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013), for the proposition that "assisting voters is not protected speech." Intervenors' Br. at 32. *Voting for America, Inc.*, however, does not support Intervenors' assertions. In that case, the Fifth Circuit distinguished between laws, like the provisions at issue here, that regulate "the process of advocacy itself, dictating who could . . . or how to go about speaking," and laws that "merely regulate the receipt and delivery of completed voter-registration applications, two non-expressive activities." 732 F.3d at 391. Indeed, in *Voting for America, Inc.*, Texas did "not deny that some voter registration activities involve speech [such as] . . . 'helping' voters to fill out their forms," which the court describes as "constitutionally protected speech." *Id.* at 389. Other courts have ruled similarly. *See Democracy N. Carolina v. N. Carolina St. Bd. of Elections*, 476 F. Supp. 3d 158, 224 (M.D.N.C. 2020) ("The court therefore finds that assisting voters in filling out a request form for an absentee ballot is 'expressive conduct' which implicates the First Amendment."); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 812 (E.D. Mich. 2020) (offering to assist with absentee ballots, among other things, "necessarily involve political communication and association, and thus, just as in Hargett, the exacting scrutiny standard found in Meyer and Buckley is applicable."); *DSCC v. Simon*, No. 62-cv-20-585, 2020 WL 4519785, at *29 (Minn. Dist. Ct. July 28, 2020) (assisting with absentee ballots is a "discussion of whether to vote absentee and to allow your ballot to be collected . . . that inherently implicates political thought

[9] Intervenors also rely on dicta from *Guerrero v. State*, 820 S.W.2d 378, 382 (Tex. App.—Corpus Christi 1991, pet. ref'd), for the proposition that voter assistance is not protected speech. But *Guerrero* said no such thing; it merely upheld a conviction—after trial—of a voter assistant who violated Texas election law by suggesting who a voter she was assisting should vote for. It is plainly inapposite to the claims at issue here, both procedurally and substantively.

and expression."). Here, the Petition alleges that challenged provisions restrict *how* voter assistants, like Norman, may assist voters and express their advocacy, and what they may say or do to advance their advocacy. Pet. ¶ 52 ("SB 1 will make it harder for Norman to help others, increasing the administrative burden on Norman and other assistants, thus chilling her ability to help voters"); *Id*. at ¶ 53 ("She expects that these provisions will dissuade voters from seeking her help, and she knows that these provisions will chill her ability to drive voters and help them at the polls . . .").

Second, Intervenors contend that, even if the challenged provisions restrict speech, they "do not burden that speech." Intervenors' Br. at 34. That too is wrong. As explained above, the Petition alleges that each of the challenged provisions burden voter assistants and threaten them with civil and potential criminal penalties. *See id.* at ¶¶ 41–56, 259–60. Intervenors' assertion that "Plaintiffs do not explain how fulfilling th[e] requirement [for voter assistants to fill out additional forms] is burdensome," Intervenors' Br. at 34, is simply not true. The Petition alleges that Sections 6.01, 6.03, and 6.05 "place significant burdens on . . . protected speech and associational rights because their requirements of additional forms and statements under penalty of perjury . . . will make it more difficult for Plaintiff Norman to assist voters and dissuade persons like Plaintiff Norman from assisting voters in the first place." *Id*. at ¶ 259 (emphasis added). *See also id.* at ¶ 53. The Petition also explains that Section 6.04's oath provision chills speech by requiring voter assistants to swear, under penalty of perjury, that they will not "pressure" voters into accepting their assistance. *Id*. at ¶¶ 52, 260. Intervenors' conclusory opinion that "making oneself available for assistance and broadcasting that fact to others does not plausibly constitute 'pressure,' for purposes of the oath," Intervenors' Br. at 34, is a factual dispute that is both wrong and does not warrant dismissal.

Third, Intervenors state that dismissal is warranted because of "Texas's legitimate interests in protecting the integrity of voter assistance." Intervenors' Br. at 34–35. Not so, as explained above. In any event, balancing Texas's interests against SB 1's burdens on freedom of speech is not appropriate until the development of a factual record. *See Richardson v. Tex. Sec'y of St.*, No. 19-963, 2019 WL 10945422, at *10 (W.D. Tex. Dec. 23, 2019) ("the Court notes that most of the Secretary's arguments for dismissal would require the Court to balance and evaluate the parties' asserted burdens, interests and justifications at the motion to dismiss stage. Doing so would be improper.").

VI. CONCLUSION

For the foregoing reasons, Intervenors' Rule 91a Motion should be denied.

Dated: January 24, 2022

Respectfully submitted,

/s/ Lindsey B. Cohan
Lindsey B. Cohan
Texas Bar No. 24083903
DECHERT LLP
515 Congress Avenue, Suite 1400
Austin, TX 78701
(512) 394-3000
lindsey.cohan@dechert.com
Counsel for all Plaintiffs

Damon Hewitt*
Jon Greenbaum*
Ezra D. Rosenberg*
Pooja Chaudhuri*
Sofia Fernandez Gold*
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1500 K Street, Suite 900
Washington, DC 20005
(202) 662-8600
dhewitt@lawyerscommittee.org
jgreenbaum@lawyerscommittee.org

erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
sfgold@lawyerscommittee.org
Counsel for all Plaintiffs

Neil Steiner*
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3822
neil.steiner@dechert.com
Counsel for all Plaintiffs

Gary Bledsoe
Texas Bar No. 02476500
THE BLEDSOE LAW FIRM, PLLC
6633 E Highway 290, Suite 208
Austin, TX 78723
(512) 322-9992
garybledsoe@sbcglobal.net
Counsel for Plaintiff Texas NAACP

**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2022, a true and correct copy of the foregoing was sent to all counsel of record in accordance with the provisions of the Texas Rules of Civil Procedure.

/s/ Lindsey B. Cohan
Lindsey B. Cohan

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Lindsey Cohan
Bar No. 24083903
lindsey.cohan@dechert.com
Envelope ID: 61104892
Status as of 1/25/2022 7:51 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	1/24/2022 7:39:54 PM	SENT
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	1/24/2022 7:39:54 PM	SENT
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	1/24/2022 7:39:54 PM	SENT
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	1/24/2022 7:39:54 PM	SENT
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	1/24/2022 7:39:54 PM	SENT
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	1/24/2022 7:39:54 PM	SENT
Gary Bledsoe	2476500	garybledsoe@sbcglobal.net	1/24/2022 7:39:54 PM	SENT
Gary Bledsoe	2476500	garybledsoe@sbcglobal.net	1/24/2022 7:39:54 PM	SENT
Gary Bledsoe	2476500	garybledsoe@sbcglobal.net	1/24/2022 7:39:54 PM	SENT
Gary Bledsoe	2476500	garybledsoe@sbcglobal.net	1/24/2022 7:39:54 PM	SENT
Gary Bledsoe	2476500	garybledsoe@sbcglobal.net	1/24/2022 7:39:54 PM	SENT
Gary Bledsoe	2476500	garybledsoe@sbcglobal.net	1/24/2022 7:39:54 PM	SENT
Gary Bledsoe	2476500	garybledsoe@sbcglobal.net	1/24/2022 7:39:54 PM	SENT
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	1/24/2022 7:39:54 PM	SENT
William T.Thompson		will.thompson@oag.texas.gov	1/24/2022 7:39:54 PM	SENT
Jeff White		jeff.white@oag.texas.gov	1/24/2022 7:39:54 PM	SENT
Jeff White		jeff.white@oag.texas.gov	1/24/2022 7:39:54 PM	SENT
Patrick K.Sweeten		patrick.sweeten@oag.texas.gov	1/24/2022 7:39:54 PM	SENT
Eric Hudson	24059977	eric.hudson@oag.texas.gov	1/24/2022 7:39:54 PM	SENT
Leif Olson	24032801	leif.olson@oag.texas.gov	1/24/2022 7:39:54 PM	SENT
Kathleen Hunker	24118415	Kathleen.Hunker@oag.texas.gov	1/24/2022 7:39:54 PM	SENT
Jeff White		jeff.white@oag.texas.gov	1/24/2022 7:39:54 PM	SENT