IN THE STATE COURT OF KANSAS
DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., TOPEKA INDEPENDENT LIVING RESOURCE CENTER, Plaintiffs, v. SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and KRIS KOBACH, in his official capacity as Kansas Attorney General, Defendants.	Case No. 2021-CV-299

PLAINTIFFS' MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs, the League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law & Justice, Inc., and Topeka Independent Living Center, hereby respectfully move for leave to file a Notice of Supplemental Authority, attached hereto as **Exhibit A**. The Notice informs the Court of the following decisions issued after the filing of Plaintiffs' Opposition to Defendants' Renewed Motion to Dismiss: *Get Loud Arkansas v. Thurston*, No. 5:24-CV-512, 2024 WL 4142754, at *12–14 (W.D. Ark. Sept. 9, 2024); *La Unión Del Pueblo Entero v. Abbott*, No. 5:21-CV-0844, 2024 WL 4488082, at *36 (W.D. Tex. Oct. 11, 2024); *Republican National Committee v. North Carolina State Board of Elections*, 120 F. 4th 390, 397 (4th Cir. 2024); and *Sierra Club v. U.S. Department of Transportation*, -- 4th ----, *7 (D.C. Cir. Jan. 17, 2025), which for the reasons explained in the Notice, are directly relevant to the Court's consideration of Defendants' pending Motion to Dismiss.

Respectfully submitted,

/s/ Jason A. Zavadil

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2025, a true and correct copy of the above and foregoing was served on all parties by electronic transmission via the Court's electronic filing system and electronically mailed.

/s/ Jason A. Zavadil

Jason A. Zavadil

Exhibit A

IN THE STATE COURT OF KANSAS
DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., TOPEKA INDEPENDENT LIVING RESOURCE CENTER, Plaintiffs, v. SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and KRIS KOBACH, in his official capacity as Kansas Attorney General, Defendants.	)	Case No. 2021-CV-299

PLAINTIFFS' [PROPOSED] NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF OPPOSITION TO STATE'S RENEWED MOTION TO DISMISS

Plaintiffs provide notice of additional authority demonstrating that, following *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), courts have repeatedly concluded that organizations like Plaintiffs have standing—even in *federal* court—to challenge laws that threaten their core activities, including by burdening the voters they serve.

***Get Loud Arkansas v. Thurston*, No. 5:24-CV-512, 2024 WL 4142754, at *12–14 (W.D. Ark. Sept. 9, 2024)**, held organization had standing to challenge a rule barring submission of registration applications with digital signatures because it caused a "concrete and demonstrable injury to the organization's activities" and a "consequent drain on" its resources, "compromis[ing] its ability to engage in other organizational activities."

***La Unión Del Pueblo Entero v. Abbott*, No. 5:21-CV-0844, 2024 WL 4488082, at *36 (W.D. Tex. Oct. 11, 2024)**, held organizations had standing to challenge laws that deterred voters

from requesting, and assistors from providing, voting assistance because they perceptibly impaired one of plaintiffs' core services.

***Republican National Committee v. North Carolina State Board of Elections*, 120 F. 4th 390, 397 (4th Cir. 2024)**, held party had standing where it alleged diversion of resources in response to impairment of its core mission of "organizing lawful voters" and encouraging them to support specific candidates.

***Sierra Club v. U.S. Department of Transportation*, -- 4th ----, *7 (D.C. Cir. Jan. 17, 2025)**, held tribe had standing to challenge a proposed rule that increased the risk of harm to its heritage, land, people, and resources.

These cases supplement pages 7–15 of Plaintiffs' brief, demonstrating that, like the organizations in the cases above, Plaintiffs provide services that are directly impeded by the Signature Verification Requirement and allege they must "divert resources from their other voter assistance activities to" address that harm. *League of Women Voters v. Schwab*, 63 Kan. App. 2d 187, 204 (2023). And, as in *Sierra Club*, Plaintiffs allege increased risk of injury from the Requirement both as organizations and to their members' and constituents' rights. *See*, *e.g.*, Pls.' Resp. to Renewed MTD at 12; Am. Pet. ¶¶133–37; Mot. for SVR TI, Exs. 1, 37–41.

Respectfully submitted, this 28th day of January, 2025.

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2024 WL 4142754
Only the Westlaw citation is currently available.
United States District Court, W.D. Arkansas, Fayetteville Division.

GET LOUD ARKANSAS; Vote.org; Nikki Pastor; and Trinity Blake Loper, Plaintiffs
v.
John THURSTON; Sharon Brooks; Jamie Clemmer; Bilenda Harris-Ritter; William Luther; James Harmon Smith, III; and Jonathan Williams, in their official capacities as Commissioners of the Arkansas State Board of Election Commissioners; Betsy Harrell, in her official capacity as Benton County Clerk; Becky Lewallen, in her official capacity as Washington County Clerk; and Terri Hollingsworth, in her official capacity as Pulaski County Clerk, Defendants

CASE NO. 5:24-CV-5121
|
Signed September 9, 2024

Synopsis

Background: Applicants whose voter-registration applications were rejected and nonprofit third-party voter registration organizations brought § 1983 action for declaratory and injunctive relief against Commissioners of State Board of Election Commissioners (SBEC) and county officials, challenging, under materiality provision of Civil Rights Act of 1964, SBEC's rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures. Plaintiffs filed motion for preliminary injunction and defendants filed motions to dismiss.

Holdings: The District Court, Timothy L. Brooks, J., held that:

[1] Congress intended to create federal individual right in materiality provision, thereby affording rebuttable presumption that provision was individually enforceable through § 1983;

[2] presumption of individual enforcement through § 1983 was not rebutted;

[3] a voter registration organization satisfied injury-in-fact element for organizational standing under Article III;

[4] voters and organizations were likely to succeed on merits, as element for preliminary injunction; and

[5] state's asserted interests in preventing fraud, verifying voter identity and eligibility, and promoting integrity of voter registration process were not relevant considerations for determining whether rule violated materiality provision.

Motion for preliminary injunction granted; motion to dismiss denied.

Procedural Posture(s): Motion for Preliminary Injunction; Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Lack of Standing.

West Headnotes (53)

[1] **Civil Rights** Rights Protected

To seek redress through § 1983, a plaintiff must assert the violation of a federal right, not merely a violation of federal law, and this requires a two-step process: at step one, the court must determine whether Congress unambiguously conferred federal individual rights, and if Congress did intend to create such a right, then the plaintiff is afforded the rebuttable presumption that the statute is individually enforceable under § 1983, and accordingly, the second step assesses whether the defendants have rebutted the presumption. 42 U.S.C.A. § 1983.

[2] **Civil Rights** Other particular rights

Congress intended to create federal individual right in materiality provision of Civil Rights Act of 1964, thereby affording rebuttable presumption that provision was individually enforceable through § 1983; provision stated that no person acting under color of law "shall" deny the "right" of any "individual" to vote in any election because of error or omission that was not material in determining whether such

"individual" was qualified to vote, provision's use of "shall" created mandatory rather than precatory prohibition, making it more likely that Congress intended to establish a right, and surrounding provisions focused on individual's right to vote, though materiality provision did not focus exclusively on rights bearers and it also discussed regulated parties. 42 U.S.C.A. § 1983; 52 U.S.C.A. § 10101(a)(1), (a)(2)(B), (c, e).

[3] **Civil Rights** Rights Protected

It would be strange to hold that a statutory provision fails to secure federal individual rights, as would be required for the statute to be individually enforceable through § 1983, simply because it considers, alongside the rights bearers, the actors that might threaten those rights. 42 U.S.C.A. § 1983.

[4] **Civil Rights** Rights Protected

Civil Rights Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies

Even if a statutory provision unambiguously secures federal individual rights, a defendant may defeat the presumption that the statute is individually enforceable through § 1983 by showing that Congress specifically foreclosed a remedy under § 1983, and such a prohibition may be explicitly contained within the statute, but absent such a sign, a defendant must show that Congress issued the same command implicitly by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. 42 U.S.C.A. § 1983.

[5] **Civil Rights** Rights Protected

Civil Rights Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies

To rebut the presumption that a federal statute that unambiguously confers federal individual rights is individually enforceable through § 1983, if there is no language in the statute showing that Congress explicitly foreclosed an individually enforceable remedy under § 1983, then, for question of whether such remedy is implicitly foreclosed the key inquiry is whether a private right of action under § 1983 would be incompatible with an enforcement scheme created by Congress, and this inquiry boils down to what Congress intended, as divined from text and context. 42 U.S.C.A. § 1983.

[6] **Civil Rights** Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies

Implicit prohibition by Congress of individual enforcement through § 1983 for a federal statute that unambiguously confers federal individual rights, which prohibition would arise from private right of action under § 1983 being incompatible with an enforcement scheme created by Congress, may be indicated by a statute's text containing its own private remedy that is more restrictive than an action under § 1983 or a statute's comprehensive remedial scheme that is revealed—through statutory interpretative tools—to be incompatible with a § 1983 suit. 42 U.S.C.A. § 1983.

[7] **Civil Rights** Other particular rights

Congress did not implicitly prohibit, based on being incompatible with an enforcement scheme created by Congress, individual enforcement through § 1983 of materiality provision of Civil Rights Act of 1964, which unambiguously conferred federal individual rights by prohibiting denial of individual's right to vote because of error or omission that was not material to determining qualification to vote under state law; Act lacked any specific private judicial right of action or private federal administrative remedy that required plaintiffs to comply with particular procedures, let alone a right of action or remedy that offered fewer benefits than § 1983. 42 U.S.C.A. § 1983; 52 U.S.C.A. § 10101(a)(2)(B).

[8] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, a plaintiff must show that: (1) they have suffered or likely will suffer an injury in fact; (2) the injury likely was caused or will be caused by the defendant; and (3) the injury likely would be redressed by the requested judicial relief. U.S. Const. art. 3, § 2, cl. 1.

[9] **Federal Civil Procedure** 🔑 In general; injury or interest

Where multiple plaintiffs seek identical relief, only one plaintiff need satisfy Article III standing requirements. U.S. Const. art. 3, § 2, cl. 1.

[10] **Injunction** 🔑 Persons entitled to apply; standing

At the preliminary injunction stage, a plaintiff need only show that they are likely to have Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[11] **Federal Civil Procedure** 🔑 In general; injury or interest

An "injury in fact," as element for Article III standing, must be (a) concrete and particularized, and (b) actual or imminent. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** 🔑 In general; injury or interest

A "concrete injury," as required for injury-in-fact element for Article III standing, is one that is real and not abstract. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** 🔑 In general; injury or interest

Federal Civil Procedure 🔑 Rights of third parties or public

An injury is a "particularized injury," as required for injury-in-fact element for Article III standing, when it affects the plaintiff personally and individually, rather than being a generalized grievance. U.S. Const. art. 3, § 2, cl. 1.

[14] **Federal Civil Procedure** 🔑 In general; injury or interest

An injury in fact, as element for Article III standing, must be "actual or imminent," not speculative—meaning that the injury must have already occurred or be likely to occur soon. U.S. Const. art. 3, § 2, cl. 1.

[15] **Injunction** 🔑 Persons entitled to apply; standing

For the injury-in-fact element for Article III standing, when a plaintiff seeks prospective relief such as an injunction, the plaintiff must establish a sufficient likelihood of future injury. U.S. Const. art. 3, § 2, cl. 1.

[16] **Federal Civil Procedure** 🔑 In general; injury or interest

The injury-in-fact element for Article III standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action. U.S. Const. art. 3, § 2, cl. 1.

[17] **Federal Civil Procedure** 🔑 In general; injury or interest

Generally, the injury-in-fact requirement for Article III standing will be easily met where a government regulation requires or forbids some action by the plaintiff. U.S. Const. art. 3, § 2, cl. 1.

[18] **Injunction** 🔑 Persons entitled to apply; standing

To obtain preliminary injunctive relief, at least one plaintiff must have standing.

[19] **Associations** 🔑 Injury or interest in general

Associations 🔑 Causation and redressability in general

Organizations, like individuals, must establish the three constitutional requirements for Article III standing: injury in fact, causation, and redressability. U.S. Const. art. 3, § 2, cl. 1.

[20] **Associations** Injury or interest in general

For the injury-in-fact element for Article III standing, no matter how strong an organization's interest, it must show far more than simply a setback to the organization's abstract social interests. U.S. Const. art. 3, § 2, cl. 1.

[21] **Associations** Injury or interest in general

Where a defendant's actions perceptibly impair an organization's ability to provide organizational services, there is no question that the organization has suffered injury in fact, as element for Article III standing, and such concrete and demonstrable injury to the organization's activities—with a consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests. U.S. Const. art. 3, § 2, cl. 1.

[22] **Associations** Elections and voting rights

Nonprofit third-party voter registration organization, in seeking preliminary injunction, showed sufficient likelihood of future injury, satisfying injury-in-fact element for organizational standing under Article III, in action challenging, under materiality provision of Civil Rights Act of 1964, state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures; organization offered evidence that its ability to provide voter registration services had already precipitously declined, requiring it to expend additional time, labor, and money in adapting to rule and severely compromising its ability to engage in other organizational activities. U.S. Const. art. 3, § 2, cl. 1; Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 3, 6(a)(1), (a)(2)(G), (a)(3)(F); 52 U.S.C.A. § 10101(a)(2)(B).

More cases on this issue

[23] **Associations** Elections and voting rights

Nonprofit third-party voter registration organization, in seeking preliminary injunction, satisfied causation element for organizational standing under Article III, in action challenging, under materiality provision of Civil Rights Act of 1964, state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures; county clerks would enforce the rule. U.S. Const. art. 3, § 2, cl. 1; Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 2, 3, 6(a)(1), (a)(2)(G), (a)(3)(F), § 9(c)(1, 3); 52 U.S.C.A. § 10101(a)(2)(B).

More cases on this issue

[24] **Associations** Elections and voting rights

Nonprofit third-party voter registration organization, in seeking preliminary injunction, satisfied redressability element for organizational standing under Article III, in action challenging, under materiality provision of Civil Rights Act of 1964, state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures; preliminary injunction could remedy county clerks' enforcement of rule. U.S. Const. art. 3, § 2, cl. 1; Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 2, 3, 6(a)(1), (a)(2)(G), (a)(3)(F), § 9(c)(1, 3); 52 U.S.C.A. § 10101(a)(2)(B).

More cases on this issue

[25] **Federal Civil Procedure** Rights of third parties or public

Under principles of third-party standing or prudential standing, litigants generally are barred from asserting the rights or legal interests of

others in order to obtain relief from injury to themselves.

[26] **Injunction** Grounds in general; multiple factors

In determining whether to grant a motion for preliminary injunction, the court must weigh the following four considerations: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between the harm to the movant if the injunction is denied and the harm to other party if the injunction is granted; and (4) the public interest.

[27] **Injunction** Likelihood of success on merits

In determining whether to grant a motion for preliminary injunction, while no single factor is determinative, the factor concerning probability of success is the most significant.

[28] **Election Law** Registration

Court was required to follow statutory definition of "vote," in Civil Rights Act of 1964, as being all action necessary to make a vote effective including, but not limited to, registration, even if statutory definition differed from the term's usual meaning, in action challenging state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures, which rule was challenged under Act's materiality provision prohibiting denial of right to vote because of error or omission that was not material to determining qualification to vote under state law. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 3, 6(a)(1), (a)(2)(G), (a)(3)(F); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

[29] **Election Law** Registration

Alleged interference with voter registration process, arising from state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures, involved right to "vote," within meaning of materiality provision of Civil Rights Act of 1964, prohibiting denial of right to vote because of error or omission that was not material to determining qualification to vote under state law; rule related to an action necessary to make a vote effective. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 3, 6(a)(1), (a)(2)(G), (a)(3)(F); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

[30] **Injunction** Voters, registration, and eligibility

Voters and nonprofit third-party voter registration organizations were likely to succeed on merits, as element for obtaining preliminary injunction, on issue of whether there was a denial of right to vote, in action challenging, under materiality provision of Civil Rights Act of 1964, state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures; denial of right to vote was complete when a particular registration application was rejected because of an immaterial error or omission, so opportunity to cure would not negate the denial of statutory right to vote, and efficacy of ability to cure was doubtful because the need to cure an immaterial requirement created hurdle for right to vote. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 3, 6(a)(1), (a)(2)(G), (a)(3)(F); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

More cases on this issue

[31] **Election Law** Voting procedures

The denial of the statutory right to vote under the Civil Rights Act of 1964, which prohibits denial of right to vote because of error or omission that is not material to determining qualification to vote under state law, is complete

when a particular application is rejected, and an opportunity to cure the rejection or submit another application does not negate the denial of the statutory right to vote. 52 U.S.C.A. § 10101(a)(2)(B).

[32] **Election Law** Registration

A voter-registration form is a "record or paper" relating to an application, registration, or other act requisite to voting, within meaning of materiality provision of Civil Rights Act of 1964, prohibiting denial of individual's right to vote because of error or omission on record or paper relating to application, registration, or other act requisite to voting, if such error or omission is not material in determining whether individual is qualified under state law to vote. 52 U.S.C.A. § 10101(a)(2)(B).

[33] **Election Law** Registration

Election Law Voting procedures

Failure to include a handwritten, wet signature, as would violate the challenged state administrative rule, due to the use of a digital signature would constitute an "omission," as element of claim that rule violated materiality provision of Civil Rights Act of 1964, prohibiting denial of individual's right to vote because of error or omission on record or paper relating to application, registration, or other act requisite to voting, if such error or omission was not material in determining whether individual was qualified under state law to vote. 52 U.S.C.A. § 10101(a)(2)(B).

[34] **Election Law** Voting procedures

Whether or not a state administrative rule comports with the state constitution says nothing about its lawfulness under the materiality provision of the federal Civil Rights Act of 1964, prohibiting denial of right to vote because of error or omission that is not material to determining qualification to vote under state law. 52 U.S.C.A. § 10101(a)(2)(B).

[35] **Election Law** Voting procedures

A state administrative rule, despite its importance in safeguarding election integrity, may be prohibited under the materiality provision of the federal Civil Rights Act of 1964, if the rule denies the right of any individual to vote in any election because of an error or omission that is not material in determining whether the individual is qualified under state law to vote in the election. 52 U.S.C.A. § 10101(a)(2)(B).

[36] **Courts** Previous Decisions as Controlling or as Precedents

Statutes Purpose

Statutes Context

Interpretation of a word or phrase in a statute depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

[37] **Statutes** Defined terms; definitional provisions

Statutes Context

Courts should depart from the ordinary meaning of the words used in a statute only if the words are otherwise defined in the statute itself, or if the context requires a different result.

[38] **Election Law** Voting procedures

"Material error or omission," within meaning of materiality provision of Civil Rights Act of 1964, prohibiting denial of right to vote because of error or omission that is not material to determining qualification to vote under state law, is an error or omission that is significant, or of such nature that knowledge would affect a person's decision-making, or of serious or substantial import, or important, or of consequence. 52 U.S.C.A. § 10101(a)(2)(B).

[39] **Election Law** Voting procedures

To determine whether an error or omission is material, for purposes of materiality provision of Civil Rights Act of 1964, prohibiting denial of right to vote because of error or omission that is not material to determining qualification to vote under state law, the required information must be compared to state-law qualifications to vote, meaning substantive voter attributes. 52 U.S.C.A. § 10101(a)(2)(B).

[40] **Injunction** Voters, registration, and eligibility

Voters and nonprofit third-party voter registration organizations were likely to succeed on merits, as element for obtaining preliminary injunction, of contention that use of handwritten, wet signature on mail voter-registration form, as required by state administrative rule, was unlikely to aid in determining a voter's substantive qualifications, for purposes of challenge to rule as violating materiality provision of Civil Rights Act of 1964, prohibiting denial of right to vote because of error or omission that was not material to determining qualification to vote under state law; signature's "wetness" did not affect county officials' determinations of qualifications at all, consistent with state constitution's prohibition of any notary or authentication requirement for applications. Ark. Const. art. 3, § 1(a); Ark. Const. amend. 51, §§ 2, 3, 6(a)(1), (a)(2)(G), (a)(3)(F), (a)(5), (b)(2), 9(c)(1, 3), 11(a)(4, 5); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

More cases on this issue

[41] **Election Law** Registration

State's asserted interests in preventing fraud, verifying voter identity and eligibility, and promoting integrity of voter registration process were not relevant considerations for determining whether state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures violated materiality provision of Civil Rights Act of 1964, prohibiting denial of right to vote because of error or omission that was not material to determining qualification to vote under state law; materiality provision was not burden-interest balancing provision in voting-rights context. Ark. Const. art. 3, § 1(a); Ark. Const. amend. 51, §§ 3, 6(a)(1), (a)(2)(G), (a)(3)(F), (a)(5), (b)(2), 11(a)(4, 5); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

[42] **Election Law** Voting procedures

State interests are not a relevant consideration in analyzing whether there is a violation of the materiality provision of Civil Rights Act of 1964, prohibiting denial of right to vote because of error or omission that is not material to determining qualification to vote under state law; unlike many other causes of action in voting-rights context, materiality provision is not a burden-interest balancing statute, and violations of materiality provision are prohibited no matter their policy aim. 52 U.S.C.A. § 10101(a)(2)(B).

[43] **Injunction** Voters, registration, and eligibility

Assuming that it was appropriate for court to consider state's asserted interests in uniformity and integrity, voters and nonprofit third-party voter registration organizations were likely to succeed on merits, as element for obtaining preliminary injunction, of contention that those interests were not furthered by state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures, which rule was challenged under materiality provision of Civil Rights Act of 1964; state constitution permitted digital signatures from state registrations agencies, and agency officials did not explain why use of digital signatures by third-party organizations threatened election integrity more than their use by registration agencies. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 3, 5(a), 5(b)(2, 3,

4), 6(a)(1), (a)(2)(G), (a)(3)(F), (a)(5), (b)(1)(G), (b)(2); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

More cases on this issue

[44] **Injunction** Irreparable injury

Injunction Adequacy of remedy at law

Injunction Recovery of damages

"Irreparable harm" occurs, as element for obtaining preliminary injunction, when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.

[45] **Injunction** Irreparable injury

To obtain a preliminary injunction, rather than merely showing a possibility of irreparable harm, plaintiffs must show harm that is certain and great and of such imminence that there is a clear and present need for equitable relief.

[46] **Injunction** Voters, registration, and eligibility

Individual voters would suffer irreparable harm in absence of preliminary injunction against enforcement of state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures, which rule was challenged under materiality provision of Civil Rights Act of 1964; it was likely that the rule violated the Act, and efficacy of ability to cure was doubtful because the need to cure an immaterial requirement created hurdle for right to vote. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 3, 6(a)(1), (a)(2)(G), (a)(3)(F); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

More cases on this issue

[47] **Injunction** Elections, Voting, and Political Rights

Injunction Voters, registration, and eligibility

Organizations involved in election-related activities suffer irreparable harm, as element for obtaining preliminary injunction, when a defendant's conduct causes them to lose opportunities to conduct those activities, such as voter registration and education.

[48] **Injunction** Voters, registration, and eligibility

Nonprofit third-party voter registration organizations would suffer irreparable harm in absence of preliminary injunction against enforcement of state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures, which rule was challenged under materiality provision of Civil Rights Act of 1964; organizations would continued to incur compliance costs and suffer interference with their election-related activities, election was two months away, and once the election occurred there could be no do-over and no redress. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 3, 6(a)(1), (a)(2)(G), (a)(3)(F); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

More cases on this issue

[49] **Injunction** Conduct of elections

The *Purcell* principle is not some magic wand that bars courts from issuing injunctions some amount of time out from an election.

[50] **Injunction** Voters, registration, and eligibility

Purcell principle, reflecting concerns with altering election rules on eve of election, would not be implicated by granting preliminary injunction against enforcement of state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications

with digital signatures rather than handwritten, wet signatures, which rule was challenged under materiality provision of Civil Rights Act of 1964; injunction would restore the pre-rule status quo. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 3, 6(a)(1), (a)(2)(G), (a)(3)(F); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

More cases on this issue

[51] Injunction Injunctions against government entities in general

When the government opposes the issuance of a preliminary injunction, the balance of the equities and the public interest, as factors for determining whether to grant a preliminary injunction, merge.

[52] Injunction Voters, registration, and eligibility

Balance of equities and public interest were factors decidedly favoring preliminary injunction against enforcement of state administrative rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures, which rule was challenged under materiality provision of Civil Rights Act of 1964; it was likely that rule would deny state's voters their statutory right under federal law to have otherwise legible and complete voter registration applications accepted by county clerks regardless of any immaterial errors or omissions, and county clerks already accepted registration applications with digital signatures if they were submitted through registration agencies. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 2, 3, 6(a)(1), (a)(2)(G), (a)(3)(F), 9(c)(1, 3); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

More cases on this issue

[53] Election Law Parties; standing

Permanent registrars tasked with registering qualified applicants to vote and enforcing the challenged state administrative rule were proper defendants in action challenging, under materiality provision of Civil Rights Act of 1964, rule prohibiting individuals and third-party voter registration organizations from submitting mail voter-registration applications with digital signatures rather than handwritten, wet signatures. Ark. Const. art. 3, § 1(a)(4); Ark. Const. amend. 51, §§ 2, 3, 6(a)(1), (a)(2)(G), (a)(3)(F), 9(c); 52 U.S.C.A. § 10101(a)(2)(B), (a)(3)(A), (e).

More cases on this issue

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MEMORANDUM OPINION AND ORDER

TIMOTHY L. BROOKS, UNITED STATES DISTRICT JUDGE

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I. INTRODUCTION

Plaintiffs challenge a rule promulgated by the Arkansas State Board of Election Commissioners ("SBEC") that requires voter registration applications in Arkansas to be signed with a handwritten, wet signature ("Wet Signature Rule" or "Rule"). [1] Under the Rule, a voter registration application must include a "signature or mark" that consists of

> ... a handwritten wet signature or handwritten wet mark made on a Registration Application Form with a pen or other writing device that is physically moved across the form and that forms the applicant's signature or mark on the paper form. A Signature or Mark that utilizes a computer to generate or recreate the applicant's signature or mark is not an acceptable signature or mark of the applicant ....

(Doc. 46-7, p. 63). However, this requirement is not imposed on all voter registration applications. For example, where a person registers to vote at a state agency, such as the Department of Motor Vehicles, no wet signature is required. But the Rule does bar individuals and third-party voter registration organizations from submitting voter registration applications with digital signatures. *Id.* at pp. 62-63.

Plaintiffs Get Loud Arkansas ("GLA") and Vote.org are nonprofit third-party voter registration organizations. GLA is an Arkansas-based organization founded in 2021 to address low voter registration and turnout in Arkansas. According to the U.S. Census Bureau, in 2020, only 62% of Arkansas citizens were registered to vote and only 54% voted—the lowest rates nationwide. *See id.* at p. 5. GLA works to encourage and facilitate civic engagement by registering new voters; organizing get-out-the-vote campaigns; assisting voters in finding their polling location; identifying and helping voters who have been purged from Arkansas's voter rolls in reestablishing their registration status; monitoring and documenting changes to local election rules; along with other education and engagement campaigns. Vote.org is a nationwide 501(c)(3) nonprofit, nonpartisan voter registration and get-out-the-vote technology platform that works to simplify political engagement and increase voter turnout. Both GLA and Vote.org have developed tools that allow Arkansas voters to register online, which aim to increase the organizations' overall reach and efficacy. Plaintiffs Nikki

Pastor and Trinity "Blake" Loper (together "Individual Plaintiffs") are Arkansans who applied to register to vote with the help of GLA and were rejected because their applications included digital signatures rather than wet signatures. There is no dispute that both Pastor and Loper are otherwise qualified to vote under Arkansas law.

***2** Defendants John Thurston, Sharon Brooks, Jamie Clemmer, Bilenda Harris-Ritter, William Luther, James Harmon Smith, III, and Jonathan Williams serve on the SBEC. Specifically, John Thurston is the Arkansas Secretary of State ("Secretary") and the *ex officio* chairman of the SBEC, and the other individuals are Commissioners, all of whom are sued in their official capacities for implementing the Wet Signature Rule. Defendants Betsy Harrell, Becky Lewallen, and Terri Hollingsworth are the county clerks and permanent registrars for Benton County, Washington County, and Pulaski County, respectively. They are sued in their official capacities as the enforcers of the Rule.

Plaintiffs bring a singular claim: that the Wet Signature Rule violates the Materiality Provision of the Civil Rights Act of 1964 ("CRA"), now codified at 52 U.S.C. § 10101(a)(2)(B), which provides:

> No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

The CRA was enacted "to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States," including by reducing "obstacles to the exercise of the right to vote and provid[ing] means of expediting the vindication of that right." H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2391, 2393.

The Materiality Provision of the CRA addresses the long history of county clerks rejecting Black Americans' registration applications "on the basis of purported 'errors' ... that were hyper-technical, or entirely invented." Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 Wm. & Mary L. Rev. 83, 148 (2012) (citations omitted). For example, applications were rejected for arbitrary mistakes like an applicant underlining "Mr." instead of circling it or misspelling his state as "Louiseana." *Id.* (citations omitted). Other applications were rejected because the applicant "identified [their] skin color as 'Negro' instead of 'brown' or 'brown' instead of 'Negro.' " *Id.* (citations omitted). In one of the more notorious examples, a woman's application was rejected "because the would-be registrant, required to account for her age in years, months, and days, missed the mark by one day because the day had not yet ended." *Id.* (citations omitted).

Plaintiffs seek declaratory and injunctive relief on the basis that the use of a digital signature—as opposed to a wet signature—is immaterial to determining whether an applicant is qualified to vote under Arkansas law and, thus, cannot serve as grounds for the rejection of a registration application. Defendants reject this and maintain that the Wet Signature Rule does not violate the Materiality Provision.

Now before the Court are Plaintiffs' Motion for Preliminary Injunction (Doc. 46) and Defendants Betsy Harrell and Terri Hollingsworth's Motions to Dismiss (Docs. 39 & 41). The Motions have been fully briefed and are ripe for review. On August 29, 2024, the Court held a hearing, at which the Court received oral argument on all three motions and ruled from the bench. For the reasons stated from the bench and herein, the Motion for Preliminary Injunction (Doc. 46) is **GRANTED**, and the Motions to Dismiss (Docs. 39 & 41) are **DENIED**. To the extent this written Order contradicts any of the Court's statements from the bench, this Order controls.

To roadmap, the Court will first provide background on the laws and facts at play. Then, the Court will address two threshold questions raised by Defendants: whether there is a private right of action under the Materiality Provision and whether Plaintiffs have standing. Lastly, the Court will address whether a preliminary injunction is proper.

II. BACKGROUND

***3** Th[e] right to vote [is] ... the foundation of our representative form of government. It is the sole means

> by which the principle of consent of the governed as the source of governmental authority is made a living thing.

H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1977 (capitalization revised).

A. Registering to Vote in Arkansas

Under Arkansas law, any person may vote in an election provided they: (1) are a United States citizen; (2) are an Arkansas resident; (3) are at least eighteen years old; (4) are lawfully registered to vote; (5) have not been convicted of a felony; and (6) have not been adjudged mentally incompetent by a court. Ark. Const. art. 3, § 1(a)(1)-(4); *id.* amend. 51, § 11(a)(4), (5).

To vote, a person must first submit a registration application per the requirements of Amendment 51 to the Arkansas Constitution. *Id.* amend. 51, § 3. A person may register by submitting their application themselves, submitting through a third-party registration organization, or by registering at a state "Registration Agency," such as the DMV. *See id.* amend. 51, § 6(a)(2)(G) (contemplating submission by third-party registration organizations); *id.* amend. 51, § 5(a) (designating Registration Agencies).

Section 6 of Amendment 51 specifies certain requirements for *mail voter registration applications*—i.e., those submitted by individuals and third-party organizations—and certain requirements for applications submitted by Registration Agencies. Relevant here, both processes require the applicant to make a "signature or mark" on the application, affirming under penalty of perjury that the applicant meets the voter registration requirements. *Id.* amend. 51, §§ 6(a)(3)(F), (b)(1)(G), (b)(2).

The Arkansas Constitution does not define "signature or mark." And though Amendment 51 explicitly discusses the use of a "computer process" by Registration Agencies in registering new voters, the text makes no such mention regarding *mail voter registration applications*. *See id.* amend. 51 § 5(b)(2)-(4). However, section 6 explicitly excludes "any requirement for notarization or other formal identification" or "authorization" for registration applications. *Id.* amend. 51, §§ 6(a)(5), (b)(2).

Under Amendment 51, county clerks serve as the permanent registrars and are tasked with processing registration applications. *See id.* amend. 51, §§ 2, 9(c). The Amendment instructs, "The permanent registrar shall register qualified applicants when a legible and complete voter registration application is received and acknowledged by the permanent registrar." *Id.* amend. 51, § 9(c)(1), (3).

Historically, county clerks in Arkansas have been "advised to accept voter registration applications with any type of signature or mark," including where "a person signs their name in an illegible fashion—or even just makes a mark." (Doc. 46-6, ¶ 16). While the signature or mark may be used for later comparisons against a voter's absentee ballot, *id.* at ¶ 19,[2] at the registration stage the signature or mark's "purpose ... is to affirm under penalty of perjury that the information in the application is true and correct to the best of the applicant's knowledge." *Id.* at ¶ 16.

B. GLA and Vote.org's Online Tools

***4** In its early years, GLA relied on paper applications to register new voters, but it soon learned that this method—which required disseminating and tracking the physical applications—was resource-intensive and of limited efficacy. (Doc. 46-2, ¶ 9). Further, this method was not fully accessible to many Arkansans within GLA's target demographic, such as young people and those living in rural areas who "do not have the means to easily print and submit paper applications." *Id.*

To address these limitations, GLA developed an online tool in early 2023 that allowed applicants to fill out the registration application using a mobile device or computer. *Id.* at ¶¶ 10, 11. The first iteration of this tool allowed applicants to digitally fill out the information on the form promulgated by the Secretary, which GLA would then print and mail to the applicant for the applicant to hand-sign the application. *Id.* at ¶ 11. Then, the applicant could either mail the application to the appropriate county clerk themselves or send it back to GLA and authorize GLA to forward the application to the county clerk. *Id.* at ¶ 11. Though this process was more efficient than the paper-only method, it still posed accessibility issues for many voters and imposed financial and time costs on GLA. *Id.*

By mid-2023, GLA piloted an option to digitally sign the online form. *Id.* at ¶ 12. GLA then launched an entirely digital tool in January 2024. *Id.* at ¶ 13. This newest tool would allow all applicants to complete *and sign* the voter registration

application digitally. *Id.* Like the 2023 tool, an applicant first fills out the information required by Amendment 51, which then populates the form created by the Secretary. *Id.* at ¶ 14. The applicant then uses either their finger, a stylus, or a mouse to digitally sign their name, under penalty of perjury, above a sworn statement as it appears on the Secretary's form. *Id.* Once the form is completed and signed, the applicant authorizes GLA to print and submit the form to the appropriate county clerk on the applicant's behalf. *Id.*

On February 5, 2024, GLA's Executive Director contacted the Secretary's office to confirm her understanding that Arkansas law does not require wet signatures on voter registration applications. *Id.* at p. 15. The Secretary's office promptly responded, stating that its "attorneys looked into this last week and came to the same conclusion" that Arkansas law does not require a wet signature; the office noted "another concern," however, with the accuracy of a digital signature made with one's finger if it later needed to be compared against an absentee ballot. *Id.* at pp. 14-15. GLA's Deputy Director replied once again to clarify that "the registrations [that GLA] submit[s] right now are not going to be rejected based on the [use of a digital] signature," acknowledging that she understood the separate possibility of later issues when comparing signatures on absentee ballots. *Id.* at p. 14. The Secretary's office emailed back that while they could not "officially speak on the acceptance or rejection of applications"—which lies within the province of the county clerks—the office's "unofficial, non-attorney[ ] advice to the county clerks would be to err on the side of the voter and accept the registrations." *Id.* at p. 13.

One week later on February 12, GLA contacted the Secretary's office to ask if there were any differences between digital and wet signatures that they should take into account when registering potential voters. *Id.* at pp. 17-20. The Secretary's office responded: "While this is a sensitive issue that is not clear in the law, the Secretary of State does not see how a digital signature should be treated any differently than a wet signature. Again, this is a grey area in the law, so this should not be taken as an official legal opinion." *Id.* at p. 19.

***5** GLA's fully online tool was a near-instant success, with the *Arkansas Times* reporting on February 26, 2024, that GLA had registered 358 voters using the new tool, 78% of whom were under twenty years old—GLA's target demographic. *Id.* at ¶ 15.[3] The tool expanded GLA's capacity and success in reaching voters by making its "outreach efforts more cost-effective and scalable." *Id.* at ¶ 16. For example, where GLA would previously register five to ten students at a high school visit using paper applications, it was now able to register forty to sixty students per visit using the online tool. *Id.* at ¶ 17. GLA extended its reach beyond the fifteen counties it previously focused on and started registering voters in all seventy-five Arkansas counties. *Id.* at ¶ 18. The organization also noticed an exponential increase in the percentage of completed applications—from 33% when using the semi-online tool in 2023 to nearly 100% using the fully-online tool. *Id.* at ¶ 20. And, when compared to paper applications, the online applications were consistently more legible, *id.*, increasing the likelihood that they would be accepted and that all information would be accurately recorded by the clerk.

As to Vote.org, it has developed a digital signature function that it intends to launch in Arkansas like it has in various other states. (Doc. 46-3, ¶¶ 8, 9). Logistically distinct from GLA's digital signature tool, Vote.org's form has applicants upload an image of their original signature, which is then affixed to the form. *Id.* at ¶ 8. Once the signature is affixed, the applicant reviews the signed application, and Vote.org submits it to the appropriate county clerk thereby saving the applicant the time, trouble, and expense of printing and mailing the application. *Id.* Due to the Wet Signature Rule, Vote.org has yet to launch its digital signature function in Arkansas and continues to use an online tool that allows applicants to fill out the registration form but still requires the applicant to print, sign, and mail the application to the clerk. *Id.* at ¶ 7.[4]

C. The Wet Signature Rule

1. Implementation of the Rule

On February 28, 2024—two days after the *Arkansas Times* reported on the success of GLA's online tool—Secretary Thurston sent notice to all county clerks in Arkansas, "strongly recommend[ing] that counties do not accept voter registration applications executed by electronic signature" and remarking on the need to "maintain [ ] strong election integrity." (Doc. 46-7, p. 17).

Soon after, on March 12, Secretary Thurston contacted Arkansas Attorney General Tim Griffin's office requesting a "formal opinion" on the legality of digital signatures on voter registration applications that are "created by a third-party non-governmental agency." *Id.* at p. 19; *see* Ark. Code Ann. § 7-4-101(g) ("The Attorney General shall provide legal

assistance to the State Board of Election Commissioners in answering questions regarding election laws."). In April, Attorney General Griffin issued his formal opinion that "an electronic signature or mark is generally valid under Arkansas law," provided the "registration form [is] created and distributed by the Secretary of State." (Doc. 46-7, p. 21). In reaching this conclusion, Attorney General Griffin stated,

> given the historical acceptance of signatures produced through a variety of means, the widespread acceptance of electronic signatures, and the fact that Amendment 51 does not contain any restrictions on how a "signature or mark" may be made, I believe that an electronic signature satisfies Amendment 51's "signature or mark" requirement.

Id. at p. 23.

Disregarding the Attorney General's opinion, the SBEC swiftly adopted an emergency rule that prohibited county clerks from accepting voter registration applications with digital signatures from individuals and third-party organizations. *Id.* at pp. 61-63, 66, 73; *see* Ark. Const. amend. 51, § 5(e) (authorizing and directing the SBEC to make rules that "are necessary to secure uniform and efficient procedures in the administration" of Amendment 51); Ark. Code Ann. § 7-4-101(f)(5) (similar). The emergency rule went into effect on May 4, a comment period was held mid-summer, and the Legislative Council approved the rule—thereby making it permanent—on August 23. *See* Doc. 63, ¶ 4 (Supplement to Complaint); Ark. Code Ann. § 10-3-309(c) (providing the process for the Legislative Council's approval of agency rules).

2. The Rule

***6** In short, the Wet Signature Rule grafts SBEC-created definitions onto certain parts of Amendment 51 and alters the requirements for when a county clerk should accept a registration application.

Most pertinent here, the Rule narrows the definition of "signature or mark" only as applied to *mail voter registration applications*, but not as applied to Registration Agencies. (Doc. 46-7, pp. 62, 63). Under the Rule,

> "Signature or Mark"—means a handwritten wet signature or handwritten wet mark made on a Registration Application Form with a pen or other writing device that is physically moved across the form and that forms the applicant's signature or mark on the paper form. A Signature or Mark that utilizes a computer to generate or recreate the applicant's signature or mark is not an acceptable signature or mark of the applicant for purposes of Amendment 51 §§ 6(a)(1) & (a)(3)(F) Registration Application Form.

Id. at p. 63. Notably, this definition of "signature or mark" does not apply to applications submitted by a Registration Agency under section 6(b)(1)(G).

Amendment 51 instructs that clerks "shall accept legible and complete voter registration applications." Ark. Const. amend. 51, § 9(c)(1), (3). While the Rule leaves this directive substantively untouched for applications submitted by Registration Agencies, it slightly alters it as applied to *mail voter registration applications*, tacking on the requirement that the application be "executed with a Signature or Mark made by the voter registration applicant," as defined by the Rule, in order to be accepted. (Doc. 46-7, p. 63).

3. Effect on GLA, Vote.org, and Individual Plaintiffs

i. GLA and Vote.org

Without the ability to offer digital signatures, "the pace at which [GLA was] able to register new voters declined precipitously." (Doc. 46-2, ¶ 29). After the Rule went into effect on an emergency basis, GLA was "forced to fully disable [its] online voter registration tool." *Id.* While GLA eventually relaunched its online tool, it had to remove the digital signature feature, meaning applicants now were required to fill out the application online, print it out, apply

a handwritten wet signature, and then mail or deliver the application to their county clerk without the help of GLA. *Id.* at ¶ 30. Rather than sending out texts or asking large groups to register simultaneously using the online tool at events, GLA has had to retrain and hire additional staff to attend public events and register people using paper applications. *Id.* at ¶¶ 19, 32. Additionally, the use of paper applications makes it far more difficult for GLA to track applicants' registration status "[b]ecause information on rejected applicants is only available at the county level and each county clerk tracks applicants differently," so "there is typically no way to tell whether an applicant's absence from the statewide voter file is because their application has been rejected or because it was never completed and submitted by the applicant." *Id.* at ¶ 32. By comparison, "[w]hen the online tool utilized electronic signatures, GLA could eliminate the latter scenario because [it] knew when applications were submitted to county clerks by GLA staff." *Id.*

***7** This shift in resources has compromised GLA's ability to engage in its other activities, including organizing its get-out-the-vote campaign, *id.* at ¶ 33, assisting voters who have been purged from voter rolls to reestablish their registration status, and monitoring changes to local election rules. *Id.* at ¶ 34. These efforts have been nearly—if not entirely—abandoned by GLA in order to meet the demands of the Wet Signature Rule, making it all the more difficult for GLA to address the low voter registration rates in Arkansas. *See id.* at ¶¶ 33, 34.

As for Vote.org, it had invested significant resources to develop its own digital signature tool which it has implemented in many states. (Doc. 46-3, ¶¶ 8–9). However, due to the Wet Signature Rule, Vote.org is barred from deploying that tool in Arkansas, which has "impair[ed] the organization's ability to accomplish its mission" of registering Arkansans to vote, increasing the likelihood that Arkansas will continue to have the lowest registration rate in the nation. *Id.* at ¶¶ 9, 10. Without the digital signature function, voters will have to print and mail their own applications—short of Vote.org printing nearly-completed, unsigned applications and mailing them to applicants to be signed by hand—which will present an obstacle for the many applicants who do not have access to a printer. *See id.* at ¶¶ 7, 8, 10.

ii. Individual Plaintiffs

Nikki Pastor registered to vote on February 24, 2024, using a QR code that GLA provided to her at a community event in Fayetteville, Arkansas. (Doc. 46-4, ¶¶ 7–9). Once Pastor returned home, she opened the saved link, completed and signed the form, and gave GLA approval to print and submit the application to the Washington County Clerk on her behalf. *Id.* Approximately one month later, Pastor's application was rejected by the Washington County Clerk for having a digital signature. *Id.* at ¶ 11. Pastor remains unregistered to vote. *Id.* at ¶ 12.

Blake Loper received a link to the online tool from a GLA staff member and used it to update Loper's registration from Yell County to Pope County in December 2023, completing and signing the form digitally. (Doc. 46-5, ¶¶ 4–5). Like Pastor, Loper granted GLA permission to print and submit the application to the Pope County Clerk on Loper's behalf. *Id.* at ¶ 5. GLA submitted Loper's application on December 11, 2023; and, when Loper did not receive confirmation of the registration status, GLA resubmitted a copy of the application on May 1. *Id.* at ¶¶ 7–8. Then, on May 2, Loper received notice from the Pope County Clerk that the application had been rejected due to the digital signature. *Id.* at p. 4. Plaintiffs assert that Loper remains unregistered to vote. [5]

III. PRIVATE RIGHT OF ACTION UNDER THE MATERIALITY PROVISION

[1] The SBEC contests whether the Materiality Provision creates a private right of action enforceable through § 1983. "To seek redress through § 1983, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (cleaned up). This requires a two-step process. At step one, the Court must determine whether Congress "unambiguously conferred federal individual rights." *See Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 172, 143 S.Ct. 1444, 216 L.Ed.2d 183 (2023); *Gonzaga*, 536 U.S. at 283, 122 S.Ct. 2268. [6] If Congress did intend to create such a right, then the plaintiff is afforded the rebuttable presumption that the statute is enforceable under § 1983. Accordingly, the second step assesses whether the defendants have rebutted the presumption.

***8** Four circuits have spoken on this exact question: the Third, Fifth, and Eleventh Circuits have held that there is a private right of action under the Materiality Provision enforceable via § 1983, while the Sixth Circuit has held to the contrary. *Compare Migliori v. Cohen*, 36 F.4th 153 (3d

Cir. 2022), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, —— U.S. ——, 143 S. Ct. 297, 214 L.Ed.2d 129 (2022),[7] *and Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023) [hereinafter *Callanen II*], *and Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003) [hereinafter *Schwier I*], *with McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000). Additionally, Judge P.K. Holmes, III in this District has held in accord with the Third, Fifth, and Eleventh Circuits. *See League of Women Voters of Ark. v. Thurston*, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021).

In *McKay*, the Sixth Circuit stated, "Section 1971"—now 52 U.S.C. § 10101—"is enforceable by the Attorney General, not by private citizens." 226 F.3d at 756. The court, however, did not engage with the text of the statute or any binding precedent. As both the Fifth and Eleventh Circuits have described, the court in *McKay* "relied entirely" on two district court decisions, and "[n]either the Sixth Circuit nor these two district courts wrestled with the considerations for implying a private right." *Schwier I*, 340 F.3d at 1294; *Callanen II*, 89 F.4th at 478. This Court is not persuaded by *McKay*.

In contrast, the Third, Fifth, and Eleventh Circuits—each of which thoroughly engaged with *Gonzaga*, the statutory language, and the legislative history—concluded that the Materiality Provision does contain a private right of action enforceable through § 1983. *See Migliori*, 36 F.4th at 159; *Callanen II*, 89 F.4th at 478; *Schwier I*, 340 F.3d at 1297.

A. Step One: Congressional Intent to Create a Right

According to the Supreme Court:

> the *Gonzaga* test is satisfied where the provision in question is phrased in terms of the persons benefitted and contains rights-creating, individual centric language with an unmistakable focus on the benefited class. Conversely, we have rejected § 1983 enforceability where the statutory provision contained no rights-creating language; had an aggregate, not individual focus; and served primarily to direct the Federal Government's distribution of public funds.

Talevski, 599 U.S. at 183–84, 143 S.Ct. 1444 (cleaned up); *see also Gonzaga*, 536 U.S. at 284, 287, 290, 122 S.Ct. 2268. The Supreme Court's analyses in *Gonzaga* and *Talevski* are instructive here.

In *Gonzaga*, the Court held that the Family Education Rights and Privacy Act's ("FERPA") nondisclosure provisions did not provide a private right of action under § 1983 because they did not contain rights-creating language, had an aggregate focus, and mostly served to direct the Secretary of Education's distribution of funds. 536 U.S. at 290, 122 S.Ct. 2268. In so holding, the Court distinguished FERPA's nondisclosure provision from rights-creating statutes, such as Titles VI and IX. *Id.* at 284 & n.3, 287, 122 S.Ct. 2268. While these statutes include "individually focused terminology," such as, "[n]o person ... shall ... be subjected to discrimination," FERPA's provisions "speak only to the Secretary of Education." *Id.* at 287, 122 S.Ct. 2268 (quoting statutory language). The Court concluded that FERPA's language is "two steps removed from the interests of [the] individual," likening it to if Title IX had been written "simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690–93, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)).

***9** More recently, in *Talevski*, the Court analyzed two provisions of the Federal Nursing Home Reform Act ("FNHRA"), found at 42 U.S.C. § 1396r(c), under *Gonzaga* and held that the two provisions of the FNHRA unambiguously conferred private federal rights because they "use clear 'rights-creating language,' speak 'in terms of the persons benefited,' and have an 'unmistakable focus on the benefited class.' " 599 U.S. at 186, 143 S.Ct. 1444 (quoting *Gonzaga*, 536 U.S. at 284, 287, 290, 122 S.Ct. 2268). Looking to the specific language of the statute, one of the provisions "requires nursing homes to 'protect and promote *the right* to be free from [restraints that are] not required to treat *the resident's* medical symptoms.' " *Id.* at 184, 143 S.Ct. 1444 (cleaned up) (quoting statutory language). The other provision, the Court noted, was "[n]estled in a paragraph concerning 'transfer and discharge *rights*.' " *Id.* at 184–85, 143 S.Ct. 1444 (quoting statutory language). The Court further observed that even the exceptions to the provisions

"sustain the focus on individual residents," using language like "to ensure the physical *safety of the resident or other residents*" and by referencing "*the resident's* welfare." *Id.* (quoting statutory language). Importantly, *Talevski* explained that, although there is some focus on the regulated party within the provisions, this is "not a material diversion from the necessary focus on the nursing-home residents," as "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights (and we have never so held)." *Id.* at 185, 143 S.Ct. 1444.

[2] Turning now to the question here: did Congress unambiguously intend to create a right within the Materiality Provision? This Court finds that it did.

The Materiality Provision itself states, "No person acting under color of law *shall* ... deny the *right* of any *individual* to vote in any election because of an error or omission" that is "not material in determining whether such *individual* is qualified" to vote. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). To start, "[t]his language is clearly analogous to the right-creating language [of Titles VI and IX] cited by the Supreme Court in *Gonzaga*." *Schwier I*, 340 F.3d at 1296; *see Callanen II*, 89 F.4th at 474 ("The phrasing of the Materiality Provision is similar to language the Court has held to confer a private right." (citing *Gonzaga*, 536 U.S. at 284 & n.3, 122 S.Ct. 2268)). Further, the language creates a "mandatory rather than precatory" prohibition on denying a person the right to vote in violation of the Provision. *Schwier I*, 340 F.3d at 1290, 1297 (relying on *Blessing v. Freestone*, 520 U.S. 329, 340-41, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) for the proposition that "mandatory" language is more likely to evince an intent to establish a right). And despite the subject of the sentence being the person proscribed, "the focus of the text is nonetheless the protection of each individual's right to vote," which the statute clearly and specifically provides. *Id.* at 1296; *Callanen II*, 89 F.4th at 474. No part of the Materiality Provision speaks of an "aggregate focus," "institutional policy," or the direction of government funds, making "the Materiality Provision's language [ ] decidedly more rights-focused than language the [Supreme] Court has held *not* to confer a private right." *Callanen II*, 89 F.4th at 474-75; *see Talevski*, 599 U.S. at 183–84, 143 S.Ct. 1444; *Gonzaga*, 536 U.S. at 279, 122 S.Ct. 2268; *see also Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

[3] Admittedly, neither § 10101 nor the Materiality Provision itself focus exclusively on the rights-bearer; they also discuss the regulated parties. At first blush, this could create pause under Eighth Circuit precedent. *See Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1210 (8th Cir. 2023) (analyzing § 2 of the Voting Rights Act and stating, "It is unclear what to do when a statute focuses on both [the benefitted and regulated parties]."). However, as the Fifth Circuit aptly notes, *Talevski* is right on point here: "[I]t would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights ...." *Talevski*, 599 U.S. at 185, 143 S.Ct. 1444; *see also Callanen II*, 89 F.4th at 474–75. Under *Talevski*, this Court sees no problem with the fact that the Materiality Provision focuses both on the persons benefited and the persons regulated as it otherwise contains unambiguous rights-creating language.

***10** The Materiality Provision does not exist in a vacuum but "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *Talevski*, 599 U.S. at 184, 143 S.Ct. 1444 (quoting *West Virginia v. EPA*, 597 U.S. 697, 721, 142 S.Ct. 2587, —— L.Ed.2d —— (2022)). The surrounding provisions' focus on an individual's right to vote provides "framing" that is "indicative of an individual 'rights-creating' focus." *Id.* (citing *Gonzaga*, 536 U.S. at 284, 122 S.Ct. 2268). Most notably, the preceding provision states, "*All citizens* of the United States ... *shall be entitled and allowed to vote* at all such elections ...." 52 U.S.C. § 10101(a)(1) (emphasis added). Subsection (a)(1) speaks in terms of the rights holder, granting a mandatory entitlement to vote in all elections. *See Callanen II*, 89 F.4th at 474 (describing subsection (a)(1) as bearing "strong 'rights-creating' language"); *Migliori*, 36 F.4th at 159 (agreeing that "the Materiality Provision unambiguously confers a personal right because it places all citizens qualified to vote at the center of its import and provides that they 'shall be entitled and allowed' to vote" (cleaned up)). Additionally, the statute itself characterizes subsection (a) as "secur[ing]" a "right" and "privilege," stating as much three times within § 10101. *See* 52 U.S.C. §§ 10101(c), (e). Lastly, these subsections—along with the Materiality Provision—all "reside" in § 10101, which is titled "Voting Rights." *See Talevski*, 599 U.S. at 184, 143 S.Ct. 1444 (observing that both provisions "reside in 42 U.S.C. § 1397r(c), which expressly concerns 'requirements *relating to residents' rights*' " (cleaned up)).

Accordingly, the Court concludes that the Materiality Provision "unambiguously confer[s] federal individual

rights" because it "use[s] clear 'rights-creating language,' speak[s] 'in terms of the persons benefited,' and ha[s] an 'unmistakable focus on the benefited class.' " *Talevski*, 599 U.S. at 172, 186, 143 S.Ct. 1444 (quoting *Gonzaga*, 536 U.S. at 284, 287, 290, 122 S.Ct. 2268). Thus, the Materiality Provision is presumptively enforceable under § 1983.

B. Step Two: Rebuttable Presumption of Enforceability Under § 1983

[4] **[5]** "Even if a statutory provision unambiguously secures rights, a defendant 'may defeat t[he] presumption by demonstrating that Congress did not intend' that § 1983 be available to enforce those rights." *Talevski*, 599 U.S. at 186, 143 S.Ct. 1444 (alterations in original) (quoting *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 120, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005)). Put differently, to rebut the presumption, one must "show[ ] that Congress specifically foreclosed a remedy under § 1983." *Gonzaga*, 536 U.S. at 284 n.4, 122 S.Ct. 2268 (citations and quotation marks omitted). Such a prohibition may be explicitly contained within the statute, but "[a]bsent such a sign, a defendant must show that Congress issued the same command implicitly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Talevski*, 599 U.S. at 186, 143 S.Ct. 1444 (citations and quotation marks omitted). There is no language in § 10101 that "expressly forbid[s] § 1983's use," therefore the Court must look to whether the statute implicitly precludes bringing suit through § 1983. *Id.* The key inquiry, then, is whether a private right of action under § 1983 is *incompatible* with the enforcement scheme created by Congress. *Id.* (citing *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009)). This "inquiry boils down to what Congress intended, as divined from text and context." *Id.* at 187, 143 S.Ct. 1444.

[6] The text may so indicate where a statute contains its own private remedy that is more restrictive than an action under § 1983 or provides for a "comprehensive remedial scheme" that is revealed—through statutory interpretative tools—to be incompatible with a § 1983 suit. *Id.* at 188–89, 143 S.Ct. 1444. The Supreme Court has only found implicit preclusion in three cases. *Id.* at 189, 143 S.Ct. 1444 (citing *Rancho Palos Verdes*, 544 U.S. at 120–23, 125 S.Ct. 1453; *Smith v. Robinson*, 468 U.S. 992, 1008–13, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984); and *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 6-7, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981)). And each of these cases "concerned statutes with self-contained enforcement schemes that included statute-specific rights of action" that "required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies under the statute's enforcement scheme before suing under its dedicated right of action." *Id.* (citations omitted). And each right "offered fewer benefits than those available under § 1983." *Id.* (citations omitted). Thus, the statutes in those three cases were "incompatible with individual enforcement under § 1983." *Id.* at 189–90, 143 S.Ct. 1444 (citations omitted).

***11** **[7]** "Section 10101 lacks any specific 'private judicial right of action' or 'private federal administrative remedy' that requires plaintiffs to comply with particular procedures"—let alone one that offers fewer benefits than § 1983. *Callanen II*, 89 F.4th at 476 (quoting *Talevski*, 599 U.S. at 190, 143 S.Ct. 1444). Therefore, "this exception to using Section 1983 is inapplicable." *Id.* Moreover, the statute's enforcement scheme, which grants enforcement authority to the United States Attorney General, *see* 52 U.S.C. §§ 10101(c)–(e), is not incompatible with a private right of action under § 1983. Rather, the legislative history shows that the Attorney General's enforcement power "augment[ed] the implied but established private right to sue." *Callanen II*, 89 F.4th at 476.

The most relevant history here revolves around the 1957 amendment to the Civil Rights Act. This amendment both granted the Attorney General enforcement authority—under what is now § 10101(c)—and "added what is now 52 U.S.C. § 10101(d), which provides that all actions brought 'pursuant to this section' can be exercised 'without regard to whether the party aggrieved shall have exhausted administrative or other remedies that may be provided by law.' " *Id.* at 475 (citing Civil Rights Act of 1957, Pub. L. No. 85-315 § 131, 71 Stat. 634, 637 (1957)). This supports a private right of action for two reasons.

First, the reference to the "party aggrieved" in subsection (d) very likely refers to private parties, not the Attorney General. *Callanen II*, 89 F.4th at 475; *Migliori*, 36 F.4th at 160 ("[T]his section specifically contemplates an aggrieved party (i.e., private plaintiff) bringing this type of claim in court."). This interpretation is supported by House Report 291, which recognized the long history of individuals using § 1983 to enforce the substantive rights of § 10101(a). *Schwier I*, 340 F.3d at 1295 (citing H.R. Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1977); *Callanen II*, 89 F.4th at 475–76 (citing the same and noting its reference to court opinions in which "exhaustion of remedies had been required for *private* plaintiffs"); *Migliori*, 36 F.4th at 162 ("When Congress added a provision for civil enforcement by the

Attorney General, it acknowledged that private individuals had enforced the substantive rights in § 10101(a) via § 1983 for nearly a century."). Further, "the Committee first stated that the bill's purpose was 'to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States,' " indicating that the addition of enforcement through the Attorney General was not intended to supplant already-existing avenues. *Schwier I*, 340 F.3d at 1295 (citing H.R. Rep. No. 85-291, *reprinted in* 1957 U.S.C.C.A.N. at 1966).

Second, Congress's removal of any exhaustion requirement for private plaintiffs in subsection (d) makes sense only if "there were a corresponding private right." *Callanen II*, 89 F.4th at 476 (citing *Schwier I*, 340 F.3d at 1296). Lastly, the Committee's "intense focus on protecting the right to vote" in House Report 291 would be inconsistent with the conclusion that "Congress meant merely to substitute one form of protection for another." *Schwier I*, 340 F.3d at 1295.

For these reasons, the Court finds that the Materiality Provision's presumptive enforcement found at Step One has not been rebutted at Step Two as the statute neither explicitly nor implicitly forecloses a private right of action under § 1983.

IV. STANDING

The SBEC challenges GLA and Vote.org's standing as organizations. And in her Motion to Dismiss, Benton County Clerk Betsy Harrell challenges Individual Plaintiffs' standing because neither of them attempted to register in Benton County, which is addressed *infra*. *See* Part VI. This Section addresses the organizational standing of GLA.

***12** **[8]** **[9]** **[10]** To establish Article III standing, a plaintiff must show that: (1) they have "suffered or likely will suffer an injury in fact"; (2) "the injury likely was caused or will be caused by the defendant"; and (3) "the injury likely would be redressed by the requested judicial relief." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024) [hereinafter *Alliance*] (citations omitted). Where multiple plaintiffs seek identical relief, only one plaintiff need satisfy Article III standing requirements. *Horne v. Flores*, 557 U.S. 433, 446–47, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009). At the preliminary injunction stage, a plaintiff need only show that they are likely to have standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[11] **[12]** **[13]** **[14]** **[15]** **[16]** **[17]** An injury in fact must be (a) concrete and particularized, and (b) actual or imminent. *Alliance*, 602 U.S. at 381, 144 S.Ct. 1540. A concrete injury is one that is "real and not abstract." *Id.* (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021)). An injury is particularized when it affects the plaintiff personally and individually, rather than being a "generalized grievance." *Id.* (citing *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). Further, an injury in fact must be actual or imminent, "not speculative—meaning that the injury must have already occurred or be likely to occur soon." *Id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)). "[W]hen a plaintiff seeks prospective relief such as an injunction, the plaintiff must establish a sufficient likelihood of future injury." *Id.* (citing *Clapper*, 568 U.S. at 401, 133 S.Ct. 1138). These requirements "screen[ ] out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action." *Id.* Generally, the injury-in-fact requirement will be easily met where a government regulation "require[s] or forbid[s] some action by the plaintiff." *Id.* at 382, 144 S.Ct. 1540.

A. Organizational Standing of GLA

[18] **[19]** **[20]** To obtain preliminary injunctive relief at least one plaintiff must have standing. Organizations, like individuals, must establish the three constitutional requirements for standing. *Id.* at 393–94, 144 S.Ct. 1540 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)). No matter how strong the organization's interest, it "must show 'far more than simply a setback to the organization's abstract social interests.' " *Id.* at 394, 144 S.Ct. 1540 (first citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), then quoting *Havens*, 455 U.S. at 379, 102 S.Ct. 1114). As detailed below, the Court finds that GLA has established that it is likely to have standing as to all Defendants.

1. Injury in Fact

[21] Where a defendant's actions "perceptibly impair[ ]" the plaintiff's "ability to provide [organizational] services," there is "no question that the organization has suffered injury in fact." *Havens*, 455 U.S. at 379, 102 S.Ct. 1114. "Such concrete and demonstrable injury to the organization's activities—with a consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*; *see also Nat'l Fed'n of Blind of Mo. v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999) ("Standing may be found when there is a concrete and demonstrable injury to an organization's activities which drains its resources and is more than simply a setback to its abstract social interests." (citing *Havens*, 455 U.S. at 379, 102 S.Ct. 1114). [8]

***13** The Supreme Court recently clarified that "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way." *Alliance*, 602 U.S. at 394, 144 S.Ct. 1540. [9] The Court made explicit that its decision in *Havens* did not stand for the "expansive" proposition that "standing exists when an organization diverts its resources in response to a defendant's action." *Id.* at 395, 144 S.Ct. 1540. If that were the case, "all organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies." *Id.* The Court factually distinguished *Alliance* and *Havens*, noting that the plaintiff in *Havens* was "not only [ ] an issue-advocacy organization, but also operated a housing counseling service" and when the defendant gave the plaintiff "false information about apartment availability" it "perceptibly impaired [the plaintiff's] ability to provide counseling and referral services" to their target demographic. *Id.* (quoting *Havens*, 455 U.S. at 379, 102 S.Ct. 1114).

GLA contends that the Wet Signature Rule *requires* third-party registration organizations to collect hand-written signatures and *prohibits* them from utilizing online digital signature technology, which severely limits their ability to register new voters. Indeed, the Wet Signature Rule and supplementary materials from the SBEC specify that applications submitted by third-party organizations must include a wet signature, whereas those submitted by Registration Agencies, such as the DMV, may include digital signatures. *See, e.g.*, Doc. 46-7, p. 72. It follows that, in implementing the Wet Signature Rule—from which Registration Agencies are essentially exempt—the SBEC was specifically targeting GLA's activity of registering voters through its online tool. [10] *See Callanen II*, 89 F.4th at 493 (Higginson, J., dissenting) ("The record contains a simple explanation for Texas's singular interest in a wet signature in the context of registration applications submitted by fax machine: Texas officials explicitly drafted [the requirement] to prevent the use of Vote.org's e-sign tool."). This is underscored here by the fact that the Secretary's about-face occurred two days after the *Arkansas Times* reported on GLA's success. (Doc. 46-2, ¶ 15; Doc. 46-7, p. 17).

[22] The Rule's direct effect and interference with GLA's organizational activities has "perceptibly impaired" GLA's ability to provide voter registration services to Arkansans, as evidenced by the precipitous decline in registrations through GLA since the Rule was put into place. *See Havens*, 455 U.S. at 379, 102 S.Ct. 1114; *Alliance*, 602 U.S. at 395, 144 S.Ct. 1540; Doc. 46-2, ¶ 29. This has caused a "concrete and demonstrable injury to the organization's activities." *See Havens*, 455 U.S. at 379, 102 S.Ct. 1114. GLA has also shown a "consequent drain on the organization's resources" because of the costs of complying with the Rule. *Id.* GLA has had to expend additional time, labor, and money in adapting to the new rule, including redesigning its tool and retraining and hiring additional staff to register people using paper applications. (Doc. 46-2, ¶ 32). It has also shown that these compliance costs have severely compromised its ability to engage in other organizational activities, such as assisting voters who have been purged from voter rolls and organizing campaigns. *Id.* at ¶¶ 33, 34. Put simply, GLA did not merely spend its way into standing—as the plaintiff in *Alliance* attempted to—rather it used its resources to comply with the Rule that proscribed the use of its digital signature tool, markedly limiting its ability to carry out its organizational activities.

***14** GLA has shown a likelihood of more than an "indirect 'pocketbook' harm" from the Wet Signature Rule. [11] It has shown that it has likely suffered a concrete and particularized injury to its organizational activities through the requirements and proscriptions imposed by the Rule. *See League of Women Voters of Ohio v. LaRose*, —— F.Supp.3d ——, —— n.3, 2024 WL 3495332, at *5 n.3 (N.D. Ohio July 22, 2024) (distinguishing *Alliance* from a case where a voting rights organization challenged an Ohio law that "forbid[ ] [organization] members from assisting disabled voters" because the injury was direct and not merely based on a diversion of funds). GLA has already been, and will

continue to be, required to undertake certain actions by the Rule and forbidden to take others, thus the injury is actual. Under *Alliance*, where the regulation or law in question "require[s] or forbid[s] some action by the plaintiff," standing is "usually easy to establish." 602 U.S. at 382, 144 S.Ct. 1540. Such is the case here.

2. Causation and Redressability

[23] **[24]** **[25]** As the Court has found that GLA likely sustained an injury in fact due to the Rule, as discussed above, it reasonably follows that such injury was caused by the actions of the SBEC in enacting the Rule, will continue to be caused by the enforcement of the Rule by the county clerks, and could be remedied by this Court enjoining the Rule. Thus, causation and redressability are established. Therefore, it is likely that at least one plaintiff, GLA, has standing to sue as to all Defendants. [12]

V. PRELIMINARY INJUNCTION DISCUSSION

***15** **[26]** **[27]** In determining whether to grant a motion for preliminary injunction, the Court must weigh the following four considerations: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between the harm to the movant if the injunction is denied and the harm to other party if the injunction is granted; and (4) the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). "While no single factor is determinative, the probability of success factor is the most significant." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019) (citations and quotation marks omitted).

A. Likelihood of Success on Merits

The SBEC argues Plaintiffs are unlikely to succeed on the merits because they cannot establish that requiring a wet signature is immaterial to determining a voter's qualifications under Arkansas law. Whether the Rule violates the Materiality Provision depends on whether its enforcement: (a) denies an individual the right to vote (b) based on an error or omission on a record or paper (c) that is immaterial in determining the individual's qualifications to vote. The Court will begin its analysis by discussing how the enforcement of the Rule constitutes a denial of the right to vote due to an error or omission. [13] The Court will then turn to the contested issue of whether such an error or omission is material in determining one's qualifications to vote under Arkansas law.

1. Denial of the Right to Vote Based on an Error or Omission

[28] **[29]** In answering whether enforcement of the Rule constitutes a denial of the right to vote under the Materiality Provision, the Court starts with the statutory definition, which it must follow even if it differs from the term's usual meaning. *Van Buren v. United States*, 593 U.S. 374, 387, 141 S.Ct. 1648, 210 L.Ed.2d 26 (2021) (citations omitted). Section 10101 explicitly defines "vote" as "all action necessary to make a vote effective including, but not limited to, registration." *See* 52 U.S.C. §§ 10101(a)(3)(A), (e). Therefore, interference with the voter registration process in violation of this Provision constitutes an impermissible denial of the right to vote. To suggest otherwise would—as Plaintiffs put it—"conflate the opportunity to register to vote in the abstract with the opportunity to register to vote consistent with the guarantees of federal law." (Doc. 58, p. 25).

[30] **[31]** Here, the SBEC intimates that the opportunity to resubmit in accordance with the Rule cures any statutory violation. But the "[d]enial of the statutory right to vote under Section 101 is complete when a particular application ... is rejected"—"an opportunity to cure the rejection[or] submit another application ... does not negate the denial of the statutory right to vote." *La Unión del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 760 (W.D. Tex. 2023) [hereinafter *LUPE*] (citations omitted).

Moreover, the Court "doubt[s]" the "efficacy of an *ability* to cure" because "the *need* to cure an immaterial requirement creates a hurdle for—even if it is not itself a final denial of—the right to vote." *See Callanen II*, 89 F.4th at 487 (setting aside the motion panel's holding that the opportunity to resubmit cures the denial of the right to vote, leaving the issue open for another day, and noting that the court "do[es] not rely today on the fact alternatives exist if the initial registration fails"). Put more plainly, the opportunity to resubmit the application in compliance with the Rule does not negate the denial of the right to vote.

> ***16** Section 101 provides that state actors may not deny the right to vote based on errors or omissions that are not material; it does not say that state actors may initially deny the right to vote based on errors or omissions that are not material as long as they institute cure processes.

La Unión del Pueblo Entero v. Abbott, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022). If the only way an applicant can register is by complying with an immaterial requirement—and failure to do so will result in the applicant remaining unregistered—then the applicant is, by definition, being denied the statutory right to vote due to an error or omission that is immaterial to determining their qualifications to vote under state law, in violation of the Materiality Provision. The Court finds it likely that enforcement of the Rule constitutes a denial of the right to vote based on an error or omission on a record or paper.

[32] **[33]** Further, the Rule indisputably involves an error or omission on a record or paper. It is simply common sense that a registration form would constitute a "record or paper relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B); *see generally Schwier I*, 340 F.3d 1284 (applying Materiality Provision to registration forms). And from the Rule's requirement that the registration form include a wet, handwritten signature, it follows that the failure to include a wet signature (due to the inclusion of a digital signature) would constitute an omission.

2. Material in Determining Whether Such Individual is Qualified to Vote [14]

i. Defining "Material in Determining Whether Such Individual is Qualified Under State Law to Vote"

[34] **[35]** The Materiality Provision asks whether the error or omission is "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

[36] **[37]** The first inquiry, then, is to define the meaning of "material." "[I]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Sanzone v. Mercy Health*, 954 F.3d 1031, 1040 (8th Cir. 2020) (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006)). Courts should "depart from the ordinary meaning only if the words are otherwise defined in the statute itself, or if the context requires a different result." *Id.* at 1040–41 (citations and quotation marks omitted).

***17** **[38]** Here, the statute does not provide a definition, so the Court looks to the plain meaning. Black's Law Dictionary defines "material" as, "Of such a nature that knowledge of the item would affect a person's decision-making: significant; essential." *See Callanen II*, 89 F.4th at 478 (quoting Material, BLACK'S LAW DICTIONARY (8th ed. 2004)). Oxford English Dictionary offers a similar definition: "Of serious or substantial import; significant, important, of consequence." *Id.* (quoting Material, OXFORD ENGLISH DICTIONARY, III.6.a. (July 2023)). Like the Fifth Circuit in *Callanen II*, this Court does not see "essential" to be an appropriate meaning here, but it otherwise accepts these definitions as reasonable. *See id.* The plain meaning is further bolstered by the historical context and purpose of the statute. *See supra* Part I.

[39] Next, "[t]o determine whether an error or omission is material, the information required"—here, a wet signature—"must be compared to state-law qualifications to vote," meaning "substantive voter attributes." *LUPE*, 705 F. Supp. 3d at 751 (citing, *inter alia, Migliori*, 36 F.4th at 162). Therefore, the question this Court must answer is whether the inclusion of a digital signature—and thus the omission of a wet signature—is of such significance that it would affect the determination of whether the applicant seeking to register: (1) is a U.S. citizen; (2) is an Arkansas resident, (3) is 18 years or older; (4) has not been convicted of a felony; and (5) has not been adjudged mentally incompetent by a court. [15] Ark. Const. art. 3, § 1(a)(1)-(3); *id.* amend. 51, § 11(a)(4), (5); *see also Martin v. Haas*, 2018 Ark. 283, *2-3, 556 S.W.3d 509 (Ark. 2018).

ii. It is Unlikely the Use of a Wet Signature Aids in Determining a Voter's Substantive Qualifications

[40] Defendants do not present argument or evidence as to how a wet signature—as compared to a digital signature

—aids in determining whether a person is a U.S. citizen, is an Arkansas resident, is eighteen years or older, has a prior felony, or has been adjudged incompetent. To the extent Defendants argue that the wet signature helps confirm the identity of the applicant, thereby verifying the other qualifications, they present no argument or evidence as to why a wet signature better verifies a would-be registrant's identity than a digital signature or—more to the point—why the use of a wet signature (as opposed to digital) is of such significance that it would affect the county officials' decision in whether someone is qualified.

In fact, the record evidence shows that the "wetness" of a signature does not affect county officials' determinations of qualifications at all, consistent with the Arkansas Constitution's prohibition of any notary or authentication requirement for applications. Historically, "Arkansas election officials have not considered the type of instrument used in signing or marking a voter registration application as a factor in determining whether the applicant is or is not qualified to vote in Arkansas." (Doc. 46-6, ¶ 15). Rather, county clerks "are advised to accept voter registrations with any type of signature or mark," including even illegible signatures or marks like an "x." *See id.* at ¶ 16. This is because, at the registration stage, the signature or mark serves as an attestation under penalty of perjury to the accuracy of the information provided, *id.*, rather than being used, for example, to verify a person's identity. Once registrations are received, all registration information "is entered into the same voter database," regardless of whether it was submitted with a digital signature through an agency like the DMV or with a handwritten signature by an individual or third-party organization. *Id.* at ¶ 18. Further, clerks are not "told or trained to remove any voter from the rolls or reject any voter-registration applicant because of the quality of signature or mark on a voter registration application or because of the type of instrument the person used to make a signature or mark." *Id.* at ¶ 20.

***18** Based on the evidence and argument presented, the Court does not see how a county clerk would use the wetness of a signature to determine whether an applicant is qualified to vote under Arkansas law. [16]

iii. State Interests are Not a Relevant Consideration in Analyzing a Violation Under the Materiality Provision

[41] The SBEC and Defendant Lewallen, to some extent, assert that the SBEC enacted the Rule to ensure a uniform process and "further[ ] Arkansas's interest in preventing fraud, verifying voter identity and eligibility, and promoting the integrity of the voter registration process." Doc. 53, p. 11; *see also* Doc. 51, p. 2. However, the State's interest in the promulgation of the Wet Signature Rule is not a relevant consideration in evaluating whether requiring a wet signature violates the Materiality Provision.

[42] "To the extent that [evidence of the SBEC's intent] bears on the wisdom of the [Wet Signature Rule], it is entirely irrelevant to the Court's analysis of Plaintiffs' Section 101 claims on the merits." *LUPE*, 705 F. Supp. 3d at 744. That is because "[u]nlike many other causes of action in the voting-rights context, the Materiality Provision is not a burden-interest balancing statute." *Id.* Violations of the Materiality Provision "are prohibited no matter their policy aim." *Id.* Though the Court recognizes that Arkansas "undoubtedly has an interest in deterring and preventing voter fraud, that interest must yield to a qualified voter's right" under the Materiality Provision. *Id.* at 745 (citing *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006) [hereinafter *Schwier II*]). "[T]he provision is clear that an 'error or omission is not material' unless it serves to 'determine whether such individual is qualified under State law to vote in such election.' " *Migliori*, 36 F.4th at 163 (cleaned up) (quoting 52 U.S.C. § 10101(a)(2)(B)).

To be sure, the SBEC's argument is not completely without merit. Indeed, they ask the Court to follow the Fifth Circuit's decision in *Callanen II*. Admittedly, *Callanen II* is the most on-point case as it analyzed whether a wet signature requirement in Texas violated the Materiality Provision. The court there held that it did not. In so holding, the court grafted consideration of state interests into its analysis of the Materiality Provision. For the reasons below, this Court rejects the Fifth Circuit's reasoning and, instead, agrees with *LUPE* and Judge Higginson's dissent in *Callanen II* that such considerations are not appropriate under the Materiality Provision.

Despite recognizing that the Materiality Provision "is not a constitutional claim necessitating the application of a balancing test," the court in *Callanen II* used Fourteenth Amendment caselaw to justify consideration of the state's interest in integrity when evaluating the materiality of the rule. 89 F.4th at 480–81. Specifically, the court looked to *Crawford v. Marion County Election Board*, 553 U.S. 181,

189–90, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) among other cases, to emphasize the "significance of a State's authority to set its electoral rules and the considerable deference to be given to election procedures so long as they do not constitute invidious discrimination." *Callanen II*, 89 F.4th at 481. The court then looked to various cases applying § 2 of the Voting Rights Act that incorporated the factors from *Thornburg v. Gingles* and determined that "whether the policy underlying" the wet signature requirement was "tenuous"—i.e., lacking a "strong connection between the policy and the requirement"—was "directly applicable in analyzing a State's justifications for the materiality of a practice." *Callanen II*, 89 F.4th at 483 (internal quotation marks omitted) (citing *Veasey v. Abbott*, 830 F.3d 216, 246 (5th Cir. 2016) (en banc)); *see also Thornburg v. Gingles*, 478 U.S. 30, 37, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

***19** After a rather strained discussion, the Fifth Circuit landed on a rather strained test:

> (1) how substantial is the State's interest in the requisite to voting in which some error or omission exists; (2) does that interest relate to determining whether such individual is qualified under State law to vote in such election; and (3) under the totality of the circumstances, what is the strength of the connection between the State's interest and the measure, i.e., how well does the measure advance the interest?

Callanen II, 89 F.4th at 485 (cleaned up). [17] Later the court restated,

> Our resolution comes down to whether requiring an original signature meaningfully, even if quite imperfectly, corresponds to the substantial State interest in assuring that those applying to vote are who they say they are. Is there a strong enough connection [between the rule or law and its justification] to overcome the possible denial of registration to some applicants?

Id. at 489.

It is unclear why the creation of such a test was necessary or appropriate where the statutory text of the Materiality Provision itself makes quite clear the relevant question: Is the error or omission material in determining whether an applicant is qualified to vote under state law? The Court does not find *Callanen II*'s "importation of *Crawford* and *Gingles* into the materiality context" persuasive and does not adopt it here. [18] *See id.* at 492 (Higginson, J., dissenting).

As Judge Higginson aptly explained in his dissent, the Fifth Circuit had "previously recognized that *Crawford* 'only considered a First and Fourteenth Amendment challenge, which involves a different analytical framework than what we use for [statutory] claims.' " *Id.* at 492 (Higginson, J., dissenting) (alterations in original) (quoting *Veasey*, 830 F.3d at 249). Judge Higginson continued, "the Materiality Provision expressly limits states' purported 'considerable discretion,' " thus, "the 'considerable deference to be given to state election procedures' has no place in a materiality analysis." *Id.* (cleaned up) (quoting majority opinion). Further, Judge Higginson explained,

> ***20** The *Gingles* factors are used to help determine whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination. Unlike a section 2 claim, though—as the majority recognizes—a Materiality Provision claim need not allege any evidence of discrimination. More importantly, nothing in the Materiality Provision's text or existing case law requires plaintiffs to show a "disparate burden" on the right to vote; instead, plaintiffs need only demonstrate that the state's procedural requirement "is not material in determining whether" they are "qualified" to vote. Accordingly, reliance on the *Gingles* factors is inapposite in the materiality context.

Id. at 492 (Higginson, J., dissenting) (citations and quotation marks omitted).

Moreover, *Callanen II*'s test is not consistent with the history and purpose of the Materiality Provision. If courts allow voting restrictions because they are non-tenuously related to

a legitimate state interest, this will negate the plain language of the Materiality Provision and belie the very purpose of the statute. For example, the state surely has a strong interest in ensuring that voters are eighteen years or older, and this interest is related to determining whether someone is qualified to vote—indeed, it is a requirement to vote. A rule that requires voters to identify their age in years, months, and days would surely be non-tenuously related to that state interest. Under the Fifth Circuit's test, such a rule would likely pass muster. However, that is precisely the type of immaterial requirement that the Materiality Provision aimed to eliminate. Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 Wm. & Mary L. Rev. at 148.

Justice Alito's dissent in *Ritter v. Migliori* further calls the Fifth Circuit's reasoning on materiality into question. —— U.S. ——, 142 S. Ct. 1824, 213 L.Ed.2d 1034 (2022) (denying to stay *Migliori*, 36 F.4th 153 pending certiorari). In reaching its conclusion in *Callanen II*, the Fifth Circuit distinguished *Schwier II* and *Migliori*, stating, "[t]he immateriality of the omissions in those [cases] was fairly obvious," unlike in the case of the wet signature requirement. *Callanen II*, 89 F.4th at 480. In *Ritter*, however, Justice Alito—joined by Justice Thomas and Justice Gorsuch—offered a thorough explanation as to why he believed the Third Circuit in *Migliori* was "very likely wrong." *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting). Justice Alito drew a distinction between regulations on the requisite acts of voting as compared to regulations on how ballots are cast, stating:

> Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone else: "p. p. John or Jane Doe." Or suppose that a voter, for some reason, typed his or her name instead of signing it. Those violations would be material in determining whether a ballot should be counted, *but they would not be "material in determining whether such individual is qualified under State law to vote in such election.*"

Id. at 1826 (Alito, J., dissenting) (emphasis added). This statement not only reflects Justice Alito's disagreement with the Fifth Circuit's statement that *Migliori* involved a "fairly obvious" immaterial omission, it signals that at least three Justices would find that a defect in one's signature on a ballot, such as typing one's name, "would not be material in determining whether such individual is qualified under State law to vote in such election." *Id.* (internal quotation marks omitted). If typing one's name instead of signing it is not material to determining one's qualifications, it reasonably follows that the inclusion of a digital signature, rather than a wet signature, would not be material either.

***21** Lastly, *Callanen II*'s deference to legislative action further distinguishes the case at bar because, unlike in *Callanen II* where the court was evaluating whether a *statute* passed via the legislative process was a violation of the Materiality Provision, here the Court is evaluating a *rule* promulgated by the seven-member SBEC.

The Fifth Circuit concluded: "Texas's justification that an original signature advances voter integrity is legitimate, is far more than tenuous, and, under the totality of the circumstances, makes such a signature a material requirement." *Callanen II*, 89 F.4th at 489. This Court believes the Fifth Circuit's consideration of state interests —based on a test cobbled together from constitutional and § 2 Voting Rights Act case law—strays too far from the plain, unambiguous language of the Materiality Provision. Accordingly, the Court declines to consider the state's interest in analyzing the Materiality Provision. [19] The Rule is likely immaterial to determining whether an individual is qualified to voter under Arkansas law and therefore violates the Materiality Provision; the SBEC cannot make an immaterial rule material simply by claiming it satisfies some state interest, however noble the interest.

iv. Even if the Court Took State Interests into Account, the Rule Likely Does Not Advance the Purported Interests

[43] Assume, however, the Court accepted the Fifth Circuit's "importation of *Crawford* and *Gingles* into the materiality context, deference to [Arkansas's] election procedures" still "cannot save the wet-signature requirement." *See Callanen II*, 89 F.4th at 492 (Higginson, J., dissenting). The SBEC focuses on two primary interests to support the Rule: uniformity and integrity. But, according to the evidence presented by Plaintiffs, the Wet Signature Rule does not advance either of these interests.

The SBEC argues that it implemented the Rule to promote uniformity due to discrepancies in clerks' treatment of digital signatures in different counties. However, as noted, the Arkansas Constitution permits digital signatures from Registrations Agencies. The SBEC does not explain how implementing a rule that permits digital signatures in certain contexts and prohibits them in others promotes uniformity,

particularly when uniformity could have been better achieved by permitting digital signatures in all contexts.

The SBEC states that "a uniform process furthers Arkansas's interest in preventing fraud, verifying voter identity and eligibility, and promoting the integrity of the voter registration process." (Doc. 53, p. 11). However, the SBEC does not provide an explanation as to how the Rule accomplishes these goals, other than making conclusory statements or relying on the idea that a wet signature is more "solemn" than a digital signature. *Id.* at pp. 11-12 (citing *Callanen II*, 89 F.4th at 489; *Vote.org v. Byrd*, 700 F. Supp. 3d 1047, 1056 (N.D. Fla. 2023)).

What the Court struggles to understand is how a handwritten "x" (i.e., a mark) would better protect against fraud than a signature made with a stylus on a tablet. As previously discussed, county clerks "are advised to accept voter registration applications with any type of signature or mark," regardless of legibility or whether the applicant in fact makes a mark rather than a signature. (Doc. 46-6, ¶ 16).

***22** Even in the context of comparing registration signatures with absentee ballot signatures—which was the first, and originally only, concern expressed by the Secretary's office—there is evidence that it still does not make a difference to the clerks' ability to maintain election integrity. To start, "it is made clear to officials reviewing voter registrations for signature matches that they are not signature analysts, and they are taught to err on the side of the voter." *Id.* at ¶ 19. Frequently, the comparable signature on the voter registration application will be a digital signature because many applications come from Registration Agencies like the DMV, meaning that clerks are already regularly comparing digital registration signatures to absentee ballot signatures. *Id.* Even where the application is submitted with a handwritten signature, clerks generally make the comparisons by "viewing PDF scans of the signatures," making it "very difficult to tell the difference between a signature made by pen," "a signature made by a stylus," "or a digital image of a handwritten signature that is then printed and submitted." *Id.* In other words, when a clerk is comparing registration signatures to absentee ballot signatures—the only moment identified in which registration signatures may affect election integrity—it is unlikely that a clerk would be able to distinguish between a wet signature, a signature submitted via GLA's tool, or a signature submitted through Vote.org's tool.

The SBEC does not explain why the use of digital signatures by third-party organizations threatens election integrity more than use by Registration Agencies. To be sure, the Court can see some common-sense reasoning that, at a location like the DMV, there is likely other confirmation of identity (perhaps the person is obtaining a license at the same time). But this practical distinction only extends to verifying identity. Further, the SBEC focuses more intently on the concept of "solemnity," relying on the holdings in *Callanen II* and *Byrd*. Even if this Court were to grant that "solemnity" is a legitimate interest that should be taken into account under the Materiality Provision—which this Court does *not* grant for the reasons stated in the preceding subsection—it would still fail to be persuasive in this case.

Importantly, in *Callanen II*, which *Byrd* heavily relied on, the Fifth Circuit's reliance on solemnity "hinge[d] on 'the effect on an applicant of seeing [certain] explanations and warnings above the signature block.' " *Callanen II*, 89 F.4th at 494 (Higginson, J., dissenting) (quoting majority opinion). Indeed, as Judge Higginson pointed out, the Fifth Circuit described Texas's argument on "solemnity" as "signing the form with the warnings in front of the applicant, threatening penalties for perjury and stating the needed qualifications," which had "some prospect of getting the attention of many applicants and dissuading false statements" in a way that "an electronic signature, *without these warnings*, d[id] not." *Id.* at 489. Not only does such reasoning show that "the wet signature itself" is not material in determining qualifications, *see id.* at 494 (Higginson, J., dissenting), it is distinct from the case at bar where a person digitally signing on GLA's tool will see all the same warnings and perjury language that a person signing on a paper form would see. *See* Doc. 46-2, ¶ 14; Doc. 64, p. 82. [20]

"No evidence in the record supports—or even peripherally suggests—that the wet signature *itself* is material in determining whether a[n] [Arkansan] is qualified to vote." *Callanen II*, 89 F.4th at 494 (Higginson, J., dissenting). Arkansas "officials' admissions that they do not use the wet signature in any capacity to determine a voter's qualifications 'slams the door shut on any argument that [a wet signature] is material.' " *Id.* at 493 (Higginson, J., dissenting) (alterations in original) (quoting *Migliori*, 36 F.4th at 164). Thus, even if the Court were to take the state's interest in uniformity and integrity into account—which this Court explicitly rejects—the wetness of a signature would still be *factually* immaterial. *See id.* at 492–93 (Higginson, J., dissenting).

B. Likelihood of Irreparable Harm [21]

***23** **[44]** **[45]** "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1346 (8th Cir. 2024) (citation omitted). Rather than merely showing a "possibility of irreparable harm," Plaintiffs "must show harm that is certain and great and of such imminence that there is a clear and present need for equitable relief." *Id.* (citations omitted).

[46] Because the Wet Signature Rule likely results in the denial of the right to vote in violation of the Materiality Provision, voters in Arkansas—including Individual Plaintiffs—will suffer irreparable harm if a preliminary injunction is not granted. [22] *See League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (citations omitted) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *LUPE*, 705 F. Supp. 3d at 765 (citations omitted) (same); *see Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote [ ] constitutes irreparable injury.").

[47] **[48]** As to the organizations, "[c]ourts routinely recognize that organizations suffer irreparable harm when a defendant's conduct causes them to lose opportunities to conduct election-related activities, such as voter registration and education." *League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018) (collecting cases). The election is less than two months away, and once it occurs "there can be no do-over and no redress." *League of Women Voters of N.C.*, 769 F.3d at 247; *see also In re Georgia Senate Bill 202*, 2023 WL 5334582, at *11 (N.D. Ga. Aug. 18, 2023). ("Such mobilization opportunities cannot be remedied once lost." (citations and quotations marks omitted)). In addition, the organizations, and GLA in particular, have and will continue to incur compliance costs and suffer interference with their organizational activities. [23] Thus, absent a preliminary injunction, ongoing enforcement of the Rule, which has now been made permanent, will likely cause GLA and Vote.org irreparable harm.

Therefore, the Court finds the Plaintiffs have established a likelihood of irreparable harm absent a preliminary injunction.

C. Balance of Equities and the Public Interest [24]

***24** **[49]** **[50]** **[51]** **[52]** When the government opposes the issuance of a preliminary injunction, the final two factors —the balance of the equities and the public interest— merge. *See Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). The balance of equities and public interest here decidedly favor Plaintiffs, given the likelihood that the Rule will deny voters in Arkansas their statutory rights under federal law: to have otherwise legible and complete voter registration applications accepted by their county clerks regardless of any immaterial errors or omissions. *See League of Women Voters of Mo.*, 336 F. Supp. 3d at 1006 ("[E]nsuring qualified voters exercise their right to vote is always in the public interest." (citations and quotations omitted)). In contrast, granting the preliminary injunction will not cause any harm to Defendants—at most it will require them to accept registration applications with digital signature which they undisputedly already do. Accordingly, Plaintiffs' Motion for Preliminary Injunction (Doc. 46) is **GRANTED**.

VI. MOTIONS TO DISMISS

[53] Lastly, the Court takes up the Motions to Dismiss by Defendants Harrell and Hollingsworth (Docs. 39 & 41). The Court finds that Plaintiffs have stated a plausible claim of relief as to both Harrell and Hollingsworth. Both Defendants are permanent registrars under Amendment 51, tasked with registering qualified applicants to vote and enforcing the Wet Signature Rule, making them proper Defendants to this action. *281 Care Comm. v. Arneson*, 638 F.3d 621, 631-32 (8th Cir. 2011); *Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 785 (W.D. Ark. 2021) ("If an injunction against the county [officials] would provide at least partial redress to the alleged injury, it stands to reason that they are appropriate defendants for such a suit."); *see also* Ark. Const. amend. 51, §§ 2, 9(c); Doc. 46-7, p. 63. Further, Harrell's contention that the Individual Plaintiffs do not have standing against her is insufficient for dismissal, where, as here, the Court has already found that one party, GLA, has shown that it likely has standing as to all Defendants. *281 Care Comm.*, 638 F.3d at 631-32; *Horne*, 557 U.S. at 446–47, 129 S.Ct. 2579 (where plaintiffs seek identical relief, only one needs standing). Therefore, the Motions to Dismiss (Doc. 39 & 41) are **DENIED.**

VII. CONCLUSION

For the reasons explained herein, **IT IS ORDERED** that Plaintiffs' Motion for Preliminary Injunction (Doc. 46) be **GRANTED**, and Defendant Harrell and Defendant Hollingsworth's Motions to Dismiss (Docs. 39 & 41) be **DENIED**.

IT IS FURTHER ORDERED that Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, be **PRELIMINARILY ENJOINED** from enforcing the Wet Signature Rule and from rejecting or refusing to accept any voter registration application on the ground that it was signed with a digital or electronic signature.

IT IS SO ORDERED on this 9th day of September, 2024.

All Citations

--- F.Supp.3d ----, 2024 WL 4142754

Footnotes

1 At the time the suit was filed, the Rule had not formally been approved by the Legislative Council, but formal approval occurred on August 23, making the Rule permanent, effective on or around September 2. With leave of Court, Plaintiffs filed a Supplement (Doc. 63) to their Complaint on August 30 under Federal Rule of Civil Procedure 15(d) to acknowledge this development, and Defendants filed an Answer to the Supplement on September 6 (Doc. 70). In granting leave to file this Supplement, the Court made clear that it did not believe it necessary for relief considering the Plaintiffs' Complaint seeks relief against the Wet Signature Rule and "any other requirement that applicants sign their voter registration applications by hand or with a wet signature," thus encompassing the Wet Signature Rule—whether temporary or permanent. *See* Doc. 2, p. 24.

2 Even when comparing absentee ballot signature to registration signatures, Plaintiffs' evidence shows that county clerks often use PDF scans of the registration application or—where the voter registered through a Registration Agency—digital signatures. (Doc. 46-6, ¶¶ 18, 19). Counsel for Ms. Lewallen conceded at the hearing that "[i]n Washington County," the clerk uses "a scan of the paper copy" of the registration to make this comparison. (Doc. 64, pp. 70-71).

3 *See also* Mary Hennigan, *Get Loud Arkansas Sees Success in New Voter Registration Strategy*, Ark. Times (Feb. 26, 2024), https://arktimes.com/news/2024/02/26/get-loud-arkansas-sees-success-in-new-voter-registration-strategy [https://perma.cc/5RT8-7QCP].

4 Vote.org has operated in Arkansas through other means for many years, registering tens of thousands of Arkansans to vote between 2018 and 2022. *See* Doc. 46-3, ¶ 5.

5 Plaintiffs' explains that Loper submitted a hand-signed application in early 2024, which appears to have been accepted, but Loper's last name was incorrectly entered into the voter registration record as "Lopez." (Doc. 46-5, ¶ 9). Plaintiffs' understanding is that Loper will not be able to vote until properly registered under the correct legal name. *See id.* at ¶ 10. The Court notes that, at oral arguments, Defendants contended that this misspelling will not prevent Loper from voting in November. (Doc. 64, pp. 47–48). It is not necessary to the Court's resolution of the pending motions to determine whether Loper will indeed be permitted to vote while the registration record reflects the name "Lopez."

6 *Cf. Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1208-09 (8th Cir. 2023). Though *Arkansas State Conference NAACP* was analyzing whether § 2 of the Voting Rights Act had an implied right of action—rather than a right enforceable under § 1983—*Gonzaga* made explicit that step one

of the test is the same whether under § 1983 or under the statute itself. *Gonzaga*, 536 U.S. at 283, 122 S.Ct. 2268.

7 "The Supreme Court vacated *Migliori* and remanded to the Third Circuit with instructions to dismiss the case as moot.... One explanation for mootness is that after the Third Circuit ordered that the disputed ballots be counted, the election was certified. Then, essentially because plaintiffs had won, the Supreme Court vacated the Third Circuit's decision." *Callanen II*, 89 F.4th at 479 nn.6 & 7 (citations and quotation marks omitted). The Third Circuit remains consistent on this issue. *See Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 129 n.5 (3d Cir. 2024) (citing *Migliori*, 36 F.4th at 159-62 and *Callanen II*, 89 F.4th at 475-78) (assuming private plaintiffs can sue to enforce the Materiality Provision); *id.* at 140 n.3 (Shwartz, J., dissenting) (applying *Gonzaga* and *Talevski*).

8 *Cf. New York Ctr. for Foreign Pol'y Affs. v. U.S. Dep't of State*, 2024 WL 3400122, at *9 (D.D.C. July 12, 2024) (explaining the D.C. Circuit's two-step test for organizational standing: (1) that the organization's activities, not merely its mission, were impeded; and (2) that it used its resources to counteract that harm).

9 In *Alliance*, an organization called the Alliance for Hippocratic Medicine challenged the FDA's approval of mifepristone. The organization asserted it had standing because it had expended time and resources in challenging the FDA's approval and on educating communities about mifepristone. 602 U.S. at 394, 144 S.Ct. 1540.

10 *See also* Doc. 46-7, p. 31 (identifying GLA as an organization that they expect pushback from); *id.* at p. 19 (Secretary writing Attorney General specifically seeking guidance on digital signatures used on applications by "a third-party non-governmental agency"); *id.* at p. 27 (the SBEC stating, "the Board is seeking to provide uniform processes for all county clerks, pending the adoption of a permanent rule regarding voter registration application processes and electronic signatures submitted *by third-party registration organizations.*" (emphasis added)); *id.* at pp. 29-30 (noting the rule is meant to resolve conflict between clerks who are "accepting voter registration applications *from third-party organizations* that are signed by the applicant electronically" and those who are not (emphasis added)).

11 *Cf. Tennessee Conf. of the NAACP v. Lee*, 105 F.4th 888, 902-05 (6th Cir. 2024) (explaining that—in a case where an organization alleged harm based on a policy that made its voter registration efforts more costly but did not actually require or forbid any action of the organization—*Alliance* "creates uncertainty over when a plaintiff's own choice to spend money can give it standing to challenge a government action that allegedly caused the expenditure"); *North Carolina All. for Retired Ams. v. Hirsch*, —— F.Supp.3d ——, ——, 2024 WL 3507677, at *5 (E.D.N.C. July 19, 2024) (relying on *Alliance* in rejecting an organization's argument that it had standing to challenge a 30-day residency requirement on the basis that it "undermine[d]" the organization's "get-out-the-vote work" and "advocacy work" by "systematically preventing many of [its] members from voting ..., making [it] less effective in furthering its mission" because the requirement did not "directly affect and interfere with [the organization's] ability to advocate issues of importance to [its target audience]," and there was no showing of activities, such as voter registration, beyond advocacy (cleaned up) (citations omitted)).

12 Though the parties do not raise the issue of prudential standing, generally, litigants are "bar[red] ... from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). This is referred to as third-party standing and has generally been termed a "prudential" consideration. There is currently no clear answer whether prudential standing is jurisdictional—like Article III standing—or, as its name would suggest, merely prudential.

In *Lucas v. Jerusalem Cafe, LLC*, the Eighth Circuit identified a circuit split on this question, noted that its own opinions had gone both ways, and reserved its decision on the issue for another day. 721 F.3d 927, 938–39 (8th Cir. 2013) (collecting cases).

However, not all the circuits involved in the identified circuit split were addressing third-party standing. For example, the D.C. Circuit—the singular circuit identified by *Lucas* to hold prudential standing was jurisdictional—was considering the "zone of interests," not third-party standing. *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 179 (D.C. Cir. 2012). This is a significant distinction because, just two years later, the Supreme Court held that labelling the "zone of interests" question "prudential" was a "misnomer," and it was, in fact, an Article III consideration. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 & n.3, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (quoting *Ass'n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring). Further, Judge Silberman's concurring opinion in *Association of Battery Recyclers*—quoted in *Lexmark*—acknowledged that third-party standing, as opposed to "zone of interests," "spring[s] from concepts of jurisdictional prudence" and "really is a judge-made concept." *See Ass'n of Battery Recyclers*, 716 F.3d at 675-77. Most recently, in *Carson v. Simon*, the Eighth Circuit discussed the *Lexmark* decision, and specifically noted that "the Supreme Court recognized the concept of third-party standing may still fit within the prudential standing analysis." 978 F.3d 1051, 1058 (8th Cir. 2020) (citing *Lexmark*, 572 U.S. at 127 n.3, 134 S.Ct. 1377).

This Court believes that it is likely that third-party standing is truly a prudential—and not jurisdictional—issue. However, even if this Court were to conclude otherwise and address third-party standing *sua sponte*, it would still find that third-party standing is appropriate here because "enforcement of the challenged restriction *against the litigant*," i.e., GLA, "would result indirectly in the violation of third parties' rights." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (quoting *Warth*, 422 U.S. at 510, 95 S.Ct. 2197 and collecting cases). Due to the relationship between the parties, GLA's active participation in helping voters exercise their rights, and the fact that individual voters are also plaintiffs here, the traditional concerns with third-party standing—e.g., whether there is "concrete adverseness which sharpens the presentation of issues"—are not at issue. *NetChoice, LLC v. Griffin*, 2023 WL 5660155, at *10 (W.D. Ark. Aug. 31, 2023) (quoting *United States v. Windsor*, 570 U.S. 744, 760, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013)).

13 Though Defendants do not challenge these elements head on, the SBEC does challenge irreparable harm, which dovetails with the denial of the right to vote, and argues that the Rule does not frustrate the registration process because people can still register through traditional methods (i.e., paper applications). (Doc. 53, pp. 11, 15–16).

14 Several of the SBEC's arguments center around the contention that "the Materiality Provision does not prohibit Arkansas from enacting rules important to safeguarding election integrity, as [the provision] does not displace state registration rules" that are permissible under Arkansas law. (Doc. 53, p. 11). The SBEC has not made any argument—let alone any persuasive argument—as to why the Materiality Provision, a federal statutory provision, should bow to state law. "Whether or not an administrative rule comports with the state constitution says nothing about its lawfulness under the Civil Rights Act—a federal statute." (Doc. 58, p. 14).

Contrary to the SBEC's assertions, the Materiality Provision *may* "prohibit Arkansas from enacting rules important to safeguarding election integrity," where those rules "deny the right of any individual to vote in any election because of an error or omission" that "is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B) (emphasis added); *see also* Doc. 53, p. 11.

15 A person must also be lawfully registered in order to vote. Ark. Const. art. 3, § 1(4). And the SBEC argues that, under the Arkansas Constitution, Arkansans can vote only if they are "registered in a manner provided for by [ ] Amendment [51]." (Doc. 53, p. 10 (citations omitted)). Courts routinely reject arguments that because

something is made a requirement to vote or register, that it becomes material by the very nature of being required. *See, e.g., Callanen II*, 89 F.4th at 487 ("We reject that States may circumvent the Materiality Provision by defining all manners of requirements, no matter how trivial, as being a qualification to vote and therefore 'material.' "); *cf. United States v. Mississippi*, 380 U.S. 128, 137–38, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965) (concluding that the phrase "otherwise qualified by law" in § 10101(a)(1) means "qualifications required of all voters by valid state and federal laws"; including invalid laws would "dilute [Congress's] guarantee of the right to vote ... by saying at the same time that a State was free to disqualify its [Black] citizens by laws which violated the United State Constitution.").

16 The Court would also briefly note that the superimposition of the Wet Signature Rule onto Amendment 51 requires a distorted interpretation of the Arkansas Constitution, making it even less reasonable that such a requirement serves any purpose in determining voter qualifications.

17 The Fifth Circuit adopted the totality of the circumstances from § 2 of the Voting Rights Act and the Supreme Court's holding in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419, 426, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991), that a "State's interest in a voting measure 'is a legitimate factor to be considered by courts among the totality of the circumstances in determining whether a § 2 violation has occurred.' " *Callanen II*, 89 F.4th at 484 (cleaned up) (citing *Houston Lawyers'*, 501 U.S. at 426, 111 S.Ct. 2376; 52 U.S.C. § 10301(b)).

18 Simply because *Crawford* and *Gingles* were also vote-denial cases does not mean the tests used by the courts for constitutional challenges and challenges under a separate statute are proper. To borrow Judge Rodriguez's metaphor in *LUPE*: Though the Fourteenth Amendment, § 2 of the Voting Rights Act, and the Materiality Provision

> may have been enacted to address a common problem, one should not limit the other where they "play different roles in achieving these broad, common goals." Indeed, as a matter of common sense, it is simply incorrect to assume that tools directed at the same goal must operate by the same means. Umbrellas, goloshes, and raincoats, for example, all work toward the same purpose—protection from the elements—but function in completely different ways. To suggest that, because an umbrella works by "opening," we should likewise "open" our boots and coats in the face of a storm would be nonsensical and even—with respect to the raincoats—counterproductive.

LUPE, 705 F. Supp. 3d at 763 (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 244-45, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972)).

19 The Court is similarly skeptical of the district court's reasoning in *Vote.org v. Byrd*, 700 F. Supp. 3d 1047 (N.D. Fla. 2023), which relies almost entirely on the solemnity of a handwritten signature without much analysis, and certainly no analysis more in depth than what the Fifth Circuit provides in *Callanen II*.

20 The Court has further doubts as to the soundness of the solemnity reasoning. Digital signatures are widely recognized for all types of transactions and commitments. *See* Uniform Electronic Transaction Act ("UETA"), Ark. Code Ann. § 25-32-107(a) ("A record or signature may not be denied legal effect or enforceability solely because it is in electronic form."); Ark. Code Ann. § 25-32-107(d) ("If a law requires a signature, an electronic signature satisfies the law."). This is not to say the UETA applies to voter registration, but it demonstrates the State's acknowledgement of the legitimacy of digital signatures. *See also* Doc. 46-7, p. 23 (Attorney General Griffin noting the "widespread acceptance of electronic signatures").

21 The SBEC made an argument that Plaintiffs could not show irreparable harm because the "emergency rule adopted by SBEC, which is the subject of this lawsuit, is on the verge of being superseded by a rule recently passed by SBEC, effective on September 1, 2024." (Doc. 53, p. 15 (citations omitted)). The Court disagrees

with the SBEC on this point—as counsel for Ms. Harrell stated at the hearing, the rule doesn't "replace," but is "made permanent." Additionally, Plaintiffs brought this suit to enjoin any wet signature requirement, not merely the emergency rule. Nevertheless, out of an abundance of caution, the Court granted leave for the Plaintiffs to file a Rule 15(d) Supplement to their Complaint, which they filed on August 30, 2024, making clear that their pursuit of injunctive relief includes the now-permanent rule that was approved by the Legislative Council on August 23, 2024.

22 The Court previously addressed the SBEC's argument on the opportunity to cure in its discussion on the denial of the right to vote. Though the Court does not repeat its reasoning as to why it is unpersuaded that resubmission in compliance with the Rule would cure the Materiality Provision violation, that reasoning applies here as well.

23 Whether Vote.org will suffer irreparable harm is not as clear cut as GLA. In particular, the SBEC argues that harm to Vote.org is not imminent because it has not yet launched its online tool. The evidence shows, however, that Vote.org would have launched its tool in Arkansas—as it has done in various other states—but for the Wet Signature Rule and that the inability to do so has resulted in ongoing costs and resources.

24 Though neither party briefed the *Purcell* principle, the Court notes its agreement with Plaintiffs' statement at the hearing that *Purcell* is "not some magic wand that bars Courts from issuing injunctions some amount of time out from an election." *See* *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006); *cf.* *Brakebill v. Jaeger*, 905 F.3d 553, 560 (8th Cir. 2018) ("there is no universal rule that forbids a stay after Labor Day"). Indeed, *Purcell* is not at issue where, as here, the preliminary injunction "does not fundamentally alter the nature or rules of the election, create voter confusion, or create an incentive for voters to remain away from the polls," but rather it "*restores* and *maintains* the status quo that existed until" the SBEC's emergency rule. *Craig v. Simon*, 493 F. Supp. 3d 773, 789 (D. Minn.), *aff'd*, 980 F.3d 614 (8th Cir. 2020); *see also* *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) ("the same rationale that works to prevent election interference by federal courts also works to prevent interference by other entities as well"). Accordingly, *Purcell*'s concern with altering the election rules on the eve of an election is not at play here.

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2024 WL 4488082

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Only the Westlaw citation is currently available.

United States District Court, W.D. Texas, San Antonio Division.

LA UNIÓN DEL PUEBLO ENTERO, et al., Plaintiffs,

v.

Gregory W. ABBOTT, et al., Defendants.

5:21–CV–0844–XR [Consolidated Cases]

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Signed October 11, 2024

Synopsis

Background: Civil rights and social advocacy groups brought action against Texas, its Attorney General, its Secretary of State, and district attorneys for declaratory and injunctive relief against provisions of Election Protection and Integrity Act as preempted by voter assistance provision of Voting Rights Act (VRA). Defendants filed motions for dismissal and summary judgment.

Holdings: After bench trial, the District Court, Xavier Rodriguez, J., held that:

[1] groups had associational and organizational standing as to some claims;

[2] voter assistance provision of VRA preempted several statements in revised oath of assistance of voter;

[3] VRA provision preempted statutes requiring persons providing voter assistance to disclose relationship to voter and complete separate disclosure form;

[4] VRA provision preempted statutes banning compensated assistance and restricting canvassing;

[5] injunction against some provisions would implicate *Purcell* principle that, as a general rule, federal courts should not alter state election laws in the period close to an election; but

[6] enjoining criminal enforcement did not implicate *Purcell*.

Ordered accordingly.

Procedural Posture(s): Motion for Summary Judgment; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

West Headnotes (65)

[1] **Election Law** Powers and duties of officers in general

Texas Secretary of State is charged with broad duties to oversee administration of Texas's election laws. Tex. Educ. Code Ann. § 31.001(a).

[2] **Federal Courts** Subject-matter jurisdiction in general

"Subject matter jurisdiction" is a federal court's statutory or constitutional power to adjudicate a case.

[3] **Associations** Elections and voting rights

Election Law Parties; standing

Voter assistance provision of Voting Rights Act (VRA) permits private enforcement by both individual voters who need assistance and private organizations representing their interests. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508.

[4] **Federal Courts** Elections, voting, and political rights

Did preemption grant federal question jurisdiction?**Yes**

Action challenging provisions of Texas Election Code as preempted by Voting Rights Act arose under federal law, and, thus, court had federal question jurisdiction. 28 U.S.C.A. § 1331; Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. § 31.129, 31.130, 64.034, 64.0322(a)(2), (b), 86.010(e)(2), 86.0105, 86.013(b), 276.015.

More cases on this issue

[5] **Federal Courts** Civil rights and discrimination in general

Claims challenging state election laws as preempted by voter assistance provision of Voting Rights Act (VRA) are enforceable against state officials because, in enacting the VRA, Congress validly abrogated state sovereign immunity. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508.

[6] **Federal Civil Procedure** In general; injury or interest

Standing is a component of subject matter jurisdiction.

[7] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Plaintiff invoking a federal court's jurisdiction must establish standing by satisfying three irreducible requirements: (1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendants, and (3) that is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

[8] **Federal Civil Procedure** In general; injury or interest

The elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case.

[9] **Federal Civil Procedure** In general; injury or interest

Each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

[10] **Federal Civil Procedure** In general; injury or interest

In a case that proceeds to trial, plaintiffs must establish all three elements of standing by a preponderance of the evidence.

[11] **Declaratory Judgment** Proper Parties

Plaintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement for standing only by demonstrating a continuing injury or threatened future injury for the self-evident reason that injunctive and declaratory relief cannot conceivably remedy any past wrong.

[12] **Declaratory Judgment** Proper Parties

To constitute an injury in fact necessary for standing in suit for injunctive or declaratory relief, a threatened future injury must be (1) potentially suffered by the plaintiff, not someone else; (2) concrete and particularized, not abstract; and (3) actual or imminent, not conjectural or hypothetical.

[13] **Federal Courts** Injury, harm, causation, and redress

For a threatened future injury to satisfy the imminence requirement, there must be at least a substantial risk that the injury will occur.

[14] **Federal Courts** Injury, harm, causation, and redress

Injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle because the injury-in-fact requirement under Article III is qualitative, not quantitative, in nature. U.S. Const. art. 3, § 2, cl. 1.

[15] **Associations** Suits on organization's own behalf; organizational standing in general

Associations Suits on Behalf of Members; Associational or Representational Standing

Juridical entities may establish standing under an associational or organizational theory of standing.

[16] **Associations** Suits on Behalf of Members; Associational or Representational Standing

Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted, nor the relief requested, requires participation of individual members. U.S. Const. art. 3, § 2, cl. 1.

[17] **Associations** Participation of members; necessity of individualized proof

Participation of individual members is not required for associational standing where the association seeks prospective and injunctive relief, rather than individualized damages.

[18] **Associations** Injury or interest in general

Associations Causation and redressability in general

Organizational standing does not depend on the standing of the organization's members, and the organization can establish standing in its own name if it can show an injury in fact that is fairly traceable to the challenged conduct of the defendants and that is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

[19] **Constitutional Law** Associations and organizations

An organization can establish a likely future injury supporting standing if it intends to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute.

[20] **Associations** Injury or interest in general

Unregulated organization can demonstrate the requisite injury for standing by showing that the challenged conduct or regulation has perceptibly impaired the organization's core business activities.

[21] **Associations** Injury or interest in general

Unregulated organization's core business activities need not be profit-driven to satisfy standing requirements when challenged conduct or regulation has perceptibly impaired the organization's core business activities.

[22] **Federal Civil Procedure** In general; injury or interest

Economic injury is not the only kind of injury that can support a plaintiff's standing.

[23] **Associations** Injury or interest in general

A mission-driven organization claiming standing must proffer evidence of interference with its core activities to ensure it has a personal stake in the outcome of case beyond its abstract social interests.

[24] **Associations** Injury or interest in general

Effect on the organization's activities need not be great to confer organizational standing.

[25] **Federal Civil Procedure** Causation; redressability

When the plaintiff is an unregulated party, causation necessary for standing ordinarily hinges on the response of the regulated or regulable third party to the government action or

inaction—and perhaps on the response of others as well.

[26] **Federal Civil Procedure** 🔑 Causation; redressability

Plaintiffs generally cannot show causation necessary for standing by relying on speculation about the unfettered choices made by independent actors not before the court; therefore, to thread the causation needle in those circumstances, the plaintiff must show that the third parties will likely react in predictable ways that in turn will likely injure the plaintiffs.

[27] **Federal Civil Procedure** 🔑 Causation; redressability

Line of causation between illegal conduct and injury—the links in the chain of causation necessary for standing—must not be too speculative or too attenuated.

[28] **Federal Civil Procedure** 🔑 Causation; redressability

Causation requirement necessary for standing is satisfied where it is sufficiently predictable how third parties would react to government action or cause downstream injury to plaintiffs.

[29] **Federal Civil Procedure** 🔑 Causation; redressability

Traceability requirement for standing is not a proximate cause standard; it can be satisfied with a showing that the alleged injury was only indirectly caused by the defendant.

[30] **Federal Civil Procedure** 🔑 Causation; redressability

An injury is "redressable" as required for standing when it is likely as opposed to merely speculative that a decision in a plaintiff's favor would grant the plaintiff relief.

[31] **Federal Civil Procedure** 🔑 Causation; redressability

Plaintiff claiming standing does not need to demonstrate that a favorable decision will relieve every injury; plaintiff only needs to show that a decision in plaintiff's favor will relieve a discrete injury to plaintiff.

[32] **Federal Civil Procedure** 🔑 Causation; redressability

Even the ability to effectuate a partial remedy satisfies the redressability requirement for standing.

[33] **Declaratory Judgment** 🔑 Proper Parties

Plaintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement for standing by demonstrating continuing harm or a real and immediate threat of repeated injury in the future.

[34] **Federal Civil Procedure** 🔑 In general; injury or interest

A threatened future injury suffices for standing so long as there is a substantial risk that the harm will occur.

[35] **Injunction** 🔑 Persons entitled to apply; standing

When multiple plaintiffs seek the same injunctive relief, only one needs to establish standing.

[36] **Associations** 🔑 Elections and voting rights

Nonprofit organization of Black, college-educated women focused on serving Black community through social action lacked organizational standing to challenge, as preempted by voter assistance provision of Voting Rights Act (VRA), Texas statute requiring driver transporting seven or more

voters to polls for curbside voting to complete disclosure form stating name and address and stating whether she is assisting completion of ballots; given limited applicability of disclosure requirement, it was not sufficiently predictable that organization's members would respond to the statute by refusing to provide transportation to the polls altogether, even for voters casting their ballots inside polling place, and thus organization failed to show that injury was fairly traceable to the statute. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. § 64.009.

More cases on this issue

[37] **Associations** Elections and voting rights

Non-profit organization to advocate for children with intellectual and developmental disabilities had associational standing to challenge, as preempted by voter assistance provision of Voting Rights Act (VRA), Texas statute amending oath of assistance to eligible voter; registered voters who voted without assistance or without chosen assistant each suffered injury in fact and would have standing in her own right and would be unwilling to expose attendants to criminal liability, members' interests were germane to organization's purposes of empowering people with disabilities in voting process, and injuries were fairly traceable to state, Texas Secretary of State and Attorney General, local election officials, and prosecutors, and government act had predictable effect on third parties. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 64.034, 86.002, 86.003, 86.004, 86.008, 86.009, 86.011.

More cases on this issue

[38] **Associations** Elections and voting rights

Injuries to voters as result of amended oath of assistance to eligible voter were fairly traceable to Texas Secretary of State who had created forms for oath, local election officials who were responsible for administering oath and printing, sending, receiving, and reviewing ballot envelopes, clerks of counties where voters declined assistance or help from preferred assistant, district attorneys and state based on chilling effect from credible threat of criminal enforcement, and Texas Attorney General with investigatory powers and ability to prosecute with permission of local prosecutor, and, thus, injuries supported associational standing of organizational advocate for children with disabilities in suit claiming preemption by voter assistance provision of Voting Rights Act (VRA). Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 64.034, 86.002, 86.003, 86.004, 86.008, 86.009, 86.011, 273.002(1).

More cases on this issue

[39] **Associations** Elections and voting rights

Civil rights and social advocacy groups had organizational standing to challenge, as preempted by voter assistance provision of Voting Rights Act (VRA), Texas statutes amending oath of assistance to eligible voters and imposing new disclosure and documentation requirements on persons who provided voter assistance; organizational injuries are fairly traceable to statutes and government officials, chilling effect that disclosure and oath requirements would have on individuals' willingness to provide voting assistance and downstream effects on groups' ability to perform voter assistance services were sufficiently predictable, and order declaring requirements unlawful and enjoining enforcement would remove chilling effect on voter assistance by groups. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 64.0322(a), 64.0322(b), 64.034, 86.010(e), 86.013(b).

More cases on this issue

[40] **Associations** Elections and voting rights

Injuries to efforts of civil rights and social advocacy groups to provide voter assistance as result of Texas statutes amending oath of assistance to eligible voters and imposing

new disclosure and documentation requirements on persons who provided assistance were traceable to Texas Secretary of State who created forms implementing requirements, local election officials who administered oaths, collected disclosures, and reviewed mail ballots in counties in which groups operated, and Texas Attorney General and local district attorneys based on chilling effect that credible threat of criminal enforcement had on willingness to provide assistance, and, thus, injuries supported organizational standing in suit claiming preemption by voter assistance provision of Voting Rights Act (VRA). Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 64.0322(a), 64.0322(b), 64.034, 86.010(e), 86.013(b).

More cases on this issue

[41] **Associations** Elections and voting rights

Social and voting advocacy groups had organizational standing to sue Texas Attorney General and Secretary of State and district attorneys in counties in which groups operated to challenge, as preempted by voter assistance provision of Voting Rights Act (VRA), Texas criminal statute banning compensation or offer to compensate another person or to solicit, receive, or accept compensation for assisting voters with mail-in ballots; groups' conduct was directly regulated and exposed them and members to criminal liability, and organizational injuries from inability to provide mail-ballot assistance were fairly traceable to defendants. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. § 86.0105(a, c); Tex. Penal Code Ann. § 38.01(3).

More cases on this issue

[42] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

When suit is one challenging legality of government action or inaction and the plaintiff is himself an object of the action or forgone action at issue, there is ordinarily little question that the action or inaction has caused injury and that a judgment preventing or requiring the action will redress it, thus establishing standing.

[43] **Associations** Elections and voting rights

Social advocacy groups lacked organizational standing to sue local election officials to challenge, as preempted by voter assistance provision of Voting Rights Act (VRA), Texas criminal statute banning compensation or offer to compensate another person or to solicit, receive, or accept compensation for assisting voters with mail-in ballots; officials lacked criminal enforcement authority. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. § 86.0105(a, c).

More cases on this issue

[44] **Associations** Elections and voting rights

Civil rights and social advocacy groups had organizational standing to challenge, as preempted by voter assistance provision of Voting Rights Act (VRA), canvassing restriction in Texas criminal statute that prohibited compensation or other benefit for vote harvesting services; groups could no longer ask staff members to provide mail-ballot assistance as part of their jobs or treat volunteers who provided such assistance during in-person events, their conduct was being directly regulated and exposed groups to criminal liability, their inability to provide mail-ballot assistance was fairly traceable to Texas Attorney General and Secretary of State and to district attorneys in jurisdictions in which groups operated, and favorable decision would likely redress injuries. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. § 276.015(f).

More cases on this issue

[45] **Associations** Elections and voting rights

Civil rights and social advocacy groups lacked organizational standing to sue local election officials to challenge, as preempted by voter

assistance provision of Voting Rights Act (VRA), canvassing restriction in Texas criminal statute that prohibited compensation or other benefit for vote harvesting services; officials had no criminal enforcement authority. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. § 276.015(f).

More cases on this issue

[46] **Federal Preemption** Impossibility of complying with both state and federal law

Federal Preemption State law as obstacle to objectives or purpose of federal law

Supremacy Clause requires preemption of any state statute that, when enacted, makes compliance with both federal and state law impossible or stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress. U.S. Const. art. 6, cl. 2.

[47] **Election Law** Voting procedures

Voter assistance provision of Voting Rights Act (VRA) provides covered voters with more than a bare right to assistance in the poll booth; rather, it ensures that they will have access to any kind of assistance they need, at any step of the voting process, from a person of their choice other than their employer or a representative of their union. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508.

[48] **Election Law** Assistance to voters

Federal Preemption Elections

Voter assistance provision of Voting Rights Act (VRA) preempts state laws that impermissibly constrain access to voting assistance in various ways. U.S. Const. art. 6, cl. 2; Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508.

[49] **Election Law** Voting procedures

Voter assistance provision of Voting Rights Act (VRA) which entitles voters with disabilities and voters unable to read or write to assistance from "a person" of voter's choice, other than voter's employer or agent of that employer or officer or agent of voter's union, does not allow states to impose additional limitations or exceptions not stated in statute and does not allow states to give voters a choice between two assistors hand-picked by state; text of provision does not allow states to impose additional limitations or exceptions not stated in statute, and "a" as opposed to "the" is appropriate to clarify that the protections are enforceable against government attempts to encroach on voter's choice of assistor, but are not enforceable against putative assistors themselves. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508.

[50] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.

[51] **Election Law** Assistance to voters

Federal Preemption Elections

Voter assistance provision of Voting Rights Act (VRA) preempted "penalty of perjury" language added to oath of assistance by Texas statute requiring assistor to swear under penalty of perjury; the language deterred assistors from providing qualified voters with assistance and deterred voters from requesting assistance they needed to vote. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 64.034, 276.018.

More cases on this issue

[52] **Election Law** Assistance to voters

Federal Preemption Elections

Voter assistance provision of Voting Rights Act (VRA) preempted language added to oath of assistance by Texas statute requiring assistor to swear that voter represented eligibility for assistance; VRA afforded voters right to

assistance from chosen assistor regardless of representations to assistor about why they needed assistance in voting process, possibility that otherwise valid ballot could be tossed out based on a mistaken belief about a voter's eligibility for assistance discouraged assistance, and the language promised to deter otherwise lawful assistors from providing necessary aid to a vulnerable population. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. § 64.034.

More cases on this issue

[53] **Election Law** Assistance to voters

Federal Preemption Elections

Voter assistance provision of Voting Rights Act (VRA) preempted language added to oath of assistance by Texas statute requiring assistor to swear that assistor did not pressure or coerce voter into choosing assistor; oath did not define "pressure or coerce" or include a scienter element, but required assistor to accurately judge actual consequences of conduct on another person's state of mind, judged against two undefined terms, and chilling effect of the vague statement frustrated purpose of VRA. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. § 64.034.

More cases on this issue

[54] **Election Law** Assistance to voters

Federal Preemption Elections

Voter assistance provision of Voting Rights Act (VRA) preempted Texas statutes requiring persons providing voter assistance to disclose relationship to voter and complete separate disclosure form; oath of assistance already required assistors to swear or affirm that they were not voter's employer or agent of that employer or officer or agent of voter's union, the voter disclosure requirement appeared designed to distinguish between assistors with no relationship to voter and assistors who were family members and caregivers to the voter, and Texas sought to substitute its belief that assistors should have a close, personal relationship with voters over Congress's judgment that voters should be empowered to choose anyone other than their employer or union representative. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 64.0322(a)(2), (b), 86.010(e)(2), 86.013(b).

More cases on this issue

[55] **Election Law** Assistance to voters

Federal Preemption Elections

Voter assistance provision of Voting Rights Act (VRA) preempted Texas statutes banning compensated assistance and restricting canvassing; the bans facially restricted class of people eligible to provide voting assistance beyond the categories of prohibited individuals, i.e., voter's employer or agent of that employer or officer or agent of voter's union, they thus interfered with and frustrated substantive right Congress created, and even if Texas statutes purported to share VRA's goal of preventing voter coercion, Congress decided that assistor of choice, as opposed to election official, would best ensure that voter's intent was carried out when marking ballot. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 86.0105(a, c), 276.015.

More cases on this issue

[56] **Injunction** Grounds in general; multiple factors

A party seeking a permanent injunction must prove that: (1) it has succeeded on the merits; (2) a failure to grant the injunction will result in irreparable injury; (3) said injury outweighs any damage that the injunction will cause the opposing party; and (4) the injunction will not disserve the public interest.

[57] **Injunction** Specificity, vagueness, overbreadth, and narrowly-tailored relief

An injunction is overly vague if it fails to satisfy the specificity requirements for permanent injunction, and it is overbroad if it is not narrowly tailored to remedy the specific action which

gives rise to the order as determined by the substantive law at issue. Fed. R. Civ. P. 65(d)(1).

[58] **Injunction** Voters, registration, and eligibility

Failure to grant permanent injunction against Texas statutes revising oath of assistance to voters, requiring persons providing voter assistance to disclose relationship to voter and complete separate disclosure form, banning compensation for mail ballot assistance, and restricting canvassing would result in irreparable injury to civil rights and social advocacy groups and their members by interfering with voters' rights and ability to vote with help from their chosen assistors. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 31.129, 31.130, 64.034, 64.0322(a)(2), (b), 86.010(e)(2), 86.0105, 86.013(b), 276.015; Fed. R. Civ. P. 65(d)(1).

More cases on this issue

[59] **Injunction** Voters, registration, and eligibility

Permanent injunction against Texas statutes revising oath of assistance to voters, requiring persons providing voter assistance to disclose relationship to voter and complete separate disclosure form, banning compensation for mail ballot assistance, and restricting canvassing would serve the public interest by protecting individuals' right to vote with help from their chosen assistors under voter assistance provision of Voting Rights Act (VRA) and their fundamental right to vote. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 31.129, 31.130, 64.034, 64.0322(a)(2), (b), 86.010(e)(2), 86.0105, 86.013(b), 276.015; Fed. R. Civ. P. 65(d)(1).

More cases on this issue

[60] **Election Law** Scope of Inquiry and Powers of Court or Board

Court must weigh any protective action against the potential for confusion and disruption of election administration under the *Purcell* principle that, as a general rule, federal courts should not alter state election laws in the period close to an election.

[61] **Injunction** Elections, Voting, and Political Rights

Even when *Purcell* applies, it does not constitute an absolute bar on all injunctive relief in runup to an election.

[62] **Injunction** Voters, registration, and eligibility

Injunction requiring Texas Secretary of State to withdraw form on oath of assistance of voter, remove "Relationship to Voter" line from mail-ballot carrier envelope, revise oath printed on mail ballot carrier envelope, and revise any training and instructional materials for state and county election officials to remove language that reflected substance of enjoined oath language or the voter relationship disclosure requirements implicated *Purcell* principle that, as a general rule, federal courts should not alter state election laws in the period close to an election, and, thus, injunction against enforcement of statutes preempted by voter assistance provision of Voting Rights Act (VRA) would be stayed until after November 2024 general election. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 64.034, 64.0322(a)(2), (b), 86.010(e), 86.013(b).

More cases on this issue

[63] **Injunction** Voters, registration, and eligibility

Injunction barring Texas election officials from using forms proscribed by Texas Secretary of State concerning oath of assistance of voter and assistor disclosure of relationship to voter implicated *Purcell* principle that, as a general rule, federal courts should not alter state election laws in the period close to an election, and,

thus, injunction against enforcement of statutes preempted by voter assistance provision of Voting Rights Act (VRA) would be stayed until after November 2024 general election. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 64.034, 64.0322(a)(2), (b), 86.010(e), 86.013(b).

More cases on this issue

[64] **Injunction** Voters, registration, and eligibility

Enjoining Texas Attorney General and Secretary of state and district attorneys from conducting criminal enforcement proceedings premised on violations of preempted statutes on oath of assistance of voter, disclosures by assistor, and compensated assistance would not implicate *Purcell* principle that, as a general rule, federal courts should not alter state election laws in the period close to an election; enjoining enforcement proceedings did not require changes to the oath, and injunction against criminal enforcement was removed in space and time from mechanics and procedures of voting. Voting Rights Act of 1965 § 208, 52 U.S.C.A. § 10508; Tex. Elec. Code Ann. §§ 31.129, 31.130, 64.034, 64.0322(a)(2), (b), 86.010(e)(2), 86.0105, 86.013(b), 276.015.

[65] **Injunction** Elections, Voting, and Political Rights

Injunction Particular cases

Purcell principle that, as a general rule, federal courts should not alter state election laws in the period close to an election justifies a temporary stay of otherwise permanent injunctive relief, and, even then, only to the extent that an injunction materially impacts election administration.

West Codenotes

Preempted

Tex. Elec. Code Ann. §§ 31.129, 31.130, 64.034, 64.0322(a)(2), (b), 86.010(e)(2), 86.0105, 86.013(b), 276.015

FINDINGS OF FACT AND CONCLUSIONS OF LAW (CLAIMS UNDER SECTION 208 OF THE VOTING RIGHTS ACT)

XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGE

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The Arc of Texas...——

Delta Sigma Theta Sorority, Inc....——

The OCA Plaintiffs...——

OCA-Greater Houston...——

The League of Women Voters of Texas...——

The LUPE Plaintiffs...——

La Union Del Pueblo Entero...——

Mexican American Bar Association of Texas...——

Familias Inmigrantes Estudiantes Luchar...——

The LULAC Plaintiffs...——

League of United Latin American Citizens...——

Defendants...——

The State Defendants...——

The State of Texas...——

Texas Attorney General...——

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County Defendants...——

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INTRODUCTION

On September 7, 2021, Texas Governor Greg Abbott signed into law the Election Protection and Integrity Act of 2021, an omnibus election law commonly referred to as "S.B. 1." *See* Election Integrity Protection Act of 2021, S.B. 1, 87th Leg., 2d Spec. Sess. (2021).

Premised on the state legislature's authority to make all laws necessary to detect and punish fraud under article VI, section 4 of the Texas Constitution, S.B. 1 modified various provisions of the Texas Election Code, imposing, among other things, new restrictions on voter assistance and in-person canvassing activities. *See, e.g.*, S.B. 1 §§ 6.01, 6.03–6.07, 7.04 (JEX-1 at 50–56, 59–60).

Several private plaintiffs filed lawsuits, challenging certain provisions of S.B. 1 as unconstitutional and otherwise unlawful under federal voter-protection statutes. For judicial economy, these were consolidated under the above-captioned case, which was first filed. [1]

***2** Four Plaintiffs groups—the HAUL Plaintiffs, [2] the OCA Plaintiffs, [3] the LUPE Plaintiffs, [4] and the LULAC Plaintiffs [5] —collectively challenge S.B. 1 §§ 6.01, 6.03–6.07, and 7.04 (the "Assistance Provisions") as preempted by Section 208 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10508, which guarantees qualified voters the right to vote with an assistor of their choice.

Plaintiffs allege that S.B. 1's new disclosure requirements (§§ 6.01, 6.03, 6.05, 6.07), modifications to the oath of assistance (§ 6.04), ban on compensated assistance (§ 6.06) and in-person canvassing restriction (§ 7.04) subvert the protections of Section 208 by narrowing the class of eligible assistors, requiring voters to take additional steps as a prerequisite to receiving assistance, and deterring voters from requesting —and assistors from providing—assistance in the voting

process. Following a six-week bench trial, the Court largely agrees.

After careful consideration, the Court issues the following findings of fact and conclusions of law pursuant to FED. R. CIV. P. 52(a) bearing on Plaintiffs' Section 208 claims.

PROCEDURAL HISTORY

Plaintiffs filed their original complaints in August and September 2021, seeking to enjoin the State of Texas and the Secretary of State and Attorney General of the State of Texas (together, the "State Defendants") and local election officials from enforcing many provisions of S.B. 1, including provisions that, like most of the Assistance Provisions, impose criminal liability.

In December 2021, the Texas Court of Criminal Appeals held in *State v. Stephens* that the Election Code's delegation of unilateral prosecutorial authority to the Attorney General to prosecute election crimes violated the separation-of-powers clause of the Texas Constitution. 663 S.W.3d 45 (Tex. Crim. App. 2021). The court explained that the Texas Constitution assigns to county and district attorneys, members of the judicial branch, the "specific duty" to represent the state in criminal prosecutions. *Id.* at 52. The Attorney General, as part of the state's executive branch, has no similar, independent power under the Texas Constitution. Thus, the Attorney General can prosecute election crimes only with the consent of local prosecutors through a deputization order. *Id.* at 47.

***3** Following *Stephens*, Plaintiffs amended their complaints to join local district attorneys from several Texas counties as Defendants.[6] The State Defendants moved to dismiss these complaints in their entirety, including Plaintiffs' Section 208 challenges. The Court denied the motions as to those challenges in August 2022, concluding that the VRA waived sovereign immunity and created a private right of action to enforce Section 208, and that Plaintiffs had adequately alleged standing to assert their Section 208 claims.[7]

In May 2023, the State Defendants joined in a motion for summary judgment filed by a group of Republican committees (the "Intervenor-Defendants"),[8] arguing that: (1) state-law restrictions and requirements on assistors "of the voter's choice" do not violate Section 208 and therefore cannot be preempted; and (2) Section 208 permits state-law restrictions on who may serve as an assistor beyond the limitations provided in federal law. *See* ECF No. 608 at 27–30. The District Attorney of Harris County, Kim Ogg, also moved for summary judgment, asserting that Plaintiffs lacked standing. *See* ECF No. 614. The Court carried the motions with the case and addresses their arguments herein to the extent that they were not disposed in the Court's orders disposing of the State Defendant's motions to dismiss.

The Court held a bench trial from September 11, 2023, to October 20, 2023. In all, the parties presented about 80 witnesses (both live and by deposition testimony), nearly 1,000 exhibits, and producing over 5,000 pages of trial transcripts. The Court heard testimony from voters, Plaintiffs' organizational representatives and volunteers, former and current state and local officials, and expert witnesses.

The parties submitted proposed findings of fact and conclusions of law in January 2024,[9] and presented closing arguments on February 13, 2024.

FINDINGS OF FACT

***4** 1. Under S.B. 1, Texas law recognizes the following interactions as crimes under the Texas Election Code (the "Election Code" or "TEC"):

a. A man helps his blind wife of 20 years cast her ballot at the polls without first securing a representation from her that she is "eligible for assistance." Even if he completes her ballot according to her exact instructions, he faces up to two years in prison and a fine of up to $10,000. *See* TEC § 276.018(b); TEX. PENAL CODE § 12.35; Tr. at 3991:1–5.

b. While meeting with a client about his tax return, a staff member for a community organization that provides free income tax services agrees to help translate the man's mail-in ballot. The client fills out his own ballot, with accurate translation assistance from the staff member. Even though the ballot reflects the clients wishes, the staff member faces up to two years in prison, she and her employer may be fined up to $10,000, and the client's ballot may not be counted. *See* TEC §§ 86.0105(a), (c); TEX. PENAL CODE § 12.35; TEC § 86.010(d); Tr. at 3996:8–3997:5.

c. An elderly woman with arthritis answers her door to find a college student from her alma mater canvassing

> for a ballot measure that would create an endowment for their school. Mentioning her arthritis, the woman asks the student for help completing her mail ballot and offers the student an iced tea and cookies as a token of her appreciation. The student agrees and completes the ballot according to the voter's instructions. The voter and the student each face up to 10 years in prison and fines of up to $10,000. *See* TEC §§ 276.015(a)–(c), (f); TEX. PENAL CODE § 12.34; Tr. at 1904:1–1906:5, 3995:11–24.

2. Plaintiffs assert that, by criminalizing these routine interactions and imposing additional requirements on voters and their assistors, various provisions of S.B. 1 have frustrated qualified voters' rights under federal law to voting assistance from a person of their choice.

3. Section 208 of the Voting Rights Act provides:

> Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

52 U.S.C. § 10508.

4. Section 208 creates a federally guaranteed right of an assistant of the voter's choice when "voting," which includes "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration ... or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast[.]" 52 U.S.C. § 10310(c)(1).

5. Congress enacted Section 208 "[t]o limit the risks of discrimination" against voters with who require assistance and "avoid denial or infringement of the[ir] right to vote." S. Rep. No. 97-417 at 62 (May 25, 1982). As the Senate Report explains:

> Clearly, the manner of providing assistance has a significant effect on the free exercise of the right to vote by such people who need assistance. Specifically, it is only natural that many such voters may feel apprehensive about casting a ballot in the presence of, or may be misled by, someone other than a person of their own choice. As a result, people requiring assistance in some jurisdictions are forced to choose between casting a ballot under the adverse circumstances of not being able to choose their own assistance or forfeiting their right to vote. The Committee is concerned that some people in this situation do in fact elect to forfeit their right to vote. Others may have their actual preference overborne by the influence of those assisting them or be misled into voting for someone other than the candidate of their choice." The Committee has concluded that the only kind of assistance that will make fully 'meaningful' the vote of the blind, disabled, or those who are unable to read or write, is to permit them to bring into the voting booth a person whom the voter trusts and who cannot intimidate him.

***5** *Id.* at 472.

THE CHALLENGED PROVISIONS

Section 6.01 – Transportation Disclosures (Curbside Voting)

6. Texas provides curbside voting for voters who are "physically unable to enter the polling place without personal assistance or likelihood of injuring the voter's health," allowing them to vote from the convenience and safety of a vehicle during early voting or on Election Day. TEC § 64.009(a); *see* Tr. at 4355:22–4356:2.

7. Section 6.01 of S.B. 1 modified Texas's curbside voting procedures by requiring a person who "simultaneously" provides seven or more voters with transportation to a polling place for curbside voting to complete and sign a form—

prescribed by the Secretary of State and provided by an election officer—reporting her name, address, and whether she is only providing transportation or also serving as an assistant to the voters. TEC §§ 64.009(e), (f), (h). [10]

8. Section 6.01 further provides that "a poll watcher is entitled to observe any activity conducted under this section," other than the preparation of a voter's ballot with an assistor of the voter's choice. TEC § 64.009(e). Poll watchers are thus entitled to observe drivers as they fill out the form prescribed by the Secretary of State.

9. Completed forms must be delivered to the Secretary of State as soon as practicable. TEC § 64.009(g). The Secretary must make the form available to the Attorney General for inspection upon request. *Id.*

Section 6.04 – Amendments to Oath of Assistance

10. Section 6.04 of S.B. 1 amends the oath that a person assisting a voter is required to swear (the "Oath of Assistance" or "Oath") by adding the underlined and bolded language:

> I swear (or affirm) **under penalty of perjury** that **the voter I am assisting represented to me they are eligible to receive assistance**; I will not suggest, by word, sign, or gesture, how the voter should vote; [~~I will confine my assistance to~~ **reading the ballot to the voter, directing the voter to read the ballot, marking the voter's ballot, or directing the voter to mark the ballot** ;] [11] ~~answering the voter's questions, to stating propositions on the ballot, and to naming candidates and, if listed, their political parties;~~ I will prepare the voter's ballot as the voter directs; **I did not pressure or coerce the voter into choosing me to provide assistance**; [and] I am not the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs; **I will not communicate information about how the voter has voted to another person**; **and I understand that if assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted.**

TEC § 64.034. An offense under this subsection is a state jail felony, punishable by up to two years in prison and a fine of up to $10,000 and will result in the rejection of the voter's ballot. TEC § 276.018(a)(2)–(b); TEX. PENAL CODE §§ 12.35(a), (b).

***6** 11. An assistor must take the Oath of Assistance (and complete the disclosure form) for each voter she assists. Election officials, on the other hand, are not required to take the Oath or complete the disclosure form. *See* TEC § 64.034. When a voter receives assistance from an election official, however, Texas law permits poll watchers to be present at the voting station, and the watchers are entitled to examine the ballot before it is deposited in the ballot box. TEC § 33.057(a).

12. The Oath of Assistance must be printed on BBM carrier envelopes and signed by the assistor. TEC § 86.013(e); *see* LUPE-009 (form BBM carrier envelope prescribed by the Secretary of State).

13. Providing mail ballot assistance without signing the Oath is a state jail felony unless the assistor is a close relative of the voter or is physically living with the voter when the assistance is provided. *See* TEC § 86.010(h)(1).

Sections 6.03, 6.05, 6.07 – Assistor Disclosures

14. Before S.B. 1, the Election Code provided that, if assistance was provided by a person of the voter's choice at a polling place, an election officer must enter the person's name and address on the poll list beside the voter's name. *See* TEC § 64.032(d). A person providing mail-ballot assistance was required to provide his or her signature, printed name, and a residential address. *See* TEC § 86.010(e); JEX-1 at 53.

15. Sections 6.03, 6.05 and 6.07 of S.B. 1 added provisions imposing new disclosure and documentation requirements on persons who provide voter assistance.

16. Section 6.03 provides: "A person, other than an election officer, who assists a voter in accordance with this chapter is required to complete a form stating: (1) the name and address of the person assisting the voter; (2) the relationship to the voter of the person assisting the voter; and (3) whether the

person assisting the voter received or accepted any form of compensation or other benefit from a candidate, campaign, or political committee." TEC § 64.0322(a).

17. The Secretary of State must prescribe the Assistor Disclosure form. TEC § 64.0322(b). As prescribed by the Secretary, the form also contains the "Oath of Assistance," discussed below. *See* LUPE-189 ("Oath of Assistance Form").

18. Section 6.05 amended the Election Code to require a person who assists a mail-in voter to disclose their relationship with the voter and any compensation from a candidate, campaign, or political committee on the assisted-voter's BBM carrier envelope. TEC § 86.010(e). The Election Code already required assistors to provide their names and addresses on the carrier envelope. *See id.*; JEX-1 at 53.

19. Section 6.07 amends the disclosures on the BBM carrier envelopes that must be completed by anyone providing ballot-dropping assistance to add a space indicating the assistor's relationship to the voter (along with the person's name and address, which were already required). TEC § 86.013(b).

20. As prescribed by the Secretary of State, the form BBM carrier envelope does not distinguish between assistance in completing the ballot and ballot-dropping assistance. *See* LUPE-009 ("If you are assisting a voter by depositing the Carrier Envelope in the mail or with a common or contract carrier, you must complete the assistant section below.").

21. Providing BBM assistance without completing the Assistor Disclosures is a state jail felony, punishable by up to two years' confinement and a fine of up to $10,000 and may result in the rejection of the voter's ballot. TEC § 86.010(g); TEX. PENAL CODE §§ 12.35(a), (b). The criminal consequences are inapplicable, however, to mail-ballot assistance provided by a close relative of the voter or a person who was physically living with the voter when the assistance was provided. *See* TEC § 86.010(h)(2).

***7** 22. Although the Assistor Disclosures required under §§ 6.03 and 6.05 are technically distinct from the required Oath of Assistance set forth in § 6.04, the requirements are, as a practical matter, indistinguishable to assistors. As the images below demonstrate, on both the "Oath of Assistance" form and the form mail ballot carrier envelope prescribed by the Secretary, the space for the assistor's signature (subscribing to the Oath) appears in the same section as the disclosure requirements—directly under the printed Oath language.

Oath of Assistance

OATH OF ASSISTANCE

Type of Election | Polling Location

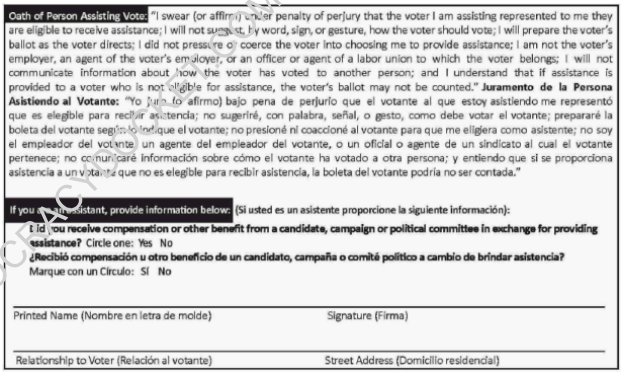
Date of Election | Authority Conducting Election

Oath of Person Assisting Voter: "I swear (or affirm) under penalty of perjury that the voter I am assisting represented to me they are eligible to receive assistance; I will not suggest, by word, sign, or gesture, how the voter should vote; I will prepare the voter's ballot as the voter directs; I did not pressure or coerce the voter into choosing me to provide assistance; I am not the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs; I will not communicate information about how the voter has voted to another person; and I understand that if assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted." **Juramento de la Persona Asistiendo al Votante:** "Yo juro (o afirmo) bajo pena de perjurio que el votante al que estoy asistiendo me representó que es elegible para recibir asistencia; no sugeriré, con palabra, señal, o gesto, como debe votar el votante; prepararé la boleta del votante según lo indique el votante; no presioné ni coaccioné al votante para que me eligiera como asistente; no soy el empleador del votante, un agente del empleador del votante, o un oficial o agente de un sindicato al cual el votante pertenece; no comunicaré información sobre cómo el votante ha votado a otra persona; y entiendo que si se proporciona asistencia a un votante que no es elegible para recibir asistencia, la boleta del votante podría no ser contada."

	Signature of Assistant (Firma del Asistente)	Printed Name of Assistant (Nombre del Asistente en Letra de Molde)	Address of Assistant (Dirección del Asistente)	Relationship of Assistant to Voter (Relación del Asistente al Votante)	Did you receive or accept any form of compensation or other benefit from a candidate, campaign, or political committee? (Recibió usted cualquier tipo de forma de compensación u otro beneficio de un candidato, campaña o comité político?)	
1					Yes	No
2					Yes	No
3					Yes	No

LUPE-189 at 1.

Form Mail Ballot Carrier Envelope



Oath of Person Assisting Voter: "I swear (or affirm) under penalty of perjury that the voter I am assisting represented to me they are eligible to receive assistance; I will not suggest, by word, sign, or gesture, how the voter should vote; I will prepare the voter's ballot as the voter directs; I did not pressure or coerce the voter into choosing me to provide assistance; I am not the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs; I will not communicate information about how the voter has voted to another person; and I understand that if assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted." **Juramento de la Persona Asistiendo al Votante:** "Yo juro (o afirmo) bajo pena de perjurio que el votante al que estoy asistiendo me representó que es elegible para recibir asistencia; no sugeriré, con palabra, señal, o gesto, como debe votar el votante; prepararé la boleta del votante según lo indique el votante; no presioné ni coaccioné al votante para que me eligiera como asistente; no soy el empleador del votante, un agente del empleador del votante, o un oficial o agente de un sindicato al cual el votante pertenece; no comunicaré información sobre cómo el votante ha votado a otra persona; y entiendo que si se proporciona asistencia a un votante que no es elegible para recibir asistencia, la boleta del votante podría no ser contada."

If you are an assistant, provide information below: **(Si usted es un asistente proporcione la siguiente información):**

Did you receive compensation or other benefit from a candidate, campaign or political committee in exchange for providing assistance? Circle one: Yes No

¿Recibió compensación u otro beneficio de un candidato, campaña o comité político a cambio de brindar asistencia? Marque con un Círculo: Sí No

Printed Name (Nombre en letra de molde) | Signature (Firma)

Relationship to Voter (Relación al votante) | Street Address (Domicilio residencial)

LUPE-009 at 2.

23. Moreover, the provisions impose identical consequences for non-compliance. Knowingly providing assistance without completing the Oath (evidenced by the assistor's signature) or the relevant disclosure fields on mail-in ballots (1) is a state jail felony and (2) may result in the rejection of the voter's ballot. *See* TEC §§ 86.010 (d), (f)–(g).

Section 6.06 – Ban on Compensated Mail–Ballot Assistance

24. Section 6.06 of S.B. 1 makes it a state jail felony, for a person who is not an attendant or caregiver previously known to the voter, to compensate or offer to compensate another person—or to solicit, receive, or accept compensation—for assisting voters with their mail-in ballots. TEC §§ 86.0105(a), (c).

25. For purposes of this section, "compensation" means "anything reasonably regarded as an economic gain or advantage, including accepting or offering to accept

employment for a fee, accepting or offering to accept a fee, entering into a fee contract, or accepting or agreeing to accept money or anything of value." *Id.*; *see also* TEX. PENAL CODE § 38.01(3).

26. The prohibition on compensation does not apply if the person assisting the voter is an "attendant" or "caregiver" previously known to the voter. Tr. at 1906:23–1907:2. S.B. 1, however, does not define "attendant" or "caregiver," Tr. at 1907:3–6, nor has the Secretary published any guidance or training on how to interpret either term. Tr. at 1907:7–12, 1908:17–24. Further, the Secretary of State's Office does not define the phrase "previously known to the voter," nor has it published any guidance or training on how the phrase should be interpreted. Tr. at 1909:3–13. At trial, former Director of the Elections Division in the Secretary of State's Office Keith Ingram testified that it does not matter how long the voter has actually known the attendant or caregiver before providing voter assistance; it could be "15 years" or "15 minutes." Tr. at 1909:14–22.

Section 7.04 – Canvassing Restriction

27. Section 7.04 of S.B. 1 creates three new, third-degree felonies under the Election Code, each imposing up to ten years in prison and a fine of up to $10,000 on anyone who gives, offers, or receives some "compensation or other benefit" for "vote harvesting services." [12] TEC § 276.015(f); TEX. PENAL CODE § 12.34.

***8** 28. "Vote harvesting services" include any "in-person interaction with one or more voters, in the physical presence of an official ballot or a ballot voted by mail, intended to deliver votes for a specific candidate or measure." TEC § 276.015(a)(2).

29. A "benefit" is "anything reasonably regarded as a gain or advantage, including a promise or offer of employment, a political favor, or an official act of discretion, whether to a person or another party whose welfare is of interest to the person." TEC § 276.015(a)(1).

30. Using these definitions, Section 7.04 creates three third-degree felonies:

> (b) A person commits an offense if the person, directly or through a third party, knowingly provides or offers to provide vote harvesting services in exchange for compensation or other benefit.
>
> (c) A person commits an offense if the person, directly or through a third party, knowingly provides or offers to provide compensation or other benefit to another person in exchange for vote harvesting services.
>
> (d) A person commits an offense if the person knowingly collects or possesses a mail ballot or official carrier envelope in connection with vote harvesting services.

TEC §§ 276.015(b)–(d).

31. There are a number of exceptions. The Canvassing Restriction "does not apply" to:

> (1) an activity not performed in exchange for compensation or a benefit;
>
> (2) interactions that do not occur in the presence of the ballot or during the voting process;
>
> (3) interactions that do not directly involve an official ballot or ballot by mail;
>
> (4) interactions that are not conducted in-person with a voter; or
>
> (5) activity that is not designed to deliver votes for or against a specific candidate or measure.

TEC § 276.015(e).

THE PARTIES

The Plaintiffs

32. Plaintiffs are membership-driven, non-partisan civil rights and social advocacy groups in Texas with members who require voting assistance due to a disability, blindness, or an inability to read or write the language in which ballot is written. Their staff and volunteers have regularly assisted voters with disabilities and/or voters with limited English proficiency ("LEP"), including mail voters, cast their ballots.

33. Plaintiffs conduct in-person voter outreach and engagement activities, including voting assistance and transportation to the polls. Despite the diversity of their respective missions in the state—e.g., encouraging civic participation, empowering voters with disabilities, improving infrastructure in the colonias—the Plaintiff organizations rely on in-person voter advocacy to advance their causes. These voter engagement efforts include neighborhood door-

knocking campaigns, voter registration drives, candidate forums, town hall meetings, tabling at community events, and exit-polling. During some outreach events, voters have taken out their mail ballots while speaking with organizers to ask questions about their ballots or request voting assistance.

34. Plaintiffs' volunteers often receive refreshments, t-shirts, pens, gas cards, and other tokens of appreciation for their canvassing and assistance efforts.

35. Plaintiffs' organizational representatives testified at trial that the Challenged Provisions have frustrated their voter engagement and turnout efforts by chilling their members' willingness to provide voter assistance due to fear of criminal liability. Moreover, some of Plaintiffs' members with disabilities who typically vote with assistance decided to forgo assistance altogether to avoid subjecting their preferred assistors to criminal sanctions.

***9** 36. Collectively, Plaintiffs seek declaratory and injunctive relief and ask the Court to enjoin the Attorney General ("AG"), and Secretary of State ("Secretary" or "SOS") of Texas, and several local election officials and prosecutors from enforcing the Challenged Provisions.

The HAUL-MFV Plaintiffs

37. Together, the HAUL-MFV Plaintiffs challenge the Transportation Disclosure (S.B. 1 § 6.01), the Amended Oath (§ 6.04), and the Assistor Disclosures (§§ 6.03, 6.05, 6.07), seeking injunctive relief against the Secretary, the AG, and the local election officials and the DAs of Bexar County and Harris County. *See* ECF No. 199 ¶ 323.

The Arc of Texas

38. The Arc of Texas (the "Arc") is a non-profit organization founded in 1953 by parents of children with intellectual and developmental disabilities ("IDD") to advocate for their children to have access to education, employment, community supports, and other areas of community life. Tr. at 3492:18–25, 3493:1–5. The Arc has 7,000 individual members across the state. [13] Tr. at 3495:20–25, 3496:4–24.

39. The Arc's mission is to "promote, protect, and advocate for the human rights and self–determination of Texans with intellectual and developmental disabilities." Tr. at 3490:23–25, 3493:7–9. In pursuit of that mission, The Arc engages in legislative advocacy and grassroots advocacy to help empower people with IDD advance public policy and. Tr. at 3493:10–21; 3494:5–10. Voting is "the backbone" of The Arc's work because it is critical to members' self-determination and voting rights advocacy has been a priority since The Arc's founding. Tr. at 3499:23–3500:12, 3499:23–3500:12.

40. As discussed in greater detail herein, several members of the Arc with disabilities have been unable to vote with their assistor of choice due to the burdens imposed by S.B. 1's Assistor Disclosure requirement and amended Oath of Assistance, including Jodi Lydia Nunez Landry. Tr. at 3229:15.

Delta Sigma Theta Sorority, Inc.

41. Plaintiff Delta Sigma Theta Sorority, Inc. ("DST" or the "Sorority") is a national, nonprofit, nonpartisan organization of Black, college-educated women, focused on serving the Black community through social action. Tr. at 2081:1–20. DST has 75 Chapters in Texas, including chapters in Bexar, Harris, and Travis Counties, and 21,450 members registered to vote in Texas. Tr. at 2083:13–25.

42. The Sorority organizes its social action under what it calls its "Five Point Programmatic Thrust": educational development, economic development, international awareness and involvement, physical and mental health, and political awareness and involvement. Tr. at 2081:7–13.

43. In support of this mission, DST has participated in voting rights efforts since its founding in 1913. Tr. at 2082:23–2083:8. The organization's civic engagement programs include voter registration drives, voter education, candidate forums, and voter assistance and transportation programs. Tr. at 2086:21–2087:15.

***10** 44. DST Chapters in Texas provide voter assistance to residents of nursing homes and senior care facilities who need help filling out applications for ballots by mail ("ABBMs"), address changes, and ballots by mail ("BBMs") and voting in-person. Tr. at 2088:1–18, 2199:9–19.

45. Before S.B. 1, DST members regularly provided transportation to the polls by participating in Souls to the

Polls, a caravanning initiative that partners with churches to drive voters to their voting location. Tr. at 2088:8–15.

46. Members of DST include individuals that have disabilities and depend on assistance to cast their vote. Tr. at 2110:3–11.

The OCA Plaintiffs

47. Together, the OCA Plaintiffs challenge the Ban on Compensated Assistance (S.B. 1 § 6.06), seeking injunctive relief against the Secretary, the AG, the County Clerks of Harris and Travis Counties, and the DAs of Harris and Bexar Counties. *See* ECF No. 200 ¶ 181. [14]

OCA-Greater Houston

48. Plaintiff OCA-Greater Houston ("OCA") is a membership-driven organization dedicated to advancing the social, political, and economic well-being of Americans of Asian and Pacific Island descent ("AAPIs"), largely in Harris, Brazoria, and Fort Bend counties. Tr. at 1684:8–12, 1685:1–3, 1686:16–17, 1688:10–14.

49. The organization's mission comprises four main goals: (1) advocate for social justice, equal opportunity, and fair treatment; (2) promote civic participation, education and leadership; (3) advance coalition and community building; and (4) foster cultural heritage. Tr. at 1689:6–13.

50. To further this mission, OCA engages in numerous election-related activities carried out by volunteers and paid staff, all of whom are OCA members. Tr. at 1687:22–1688:6, 1693:21–25. Before S.B. 1 was enacted, OCA regularly hosted election events, including in-person candidate forums (Tr. at 1694:21–1696:8), "AAPI meet-and-greets" with AAPI political candidates (Tr. at 1699:24–1702:2), and voting machine demonstrations (Tr. at 1706:12–1707:3). Attendees often brought their mail-in ballots to these events and received assistance, including language assistance, from OCA volunteers and staff. Tr. at 1696:9–1697:8, 1697:22–1699:7, 1700:1–1702:2, 1706:12–1707:3.

51. OCA has also engaged in canvassing efforts through volunteers and staff, who knocked on voters' doors to provide information about voting. Tr. at 1702:3–17. As they were door-knocking, some bilingual OCA canvassers assisted voters who requested language assistance with their mail-in ballots. Tr. at 1703:17–20. OCA staff and volunteers have provided mail-ballot assistance while conducting exit-polling at polling locations, where voters also requested (and received) assistance with their mail-ballots from OCA. Tr. at 1706:4–11, 1723:6–13.

52. OCA's voting-related activities are carried out by volunteers and paid staff. Tr. at 1687:22–1688:6, 1693:21–25. OCA provides its members and volunteers with benefits like food and beverages at in-person events where they provide voting assistance to LEP voters. Tr. at 1694:4–20, 1697:22–25.

The League of Women Voters of Texas

53. The League of Women Voters of Texas ("LWV" or the "League") is a non-partisan organization founded in San Antonio in 1919 with over 3,000 dues-paying members, including members in Harris and Travis Counties. Tr. at 1580:1–4, 1585:18–22, 1586:7–19, 1587:19–21,

***11** 54. The League's mission is to empower voters and defend democracy. Tr. at 1580:1–4. The League actively works to register eligible citizens to vote, ensure that voters' ballots count, help voters obtain mail-in ballots, vote by mail, and obtain voter assistance when needed. Tr. at 1580:1–8, 1581:9–18, 1589:12–15, 1589:25–1590:3.

55. The League has members who use assistants when they vote by mail, and members who assist others with their vote by mail ballots. Tr. at 1578:3–8, 1589:12–1590:3. League members assist mail-in voters who are family, friends, in nursing homes, in assisted living centers, or in homes where voters with disabilities live. Tr. at 1590:16–25. Members of the League "offer[ ] tea, or coffee, or water," to assistors that help them and other voters vote by mail. Tr. at 1591:1–1592:5, 1590:4–12.

The LUPE Plaintiffs

56. Together, the LUPE Plaintiffs challenge the Oath of Assistance S.B. 1 (S.B. 1 § 6.04), Assistor Disclosures (§§ 6.03, 6.05, 6.07), the Ban on Compensated Assistance (§ 6.06), and the Canvassing Restriction (§ 7.04) seeking injunctive relief against the Secretary, the AG, and the election officials and prosecutors of Dallas and El Paso Counties and the Travis County District Attorney. *See* ECF No. 208 ¶ 267.

La Union Del Pueblo Entero

57. La Union Del Pueblo Entero ("LUPE") is a non-partisan, membership organization headquartered in San Juan, Texas, with members primarily in Hidalgo, Cameron, Willacy, and Starr Counties, Texas. Tr. at 58:13–16.

58. LUPE organizes its approximately 8,000 members and other colonia residents on issues that affect low-income neighborhoods, including drainage, lighting, paved roads, safety, emergency services, trash pickup, among others. Tr. at 88:8–24. In addition to civic engagement organizing, LUPE is a social services hub for the community and provides income tax services, language translation services and family-based immigration legal services. Tr. at 61:3–17

59. In recent years, LUPE's primary organizing focus has been civic engagement and educating voters about their right to vote. Tr. at 60:10–61:2. LUPE relies on paid staff members, temporary paid canvassers, and volunteers to engage with voters in-person. Tr. at 88:1–7. LUPE members speak to voters on issues promoted by LUPE, including urging voters to support certain non-partisan ballot measures. Tr. at 88:1–24.

60. LUPE organizers advocate for ballot measures in a variety of settings, including when meeting with community members in neighborhoods, at LUPE events, at union halls, and in the LUPE offices. Tr. at 89:7–18. While canvassing neighborhoods in support of ballot measures, LUPE organizers have been invited into voters' homes and asked for assistance with voters' mail-in ballots. Tr. at 71:1–72:15, 75:11–75:17, 119:20–120:18. LUPE members also often bring mail ballots to meetings at LUPE offices and union halls. Tr. at 90:4–24.

61. LUPE's membership includes individuals who use assistance to vote by mail and in-person, including elderly and/or disabled voters and voters with limited English proficiency ("LEP") or low-literate. Tr. at 63:19–64:6, 65:7–65:13, 75:18–77:4, 77:17–78:2, 84:4–84:25, 85:1–85:4, 87:3–87:21, 97:11–97:17, 119:20–120:18, 116:22–117:7, 3676:11–25. Some of these members are not literate in English or Spanish. Tr. at 64:7–65:6.

***12** 62. Members of LUPE include voters who are disabled and vote with assistance in person and by mail. Tr. at 63:19–64:6, 65:7–65:13, 96:15–97:17, 75:18–77:4, 77:17–78:2, 84:4–84:25, 85:1–85:4, 119:20–120:18, 116:22–117:7, 87:3–87:21, 3676:11–25.

63. LUPE staff members and volunteers have been asked for assistance with voting by mail and in-person at the polls elderly and disabled voter and have provided such assistance. *See* Tr. at 145:16–20, 145:25–146:4, 150:9–13, 150:19–151:2, 157:14–158:9; LUPE-284, Maria Gomez Dep. at 41:24–42:24, 11:15–12:10, 15:17–20, 29:9–12. 40:24–42:2. LUPE trains its organizers to provide voter assistance consistent with the law, to limit assistance to what is requested by the voter, and to carry out the wishes of the voter. Tr. at 78:3–78:15.

64. LUPE often provides its volunteers with t-shirts or gas cards, particularly because there is little public transportation in the Rio Grande Valley. Tr. at 122:3–19.

Mexican American Bar Association of Texas

65. The Mexican American Bar Association of Texas ("MABA") is a volunteer-based professional membership association of Latino lawyers across Texas with approximately 500 members. Tr. at 2533:20–23, 2535:9–10.

66. Although MABA is non-partisan, it routinely encourages voters to support a candidate or measure. Tr. at 2535:19, 2542:6–8.

67. MABA encourages its attorneys to provide pro bono services and support voter engagement in their local communities. Tr. at 2533:24–2534:4, 2535:11–2536:5. MABA engages in voter outreach and education by tabling at local community events, such as candidate forums. Tr. at 2535:21–2536:5. MABA members also provide voter assistance. *See, e.g.*, Tr. at 2539:3–4. Members are concerned that they are committing a crime if they accept meals, gas cards, swag or other forms of compensation while performing these activities. Tr. at 2542:6–20.

Familias Inmigrantes Estudiantes Luchar

68. Familias Inmigrantes Estudiantes Luchar ("FIEL"), translated to English means "Immigrant Families and Students in the Fight." Tr. at 2430:12–19. FIEL is an immigrant-led civil rights organization with approximately 16,000 members in the Greater Houston area. Tr. at 2431:21–

25. FIEL employs eight paid staffers. Tr. at 2433:18–22. FIEL's mission is to organize and empower people, and to make sure that people know their rights and that they exercise their rights in the community. Tr. at 2434:21–2435:1. FIEL focuses on work related to access to higher education, community organizing, and civic engagement, including voter outreach. Tr. at 2435:2–14.

69. Before S.B. 1 was enacted, FIEL furthered its mission of voter outreach and civic engagement by assisting its members in voting at the polls. Tr. at 2438:9–11, 2444:24–2445:3. FIEL typically partnered with another organization to take people to vote and provide translation and other assistance at the polls. Tr. at 2438:12–16.

The LULAC Plaintiffs

70. The LULAC Plaintiffs challenge the Canvassing Restriction (S.B. 1 § 7.04), seeking relief against the AG, the Secretary, election officials and district attorneys in Bexar, Travis, Hidalgo, Dallas and El Paso Counties. ECF No. 207.

League of United Latin American Citizens

71. The League of United Latin American Citizens ("LULAC") is a national Latino civil rights organization founded in 1929 in Corpus Christi, Texas. Tr. at 1632:9–11. The group has about 4,000 to 5,000 dues-paying members within Texas, as well roughly 80,000 to 90,000 "eMembers" in the state. There are 30 to 40 LULAC councils in Texas, including in Dallas, San Antonio, Houston, and El Paso. Tr. at 1634:6–20, 1637:3–7.

***13** 72. LULAC's mission is "to improve the lives of Latino families throughout the United States" and "to protect their civil rights in all aspects." Tr. at 1633:10–18. Promoting the right to vote is "crucial" to LULAC's mission because when Latinos are "allowed to vote, they are able to choose candidates of their choice" who "will stand and work on issues that are important to them." Tr. at 1645:4–15.

73. LULAC has volunteers that engage in voter registration and GOTV efforts every year. Tr. at 1645:23–1646:5. These efforts often focus on community members who face greater challenges when voting, including elderly Latinos and those who do not speak or write English. Tr. at 1649:7–24. Accordingly, LULAC has historically run a voter assistance program for seniors, including many who are not literate or have physical disabilities. Tr. at 1654:20–1655:5.

74. LULAC's members and volunteers who participate in these GOTV and voter assistance efforts often receive food and drink, gas credit, or other tokens of appreciation for their efforts. Tr. at 1655:19–1656:10, 1656:11–18.

Defendants [15]

75. Collectively, Plaintiffs have sued the State of Texas, the Attorney General and Secretary of State of the State of Texas, and the chief election officials and district attorneys of several counties in Texas, including Harris County, Bexar County, Travis County, Dallas County, Hidalgo County, and El Paso County, all in their official capacities.

The State Defendants

The State of Texas

76. The State of Texas became the 28th state in the union in 1845.

Texas Attorney General

77. Defendant Ken Paxton is the Attorney General of the State of Texas. His office, the Office of the Attorney General of Texas ("OAG"), is an executive department or agency of the State of Texas. ECF No. 753 ¶ 40.

78. The AG has statutory duties for certain aspects of S.B. 1's enforcement scheme, including Sections 6.04, 6.05, 6.06 & 7.04. *Stephens* did not alter the authority of the AG to investigate allegations of election-related crimes, and, in some cases, the OAG considers its investigative duties to be "statutorily required" or "mandatory" for election-related allegations. Tr. at 4041:18–4042:25; *see, e.g.*, TEC § 273.001 (providing that the AG "shall investigate" allegations of election crimes in elections covering more than one county). The AG may also "direct the county or district attorney ... to *conduct* or *assist* the attorney general in conducting the investigation." *See* TEC § 273.002(1) (emphasis added); *see also id.* § 273.001 (district attorneys must investigate alleged violations referred to them).

79. The AG has demonstrated a willingness to enforce, and has actually enforced, the Election Code, including S.B. 1. Tr. at 3909:8–17, 3913:9–3914:16. He publicly maintains that one of his key priorities is to investigate and prosecute allegations of voter fraud. *See, e.g.*, OCA-384, OCA-385, OCA-386.

80. The OAG continues to operate the Criminal Prosecutions Division unit that prosecutes election-related allegations, known as the Election Integrity Division. Tr. at 3903:23–3905:4, 3905:11–15, 4039:14–19. As of March 17, 2023, the OAG had identified investigations of a possible violations of the Assistor Disclosure requirement for mail ballots (S.B. 1 § 6.03) and the Canvassing Restriction (S.B. 1 § 7.04). [16] *See* LULAC-86 at 6.

***14** 81. Before *Stephens*, the OAG regularly prosecuted election crimes, including alleged unlawful-assistance and vote-harvesting schemes, in counties across Texas. *See* OCA-377 (showing 401 counts—not cases—of election crimes prosecuted by the OAG, alone or in conjunction with local prosecutors, between 2005 and 2022).

82. Even after *Stephens*, Jonathan White, former Chief of the OAG Election Integrity Division, testified that the "vote harvesting" schemes (purportedly targeted by the Canvassing Restriction) and "assistance fraud" (purportedly targeted by the all the challenged provisions) remain among the three most common elections-related allegations that the OAG pursues. Tr. at 3915:3–8. For the November 2022 elections, the OAG established a 2022 General Election Integrity Team and publicly stated it was "prepared to take action against unlawful conduct where appropriate," highlighting offenses related to voter assistance and "vote harvesting." OCA-383.

83. Although the AG may no longer unilaterally prosecute allegations of election-related crimes, *Stephens*, 663 S.W.3d at 51–55, the OAG enforces criminal election offenses through other mechanisms. After OAG investigations conclude, the OAG refers cases to local prosecuting attorneys [17] and often seeks opportunities to partner with DAs to prosecute such allegations through deputization by a DA or appointment *pro tem* by a district judge or the DA. Tr. at 3908:21–3909:17, 3909:1–12; 4043:21–4045:21; 4051:2–10.

84. The OAG has specifically identified previous prosecutions in which it participated, including prosecutions for unlawful voting assistance and "vote harvesting" and prosecutions conducted by or with the assistance of local DAs in the following counties: Nolan County, Limestone County, Hidalgo County, Harris County, Navarro County, Brewster County, Gregg County, and Starr County. *See* OCA-377.

85. Finally, the AG is tasked to enforce S.B. 1 against election officials who are subject to civil prosecution for Election Code violations. S.B. 1 § 8.01 (TEC §§ 31.128, .129, .130); *see* Tr. at 772:2–6. He is authorized under S.B. 1 § 8.01 (TEC § 31.129(b)) to assess civil penalties against local officials who violate the law by failing to enforce certain provisions of S.B. 1, including provisions that Plaintiffs challenge.

Texas Secretary of State

86. Plaintiffs seek to enjoin Defendant Jane Nelson, the Secretary of State (the "Secretary") of the State of Texas, from enforcing the Challenged Provisions.

[1] 87. The Secretary is the Chief Election Officer of Texas. TEC § 31.001(a). In that capacity, the Secretary is charged with "broad duties to oversee administration of Texas's election laws." *Ostrewich v. Tatum*, 72 F.4th 94, 100 (5th Cir. 2023) (quoting *Richardson v. Flores*, 28 F.4th 649, 654 (5th Cir. 2022)).

88. It is the Secretary's duty to obtain and maintain uniformity in the interpretation, application, and operation of the election code and election laws outside the election code. TEC § 31.003; Tr. at 1827:6–12.

***15** 89. These responsibilities include "prescribing official forms" for elections. Tr. at 1834:2–12; TEC §§ 31.001(a)–(b), 31.003. The Secretary, for example, is responsible for the design and content of the Assistor Disclosure form and BBM carrier envelopes. *See* Tr. at 1843:4–7; TEC §§ 64.0322(b), 86.013(d); LUPE-009; LUPE-189.

90. The Secretary routinely issues guidance, directives, orders, instructions, and handbooks to county registrars of all 254 Texas counties, as well as to district attorneys, political candidates, and voters, on various election procedures, including changes implemented in S.B. 1. Tr. at 119:24–120:6, 125:4–21, 128:14–20, 129:3–14, 143:15–18, 159:9–160:11, 1831:7–14, 1875:5–10, 1875:18–25.

91. The Secretary also collaborates with the OAG to enforce election laws in accordance with her mandatory duties under the Election Code. Tr. at 3913:9–19, 4054:16–4055:8.

92. Under the Election Code, the Secretary must evaluate information she "receiv[es] or discover[s]" about potential election crimes and, if she "determines that there is probable cause to suspect that criminal conduct occurred, the [S]ecretary *shall* promptly refer the information to the attorney general" and provide all pertinent documents and information in his possession to the AG. TEC § 31.006 (emphasis added).

93. In this capacity, the Secretary serves as "a gathering point for election complaints from individuals and election officials." Tr. at 3913:12–19. The Secretary logs each complaint received. Tr. at 4326:23–4327:2. Sometimes, the Secretary will also ask the complainant for additional information. Tr. at 1876:24–1879:21. Ultimately, the Secretary must determine whether the information in her possession satisfies the probable cause standard. Tr. at 1881:1–9. "If it's a close call, [the Secretary of State's Office] refer[s] it anyways, because it's better to err on the side of making sure that crimes are prosecuted." Tr. at 1877:14–21.

94. The Secretary has received allegations related to mail ballot "vote harvesting," which she has referred to the OAG both before and after the passage of S.B. 1. Tr. at 1914:1–6.

County Defendants

95. Plaintiffs have named various local election officials and prosecutors as Defendants in their official capacities for their roles in implementing and enforcing the Challenged Provisions.

County Election Officials

96. Plaintiffs have sued local election administrators in several counties in Texas (the "EAs" or "County Clerks," as applicable) in their official capacity to enjoin them from enforcing the Challenged Provisions.

97. The HAUL Plaintiffs seek injunctive relief against the Bexar County EA and the Harris County Clerk.[18] *See* ECF No. 199. The OCA Plaintiffs seek injunctive relief against the County Clerks of Harris County and Travis County. *See* ECF No. 200. The LUPE Plaintiffs seek injunctive relief against the EAs of Dallas County and El Paso County. *See* ECF No. 208. The LULAC Plaintiffs seek injunctive relief against the Bexar County EA, the Harris County Clerk, the Travis County Clerk, the Hidalgo County EA, and the Dallas County EA. *See* ECF No. 207.

***16** 98. Local election officials administer Texas elections. They are responsible for administering the Oath of Assistance at polling places, TEC § 64.034, and for collecting and reviewing required disclosures at the polls and on the carrier envelopes of mail-in ballots, *id.* § 64.034. They also receive and review mail carrier and ballot envelopes to voters, *id.* § 86.002, receive and process marked ballots, *id.* §§ 86.006, 86.007(b), 86.011, verify voter signatures, *id.* § 87.027(i), and count the results, *id.* § 87.061.

County District Attorneys

99. Plaintiffs seek to enjoin the District Attorneys of several counties in Texas (the "DAs" or "County DAs") from enforcing S.B. 1 §§ 6.04–6.06 and 7.04.

100. The HAUL Plaintiffs seek injunctive relief against the DAs of Bexar County, Harris County, and Travis County. *See* ECF No. 199. The OCA Plaintiffs seek injunctive relief against the Harris County DA and the Travis County DA. *See* ECF No. 200. The LUPE Plaintiffs seek injunctive relief against the DAs of Travis County, Dallas County and the 34th Judicial District, which includes El Paso, Culberson, and Hudspeth Counties. *See* ECF No. 208. The LULAC Plaintiffs name the DAs of Travis, Dallas, and Hidalgo Counties as Defendants. *See* ECF No. 207.

101. County district attorneys are tasked with enforcement of the State's criminal laws and represent the State of Texas in all criminal cases in their district, unless conflicts arise. Tex. Const. art. 5, § 21; TEX. CODE CRIM. P. ART. 2.01; *see* TEX. GOV'T CODE § 43.180(b). Thus, by virtue of their positions, DAs are charged with investigating and prosecuting violations of the Election Code, including those among the Challenged Provisions. *See Stephens*, 663 S.W.3d at 55. Indeed, all prosecutions under the Election Code require the consent or authorization of the applicable DA. *See id.* (concluding that the Attorney General "can prosecute [crimes under the Election Code] with the permission of the local prosecutor but cannot initiate prosecution unilaterally.").

102. The DAs for Travis, Dallas, and Hidalgo Counties each executed stipulations stating that he or she had *not* (1) adopted a policy refusing to prosecute crimes under S.B. 1, (2) instructed law enforcement to refuse to arrest individuals suspected of criminal conduct under S.B. 1, or (3) permitted an assistant DA to take either of the foregoing actions. *See* ECF No. 753-6 (Travis) ¶¶ 3–6; ECF No. 753-7 (Dallas) ¶¶ 3–4; ECF No. 753-13 (Hidalgo) ¶¶ 3–6.

103. The Bexar County DA likewise signed a stipulation stating that his office has not disavowed any intent to investigate or prosecute crimes under S.B. 1. ECF No. 753-5 ¶¶ 2–6.

104. The DA of the 34th Judicial District agreed not to enforce the provisions challenged by the LUPE Plaintiffs during the pendency of this action but stipulated that he has the authority to enforce crimes under the Election Code, would be free to do so at any time, and intends to fulfill his duty to enforce election crimes, subject to his prosecutorial discretion. ECF No. 753-8 ¶¶ 5–7.

105. The Harris County DA's Office ("HCDAO") has previously prosecuted alleged violations under the Election Code and/or related to elections, including under provisions that were amended by S.B. 1.[19] The Harris County DA has jointly prosecuted at least two election–related cases alongside the OAG in the past.[20]

***17** 106. A newly enacted law House Bill 17 ("H.B. 17") curbs DAs' authority to adopt a policy against enforcing crimes under the Election Code. H.B. 17, which went into effect on September 1, 2023, provides that DAs may be removed from office if they adopt any policy that "prohibits or materially limits the enforcement of any criminal offense." H.B. 17 § 1 (adding TEX. LOC. GOV'T CODE § 813(B)).

IMPACT OF THE CHALLENGED PROVISIONS

107. At trial, the Court heard testimony (live and by deposition designation) from numerous voters who qualify for voting assistance, individuals who have served as assistants in the past, and election officials describing the impact that the Challenged Provisions have impaired voters' ability to vote with their chosen assistors of their choice.

Transportation Disclosure (§ 6.01)

108. Before S.B. 1, DST members regularly provided transportation to the polls by participating in Souls to the Polls, a caravanning initiative that partners with churches to drive voters to their voting location. Tr. at 2088:8–15.

109. DST members who provide transportation assistance members are concerned about who may gain access to the personal information disclosed on the forms required under Section 6.01 and potential harassment by poll watchers, who are permitted to observe drivers subject to Section 6.01 as they complete the Transportation Disclosure form during curbside voting. Tr. at 2108:7–2109:3 ("Our members or even community members who provide transportation are afraid to fill out those forms. They don't know what's going to happen to the information that they put on those forms.").

110. It is unclear whether drivers who refuse to complete the disclosure form will face any consequences. Unlike the provisions of S.B. 1 requiring individuals providing voting assistance to make similar disclosures on mail ballot carrier envelopes (TEC § 86.010(g).) and take the Oath of Assistance (TEC § 64.034), Section 6.01 does not, to the Court's knowledge, state that non-compliance is punishable as a state jail felony or will result in the rejection of a voter's ballot. Section 6.01 merely explains that SOS must maintain records of the drivers' disclosures and produce them to the AG upon request. TEC § 64.009(g). Instead, enforcement of Section 6.01 appears to be left to election officers, who would, presumably not permit the curbside voters to cast their ballots until the driver had completed the disclosure form.

111. The Austin Alumnae Chapter of DST stopped providing transportation assistance to elderly, disabled individuals because of Section 6.01's transportation assistance disclosure requirement and the attendant criminal penalties assistors maybe subjected to under S.B. 1. Tr. at 2147:12–2148:3. The Austin Alumnae and Bay Area-Houston Chapters have been unable "to recruit members who are brave enough to assist with senior voters [with transportation to the polls] because of the fear[ ] of criminal penalties." Tr. at 2198:2–6. Members of the Fort Worth Chapter of DST had routinely provided transportation assistance to elderly voters at the Friendship Senior Center in Fort Worth, Texas. However, none of the members were willing to assist because of the burdens on assistance placed on Section 6.01 Tr. at 2197:3–17, 2198:20–24.

Assistor Disclosures (§§ 6.03, 6.05, 6.07) and Oath of Assistance (§ 6.04)

112. The Assistor Disclosures and Oath requirements deter voters from requesting, and assistors from providing, assistance in the voting process. As a result, some voters who need assistance have forgone assistance altogether and struggled to complete their ballots. Those who engaged with election officials sacrificed their privacy while voting but still did not receive the assistance they needed.

***18** 113. The Court heard trial and deposition testimony from several Texas voters who, due to their physical disabilities, require assistance in nearly every facet of their daily lives, including Jodi Nunez Landry, Laura Halvorson, Amy Litzinger, and Nancy Crowther. All four witnesses are members of the Arc.

114. Although Ms. Nunez Landry, Ms. Halvorson, Ms. Litzinger, and Ms. Crowther are eligible for assistance under Texas and federal law, none of them received voting assistance from their assistors of choice in the 2022 primary or general election because of the burdens—including the threat of criminal liability—that S.B. 1's disclosure and oath requirements impose on assistors.

115. These voters were not worried that their chosen assistors would influence their vote. Ms. Halvorson testified that she has never felt that one of her attendants was trying to influence her choices or would manipulate the way her ballot was marked. Tr. at 3318:3–11. Similarly, Ms. Litzinger explained that her personal care attendant is not able to manipulate how she votes because she is always present when they are assisting her with marking the ballot and ensures that she can see her ballot and verify what the attendant marks. *See, e.g.*, Tr. at 3296:20–3297:8.

116. Instead, voters' primary concern was exposing their caregiver to criminal liability under S.B. 1 and losing the critical assistance they provide outside the voting process. Ms. Nunez Landry testified that her "worst fear is ending up in a nursing facility due to her inability to find care attendants." Tr. at 3234:7–23 (has had difficulty finding personal care attendants due to shortage of home health care workers, who generally receive low wages without benefits and can earn more money working less physically demanding jobs); *see also* Tr. at 3331:2–18 (Halvorson) (finding replacement caregivers is "hard enough" without criminal penalties being added to the mix of what they are being asked to do).

117. Voters with disabilities also fear being disenfranchised due to the mistaken perception by election workers and poll watchers that voters receiving assistance are being improperly coerced or influenced. As Ms. Halvorson explained, "especially if they don't have an understanding of disability," people may believe that "we're not able to make decisions for ourselves or we don't have the intellectual capacity to do so.... I [worry] that other people would perceive that my caregivers were influencing my vote, if they just see from across the room someone pressing buttons for me." Tr. at 3324:15–3325:5, 3331:2–18.

Voters have been deterred from requesting assistance.

Jodi Nunez Landry

118. Jodi Nunez Landry is a registered voter of Harris County, Texas and votes with assistance. Tr. at 3236:11–17; Tr. at 3234:1–6. Ms. Nunez Landry has a rare, untreatable, and progressive form of muscular dystrophy. Tr. at 3233:7–14. She uses a power wheelchair to navigate and requires assistance with most activities of daily living, including bathing, dressing, cooking, and cleaning. Tr. at 3233:2–14, 3235:10–3236:2

119. Ms. Nunez Landry prefers to vote in person. Tr. at 3236:24–3237:14. She prefers to have her partner assist her with voting because she "can trust him and there's a certain amount of privacy there[.]" Tr. at 3243:5–25. Because her partner already understands the contours of her disability, she does not need to give him a lengthy explanation of the assistance she needs. Tr. at 3234:2–6, 3236:24–3237:14.

***19** 120. Ms. Nunez Landry has not asked her partner for voting assistance since S.B. 1 was enacted because she did not "want to put him in jeopardy" or draw attention to herself or have people assume that she was "being coerced" in light of S.B. 1' voter assistance provisions. Tr. at 3246:23–3247:6. She explained:

> I would have liked to have had my partner assist me but I knew under SB 1 that we were going to have to go through all sorts of difficulties to do that, and ... I didn't want to put him through that. I'm really afraid of losing assistance and not having

> anyone, and also I don't want to draw more attention to myself.

Tr. at 3256:15–3257:4; *see also id.* at 3260:2–18 (stating that she was "too afraid to ask his assistance," noting that S.B. 1 has a "chilling effect" on voters who need assistance "makes it very burdensome and frightening for many of us to risk losing attendants or risk putting them in some type of legal jeopardy").

121. In the November 2022 election, Ms. Nunez Landry could not access the remote that would allow her to vote independently at her voting station and, once she had it, found that it was not functioning properly. Tr. at 3244:25–3245:14. When the poll worker she asked for help did not understand the problem, he brought other unknown individuals to Ms. Nunez Landry's booth. Tr. at 3245:18–3246:10. Although they failed to help her, all three strangers watched as Ms. Nunez Landry made her selections.

122. Discussing the loss of her privacy, Ms. Nunez Landry testified that it "made me really nervous" and "they all voted with me, much to my chagrin and frustration." Tr. at 3246:7–8. Had she been able to receive assistance from her partner, "he could have touched the screen and it would have all been rather effortless." Tr. at 3246:16–17. When she finally finished voting, she "was very, very angry." Tr. at 3246:21–22.

Laura Halvorson

123. Laura Halvorson is a registered voter in Bexar County. Tr. at 3315:25. Ms. Halvorson has chronic muscular respiratory failure and muscular dystrophy, a progressive condition that has worsened since her diagnosis. Tr. at 3311:14–22. Presently, Ms. Halvorson relies on a breathing machine and a power wheelchair. Tr. at 3312:2–3.

124. Ms. Halvorson requires "total care" for everyday life, including assistance with transferring, bathing, dressing, eating, and meal preparation. Tr. at 3312:9–12. To accomplish these daily tasks, Ms. Halvorson employs several personal care attendants. Tr. at 3312:15–17.

125. In the March 2022 primary, Ms. Halvorson opted to vote by mail. Tr. at 3318:23–24. Her assistant, however, did not feel comfortable taking the Oath of Assistance and declined to assist Ms. Halvorson. Tr. at 3319:7–16. As a green card holder, her personal care attendant was not comfortable taking an oath under penalty of perjury that could risk her green card status. This was the first time a personal care attendant ever declined to assist Ms. Halvorson in voting. Tr. at 3319:14–16. Without her assistant, Ms. Halvorson struggled to complete the mail in ballot. Tr. at 3319:17–20. Her muscle weakness inhibited her ability to write legibly, Tr. at 3320:4–18, forcing her to fill out her ballot in ten- or fifteen- minute intervals over the course of two full days. Tr. at 3320:19–22.

126. In the November 2022 general election, Ms. Halvorson voted in-person. Tr. at 3322:5–10. She again voted without assistance to avoid exposing her assistants to potential liability. Tr. at 3322:11–18, 3323:10–24. Ms. Halvorson believes S.B. 1's Oath is intimidating, ambiguous, and that her caregivers may be accused of influencing her vote by simply helping her cast it. Tr. at 3324:11–3325:5. When Ms. Halvorson arrived to vote, her remote control had a glitch that essentially inverted the controls. Tr. at 14–17. She struggled to highlight voting machine choices, and when was able to do so, could not deduce what the candidate's party affiliation was. Tr. at 3327:13–23. Ms. Halvorson testified that, when she sought help from poll workers, they snidely told her to push the buttons. Tr. at 3328:6–11. After nearly 45 minutes at the poll booth, Ms. Halvorson weakly delivered it into the counting machine. Tr. at 3329:1–8; 3330:1–3.

Amy Litzinger

***20** 127. Amy Litzinger is a registered voter in Travis County. Tr. at 3281:14–17. Ms. Litzinger has spastic quadriplegic cerebral palsy, which impairs her stability and ambulation and limits her muscle strength. Tr. at 3275:19–24. Additionally, Ms. Litzinger has dysautonomia, which affects involuntary functions, such as her digestion, breathing, and heart rate and temperature regulation. Tr. at 3276:2–6.

128. Due to these conditions, Ms. Litzinger uses a power wheelchair and other mobility devices. Tr. at 3276:8–10. Because her muscle strength fluctuates, Ms. Litzinger cannot always operate these devices, Tr. at 3276:18–22, and often requires the assistance with her daily activities. Tr. at 3279:11–15. Ms. Litzinger requires assistance to get in and out of bed, to the shower, and to use the restroom. Tr. at 3279:16–25. She cannot lift or raise anything heavier than two pounds—which inhibits her ability to write and open doors. Tr. at 3277:16–3278:6. Ms. Litzinger owns a mobility van,

which her assistors use to drive her around the city. Tr. at 3277:10–14. They must also secure Ms. Litzinger into her power wheelchair using a "chest clip" and "strap" and secure her power wheelchair in the van. Tr. at 3277:4–9.

129. Although she is eligible to vote by mail, Ms. Litzinger prefers to vote in person because she anticipates that her disability will produce conflicting handwriting samples on a mail ballot—her own handwriting fluctuates with her strength, and she sometimes relies on assistors to complete her ballot. Tr. at 3282:14–21.

130. Ms. Litzinger prefers to have her personal care attendant assist with voting. Since she has limited dexterity, the poll worker would have to interact with intimate parts of her body, which could be unsafe or uncomfortable for both individuals. Tr. at 3286:11–3287:4. She also relies on her personal care attendant to get to the polling site. Her attendant drives her van, loads and unloads Ms. Litzinger from the van, ensures there are no barriers to enter the voting space, requests curbside voting, handles her ID, and places the completed ballot in the machine. Tr. at 3284:13–3285:23. Ms. Litzinger also relies on an attendant when voting by mail, as she did in 2020. Ms. Litzinger needs someone to open the envelope, fill it out, and tape it down so she can sign it. Tr. at 3287:20–3288:5.

131. All of Ms. Litzinger's attendants have expressed to her that they are uncomfortable taking the Oath of Assistance, and accordingly, none of them have provided voting assistance since S.B. 1 was enacted. Tr. at 3293:17–21.

132. During the May 2022 primary, when Ms. Litzinger approached the ballot machine to vote in person, she realized her chest clip was still fastened. Tr. at 3289:23–3290:2. She was uncertain if the assistant could release the clip or if that would be considered impermissible voting assistance. Tr. at 3290:2–5. Thus, Ms. Litzinger voted with the chest clip fastened and remembered it was "quite painful." Tr. at 3290:13–17. Due to the discomfort, she struggled to complete the five-page ballot. Tr. at 3290:15–17.

133. In the November 2022 general election, Ms. Litzinger spoke at length with her attendant about the Oath. Ultimately, to avoid exposing the attendant to criminal liability under the Oath, especially concerning Ms. Litzinger's "eligibility" for assistance, they decided that the attendant would provide Ms. Litzinger with transportation assistance but would not help her inside the polling place. Tr. at 3291:4–3292:5. Thus, Ms. Litzinger held her own notes and was ultimately unable to review them while she voted because she dropped them and could not pick them up. Tr. at 3292:6–9. Despite Ms. Litzinger's decision to vote without assistance, poll workers attempted to have the attendant sign the Oath simply because she was in the room with Ms. Litzinger. Tr. at 3292:9–17. During the entire time Ms. Litzinger was voting, three people debated whether she needed assistance and ultimately watched her vote. Tr. at 3293:1–13. She described the process as nerve-wracking and noted that "for something that was designed to keep my ballot private, I didn't think ... it was very private because everyone [was] watching me vote and debating whether [I was] self-sufficient or not." Tr. at 3292:21–3293:4–7.

Nancy Crowther

***21** 134. Nancy Crowther, a registered voter in Travis County, is a member of The Arc. HAUL-413, Crowther Dep. at 16:22–25, 17:4–5, 30:5–12. Ms. Crowther has a progressive neuromuscular disease and requires a personal care attendant to complete major life activities. She cannot sit up by herself, so her attendant helps her get dressed, use the bathroom, transfer in and out of her wheelchair, and use her CPAP machine for her sleep apnea. Ms. Crowther also uses her attendant to complete household tasks and personal hygiene. Her attendant is with her for most of her daily activities. *Id.* at 23:25–24:8, 18:3–9, 30:5–12.

135. Ms. Crowther did not take her attendant with her to vote in May 2022 because of her fears that the Oath could jeopardize her relationship with her attendant: "I would be mortified ... if they were to get in trouble just for helping me." *Id.* at 52:11–53:4, 54:7–14. Ms. Crowther explained that, even though she will need more and more help over time as her disability progresses, she does not want to expose her attendants to "danger" that "they aren't paid for" by asking for their assistance under the conditions imposed by S.B. 1.

The Oath of Assistance (§ 6.04) deters voting assistance.

136. The Oath of Assistance under Section 6.04 of S.B. 1, as enjoined by Judge Pitman, provides:

> I swear (or affirm) **under penalty of perjury** that **the voter I am assisting represented to me they are**

> **eligible to receive assistance**; I will not suggest, by word, sign, or gesture, how the voter should vote; **I did not pressure or coerce the voter into choosing me to provide assistance**; [and] I am not the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs; **I will not communicate information about how the voter has voted to another person**; **and I understand that if assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted.**

TEC § 64.034.

137. Aside from the amended language that has not already been enjoined, Plaintiffs challenge the chilling effect on voting assistance created by the Oath's "penalty of perjury" language, the requirement that the voter represent his or her eligibility for assistance and assistor statements concerning eligibility and "pressure or coerc[ion]."

The "penalty of perjury" language deters assistance.

138. At trial, voters,[21] assistors,[22] and election officials[23] alike characterized the "penalty of perjury" language in the amended Oath as "intimidating," "scary," and "threatening." Several witnesses who assisted voters in elections prior to S.B. 1's enactment testified that they are no longer willing to serve as assistors due to the threat of criminal sanctions under the Oath.[24]

139. Witnesses also pointed out that the "penalty of perjury" language can interact with other language in the Oath to prohibit assistors from providing the assistance a voter requires. For example, an assistor must swear "under the penalty of perjury," that they "will not suggest, by word, sign, or gesture, how the voter should vote." Although this language appeared in the Oath before S.B. 1, the "penalty of perjury" language poses barriers to assistance to voters with intellectual disabilities and certain cognitive and physical impairments who need to be reminded of their selections, discussed in a previous conversation with their chosen assistor. *See, e.g.*, Tr. at 3491:9–20 (explaining that "cuing" is a common method of assistant voters with IDD); *see also* Tr. at 3740:19–23; LUPE-002 ¶ 40, Table 1 (stating that approximately 1,082,500, or one-third of voting-eligible Texans with disabilities, have a "cognitive impairment," defined as difficulty remembering, concentrating, or making decisions).

***22** 140. Before voting curbside, Toby Cole, a disability rights attorney and Harris County voter with quadriplegia, goes through a sample ballot with his assistant, who helps him research candidates and mark the sample ballot. During the voting process, Mr. Cole asks his assistant to reference the sample ballot to remind him of his previous selections:

> I don't remember things the way I did when I was younger. I need someone to help me ... I rely on my assistants to help me remind me of things.... And so I specifically request the people that help me, that they help remind me of what I've told them I want to do and how I want to vote.

Tr. at 702:10–703:19, 706:19–707:20. Thus, read together with the "penalty of perjury" language, Mr. Cole understands this portion of the Oath to mean that he must either change how he votes or require his assistor to commit perjury. Tr. at 710:20–711:11. Mr. Cole is not the only attorney concerned about the "perjury" language. MABA members find this language alarming because they do not want to subject themselves to the consequences of being accused of perjury—and potentially be disbarred—for providing voter assistance. Tr. at 2538:8–14.

141. Voters with disabilities testified that they believed the "penalty of perjury" language will deter some people from voting altogether:

> I talk to a lot of people after they get disabled ... as you make things harder, you just start cutting things out ... it's too hard to find someone to feed me, or it's embarrassing, so I don't want to go to dinner. It's too hard to get on an airplane to go travel, so I just don't do that. And so every time you put even one little road bump or one little barrier in front, it just makes it that much harder, and so you don't do it ... I look at the oath and it says "I swear under the penalty of perjury." ... That's a big deal. That's a scary deal. [A]m I going to have somebody that may get deported or

> thrown in jail come help me? No, I'm just not going to vote. I'm just not going to exercise that right.

Tr. at 714:6–18, 715:1–14. Ms. Halvorson stated that many of her friends with disabilities are worried about their caregivers facing these issues with the penalty of perjury and "[s]ome of them may not be going out and voting like they used to, due to it." Tr. at 3332:11–18.

142. Finally, there is some uncertainty about the type of "assistance" that triggers the Oath requirement in the first place. Ms. Litzinger did not ask her attendant to unfasten her chest clip while she was voting out of concern that it would trigger the Oath requirement. Tr. at 3290:2–5. Mr. Ingram testified that whether an attendant who wheels a voter who uses a wheelchair to the poll booth (but does not actually help her cast the ballot) must take the Oath is "a very gray area and kind of depends on the presiding judge." Tr. at 4420:18–4422:6. Mr. Ingram suggested that a voter faced with such a situation could ask the presiding judge for a reasonable accommodation (by permitting her attendant to move her to the poll booth without taking the Oath). [25] Alternatively, Mr. Ingram suggested that the attendant could "just take the Oath of Assistance, and whether you help the voter or not, you're in the polling place legally at that point." Tr. at 4420:18–4422:6. But, of course, this response just begs the question. Voters and attendants want to know what kind of assistance can be provided, if any, *without* trigging the Oath requirement.

***23** 143. Voter Eligibility for Assistance. Voters and assistors testified that these portions of the Oath addressing the voter's eligibility to receive assistance were troubling, in numerous respects.

144. To begin, although the Oath requires the voter to affirm his eligibility for assistance, it does not define who is "eligible" to receive voting assistance or explain who determines eligibility. *See* TEC § 64.034. As a result, both voters and assistors expressed confused about the eligibility requirements. [26] Tr. at 3251:16–3252:11 (Nunez Landry); Tr. at 3561:2–3562:17, 3575:1–10 (Cranston); Tr. at 149–25 (Rocha).

145. Mr. White testified that the new language in the Oath probably requires the assistant to obtain a representation of eligibility from the voter. Tr. at 3991:1–5.

146. Voters expressed discomfort with the requirement to represent their eligibility to their assistors or explain the basis for their eligibility. As several voters with disabilities pointed out, the requirement that the voter affirmatively represents his or her eligibility amounts to an *additional* eligibility requirement. Ms. Nunez Landry testified that, while her partner served as her assistor before S.B. 1, she had never specifically told him that she was eligible to receive assistance. Tr. at 3252:17–3253:2. She felt that it would be "very undemocratic" if her vote did not count because she failed to represent her eligibility and that she "would feel disenfranchised" and like a "a second-class citizen." Tr. at 3252:17–3253:2. Mr. Cole stated that the provision is "offensive" because it requires him to share private health information with his assistor to receive the assistance he needs to vote—something he is not required to do in any other aspect of his life in order to receive the assistance he needs. Tr. at 695:6–7.

147. While the Oath does not explicitly require voters to explain the basis for their eligibility, in practice, assistors who want to ensure that a voter's ballot will be counted must also confirm that the voter is eligible to receive assistance, because, as the Oath cautions, the voter's ballot may not be counted if he or she is ineligible. TEC § 64.034.

148. Critically, because it does not contain a scienter requirement, the Oath appears as it is written to hinge on *actual* eligibility, regardless of the assistor's *or* voter's beliefs about the voter's eligibility. In other words, the provision of assistance itself, even if it is given in accordance with the voter's wishes, may result in the rejection of the voter's ballot. Thus, from an assistor's perspective, to avoid disenfranchising the very voters he hopes to assist, he must confirm that voters who have asked for his help are eligible for assistance and cannot reasonably rely on the voter's representation of their own eligibility.

***24** 149. How assistors are supposed to confirm a voter's actual eligibility without asking the voter to disclose private health information is not at all clear. *See, e.g.*, Tr. at 147:1–9 (LUPE staff member is uncertain whether a voter who asks for help because he cannot see too well has sufficiently represented his eligibility); Tr. at 2543:21–16 (MABA members are concerned because they cannot guarantee that they have the knowledge to attest to someone's disability). Mr. White testified that "anyone who takes this oath is determining what that means to them," Tr. at 3989:10–16, but acknowledged that "it would certainly be the interpretation of the D.A. in that county where [the potential] offense took

place" that would determine whether an assistor would be prosecuted, Tr. at 4105:13–21.

150. Assistors and witnesses with disabilities also testified that the statements regarding eligibility in the Oath were likely to subject voters receiving assistance to greater scrutiny in the polls, especially those with disabilities that are not readily perceptible. For example, Jennifer Miller, whose daughter, Danielle, requires voting assistance due to dysgraphia, worried that because Danielle's disability is not always visible, her daughter's vote might not be counted based on someone else's perception that she was ineligible for assistance. Tr. at 3215:16–3216:8. Even voters with *visible* disabilities attempting to vote *without* assistance have been subject to undue scrutiny, such as Ms. Litzinger, have had their privacy invaded while voting due to election officials' questions about her need for assistance. *See* Tr. at 3293:1–13; *see also* Tr. at 3245:18–3246:10 (Nunez Landry).

151. Pressure or coercion. Voters and assistors expressed concerns about the Oath provision requiring assistors to swear that they "did not pressure or coerce the voter into choosing me to provide assistance" due to confusion about the meaning of "pressure" under such circumstances. *See* Tr. at 2540:11–16 (MABA organizational representative stating that, as an attorney, she would like to see a definition or context for the words "pressure" and "coerce").

152. For example, assistors worry that encouraging voters to seek assistance if they need it or calling them to ask about their plans to vote could be construed as "pressuring" a voter to choose them as assistors. Tr. at 2540:11 (MABA).

153. Witnesses also explained that the practical reality of relationships between caregivers and their clients means that many voters may have few potential assistors to choose from. For example, Ms. Nunez Landry asked:

> What does pressure or coerce mean in this context? And I think especially if people ... are under penalty of perjury they may be afraid, and for so many of us who don't have options on who is going to help us, is that coercion? Is that pressure? I just think there is going to be so much confusion that my fear is that people will be too afraid to help us.

Tr. at 3249:21–3250:2.

154. Ms. Miller, whose daughter requires voting assistance, worried that parents could face prison time based on simple logistical matters: if a voter prefers that her father assist her, for example, but it is more convenient for her mother to take her to the polls, has the mother "pressured" the voter into choosing the mother by relaying this information to her daughter? Tr. at 3206:11–3207:4; *see also* Tr. at 3207:20–25, 3214:13–3215:9.

155. Cameron County Election Administrator Remi Garza testified that he believed the "I did not pressure" language in the Oath could make people hesitant to provide assistance based on the fear that they could be understood to be pressuring the voter to take their assistance: "The wording is vague enough where ... they might be concerned that they are going to violate the oath if they signed it." Tr. at 733:21–734:7

***25** 156. Communication to others about how the voter has voted. Plaintiffs did not meaningfully challenge the language in the Oath barring assistors from "communicat[ing] information about how the voter has voted to another person," either at trial or in any of their post-trial briefing. The Court thus considers any challenge to this language to have been waived. Additionally, it is difficult to see how this language could possibly frustrate Section 208, which was enacted in large part to protect voters' privacy. [27]

The Assistor Disclosure requirements (§§ 6.03, 6.05, and 6.07) deter voting assistance.

157. Sections 6.03 and 6.05 of S.B. 1 require a voter assistor to record and swear to their relationship to the voter and indicate whether the assistor received or accepted any form of compensation or benefit from a candidate campaign or a political action committee. Section 6.03 creates a new form with this requirement for assistors in the polling place and Section 6.05 adds this requirement to the mail ballot carrier envelope. TEC § 86.010(e).

158. Section 6.07 revises the mail ballot carrier envelope to require a person who deposits the carrier envelope in the mail to indicate that person's relationship to the voter. *Id.* at 55. Even before S.B. 1, the mail ballot carrier envelope required assistors to disclose their name and address. *See* TEC § 86.010(e); JEX-1 at 53.

159. Assistors and county election officials testified that the form requirement, coupled with the Oath of Assistance, created delays during in-person voting. Tr. at 81:15–25 (Chavez Camacho); Tr. at 383:14–18 (Scarpello); Tr. at 732:8–733:17 (Garza); Tr. at 1057:12–24 (Callanen); Tr. at 2316:16–20 (Ramon). Ms. Rocha, a LUPE employee, testified that, on two occasions when agreed to assist voters at the polls under S.B. 1, she left the voter to stand in a separate line for assistors and, by the time she had completed the disclosures, the voter was being assisted by other people. Tr. at 150:6–18, 151:3–14, 152:6–153:3, 153:4–17, 150:9–12, 150:14–151:2, 157:14–158:9. Extended wait times at the polls are especially burdensome on voters with physical disabilities, and waiting in line is the most common difficulty that voters with disabilities face. *See* Tr. at 3756:1–19; LUPE-002, Table 10.

160. In addition to the potential delays caused by the Oath of Assistance Form at the polls, potential assistors who, like many of Plaintiffs' staff and volunteers, do not have preexisting relationships with voters they help vote by mail or at the polls have a well-founded concern about providing the information required by Sections 6.03 and 6.05.

161. Even absent evidence of fraud or coercion, the consequences for both the voter and the assistor for failing to disclose their relationship on a mail ballot are severe: the voter's ballot may not count, and the assistor faces up to two years in prison and a fine of up to $10,000. *See* TEC § 86.010(g). These criminal sanctions, however, are inapplicable to mail-ballot assistance provided by a close relative of the voter or someone who lives with the voter. *See* TEC § 86.010(h)(2).

162. Jonathan White, the State's top voter fraud prosecutor, testified that, in his view, "normal assistance" is a voter being assisted by family members or caregivers. Tr at 3987:15–23. With respect to Section 6.03, Mr. White testified that having information about assistors' relationships to voters can help distinguish between workers with no relationship to the voter versus the folks who are assisted by family members or caregivers, which he considers more legitimate assistance. Tr. at 3987:1–14. Still, the OAG's tracker of election crime prosecutions resolved does not identify a single case of voter assistance fraud relating to assistance provided in the polling place. Tr. at 4034:16–20; OCA-377 at 1–12.

***26** 163. Despite Mr. White's impression that voter assistance provided by members of trusted community organizations (rather than, e.g., family members or caregivers) is somehow suspect, in 2020, approximately one-fifth of voters with disabilities received voting assistance from non-family members. LUPE-002 ¶ 102. This is unsurprising, as Texans with disabilities are more likely to live alone, less likely to be married, and more likely to be separated, divorced, or widowed. Tr. at 3747:20–25; LUPE-002, Table 4. And, irrespective of Mr. White's perception that "caregivers" are "normal" assistants, a caregiver who provides BBM assistance is still subject to criminal sanctions for failing to disclose his relationship to the voter, unless the caregiver is *also* a close relative of the voter or lives with the voter. *See* TEC § 86.010(h)(2).

164. Sections 6.05 has deterred DST members from helping mail-in voters because these provisions threaten assistors with criminal liability for failing to satisfy these disclosure requirements or violating the Oath, which appears in the same section of the ballot envelope. Tr. at 2202:9–14. DST chapters have had difficulty recruiting members who are willing to place themselves at risk to provide in-person voter assistance at the polls. Tr. at 2199:16–2200:3, 2202:9–14, 2203:10–15.

165. Out of fear of prosecution pursuant under Sections 6.04 and 6.05 of S.B. 1, LUPE staff and volunteers turn away voters who ask for their assistance, and instead encourages them to ask a family member or a friend for assistance. Tr. at 82:6–12, 111:10–111:20, 118:16–119:4. Cris Rocha, a LUPE employee, is only willing to assist voters at the polls if she is the last person the voter can use as an assistor. Tr. at 145:21–24; 48:22–149:3, 156:12–18. Maria Gomez, a LUPE volunteer who has provided voting assistance for over 25 years, is no longer willing to provide assistance due to the threat of criminal sanctions under S.B. 1. LUPE-284, Gomez Dep. at 13:19–14:15, 32:2–8, 17:2–13, 33:7–35:9, 40:24–42:2.

166. FIEL no longer conducts voter caravans because its members feel uneasy about running afoul of requirements put in place by S.B. 1, including the Oath and the Oath of Assistance Form (which includes the required Assistor Disclosures). Tr. at 2450:3–20. Without these caravans to the polls, FIEL is unable to engage as many voters as possible and help them actively participate in the voting process. Tr. at 2451:1–5.

167. FIEL has also struggled to recruit volunteers to provide in-person voter assistance at the polls since the enactment of S.B. 1 due to FIEL members' concerns about the Oath

and the Assistor Disclosure requirements. Tr. at 2444:10–14, 2444:24–2445:7, 2451:19–25, 2452:1–11. Indeed, while before S.B. 1 about 100 FIEL members volunteered to assist voters at the polls, in 2022, there were at most 20 members who did so. Tr. at 2470:22–25. Cesar Espinosa, the founding executive director of FIEL, no longer provides voter assistance due to his concerns about the Oath's "penalty of perjury" language and the Assistor Disclosure requirements. Tr. at 2430:3–4, 2439:6–23, 2444:24–2445:7; *see also* Tr. at 2445:4–22 (Espinosa) (describing FIEL member Debany Gonzales, who was a very active voter assistant at the polls, but is no longer willing to assist voters due to amended language of the Oath of Assistance); Tr. at 2445:23–2446:22, 2447:6–13 (Espinosa) (describing Tonya Rodriguez, naturalized citizen with LEP, who sought, but did not receive, translation assistance from a FIEL member at the polls and struggled to cast her ballot in person).

168. Mr. Espinosa is particularly concerned about the Assistor Disclosures because when he volunteers at the polls, he often provides translation assistance to voters with whom he has no direct relationship. Tr. at 2443:24–2443:3. Asked about his concerns, Mr. Espinosa stated:

> ***27** [T]he number one question that ... pops into my head is why is this table even necessary? Or what is my information that I provided here going to be used for? How is it going to be stored? Who is going to be able to handle it or see it? Who is going to be able to see my signature?

Tr. at 2442:6–2443:9

169. Consistent with Mr. Espinosa's concerns about the Assistor Disclosure requirements, community stakeholders submitted letters to the Texas legislature, anticipating that S.B. 1's additional paperwork and disclosure requirements were likely to have a "chilling effect" on voter assistance. *See* HAUL-216 (testimony regarding S.B. 1 before the Senate State Affairs Committee by Alex Cogan, Manager of Public Policy and Advocacy for The Arc, asserting that the new Assistor Disclosure requirements would "create a chilling effect that decreases the availability of support for Texas with disabilities to exercise their right to vote").

Election officials are inadequate substitutes for private assistors

170. By deterring assistance by private assistors, the Assistant Disclosure and Oath requirements encourage voters to forgo assistance altogether or receive assistance from an election official. Election officials are imperfect substitutes for voters' chosen assistors for at least two practical reasons.

171. First, election officials may be unable to provide the kind of assistance the voter requires. For example, an election official who does not speak the same language as a voter who needs assistance will be unable to translate and mark the voter's ballot. Similarly, a voter with cognitive or memory impairments will be unable to receive "cuing" assistance from election officials who are unfamiliar with how the voter intends to vote. Finally, it may be unsafe or uncomfortable for voters with physical disabilities to receive assistance from an election official who is unfamiliar with the contours of their disabilities and needs. For example, Ms. Litzinger explained that it takes over two months to train a personal care attendant to safely transfer her out of her wheelchair due to her balance issues. Tr. at 3281:1–17.

172. Second, voters who receive assistance from election officials are forced to sacrifice the privacy of their ballot. Their selections must be disclosed not only to the county elections official(s) providing the assistance but to any poll watchers observing the activity. TEC § 33.057(a).

173. Thus, S.B. 1's Oath and Assistor Disclosure requirements leave many voters in need of assistance with a choice between three dignitary harms—voting without any assistance, losing their privacy while voting, or foregoing the voting process altogether. *See* Tr. at 707:25–708:14 (Cole) (describing the loss of his privacy when an official prevented his assistant from helping him vote as a violation).

174. This is precisely the choice that the right to assistance under Section 208 was intended to avoid: "As a result, people requiring assistance in some jurisdictions are forced to choose between casting a ballot under the adverse circumstances of not being able to choose their own assistance or forfeiting their right to vote. The Committee is concerned that some people in this situation do in fact elect to forfeit their rights to vote." S. Rep. No. 97-417 at 472.

***28** 175. Dr. Douglas Kruse, Plaintiffs' expert witness on S.B. 1's impact on voters with disabilities, explained that adding additional requirements to the assistance process for

both voters and assistors increases the likelihood that voters with disabilities will be disenfranchised:

> It doesn't sound like a big deal ... but it's an extra hurdle. It's an extra thing to do. Combined with all the other barriers that people with disabilities face, it's an extra thing to — simply to remember, but there's also an extra issue that both the assister and the person with the disability may be uncertain about. It's an extra hurdle. It kind of exacerbates the other issues that — in combination with all the other hurdles that people with disabilities face, that they — that may make it more difficult to exercise the right to vote.

Tr. at 3776:19–3777:8; LUPE-002 ¶ 101 ("[I]t is highly likely that many Texans with disabilities will find it difficult or impossible to obtain the assistance they require given the restrictions imposed by section 6.04 ... and will cause some Texans with disabilities to be disenfranchised[.]").

176. Trial testimony by voters reified these predictions about the impact that additional barriers to voting can have on voters with disabilities

177. Ms. Crowther explained that S.B. 1 has hampered her ability to receive assistance in voting because it puts her attendants in a position of "danger" that "they aren't paid for" and she would not want to put them in a situation that has legal ramifications even though she will need more and more help over time as her disability progresses. HAUL-413, Crowther Dep. at 80:8–81:8. As Ms. Crowther summarized:

> That something as meaningful as voting is to me, that I need assistance with ... has now a bump ... in the process, to where now it's become more threatening to bring an attendant in ... why would I want to bring ... my attendant, into that role and have them get all freaked out about, You mean to tell me if I help you do something that is not on this form ... I could get in trouble? And it's just not worth it when your life is dependent on your attendant or your caregiver or your spouse or anything. It's just not worth it.

Id. at 98:6–22.

178. Mr. Cole testified that each provision of S.B. 1 that makes voting marginally harder for disabled people makes it less likely that they will vote:

> Well, it just makes it hard. You know, the thing that we have, and I talk to a lot of people after they get disabled, is as you make things harder, you just start cutting things out. You know, it's too hard to find someone to feed me, or it's embarrassing, so I don't want to go to dinner. It's too hard to get on an airplane to go travel, so I just don't do that. And so every time you put even one little road bump or one little barrier in front, it just makes it that much harder, and so you don't do it.

Tr. at 714:17–715:15.

Ban on Compensated Assistance (§ 6.06)

179. Section 6.06 of S.B. 1 prevents voters from choosing Plaintiffs' staff members and volunteers to assist them with their mail ballots because they receive "compensation" for their assistance efforts. It creates a state jail felony for offering, soliciting or receiving compensation for assisting mail ballot voters, unless the compensated assistor is an "attendant or caregiver previously known to the voter." TEC § 86.0105.

***29** 180. At trial, Jonathan White testified that offering or accepting compensation for mail ballot assistance is a state jail felony, with a sentence of up to two years, *even if there is no fraud in the assistance and the assistor marks the ballot consistent with the wishes of the voter.* Tr. at 3996:8–3997:5. He confirmed that Section 6.06 "criminalizes

compensation for assistance" as opposed to criminalizing fraud in assistance. Tr. at 3995:25–3996:7. Formerly, the Election Code prohibited payment for performance-based work, i.e. paying someone to assist mail voters on a quota basis. Tr. at 3991:18–3992:15. S.B. 1 extended the offense, making it a crime to provide, receive or ask for compensation to assist a mail ballot voter regardless of whether the assistance is on a per capita basis. Tr. at 3992:3–7, 12–19.

181. Mr. White confirmed that Section 6.06 "appear[s] to apply to [the] scenario" in which a paid canvasser for a nonprofit Get Out the Vote organization engages with voters and provides mail ballot assistance at the voter's request. Tr. at 3993:22–3995:10. He testified that if his office encountered a GOTV group that paid its organizers to provide mail ballot assistance as a public service while canvassing, he would be concerned that this activity is used as a subterfuge for voter fraud, and "we'd be looking for the fraud at the bottom of things." Tr. at 3995:11–24. Again, however, a conviction under TEC § 86.0105 requires no evidence of fraud or coercion.

182. Indeed, these provisions potentially expose *voters* to liability for providing tokens of appreciation to assistors who help them complete their mail ballots. Keith Ingram confirmed that a voter who offered a volunteer $20—or offered to buy a friend lunch—to help him complete his mail-ballot could be liable under Section 6.06. Tr. at 1904:1–1906:5.

183. This is not a fanciful hypothetical. Grace Chimene, testifying on behalf of the League, was especially worried that volunteer activities' during door-to-door canvassing could expose *voters* to criminal liability: "It's not just my concern for the League members, but it's also a concern if just a voter that were helping provides compensation, or the place that they live provides compensation of some type that they may be committing a crime." Tr. at 1592:1–5. Members of the League "offer[ ] tea, or coffee, or water," to assistors that help them and other voters vote by mail. Tr. at 1591:1–1592:5, 1590:4–12. To avoid jeopardizing voters and volunteers, institutions like assisted care centers that historically welcomed the League as assistors now discourage the League from sending people to assist residents. Tr. at 1593:9–22. Texans—including League members—residing in these facilities who relied on the League for years are no longer able to obtain assistance voting from the individuals of their choice.

184. As a result of S.B. 1's prohibition on compensated mail-ballot assistance, voters may no longer choose Plaintiffs' staff members and volunteers who accept "anything of value" to assist them with their mail ballots. TEC § 86.0105; TEX. PENAL CODE § 38.01(3).

185. Before S.B. 1, LUPE staff would assist members to complete their mail ballots one-on-one and provide assistance, either at the LUPE offices, in house meetings, or at LUPE's union hall events. Some members would call LUPE and ask LUPE to go to their home to help them fill out their ballot by mail and LUPE would provide that assistance in the members' homes. Tr. at 87:3–21, 3676:11–25.

186. LUPE has stopped assisting voters who request their help completing mail ballots. Tr. at 119:20–120:18. As LUPE's executive director Tania Chavez testified, LUPE has stopped assisting members with their mail ballots because "[it] will mean that our staff could be jailed, that I could be put in prison, that any volunteer that receives any kind of compensation could be then prosecuted, and so we have refrained from doing so." Tr. at 82:20–84:3.

***30** 187. Now, when a LUPE member comes to the LUPE office and requests help with their mail ballot, LUPE informs the member that LUPE cannot provide assistance and tells the voter that they should find help with their family or friends. Tr. at 86:9–86:13, 86:14–87:2, 87:3–87:21. LUPE staff will not provide mail ballot assistance to LUPE members who are elderly and/or disabled or otherwise need assistance to vote by mail and choose LUPE staff as their assistors. Tr. at 86:9–86:13, 86:14–87:2, 87:3–87:21.

188. LUPE is not alone in its decision to stop providing mail ballot assistance. OCA no longer offers voters assistance. Tr. at 1722:3–16. The League has stopped providing voting assistance at some retirement homes and assisted care centers out of the fear the voters—including League members—will "compensate" their assistors with refreshments. Tr. at 1620:7–1621:1. MABA members are no longer willing to provide voting assistance because members fear that they might inadvertently commit a crime, potentially costing them their law licenses. Tr. at 2543:14–2544:23. LULAC volunteers "scaled ... down" their GOTV efforts and decided not to conduct voter outreach with seniors, many of whom require voting assistance, for "fear that they could be subject to prosecution if they help seniors vote by mail." Tr. at 1655:10–18.

The Canvassing Restriction (§ 7.04)

189. The Canvassing Restriction applies to anyone who knowingly gives or receives some "compensation or other benefit" for an "in-person interaction with one or more voters, in the physical presence of an official ballot or a ballot voted by mail, intended to deliver votes for a specific candidate or measure." TEC § 276.015(a)(2).

190. Section 7.04 interferes with community organizers' ability to assist voters with their mail-ballots because its prohibition on "in-person interactions" in the "presence of a mail ballot" does not include an exception for mail-ballot assistance. *See* Tr. at 758:8–19, 758:22–759:12 (Cameron County EA Remi Garza); Tr. at 841:15–842:9, 844:13–25 (DeBeauvoir); Tr. at 496:2–8 (Scarpello).

191. Mr. White testified that if his office encountered a GOTV group that paid its organizers to provide mail ballot assistance as a public service while canvassing, he would be concerned that this activity is a subterfuge for voter fraud. Tr. at 3995:11–24. He acknowledged, however, that prior to S.B. 1, the Election Code already criminalized: assisting a voter who is not eligible for assistance or did not ask for assistance; voting a ballot differently than the voter wished or directed the assistant to vote the ballot; suggesting to the voter during the voting process how the voter should vote, or attempting to influence or coerce the voter receiving assistance. Tr. at 3923:21–3924:14, 3925:4–6.

192. Finally, like Section 6.06, the Canvassing Restriction can be read to impose criminal liability on the very voters it purports to protect. For example, a like-minded voter who asks for voting assistance from a GOTV volunteer and invites him inside for an iced tea would arguably violate Section 7.04. *See* TEC § 276.015 (making it a crime to offer a benefit for the canvasser's "services").

193. Trial testimony establishes that there is widespread confusion about the meaning of the Canvassing Restriction. Even local election administrators ("EAs") are unsure about how to interpret Section 7.04. *See, e.g.*, Tr. at 496:5–8 (Dallas County EA Michael Scarpello) ("I don't know what ballot harvesting means," "it could be interpreted a lot of different ways based on the definition ... put into the law.").

***31** 194. Witnesses were particularly uncertain about how to interpret the terms "compensation" and "physical presence"—neither of which is defined in the statute—and how Section 7.04 impacts organizers' ability to provide voting assistance. Despite this confusion, state officials have not offered any definitive answers about the scope of the Canvassing Restriction. The Secretary of State has not provided any guidance. Tr. at 1914:7–14, 1924:7–18. Nor has the OAG. Tr. at 1924:24–1925:3.

195. In response to Section 7.04, many Plaintiffs groups stopped hosting in-person events where voters had frequently brought their mail ballots for voting assistance and stopped providing assistance to voters. [28]

CONCLUSIONS OF LAW

SUBJECT MATTER JURISDICTION

[2] Before addressing the merits of Plaintiffs' challenges under Section 208, the Court must first consider its subject matter jurisdiction over Plaintiffs' claims. Subject matter jurisdiction is a federal court's statutory or constitutional power to adjudicate a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

[3] **[4]** As the Court has previously explained, Section 208 of the VRA permits private enforcement by both individual voters who need assistance and private organizations representing their interests. *See, e.g., La Unión del Pueblo Entero v. Abbott*, 618 F. Supp. 3d 388, 426 (W.D. Tex. 2022) (citing *OCA-Greater Houston v. Texas* (*OCA-Greater Hous. I*), 867 F.3d 604, 609–614 (5th Cir. 2017)). [29] Because this civil action arises under federal law, the Court has federal question jurisdiction under 28 U.S.C. § 1331.

[5] Sovereign immunity does not limit the Court's subject matter jurisdiction over this action. Section 208 claims are enforceable against state officials because, in enacting the VRA, Congress validly abrogated state sovereign immunity. *See id.* at 433 (citing *OCA-Greater Hous. I*, 867 F.3d at 614).

[6] Finally, the Court considers Plaintiffs' standing to assert their Section 208 challenges because standing "is a component of subject matter jurisdiction." *HSBC Bank USA, N.A. as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 202 (5th Cir. 2018).

Standing

Legal Framework

***32** **[7]** It is well settled that a plaintiff invoking a federal court's jurisdiction must establish standing by satisfying three irreducible requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant[s], and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

[8] **[9]** **[10]** The elements of standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. Thus, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* In a case that proceeds to trial, plaintiffs must establish all three elements by a preponderance of the evidence. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021) ("[I]n a case like this that proceeds to trial, the specific facts set forth by the plaintiff to support standing 'must be supported adequately by the evidence adduced at trial.' "). These requirements ensure that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)) (quotation marks removed).

[11] "[P]laintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement only by demonstrating a continuing injury or threatened future injury" for the self-evident reason that "injunctive and declaratory relief 'cannot conceivably remedy any past wrong.' " *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

[12] **[13]** **[14]** To constitute an injury in fact, a threatened future injury must be (1) potentially suffered by the plaintiff, not someone else; (2) "concrete and particularized," not abstract; and (3) "actual or imminent, not 'conjectural' or 'hypothetical.' " *Id.* at 720–21 (citations omitted). The injury must be "imminent ... to ensure that the alleged injury is not too speculative for Article III purposes." *Id.* at 721 (quoting *Lujan*, 504 U.S. at 564 n.2, 112 S.Ct. 2130). For a threatened future injury to satisfy the imminence requirement, there must be at least a "substantial risk" that the injury will occur. *Stringer*, 942 F.3d at 721 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). Nonetheless, "[t]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle." (*OCA-Greater Hous. I*, 867 F.3d at 612) (quotations omitted). "This is because the injury in fact requirement under Article III is qualitative, not quantitative, in nature." *Id.* (quotations omitted).

[15] Juridical entities may establish standing under an associational or organizational theory of standing. *Id.* at 610.

[16] **[17]** "Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted, nor the relief requested requires participation of individual members." *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 143 S. Ct. 2141, 2157, 216 L.Ed.2d 857 (2023) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). Participation of individual members is not required where, as here, the association seeks prospective and injunctive relief, rather than individualized damages. *Consumer Data Indus. Ass'n v. Texas*, No. 21-51038, 2023 WL 4744918, at *4 n.7 (5th Cir. July 25, 2023).

***33** **[18]** "By contrast, 'organizational standing' does not depend on the standing of the organization's members. The organization can establish standing in its own name if it 'meets the same standing test that applies to individuals.' " *OCA-Greater Hous. I*, 867 F.3d at 610 (citations omitted) (quoting *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999)).

[19] "When the suit is one challenging the legality of government action or inaction" and "the plaintiff is himself an object of the action (or forgone action) at issue[,] ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62, 112 S.Ct. 2130. An organization can establish a likely future injury if it intends "to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979); *see, e.g., Veterans*

of Foreign Wars of U.S. v. Tex. Lottery Comm'n, 760 F.3d 427, 439 (5th Cir. 2014) (charitable organizations had standing to challenge statute prohibiting their use of bingo proceeds for political advocacy as an unconstitutional burden on their political speech). [30]

[20] **[21]** **[22]** **[23]** Finally, an unregulated organization can also demonstrate the requisite injury by showing that the challenged conduct or regulation has "perceptibly impaired" the organization's "core business activities." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 395, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)). Such "business activities" need not be profit-driven. *See Havens*, 455 U.S. at 379 n.20, 102 S.Ct. 1114 ("That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not [affect] the nature of the injury suffered, and accordingly does not deprive the organization of standing."). "It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Still, a mission-driven organization must proffer evidence of interference with its core activities to ensure it has a personal stake in the outcome of case beyond its "abstract social interests." *Havens*, 455 U.S. at 379, 102 S.Ct. 1114. [31]

***34** **[24]** The effect on the organization's activities need not be great. *OCA-Greater Hous. I*, 867 F.3d at 612; *see also Havens*, 455 U.S. at 379, 102 S.Ct. 1114. In *Havens*, for example, the Supreme Court held that the organizational plaintiff, HOME, had standing to sue a real estate company, Havens, for providing false information to HOME's black employees about apartment availability on four occasions. *Havens*, 455 U.S. at 368–69, 102 S.Ct. 1114. "Critically, HOME not only was an issue-advocacy organization, but also operated a housing counseling service." *All. for Hippocratic Med.*, 602 U.S. at 394, 144 S.Ct. 1540. HOME asserted that these discriminatory racial steering practices "perceptibly impaired [its] ability to provide counseling and referral services for low-and moderate-income homeseekers." *Havens*, 455 U.S. at 379, 102 S.Ct. 1114. [32] HOME alleged only that its counseling services had been "frustrated" by Havens's conduct—not that HOME had been forced to stop providing the services altogether. *Cf. La. Fair Hous. Action Ctr. at, Inc. v. Azalea Garden Props., L.L.C.*, 82 F.4th 345, 355 (5th Cir. 2023) ("HOME could not place African American clients into housing at Havens's complex when Havens was engaged in illegal racial steering."). Still, the Court concluded that if Havens had impaired HOME's ability to provide such services, "there can be no question that the organization has suffered injury in fact." *Havens*, 455 U.S. at 379, 102 S.Ct. 1114.

[25] **[26]** **[27]** "When the plaintiff is an unregulated party, causation 'ordinarily hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction —and perhaps on the response of others as well.' " *All. for Hippocratic Med.*, 602 U.S. at 383, 144 S.Ct. 1540 (quoting *Lujan*, 504 U.S. at 562, 112 S.Ct. 2130). But plaintiffs generally cannot show causation by "rely[ing] on speculation about the unfettered choices made by independent actors not before the court." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (quotation marks omitted). "Therefore, to thread the causation needle in those circumstances, the plaintiff must show that the 'third parties will likely react in predictable ways' that in turn will likely injure the plaintiffs." *All. for Hippocratic Med.*, 602 U.S. at 383, 144 S.Ct. 1540 (quotation marks omitted) (citing *California v. Texas*, 593 U.S. 659, 675, 141 S.Ct. 2104, 210 L.Ed.2d 230 (2021)). The "line of causation between the illegal conduct and injury"—the "links in the chain of causation," *Allen v. Wright*, 468 U.S. 737, 759, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)—must not be too speculative or too attenuated, *Clapper*, 568 U.S. at 410–11, 133 S.Ct. 1138.

[28] The causation requirement is satisfied where it is sufficiently predictable how third parties would react to government action or cause downstream injury to plaintiffs. *All. for Hippocratic Med.*, 602 U.S. at 386, 144 S.Ct. 1540. In *Department of Commerce v. New York*, for example, the Supreme Court recognized states' standing to challenge the reinstatement of the citizenship question on the census because noncitizens would "likely react in predictable ways to the citizenship question"—i.e., by failing to respond to the census altogether—"even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential." 588 U.S. 752, 767–68, 139 S.Ct. 2551, 204 L.Ed.2d 978 (2019). The depression of the response rate among non-citizens would, in turn, cause them to be undercounted in the census results and injure states with disproportionate numbers of non-citizens through, *e.g.*, the loss of federal funds, diminishment of political representation, and the degradation of census data. The Court concluded that the states' "theory of standing thus [did] not rest on mere speculation about the decisions of third parties; it

relie[d] instead on the predictable effect of Government action on the decisions of third parties." *Id.* at 768, 139 S.Ct. 2551.

***35** **[29]** The defendant's conduct contributes to a plaintiff's injuries, even if it is not the sole cause of those injuries. *Massachusetts v. E.P.A.*, 549 U.S. 497, 523, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). Similarly, the traceability requirement is not a proximate cause standard; it can be satisfied with a showing that the alleged injury was only indirectly caused by the defendant. *Bennett v. Spear*, 520 U.S. 154, 168, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

[30] **[31]** **[32]** **[33]** **[34]** An injury is redressable when it is "likely" as opposed to merely "speculative" that a decision in a plaintiff's favor would grant the plaintiff relief. *OCA-Greater Hous. I*, 867 F.3d at 610. A plaintiff does not need to demonstrate that a favorable decision will "relieve [their] every injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). They only need to show that a decision in their favor will "relieve a discrete injury to [them]self." *Id.* Even "the ability 'to effectuate a partial remedy' satisfies the redressability requirement." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 141 S.Ct. 792, 209 L.Ed.2d 94 (2021) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992)); *see also Netsphere, Inc. v. Baron*, 703 F.3d 296, 314 (5th Cir. 2012) (explaining so long as "there is some means by which [the court] can effectuate a partial remedy, [there] remains a live controversy" (citation omitted)). Plaintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement by "demonstrat[ing] 'continuing harm or a real and immediate threat of repeated injury in the future.' " *James v. Hegar*, 86 F.4th 1076, 1081 (5th Cir. 2023) (quoting *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992)). A threatened future injury suffices for standing so long as "there is a substantial risk that the harm will occur." *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 782 (5th Cir. 2024) (quoting *Susan B. Anthony List*, 573 U.S. at 158, 134 S.Ct. 2334).

[35] When multiple plaintiffs seek the same injunctive relief, only one needs to establish standing. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). Here, the Court must identify at least one organization in each Plaintiff group with standing to seek injunctive against local election officials and DAs in their respective jurisdictions.

Analysis

At the outset, the Court observes that the State Defendants and Intervenor-Defendants appear to be confused about the basis for Plaintiffs' standing, insisting that Section 208 does not afford Plaintiffs a "right" to provide voting assistance. *See, e.g.*, ECF No. 608 at 643.

To be clear, the "right" to provide assistance is not now, nor has it ever been, at issue in this case. Defendants are correct, of course, that Section 208 did not create such a right—just as the FHA did not create a "right" to provide housing referrals.

Defendants' confusion appears to stem from the fact that most Plaintiffs have two bases for standing under Section 208: associational standing (based on injuries to their members entitled to voting assistance) and organizational standing (based on impairment of the organizations' ability to provide voting assistance). The concept is not difficult: some of Plaintiffs' members *require* voting assistance, while others *provide* voting assistance. The former establish a basis for associational standing; the latter establish a basis for organizational standing.

***36** As in *Havens*, the organizational injury here is a perceptible impairment of one of Plaintiffs' core services —voter assistance—resulting from violations of a federal law—Section 208. And, to the extent that a rule directly regulates the Plaintiff organizations (rather than their individual assistors), Plaintiffs unquestionably have standing to challenge it. *See Lujan*, 504 U.S. at 561–62, 112 S.Ct. 2130.

Sections 6.01 – Curbside Voting Transportation Disclosure

[36] DST challenges Section 6.01's requirement that a driver transporting seven or more voters to the polls for curbside voting complete a disclosure form stating her name, address, and whether she is serving as an assistor. Because Section 6.01 does not regulate DST directly, DST must demonstrate that "third parties will likely react in predictable ways that in turn will likely injure the plaintiffs." *All. for Hippocratic Med.*, 602 U.S. at 383, 144 S.Ct. 1540.

DST asserts that Section 6.01 has deterred its members from providing transportation to the polls. ECF No. 856 ¶ 968 (citing Tr. at 2196:21–2197:7). While the Court agrees that DST has suffered a perceptible impairment to one of its core voter activities—transporting voters to the polls—DST has not shown that its injury is fairly traceable to Section 6.01, which applies only to curbside voting.

The State Defendants object that DST cannot establish standing because the obligation to provide the Transportation Disclosures bears no "close relationship" to "traditional[ ]" legal injuries. ECF No. 862 ¶ 62(k) (quoting *TransUnion*, 594 U.S. at 431, 141 S.Ct. 2190). The Court disagrees. The Supreme Court has recognized the deterrent effect that disclosure requirements can have on associative activities. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 486, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (striking down law requiring teachers to disclose all of the organizations to which they had belonged in the past five years because "[e]ven if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy"); *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *see also Dep't of Com. v. New York*, 588 U.S. at 767, 139 S.Ct. 2551 (finding no clear error in district court's conclusion that the reinstatement of a citizenship question on the census was likely to discourage non-citizens from responding to the census).

DST has not shown, however, that its members who drive voters to the polls have engaged or intend to engage in conduct that is "arguably proscribed" under Section 6.01 by transporting more than seven voters to polls for curbside voting. *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008) ("Without concrete plans or any objective evidence to demonstrate a 'serious interest' [to engage in proscribed conduct], [plaintiff] suffered no threat of *imminent injury.*"); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155–56, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.").

Given Section 6.01's limited application, it is not "sufficiently predictable" that DST members would respond to Section 6.01's regulation of transportation for more than seven curbside voters by refusing to provide transportation to the polls altogether—even for voters casting their ballots inside the polling place. *All. for Hippocratic Med.*, 602 U.S. at 383, 144 S.Ct. 1540. Thus, the Court concludes that DST has failed to thread the causation needle establishing a connection between Section 6.01 and the injury DST members have caused to DST's organizational interests.

***37** Accordingly, DST has not established standing to challenge Section 6.01's Transportation Assistance disclosure requirement, and its claim must be dismissed without prejudice for a lack of subject matter jurisdiction.

Sections 6.03, 6.04, 6.05 and 6.07 – Oath of Assistance and Assistor Disclosures

Sections 6.03, 6.04, and 6.05 of S.B. 1 establish new procedures for voter assistors, specifically by requiring the assistor to disclose certain information—their name, address, relationship to the voter, and whether they are being compensated by a candidate, campaign, or political committee—on a form at the polling place (Section 6.03) or on the mail ballot carrier envelope (Section 6.05) and by requiring assistors to take a revised Oath (Section 6.04).

Section 6.04 of S.B. 1, amending the Oath of Assistance, is challenged by the HAUL Plaintiffs (including The Arc) and the LUPE Plaintiffs. Sections 6.03 and 6.05 are challenged by the HAUL and LUPE Plaintiffs. Section 6.07 is challenged only by the HAUL Plaintiffs.

The Arc has associational standing to challenge § 6.04.

[37] As a result of the Oath of Assistance requirements set forth in S.B. 1 § 6.04, members of The Arc who qualify for assistance under Section 208 voted without the assistors of their choice, both in-person and by mail, in Harris County, Bexar County, and Travis County. [33]

Ms. Nunez Landry, Ms. Halvorson, Ms. Litzinger, and Ms. Crowther have each suffered an injury in fact and each would have standing to sue in her own right. Even if voters requiring assistance successfully cast a ballot, their right under Section 208 is violated if they voted without an assistor of their choice or forwent assistance altogether. *See* Consent Decree, *United States v. Hale County*, No. 5-05CV0043-C (N.D. Tex. Apr. 27, 2006) (requiring election administrators to provide language assistance to voters with limited English-language proficiency who had voted in an election in which the County failed to permit assistance to those voters); *Democracy N.C. v. N.C. State Bd. of Elections*, 590 F. Supp. 3d 850, 869 (M.D.N.C. 2022) (holding legally blind plaintiff who voted absentee with his wife's assistance had standing to challenge a law restricting assistance that would prevent him from seeking assistance from staff at nursing home). As long as the amended Oath of Assistance remains in effect, these voters will be unwilling to expose their attendants to criminal liability by asking for their assistance. Thus, there is a

"substantial risk" that the injury will occur. *Stringer*, 942 F.3d at 721.

***38** The members' interests in voting with the assistors of their choice are germane to the purposes of The Arc, which works to empower people with disabilities in the voting process. [34]

[38] Plaintiffs' injuries arising out of S.B. 1's amended Oath language are traceable to the Secretary because she has created forms implementing Section 6.04. *See* LUPE-009 (mail ballot carrier envelope) and LUPE-189 (Oath of Assistance form). The Oath regulates Ms. Nunez Landry, Ms. Halvorson, Ms. Litzinger, and Ms. Crowther directly by requiring them to represent their eligibility to potential assistors as a condition of their eligibility.

Plaintiffs' injuries from these provisions are fairly traceable to the local election officials who are responsible for administering the Oath in polling places, TEC § 64.034, and printing, sending, receiving, and reviewing mail carrier and ballot envelopes, TEC §§ 86.002–.004, 86.008–.009, 86.011. Thus, their injuries are fairly traceable the Bexar County EA, Harris County Clerk, and Travis County Clerk, because Plaintiffs' members suffered their injuries while voting in those jurisdictions.

The Arc members' injuries are also traceable to the DAs in those counties and the State Defendants based on the chilling effect that the credible threat of criminal enforcement of the Oath against their assistors have had on their willingness and ability to receive assistance from their chosen assistors. Although Ms. Nunez Landry, Ms. Halvorson, Ms. Litzinger, and Ms. Crowther are not themselves subject to criminal sanctions under § 6.04, given the practical realities of these voters' relationships with their chosen assistors—including their physical dependence on their attendants for assistance outside of voting—their unwillingness to expose their assistors to criminal liability is "sufficiently predictable" to establish causation for standing purposes. *All. for Hippocratic Med.*, 602 U.S. at 386, 144 S.Ct. 1540.

Similarly, their attendants' unwillingness to provide in-person or mail-ballot assistance due to potential criminal liability under S.B. 1 is not speculative—attendants specifically cited the "penalty of perjury" and "eligibility" language in the Oath as their reasons for declining to provide assistance. Tr. at 3319:7–16 (Ms. Halvorson's attendant told her that she was unwilling to take the Oath of assistance "under penalty of perjury" due to her green card status); Tr. at 3291:4–3292:5 (Ms. Litzinger's attendant was not comfortable assisting her due to fear of criminal liability under the Oath, especially with respect to the meaning of "eligibility" and "assistance"). Indeed, the chilling effect on assistors was *actually foreseen* by disability rights advocates who testified before the Texas legislature in opposition to S.B. 1. *See, e.g.*, HAUL-216.

***39** Thus, The Arc's "theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable [and actual] effect of Government action on the decisions of third parties." *Dep't of Com. v. New York*, 588 U.S. at 767, 139 S.Ct. 2551 (recognizing that citizenship question on the census was likely to depress non-citizens' response rate).

The State of Texas enforces election crimes, including violations of the Oath of Assistance through county and local prosecutors. *Stephens*, 663 S.W.3d at 52. The State has not disavowed enforcement. *KVUE, Inc. v. Moore*, 709 F. 2d 922, 930 (5th Cir. 1983) (holding that plaintiffs had standing to pursue a pre-enforcement challenge in part because "the state has not disavowed enforcement"), *aff'd sub nom. Texas v. KVUE-TV, Inc.*, 465 U.S. 1092, 104 S.Ct. 1580, 80 L.Ed.2d 114 (1984). Individual County DAs *may not* disavow such enforcement under Texas law. *See* TEX. LOC. GOV'T CODE § 87.011(3)(B) (prohibiting district attorneys from adopting an enforcement policy of refusing to prosecute a type or class of criminal offense). [35]

Plaintiffs' organizational injuries are also traceable to the AG, who, even after *Stephens*, retains "broad investigatory powers" under the Election Code, State's Br. at 49, *LUPE v. Scott*, No. 22-50775 (5th Cir. Dec. 9, 2022), ECF No. 62, and may "direct the county or district attorney ... to *conduct* or *assist* the attorney general in conducting the investigation." *See* TEC § 273.002(1) (emphasis added); *see also id.* § 273.001 (district attorneys must investigate alleged violations referred to them). On top of this investigatory power, "the Attorney General can prosecute with the permission of [a] local prosecutor," *Stephens*, 663 S.W.3d at 55, and no County DA has disavowed a willingness to let the AG pursue cases within their counties.

An order declaring the challenged language in the amended Oath unlawful and enjoining its enforcement would remove the chilling effect on voter assistance that the provisions presently impose on these members of The Arc and their assistors. *See Ctr. for Individual Freedom v. Carmouche*, 449

F.3d 655, 661 (5th Cir. 2006) (finding "redressability prong[ ] of the standing inquiry ... easily satisfied" where "[p]otential enforcement of the statute caused the [plaintiff's] self-censorship, and the injury could be redressed by enjoining enforcement of the [statute]"); *McCraw*, 504 F. Supp. 3d at 582 (W.D. Tex. 2020), *aff'd*, 90 F.4th 770 (5th Cir. 2024) (similar).

In short, with respect to their Section 208 challenge to S.B. 1 § 6.04, members of The Arc are "sufficiently adverse" to the State Defendants and the election officials and DAs of Bexar County, Harris County, and Travis County to present a case or controversy within this Court's jurisdiction. *Babbitt*, 442 U.S. at 302, 99 S.Ct. 2301.

DST and the LUPE Plaintiffs have organizational standing to challenge §§ 6.03–6.05, 6.07

***40** **[39]** DST, LUPE, MABA, and FIEL have had difficulty recruiting members to provide voting assistance services due to the threat of criminal sanctions under S.B. 1's Assistor Disclosure and Oath requirements, and some members have stopped providing assistance altogether. [36]

The Assistor Disclosure requirements are burdensome to assistors and have also caused delays at polling places that have interfered with voting assistance. [37] Providing such assistance is a core part of their respective missions. [38]

Plaintiffs' organizational injuries are fairly traceable to S.B. 1 §§ 6.03–6.05. The chilling effect that the Assistor Disclosure and Oath requirements would have on individuals' willingness to provide voting assistance—and the downstream effects on organizations' ability to perform voter assistance services—was "sufficiently predictable" to establish causation for standing purposes. *All. for Hippocratic Med.*, 602 U.S. at 386, 144 S.Ct. 1540; *see Shelton*, 364 U.S. at 486, 81 S.Ct. 247, *NAACP*, 357 U.S. at 462, 78 S.Ct. 1163; *Dep't of Com. v. New York*, 588 U.S. at 767, 139 S.Ct. 2551. Indeed, the chilling effect on assistors was *actually foreseen* by disability rights advocates who testified before the Texas legislature in opposition to S.B. 1. *See, e.g.*, HAUL-216.

[40] Here again, the organizations' injuries are traceable to the Secretary, who creates forms implementing the requirements, and to local election officials, who administer oaths, collect disclosures, and review mail ballots in the counties in which DST, LUPE, MABA, and FIEL operate. [39] Their organizational injuries are also fairly traceable to the State Defendants and the local DAs in those counties based on the chilling effect that the "credible threat" of criminal enforcement has on their willingness to provide BBM assistance.

***41** Even before S.B. 1, the Election Code required election officials to note an assistor's name and address next to each voter they assisted in the poll list, TEC § 64.032(d) (1986), and required assistors to provide the same information and their signature on the outside of voters' mail-ballot carrier envelopes, TEC § 86.010(e), JEX-1 at 53. Accordingly, Plaintiffs cannot establish that any injuries arising from the mere *disclosure* of assistors' names and addresses—at the polls or on the mail ballot carrier envelopes—would be redressed by an order enjoining enforcement of Sections 6.03 and 6.05. Section 6.03 did not relieve election officials of their duty to separately record assistors' names and addresses in the poll list under TEC § 64.032(d). Indeed, the Secretary has issued several form poll lists that contain spaces for recording assistors' names and addresses. [40] Being required to provide duplicative information on a separate form for each voter that an assister helps is undoubtedly burdensome.

An order declaring the challenged language in the amended Oath and the Assistor Disclosure requirements unlawful and enjoining their enforcement would remove the chilling effect on voter assistance that has impaired the organization's ability to provide assistance services to voters.

The Court concludes that DST, LUPE, MABA, and FIEL are "sufficiently adverse" to the State Defendants, the election officials and DAs of Bexar, Harris, Travis, and Dallas Counties and the 34th Judicial District to present a case or controversy within this Court's jurisdiction. *Babbitt*, 442 U.S. at 302, 99 S.Ct. 2301.

Section 6.06 – Prohibition on Compensated Mail-Ballot Assistance

[41] Section 6.06 is challenged by the OCA Plaintiffs and the LUPE Plaintiffs. OCA, the League, LUPE, and MABA are regulated by Section 6.06 of S.B. 1 because they have provided their staff members and volunteers with "compensation," as it is broadly defined under TEX. PENAL CODE § 38.01(3), for assisting voters, including mail voters. [41] As a result, Plaintiffs have stopped assisting mail voters. [42]

[42] "When the suit is one challenging the legality of government action or inaction" and "the plaintiff is himself an object of the action (or forgone action) at issue[,] ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62, 112 S.Ct. 2130.

Again, because their conduct is being directly regulated by Section 6.06 and exposes the OCA Plaintiffs (and their members) to criminal liability, their organizational injuries —their inability to provide mail-ballot assistance—is fairly traceable to the State Defendants and to the DAs in the jurisdictions in which Plaintiffs operate. [43]

***42** **[43]** Both the OCA and LUPE Plaintiffs' name local election officials as Defendants to their Section 208 challenges to the S.B. 1 § 6.06. *See* ECF No. 200 at 61; ECF No. 208 at 76. Plaintiffs have not identified, and the Court cannot locate, any reason to believe that their organizational injuries caused by the Section 6.06 are fairly traceable to (or redressable by) local election officials, who have no criminal enforcement authority under the Election Code. Accordingly, Plaintiffs lack standing to sue these local election officials in connection with their challenges to Section 6.06.

Section 7.04 – Canvassing Restriction

[44] Section 7.04 is challenged by the LUPE Plaintiffs and the LULAC Plaintiffs. At trial, Plaintiffs established by a preponderance of the evidence that LUPE and LULAC and their staff and volunteers are presently and prospectively subject to Section 7.04.

Both organizations:

(a) have supported ballot measures and/or candidates in the past and intend to do so in the future; [44]

(b) have advocated for their positions through in-person voter engagement efforts, such as neighborhood block-walking, tabling in public places, and hosting candidate forums, town hall meetings, and other events at their offices and in members' homes; [45]

(c) reasonably expect mail-in ballots to be present during such interactions with voters, who often take out their ballots at election events or in conversations with door-to-door canvassers because they have questions about the ballot or needed voting assistance; [46] and

(d) maintain staff and/or volunteers who receive some "benefit" in exchange for their in-person canvassing efforts. [47]

Accordingly, the LUPE and LULAC Plaintiffs can no longer ask staff members to provide mail-ballot assistance as part of their jobs or treat volunteers who provide such assistance during in-person events. [48] Again, because their conduct is being directly regulated by the Canvassing Restriction and exposes Plaintiffs to criminal liability, their organizational injury—their inability to provide mail-ballot assistance—is fairly traceable to the State Defendants and to the DAs in the jurisdictions in which Plaintiffs operate. [49]

***43** These injuries are also "likely to be redressed by a favorable judicial decision." *Spokeo, Inc.*, 578 U.S. at 338, 136 S.Ct. 1540. An order declaring that S.B. 1 § 7.04 is preempted by Section 208 and enjoining its enforcement by the State Defendants and County DAs would remove the restrictions and burdens on assistors that have frustrated Plaintiffs' ability to provide voting assistance services and Texas voters' right to vote with their chosen assistors under Section 208.

The LUPE and LULAC Plaintiffs' position with respect to Section 7.04's Canvassing Restriction is "sufficiently adverse" to the State Defendants and the County DAs to present a case or controversy within this Court's jurisdiction. *Babbitt*, 442 U.S. at 302, 99 S.Ct. 2301.

[45] Both the LUPE and LULAC Plaintiffs' name local election officials as Defendants to their Section 208 challenges to the Canvassing Restriction. *See* ECF No. 207 at 60; ECF No. 208 at 76. Plaintiffs have not identified, and the Court cannot locate, any reason to believe that their organizational injuries caused by the Canvassing Restriction are fairly traceable to local election officials, who have no criminal enforcement authority under the Election Code. Accordingly, Plaintiffs lack standing to sue these local election officials in connection with their challenges to Section 7.04.

SECTION 208 PREEMPTION

Legal Framework

Section 208's text is "unambiguous." *OCA-Greater Hous. I*, 867 F.3d at 614. It provides that voters with disabilities and voters unable to read or write are entitled to voting assistance from "a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508.

[46] The Supremacy Clause of the U.S. Constitution requires preemption of any state statute that, when enacted, makes compliance with both federal and state law impossible or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting Section 208. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377, 135 S.Ct. 1591, 191 L.Ed.2d 511 (2015) (internal citations omitted).

Congress enacted Section 208 with the "clear purpose to allow [a] voter to decide who assists them" during the voting process. *Ark. United v. Thurston* (*Ark. United II*), 626 F. Supp. 3d 1064, 1085 (W.D. Ark. 2022), *appeal docketed*, No. 22-2918 (8th Cir. Sept. 12, 2022). It found "this broad protection was necessary to prevent discrimination against voters who require assistance because 'many such voters may feel apprehensive about casting a ballot in the presence of, or may be misled by, someone other than a person of their own choice.' " *Id.* at 1085–86 (citing S. Rep. No. 97-417 at 62 (1982)). The Senate Report explained that Section 208 was necessary "to limit the risks of discrimination against voters in these specified groups and avoid denial *or infringement* of their right to vote." *Id.* (emphasis added).

[47] **[48]** Section 208 provides covered voters with more than a bare right to assistance in the poll booth. Rather, it ensures that they will have access to any kind of assistance they need, at any step of the voting process, from a person of their choice other than their employer or a representative of their union. *See, e.g., OCA-Greater Hous. I*, 867 F.3d at 615 (explaining that assistance to vote "plainly contemplates more than the mechanical act of filling out the ballot sheet"). Section 208 thus preempts state laws that impermissibly constrain access to voting assistance in various ways. *See id.* at 614 (concluding that a limitation on assistance "beyond the ballot box"—even with "near–unfettered choice of assistance *inside the ballot box*"—"impermissibly narrows the right guaranteed by Section 208" (emphasis in original)); *see also OCA-Greater Hous. v. Texas* (*OCA-Greater Hous. II*), No. 1:15-CV-679, 2022 WL 2019295, at *3 (W.D. Tex. June 6, 2022) (modifying injunction to enjoin new state law "limiting the activities eligible for assistance to 'marking or reading the ballot' " (citation omitted)).

***44** Because a state law can interfere with a voter's substantive rights under Section 208 by regulating assistors just as readily as by regulating voters needing assistance, laws regulating assistors may stand as obstacles to accomplishing Congress's objectives in enacting Section 208. Determining whether they in fact frustrate Congress's purpose is "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000); *see also Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012); *Felder v. Casey*, 487 U.S. 131, 151, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (state law preempted where it "interferes with and frustrates the substantive right Congress created").

Consistent with Section 208's text, context, and history, courts have found state laws regulating assistors to be preempted both because compliance with such laws makes full compliance with Section 208 impossible, *see Disability Rts. N.C. v. N.C. State Bd. of Elections* (*Disability Rts. N.C. II*), No. 5:21-CV-361-BO, 2022 WL 2678884, at *4–6 (E.D.N.C. July 11, 2022); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 235 (M.D.N.C. 2020), and because such laws "pose[ ] an obstacle to Congress's clear purpose to allow the voter to decide who assists them at the polls," *Ark. United II*, 626 F. Supp. 3d at 1085; *see also, e.g., OCA-Greater Hous. I*, 867 F.3d at 614–15.

[49] In support of their view that states are permitted to further restrict voters' choice of assistor—beyond the two groups excluded by the text of the statute—the State Defendants insist that Section 208 only guarantees "an" assistor of the voter's choice, not "the" assistor of the voters' choice. *See* ECF No. 862 ¶ 551 (citing *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 619 (E.D. Mich. 2020), *rev'd and remanded*, 860 F. App'x 419 (6th Cir. 2021)). [50] Thus, according to the State Defendants, "Section 208 recognizes that covered voters have the right to select a someone as an assistor, as opposed to having one chosen for them, but it does not guarantee them their first choice; nor does it foreclose Texas from enacting reasonable regulations on whom might assist voters and the procedural prerequisites assistors must follow." *Id.* The Court is not persuaded by the State Defendants' tortured grammatical analysis, which

is unsupported by the plain text of Section 208, Congress's legislative intent, or common sense.

[50] To begin, nothing in the text of Section 208 allows states to impose additional limitations or exceptions not stated in the statute. "[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980)); *see also United States v. Rand*, 924 F.3d 140, 144 (5th Cir. 2019). As the Fifth Circuit analogized in another context:

> ***45** [W]hen Congress provided the two exceptions to the ... requirement, it created all the keys that would fit. It did not additionally create a skeleton key that could fit when convenient. To conclude otherwise "would turn this principle on its head, using the existence of two exceptions to authorize a third very specific exception."

Parada v. Garland, 48 F.4th 374, 377 (5th Cir. 2022) (quoting *Quebrado Cantor v. Garland*, 17 F.4th 869, 874 (9th Cir. 2021)).

No other exceptions are provided, and nothing in the statute suggests that extra-textual exceptions can be imposed or implied. *See Ark. United v. Thurston (Ark. United I)*, No. 5:20-CV-5193, 2020 WL 6472651, at *4 (W.D. Ark. Nov. 3, 2020) ("[T]here is nothing in the statutory language to suggest that a state may burden, unduly or otherwise, the right [to choice] articulated in § 208."). "The express exclusion of only two groups is significant, because it implies that all other categories of assisters are permitted. If Congress intended to exclude more categories, or to allow states to exclude more categories, it could have said so." *Disability Rts. N.C. v. N.C. State Bd. of Elections*, No. 5:21-CV-361-BO, 2022 WL 2678884, at *4 (E.D.N.C. July 11, 2022) ("[O]ther than these two excluded groups, the plain language of Section 208 gives voters unrestricted choice over who may assist them with the voting process").

The Senate Judiciary Committee's Report—which is the "authoritative source for legislative intent" regarding the 1982 amendments to the Voting Rights Act, *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)—confirms Congress's intent that covered voters must be allowed assistance "from a person of their own choosing, with two exceptions" only. S. Rep. No. 97-417 at 2; *see also Niz-Chavez v. Garland*, 593 U.S. 155, 141 S. Ct. 1474, 1481, 209 L.Ed.2d 433 (2021) (explaining that courts must look at the statutory context to determine the meaning of "a"). Indeed, Congress viewed the guarantee of choice as so central to its remedial scheme that it noted Section 208's employer exception should yield in certain circumstances where "the burden on the individual's right to choose a trustworthy assistant would be too great to justify application of the bar on employer assistance." Rep. No. 97-417 at 64.

The State Defendants' reading also flatly contradicts Texas's own interpretation of Section 208. The Election Code provides that, "on the voter's request, the voter may be assisted by *any* person selected by the voter other than the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs." TEC § 64.032(c) (emphasis added). In *OCA-Greater Hous. I*, Texas argued that this provision "track[s] the plain language of Section 208," 867 F.3d at 615, and the Fifth Circuit approved of this reading, interpreting the state law assistor provisions as granting physically disabled voters "the right to select *any* assistor of their choice, subject only to the restrictions expressed in Section 208 of the VRA itself." *Id.* at 608. Texas and the Fifth Circuit have used "a" and "any" interchangeably when interpreting Section 208 without adopting the contrived distinction the State Defendants now propose. *Id.*; *cf. United States v. Naranjo*, 259 F.3d 379, 382 (5th Cir. 2001) (" 'Such *a* violation' ... refers to ... *any* violation ....").

The facts of *OCA-Greater Hous. I* itself foreclose the State Defendants' interpretation. In that case, Mallika Das, a registered voter in Williamson County, brought her son to serve as an interpreter in the polling place. Her son was barred from assisting Ms. Das, however, under a Texas statute, TEC § 61.033, that limited the class of eligible interpreters in each county to individuals registered to vote in the same county. Because he was registered to vote in Travis County, Mr. Das's son was prohibited from serving as his mother's interpreter in Williamson County.

***46** The Fifth Circuit affirmed the district court's conclusion that denying Ms. Das the right to select her son as an interpreter violated her right to vote with assistance from the person of her choice under Section 208. The Fifth Circuit did *not* conclude, as the State Defendants propose here, that the interpreter provision was consistent with Section 208 because it still permitted Ms. Das to make a choice among the narrow class of translators eligible under state law. That is, even

though Ms. Das could have chosen someone else—any voter registered in Williamson County who spoke her language—to serve as her translator, her right to assistance from "a" person of her choice under Section 208 was violated because the law precluded her from receiving assistance from "the" person she actually chose—her son.

The State Defendants insist that the Fifth Circuit's decision in *OCA-Greater Hous. I* is inapposite because it hinged on the VRA's capacious definition of "vote," rather than regulating assistors themselves. ECF No. 862 ¶¶ 562–68. But the translator restriction violated Section 208 only because, under the VRA's expansive definition of "voting," narrowing the class of eligible *translators* necessarily narrowed the class of eligible *assistors* beyond the two categories identified in the text of Section 208. In reaching this conclusion, the Fifth Circuit clarified that a "state cannot restrict [Section 208's] federally guaranteed right by enacting a statute tracking its language, then defining terms more restrictively than as federally defined." 867 F.3d at 615.

The indefinite "a" (as opposed to the definite "the") is appropriate because the identity of the chosen assistor is (and cannot be not) known to the reader of the statute. Moreover, the indefinite article clarifies that Section 208's protections are enforceable against attempts by states and local governments (and their officials) to encroach on a voter's choice of assistor; it is not enforceable against putative assistors themselves. A right to assistance from "the" person of a voter's choice would imply that chosen assistors *must* provide the assistance requested of them. But Section 208 does not permit voters to conscript assistors who are unwilling or unable to help; it prohibits regulations that effectively narrow the universe of willing and eligible assistors from which a voter can choose. [51]

***47** The State Defendants' reading would eviscerate Section 208 by permitting states to give voters a "choice" between two assistors hand-picked by the state because voters could receive assistance from "a person" of their choice between the two possibilities. Section 208's use of "a" to modify "person" does not obviate Section 208's essential guarantee, and it is no evidence of an "intent by Congress to allow states to restrict a federally created right, for Congress does not 'hide elephants in mouseholes.' " *Disability Rts. N.C. v. N.C. State Bd. of Elections (Disability Rts. N.C. I)*, 602 F. Supp. 3d 872, 878 (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001)).

In their motion for summary judgment, the Intervenor-Defendants suggest that S.B. 1's restrictions on choice of assistor are "exactly the type of laws Congress sought to leave undisturbed when it enacted Section 208." ECF No. 608 at 35. But the Senate Report refutes that. It directly addresses which contemporary state laws Section 208 intended to leave undisturbed: those in "many states [that] already provide for assistance by a person of the voter's choice." S. Rep. No. 97-417 at 63. Congress could have preserved other more restrictive state laws by adding more exceptions to the text of Section 208. It didn't. Instead, the Senate Judiciary Committee was clear that guaranteeing voters their choice of assistor was "the most effective method of providing assistance while at the same time conforming to the pattern already in use in many states." *Id.* at 64. States may not second guess that decision. And while the Senate Committee recognized the states' rights "to establish necessary election procedures ... designed to protect the rights of voters," it also clearly stated the intention that any such voter assistance procedures "be established in a manner which *encourages greater participation* in the electoral process." *Id.* at 241 (emphasis added); *see, e.g., id.* at 240 ("Specifically, it is only natural that many such voters may feel apprehensive about casting a ballot in the presence of, or may be misled by, someone other than a person of their own choice ... The Committee is concerned that some people in this situation do in fact elect to forfeit their right to vote.").

Finally, given the evidence adduced at trial, the State Defendants' grammatical argument is purely academic: several voters who testified at trial have voted without assistance from their chosen assistors under S.B. 1 because of its burdensome requirements on both voters and assistors.

Analysis

Section 208 of the federal Voting Rights Act prohibits states from limiting voters' right to assistance and preempts conflicting state laws. S.B. 1 §§ 6.03–6.07 and 7.04 are preempted, in whole or in part, by Section 208 of the VRA because:

- Section 6.04 requires voters to represent to their assistors that they are eligible for assistance as a condition of receiving assistance.
- Section 6.04 deters voter assistors by requiring them to swear, under penalty of perjury, to additional information, including that they did not pressure or coerce the voter into choosing them to assist, and that

they obtained a representation of eligibility of assistance from the voter. Section 6.04 also deters voters from using their chosen assistors for fear of placing them at risk of criminal prosecution.

- Sections 6.03, 6.05 and 6.07 deter assistors by requiring them to complete an additional form with duplicative information and disclose their relationship to a voter as a prerequisite to providing voter assistance.

***48** - Sections 6.06 and 7.04 deny mail voters the ability to choose assistors who are compensated or receive "anything reasonably regarded" as an economic gain or advantage.

Portions of the Oath of Assistance (§ 6.04) are preempted by Section 208

Section 6.04 of S.B. 1 amends the Oath by adding the underlined and bolded language:

> I swear (or affirm) **under penalty of perjury** that **the voter I am assisting represented to me they are eligible to receive assistance**; I will not suggest, by word, sign, or gesture, how the voter should vote; I will prepare the voter's ballot as the voter directs; **I did not pressure or coerce the voter into choosing me to provide assistance**; I am not the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs; **I will not communicate information about how the voter has voted to another person**; **and I understand that if assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted.**

TEC § 64.034.

The Oath of Assistance set forth in S.B. 1 § 6.04 restricts the right of assistance protected under Section 208 by conditioning voters' eligibility for assistance on their "represent[ation] to [their chosen assistor that] they are eligible to receive assistance.

This new restriction on the right to assistance and other provisions of the Oath have also deterred voters from requesting assistance and narrowed the universe of willing assistors, thereby "interfer[ing] with and frustrat[ing] the substantive right Congress created" under Section 208. *Felder*, 487 U.S. at 151, 108 S.Ct. 2302. Accordingly, those portions of Section 6.04, described below, are preempted by Section 208 of the VRA.

The "penalty of perjury" language is preempted by Section 208.

[51] The State Defendants assert that the "penalty of perjury" language in the Oath cannot frustrate Section 208 because the Oath has always been taken under penalty of perjury. *See* ECF No. 862 ¶ 455. It is true that, since 1974, it has been a Class A misdemeanor "make[ ] a false statement under oath" with "intent to deceive and with knowledge of the statement's" meaning TEX. PENAL CODE § 37.02; *see also id.* § 12.21 (Class A misdemeanors can impose fines of up to $4,000 and up to one year in confinement). S.B. 1, however, added a new provision increasing the penalties for perjury as to oaths under the Election Code, making it a state jail felony to "knowingly or intentionally make a false statement or swear to the truth of a false statement" in an oath with "the intent to deceive." TEC § 276.018.

In any event, neither of the scienter requirements set forth in either perjury provision appear in the Oath itself, with confusing results. What does it mean, for example, for an assistor to "knowingly" make a false statement that he "understand[s] that if assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted." Suggesting that an assistor can be criminally liable for "knowingly" failing to understand a fact appears to be a contradiction in terms. The Oath could have said, "I am not knowingly assisting someone who is ineligible for assistance." As written, however, the Oath requires assistors to confirm that voters are eligible to receive assistance to ensure that their assistance will be effective (i.e., that the voter's ballot will count). Similarly, voters with cognitive disabilities or memory impairments may need their assistors to remind them how they intended to vote or visually point out the voter's preferred candidate on the ballot. Because of the assistance he requires when voting, Mr. Cole understands this portion of the Oath to mean that he must either change

how he votes or require his assistor to commit perjury. Tr. at 710:20–711:11.

***49** At trial, voters, [52] assistors, [53] and election officials [54] alike characterized the "penalty of perjury" language in the amended Oath as "intimidating," "scary," and "threatening." Without any reference to the scienter requirement of the Election Code's perjury provision, there is nothing in the Oath to mitigate these concerns. Even attorneys involved in voting assistance are concerned about the reference to "perjury" in the Oath. MABA members find this language alarming because they do not want to subject themselves to the consequences of being accused of perjury—and potentially be disbarred—for providing voter assistance. Tr. at 2538:8–14; *see also* Tr. at 710:20–711:11 (Cole).

As it is written, the "penalty of perjury" language has deterred assistors from providing qualified voters with assistance and deterred voters from requesting assistance they need to vote, thereby frustrating Section 208's purpose.

The statements regarding voter eligibility are preempted by Section 208.

[52] Section 6.04 conditions a voter's eligibility for assistance on her willingness to make a representation about her eligibility—in effect adding a new requirement to her eligibility for assistance. That new requirement is preempted by Section 208, which affords voters the right to assistance from their chosen assistor regardless of their representations to the assistor about why they need assistance in the voting process. A voter's eligibility for assistance is determined by the conditions described in Section 208: blindness, disability, or inability to read or write. 52 U.S.C. § 10508. Imposing additional eligibility requirements on voters impermissibly narrows the class of voters Section 208 was intended to protect.

Moreover, the Election Code's fixation with voter eligibility for assistance undermines any assertion that Section 6.04 protects voters who need assistance. On its face, Section 6.04's eligibility language appears to protect only the inverse class of people—those who do *not* need assistance. In other words, Section 6.04 gestures at the possibility of fraudulent assistance targeting some ill-defined category of people who, for some reason *other than* blindness, disability, or the inability to read or write, are especially vulnerable to manipulation. But "protecting" voters who are *ineligible* for assistance does nothing to protect *eligible* voters. Assistance to an eligible voter is no less effective because the same assistance is provided to someone who does not need it. More importantly, Congress did not pass a law to protect voters who are *ineligible* for assistance; it passed a law to protect those who need it. Texas cannot establish laws that protect the former at the expense of the latter.

Finally, it is not even clear to the Court that the Election Code even operates to "protect" ineligible voters from "coercion" because even ballots voted in accordance with a voter's wishes may be voided if the voter received unauthorized assistance. *See* TEC § 64.037 ("If assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted."). This possibility—that an otherwise valid ballot might be tossed out based on a mistaken belief about a voter's eligibility for assistance—discourages assistance. Assistors with any uncertainty about the meaning of "eligibility" or whether a particular individual is legally eligible will refrain from providing assistance. [55] *See, e.g.*, Tr. at 3291:4–3292:5 (Litzinger); Tr. at 147:1–9 (LUPE); Tr. at 2543:21–16 (MABA).

***50** The Oath's eligibility language is preempted because it "promise[s] to deter otherwise lawful assistors from providing necessary aid to a vulnerable population." *Disability Rts. of Miss. v. Fitch*, 684 F. Supp. 3d 517, 520 (S.D. Miss. 2023), *vacated as moot*, 2024 WL 3843803 (5th Cir. Aug. 14, 2024) (enjoining state law criminalizing third-party mail ballot collection and regulating the "identity of allowable assistors" based on the ill-defined categories of exempt assistors and broad impact on the state's voting population, coupled with the threat of criminal sanctions). *Id.* at 519. [56]

The statement regarding "pressure or coerc[ion]" is preempted by Section 208.

[53] The Oath's statement that the assistor did not "pressure or coerce" the voter into choosing the assistor to provide assistance suffers from the same defects as the eligibility statements. Specifically, the Oath does not define "pressure or coerce" or include a scienter element.

Rather, by its text, the Oath requires an assistor to accurately judge the *actual* consequences of their conduct on another person's state of mind, judged against two undefined terms. But this language fails to provide assistors with any notice

about the standard of conduct to which they are swearing or affirming. *See Coates v. City of Cincinnati*, 402 U.S. 611, 612, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). In *Coates*, for example, the Supreme Court held that an ordinance prohibiting conduct that was "annoying to persons passing by" was unconstitutionally vague because "[c]onduct that annoys some people does not annoy others." 402 U.S. at 614, 91 S.Ct. 1686. The ordinance required "men of ordinary intelligence" to "guess at its meaning" because it specified "no standard of conduct ... at all." *Id.*

Similarly, the Eleventh Circuit recently struck down a statute prohibiting "activity with the ... effect of influencing a voter" as unconstitutionally vague because, even if the meaning of "influence" was clear, because "[k]nowing what it means to influence a voter does not bestow the ability to predict which actions will influence a voter." *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 947 (11th Cir. 2023). "How," the court asked, "is an individual seeking to comply with the law to anticipate whether his or her actions will have the subjective effect of influencing a voter?" *Id.* "If the best—or perhaps only—way to determine what activity has the 'effect of influencing' a voter is to ask the voter, then the question of what activity has that effect is a 'wholly subjective judgment[ ] without statutory definition[ ], narrowing context, or settled legal meaning[ ].' " *Id.*

Of course, the constitutionality of the Oath's "pressure or coerce" language is not before the Court; the question is whether the language frustrates Section 208 by deterring lawful voting assistance. But the vagueness analysis explains the chilling effect that the "pressure or coerce" statement has on assistance. *See* Tr. at 2540:11–15 (MABA) (assistors do not want to sign an oath swearing to conduct that appears without definition or context); Tr. at 3249:21–3250:2 (Nunez Landry) (worried that assistors will be too afraid to provide assistance due to confusion about the meaning of the terms); Tr. at 733:21–734:7 (Garza) ("The wording is vague enough where ... they might be concerned that they are going to violate the oath if they signed it."). It is unreasonable to expect assistors to swear an oath, under penalty of perjury, that requires them to guess at its meaning. *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.").

***51** The Court concludes that the chilling effect of the Oath's vague statement requiring assistors to swear that they did not "pressure or coerce" voters into choosing them as assistors frustrates Section 208's purpose. The language is therefore preempted by Section 208.

The Assistor Disclosures (§§ 6.03, 6.05, 6.07) are preempted by Section 208

[54] The requirements that assistors complete an additional form disclosing duplicative information at the polls and disclose their relationships with the voters they assist have deterred voters from requesting assistance and narrowed the universe of willing assistors and thereby "interfer[ed] with and frustrat[ed] the substantive right Congress created" under Section 208. *Felder*, 487 U.S. at 151, 108 S.Ct. 2302. Accordingly, S.B. 1 §§ 6.03 and 6.05 (as implemented by 6.07) are preempted by Section 208 of the VRA.

The Supreme Court has recognized the deterrent effect that disclosure requirements can have on associative activities. *See, e.g., Shelton*, 364 U.S. at 486, 81 S.Ct. 247, *NAACP*, 357 U.S. at 462, 78 S.Ct. 1163; *Dep't of Com. v. New York*, 588 U.S. at 767, 139 S.Ct. 2551.[57] And, in this case, individuals who assist voters with whom they do not have a preexisting relationship—including staff members and volunteers for the Plaintiff organizations—have good reason to be concerned about the basis for the disclosure requirement.

The State Defendants insist that such disclosures "help enforce" Section 208 "by having assistors articulate their relationship to the voter, which lets county election officials flag violations of the law." ECF No. 862 ¶ 605. But both trial testimony and the text of S.B. 1 § 6.05 indicate that the purpose of the "relationship disclosure" requirement is not to identify either of the categories of prohibited assistors under Section 208. After all, the Oath of Assistance already requires in-person and mail-ballot assistors to swear or affirm that they do not belong to either of the proscribed classes. *See, e.g.*, TEC § 64.034 ("I am not the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs[.]").

Instead, the "Voter Relationship Disclosure" requirement appears to be designed to distinguish between assistors with no relationship to the voter and assistors who are family members and caregivers to the voter, who Mr. White characterized as providing "normal assistance." *See also* TEC § 86.010(h)(2) (excusing close relatives from criminal penalties for failing to disclose their relationship to the voter).

But Section 208 is indifferent to Mr. White's theories about "normal assistance." Aside from the two relationships explicitly identified in the text, Section 208 leaves the choice of assistor entirely up to the voter. To be sure, some voters may prefer to vote with the assistance of a close family member or friend. Others might be more comfortable receiving help from a stranger who has been trained by a trusted community organization to provide high-quality voting assistance. Such an assistor may be more familiar with the voting process (and thus help the voter avoid common pitfalls) and, as a stranger serving multiple voters in an election period, may be less likely to remember or care how an individual voter casts his or her ballot. Neither Mr. White nor the State of Texas is permitted to second-guess the basis for the voter's selection.

***52** The "Voter Relationship Disclosure" discourages community organizations like the Plaintiffs from providing voter assistance services by implicitly requiring that they have an articulable relationship to the voters they assist *beyond* "assistor." But nothing in the text of Section 208 suggests that Texas can adopt rules that discourage certain categories of assistors by, e.g., subjecting them to greater scrutiny, greater administrative burdens, and greater penalties for non-compliance than the state's preferred assistors. Such laws "pose[ ] an obstacle to Congress's clear purpose to allow the voter to decide who assists them at the polls," *Ark. United II*, 626 F. Supp. 3d at 1085; *see also, e.g.*, *OCA-Greater Hous. I*, 867 F.3d at 614–15; *see also Cummings v. Missouri*, 71 U.S. 4 Wall. 277, 278, 18 L.Ed. 356 (1866) ("[W]hat cannot be done directly cannot be done indirectly.").

Here, Texas seeks to supplant its belief that assistors should have a close, personal relationship with voters over Congress's judgment that voters should be empowered to choose anyone other than their employer or union representative. Texas may not substitute its judgment for that of Congress, or for that matter, Texans who require voting assistance. *See Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 164, 136 S.Ct. 1288, 194 L.Ed.2d 414 (2016) (explaining that "[s]tates may not seek to achieve ends, however legitimate, through ... means that intrude" on federal power); *see also Ark. United II*, 626 F. Supp. 3d at 1086 (noting there is no "exception to the Supremacy Clause when a state has a compelling interest in enacting a statute that conflicts with federal law").

While the Senate Committee recognized the states' rights "to establish necessary election procedures ... designed to protect the rights of voters," it also clearly stated the intention that any such voter assistance procedures "be established in a manner which *encourages greater participation* in the electoral process." S. Rep. No. 97-417 at 63 at 241 (emphasis added). Thus, any regulations of the assistors must encourage —or at a minimum not discourage—people from providing voting assistance.

Congress's concern for voters cannot serve as the basis for gutting the very means Congress chose to address that issue. In fact, these differing paths to a common goal underscore that preemption is appropriate. *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 529 (5th Cir. 2013) ("As the Supreme Court has cautioned, ... 'conflict is imminent' when 'two separate remedies are brought to bear on the same activity.' " (quoting *Crosby*, 530 U.S. at 380, 120 S.Ct. 2288)); *see also United States v. Locke*, 529 U.S. 89, 115, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) ("[A] state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." (quoting *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604, 35 S.Ct. 715, 59 L.Ed. 1137 (1915))).

The "Voter Relationship Disclosure" requirement set forth in S.B. 1 §§ 6.03–6.04 (and implemented by S.B. 1 § 6.07) and the requirement that in-person assistors complete a separate disclosure form under S.B. 1 § 6.03 is preempted by Section 208.

The State Defendants correctly observe that none of the Plaintiffs challenge the requirement that assistors disclose whether they "received or accepted any form of compensation or other benefit from a candidate, campaign, or political committee" under TEC § 64.0322(a) or § 86.010(e)(3). *See* ECF No. 862 at 216–17. Plaintiffs' failure to challenge that disclosure requirement preserves the question on mail ballot carrier envelopes, but it does not save the separate disclosure form prescribed by the Secretary of State for in-person voting. *See* LUPE-189. For the compensation question to have any meaning, the assistor would still be required to provide duplicative information—his name (and probably address)—on the form for identification purposes. The answer to a single yes-or-no question cannot justify imposing an entirely new form on each chosen assistor. The Secretary and local election officials can comply with Section 6.03 by adding the answer to this question to the poll lists, alongside the assistor's name and address. *See* TEC § 63.004 (permitting the Secretary to combine the poll list, the signature roster, or any other form used in connection with the acceptance of voters at polling places).

Bans on Compensated Assistance (§§ 6.06 and 7.04) are preempted by Section 208

***53** **[55]** The prohibitions on compensated assistance set forth in S.B. 1 §§ 6.06 and 7.04 conflict with the text of Section 208 of the VRA because they facially restrict the class of people who are eligible to provide voting assistance beyond the categories of prohibited individuals identified in the text of the statute—the voter's employer (or an agent of the employer) or union representative. [58]

In doing so, Sections 6.06 and 7.04 "interfere[ ] with and frustrate[ ] the substantive right Congress created" under Section 208. *Felder*, 487 U.S. at 151, 108 S.Ct. 2302. S.B. 1 §§ 6.06 and 7.04 are thus preempted by Section 208 of the VRA. Sections 6.06 and 7.04 make it an "impossibility" for an eligible voter to choose an assistor who is permitted by Section 208 but disqualified by S.B. 1 because that assistor is compensated (or receives an economic benefit) either to provide mail ballot assistance or to advocate for a ballot measure. *Fla. Lime & Avocado Growers*, 373 U.S. at 142–43, 83 S.Ct. 1210.

Section 6.06's exception for family members and "attendant or caregiver previously known to the voter" does nothing to save the rule from preemption. Implicitly acknowledging that neither "caregiver" nor "previously known to the voter" are defined in the Election Code, the State Defendants have taken the position that "[t]he ban on compensation applies only in the narrow circumstance when an individual is paid specifically to assist the voter with their ballot." ECF No. 862 ¶ 653 (citing Tr. at 1902:4–8). The "caregiver or attendant" exception to Section 6.06 suggests that just the opposite is true. By exempting paid caregivers and attendants "to ensure that Section 6.06 would not interfere with their duties," as the State Defendants describe it, Section 6.06 impliedly *does* interfere with the duties of *other* professionals who might provide mail-ballot assistance in the ordinary course of their employment. It would prohibit a high school teacher, for example, from providing mail-ballot assistance to students with disabilities during a civics unit. It would likewise prevent a legal aid attorney from translating his client's mail ballot, and an activities director at an assisted living facility from helping disabled voters cast their BBMs.

***54** Moreover, the State Defendants' position squarely conflicts with testimony by their own witnesses. For example, the State Defendants insist that nothing in Sections 6.06 or 7.04 prevent "individuals with paid jobs, such as canvassing, from assisting the voter." ECF No. 862 ¶ 653. [59] At trial, however, Mr. White confirmed that Section 6.06 "appear[s] to apply to [the] scenario" in which a paid canvasser for a nonprofit Get Out the Vote organization engages with voters and provides mail ballot assistance at the voter's request. Tr. at 3993:22–3995:10. Similarly, while the State Defendants purportedly endorse Mr. Ingram's position that reimbursement is not "compensation," *see* ECF No. 862 ¶ 653 (citing Tr. at 1903:10–1904:2), Mr. White testified that he would need to perform *legal research* to determine what kinds of economic benefits would violate Section 6.06. Tr. at 3992:20–3993:21 (conceding that he would need to "review[ ] the case law" to determine whether a meal, bus fare, or a gift bag containing a t-shirt constitute prohibited compensation).

Even if S.B. 1 purports to share Section 208's goal of preventing voter coercion, Congress decided that an assistor of choice, as opposed to an election official, would best ensure that the voter's intent is carried out when marking the ballot. *See* H.R. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981) (discussing need to deter coercion of voters by election officials). Thus, S.B. 1's voter assistance provisions "involve[ ] a conflict in the method of enforcement. The Court has recognized that a '[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.' " *Arizona v. United States*, 567 U.S. at 406, 132 S.Ct. 2492 (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971)). [60]

***55** The text of Section 208 does not permit the restrictions on the class of eligible assistors imposed by Sections 6.06 and 7.04 of S.B. 1. Accordingly, those provisions are preempted.

PERMANENT INJUNCTION OF S.B. 1 §§ 6.03–6.07 AND 7.04

Legal Standard

[56] A party seeking a permanent injunction must prove: (1) that it has succeeded on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest. *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021). The Court addresses each factor in turn.

[57] Further, in accordance with Federal Rule of Civil Procedure 65(d)(1), an order granting a permanent injunction

must "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail ... the act or acts restrained or required." *Scott v. Schedler*, 826 F.3d 207, 208 (5th Cir. 2016) (quoting FED. R. CIV. P. 65(d)(1)). According to the Fifth Circuit, this means the injunction must not be vague or overbroad. *Id.* "[A]n injunction is overly vague if it fails to satisfy the specificity requirements set out in Rule 65(d)(1), and it is overbroad if it is not 'narrowly tailor[ed] ... to remedy the specific action which gives rise to the order' as determined by the substantive law at issue." *Id.* (quoting *Doe v. Veneman*, 380 F.3d 807, 813 (5th Cir. 2004)).

Analysis

Plaintiffs have satisfied all four factors required for injunctive relief. *Valentine*, 993 F.3d at 280.

First, for the reasons set forth in this order, the Court concludes that the Sections 6.03–6.07 and 7.04 of S.B. 1. are preempted, at least in part, by Section 208. Plaintiffs have thus succeeded on the merits of their Section 208 claims challenging those provisions.

[58] Second, the Court concludes that failure to grant the requested injunction will result in irreparable injury to Plaintiffs and their members by interfering with voters' rights and ability to vote with help from their chosen assistors.

Plaintiffs have established that Sections 6.03, 6.04, 6.05, and 6.07 of S.B. 1 have deterred members from requesting—and their chosen assistors from providing—voting assistance guaranteed under Section 208 due to the credible *threat* of enforcement. *See also Babbitt*, 442 U.S. at 302, 99 S.Ct. 2301 ("a plaintiff need not first expose himself to actual arrest or prosecution" to establish a cognizable harm). As a result, voters, including some of Plaintiffs' members, have forgone assistance to which they are lawfully entitled and will continue to do so as long as those provisions remain in effect. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases); *see also Purcell v. Gonzalez*, 549 U.S. 1, 7, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (recognizing the "strong interest in exercising the fundamental political right to vote") (citing *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)).

[59] Finally, it is clear to the Court that the injunction would not disserve the public interest, and, to the contrary, will serve the public interest by protecting individuals' right to vote with help from their chosen assistors under Section 208 and their fundamental right to vote. *See Dunn*, 405 U.S. at 336, 92 S.Ct. 995 (stating that protecting the right to vote is of particular public importance because it is "preservative of all rights.") (citing *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)).

***56** **[60]** Even recognizing the importance of the fundamental right to vote, a court must weigh any protective action against the potential for confusion and disruption of the election administration under the "*Purcell* principle." *See Benisek v. Lamone*, 585 U.S. 155, 138 S. Ct. 1942, 1945, 201 L.Ed.2d 398 (2018). The *Purcell* principle provides that, as a general rule, federal courts "should not alter state election laws in the period close to an election." *Democratic Nat'l Comm. v. Wis. State Legislature*, —— U.S. ——, 141 S. Ct. 28, 208 L.Ed.2d 247 (2020) (Kavanaugh, J., concurring) (upholding Seventh Circuit's stay of injunction entered six weeks before the general election). In *Purcell*, the Supreme Court reversed a lower court's order enjoining the implementation of a proposition, passed by ballot initiative two years earlier, that required voters to present identification when they voted on election day. Reversing the lower court, the Court emphasized that the injunction was likely to cause judicially-created voter confusion in the face of an imminent election. *Purcell*, 549 U.S. at 2, 6, 127 S.Ct. 5.

The Supreme Court has recognized that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5. The *Purcell* principle's logic extends only to injunctions that affect the mechanics and procedures of the act of voting. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm. ("RNC v. DNC")*, 589 U.S. 423, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (extension of absentee ballot deadline); *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 863 (5th Cir. 2020) (mask mandate exemption for voters); *Tex. Alliance for Retired Ams. v. Hughs*, 976 F.3d 564, 566–67 (5th Cir. 2020) (new ballot type eliminating straight-ticket voting); *Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. at 31 (extension of absentee ballot deadline).

[61] Even when *Purcell* applies, however, it does not constitute an absolute bar on all injunctive relief in the runup to an election. *See Merrill v. Milligan*, —— U.S. ——, 142 S. Ct. 879, 881, —— L.Ed.2d —— (2022) (Kavanaugh, J., concurring). Rather, it directs courts to consider whether:

(1) "the underlying merits are entirely clearcut in favor of the plaintiff;" (2) "the plaintiff would suffer irreparable harm absent the injunction;" (3) the "plaintiff has [ ] unduly delayed bringing the complaint to court;" and (4) "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Id.*; *see also Robinson v. Ardoin*, 37 F.4th 208, 228 n.11 (5th Cir. 2022) (per curiam) (citing *Merrill* concurrence as authority on *Purcell*). The Court concludes that Plaintiffs have satisfied the first three elements with respect to all their successful Section 208 challenges. Thus, the Court must determine, with respect to each challenged provision, whether the conduct to be enjoined affects the mechanics of voting and, if so, the feasibility of implementing any injunctive relief before the November 2024 election.

Injunctive relief as to the Secretary's forms and instructions implicates Purcell.

[62] Plaintiffs have succeeded on the merits of their Section 208 challenges to two forms designed by the Secretary of State: the "Oath of Assistance Form" used to collect Assistor Disclosures at the polls (LUPE-189) and the mail ballot carrier envelope (LUPE-009). Specifically, she will be required to withdraw the Oath of Assistance Form, remove the "Relationship to Voter" line from the mail-ballot carrier envelope, and revise the Oath printed on the mail ballot carrier envelope to reflect the language below:

> I swear (or affirm) that I will not suggest, by word, sign, or gesture, how the voter should vote; I will prepare the voter's ballot as the voter directs; I am not the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs; I will not communicate information about how the voter has voted to another person.

***57** The Secretary will also be required to revise any training and instructional materials for state and county election officials to remove language that reflects the substance of the Enjoined Oath Language or the Voter Relationship Disclosure requirements. Any injunctive relief against the Secretary as to Sections 6.03, 6.04, 6.05, and 6.07 of S.B. 1 will plainly implicate *Purcell* and it is not feasible for the Secretary to redesign any of these materials in the weeks before the November 2024 general election.

Accordingly, the Court will stay any injunction applicable to the Secretary's forms until after the November 2024 general election.

Injunctive relief as to election officials' conduct implicates Purcell.

[63] Injunctive relief as to election officials' administration of the Oath and Assistor Disclosure requirements for both in-person and mail-in voting clearly implicates *Purcell*.

The Court will not enjoin the County Election Officials from using either of the forms prescribed by the Secretary of State in administering the November 2024 general election for the same reasons set forth above.

Of course, it would be feasible, in terms of both cost and hardship, to enjoin officials from giving *effect* to certain portions of the forms by, e.g., permitting assistors to skip the "Relationship to Voter" line on the disclosure form at the polls or accepting mail ballots omitting that information. It would be similarly feasible to direct officials to administer the revised Oath orally at the polls. Nonetheless, due to the potential for voter confusion about the procedural discrepancies between in-person and mail-in voting, the Court will not enjoin officials from implementing the requirements of Sections 6.03, 6.04, and 6.05 of S.B. 1 until after the November 2024 general election.

Enjoining enforcement proceedings does not implicate the Purcell principle.

[64] With respect to criminal enforcement of S.B. 1 §§ 6.04, 6.05, 6.06, and 7.04, injunctive relief against the State Defendants and County DAs would not affect the procedures for voting by mail from a voter's perspective.

Enjoining enforcement proceedings premised on violations of the Enjoined Oath Language, for example, does not require any changes to the Oath as it is printed on the mail ballot carrier envelope or the Oath of Assistance Form or any of the inserts used in the mail voting process. *See, e.g.*, LUPE-009 at 2; LUPE-189 at 2; Tex. Sec'y of State, Form

6-29, https://perma.cc/N5FYXSCL; Tex. Sec'y of State, Form 6-26, https://perma.cc/QGT9-UH9E.

The first insert urges voters to report "attempts to pressure or intimidate" them to their local county elections office, local district attorney, or the Secretary of State. To state the obvious, an injunction against enforcement has no impact on the general public's ability to report activity—criminal or otherwise—to the officials responsible for collecting such reports. Enjoining criminal enforcement of the Enjoined Oath Language would not impair any official's ability to enforce provisions of the Election Code criminalizing efforts to "pressure or intimidate" a voter. For example, the Election Code already imposes criminal penalties against "effort[s] to influence the independent exercise of the vote of another in the presence of the ballot or during the voting process," TEC § 276.013, or voting (or attempting to vote) a ballot belonging to another person, or attempting to mark another person's ballot without their consent or specific direction, TEC § 64.012. Similarly, it is already a crime for an assistor to "suggest[ ] by word, sign, or gesture how the voter should vote" while providing such assistance or to "prepare[ ] the voter's ballot in a way other than the way the voter directs or without direction from the voter." TEC § 64.036.

***58** The second insert explains to voters that their assistor's failure to sign the Oath and complete the Assistor Disclosures is a state jail felony unless the person is one of certain close relatives of the voter or physically living in the same dwelling. Tex. Sec'y of State, Form 6-26, https://perma.cc/QGT9-UH9E. Again, the Court is not directing any change to the inserts, the Oath, or the Assistor Disclosure requirements at this time. Instead, injunctive relief against enforcement of the provisions would simply prevent the Secretary from referring alleged violations of the Enjoined Oath Language or the Voter Relationship Disclosure requirement to the Attorney General, and prevent the Attorney General and the State of Texas (through its local prosecutors) from investigating and prosecuting such violations.

The Election Code itself acknowledges a distinction between its administrative procedures and their enforcement. For example, the Oath of Assistance, printed on the mail ballot carrier envelope and Oath of Assistance Form, does not reflect the scienter requirement set forth in the criminal enforcement provision. *Compare* LUPE-009, LUPE-189, and TEC § 64.034 with TEC § 276.018. Likewise, the Election Code—and the forms that implement it—requires *all* assistors to complete the Assistor Disclosures. *See* LUPE-009, LUPE-189, and TEC § 64.0322. The provision imposing criminal liability on *some* mail-ballot assistors—but not others—who knowingly fail to comply with the requirements is codified under a separate provision, TEC § 86.010(h)(2), but neither the distinction between types of assistors nor the scienter requirement appears on the BBM carrier envelope. *See* LUPE-009.

Any objection to enjoining criminal enforcement of the Enjoined Oath Language or Voter Relationship Disclosure requirement, in effect, amounts to an objection to the limited relief that the injunction will afford. That is, both requirements will undoubtedly continue to have some chilling effect on voter assistance in the November 2024 election. To be sure, with respect to the November 2024 election, Plaintiffs' prospective injuries will not be fully relieved. But *Purcell* does not require courts to double-down on the unjust effects of unlawful election rules by continuing to permit criminal enforcement of those provisions. *See Longoria v. Paxton*, 585 F. Supp. 3d 907, 935 (W.D. Tex. 2022) (less than three weeks before primary, enjoining statute criminalizing solicitation of vote-by mail applications), *vacated and remanded on other grounds*, 2022 WL 2208519 (5th Cir. 2022); *Chancey v. Ill. State Bd. of Elections*, 635 F. Supp. 3d 627, 629–30, 644 (N.D. Ill. 2022) (declining to apply *Purcell* less than a month before an election, reasoning that an injunction of the campaign finance law at issue "did not implicate the same concerns" as *Purcell*, as because "it is difficult to imagine ... that if relief is granted, then voters will be confused about whether, how, where, when, or for whom they can vote"); *Coal. for Good Governance v. Kemp*, 558 F. Supp. 3d 1370, 1393 (N.D. Ga. 2021) (enjoining SB 202 provision imposing criminal penalties one month before election); *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1295–96 (S.D. Fla. 2012) (similar).

[65] The Court is not considering a preliminary injunction of a new election law intended to mitigate its administrative consequences before an upcoming election. At most, *Purcell* justifies a temporary stay of otherwise *permanent* injunctive relief, and, even then, only to the extent that an injunction materially impacts election administration. The effect of an injunction prohibiting criminal enforcement is limited to the criminal realm. Indeed, injunctions against criminal enforcement are, by their nature, removed in space and time from the mechanics and procedures of voting. Prosecutions simply do not occur at the polls (or, as the case may be, during block-walking and candidate forums); they require investigation, evidence, and due process.

***59** In the same vein, the Attorney General and County District Attorneys may very well be pursuing investigations and prosecutions arising out of violations of these provisions that occurred in *previous* elections. Regardless of the upcoming election, those investigations and prosecutions constitute enforcement of state laws that are preempted by Section 208 of the VRA. How could an injunction of such enforcement activity possibly implicate *Purcell*? Indeed, considering the State Defendants' continued reliance on the investigative privilege in the course of this litigation, it is difficult to imagine that voters are so accustomed to the enforcement of these provisions that they would be confused by an injunction that—for the purposes of November 2024 election—changes nothing about how or when they cast their ballot, by mail or in person.

Because criminal investigations and prosecutions necessarily follow the offending conduct in time, the only prospective interest that the AG and DAs can plausibly allege would be impaired by injunctive relief is the deterrent effect of the provisions arising from the threat of enforcement. However, given that the chilling effect on voting assistance is the very feature that renders the challenged provisions infirm under Section 208, permitting the State Defendants and local prosecutors to continue to threaten criminal enforcement is unlikely to serve the public interest.

CONCLUSION

For the foregoing reasons, the Court concludes that Sections 6.06 and 7.04 of S.B. 1 and portions of Sections 6.03, 6.04, 6.05, and 6.07 of S.B. 1 are preempted by Section 208 of the VRA.

The motions for summary judgment filed by the Intervenor-Defendants (ECF No. 608) and the Harris County District Attorney (ECF No. 614) are **DENIED** as to Plaintiffs' Section 208 claims.

The HAUL Plaintiffs' Section 208 challenge to S.B. 1 § 6.01 is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

Section 6.04 (TEC § 64.034) – The Oath of Assistance

With respect to the HAUL and LUPE Plaintiffs' Section 208 challenges to S.B. 1 § 6.04, codified at TEC § 64.034:

The Court **DECLARES** that the following statements in the Oath of Assistance, codified at TEC § 64.034, are preempted by Section 208 of the Voting Rights Act:

- "under penalty of perjury that the voter I am assisting represented to me they are eligible to receive assistance";
- "I did not pressure or coerce the voter into choosing me to provide assistance; and"
- "I understand that if assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted."

Plaintiffs' challenges to the Oath's statement that "I will not communicate information about how the voter has voted to another person" are dismissed.

The Attorney General and Secretary of State of Texas, the District Attorneys of Bexar County, Harris County, Travis County, Dallas County, Hidalgo County, and the 34th Judicial District, and their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, are **PERMANENTLY ENJOINED** from implementing, enforcing, or giving any effect to the following language in the Oath of Assistance, codified at TEC § 64.034 (the "Enjoined Oath Language"):

- "under penalty of perjury that the voter I am assisting represented to me they are eligible to receive assistance";
- "I did not pressure or coerce the voter into choosing me to provide assistance; and" and
- "I understand that if assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted."

Nothing in this order should be read to enjoin the Attorney General, the Secretary, or the County District Attorneys from enforcing the surviving portions of the Oath under TEC § 276.018(b).

Accordingly, the Attorney General may not investigate potential violations, refer potential violations to District Attorneys for investigation or prosecution, or prosecute any potential violation of the Enjoined Oath Language with the consent or at the request of any county or local prosecutor or appointment *pro tem* by a district judge. Likewise, all county and local prosecutors are permanently enjoined from

deputizing the Attorney General, appointing him *pro tem*, or seeking his appointment *pro tem* from or by a district judge to prosecute alleged violations of the Enjoined Oath Language that occur within their jurisdictions.

***60** In the interest of clarity, injunctions against enforcement extend to civil penalties and civil investigations and enforcement proceedings (e.g., writs of mandamus) against election officials pursuant to Section 8.01 of S.B. 1 (codified at TEC §§ 31.129, 31.130),

The Secretary of State is **PERMANENTLY ENJOINED** from implementing the Enjoined Oath Language. The Secretary shall revise any applicable forms and training and instructional materials for state and county election officials to remove language that reflects the substance of the Enjoined Oath Language. This injunction is **STAYED**, however, **until after the November 2024 general election**.

The Bexar County Elections Administrator, Harris County Clerk, Dallas County Elections Administrator, and El Paso County Elections Administrator are **PERMANENTLY ENJOINED** from implementing the Enjoined Oath Language. This injunction is **STAYED**, however, **until after the November 2024 general election**. Nothing in this order should be read, however, to prevent local election officials from providing reasonable accommodations to voters consistent with TEC § 1.022.

Sections 6.03, 6.05, 6.07 (TEC § 64.034) – Voter Relationship Disclosure

With respect to the LUPE and HAUL Plaintiffs' Section 208 challenges to S.B. 1 §§ 6.03, 6.05, and 6.07:

The Court **DECLARES** that the Oath of Assistance Form and Voter Relationship Disclosure requirement, codified at TEC §§ 64.0322(a)(2) and 86.010(e)(2) (and implemented by TEC §§ 64.0322(b) and 86.013(b)) are preempted by Section 208 of the Voting Rights Act.

The State Defendants and their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, are **PERMANENTLY ENJOINED** from implementing, enforcing, or giving any effect to TEC § 86.010(e)(2). All county and local prosecutors are agents of the State of Texas in prosecuting crimes under the Election Code. *Stephens*, 663 S.W.3d at 52.

Accordingly, the Attorney General may not investigate potential violations of TEC § 86.0105, refer potential violations of TEC § 86.010(e)(2) to county or local prosecutors for investigation or prosecution, or prosecute any potential violation of TEC § 86.010(e)(2) with the consent or at the request of any county or local prosecutor or appointment *pro tem* by a district judge. Likewise, all county and local prosecutors, as agents of the State of Texas, are permanently enjoined from deputizing the Attorney General, appointing him *pro tem*, or seeking his appointment *pro tem* from or by a district judge to prosecute alleged violations of TEC § 86.010(e)(2) that occur within their jurisdictions.

In the interest of clarity, injunctions against enforcement extend to civil penalties and civil investigations and enforcement proceedings (e.g., writs of mandamus) against election officials pursuant to Section 8.01 of S.B. 1 (codified at TEC §§ 31.129, 31.130).

The Secretary of State is **PERMANENTLY ENJOINED** from implementing the Voter Relationship Disclosure requirement. The Secretary shall revise all applicable forms and training and instructional materials for state and county election officials to remove language that reflects the substance of the Voter Relationship Disclosure requirement. This injunction is **STAYED**, however, **until after the November 2024 general election**.

***61** The Bexar County Elections Administrator, Harris County Clerk, Dallas County Elections Administrator, and El Paso County Elections Administrator are **PERMANENTLY ENJOINED** from using the Oath of Assistance Form (LUPE-189) or implementing the Voter Relationship Disclosure requirement. This injunction is **STAYED**, however, **until after the November 2024 general election**. Nothing in this order should be read, however, to prevent local election officials from providing reasonable accommodations to voters consistent with TEC § 1.022.

Section 6.06 (TEC § 86.0105) – Ban on Compensated Mail-Ballot Assistance

With respect to the OCA and LUPE Plaintiffs' Section 208 challenges to S.B. 1 § 6.06:

The Court **DECLARES** that the ban on compensated mail-ballot assistance, codified at TEC § 86.0105, is preempted by Section 208 of the Voting Rights Act.

The State Defendants, and their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, are **PERMANENTLY ENJOINED** from implementing, enforcing, or giving any effect to TEC § 86.0105. All county and local prosecutors are agents of the State of Texas in prosecuting crimes under the Election Code. *Stephens*, 663 S.W.3d at 52.

Accordingly, the Attorney General may not investigate potential violations of TEC § 86.0105, refer potential violations of TEC § 86.0105 to county or local prosecutors for investigation or prosecution, or prosecute any potential violation of TEC § 86.0105 with the consent or at the request of any county or local prosecutor or appointment *pro tem* by a district judge. Likewise, all county and local prosecutors, as agents of the State of Texas, are permanently enjoined from deputizing the Attorney General, appointing him *pro tem*, or seeking his appointment *pro tem* from or by a district judge to prosecute alleged violations of TEC § 86.0105 that occur within their jurisdictions.

The OCA and LUPE Plaintiffs' Section 208 claims challenging S.B. 1 § 6.06 against the Harris County Clerk, Travis County Clerk, Dallas County Elections Administrator, and El Paso County Elections Administrator, as applicable, are **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

Section 7.04 (TEC § 276.015) – Canvassing Restriction

With respect to the LUPE and LULAC Plaintiffs' Section 208 challenges to S.B. 1 § 7.04:

The Court **DECLARES** that the Canvassing Restriction, codified at TEC § 276.015, is preempted by Section 208 of the Voting Rights Act.

The State Defendants and their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, are **PERMANENTLY ENJOINED** from implementing, enforcing, or giving any effect to TEC § 86.0105. All county and local prosecutors are agents of the State of Texas in prosecuting crimes under the Election Code. *Stephens*, 663 S.W.3d at 52.

Accordingly, the Attorney General may not investigate potential violations of TEC § 276.015, refer potential violations of TEC § 276.015 to county or local prosecutors for investigation or prosecution, or prosecute any potential violation of TEC § 276.015 with the consent or at the request of any county or local prosecutor or appointment *pro tem* by a district judge. Likewise, all county and local prosecutors, as agents of the State of Texas, are permanently enjoined from deputizing the Attorney General, appointing him *pro tem*, or seeking his appointment *pro tem* from or by a district judge to prosecute alleged violations of TEC § 276.015 that occur within their jurisdictions.

***62** The LUPE and LULAC Plaintiffs' Section 208 claims challenging S.B. 1 § 7.04 against the Dallas County Elections Administrator, El Paso County Elections Administrator, Bexar County Elections Administrator, Travis County Clerk, Harris County Clerk, and Hidalgo County Elections Administrator, as applicable, are **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

It is so **ORDERED**.

All Citations

--- F.Supp.3d ----, 2024 WL 4488082

Footnotes

1 *See* ECF No. 31 (consolidating *OCA-Greater Houston v. Esparza*, No. 1:21-cv-780, 2021 WL 4066391 (W.D. Tex. 2021)); *Houston Area Urban League v. Abbott*, No. 5:21-cv-848, 2021 WL 4066389 (W.D. Tex. 2021); *LULAC Texas v. Esparza*, No. 1:21-cv-786, 2021 WL 4066396 (W.D. Tex. 2021) and *Mi Familia Vota v. Abbott*, No. 5:21-cv-920, 2021 WL 4437115 (W.D. Tex. 2021) under the lead case.

2 For the purposes of the HAUL Plaintiffs' Section 208 claims, this group includes The Arc of Texas, Delta Sigma Theta Sorority, Inc., and Mi Familia Vota. ECF No. 199 (HAUL Compl.) ¶¶ 287–94 (Count V).

3 For the purposes of the OCA Plaintiffs' Section 208 claims, this group includes OCA-Greater Houston, The League of Women Voters of Texas, and REVUP-Texas. *See* ECF No. 200 (OCA Compl.) ¶¶ 176–81 (Count IV); Text Order dated Apr. 14, 2022 (granting Texas Organizing Project's withdrawal from the case); ECF No. 551 (granting Workers Defense Action Fund's withdrawal from the case and dismissing its claims with prejudice).

4 This group includes La Unión del Pueblo Entero, Friendship-West Baptist Church, the Southwest Voter Registration Education Project, Texas Impact, the Mexican American Bar Association of Texas, Texas Hispanics Organized for Political Education, Jolt Action, the William C. Velasquez Institute, FIEL Houston Inc., and James Lewin. ECF No. 208 (LUPE Compl.) ¶¶ 266–71 (Count V).

5 For the purposes of the LULAC Plaintiffs' Section 208 challenges, this group includes LULAC Texas, Voto Latino, Texas Alliance for Retired Americans, and Texas AFT. *See* ECF No. 207 (LULAC. Compl.) ¶¶ 287–94 (Count IV).

6 Plaintiffs filed their Second Amended Complaints, the operative pleadings, in January 2022. *See* ECF Nos. 199, 200, 207, 208.

7 *See La Union del Pueblo Entero v. Abbott*, 614 F. Supp. 3d 509 [LULAC], 618 F. Supp. 3d 388 [OCA], 618 F. Supp. 3d 449 [HAUL], 618 F. Supp. 3d 504 [LUPE], (W.D. Tex. 2022). The Court dismissed the HAUL Plaintiffs' claims against the Governor, however, concluding that their injuries were not fairly traceable to him.

8 The Intervenor-Defendants include the Harris County Republican Party, the Dallas County Republican Party, the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee. The Court initially denied their motion to intervene for failing to identify a legally protectable interest at stake in this litigation or show that the State Defendants' representation of any such interest would be inadequate. *See* ECF No. 122 at 2–7. The Fifth Circuit reversed, concluding that the Committees' interest in S.B. 1's provisions concerning party-appointed poll watchers—an interest raised for the first time on appeal—warranted intervention. *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022). Accordingly, the Committees were allowed to intervene. It is not clear to the Court that their interest in the provisions applicable to *partisan* poll watchers establishes a commensurate interest in voter assistance regulations. Nonetheless, because the State Defendants joined the arguments in the Committees' motion for summary judgment, *see* ECF No. 610, the Court considers the Intervenor-Defendants' motion and briefing.

9 *See, e.g.*, ECF Nos. 850, 852 (Plaintiffs, jointly); ECF No. 855 (LUPE); ECF No. 856 (HAUL); ECF No. 843-1 (Dallas County DA); ECF No. 845 (Harris County DA); ECF Nos. 861, 862 (State Defendants and Intervenor-Defendants). The parties also submitted supplemental briefing on the Supreme Court's recent decision in *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024). *See* ECF Nos. 1138, 1140, 1142–45.

10 The driver need not provide the disclosures if the person is related to each voter within the second degree by affinity or the third degree by consanguinity under TEX. GOV'T CODE § 573.023. TEC § 64.009(f-1).

11 The requirement that a person who assists a voter must confine assistance to reading the ballot, marking the ballot, and directing the voter to do the same was enjoined in *OCA of Greater Houston v. Texas*, No. 1:15-CV-679-RP, 2022 WL 2019295, at *4 (W.D. Tex. June 6, 2022).[11] Accordingly, this Court held that "all claims in this consolidated action challenging the portions of section 6.04 that the district court recently enjoined ... are moot." *LUPE v. Abbott*, 614 F. Supp. 3d 509, 513 n.3 (W.D. Tex. 2022).

The United States brought a Section 208 claim in this consolidated action challenging the oath language enjoined in *OCA-Greater Houston v. Paxton (OCA-Greater Hous. II)*, No. 1:15-CV-679-RP, 2022 WL

2019295, (W.D. Tex. June 6, 2022), which was rendered moot by the injunction. *See* *LUPE v. Abbott*, 614 F. Supp. 3d at 513 n.3.

12 While Section 7.04 of S.B. 1 sets out a ban on "vote harvesting," *see* TEC § 276.015, Plaintiffs generally refer to the provision as a "ban on in-person canvassing" or "voter interaction ban." *See, e.g.*, ECF No. 848 ¶ 97; ECF No. 849 ¶ 296. In the Court's view, all three characterizations are misleading in multiple respects. Regardless of how the term is defined in the Election Code, the scope of Section 7.04's proscriptions reach conduct well beyond any common understanding of "vote harvesting." On the other hand, the provision does not ban canvassers from interacting with voters altogether—it prohibits *compensated* interactions in the *presence of a mail ballot.* To describe Section 7.04's proscription more accurately and impartially, the Court refers to the challenged provisions as the "Canvassing Restriction" throughout this order.

Section 7.04 also added Election Code provisions addressing the solicitation of applications to vote by mail (TEC § 276.016), the distribution of early voting ballots and balloting materials (TEC § 276.017), and unauthorized alterations to election procedures (TEC § 276.019). For the purposes of this order, however, "Section 7.04" refers only to the Canvassing Restriction, codified at TEC § 276.015.

13 Although individual members previously paid membership dues, The Arc stopped charging fees after concluding that they were a barrier for people with IDD being able to join the organization. Tr. at 3497:17–25, 3498:1–3 (noting that people with IDD often "live in poverty and don't have extra money to pay membership dues."). Thus, members can join The Arc of Texas in several other ways, including by subscribing to their Disability Dispatch email, making a donation, serving on the board, or serving on a committee. Tr. at 3495:22–25, 3496:1–3, 3497:10–16.

14 OCA-Greater Houston, REV UP Texas, and the League of Women Voters Texas voluntarily withdrew their Section 208 challenges to S.B. 1 § 6.04. *See* ECF No. 753 at 5 nn.4–5

15 Over the course of these proceedings, several Defendants sued in their official capacities were substituted by their successors in office pursuant to Federal Rule of Civil Procedure 25(d).

16 There may very well be additional investigations that the DA failed to produce during discovery. Throughout this litigation, the OAG has, invoking the investigative privilege, withheld documents discussing "actual or alleged illegal voting, election fraud, or other criminal conduct in connection with" voting and voter assistance. *See* ECF No. 992-3; ECF No. 992-16; *In Re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568–69, n.2 (5th Cir. 2006) (the investigative privilege, also known as the "law enforcement privilege," protects government documents relating to an ongoing criminal investigation from release).

17 For example, after the prosecution of Hervis Rogers was dismissed in Montgomery County, the OAG referred the case to the Harris County DA, who brought charges against Mr. Rogers before a grand jury. Tr. at 4058:17–4059:24, 4062:7–12. The same procedure was used in the prosecution of Ignacio González Beltrán, whose case was dismissed in Montgomery County and referred by the OAG to Harris County, where it was presented to a grand jury. Tr. at 4063:3–4064:6.

18 The Harris County EA's office was abolished on September 1, 2023, pursuant to 88th Leg. R.S. Senate Bill 1750 (amending TEC § 31.050). ECF No. 753 ¶ 44 & n.12.

19 For example, in 2022, after the prosecution of Hervis Rogers was dismissed in Montgomery County, OAG referred the case to HCDAO, who presented charges against Rogers to a grand jury. Tr. at 4058:17–4059:24, 4062:7–12. In addition, HCDAO presented another charge to a grand jury regarding an alleged Election Code violation by Mr. González Beltrán after the case was similarly dismissed in Montgomery County. Tr. at 4063:3–4064:6.

20 OCA-377 at 17 (noting certain cases that were "[p]rosecuted by or with assistance of local district/county attorney," including Harris County); *id.* at 14 (identifying joint prosecution of Anthony Rodriguez with Harris County in 2019); OCA-225 at 4 (Harris DA interrogatories identifying prosecution of Anthony Rodriguez under a provision amended or enacted by S.B. 1); OCA-377 at 6 (identifying joint prosecution of Avery Ayers with Harris County in 2015). The Harris DA further acknowledged prosecuting two other election–related violations in 2020 under provisions enacted or amended by S.B. 1. OCA-225 at 4 (identifying prosecutions of Richard Bonton and Natasha Demming).

21 *See, e.g.*, Tr. at 3324:10–14 (Halvorson).

22 *See, e.g.*, Tr. at 147:10–148:8 (Rocha); Tr. at 3208:9–17; Tr. at 3217:12–3218:1 (Miller); Tr. at 2439:24–2440:10 (Espinosa); Tr. at 2540:21–23 (Ortega).

23 *See, e.g.*, Tr. at 175:6–176:8 (Wise); Tr. at 1312:25–1314:9 (Longoria)

24 *See, e.g.*, Tr. at 2443:20–2444:14 (Espinosa); Tr. at 2539:12–19 (Ortega).

25 Of course, there is no guarantee that a presiding judge would in fact grant such an accommodation. *Cf.* TEC § 276.019 ("public official or election official may not create, alter, modify, waive, or suspend any election standard, practice, or procedure mandated by law or rule in a manner not expressly authorized by" the Election Code); TEC § 1.002 (recognizing qualified individuals' right to "*request*[ ] a reasonable accommodation or modification to any election standard, practice, or procedure mandated by law," but not their right to *receive* any such accommodations) (emphasis added).

26 Adding to the confusion, the Secretary of State's "VOTER INFORMATION" poster, which must be posted in every polling place and voting station, provides an incorrect and overly-narrow definition of eligibility for voter assistance:

> a. You have: (6) The right to assistance while casting your ballot if you cannot write, see the ballot, understand the language in which it is written, or cannot speak English, or communicate only with sign language, and want assistance in communicating with election officials.

LUPE-265, https://perma.cc/LKS6-HGJH; TEC § 62.011.

27 Still, the Court observes that it is unclear whether this proscription applies to the *substance* of the voter's ballot or the *manner* in which the ballot was cast.

28 Tr. at 1718:20–24, 1721:2–10, 1721:3–1722:22 (OCA has stopped hosting in-person events where members have historically brought mail-in ballots and received voting assistance, including candidate forums, and no long offers voters assistance or rides to the polls); Tr. at 1593:9–22, 1620:7–1621:1 (The League has been discouraged from providing assistance to voters at assisted living facilities and determined that it "would turn away members with their mail-in ballots from candidate forums"); Tr. at 82:20-–84:3 (LUPE has stopped assisting members with their mail ballots because "[it] will mean that our staff could be jailed, that I could be put in prison, that any volunteer that receives any kind of compensation could be then prosecuted, and so we have refrained from doing so."); Tr. at 2543:14–2544:23 (MABA members are no longer willing to provide voting assistance because members fear that they might inadvertently commit a crime, potentially costing them their law licenses).

29 *See also Ark. United v. Thurston*, 517 F. Supp. 3d 777, 790, 798 (W.D. Ark. 2021); *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1301 (N.D. Ga. 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 233–36 (M.D.N.C. 2020); *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 988–90 (N.D. Fla. 2021).

30 *See also* S. Christian Leadership Conf. v. Sup. Ct. of State of La., 252 F.3d 781, 788 (5th Cir. 2001) (concluding that "at least some" of the plaintiffs—law students and faculty and community and student organizations—had standing to challenge a Louisiana Supreme Court rule restricting representation by student-practitioners because the operations of law-school clinics were "directly regulate[d]" and "[s]everal of the client organizations would be unable to obtain representation by the clinics").

31 *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (recognizing that non-profit's interest in building a low-cost housing project arose "not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce" and concluding that "[t]he specific project [the plaintiff] intends to build, whether or not it will generate profits, provides that 'essential dimension of specificity' that informs judicial decisionmaking").

32 In describing its injuries, HOME also alleged that it "had to devote significant resources to identify and counteract [Havens]'s racially discriminatory steering practices." *Havens*, 455 U.S. at 379, 102 S.Ct. 1114. As the Supreme Court recently confirmed, however, *Havens* does not stand for the expansive theory that "standing exists when an organization diverts its resources in response to a defendant's actions." *All. for Hippocratic Med.*, 602 U.S. at 395, 144 S.Ct. 1540. "[A]n organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *Id.* at 394, 144 S.Ct. 1540; *see also Azalea*, 82 F.4th at 355 ("We [ ] hold [that] 'diverting' resources from one core mission activity to another, i.e., prioritizing which 'on-mission' projects, out of many potential activities, an entity chooses to pursue, does not suffice—organizations daily must choose which activities to fund, staff, and prioritize. Nor do conclusory allegations that an organization's diversion of resources 'impaired or impeded' some planned projects.").

33 Ms. Halvorson, a registered voter in Bexar County and a member of The Arc, voted without assistance for the very first time in the March 2022 primary (by mail) because her personal care attendant was uncomfortable taking the Oath of Assistance printed on the mail carrier envelope. Tr. at 3318:25–3319:20. In the November 2022 general election, Ms. Halvorson voted in person, again voting without assistance due to fear of exposing her personal attendant to potential criminal liability. Tr. at 3322:5–18, 3323:10–24.

Ms. Nunez Landry, a registered voter of Harris County and a member of The Arc, voted without her chosen assistant—her partner—in both the March 2022 primary and the November 2022 general election because she did not want to expose him to criminal liability. Tr. at 3236:11–17; Tr. at 3234:1–6, 3256:15–3257:4. She did not receive any assistance while voting in either election.

Amy Litzinger, a registered voter in Travis County and a member of The Arc. Tr. at 3281:14–17. Ms. Litzinger voted without assistance from her personal attendant in the March 2022 primary and November 2022 general election because she and her attendant were concerned about criminal liability under the Oath. Tr. at 3291:4–3292:5.

Ms. Crowther did not take her attendant with her to vote in May 2022 because of her fear that the Oath could jeopardize her relationship with her attendant. HAUL-413, Crowther Dep. at 52:11–53:4, 54:7–14.

34 The Arc's mission is to "promote, protect, and advocate for the human rights and self–determination of Texans with intellectual and developmental disabilities." *Id.* at 3490:23–25, 3493:7–9. Voting is "the backbone" of The Arc's work because it is critical to members' self-determination and voting rights advocacy has been a priority since The Arc's founding. Tr. at 3499:23–3500:12, 3499:23–3500:12.

35 Neither the Bexar County DA nor the Travis County DAs have disavowed enforcement of the challenged provisions. *See* ECF No. 753-5 (Bexar County) ¶¶ 2–6; ECF No. 753-6 (Travis County) ¶ 2. Coupled with TEX. LOC. GOV'T CODE § 87.011(3)(B), the Harris County DA's history of accepting referrals for Election

Code prosecutions from the AG following S.B. 1, *see supra* ¶ 98, is sufficient to establish a substantial threat of future injury to Plaintiffs' members' right to assistance under Section 208.

36 Tr. at 2203:10–15, 2202:9–14, 2110:12–2111:1, 2148:25–2149:10 (DST chapters have had difficulty recruiting members who are willing to risk criminal liability to provide assistance, by mail or in-person, under S.B. 1, and some chapters have ceased providing voting assistance altogether due to the threat of enforcement of the Assistor Disclosure and amended Oath requirements); Tr. at 80:2–82:12, 150:15 (LUPE's staff and volunteers who assist voters are frightened by the new oath language, and as a result LUPE's staff and volunteers have restricted their assistance to voters, encouraging voters to seek assistance from friends and family members before turning to LUPE); *see also* Tr. at 145:25–46:4 (LUPE employee Chris Rocha); LUPE-284 at 13:19–14:15; 32:2–8; 17:2–13 (LUPE volunteer Maria Gomez); Tr. at 2543:16–23 (MABA members are no longer willing to provide voter assistance due to fears about the Oath requirements); Tr.at 2470:22–25, 2430:3–4, 2439:6–23, 2444:24–2445:7 (FIEL has had difficulty recruiting volunteers to provide voter assistance at the polls and some members have stopped providing assistance).

37 Tr. at 81:15–25 (Chavez Camacho); Tr. at 383:14–18 (Scarpello); Tr. at 732:8–733:17 (Garza); Tr. at 1057:12–24 (Callanen); Tr. at 2316:16–20 (Ramon).

38 Tr. at 2081:7–13, 2086:21–2087:15 (DST provides in-person and mail-ballot voter assistance in support of its "political awareness and involvement" mission); Tr. at 60:10–61:2 (LUPE provides voting assistance to support its mission of increasing civic engagement in the colonias); Tr. at 2533:24–2534:4, 2535:11–2536:5 (MABA provides voter assistance to support its mission to promote public service by its members and promote civic engagement); Tr. at 2438:9–11, 2444:24–2445:3 (FIEL furthered its mission of voter outreach and civic engagement by assisting its members in voting at the polls).

39 All Plaintiffs operate within the State of Texas and thus are subject to enforcement by the State Defendants. LUPE serves voters in Hidalgo County, Tr. at 58:13–16, and. FIEL serves voters in Harris County. MABA and DST have chapters throughout Texas, including Bexar, Harris, Dallas, and Travis Counties Tr. at 2533:21–23, 2536:17–20 (MABA); Tr. at 2083:13–25 (DST).

40 *See, e.g.*, Tex. Sec'y of State, Form 7-57, https://perma.cc/RAZ3-2G7K; Tex. Sec'y of State, Form 7-59, https://perma.cc/NN7T-PM9P; Tex. Sec'y of State, Form 7-61, https://perma.cc/G79M-NWKG; *see also* Tex. Sec'y of State, Texas Requirements for Electronic Pollbook Forms at 2, https://perma.cc/TH7A-2D79 (requiring poll book to entry for each voter to contain fields for assistor's name and address).

41 *See* Tr. at 1694:21–1696:8, 1699:24–1702:2, 1706:12–1707:3 (OCA provided meals, beverages, snacks, academic credit, shirts, and other nominal gifts to volunteers, who provide assistance to mail voters during OCA events); Tr. at 1598:6–15 (League volunteers who assist members and other voters "often get little pens," "stickers" "cookies" "doughnuts" and "pizza"); Tr. at 75:11–17, 124:14–127:13 (LUPE relies primarily on paid staff members); Tr. at 2539:3–4, 2542:6–20 (MABA are concerned that they are committing a crime if they accept meals, gas cards, swag or other forms of compensation while providing voting assistance).

42 Tr. at 1717:5–13, 1719:3–22, 1723:6–19, 1724:3–15, 1726:21–1727:6 (OCA); Tr. at 1620:7–1621:1 at (LWV); Tr. at 86:9–86:13, 86:14–87:2, 87:3–87:21 (LUPE); Tr. at 2542:17–20, 2543:16–23, 2544:14–16 (MABA).

43 All Plaintiffs operate within the State of Texas and thus are subject to enforcement by the State Defendants. OCA operates primarily in Harris County, Tr. at 1688:10–14, and the League operates chapters throughout the State of Texas, including in Travis County, Tr. at 1586:12–13. LUPE serves voters in Hidalgo County, Tr. at 58:13–16, and MABA operates throughout the State of Texas. Tr. at 2533:21–23.

44 Tr. at 89:2–18 (LUPE has supported ballot measures, including a drainage bond, the creation of a health care district in Hidalgo County, increased broadband access in South Texas); Tr. at 2542:6–8 (MABA routinely

encourages support for candidates and ballot measures by tabling at local events, such as candidate forums); Tr. at 1632:25–1633:9 (LULAC does not endorse particular candidates but has taken positions on issues such as school and municipal bond measures, state constitutional amendments, and ballot propositions affecting taxes and public education).

45 Tr. at 71:1–72:15, 75:11–75:17, 90:4–24, 119:20–120:18 (LUPE members brought mail ballots to LUPE offices and meetings and took them out during interactions with door-to-door canvassers and asked for voting assistance); Tr. at 2535:21–2536:5 (MABA tables at local events, including candidate forums and provides voter assistance); Tr. at 1654:2–1657:19 (LULAC members provided voter assistance during their GOTV efforts with senior citizens).

46 *See id.*

47 Tr. at 75:11–17 (LUPE relies primarily on paid staff members and temporary paid canvassers); Tr. at 2542:17–20, 2544:14–16 (MABA volunteers are concerned that accepting gas cards, meals, swag, or a bottle of water will expose them to criminal liability); Tr. at 1654:2–1657:19 (LULAC volunteers receive modest compensation in the form of raffle tickets, food, and gasoline money).

48 *See* Tr. at 120:19–120:25 (LUPE staff and volunteers to fear prosecution and to stop assisting voters when they are canvassing on a ballot measure); Tr. at 2543:16–23 (MABA members are no longer willing to provide voter assistance); Tr. at 1655:10–18 (LULAC volunteers "scaled ... down" their GOTV efforts and decided not to conduct voter outreach with seniors, many of whom require voting assistance, for "fear that they could be subject to prosecution if they help seniors vote by mail").

49 All Plaintiffs operate within the State of Texas and thus are subject to enforcement by the State Defendants. LUPE serves voters in Hidalgo County, Tr. at 58:13–16, and MABA and LULAC have chapters throughout the State of Texas, Tr. at 2533:21–23 (MABA); Tr. at 1634:6–20 (LULAC).

50 The Court is neither bound nor persuaded by *Nessel*, which has also been rejected by other courts. *See, e.g., Ark. United I*, 2020 WL 6472651, at *4 ("[T]he Court is unconvinced by the opinion in *Nessel*."). Nessel flouts the settled canon that enumerated statutory exceptions are presumed to be exclusive, engages in an undue burden analysis unsupported by the statute and preemption law, and misreads the legislative history by overlooking the importance of voter choice as Congress's chosen remedy. *Compare Nessel*, 487 F. Supp. 3d at 619 (relying solely on dictionary definition of "a" to interpret Section 208), with *Niz-Chavez v. Garland*, 593 U.S. 155, 141 S. Ct. 1474, 1481, 209 L.Ed.2d 433 (2021) (explaining that courts must look at the statutory context to determine the meaning of "a"); *see also United States v. Alabama*, 778 F.3d 926, 933 (11th Cir. 2015) ("We have repeatedly found ... that the context of a statute required us to read 'a' or 'an' to mean 'any' rather than 'one.' ").

51 It is self-evident that the assistor must be actually *capable* of providing the assistance the voter needs in order to serve as an assistor. The State Defendants' and Intervenor-Defendants fanciful hypotheticals about the scope of voters' right to receive assistance are unavailing. For example, Intervenor-Defendants argue that Plaintiffs' reading would allow a voter to select an incarcerated person as an assistor. ECF No. 608 at 35. As the court in *Ark. United II* explained, "a common-sense reading of § 208 suggests that any assistor chosen by a voter must be willing and able to assist. If a chosen person declines to assist the voter or simply does not show up at the polling place, that person has not violated § 208." 626 F. Supp. 3d 1064, 1087 (W.D. Ark. 2022). "And an incarcerated person would not be able assist at the polling place for reasons that are completely unrelated to [Texas's] elections laws." *Id.*

At trial, counsel for the State Defendants similarly posited that Plaintiffs' reading of Section 208 would require election officials to admit assistors who refuse to provide assistance unless they can bring a firearm into

the polling place. Not so. There is no question that assistors remain subject to generally applicable laws. At issue here, however, are laws that regulate voting assistors in their capacity as voting assistors (rather than as members of the general public). But regulations governing "voter assistance" must "be established in a manner which *encourages greater participation* in the electoral process." S. Rep. No. 97-417 at 241. Because the provisions in S.B. 1 challenged in this case regulate voter assistance specifically, the question before the Court is whether those provisions "encourage greater participation in the electoral process."

52 *See, e.g.*, Tr. at 3324:10–14 (Halvorson).

53 *See, e.g.*, Tr. at 147:10–148:8 (Rocha); Tr. at 3208:9–17; Tr. at 3217:12–3218:1 (Miller); Tr. at 2439:24–2440:10 (Espinosa); Tr. at 2540:21–23 (Ortega).

54 *See, e.g.*, Tr. at 175:6–176:8 (Wise); Tr. at 1312:25–1314:9 (Longoria).

55 Upon the suggestion by counsel for the State Defendants that voters concerned about their eligibility for assistance should contact the SOS office regarding the requirements of the Oath, Ms. Nunez Landry responded: "So I guess all disabled people have to call the Secretary of State to find out precisely whether we're eligible to vote [with assistance] and whether we're pressured or coerced? They are going to be a very busy office I would think." Tr. at 3265:21–3266:11. Impracticality aside, counsel's proposal would not cure the Oath's Section 208 problem because, much like the representation of eligibility, it would impose an additional eligibility requirement on voters who need assistance (i.e., that they confirm their eligibility with the SOS).

56 The court highlighted the dearth of evidence justifying the restrictions on ballot-dropping assistance:

> Defendants were unable to provide any data illustrating whether Mississippi has a widespread ballot harvesting problem. Seemingly, no fact-findings or committee-finding investigations or legislative committee inquiries have focused upon this perceived threat. This may explain why the definitional approach of the statute is so barren.
>
> Plaintiffs, contrariwise, have provided this court with examples of how S.B. 2358, which subjects violators to criminal penalties, would deter eligible absentee voters[.]

Disability Rts. of Miss., 684 F. Supp. 3d at 521–22.

57 It's worth noting that the disclosure of an assistor's address and relationship to the voter on the outside of the mail ballot carrier envelope risks public exposure of that information given (1) the potential delay between the time the mail ballot is completed and the time it is mailed or dropped off, and (2) the right to public inspection of the mail carrier envelopes after the election. TEC § 86.014(b).

58 The State Defendants assert that assistance by paid canvassers falls outside the purview of Section 7.04 because it is not "designed to deliver votes for or against a specific candidate or measure." ECF No. 862 ¶ 479 (citing TEC § 276.05(e)); *see also* ECF No. 608 at 36. But any efforts designed to increase *turnout* among voters who are already likely to vote for the organization's preferred candidate or measure are, arguably "designed to deliver votes for the candidate or measure." Thus, training canvassers on how to provide non-coercive voting assistance to LEP and disabled voters upon request during candidate forums or block-walking would be arguably "designed to deliver votes for a specific candidate or measure" if the organization's outreach efforts were directed toward like-minded voters.

The expansive reach of the term "interaction"—as opposed to "communication" or "speech" or "advocacy"—compels the same conclusion because it very clearly encompasses *both* core political speech *and* voting assistance. *See Interaction*, Merriam-Webster, https://www.merriam-webster.com/dictionary/interaction (last visited Sept. 24, 2024) (defining "interaction" means "mutual or reciprocal action or influence"). Nothing in the

text of the Canvassing Restrictions suggests that a voter who asks a canvasser for voting assistance while discussing a ballot measure begins a new, distinct "interaction" that is no longer imbued with the canvasser's original intent.

59 The State Defendants themselves have taken inconsistent positions on the question of whether Section 7.04 reaches voter assistance activity. *Compare* ECF No. 862 ¶ 653 (arguing that nothing prevents paid canvassers from providing voter assistance) with *La Union del Pueblo Entero v. Abbott*, No. 22-50775, ECF No. 92 at 2 (5th Cir. Oct. 9, 2024) (suggesting that an injunction against criminal enforcement of the Canvassing Restriction would somehow impact selectively quoted instructions pertaining to the Assistor Disclosure requirements). If, as the State Defendants would have it, the Canvassing Restriction always permitted paid canvassers to provide mail-ballot assistance, enjoining criminal enforcement of the Canvassing Restriction should have no impact on how canvassers provide such assistance.

60 Even under the State Defendants' proposed balancing test, Sections 6.06 and 7.04 would fail. The Senate Report states that any voter protection laws must be implemented to "encourage participation in the electoral process." S. Rep. No. 97-417 at 63 at 241. The trial record shows that several, non-partisan community organizations have stopped providing mail-ballot assistance to voters because they compensate their staff members (with salaries) and volunteers (with nominal gifts). *See, e.g.*, Tr. at 1722:3–16 (OCA); Tr. at 86:9–86:13, 86:14–87:2, 87:3–87:21, 86:9–86:13, 86:14–87:2, 87:3–87:21 (LUPE); Tr. at 2543:14–2544:23 (MABA). Worse, both Mr. White and Mr. Ingram acknowledged that, in addition to exposing their assistors to criminal liability under Sections 6.06 and 7.04, voters themselves could face jail time under either provision for offering to buy their assistor lunch as a token of appreciation. Tr. at 1904:1–1906:5. Members of the League have stopped providing assistance at assisted living facilities based on this very concern. Tr. at 1620:7–1621:1. Threatening volunteers who accept water bottles and the voters who offer them with years in prison and thousands of dollars in fines can hardly be said to "encourage participation in the electoral process."

The State Defendants insist that these provisions protect voters from incentive structures that increase the likelihood of assistors applying pressure on the voter in pursuit of partisan or ideological ends. But nothing in the text of either Section 6.06 or 7.04 limits the application of criminal liability to those who receive or offer compensation to "apply pressure" for partisan or ideological ends. Nor is there any evidence that bottles of water, t-shirts, bus fare, or a person's receipt of their normal salary constitute "an incentive structure that increases the likelihood" of such pressure. Indeed, the State Defendants failed to proffer a shred of evidence showing that S.B. 1's assistance provisions actually protect voters from undue influence or encourage participation by voters who need assistance. Weighed against the effect of excluding these broad categories of non-partisan assistors and exposing voters and assistors alike to criminal liability, the burden that Sections 6.06 and 7.04 impose on voters' right to vote with assistance from a person of their choice cannot be justified by the State Defendants' vague gesture toward voter protection.

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120 F.4th 390
United States Court of Appeals, Fourth Circuit.

REPUBLICAN NATIONAL COMMITTEE; North Carolina Republican Party, Plaintiffs – Appellees,
v.
NORTH CAROLINA STATE BOARD OF ELECTIONS; Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections; Alan Hirsch, in his official capacity as Chair of the North Carolina State Board of Elections; Jeff Carmon, in his official capacity as Secretary of the North Carolina State Board of Elections; Stacy Eggers, IV, in their official capacities as Members of the North Carolina State Board of Elections; KEVIN N. LEWIS, in their official capacities as Members of the North Carolina State Board of Elections; Siobhan O'Duffy Millen, in their official capacities as Members of the North Carolina State Board of Elections, Defendants – Appellants,
and
Democratic National Committee, Intervenor/Defendant.
Jackson Sailor Jones; Bertha Leverette; North Carolina State Conference of the NAACP, Amici Supporting Appellant.
Republican National Committee; North Carolina Republican Party, Plaintiffs – Appellees,
v.
Democratic National Committee, Intervenor/Defendant – Appellant,
and
North Carolina State Board of Elections; Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections; Alan Hirsch, in his official capacity as Chair of the North Carolina State Board of Elections; Jeff Carmon, in his official capacity as Secretary of the North Carolina State Board of Elections; Stacy Eggers, IV, in their official capacities as Members of the North Carolina State Board of Elections; Kevin N. Lewis, in their official capacities as Members of the North Carolina State Board of Elections; Siobhan O'Duffy Millen, in their official capacities as Members of the North Carolina State Board of Elections, Defendants.

No. 24-2044, No. 24-2045
|
Argued: October 28, 2024
|
Decided: October 29, 2024

Synopsis

Background: National and state political parties filed state court action against North Carolina State Board of Elections and its members asserting state law claims stemming from Board's alleged noncompliance with Help America Vote Act (HAVA). Opposing political party intervened as defendant. After removal, the United States District Court for the Eastern District of North Carolina, Richard E. Myers, II, Chief Judge, 2024 WL 4523912, dismissed statutory state law claim and declined to exercise supplemental jurisdiction of state constitutional claim and remanded it to state court. Plaintiffs appealed.

Holdings: The Court of Appeals, Berner, Circuit Judge, held that:

[1] parties satisfied injury-in-fact requirement for organizational standing;

[2] parties satisfied redressability requirement for organizational standing;

[3] parties' state law claims fell within scope of district court's federal question jurisdiction; and

[4] removal fell within scope of civil rights removal statute'.

Reversed and remanded.

Diaz, Chief Judge, concurred and filed opinion.

Procedural Posture(s): On Appeal; Motion for Remand.

West Headnotes (19)

[1] Federal Civil Procedure In general; injury or interest

Federal courts have independent obligation to assure that standing exists.

[2] Associations Injury or interest in general

Associations Causation and redressability in general

Organization may have standing to sue on its own behalf for injuries it sustains as result of defendant's actions, but to do so, plaintiff must show far more than simply setback to organization's abstract social interests; rather, organization must make necessary showing to demonstrate Article III standing—injury-in-fact, caused by defendant, that can be redressed by favorable decision from court. U.S. Const. art. 3, § 2, cl. 1.

1 Case that cites this headnote

[3] **Associations** Injury or interest in general

Mere expense incurred by organization does not constitute injury in-fact required for organizational standing where decision to divert resources is not in response to threat to organization's core mission.

1 Case that cites this headnote

[4] **Associations** Injury or interest in general

Organizational standing cannot be established on sole basis of organization's uncompelled choice to expend resources.

1 Case that cites this headnote

[5] **Associations** Elections and voting rights

National and state political parties satisfied injury-in-fact requirement for organizational standing to bring action against North Carolina State Board of Elections and its members asserting state law claims stemming from Board's alleged noncompliance with Help America Vote Act (HAVA); parties alleged that Board's actions and inaction directly impacted their core organizational missions of election security and providing services aimed at promoting voter engagement and electing their candidates for office, and that Board's HAVA violations forced them to divert significantly more of their resources into combatting election fraud in North Carolina, efforts that frustrated their organizational and voter outreach efforts. 52 U.S.C.A. § 20901 et seq.

1 Case that cites this headnote
More cases on this issue

[6] **Federal Civil Procedure** Causation; redressability

To satisfy traceability requirement for standing, plaintiffs must show that their injury can be traced to defendant's actions, and did not result from independent action of non-party to case.

[7] **Federal Civil Procedure** Causation; redressability

To satisfy redressability prong of standing, plaintiffs must show that it is likely, and not merely speculative, that favorable decision from federal court will remedy their injury.

[8] **Federal Civil Procedure** Causation; redressability

Burden under redressability prong of standing is not onerous and requires plaintiffs to show only that they personally would benefit in tangible way from court's intervention.

[9] **Associations** Elections and voting rights

National and state political parties satisfied redressability requirement for organizational standing to bring action against North Carolina State Board of Elections and its members asserting state law claims stemming from Board's alleged noncompliance with Help America Vote Act (HAVA); parties' request for order requiring Board to remove all voter registrants who did not provide their driver's license number or last four digits of their social security number on their application or, alternatively, to require those individuals to vote provisionally would address their alleged injury and permit them to reallocate their resources accordingly. 52 U.S.C.A. § 20901 et seq.

More cases on this issue

[10] **Removal of Cases** Review

When remand of removed case is based on lack of subject matter jurisdiction, appellate review of remand order is typically barred. 28 U.S.C.A. § 1447(d).

[11] **Removal of Cases** Review

When appeal involves order remanding case to state court from which it was removed pursuant to civil rights removal statute, general bar to appellate review of remand order does not apply. 28 U.S.C.A. §§ 1443, 1447(d).

1 Case that cites this headnote

[12] **Removal of Cases** Review

Court of Appeals' review of order remanding case to state court from which it was removed pursuant to civil rights removal statute is not confined to argument for removal under that statute; Court of Appeals may properly review whole of district court's order, not just some of its parts or pieces. 28 U.S.C.A. § 1443.

1 Case that cites this headnote

[13] **Removal of Cases** Review

When district court remands claims to state court after declining to exercise supplemental jurisdiction, remand order is not based on lack of subject matter jurisdiction, and thus Court of Appeals has jurisdiction to review remand order. 28 U.S.C.A. §§ 1367(c), 1447(d).

1 Case that cites this headnote

[14] **Federal Courts** Jurisdiction

Removal of Cases Review

Court of Appeals reviews de novo questions of subject matter jurisdiction, including removal.

2 Cases that cite this headnote

[15] **Removal of Cases** Evidence

Party seeking removal bears burden of showing removal is proper.

[16] **Removal of Cases** Constitutional and statutory provisions

Because removal jurisdiction raises significant federalism concerns, federal courts must strictly construe removal jurisdiction.

[17] **Federal Courts** State-law claims and causes of action

Federal jurisdiction over state law claim will lie if federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting federal-state balance approved by Congress. 28 U.S.C.A. § 1331.

[18] **Federal Courts** Elections, voting, and political rights

National and state political parties' claim that North Carolina State Board of Elections violated state constitution's equal protection clause and state statute by accepting voter registrations that were non-compliant with Help America Vote Act (HAVA) fell within scope of district court's federal question jurisdiction; both state law causes of action were based on alleged HAVA violations, Board did not concede HAVA violation, parties' requested relief presented potential conflict with National Voter Registration Act's (NVRA) 90-day quiet period, desired remedy was forward-looking, issue was of substantial importance to federal system as a whole, and exercising federal jurisdiction would not open floodgates to wave of state constitutional litigation in federal court. N.C. Const. art. 1, § 19; 28 U.S.C.A. § 1331; 52 U.S.C.A. §§ 20507(c)(2)(A), 21083(a)(5)(A); N.C. Gen. Stat. Ann. § 163-82.11(c).

More cases on this issue

[19] Removal of Cases Denial of civil rights

Civil Rights Act's materiality provision and National Voter Registration Act's (NVRA) 90-day quiet period were laws providing for racial equality, and thus removal of national and state political parties' action alleging that North Carolina State Board of Elections violated state constitution's equal protection clause and state statute by accepting voter registrations that were non-compliant with Help America Vote Act (HAVA) fell within scope of civil rights removal statute's provision allowing for removal of cases by defendant who was "refusing to do any act on the ground that it would be inconsistent with" defendant's "authority derived from any law providing for equal rights." 28 U.S.C.A. § 1443(2); 52 U.S.C.A. §§ 10101(a)(2), 20507(c)(2)(A).

More cases on this issue

***393** Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Richard E. Myers, Chief District Judge. (5:24-cv-00547-M-RJ)

Attorneys and Law Firms

ARGUED: Sarah Gardner Boyce, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Seth Paul Waxman, WILMERHALE LLP, Washington, D.C., for Appellants. Phillip John Strach, NELSON MULLINS RILEY & SCARBOROUGH, LLP, Raleigh, North Carolina, for Appellees. ON BRIEF: Jim W. Phillips, Jr., Shana L. Fulton, Eric M. David, William A. Robertson, James W. Whalen, BROOKS, PIERCE, MCLENDON HUMPHREY & LEONARD, LLP, Raleigh, North Carolina; Daniel S. Volchok, Christopher E. Babbitt, Gary M. Fox, Joseph M. Meyer, Jane E. Kessner, Nitisha Baronia, WILMER CUTLER PICKERING HALE & DORR LLP, Washington, D.C., for Appellant Democratic National Committee. Sripriya Narasimhan, Deputy General Counsel, Mary Carla Babb, Terence Steed, Special Deputy Attorney General, South A. Moore, Deputy General Counsel, Marc D. Brunton, General Counsel Fellow, NORTH CAROLINA DEPARTMENT OF JUSTICE, for Appellants North Carolina State Board of Elections; Karen Brinson Bell; Alan Hirsch; Jeff Carmon; Stacy Eggers, IV; Kevin Lewis; and Siobhan O'Duffy Millen. Jordan A. Koonts, NELSON MULLINS RILEY & SCARBOROUGH LLP, Raleigh, North Carolina, for Appellees. Jeffrey Loperfido, Hilary H. Klein, Christopher Shenton, SOUTHERN COALITION FOR SOCIAL JUSTICE, Durham, North Carolina; Ezra D. Rosenberg, Jennifer Nwachukwu, Pooja Chaudhuri, Alexander S. Davis, Javon Davis, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C.; Lee Rubin, Palo Alto, California, Rachel J. Lamorte, Catherine Medvene, Washington, D.C., Jordan Hilton, Salt Lake City, Utah, Harsha Tolappa, MAYER BROWN LLP, Chicago, Illinois, for Amici North Carolina NAACP, Jackson Sailor Jones, and Bertha Leverette.

Before DIAZ, Chief Judge, GREGORY and BERNER, Circuit Judges.

Opinion

Reversed and remanded by published opinion. Judge Berner wrote the opinion, in which Chief Judge Diaz and Judge Gregory joined. Chief Judge Diaz wrote a concurring opinion.

BERNER, Circuit Judge:

***394** This appeal concerns whether remand of a claim to state court was proper. The Republican National Committee ("RNC") and the North Carolina Republican Party ("NCGOP") (together, "Plaintiffs") filed two state law claims, one statutory and one constitutional, in a North Carolina superior court against the North Carolina State Board of Elections and its members ("State Board"). Both claims stemmed from the State Board's alleged noncompliance with the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. § 20901 *et seq.*, a federal statute that was intended to improve voting systems and voter access.

The Democratic National Committee ("DNC") intervened as a defendant. Together, the DNC and the State Board ("Defendants") removed the action to federal court pursuant to 28 U.S.C. §§ 1441 and 1443(2) and filed a motion to dismiss both claims. Under 28 U.S.C. § 1441, defendants may remove to federal court those claims over which federal courts possess original jurisdiction, including federal question jurisdiction under 28 U.S.C. § 1331. Title 28 of the United States Code, Section 1443, allows defendants to remove to federal court certain claims involving federal equal rights laws.

The district court held that it possessed original jurisdiction over Plaintiffs' state statutory claim but lacked original jurisdiction over the state constitutional claim. The district court then granted Defendants' motion to dismiss the statutory claim because the relevant statutory provision does not provide for a private right of action. Following dismissal of the state statutory claim, the district court declined to exercise supplemental jurisdiction over the remaining state constitutional claim. It also held that Section 1443 did not provide a valid basis for removal. As a result, the district court remanded the constitutional claim to state court.

We hold that the district court's remand order was improper for two reasons. First, the district court possessed original jurisdiction over the state constitutional claim under Section 1331, as the claim contains ***395** an embedded federal question. Removal was thus permissible under Section 1441. Second, Defendants validly removed the constitutional claim pursuant to Section 1443(2), which allows for removal in cases involving the "refus[al] to do any act on the ground that it would be inconsistent with" "any law providing for equal rights." 28 U.S.C. § 1443(2). Here, the State Board refused to perform Plaintiffs' requested act—striking certain registered voters from North Carolina's voter rolls—on the ground that doing so within 90 days of a federal election would violate provisions of Title I of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241, 241-42 (July 2, 1964) (codified at 52 U.S.C. § 10101), and the National Voter Registration Act of 1993 ("NVRA"), Pub. L. No. 103-31, 107 Stat. 77 (May 20, 1993) (codified at 52 U.S.C. § 20501 *et seq.*). These are "law[s] providing for equal rights" within the meaning of Section 1443. We thus reverse the district court's remand order and return this matter to the district court for further proceedings consistent with this opinion.

I. Statement of Jurisdiction

A. Organizational Standing

[1] **[2]** Though both parties agree that Plaintiffs possess Article III standing, we have "an independent obligation to assure that standing exists." [1] *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). An organization may have standing to sue on its own behalf for injuries it sustains as a result of a defendant's actions. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n. 19, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). To do so, however, a plaintiff must show "far more than simply a setback to the organization's abstract social interests." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 394, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024) ("*Hippocratic Medicine*") (quoting *Havens Realty*, 455 U.S. at 379, 102 S.Ct. 1114). Rather, the organization must make the necessary showing to demonstrate Article III standing—an injury-in-fact, caused by the defendant, that can be redressed by a favorable decision from the court. *Id.* at 393-94, 144 S.Ct. 1540. "A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 39, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

1. Injury-in-Fact

The Supreme Court set forth the standard for organizational standing in *Havens Realty*. *See generally Havens Realty*, 455 U.S. at 378-79, 102 S.Ct. 1114. There, the Court held that an organization whose core mission included providing housing counseling services had standing to sue a real estate company that engaged in racial steering. *Id.* The Court found that the organization suffered an injury-in-fact because the company's racial steering "perceptibly impaired" the organization's ability to provide a key component of the organization's mission. *Id.* at 379, 102 S.Ct. 1114.

This court has applied *Havens Realty*'s organizational standing principles on numerous occasions. We have recognized that "when an action 'perceptibly impair[s]' an organization's ability to carry out its mission and 'consequent[ly] drain[s] ... the ***396** organization's resources,' 'there can be no question that the organization has suffered' an injury-in-fact.' " *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) (alterations in original) (quoting *Havens Realty*, 455 U.S. at 379, 102 S.Ct. 1114); *see also People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, 843 F. App'x 493, 496-97 (4th Cir. 2021) ("*PETA*") (holding that PETA had standing because its diversion of resources in response to defendant's actions impeded the organization's "efforts to carry out its mission").

[3] **[4]** At the same time, we have recognized limitations to organizational standing. In *Lane v. Holder*, we noted that "mere expense" does not constitute an injury in-fact where the decision to divert resources is not in response to a threat to the organization's core mission. 703 F.3d 668, 675 (4th Cir. 2012). We have consistently held that standing cannot be established on the sole basis of an organization's uncompelled

choice to expend resources. *See, e.g., N.C. State Conf. of the NAACP*, 981 F.3d at 301 ("[T]he *Havens Realty* standard is not met simply because an organization makes a 'unilateral and uncompelled' choice to shift its resources away from its primary objective to address a government action."); *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 183 (4th Cir. 2013) (organization lacked standing because it failed to allege that the defendant's actions "frustrate[d] its stated organizational purpose"); *PETA*, 843 F. App'x at 497 ("PETA did not allege or prove that its injury consisted of the costs associated with the instant lawsuit, but, rather, satisfied *Havens Realty* by alleging and proving that Defendants' actions impaired its ability to carry out its mission combined with a consequent drain on its resources.").

The Supreme Court addressed organizational standing most recently in *Hippocratic Medicine*, where several medical advocacy organizations opposed to abortion, together with individual doctors, sued the Food and Drug Administration ("FDA") to challenge the agency's approval of the abortion-inducing drug mifepristone. *Hippocratic Med.*, 602 U.S. at 376, 395, 144 S.Ct. 1540. The plaintiffs asserted standing on the basis that they (1) incurred costs to conduct studies so they could inform their members and the public about risks posed by mifepristone, (2) drafted citizen petitions to the FDA, and (3) engaged in public advocacy and public education. *Id.* at 394, 144 S.Ct. 1540. The medical advocacy organizations argued that they established standing under *Havens Realty* because they had diverted resources in response to the FDA's actions. *Id.* at 394-95, 144 S.Ct. 1540. The Court rejected that argument and explicitly declined to "extend the *Havens* holding beyond its context." *Id.* at 396, 144 S.Ct. 1540. The Court held that the organizations lacked organizational standing because they failed to allege that the FDA's actions imposed an impediment to their advocacy similar to the impediment imposed in *Havens Realty*. *Id.* at 395, 144 S.Ct. 1540. Instead, the organizations expended resources only relevant to "abstract social interests" in response to the FDA's approval of mifepristone, and not to their core mission. *Id.* at 394, 144 S.Ct. 1540.

[5] This case involves more than simply an organization's efforts to "spend its way into standing." *Id.* at 394, 144 S.Ct. 1540. Here, Plaintiffs together allege that "Defendants' actions and inaction directly impact Plaintiffs' core organizational missions of election security and providing services aimed at promoting Republican ***397** voter engagement and electing Republican candidates for office." J.A. 26. Plaintiffs allege that the RNC's "core mission involves organizing lawful voters and encouraging them to support Republican candidates at all levels of government" and that it "expends significant time and resources fighting for election security and voting integrity across the nation." J.A. 25. As for the NCGOP, Plaintiffs allege that the organization's "core mission includes counseling interested voters and volunteers on election participation including hosting candidate and voter registration events, staffing voting protection hotlines, investigating reports of voter fraud and disenfranchisement." J.A. 25-26. Plaintiffs contend that the State Board's violations of HAVA forced them to "divert significantly more of their resources into combatting election fraud in North Carolina," efforts which have frustrated their organizational and voter outreach efforts. J.A. 26. Under Supreme Court precedent, and that of this court, these allegations suffice to allege organization injury under Article III.

In *Havens Realty*, the plaintiff's core mission included counseling low-and moderate-income home buyers. Similarly here, the core mission of the RNC and the NCGOP is to counsel voters to support Republican candidates. Plaintiffs contend that this core mission is directly "affected and interfered with," *see Hippocratic Med.*, 602 U.S. at 395, 144 S.Ct. 1540, because Plaintiffs are unable to ascertain which of the 225,000 people whom they allege registered improperly will be able to vote in the upcoming election. Plaintiffs claim they have already spent significant resources and seen their mission frustrated by the inaction of the State Board in remedying the alleged defects in the voter rolls. They claim that their "organizational and voter outreach efforts"—which, for the RNC, are on a national scale—"have been and will continue to be significantly stymied due to Defendants' ongoing failures." J.A. 26. Plaintiffs sufficiently allege that the State Board's failure to act has concretely impaired their core missions.

2. *Causation*

[6] The allegations in Plaintiffs' Complaint also satisfy the other standing requirements—causation and redressability. To prove causation, Plaintiffs must show that their injury can be traced to the State Board's actions, and did not result from the independent action of a non-party to the case. *Bishop v. Bartlett*, 575 F.3d 419, 425 (4th Cir. 2009) (citing *Simon*, 426 U.S. at 41-42, 96 S.Ct. 1917). Here, Plaintiffs allege the State Board's failure to comply with HAVA forced

them to divert resources into combatting election fraud and monitoring various aspects of the upcoming election in North Carolina. Their injury is therefore traceable to State Board's conduct.

3. *Redressability*

[7] **[8]** To satisfy the redressability prong, Plaintiffs must show that it is likely, and not merely speculative, that a favorable decision from the federal court will remedy their injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The burden under this prong is "not onerous" and requires Plaintiffs to show only that they "personally would benefit in a tangible way from the court's intervention." *Disability Rts. S.C. v. McMaster*, 24 F.4th 893, 903 (4th Cir. 2022). To that end, we have stated that "[t]he removal of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient to show redressability." *Id.*

[9] Plaintiffs ask the court to "immediately and permanently rectify th[e] harm" they suffered as a result of the State ***398** Board's failure to comply with HAVA "in order to protect the integrity of North Carolina's elections." J.A. 40. More specifically, Plaintiffs ask the court to order the State Board to remove all voter registrants who did not provide their driver's license number or the last four digits of their social security number on their application or, alternatively, to require those individuals to vote provisionally. Such an order would address Plaintiffs' alleged injury and permit them to reallocate their resources accordingly. Thus, a favorable decision would redress Plaintiffs' injury.

Therefore, we find that Plaintiffs have standing to proceed in federal court.

B. Removal Jurisdiction

[10] Appellate review of a district court order remanding a removed case to state court is circumscribed by Section 1447(d) of Title 28 of the United States Code. When remand is based on a lack of subject-matter jurisdiction, review of the remand order is typically barred. *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638, 129 S.Ct. 1862, 173 L.Ed.2d 843 (2009).

[11] In passing the Civil Rights Act of 1964, however, Congress created an exception to the Section 1447(d) general rule barring appellate review of a remand order. Title IX of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 901, 78 Stat. 241, 266 (July 2, 1964). When an appeal involves an order remanding a case to the state court from which it was removed pursuant to Section 1443, the general bar to appellate review of a remand order does not apply. *BP P.L.C. v. Mayor of Balt.*, 593 U.S. 230, 241-42, 141 S.Ct. 1532, 209 L.Ed.2d 631 (2021) (discussing the exception to Section 1447).

[12] **[13]** Our review of the remand order is not confined to the argument for removal under Section 1443. *Id.* at 236-37, 141 S.Ct. 1532. We may properly review "the whole of a district court's 'order,' not just some of its parts or pieces." *Id.* at 237, 141 S.Ct. 1532. Indeed, we are required to "review the merits of all theories for removal that a district court has rejected." *Id.* at 236, 141 S.Ct. 1532. In this case, that includes whether jurisdiction was proper under 28 U.S.C. §§ 1331, 1443, or 1367. [2]

II. Standard of Review

[14] **[15]** **[16]** We review *de novo* questions of subject-matter jurisdiction, including removal. *Mayor of Balt. v. BP P.L.C.*, 31 F.4th 178, 197 (4th Cir. 2022), *cert. denied*, —— U.S. ——, 143 S. Ct. 1795, 215 L.Ed.2d 678 (2023). "The party seeking removal bears the burden of showing removal is proper." *Id.* (quoting *Prince v. Sears Holdings Corp.*, 848 F.3d 173, 176 (4th Cir. 2017)). "Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction." *Id.* (quoting *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994)).

III. Factual Background

On August 23, 2024, Plaintiffs filed a two-count Complaint in a North Carolina ***399** superior court. Though brought under state law, the entire lawsuit—as pled—turns on whether Defendants violated HAVA. The Plaintiffs contend in their Complaint that the State Board "violated HAVA and, as a result, state law." J.A. 156.

The alleged HAVA violations that form the basis of the state law claims derive from concerns about the adequacy of a voter registration form which had been in use in North Carolina before December 2023. In accepting and processing voter registration applications, HAVA requires states to include "the

applicant's driver's license number" or, if the applicant lacks a valid driver's license, "the last 4 digits of the applicant's social security number." HAVA § 21083(a)(5)(A) (hereinafter "Subsection (a)(5)(A)"). If an applicant possesses neither a valid driver's license nor a social security number, then the state must "assign the applicant a number which will serve to identify the applicant for voter registration purposes." *Id.*

Plaintiffs allege that a voter registration form previously used by the State Board was noncompliant with HAVA because it did not clearly indicate that an applicant—unless she lacked either number—was required to list her driver's license number or the last four digits of her social security number. North Carolina's previous voter registration form instructed applicants, "if you have a NC driver license or non-operator's identification number, provide this number. If you do not have a NC driver license or ID card, then provide the last four digits of your social security number." J.A. 427. The form contained fields for applicants to enter both numbers. While the form stated that "fields in red text are required," the fields for the driver's license and social security numbers were not in red text. J.A. 426.

In response to a complaint about this discrepancy, the State Board updated its form to mark the driver's license number and social security number fields in red text. Plaintiffs contend that 225,000 people, including "possible non-citizens" and other ineligible voters, registered to vote using the previous form. J.A. 23. Plaintiffs allege that the State Board was required to strike these ineligible voters from the North Carolina voter rolls and refused to do so.

Plaintiffs allege that the State Board's conduct violated two provisions of HAVA, infractions that in turn constitute two violations of North Carolina state law. The first HAVA provision, Subsection (a)(5)(A), sets forth requirements states must follow when *registering* voters. The second HAVA provision, Subsection (a)(2)(A), establishes states' obligations in *maintaining* their voter rolls. This provision requires state election officials to "perform list maintenance with respect to the computerized list on a regular basis." HAVA Subsection (a)(2)(A). Count One of Plaintiffs' Complaint alleges a violation of North Carolina General Statutes Section 163.82-11(c) (hereinafter "the North Carolina statute"), which requires "[t]he State Board of Elections [to] update the statewide computerized voter registration list and database to meet the requirements of [HAVA]." Count Two asserts that the State Board violated the Equal Protection Clause of the North Carolina Constitution, Article 1 § 19, through HAVA violations that "open[ed] the door to potential" vote dilution. J.A. 40.

IV. Analysis

A. The District Court Possessed Federal Question Jurisdiction Over Count Two

[17] We first evaluate whether Count Two, though brought under state law, contains ***400** an embedded federal question giving rise to federal jurisdiction under Section 1331. In the "vast bulk of suits" involving the exercise of federal jurisdiction under Section 1331, "federal law creates the cause of action." *Gunn v. Minton*, 568 U.S. 251, 257, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). Certain claims brought under state law, however, also fall within the scope of federal question jurisdiction. The Supreme Court has established that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* at 258, 133 S.Ct. 1059 (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005)).

The district court held that Count One satisfied all four *Gunn* factors. It then "assume[d] without deciding" that Count Two met the first three requirements. J.A. 575. The district court held, however, that federal jurisdiction did not lie over Count Two because of the fourth *Gunn* factor. In the view of the district court, the federal issue implicated by Count Two could not be resolved in federal court without disrupting the federal-state balance. J.A. 575 (quoting *Gunn*, 568 U.S. at 258, 133 S.Ct. 1059).

We conclude that the district court was correct in its assumption that Count Two satisfied the first three *Gunn* factors for the same reasons as Count One. We disagree, however, with its conclusion regarding the fourth factor. Because we find that Count Two satisfies all four *Gunn* factors, we hold that the district court possessed original jurisdiction over Count Two under Section 1331. As a result, removal of Count Two pursuant to Section 1441 was proper.

1. Necessarily Raised

Looking to the first *Gunn* factor, the district court had no difficulty concluding that Count One "necessarily raises an issue of federal law." J.A. 577. The court explained:

> "To prevail on [the] claim," Plaintiffs "must show that" Defendants failed to comply with Section 303(a) of HAVA. *Gunn*, 568 U.S. at 259 [133 S.Ct. 1059]. "That will necessarily require application of [HAVA] to the facts of [Plaintiffs'] case." *Id.* In other words, whether Defendants violated HAVA is "an essential element" of Plaintiffs' state law claim. *Grable*, 545 U.S. at 315 [125 S.Ct. 2363]; *see also* N.C.G.S. § 163-82.11(c). And "the claim's very success depends on giving effect to a federal requirement." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 384 [136 S.Ct. 1562, 194 L.Ed.2d 671] (2016). The court finds the first factor is met.

J.A. 577.

[18] This analysis applies to Count Two with equal force. Plaintiffs' state constitutional theory runs squarely through HAVA. Under the theory articulated in the Complaint, determining whether the State Board violated HAVA is necessary and essential to the resolution of Plaintiffs' state constitutional claim. The federal questions essential to resolving Plaintiffs' state constitutional claim are the same questions that the district court found necessary to the resolution of Plaintiffs' now-dismissed state statutory claim: (1) did North Carolina's previous voter registration form violate HAVA Subsection (a)(5)(A); and (2) if so, did the "list maintenance" mandated by HAVA Subsection (a)(2)(A) include a requirement that the State Board remove voters who registered to vote using a form that violated HAVA Subsection (a)(5)(A)?

***401** Count Two of Plaintiffs' Complaint begins as follows: "Defendants have a non-discretionary, statutory duty to maintain the state's voter rolls in a manner compliant with Section 303(a) of HAVA." J.A. 39. The Complaint then states that the North Carolina statute is "an affirmative command, creating a duty imposed by law." *Id.* As discussed more fully below, the North Carolina statute does nothing more than require the State Board to "meet the requirements of [S]ection 303(a) of [HAVA]." N.C. Gen. Stat. § 163-82.11(c). Count Two also states that the State Board admitted they failed to uphold this duty, namely, the duty to comply with HAVA, "when they accepted hundreds of thousands of voter registrations which were plainly non-compliant with Section 303(a) of HAVA." J.A. 39. The Complaint further asserts that "[d]espite this admission, Defendants refuse to take any action to remedy their violations" of HAVA and the North Carolina statute. J.A. 40.

Plaintiffs' requests for relief make it abundantly clear that Count Two turns entirely on a determination of the requirements of HAVA. First, Plaintiffs seek "a writ of mandamus and a mandatory injunction ordering Defendants to develop, implement, and enforce practices and policies *to ensure compliance with HAVA*." *Id.* (emphasis added). Second, they request "a court-approved plan" that would direct Defendants "to remedy" their alleged violations of HAVA. *Id.* This plan would, where necessary, "require all individuals *who failed to provide necessary HAVA identification* information but were still registered to vote under the state's prior registration form, to cast a provisional ballot in upcoming elections pending Defendants' receipt and *confirmation of the required HAVA information*." J.A. 40-41 (emphases added). Finally, Plaintiffs ask the court to direct Defendants to take all actions necessary to ensure future compliance with HAVA. J.A. 41. All three requests for relief, if granted, would require the court to mandate compliance with HAVA.

In sum, Count Two alleges that the State Board violated the North Carolina state constitution by (1) violating HAVA, (2) violating a state statute requiring them not to violate HAVA, and (3) failing to remedy their violations of (1) and (2). The Complaint contains no articulation of a state constitutional violation separate and apart from an alleged HAVA violation. This is a state cause of action in name only.

Plaintiffs requested relief also presents a potential conflict with the 90-day "quiet period" contained in Section 8(c) of the NVRA. The 90-day quiet period requires that:

> A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

52 U.S.C. § 20507(c)(2)(A). The 90-day quiet period prohibits systematic removal programs "90 days before an election because that is when the risk of dis[en]franchising

eligible voters is the greatest." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014).

Plaintiffs filed their Complaint 74 days before the November federal election—well within the NVRA's proscribed 90-day quiet period. North Carolina has a unified registration system for both state and federal elections, and thus is bound by the provisions of the NVRA for the registrants at issue here. *See* N.C. Gen. Stat. § 163-82.11(a) (establishing "a statewide computerized voter registration system" to "serve as the single system for storing and ***402** managing the official list of registered voters in the State").

Without weighing whether the relief requested by Plaintiffs runs afoul of the 90-day quiet period, at a minimum the NVRA poses a threshold federal question that must be answered before Plaintiffs can prevail on their claim. The district court correctly noted that Plaintiffs could not succeed unless a court first accepted Plaintiffs' theory that "the NVRA's restrictions on removals only appl[y] to valid registrants, and individuals who registered to vote in a manner inconsistent with HAVA are not valid registrants." J.A. 580.

That the 90-day quiet period in the NRVA could altogether foreclose Plaintiffs' requested relief only serves to bolster the conclusion that Plaintiffs' claims necessarily raise an issue of federal law. Plaintiffs' theory of Count Two, like their theory of Count One, turns entirely on alleged violations of HAVA Subsections (a)(2)(A) and (a)(5)(A). Accordingly, Count Two satisfies the first *Gunn* factor because it "necessarily raises an issue of federal law."

2. Actually Disputed

The second *Gunn* factor looks to whether the federal issue is "actually disputed." In analyzing this factor in the context of Count One, the district court found that Defendants "effectively conceded a violation of [HAVA Subsection (a)(5)(A)]" by admitting that the previous voter registration form created the risk of confusion and error. J.A. 578. As a result, the district court concluded that a HAVA Subsection (a)(5)(A) violation was "undisputed."[3] *Id.*

The district court held, however, that Count One hinged on the meaning of a different sub-provision of HAVA—Subsection (a)(2)(A). In the district court's view, "Plaintiffs in theory could have attempted to articulate a violation of [the state statute] that rested *solely* on Defendants' registration of voters in a manner out of compliance with HAVA [Subsection (a)(5)(A)]. But Plaintiffs are the masters of their Complaint and that is not the theory that they alleged." J.A. 579 n.5 (emphasis in original).

Instead, Plaintiffs allege in their Complaint that the State Board violated the North Carolina statute providing that "[t]he State Board of Elections shall *update* the statewide computerized voter registration *list and database* to meet the requirements of [S]ection 303(a) of the Help America Vote Act of 2002." N.C. Gen. Stat. § 163-82.11(c) (emphasis added). Under the theory outlined in the Complaint, the State Board violated North Carolina state law through its failure to comply with HAVA's "list maintenance" requirements by refusing to remove certain voters from the voter rolls, not through the initial use of an allegedly defective form. As a result, the question critical to Plaintiffs' state statutory claim was whether the "list maintenance" mandated by HAVA included a requirement that the State Board remove voters who registered using a flawed form.

Defendants argue that HAVA Subsection (a)(2)(A) actually *prohibits* them from removing the voters in question rather than requiring them to do so. HAVA permits state officials to remove a registered voter from a registration list only in accordance with certain "provisions of the National Voter Registration Act of 1993." J.A. 508; HAVA Subsection (a)(2)(A). The NVRA, in turn, limits the circumstances under which "the name of a registrant may ... be removed from the official list of ***403** eligible voters." 52 U.S.C. § 20507(a). As the district court noted, "those defined circumstances do not include a voter's failure to initially register to vote in compliance with [HAVA Subsection (a)(5)(A)]." J.A. 579.

Plaintiffs assert that the meaning of "registrant" within the NVRA is implicitly limited to *valid registrants*—a category excluding those who registered under North Carolina's previous form. Thus, according to Plaintiffs, the NVRA presents no barrier, and the "list maintenance" required by HAVA Subsection (a)(2)(A) includes removing those voters. J.A. 580.

Because the district court found that the North Carolina statute lacked a private right of action, it declined to resolve the dispute concerning the parties' competing interpretations of HAVA Subsection (a)(2)(A) and, in turn, the meaning of the term "registrant" within the NVRA. The district court recognized, however, that the Plaintiffs' statutory claim under

the North Carolina statute turned on a *disputed* issue of federal law—the meaning of HAVA Subsection (a)(2)(A):

> Like in *Grable*, the meaning of ... HAVA is "an essential element" of Plaintiffs' claim under [N.C. Gen. Stat.] Section 163-82.11. *Grable*, 545 U.S. at 315 [125 S.Ct. 2363]. This question of federal law "requires resolution," *Franchise Tax Bd. [of State of Cal. v. Construction Laborers Vacation Trust for Southern California]*, 463 U.S. [1] at 13 [103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)], and "is the central point of dispute," *Gunn*, 568 U.S. at 259, 133 S.Ct. 1059. Because Plaintiffs' state law claim "really ... involves a dispute" concerning the "construction, or effect," of a federal law, *Shulthis* v. *McDougal*, 225 U.S. 561, 569 [32 S.Ct. 704, 56 L.Ed. 1205] (1912).

J.A. 580-81.

The federal issue—whether defendants violated HAVA Subsection (a)(2)(A)—is "actually disputed." This is equally true for Count Two as it was for Count One. "[I]ndeed, on the merits, it is the central point of dispute." *Gunn*, 568 U.S. at 259, 133 S.Ct. 1059. The district court aptly noted that, even if Defendants conceded a violation of HAVA Subsection (a)(5)(A), whether Defendants violated HAVA Subsection (a)(2)(A) remains in contention.

We note that this court recently rejected a theory of statutory construction closely resembling Plaintiffs' argument in this case. Plaintiffs contend that the NVRA, in limiting the circumstances in which "the name of a *registrant* may ... be removed from the official list of eligible voters," 52 U.S.C. § 20507(a), implicitly qualified the word *registrant* to refer only to *valid registrants*.

In *Virginia Coalition for Immigrant Rights v. Beals*, this court declined to adopt a construction of the NVRA that added an implicit modifier to the word "registrant." Case No. 24-2071, at 3-4 (4th Cir. Oct. 27, 2024), ECF No. 22. We stated, "Appellants' proposed interpretation appears to violate another bedrock principle of statutory interpretation—this time, the plain-meaning rule—by reading 'registrant' in [NVRA] subsection (a)(3) as meaning something other than 'one that registers or is registered' to vote." *Id. Virginia Coalition* casts serious doubt on Plaintiffs' theory of statutory interpretation. That is a merits issue, however, that lies beyond the scope of this appeal. For the purpose of analyzing the second factor of the *Gunn* test, it is enough to note that parties certainly dispute whether a HAVA Subsection (a)(2)(A) violation occurred.

3. Substantial

The third *Gunn* factor asks whether the federal issue is "substantial." The substantiality ***404** inquiry looks to "the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260, 133 S.Ct. 1059. Here, we confront whether HAVA (and, by extension, the NVRA) issues presented by Count Two implicate substantial federal interests. As framed by the district court:

> Distilled to its essence, this case concerns whether or not a state may, or in fact must, remove a registered voter from a voting roll shortly before a national election or require that voter to cast a provisional ballot because that voter (through no apparent fault of their own) was initially registered to vote in a manner inconsistent with federal law.

J.A. 581. We have no hesitation concluding that this issue is of substantial importance "to the federal system as a whole." *Gunn*, 568 U.S. at 260, 133 S.Ct. 1059. "It is beyond cavil that voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). At the same time, confirming that all voters are eligible is of great national importance. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam).

This case stands in stark contrast to *Gunn*. The patent dispute in *Gunn* was "backward-looking" and "hypothetical," 568 U.S. at 261, 133 S.Ct. 1059, and any potential preclusive effect of the state court's ruling "would [have] be[en] limited to the parties and patents that had been before the state court." *Id.* at 263, 133 S.Ct. 1059. This case, on the other hand,

requires a prospective interpretation of what HAVA and the NVRA require. The desired remedy is forward-looking, and it would concretely impact 225,000 North Carolina voters. A state court ruling could very much change how *federal* law is enforced for this *federal* election and in future elections.

We readily agree with the district court's conclusion that "[t]here is a substantial federal interest in protecting the right to vote and in ensuring the integrity of elections." J.A. 581. Where the answer to a question of federal law could potentially determine whether nearly a quarter-of-a-million voters may have their ballots counted in a federal election, it is one of substantial federal importance.

4. Federal-State Balance

Turning to the fourth and final *Gunn* factor, which the district court found dispositive, we consider whether the exercise of federal jurisdiction over Count Two would "disrupt[ ] the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258, 133 S.Ct. 1059. This factor asks us to evaluate whether hearing Count Two in federal court will "attract[ ] a horde of original filings and removal cases raising other state claims" or "portend only a microscopic effect" on "the normal currents of litigation." *Grable*, 545 U.S. at 315, 318-19, 125 S.Ct. 2363.

We disagree with the district court's conclusion that exercising federal jurisdiction over Count Two would open the floodgates to a wave of state constitutional litigation in federal court. Just as *Grable* found that "it will be the rare state title case that raises a contested matter of federal ***405** law," *id.* at 315, 125 S.Ct. 2363, we conclude that it will be the rare state equal protection case that turns on a violation of HAVA or the NVRA. In fact, we are aware of no other state constitutional case similar to this one, and Plaintiffs have pointed to none.

Plaintiffs' Count Two claim may come cloaked in state constitutional garb, but it raises only federal statutory questions.[4] Here, the alleged state constitutional claim necessarily turns on the contested interpretation of provisions of federal laws, HAVA and the NVRA. The viability of the state constitutional claim depends, therefore, on a court's adopting Plaintiffs' preferred reading of two federal statutes.

As the district court recognized, consideration of HAVA's overall statutory scheme "leads to the conclusion that Congress intended for federal courts to resolve core questions of statutory interpretation." J.A. 591. HAVA authorizes the Attorney General to enforce compliance with its requirements "*in an appropriate United States District Court.*" HAVA § 21111 (emphasis added). We are confident that Congress did not intend to prevent federal courts from deciding cases where the sole issue, the interpretation of a federal statute, may determine who can vote in a federal election. The mere invocation of a state constitutional provision does not unsettle that conclusion.

Because we find that Count Two satisfies all four *Gunn* factors, we hold that the district court possessed federal question jurisdiction over Count Two under Section 1331. As a result, removal of Count Two pursuant to Section 1441 was proper. Having concluded that the district court possessed original jurisdiction over Count Two, we need not consider whether it abused its discretion in declining to exercise supplemental jurisdiction over that claim.

B. Removal Was Proper Under Section 1443(2)

[19] Removal of Count Two was also proper under Section 1443(2). That provision allows for removal of cases by a defendant who is "refusing to do any act on the ground that it would be inconsistent with" the defendant's "authority derived from any law providing for equal rights." 28 U.S.C. § 1443(2). The State Board, in its notice of removal, grounded its refusal to strike people from voting rolls within 90 days of an election "on [its] obligation to comply with 52 U.S.C. § 10101(a)(2) and 52 U.S.C. § 20507(c)(2)(A)." Notice of Removal at 2, J.A. 8. These provisions "provid[e] for equal rights" within the meaning of Section 1443(2).

The Supreme Court has limited the scope of Section 1443. In *Georgia v. Rachel*, the Court held that "the phrase 'any law providing for equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of *racial* equality." 384 U.S. 780, 792, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966) (emphasis added). Contrary to the district court's remand order, however, this case meets *Rachel*'s standard for removal under Section 1443. The relevant provisions of the Civil Rights Act and the NVRA expressly protect ***406** rights "stated in terms of racial equality." *Id.*

The first provision upon which Defendants based removal, Section 10101(a)(2), was enacted as Title I of the Civil Rights Act of 1964. The subsection relevant to the State Board's refusal to strike individuals from voter rolls is known as the Materiality Provision of the Civil Rights Act. It provides that:

> No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B).

As the Third Circuit explained, the Materiality Provision was "part of Congress' effort to 'outlaw[s] some of the tactics' used by States 'to disqualify [African Americans] from voting in federal elections.' " *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 126 (3d Cir. 2024) (alteration in original) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 313, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)). "One of the many techniques used to keep Black voters from the polls was to reject would-be registrants for insignificant, hyper-technical errors in filling out application forms." *Id.* (citing Report of U.S. Comm'n on Civil Rights 1963, at 22). The Materiality Provision is contained in a section entitled "Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers." 52 U.S.C. § 10101(a). That section of the Civil Rights Act further provides that "[a]ll citizens of the United States who are otherwise qualified by law to vote ... shall be entitled and allowed to vote ..., without distinction of race, color, or previous condition of servitude." *Id.*

The district court held that the Materiality Provision of the Civil Rights Act of 1964 was not a law "providing for specific civil rights stated in terms of racial equality," *Rachel*, 384 U.S. at 792, 86 S.Ct. 1783, because the provision itself "does not mention race" and is "phrased in terms of general application available to all persons." J.A. 593. This reading is far too formalistic. [5] The Supreme Court's decision in *City of Greenwood v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966), a companion case to *Rachel*, cuts against a narrow reading of what constitutes a law providing for racial equality. In *Peacock*, the Supreme Court stated that a "precise definition of the limitations of the phrase 'any law providing for ... equal civil rights' in § 1443(1) is not a matter we need pursue ... because ... at least the two ***407** federal *statutes* specifically referred to in the removal petitions, 42 U.S.C. § 1971 and 42 U.S.C. § 1981, do qualify under the statutory definition [of Section 1443(1)]." *Id.* at 825, 86 S.Ct. 1800 (emphasis added). The Court referred to its description of these statutes, which included a citation to § 1971(b), which makes no express mention of race. *Id.* at 811 n.3, 86 S.Ct. 1800. The text formerly incorporated in 42 U.S.C. Section 1971(b) is now codified at Section 10101(b).

Rachel and *Peacock* do not require us to wear blinders when reading subsections of the Civil Rights Act. It would be a stunning conclusion to hold that the Materiality Provision and similar sections of the Civil Rights Act of 1964 are not laws providing for racial equality. Indeed, Section 1443 and the accompanying exception to Section 1447's general bar on appellate review of remand orders were passed alongside Section 10101 in the Civil Rights Act of 1964. Considering the context of the Civil Rights Act of 1964, as well as the history of discriminatory voting practices motivating the provision's passage, we are left with no doubt that the Materiality Provision is a law protecting against racially discriminatory voting practices and "providing for equal rights" within the meaning of Section 1443(2).

The provision of the NVRA establishing a 90-day quiet period is also a law providing for racial equality. 52 U.S.C. § 20507(c)(2)(A). That provision requires states to "complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." *Id.* Congress adopted the NVRA in part to address "discriminatory and unfair registration laws and procedures [that] can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a).

The NVRA's legislative history confirms that Congress enacted the act, and the 90-day quiet period in particular, for the express purpose of combating racial discrimination. "Several witnesses at the [committee] hearings in the 102d Congress testified that registration procedures in the United States are not uniform and that discriminatory and restrictive practices that deter potential voters are employed by some States." S. Rep. 103-6, at 3 (1993). The Senate Report explained that while "[t]he Voting Rights Act of 1965 made

most of these restrictive practices illegal," "discriminatory and unfair practices still exist and deprive some citizens of their right to vote." *Id.* It then warned that voter purge processes "must be structured to prevent abuse which has a disparate impact on minority communities. Unfortunately, there is a long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens." *Id.* at 18. The Report made clear that certain provisions, including the 90-day limitation at issue here, "were added to prevent the discriminatory nature of periodic voter purges, which they assert appear to affect [B]lacks and minorities more than others." [6] *Id.* at 20.

The text of the NVRA, including its lead provision, reveals that it is a law "providing ***408** for specific civil rights stated in terms of racial equality." *Rachel*, 384 U.S. at 792, 86 S.Ct. 1783. Defendants' reliance on NVRA, like the Materiality Provision of the Civil Rights Act, provides a proper basis for removal under Section 1443(2).

V. Conclusion

We hold that remand of Count Two to North Carolina state court was improper. At issue is a substantial question of federal law, the resolution of which is appropriately decided by the federal courts because it respects the federal-state balance envisioned by Congress and HAVA itself. The district court possessed original jurisdiction over Count Two pursuant to Section 1331, and Count Two was properly removed to federal court under Section 1441. We further conclude that removal was proper under Section 1443 because both the Civil Rights Act of 1964 and the NVRA are laws "providing for equal rights."

* * *

The judgment of the district court is reversed, and the case is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

DIAZ, Chief Judge, concurring:
I join the majority's thoughtful opinion but write separately to comment on the plaintiffs' Article III standing—a threshold showing that they have made by the barest of threads.

This lawsuit began in state court before being removed quickly to federal court. That removal should have prompted a fundamental jurisdictional question: Does the plaintiffs' complaint plead the necessary Article III standing "to get in the federal courthouse door[?]" *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 379, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024).

The district court's opinion didn't consider this issue. Yet a plaintiff must meet this "bedrock constitutional requirement" in all cases. *Id.* at 378, 144 S.Ct. 1540 (cleaned up). This showing is particularly important when political organizations try to vindicate the rights of individual voters mere weeks before a national election (and when early voting has already begun). And it's a showing that we must satisfy ourselves of, despite the odd procedural posture of this case. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (stating that federal courts have an "independent obligation to assure standing exists [even if not] challenged by any of the parties").

While ultimately I'm satisfied—again, just barely—by the plaintiffs' showing at the pleading stage, I highlight recent developments in the law that expose the perils in relying on bare allegations and buzzwords to prove standing. [1]

I.

To first summarize the facts here: the Republican National Committee ("RNC") and the North Carolina Republican Party filed a two-count complaint in North Carolina state court. The suit claims that the defendants' alleged failure to collect certain information—either a person's driver's license number or the last four digits of their social security number—before registering ***409** that person to vote, violated the Help America Vote Act of 2002 (and, by extension, a North Carolina statute mandating compliance with the Act) and the North Carolina Constitution. After the defendants removed the case to federal court, the plaintiffs moved to remand.

To state the obvious then, the plaintiffs don't want to be here. Their complaint does, however, allege that they had organizational and associational standing to sue in state court. But with the case now in federal court, the question is whether the allegations are enough to support Article III standing.

A.

Any plaintiff appearing in federal court—whether an individual or organization—must show three things to establish standing: "(1) [they] suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, 892 F.3d 613, 619–20 (4th Cir. 2018) (cleaned up). An organization may do so in two ways, either "in its own right to seek judicial relief for injury to itself," or "as a representative of its members who have been harmed." *People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, 843 F. App'x 493, 495 (4th Cir. 2021) (citing *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013)). We call the former organizational standing, and the latter associational or representational standing. *See id.*; *see also N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020).

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), the Supreme Court explained that an organization pleads an injury-in-fact if it shows that a defendant's acts "perceptibly impaired" the organization's activities and caused a "consequent drain on the organization's resources." *Id.* at 379, 102 S.Ct. 1114. Even under that standard, however, the organization must show "far more than simply a setback to [its] abstract social interests." *Id.*

But this year in *Food & Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024), the Court tightened its standing analysis, clarifying that *Havens Realty* was "an unusual case," *id.* at 396, 144 S.Ct. 1540, that doesn't support the "expansive theory" that "standing exists when an organization diverts its resources in response to a defendant's actions," *id.* at 395, 144 S.Ct. 1540. Rather, the Court reinforced that, as for an individual plaintiff, an organization's harm must be "concrete," meaning "real and not abstract," and "particularized," affecting that organization in "a personal and individual way," *id.* at 381, 144 S.Ct. 1540 (cleaned up), to prevent organizations from "roam[ing] the country in search of government wrongdoing," *id.* at 379, 144 S.Ct. 1540 (cleaned up).

In other words, "Article III standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action." *Id.* at 381, 144 S.Ct. 1540. An organization couldn't show standing simply because it "believes that the government is acting illegally" or "based only on an asserted right to have the [g]overnment act in accordance with law." *Id.* (cleaned up). Standing, said the Court, requires more.

Applying these principles, the Court in *Alliance for Hippocratic Medicine* rejected the medical association-plaintiffs' arguments that they showed an injury-in-fact. ***410** Broadly speaking, the pro-life medical associations challenged the lawfulness of the FDA's decision to approve mifepristone, a medication used to, among other things, terminate pregnancies, as well as the agency's later decisions to relax certain requirements around the use of mifepristone. *Id.* at 375–76, 144 S.Ct. 1540.

The organizations asked the Court to enjoin the FDA's approval of the drug, in effect removing it from the market. But because the organizations didn't "prescribe or use mifepristone" and weren't otherwise required by the FDA's actions "to do anything or to refrain from doing anything," they had to resort to "several complicated causation theories to connect FDA's actions to [their] alleged injuries in fact." *Id.* at 385–86, 144 S.Ct. 1540.

The organizations alleged that the FDA's decisions had "impaired their ability to provide services and achieve their organizational missions," *id.* at 394, 144 S.Ct. 1540 (cleaned up), which caused them to "incur[ ] costs to oppose [defendant's] actions," *id.* They claimed that they had to "conduct their own studies ... [to] better inform their members and the public" about mifepristone; they had been "forced" to "expend considerable time, energy, and resources" to draft petitions in opposition to the FDA; and they had to "engag[e] in public advocacy and public education," all of which had "caused the associations to spend considerable resources to the detriment of other spending priorities." *Id.* (cleaned up).

The Court, at each turn, was unimpressed.

Not mincing words, the Court held that "an organization that has not suffered a concrete injury caused by a defendant's actions cannot spend its way into standing," nor can it "manufacture" standing merely by "expending money to gather information and advocate against the defendant's action." *Id.* Endorsing "that theory would mean that all organizations in America would have standing to challenge almost every [government] policy that they dislike, provided

they spend a single dollar opposing those policies." *Id.* at 395, 144 S.Ct. 1540.

Instead, the Court summarized the critical standard from *Havens Realty*: a plaintiff must show that a defendant's "actions directly affected and interfered with [the plaintiff's] core business activities." *Id.*

B.

In recent weeks, a trio of district courts confronted with election-related cases have embraced what is, in my mind, an appropriately stricter view of organizational standing. *See, Republican Nat'l Comm. v. Benson*, —— F. Supp. 3d ——, ——, 2024 WL 4539309, at *10–12 (W.D. Mich. Oct. 22, 2024); *Republican Nat'l Comm. v. Aguilar*, No. 2:24-cv-00518, 2024 WL 4529358, at *6–8 (D. Nev. Oct. 18, 2024); *Strong Cmtys. Found. of Ariz. Inc. v. Richer*, No. CV-24-02030, 2024 WL 4475248, at *8–10 (D. Ariz. Oct. 11, 2024). In each case, political groups claimed that (1) they had to divert resources because of some alleged failure by the defendant to conform with a voting regulation, or (2) their members would be injured because their votes would be diluted, or because they would lose confidence in the integrity of elections. And in each case, the court found these injuries wanting.

In *Republican National Committee v. Benson*, for example, the court found that the RNC's proffered injuries described "activities in which the RNC normally engages" or "only a speculative harm to which resources might be devoted." —— F. Supp. 3d at ——, 2024 WL 4539309, at *11. The court remarked that the "allegations [did] not describe a personal stake in the ***411** outcome of a controversy as to warrant invocation of federal-court jurisdiction." *Id.* at ——, 2024 WL 4539309, at *12; *see also Richer*, 2024 WL 4475248, at *9 (explaining that an organization "must show that a challenged governmental action directly injures the organization's pre-existing core activities and does so *apart* from the plaintiffs' response to that governmental action" (cleaned up)); *Aguilar*, 2024 WL 4529358, at *7 ("[V]ague allegations of shifting resources," where plaintiff shifted "some resources from one set of pre-existing activities in support of their overall mission to another, new set of such activities," "fail[ed] to provide the court any information regarding what or which resources the organizational plaintiffs have needed to shift." (cleaned up)). [2]

So too did these courts reject general theories of vote dilution or damage to election integrity in the associational standing context, as either not particularized or overly speculative. For either individual or organization plaintiffs, "the mere fact that some invalid ballots have been inadvertently counted, without more, does not suffice to show a distinct harm to any group of voters *over any other*." *Richer*, 2024 WL 4475248, at *8 (emphasis added).

Rather, this harm "is the type of generalized grievance common to all [of a state's] residents," which doesn't affect any one plaintiff "in a personal and individual way." *Benson*, —— F. Supp. 3d at ——, 2024 WL 4539309, at *9 (cleaned up); *see also Aguilar*, 2024 WL 4529358, at *4 ("[An individual]'s fear of vote dilution can be raised by every and any voter in the [s]tate."). The same is true for vague handwaving about election integrity. *See Aguilar*, 2024 WL 4529358, at *5 ("[A plaintiff]'s undermined confidence in the integrity of [a state's] elections is not an injury that is distinct from that of any other registered voter.").

And as one district court explained, the harm is also speculative, "requir[ing] three uncertain intervening events: (1) an ineligible voter must be afforded the opportunity to commit fraud; (2) the ineligible voter will in fact commit fraud; and (3) the fraud will not be prevented." *Id.* (disagreeing with *Green v. Bell*, No. 3:21-cv-00493, 2023 WL 2572210 (W.D.N.C. Mar. 20, 2023)). Indeed, "[c]ourts have widely concluded that an alleged injury related to a lack of confidence in a voting system is too speculative to establish an injury in fact, and therefore standing." *Id.* at *6 (cleaned up) (citing cases).

C.

Given this new legal landscape, the plaintiffs' toes are just over the finish line for organizational standing, but they're stuck at the starting gate for associational standing.

The plaintiffs plead that they have organizational standing because the defendants' "actions and inaction *directly impact* [*their*] *core organizational missions* of election security and providing services aimed at promoting Republican voter engagement and electing Republican candidates for office." J.A. 26 ¶ 15 (emphasis added). They claim that they've had "to divert significantly more of their resources into combatting election fraud in North Carolina," so their "organizational

and voter ***412** outreach efforts"—which, for the RNC, are on a national scale—"have been and will continue to be significantly stymied due to [d]efendants' ongoing failures." J.A. 26 ¶ 15. "As a result," allege plaintiffs, they "will have no choice but to expend increased amounts of time and money, beyond what they would have already spent, in order to combat this unwarranted interference with their central activities," such as "monitoring North Carolina's voter rolls, voter activity, and responding to instances of potential voter fraud in upcoming elections." J.A. 26 ¶ 15.

Some of these allegations are the sort of vague and attenuated grievances that (as some district courts have found) no longer cut it to show standing. But the plaintiffs have at least alleged—however improbably—that the defendants' actions and inactions have impaired their core business activities.

Even so, the plaintiffs' showing for associational standing falls woefully short. The plaintiffs allege that their "members are harmed by ... inaccurate voter rolls," so that their "members' votes are undoubtedly diluted due to ineligible voters participating in elections." J.A. 26–27 ¶ 16. And (they allege) "these members' rights to participate in a fair and secure electoral process, free from voter fraud, will be significantly hindered." J.A. 27 ¶ 16. But under Supreme Court and our precedent, a plaintiff's harm must be concrete, it must be imminent, and it must be particularized.[3] The plaintiffs' voter dilution claim is not: it reaches every North Carolina voter, even if they're not the plaintiffs' preferred ones.[4]

II.

As if repeating family lore, the Supreme Court in *Alliance for Hippocratic Medicine* quoted Justice Scalia's first question for a plaintiff trying to open the federal court doors: "What's it to you?" 602 U.S. at 379, 144 S.Ct. 1540. For these plaintiffs, on these facts (and perhaps against their best wishes), the answer is: "Barely enough."

All Citations

120 F.4th 390

Footnotes

1 Defendants asserted that organizational standing provides a basis for federal jurisdiction. Plaintiffs equivocated on the issue but ultimately conceded at oral argument that they likely possess associational standing. We agree with the concurrence that Plaintiffs lack associational standing.

2 We also possess jurisdiction to review the remand order on an alternate ground: the district court declined to exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367(c). "When a district court remands claims to a state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction." *Carlsbad*, 556 U.S. at 641, 129 S.Ct. 1862. As discussed above, Section 1447(d) "interposes no bar to appellate review" where remand is not due to a lack of subject-matter jurisdiction. *Quackenbush v. Allstate Ins.*, 517 U.S. 706, 711-12, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996).

3 We are not convinced that Defendants conceded to a violation of HAVA, but we need not reach that issue.

4 Indeed, plaintiffs likely brought this claim under the state constitution precisely because no federal cause of action lies for a generalized claim of "vote dilution" like the one asserted here. *See Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020) (explaining that a vote dilution claim "is a 'paradigmatic generalized grievance that cannot support standing.' "). This court has consistently rejected end-runs around federal jurisdiction where "a congressional act forms the basis of the plaintiffs' complaint." *Bauer v. Elrich*, 8 F.4th 291, 297-98 (4th Cir. 2021).

5 Other courts have likewise rejected this narrow reading, instead considering the Congressional act as a whole to determine whether certain provisions fall within Section 1443. The Fifth Circuit held that removal based

on 52 U.S.C. § 10307(b), part of the Voting Rights Act, was proper, by looking at that Act more broadly, including its lead provision. *Whatley v. City of Vidalia*, 399 F.2d 521, 525-26 (5th Cir. 1968). The United States District Court for the District of Connecticut explained that, where a provision is "numbered among the laws collectively referred ... as 'any law providing for ... equal civil rights," removal is proper. *New Haven Firefighters Local 825 v. City of New Haven*, 120 F. Supp. 3d 178, 184 (D. Conn. 2015) (upholding removal because 42 U.S.C. § 2000e-3(a), which was a provision barring retaliation under Title VII, was part of the Civil Rights Act). The United States District Court for the Southern District of New York found removal proper where the law at issue was § 4(e) of the Voting Rights Act. *O'Keefe v. N.Y.C. Bd. of Elections*, 246 F. Supp. 978, 979-80 (S.D.N.Y. 1965).

6 Also relevant is the reality that North Carolina has a "history of voting-related discrimination" against racial minorities "that dates back to the Nation's founding." *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 244–45 (4th Cir. 2014) (quotation marks omitted).

1 This case is admittedly an odd vehicle to robustly analyze Article III standing. We're reviewing an appeal of a remand order after the case was removed from state court. At oral argument, that posture left the defendants arguing for the plaintiffs' Article III standing, and the plaintiffs sheepishly suggesting that they hadn't pleaded enough to stay in federal court.

2 *Cf. Republican Nat'l Comm. v. Wetzel*, —— F. Supp. 3d ——, ——, 2024 WL 3559623, at *5 (S.D. Miss. July 28, 2024) (finding standing based on several detailed declarations and affidavits where plaintiff-organizations described injuries that were "specific to each party" and not based on routine activities, so that those plaintiffs had "a direct stake in the outcome of this lawsuit"), *rev'd on other grounds*, No. 24-60395, 120 F.4th 3d 200 (5th Cir. Oct. 25, 2024).

3 That's not to say that individual voters wouldn't have standing to challenge some actions that affect a large number of voters. For example, individual voters that have been removed from the voter rolls or are at risk of being removed from the voter rolls could, with appropriate pleading, state an injury-in-fact stemming from election officials' actions. *E.g., Va. Coal. for Immigrant Rts. v. Beals*, No. 24-2071 (4th Cir. Oct. 27, 2024).

4 In other voting contexts, such as gerrymandering, a theory of vote dilution may be sufficient to support standing. *See Rucho v. Common Cause*, 588 U.S. 684, 693, 139 S.Ct. 2484, 204 L.Ed.2d 931 (2019).

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Only the Westlaw citation is currently available.
United States Court of Appeals,
District of Columbia Circuit.

SIERRA CLUB, et al., Petitioners
v.
UNITED STATES DEPARTMENT OF TRANSPORTATION, et al., Respondents

No. 20-1317
|
Consolidated with 20-1318, 20-1431, 21-1009
|
Argued September 13, 2024
|
Decided January 17, 2025

Synopsis

Background: Environmental organizations, various states, and the Puyallup Tribe of Indians petitioned for review of Pipeline and Hazardous Materials Safety Administration (PHMSA) rule authorizing the transportation of liquefied natural gas (LNG) by rail in approved rail tank cars, asserting National Environmental Policy Act (NEPA) violations.

Holdings: The Court of Appeals, Pan, Circuit Judge, held that:

[1] NEPA challenge was not unripe due to PHMSA's suspension of rule pending outcome of new rulemaking;

[2] PHMSA's suspension of rule did not moot the NEPA challenge;

[3] organizations had Article III standing;

[4] states had Article III standing;

[5] Tribe had Article III standing;

[6] PHMSA's decision not to prepare environmental impact statement (EIS) was arbitrary and capricious; and

[7] PHMSA's adoption of some safety measures in rule did not preclude need for an EIS.

Petitions granted, rule vacated, and remanded with directions.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (28)

[1] **Federal Courts** Determination of question of jurisdiction

Court of Appeals has an independent obligation to assure itself of it jurisdiction.

[2] **Administrative Law and Procedure** Ripeness; prematurity

"Ripeness" is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

[3] **Environmental Law** Ripeness

NEPA challenge to Pipeline and Hazardous Materials Safety Administration (PHMSA) rule authorizing transportation of liquefied natural gas (LNG) by rail in approved rail tank cars was not rendered unripe due to PHMSA's suspension of rule pending outcome of new rulemaking process to modify rule, where PHMSA did not disclaim any intent to implement rule, PHMSA did not concede invalidity of rule, PHMSA continued to defend rule, and rule would was slated to go into effect on a given date if not modified by that date. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

More cases on this issue

[4] **Environmental Law** Mootness

NEPA challenge to Pipeline and Hazardous Materials Safety Administration (PHMSA) rule authorizing transportation of liquefied natural gas (LNG) by rail in approved rail tank cars was not mooted by PHMSA's suspension of rule pending outcome of new rulemaking process to modify rule, where PHMSA did not promise that it would never enforce rule, and rule was slated to go into effect on a given date if not modified by that date. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

More cases on this issue

[5] **Federal Courts** Voluntary cessation of challenged conduct

Voluntary cessation of challenged conduct does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

[6] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish Article III standing, a party must demonstrate (1) that it has suffered or likely will suffer an injury in fact, (2) that the injury likely was caused or will be caused by the defendant, and (3) that the injury likely would be redressed by the requested judicial relief. U.S. Const. art. 3, § 2, cl. 1.

[7] **Environmental Law** Organizations, associations, and other groups

Environmental organizations had Article III standing to assert NEPA challenge to Pipeline and Hazardous Materials Safety Administration (PHMSA) rule authorizing transportation of liquefied natural gas (LNG) by rail in approved rail tank cars, where organizations had members who lived, worked, and recreated along the rail routes, and who would be harmed by additional train traffic from LNG trains, and LNG trains would cause increased disruption to the peace and quiet members enjoyed in their homes and in nearby scenic areas. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

More cases on this issue

[8] **Environmental Law** Government entities, agencies, and officials

States had Article III standing to assert NEPA challenge to Pipeline and Hazardous Materials Safety Administration (PHMSA) rule authorizing transportation of liquefied natural gas (LNG) by rail in approved rail tank cars, where one state already spent $29,000 to send its firefighters to train at a firefighting academy to take classes focused specifically on how to combat LNG pool fires, and those expenditures would increase significantly because of the LNG rule. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

More cases on this issue

[9] **States** Capacity of State to Sue

States can suffer injuries to their proprietary interests that are sufficient to confer Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[10] **States** Capacity of State to Sue

A state, like any party, cannot manufacture Article III standing by incurring costs in anticipation of non-imminent harm. U.S. Const. art. 3, § 2, cl. 1.

[11] **States** Capacity of State to Sue

A state does not have Article III standing when the effect of a federal regulation on the state's proprietary interests is indirect and attenuated. U.S. Const. art. 3, § 2, cl. 1.

[12] **States** Capacity of State to Sue

When a federal regulation causes a state to undertake expenditures to mitigate and recover from harms that could have been prevented if that regulation had not been enacted, the state suffers an injury to its proprietary interest sufficient to confer Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[13] **Environmental Law** Other particular parties

Puyallup Tribe of Indians had Article III standing to assert NEPA challenge to Pipeline and Hazardous Materials Safety Administration (PHMSA) rule authorizing transportation of liquefied natural gas (LNG) by rail in approved rail tank cars, where Tribe was concerned that the rule would lead to transportation of LNG from a facility adjacent to Tribe's reservation, facility's owner demonstrated its intent to ship LNG by rail by touting the facility's easy access to rail and roadways and noting the rail spur on site for future potential rail car loading, and reservation was home to many Tribe members, institutions, and cultural or historic sites. U.S. Const. art. 3, § 2, cl. 1; National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

More cases on this issue

[14] **Environmental Law** Mining; oil and gas

Environmental Law Surface transportation; highways and bridges

Pipeline and Hazardous Materials Safety Administration's (PHMSA) decision not to prepare an environmental impact statement (EIS) under NEPA before PHMSA promulgated rule authorizing transportation of liquefied natural gas (LNG) by rail in approved rail tank cars was arbitrary and capricious, where PHMSA disregarded the checkered safety record of type of tank car that would transport LNG and PHMSA also ignored the risks of including numerous cars of LNG within a single train without any required speed limit. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

[15] **Environmental Law** Adequacy of Statement, Consideration, or Compliance

An environmental impact statement (EIS) under NEPA must discuss in detail the environmental impact of the proposed action, alternatives to the action, and other considerations. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[16] **Environmental Law** Negative declaration; statement of reasons

An environmental impact statement (EIS) under NEPA is necessary unless the agency finds no significant impact on the environment. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[17] **Environmental Law** Significance in general

If any significant environmental impacts might result from the proposed agency action, an environmental impact statement (EIS) under NEPA must be prepared before agency action is taken. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[18] **Environmental Law** Assessments and impact statements

An agency's decision not to prepare an environmental impact statement (EIS) under NEPA will be overturned only if the decision was arbitrary, capricious, or an abuse of discretion. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[19] **Environmental Law** Assessments and impact statements

A court's role in reviewing an agency's decision not to prepare an environmental impact statement (EIS) under NEPA is a limited one, designed primarily to ensure that no arguably

significant consequences have been ignored. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[20] **Environmental Law** Assessments and impact statements

When reviewing an agency's decision not to prepare an environmental impact statement (EIS) under NEPA, a court asks whether the agency (1) has accurately identified the relevant environmental concern, (2) has taken a hard look at the problem in preparing its environmental assessment, (3) is able to make a convincing case for its finding of no significant impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[21] **Environmental Law** Significance in general

NEPA requires an agency to look at both the probabilities of potentially harmful events and the consequences if those events come to pass when deciding whether to prepare an environmental impact statement (EIS). National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[22] **Environmental Law** Mining; oil and gas

Environmental Law Surface transportation; highways and bridges

Record did not support Pipeline and Hazardous Materials Safety Administration's (PHMSA) finding, as part of environmental assessment (EA), that authorizing transportation of liquefied natural gas (LNG) by rail pursuant to PHMSA rule would have no significant impact on environment, where a breach of one or more approved rail tank cars containing LNG could cause an explosion, an inferno, or the spread of a freezing, flammable, suffocating vapor cloud, two prior derailment incidents involving tank cars transporting refrigerated ethylene and argon occurred in a four-year period, PHMSA relied on information addressing how tank cars withstood impacts of previous train derailment but not the probability that future derailments would occur, and National Transportation Safety Board (NTSB) opined that tank cars did not have a compelling demonstrated safety record. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

[23] **Environmental Law** Mining; oil and gas

Environmental Law Surface transportation; highways and bridges

Pipeline and Hazardous Materials Safety Administration's (PHMSA) finding, in environmental assessment (EA), that there was a low probability of a high-consequence rail accident was insufficient to support a finding of no significant impact that would preclude need for environmental impact statement (EIS) under NEPA for PHMSA rule authorizing the transportation of liquefied natural gas (LNG) by rail in approved rail tank cars; effects of a rail accident that breached one or more LNG tank cars could have been dire if not cataclysmic, and possible effects included spilled LNG igniting and burning at 2,426 degrees Fahrenheit or the LNG rapidly vaporizing into an odorless, flammable gas cloud that would crawl along ground until eventually warming to ambient air temperature or igniting. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

[24] **Environmental Law** Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements

The considered concerns of a highly specialized governmental agency carry relevant weight when determining whether an environmental impact statement (EIS) is required. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[25] **Environmental Law** Waste; hazardous materials

If an agency seeks to depart from past practice in the transportation of hazardous materials, the agency cannot use minimal past harm to brush away safety concerns as part of the agency's NEPA decision as to whether an environmental impact statement (EIS) is required, but instead the agency must look forward to examine the effects of the change; the agency must also consider whether the lack of past injury was only because of site-specific factors or even sheer luck. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[26] **Environmental Law** Mining; oil and gas

Environmental Law Surface transportation; highways and bridges

Pipeline and Hazardous Materials Safety Administration's (PHMSA) adoption of some safety measures for PHMSA rule authorizing the transportation of liquefied natural gas (LNG) by rail in approved rail tank cars did not preclude the need for an environmental impact statement (EIS) under NEPA for rule, where rule did not impose a mandatory speed limit on trains carrying LNG tank cars, PHMSA declined to cap the number of LNG tank cars per train, and PHMSA never explained why certain safety measures that it adopted, including requirement of thicker outer tanks made of higher-quality steel, were adequate to address the extreme dangers associated with derailment. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C); 49 C.F.R. § 173.115(g).

[27] **Environmental Law** Duty of government bodies to consider environment in general

NEPA is primarily information-forcing, so it directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(C).

[28] **Administrative Law and Procedure** Annulment, Vacatur, or Setting Aside of Administrative Decision

Administrative Law and Procedure Particular Errors and Defects Warranting Remand

Remand with vacatur is the ordinary remedy for unlawful agency action.

On Petitions for Review of a Final Rule of the Department of Transportation

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Bradley Marshall argued the cause for Environmental Petitioners. With him on the briefs was Jordan Luebkemann. Aaron J. Stemplewicz entered an appearance.

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Johnston, Assistant Chief Deputy Attorney General, Ellen F. Rosenblum, Attorney General, Office of the Attorney General for the State of Oregon, Paul A. Garrahan, Attorney-in-Charge, Steve Novick, Special Assistant Attorney General, Peter F. Neronha, Attorney General, Office of the Attorney General for the State of Rhode Island, Nicholas M. Vaz, Special Assistant Attorney General, Charity R. Clark, Attorney General, Office of the Attorney General for the State of Vermont, Laura B. Murphy, Assistant Attorney General, Brian L. Schwalb, Attorney General, Office of the Attorney General for the District of Columbia, Caroline S. Van Zile, Solicitor General, Robert W. Ferguson, Attorney General, Office of the Attorney General for the State of Washington, and Julian H. Beattie, Assistant Attorney General.

Aaron P. Riensche argued the cause for petitioner Puyallup Tribe of Indians. With him on the briefs were Richard A. Du Bey and Nicholas G. Thomas.

Rebecca Jaffe, Attorney, U.S. Department of Justice, argued the cause for respondents. With her on the brief were Todd Kim, Assistant Attorney General, Robert Lundman and Justin Heminger, Attorneys, and Charles E. Enloe, Attorney, U.S. Department of Transportation.

Before: Millett and Pan, Circuit Judges, and Randolph, Senior Circuit Judge.

Opinion

Pan, Circuit Judge:

***1** Liquified natural gas ("LNG") is methane gas that is liquified by cooling it to a temperature of -260° F. The liquification of gas facilitates its transportation and storage. But LNG is dangerous. If LNG is warmed, it reverts to a gaseous state, which causes it to expand. Such expansion can place tremendous pressure on the vessel that contains the LNG, creating the risk of an explosion. LNG is also highly flammable. Thus, if it leaks and encounters an ignition source, it can cause a conflagration that burns at a temperature of 2,426° F. Moreover, if LNG spills without igniting, it can form an ultra-cold gas cloud that can spread over a wide area, severely injuring people and damaging property in its path.

LNG typically is transported either by pipeline or by truck. Shipping LNG by rail has been authorized only on an ad hoc basis by special permit or approval. But in 2020, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") promulgated a rule authorizing the transportation of LNG by rail in newly designed tank cars, with no permit required. The new final rule ("LNG Rule") imposed no limit on the number of LNG tank cars that could be included in a single train and set no mandatory speed limit for trains that carry LNG. PHMSA noted that one company contemplated a single train with 80 tank cars containing LNG. During the rulemaking process, commenters expressed alarm about the potentially catastrophic consequences of a train derailment in which LNG tank cars were breached or punctured. For example, a group of environmental organizations asserted that the amount of energy contained in 22 tank cars of LNG would be equal to that of the atomic bomb that was dropped on Hiroshima, Japan, during World War II. PHMSA nevertheless opined that transporting LNG by rail under its LNG Rule would have no significant effect on the environment. It therefore declined to prepare an environmental impact statement ("EIS").

A coalition of environmental nonprofits ("Environmental Petitioners"), a collection of states ("State Petitioners"), and the Puyallup Tribe of Indians ("the Tribe") now challenge the LNG Rule. The petitioners contend that PHMSA did not sufficiently consider the safety risks of transporting LNG by rail. They argue, in relevant part, that the National Environmental Policy Act ("NEPA") required PHMSA to prepare an EIS, and that its decision not to do so was arbitrary and capricious. We agree. We thus grant the petitions, vacate the LNG Rule, and remand for further proceedings before the agency.

I.

A.

The Hazardous Materials Transportation Act ("HMTA") provides that the Secretary of Transportation "shall prescribe regulations for the safe transportation ... of hazardous material" in commerce. 49 U.S.C. § 5103(b)(1). PHMSA is the component agency "charged with carrying out the Secretary's duties and powers" under the HMTA. Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin., 741 F.3d 1309, 1311 (D.C. Cir. 2014) (citing 49 U.S.C. § 108(f)). PHMSA has promulgated Hazardous Materials Regulations to govern the transportation of natural gas and other hazardous materials. 49 C.F.R. § 171.1(c)(1).

***2** Historically, the Hazardous Materials Regulations have authorized bulk transport of LNG by pipeline or truck, but not by rail, except upon the issuance of a special permit

or approval on a case-by-case basis. Hazardous Materials: Liquefied Natural Gas by Rail, 84 Fed. Reg. 56,964, 56,966 (Oct. 24, 2019) ("Proposed Rule"). But in April 2019, then-President Trump directed the Secretary of Transportation to propose a rule to generally "permit LNG to be transported in approved rail tank cars." Exec. Order No. 13,868, 84 Fed. Reg. 15,495, 15,497 (Apr. 10, 2019). The Executive Order directed the Secretary to propose the rule within 100 days and to finalize the rulemaking within thirteen months. Id.

In October 2019, PHMSA published a notice of proposed rulemaking. 84 Fed. Reg. 56,964. The Proposed Rule contemplated the transport of LNG in "120W" tank cars (i.e., cars bearing model number DOT-113C120W). Such tank cars fall within the "DOT-113" class of cars that are designed to carry "cryogenic liquids" (i.e., refrigerated liquified gases). Id. at 56,965 (citing 49 C.F.R. § 173.115(g)), 56,967. But never before had DOT-113 cars been used to transport the large volumes of LNG considered by the Proposed Rule.

DOT-113 rail cars have numerous safety features that reduce the risk of an explosion or the release of cargo. A boiling liquid expanding vapor explosion ("BLEVE") is not triggered by ignition, but instead occurs when a pressurized container is breached and its contents are exposed to heat, without any pressure relief. 84 Fed. Reg. at 56,974 n.29. That causes cryogenic liquid in the container to quickly boil and release vapor — exploding the container. Id. DOT-113 cars are designed to minimize the heating of the tank's contents: They have a tank-within-a-tank design, with an inner alloy stainless steel tank and an outer carbon steel tank, separated by a vacuum and insulation. Id. at 56,967. The thick outer tank is intended to withstand a collision without being compromised, which protects the insulating vacuum and thereby prevents the inner tank from releasing cargo. Id. at 56,975. Additional safety features include multiple pressure relief valves and vents. Id. at 56,967, 56,973–74.

The Proposed Rule noted that the DOT-113 car had an "excellent safety record throughout its 50 years of service," during which it had been used to transport ethylene, "another flammable cryogenic liquid which shares similar chemical and operating characteristics with LNG." 84 Fed. Reg. at 56,967. The Proposed Rule acknowledged, however, that between 1980 and 2017, "there were 14 instances of damage to DOT-113 tank cars during transportation." Id. at 56,972. In three of those instances, cargo escaped because of a breach of both the outer and inner tanks; while in three other incidents, cargo escaped because of a failure of the valves or fittings. Id.

To further ensure safety, the Proposed Rule relied on the existing Hazardous Materials Regulations and voluntary industry standards. 84 Fed. Reg. at 56,968. The existing regulations cited by the Proposed Rule are designed to "reduc[e] the probability and consequences of a hazardous material release." Id. at 56,965. They primarily focus on ensuring the safe packaging and handling of hazardous materials during transportation and providing effective communications about the hazards of what is being shipped. Id. Meanwhile, the voluntary industry standards are compiled in a protocol developed by the Association of American Railroads. The protocol suggests a speed limit of 50 miles per hour for any train with at least 20 carloads of any hazardous material. Id. at 56,968–69. As noted, the Proposed Rule imposed no limit on the number of tank cars that could carry LNG in a single train.

***3** The Proposed Rule included a preliminary environmental assessment, which asserted that the rule would not result in any significant environmental impact. 84 Fed. Reg. at 56,970–75. The preliminary assessment gave little weight to the potential hazards of an accident in which LNG might be released. Id. at 56,972–73. After acknowledging the 14 instances of damage to DOT-113 tank cars during transportation, id. at 56,972, it concluded that the probability of an accident was low, id. at 56,974.

The Environmental and State Petitioners submitted comments raising grave safety concerns. They argued that the Proposed Rule failed to adequately mitigate the dangers inherent in transporting LNG by rail. Those petitioners emphasized the risk of a tank car's failure in a derailment, which could cause a BLEVE; an inextinguishable pool fire; or the release of an odorless, extremely cold vapor cloud of LNG that would "embrittle steel and cause severe burns." State Pet'rs Comments 3–4; see also Env't Pet'rs Comments 7, 22. They criticized the Proposed Rule for not capping the number of LNG cars per train and not imposing a mandatory speed limit. The Environmental and State Petitioners also argued that DOT-113 tank cars were not up to the task of transporting LNG. In particular, they questioned the safety record of the tank cars, emphasizing that the cars were breached during transport in 14 prior incidents. The petitioners also urged PHMSA to await the results of certain ongoing safety studies conducted by the Federal Railroad Administration, an agency that PHMSA, by regulation, must cooperate with. See 49 C.F.R. § 1.97(b)(3).

The National Transportation Safety Board ("NTSB"), an independent federal agency, raised similar concerns. The NTSB opined that "[b]ecause unit trains of DOT-113 tank cars carrying large volumes of flammable cryogenic gases have no operational or accident performance safety history, ... a thorough safety assessment of the tank car specification is needed." NTSB Comments 3. It added that "given the small number of DOT-113 tank cars in use, the documented 14 incidents referenced in the [Proposed Rule] in which three shell breaches occurred between 1980 and 2017 is not a compelling 'demonstrated safety record.' " Id. at 4.

B.

In July 2020, PHMSA promulgated the final LNG Rule. The final Rule authorizes transportation of LNG by rail, but it differs from the Proposed Rule in several respects. First, the final LNG Rule imposes new requirements for the outer tank of approved railcars: The outer tank must be both thicker and made of stronger steel than that used in existing 120W cars. Specifically, the tanks must be 9/16″ thick, rather than the current minimum of 7/16″. The outer tank also must be made of TC-128 Grade B normalized steel, which is less likely to crack or puncture than the steel typically used in DOT-113 cars. Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44,994, 45,003–04 (July 24, 2020). PHMSA dubbed this new type of reinforced railcar a "120W9" car. Id. at 44,996. Second, PHMSA boosted the maximum filling density from 32.5% to 37.3%. Id. at 45,006–07.[1] That allows more LNG to be loaded into each car but reduces the number of cars needed to ship a given amount of LNG. Id. at 45,014. Finally, the LNG Rule includes additional operating controls to promote safety: (1) Tank cars carrying LNG must be equipped with remote monitoring devices for detecting and reporting each car's internal pressure and location; (2) Any train with at least 20 LNG tank cars in a continuous block or with 35 such cars throughout the train must be equipped with advanced braking capabilities; and (3) PHMSA adopted the routing requirements of 49 C.F.R. § 172.820, which require railroads to consider safety risk factors, such as population density, when analyzing potential routes for transporting LNG. Id. at 45,008–09.

***4** Along with the LNG Rule, PHMSA published a final Environmental Assessment. The Environmental Assessment touted the "demonstrated safety record" of DOT-113 tank cars. J.A. 449. But it acknowledged that "[d]espite the low probability, rail incidents can be high-consequence events, given the quantity of hazardous materials in transportation." J.A. 450. Nevertheless, the Environmental Assessment determined that the potential environmental impacts of the LNG Rule did not "rise to the level of 'significant' " and that a more detailed EIS would not be necessary. J.A. 492–97. PHMSA also found that the LNG Rule would not have significant effects on public health and safety, greenhouse gas emissions, and environmental justice communities.

Environmental Petitioners,[2] State Petitioners,[3] and the Tribe all petitioned for review. See Sierra Club v. DOT, No. 20-1317; Maryland v. DOT, No. 20-1318; Puyallup Tribe of Indians v. PHMSA, No. 20-1431. The Tribe also filed a petition challenging PHMSA's denial of its administrative appeal of the LNG Rule. Puyallup Tribe of Indians v. PHMSA, No. 21-1009. We consolidated the appeals, and the Tribe and the State Petitioners adopted the Environmental Petitioners' argument that the LNG Rule violates NEPA. We have jurisdiction under 28 U.S.C. § 2342(7).

C.

During the pendency of these appeals, in January 2021, President Biden directed federal agencies to reconsider Trump Administration actions that were inconsistent with the Biden Administration's climate policies. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). The LNG Rule was one of the agency actions subject to scrutiny. In November 2021, PHMSA issued a notice of proposed rulemaking to suspend authorization of LNG transport by rail. Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 86 Fed. Reg. 61,731 (Nov. 8, 2021). In September 2023, PHMSA published a final rule suspending the LNG Rule until the earlier of June 30, 2025, or when the agency completes a rulemaking considering modifications to that rule. Hazardous Materials: Suspension of HMR Amendments Authorizing Transportation of Liquefied Natural Gas by Rail, 88 Fed. Reg. 60,356 (Sept. 1, 2023) ("Suspension Rule"). PHMSA explained that it suspended the LNG Rule because "uncertainties acknowledged in the July 2020 Final Rule — e.g., regarding the near-term commercial viability of rail tank car transportation of LNG, as well as potential safety and environmental benefits and risks of rail tank car transportation — had only increased since issuance, thereby 'cast[ing] doubt on the continued validity of the balance between potential benefits and public safety and environmental risks underpinning the [LNG Rule].' " Id. at 60,359 (quoting

86 Fed. Reg. at 61,735–36). Because the LNG Rule was suspended a few months after it went into effect, rail transport of LNG under the Rule has never occurred.

PMHSA is currently working on a rulemaking that considers modifying the LNG Rule. After oral argument, we ordered the government to provide an update "on the status and timing of any anticipated new rulemaking." Sierra Club v. Dep't of Transp., No. 20-1317 (D.C. Cir. Sept. 23, 2024). The government filed a notice informing us that it had not yet published a proposed amendment of the LNG Rule. The government added that although PHMSA did not expect to issue a final rule before June 30, 2025 — the point at which the LNG Rule would go back into effect — PHMSA had not yet decided whether to initiate a rulemaking to consider extending the suspension of the LNG Rule.

II.

A.

***5** **[1]** Although no party has questioned the court's subject matter jurisdiction over these petitions, "we have an independent obligation to assure ourselves of our jurisdiction." Waterkeeper All., Inc. v. Regan, 41 F.4th 654, 659 (D.C. Cir. 2022). We therefore address three doctrines potentially implicated in this case: ripeness, mootness, and standing. We conclude that none bars our jurisdiction here.

1.

[2] "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 807–08, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). The "rationale underlying the ripeness doctrine" is that "[i]f we do not decide it now, we may never need to." Nat'l Treasury Emps. Union v. United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996). Accordingly, courts have found cases unripe when the government represents to the court that it will never enforce the regulation in question. See, e.g., EPA v. Brown, 431 U.S. 99, 103, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977) (per curiam) (declining to pass on challenged regulations when "the federal parties have not merely renounced an intent to pursue certain specified regulations; they now appear to admit that those remaining in controversy are invalid unless modified in certain respects"); Wheaton Coll. v. Sebelius, 703 F.3d 551, 552–53 (D.C. Cir. 2012) (per curiam) (ordering cases to be held in abeyance based on government's representation "that it would never enforce [the challenged regulation] in its current form against the appellants or those similarly situated" (emphasis in original)).

[3] This case is ripe. Rather than disclaiming any intent to implement the LNG Rule or conceding its invalidity, PHMSA continues to defend the Rule. Although it has suspended the Rule pending the outcome of a new rulemaking process to modify it, the Rule will go into effect on June 30, 2025, if it is not modified by that date. PHMSA's mere suspension of the Rule does not make this case unripe. We have rejected the notion that "an agency can stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way," because "[i]f that were true, a savvy agency could perpetually dodge review." Am. Petrol. Inst. v. EPA, 683 F.3d 382, 388 (D.C. Cir. 2012); cf. Am. Petrol. Inst. v. EPA, 906 F.2d 729, 739–40 (D.C. Cir. 1990) ("If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely.").

2.

[4] **[5]** Nor does PHMSA's suspension of the LNG Rule moot this case. In West Virginia v. Environmental Protection Agency, the Supreme Court held that a challenge to a final rule was not moot even though the government maintained that it planned to promulgate a new rule rather than enforce the rule. 597 U.S. 697, 142 S. Ct. 2587, 2607, 213 L.Ed.2d 896 (2022). "Voluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Id. (cleaned up). Here, the agency does not promise that it will never enforce the Rule, even though it may, at some point, amend the Rule. Moreover, the Rule will go into effect on June 30, 2025, if it is not amended before then. Accordingly, this case is not moot.

3.

***6** **[6]** We next turn to standing. "To establish standing," a party "must demonstrate (i) that [it] has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." FDA v. All. for Hippocratic Med., 602 U.S. 367, 380, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024).

[7] Environmental Petitioners have representational standing because they are organizations with members who "live, work, and recreate along the[ ] rail routes, and who will be harmed by additional train traffic from LNG trains." Env't Pet'rs Br. 18. Such trains will cause "increased disruption to [the] peace and quiet members enjoy in their homes and in nearby scenic areas." Id.; see also Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin., 41 F.4th 586, 592 (D.C. Cir. 2022) ("An association has standing to bring suit on behalf of its members if (1) at least one of its members would have standing to sue in the member's own right; (2) the interest the association seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." (cleaned up)).

[8] **[9]** **[10]** **[11]** The State Petitioners also have Article III standing. "[L]ike other associations and private parties," states can suffer injuries to their proprietary interests that are sufficient to confer standing. Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 601–02, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). And just like any other party, a state cannot "manufacture standing by incurring costs in anticipation of non-imminent harm." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 422, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). Nor do states have standing to sue when the effects of a government regulation on their proprietary interests are "indirect" and "attenuated." United States v. Texas, 599 U.S. 670, 680 n.3, 143 S.Ct. 1964, 216 L.Ed.2d 624 (2023).

[12] However, when, as here, a regulation causes a state to undertake "expenditures to mitigate and recover from harms that could have been prevented" if that regulation had not been enacted, the state suffers an injury to its proprietary interest sufficient to confer standing. Air All. Hous. v. EPA, 906 F.3d 1049, 1059–60 (D.C. Cir. 2018). We have applied this principle to state expenditures to reduce risks related to "chemical releases in their territory[.]" Id. at 1060.

The LNG Rule causes direct and imminent harm to New York's public fisc. New York has already spent $29,000 to send its firefighters to train at the Massachusetts Firefighting Academy to take classes focused specifically on how to combat LNG pool fires. These expenditures will increase significantly because of the LNG Rule. New York's Fire Administrator attests that, if the LNG Rule goes into effect, LNG tank cars will begin traveling on New York's roughly 4,500 miles of rail lines as soon as the second half of 2025, and New York will begin spending hundreds of thousands of additional dollars on safety measures to mitigate the risks posed by those rail cars. The planned safety measures include training additional firefighters to respond to LNG spills, hiring full-time fire specialists with expertise in LNG, equipping local fire departments with methane detectors, and providing local fire departments with bulk quantities of chemicals used specifically to extinguish LNG fires.

***7** These expenditures constitute what precedent has long recognized to be a cognizable proprietary injury to states. This injury is in no way self-inflicted or premised on speculative harm. Instead, it involves direct expenses incurred and to be incurred because of the LNG Rule. The LNG Rule would be a but-for cause of substantial LNG rail traffic in New York. And two states have recently experienced catastrophic DOT-113 rail car accidents leading to breached hulls. See Section II.3.B infra. Obviously, New York cannot wait until there is an LNG pool fire in its territory to begin spending funds on safety measures.

[13] The Tribe also has adequately demonstrated its standing. The Tribe submitted a comment based on its concern that the Proposed Rule would lead to the transportation of LNG from a facility known as Tacoma LNG, which is adjacent to the Tribe's reservation. Tacoma LNG's owner, Puget LNG, has demonstrated its intent to ship LNG by rail by touting the facility's "easy access to ... rail and roadways" and noting the "[r]ail spur on site for future potential rail car loading." J.A. 570.[4] The LNG Rule thus substantially increases the probability that LNG will be shipped by rail from Tacoma LNG through the Tribe's reservation, which is home to many Tribe members, institutions, and cultural or historic sites. The Rule therefore risks harm to the Tribe's "heritage, its land, its people, and its resources." Tribe Br. 17–18. This increased risk suffices to demonstrate the Tribe's standing. See Nat. Res. Def. Council v. EPA, 464 F.3d 1, 6 (D.C. Cir. 2006) ("[W]e have recognized that increases in risk can at times be 'injuries in fact' sufficient to confer

standing."); Dep't of Com. v. New York, 588 U.S. 752, 139 S. Ct. 2551, 2565, 204 L.Ed.2d 978 (2019) (noting that "future injuries ... 'may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur' " (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)).

B.

[14] The petitioners argue that PHMSA's decision not to prepare an EIS was arbitrary and capricious because it ignored the significant environmental consequences of the LNG Rule. They claim that PHMSA failed to take a hard look at how the LNG Rule would affect public safety and therefore violated NEPA. In support of their argument, they note that PHMSA disregarded the checkered safety record of the 120W tank car and ignored the risks of including numerous cars of LNG within a single train without any required speed limit. We agree and vacate the LNG Rule. We therefore need not reach the other challenges to the LNG Rule raised by the petitioners. [5]

***8** **[15]** **[16]** **[17]** NEPA requires an agency to prepare an EIS whenever it proposes a "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The EIS must "discuss[ ] in detail the environmental impact of the proposed action, alternatives to the action, and other considerations." Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (citing 42 U.S.C. § 4332(C)). An EIS is necessary unless the agency finds "no significant impact" on the environment. Standing Rock Sioux Tribe v. Army Corps of Eng'rs, 985 F.3d 1032, 1039 (D.C. Cir. 2021); see also 42 U.S.C. § 4332(C). "If any significant environmental impacts might result from the proposed agency action, then an EIS must be prepared before agency action is taken." Standing Rock, 985 F.3d at 1039 (emphasis in original) (cleaned up).

[18] **[19]** **[20]** **[21]** An agency's decision not to prepare an EIS will be overturned "only if it was arbitrary, capricious or an abuse of discretion." Grand Canyon Tr. v. FAA, 290 F.3d 339, 340 (D.C. Cir. 2002), as amended (Aug. 27, 2002) (cleaned up). A court's role in reviewing that decision "is a limited one, designed primarily to ensure that no arguably significant consequences have been ignored." Myersville Citizens, 783 F.3d at 1322 (cleaned up). Accordingly, a court asks "whether the agency (1) has accurately identified the relevant environmental concern, (2) has taken a hard look at the problem in preparing its [environmental assessment], (3) is able to make a convincing case for its finding of no significant impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum." Id. (cleaned up). NEPA requires an agency to "look at both the probabilities of potentially harmful events and the consequences if those events come to pass." Standing Rock, 985 F.3d at 1049 (cleaned up).

[22] In this case, PHMSA determined that an EIS was not required because authorizing LNG transport by rail under the LNG Rule would have no significant impact on the environment. But the record reflects that transporting LNG by rail poses a low-probability but high-consequence risk of a derailment that could seriously harm the environment: A breach of one or more rail cars containing LNG could cause an explosion, an inferno, or the spread of a freezing, flammable, suffocating vapor cloud. The real possibility of such catastrophes significantly affects the quality of the human environment. For that reason, NEPA required PHMSA to prepare an EIS.

[23] PHMSA's consideration of the probability of a rail accident involving LNG tank cars was demonstrably inadequate. We have noted that "a finding of no significant impact is appropriate only if a grave harm's probability is so low as to be remote and speculative, or if the combination of probability and harm is sufficiently minimal." Standing Rock, 985 F.3d at 1049 (cleaned up). Here, a derailment resulting in the release of LNG was undoubtedly a "grave harm"; and the risk of that happening was neither "so low as to be remote and speculative" nor "sufficiently minimal" under the circumstances. Id. PHMSA found only that there was a "low probability" of a high-consequence rail accident, J.A. 446–50, which was plainly insufficient to support a finding of no significant impact under our precedents.

The effects of a rail accident that breached one or more LNG tank cars could be dire, if not cataclysmic. The Environmental Assessment acknowledged two potentially significant scenarios in which LNG could be released: (1) an "[a]ccident release causing outer tank damage resulting [in] vapor release from pressure relief device," and (2) an "[a]ccident release causing outer and inner tank damage resulting in large release/spill." J.A. 457. The Environmental Assessment explained that each possibility could have a "high consequence." Id. It noted that the controlled venting of vapor from a pressure relief device in the first scenario is less

concerning than the unmanaged release of the entire cargo, but the vapor could catch fire as it is released. Alternatively, it noted, if LNG spilled and ignited, the LNG would burn at 2,426° F and imperil everything in the vicinity. Absent an ignition source, the LNG would rapidly vaporize into an odorless, flammable gas cloud that would crawl along the ground until eventually warming to the ambient air temperature — or igniting. There is also the possibility of a BLEVE, although PHMSA considered a BLEVE "highly unlikely." J.A. 456.

***9** The risk of such a "high consequence" derailment is real. The Environmental Assessment identified two derailments within a four-year period in which both the inner and outer tanks of DOT-113 rail cars were breached. Because two such incidents have already occurred, the risk of a third is neither remote nor speculative. See Carolina Env't Study Grp. v. United States, 510 F.2d 796, 799 (D.C. Cir. 1975) (probability of an accident that ranges from one in 100,000 to one in a billion is "remote"). The first incident occurred in Moran, Kansas, in 2011. A train going 46 miles per hour came upon a broken rail and suddenly applied its emergency brakes, derailing three DOT-113 cars that contained refrigerated ethylene. Two of the cars were breached and went up in flames. Although the third car was not breached, its pressure relief valves began venting gas, which caught fire from an adjacent car's blaze. In the second incident, two cars carrying refrigerated argon — which is not flammable — derailed in Mer Rouge, Louisiana, in 2014. One of the derailed cars was a DOT-113 tank car, and damage from the derailment caused the breach of its inner tank and the release of argon. 85 Fed. Reg. at 45,005. Neither event caused any injuries or fatalities, but neither event involved LNG. Id.

[24] The prior performance of DOT-113 cars does not suggest a minimal risk of accidents, despite PHMSA's frequent touting of their "excellent safety record." See, e.g., 85 Fed. Reg. at 45,003. The information relied upon by PHMSA addresses how the tank cars withstood the impacts of previous train derailments, but not the probability that future derailments would occur. Moreover, "[g]iven the small number of DOT-113 tank cars in use," NTSB concluded that the cars do not have "a compelling 'demonstrated safety record.' " NTSB Comments 4. The considered concerns of a "highly specialized governmental agenc[y]" like the NTSB carry relevant weight when determining whether an EIS is required. Nat'l Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1085 (D.C. Cir.), amended on reh'g in part, 925 F.3d 500 (D.C. Cir. 2019); Standing Rock, 985 F.3d at 1043.

[25] Although the past accidents considered by PHMSA did not result in injury or death, PHMSA's focus on the "generally low consequences" of those accidents is misplaced because the prior incidents involved the derailment of only two or three railcars that were carrying ethylene and argon. J.A. 449. By contrast, LNG is a particularly hazardous material and may be transported in an unlimited number of tank cars per train under the LNG Rule. Indeed, the Environmental Assessment recognized that "neither cryogenic ethylene nor cryogenic argon is transported in the quantities that are possible for the transport of LNG" under the LNG Rule. J.A. 450. And "the risks associated with hazardous materials transportation rise with quantity." J.A. 495. As we previously have explained, if an agency seeks to depart from past practice, it cannot use minimal past harm to "brush[ ] away" safety concerns, but must instead "look forward to examine the effects of" the change. New York v. Nuclear Regul. Comm'n, 681 F.3d 471, 481 (D.C. Cir. 2012) (emphasis in original). It must also consider whether the lack of past injury was only "because of site-specific factors or even sheer luck." Id. PHMSA made no effort to take those considerations into account.

[26] Nor has PHMSA shown that "even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum." Myersville Citizens, 783 F.3d at 1322 (cleaned up). The LNG Rule fails to ameliorate the risk of accidents. First, it does not impose a mandatory speed limit on trains carrying LNG cars. The faster the train, the greater the risk that a tank car will crack or puncture if there is a derailment. Yet the LNG Rule relies on a nonbinding, recommended speed limit of 50 miles per hour that only kicks in when a train has 20 or more cars of hazardous materials. See 85 Fed. Reg. at 45,007; see also id. at 45,018. Even that voluntary standard may be insufficient because breaches of DOT-113 rail cars have occurred at speeds below 50 miles per hour, such as in the Kansas accident.

***10** Second, PHMSA declined to cap the number of LNG tank cars per train. 85 Fed. Reg. at 45,005. Danger increases with the number of tank cars in a single train, as the failure of one could trigger the "[c]ascading [f]ailure of [m]ultiple" cars. J.A. 459. For example, in the Kansas incident, LNG that was vented from a pressure relief valve caught fire from an adjacent car's blaze. Responders had to intentionally breach the tank car in a "controlled vent and burn process." J.A. 450. Yet even as PHMSA acknowledged that "rail incidents can

be high-consequence events, given the quantity of hazardous materials in transportation," J.A. 450, and noted that one operator planned to string together at least 80 cars per train, 85 Fed. Reg. at 45,005, it found that the Rule posed no significant environmental impact.

Although PHMSA adopted some safety measures in the LNG Rule — including requiring thicker outer tanks made of higher-quality steel — it never explained why those safety measures were adequate to address the extreme dangers associated with a derailment. To the contrary, one of PHMSA's own safety studies raised concerns about the efficacy of the 120W9 design. In that study, PHMSA compared three similar derailment accidents involving cars with tanks of either 9/16″ or 7/16″ thickness. 85 Fed. Reg. at 45,005–06. The thicker cars had between 62–69% fewer punctures than the thinner ones. Id. But a quarter of the thicker cars were still breached. Id. As previously discussed, any breach of a rail car containing LNG could be disastrous.

[27] In sum, transporting LNG by rail entails a potent combination of risk and extreme danger that plainly has a significant impact on the environment. Although the probability of an accident "may be low, that risk is sufficient that a person of ordinary prudence would take it into account in reaching a decision to approve the [agency action], and its potential consequences are therefore properly considered here." Standing Rock, 985 F.3d at 1050 (cleaned up). PHMSA's decision not to prepare an EIS was therefore arbitrary and capricious. [6]

* * *

[28] Because PHMSA failed to prepare an EIS as required, we vacate the LNG Rule and remand to PHMSA for further proceedings. Remand with vacatur is the ordinary remedy for unlawful agency action, United Steel v. Mine Safety & Health Admin., 925 F.3d 1279, 1287 (D.C. Cir. 2019), and the government has not asked us to depart from the ordinary course here.

So ordered.

All Citations

--- F.4th ----, 2025 WL 223869

Footnotes

1 "Filling density" refers to the percent ratio of the weight of cargo in the tank to the weight of water that the tank will hold. 49 C.F.R. § 173.319(d)(1). As the government explained, "if a tank car filled with water would weigh 10,000 pounds, and the filling-density requirement for a specific material is 50%, then the tank car can hold 5,000 pounds of that particular material." Gov't Br. 55 n.9.

2 Environmental Petitioners are the Sierra Club, Center for Biological Diversity, Clean Air Council, Delaware Riverkeeper Network, Environmental Confederation of Southwest Florida, and Mountain Watershed Association.

3 State Petitioners are the State of Maryland, State of New York, State of California, State of Delaware, District of Columbia, State of Illinois, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of New Jersey, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, and State of Washington.

4 We disagree with PHMSA's dismissal of the Tribe's concerns as "inapposite." 85 Fed. Reg. at 45,022–23. The LNG Rule stated that "it does not appear that rail transportation of LNG to the Tacoma LNG facility is currently permitted by the terms of" the Washington State regulator's authorization and that this authorization also does not "seem to contemplate rail transportation of LNG from that facility." Id. at 45,022. It also asserted that the "schematics of the Tacoma LNG facility ... suggest that rail infrastructure neither exists nor is contemplated at the site." Id. at 45,023. Yet a Puget LNG marketing document and the Tribe's standing declarations show that rail infrastructure does in fact exist at Tacoma LNG. Moreover, PHMSA's suggestion that LNG transport

by rail is not covered by the current authorizations by Washington State focused mainly on a restriction on importing LNG to the facility rather than the relevant risk of exporting from the facility.

5 The State and Environmental Petitioners also argue that PHMSA violated NEPA's public participation requirement by adopting in the final Rule a novel tank car design and increased filling density, without any notice; violated the Hazardous Materials Transportation Act's requirement to prioritize safety; violated the Administrative Procedure Act by arbitrarily and capriciously disregarding safety concerns; and violated the APA's notice-and-comment requirements. In addition, they argue that PHMSA failed to consider the Rule's effects on greenhouse gas emissions and environmental justice communities. The Tribe contends that PHMSA's failure to prepare an EIS was arbitrary and capricious because it failed to consider the LNG Rule's disparate impact on the Tribe. It also argues that PHMSA failed to adequately consult with it about the LNG Rule.

6 Of course, while we hold that the LNG Rule raises substantial environmental questions that required preparation of an EIS, we express no opinion on the wisdom of any particular set of safety protocols. NEPA is "primarily information-forcing," so it "directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another." Sierra Club v. FERC, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (cleaned up). After preparing an EIS, the agency will be best positioned to determine whether the environmental risk is worth taking. Any future legal challenges to the substance of that decision would then be brought under some other statute, not NEPA. Because we vacate the instant LNG Rule due to PHMSA's failure to prepare an EIS, such questions are left for another day.

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