

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

VOTE.ORG,

Plaintiff,

v.

JACQUELYN CALLANEN, in her official capacity as the Bexar County Elections Administrator; BRUCE ELFANT, in his official capacity as the Travis County Tax Assessor-Collector; REMI GARZA, in his official capacity as the Cameron County Elections Administrator; MICHAEL SCARPELLO, in his official capacity as the Dallas County Elections Administrator,

Defendants.

Civil Action

Case No. 5:21-cv-00649-JKP-HJB

**PLAINTIFF'S OPPOSITION TO
DEFENDANT REMI GARZA'S
MOTION TO DISMISS**

TO THE HONORABLE JASON PULLIAM:

Plaintiff Vote.org, by and through its undersigned counsel, files this Opposition to the Motion to Dismiss filed by Defendant Remi Garza, in his official capacity as the Cameron County Elections Administrator.

INTRODUCTION

During the 2018 election cycle, Plaintiff Vote.org invested significant resources developing and launching a web application that allowed Texans in Bexar, Travis, Cameron, and Dallas Counties to complete their registration applications electronically. The Wet Signature Rule—originally announced by the Secretary of State in 2018, codified earlier this year by Section 14 of House Bill 3107, and now enforced by Defendant Garza in Cameron County—requires voter registration applications to be signed with wet-ink signatures. The Wet Signature Rule was

intended to limit Vote.org's voter registration efforts and has prevented it from achieving its voter registration goals in the Lone Star State.

Defendant Garza has moved to dismiss the instant complaint, arguing that Vote.org failed to adequately allege standing because it did not allege that any of its members were injured by the Wet Signature Rule. But under blackletter law, Vote.org can allege standing in its own right if it has suffered an injury under the same standard that applies to individuals, even if none of its members suffered an injury. The complaint readily satisfies this standard.

Vote.org alleged that it has suffered and will suffer clear injuries to its organizational interests and voter engagement efforts as a result of the Wet Signature Rule; the injury is traceable to Defendant Garza, who is charged with implementing the Wet Signature Rule in Cameron County; and the injury will be redressed by a ruling from this Court that Defendant Garza's enforcement of the Wet Signature Rule violates the Civil Rights Act and the U.S. Constitution. For these reasons, Vote.org has standing to pursue this action, and Defendant Garza's motion to dismiss should be denied.

BACKGROUND

The State of Texas regularly recognizes what anyone who has used a credit card keypad or signed an online form knows to be true: electronic signatures are just as good as wet-ink signatures. That is why the Texas Business and Commerce Code makes clear that electronic signatures, or e-signatures, carry the force of law, *see, e.g.*, Tex. Bus. & Com. Code § 322.007(d), and why voter registration applications submitted through the State's agencies use imaged—not wet-ink—signatures.

The intuitiveness of electronic signatures and their acceptance under Texas law notwithstanding, the Secretary of State (the "Secretary") announced just days before the voter

registration deadline for the 2018 midterm election that Texans were required to sign their voter registration applications with original, wet signatures: the first iteration of the Wet Signature Rule. In the most recent legislative session, the Legislature codified this nonsensical rule in Section 14 of House Bill 3107 (“HB 3107”). Because the method by which a voter enters their signature on a voter registration application is immaterial to their eligibility to vote, Section 14 of HB 3107 violates the materiality provision of the federal Civil Rights Act. And it further violates the U.S. Constitution by burdening Texas voters with a logistical hurdle to the franchise that cannot be justified by the State’s purported interests.

I. The Wet Signature Rule unnecessarily and unjustifiably burdens voters and disrupts Vote.org’s voter registration efforts.

Registering to vote in Texas is already a cumbersome process. Rather than modernize this critical component of the voting experience, the State continues to invent and enforce antiquated rules that serve no purpose beyond making registration harder. The Wet Signature Rule is yet another manifestation of the State’s outdated—and often unlawful—approach to voter registration.

The Election Code provides several avenues through which eligible citizens may submit their voter registration applications to their county registrars: by personal delivery, mail, or fax. *See* Tex. Elec. Code § 13.002(a). Prior to the Secretary’s invention and the Legislature’s subsequent enactment of the Wet Signature Rule, none of these options required a wet-ink signature on a voter’s registration application.

In preparation for the 2018 elections, and after careful consideration of the Texas Election Code, Vote.org launched a web application to help Texans register to vote. *See* Compl. for Declaratory & Inj. Relief (“Compl.”) ¶¶ 3, 18–19, 27, ECF No. 1. The e-signature function of the web application allowed potential registrants in four counties—Bexar, Travis, Cameron, and Dallas—to enter information into a virtual voter registration application; sign the form by

uploading an image of their signature into the web application; review their signed voter registration application; fax the completed application to their county registrar; and generate a hard copy to be mailed to the county registrar, as required by Texas law. *Id.* ¶ 18. Between late September and early October of 2018, more than 2,400 voters in Texas used Vote.org’s web application, including its e-signature function, to complete their voter registration applications. *Id.* ¶ 19.

The Secretary proceeded to call the validity of those 2,400 voter registrations into question. *Id.* Just five days before the registration deadline for the 2018 general election, the Secretary claimed, without any basis in the law, that registration forms prepared using Vote.org’s web application were invalid because they did not contain original, wet signatures. *Id.* His announcement—and the decision of Defendants’ counties to abide by it—effectively ended Vote.org’s use of the e-signature function. *Id.*

During its 2021 regular session, the Legislature enacted HB 3107. *See* HB 3107, 87th Leg., Reg. Sess. (Tex. 2021). Among other provisions, the bill provides that in order “[f]or a registration application submitted by telephonic facsimile machine to be effective, a copy of the *original* registration application *containing the voter’s original signature* must be submitted.” *Id.* § 14 (amending Tex. Elec. Code § 13.143(d-2)). HB 3107 thus codifies the Wet Signature Rule and perpetuates its burdens on both Texas voters and Vote.org.

The Wet Signature Rule contradicts well-established Texas laws that recognize the validity of e-signatures, including in the election context. For example, the Texas Administrative Code authorizes election officials to capture voters’ signatures using electronic devices for election day signature rosters and specifically defines “Electronic Signature” as “a digitized image of a handwritten signature.” 1 Tex. Admin. Code § 81.58(a)–(b). The Texas Business and Commerce

Code recognizes that a signature “may not be denied legal effect . . . solely because it is in electronic form” and expressly states that “[i]f a law requires a signature, an electronic signature satisfies the law.” Tex. Bus. & Com. Code § 322.007(a), (d). And if a person completes a voter registration application through the Department of Public Safety, the agency must “inform the applicant that the applicant’s electronic signature provided to the department will be used for submitting the applicant’s voter registration application.” Tex. Elec. Code § 20.066(a)(2).

The inconsistency between these practices and the Wet Signature Rule demonstrates that it is immaterial to an individual’s eligibility to register and serves no legitimate governmental interest—let alone one sufficiently weighty to justify the added burdens on voting.

II. Vote.org’s lawsuit seeks relief against the county registrars who implement voter registration rules in the jurisdictions where it launched its e-signature function.

Following the enactment of HB 3107, Vote.org filed suit to challenge the Wet Signature Rule. Count I of its complaint alleges that the Wet Signature Rule violates Section 1971 of the Civil Rights Act—which prohibits denying the right to vote “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,” 52 U.S.C. § 10101(a)(2)(B)—because it is immaterial to determining whether a Texas voter is qualified to cast a ballot. *See* Compl. ¶¶ 37–40. Count II alleges that the Wet Signature Rule violates the right to vote under the First and Fourteenth Amendments to the U.S. Constitution because it imposes a burden on voters unjustified by any legitimate state interest. *See id.* ¶¶ 41–47.

Vote.org’s complaint names as defendants the voter registrars of Bexar, Travis, Cameron, and Dallas Counties, the jurisdictions where Vote.org introduced the e-signature function of its web application in 2018. *See id.* ¶¶ 18, 21–24. Its decision to seek relief against county registrars—and not to secure statewide relief from the Secretary—was the result of a Fifth Circuit decision

issued earlier this year, which concluded that county registrars are solely responsible for reviewing and accepting voter registration applications and thus “the Secretary lacks sufficient connection to enforcement of the [] wet signature rule for the *Ex parte Young* exception to state sovereign immunity to apply.” *Tex. Democratic Party v. Hughs*, No. 20-50667, 2021 WL 2310010, at *1 (5th Cir. June 4, 2021) (per curiam).

LEGAL STANDARD

“When the party challenging jurisdiction has not submitted evidence in support of its Rule 12(b)(1) motion to dismiss, the motion is a facial attack on plaintiffs’ pleadings, and the court’s review is limited to whether the complaint sufficiently alleges jurisdiction.” *Prescott v. Bexar County*, No. SA-19-CV-1392-JKP-RBF, 2021 WL 812115, at *1 (W.D. Tex. Mar. 3, 2021). “Such an attack requires the courts to ‘consider the allegations of the complaint as true.’” *United of Omaha Life Ins. Co. v. Womack-Rodriguez*, 461 F. Supp. 3d 455, 466 (W.D. Tex. 2020) (quoting *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981)). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, because courts may presume that general allegations embrace those specific facts that are necessary to support the claim.” *Trans Tool, LLC v. Faulkner*, No. SA-19-CV-1304-JKP-RBF, 2021 WL 796161, at *2 (W.D. Tex. Mar. 2, 2021) (cleaned up).

ARGUMENT

Defendant Garza argues that Vote.org has no legally cognizable interest in a challenge to an election rule that bans the use of its voter registration software. But his argument ignores the well-pleaded allegations of the complaint. Vote.org has standing because it has suffered a direct, concrete injury due to Defendants’ conduct: it expended substantial resources developing a product that cannot be used as intended so long as the Wet Signature Rule remains in effect and Defendant

Garza continues to enforce it, thus impeding Vote.org’s ability to advance its mission. As a result, it must expend additional resources to counteract the effects of the challenged rule. Defendant Garza’s lone argument to the contrary is that Vote.org failed to plead that its members have standing. But this argument is a red herring. It is hornbook law that an organization can sue to vindicate its own interests where, as here, it suffers a direct injury. Defendant Garza does not argue otherwise, and his motion to dismiss should be denied.

I. Vote.org has suffered and will continue to suffer a concrete injury in fact, traceable to Defendants’ conduct, as a result of the Wet Signature Rule.

Defendants, including Defendant Garza, have inflicted concrete injury on Vote.org by enforcing the Wet Signature Rule, conferring on Vote.org the standing needed to maintain this suit. As courts regularly recognize,

An organization, like an individual, can establish standing to sue on its own behalf by demonstrating three elements: (1) the organization suffered an injury in fact that is both “concrete and particularized, and actual or imminent, not conjectural or hypothetical;” (2) the injury is “fairly traceable to the challenged action of the defendant;” and (3) it is likely, “as opposed to merely speculative, that the injury will be redressed by a favorable decision.”

Am. C.R. Union v. Martinez-Rivera, 166 F. Supp. 3d 779, 787–88 (W.D. Tex. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). “At the pleading stage, an organization need only broadly allege [] an injury”; even a “short description in the complaint” describing the harm the challenged law causes suffices. *Id.* at 788 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Courts have also routinely held that “an organization can demonstrate injury by alleging that it had diverted significant resources to counteract the defendant’s conduct,” and thus that the defendant has “significantly and perceptibly impaired the organization’s ability to provide its activities—with the consequent drain on the organization’s resources.” *Id.* at 788 (cleaned up) (quoting *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010)); accord *Crawford v. Marion*

Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007) (concluding that “new law injures the [organization] by compelling [it] to devote resources” that it would not have needed to absent new law), *aff’d*, 553 U.S. 181 (2008); *Richardson v. Tex. Sec’y of State*, 485 F. Supp. 3d 744, 761 (W.D. Tex. 2020) (finding organizational standing and noting that its “conclusion is compelled by . . . a recent case in which the Fifth Circuit held that a voter rights group had ‘organizational’ standing to challenge a provision of the Texas Election Code under a ‘diversion-of-resources’ theory” (citing *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 611–12 (5th Cir. 2017)), *appeal docketed*, No. 20-50774 (5th Cir. Sept. 10, 2020).

Vote.org has pleaded precisely such an injury. As part of its mission to engage and register voters, it invested significant resources to develop and implement a robust and comprehensive voter registration platform that allows voters to complete, sign, and submit their registration applications. *See* Compl. ¶¶ 17–20. Use of that platforms’ e-signature function—“one of its most effective tools”—has been foreclosed by the Wet Signature Rule. *Id.* ¶¶ 19–20. Consequently, “Vote.org has been forced to divert resources from its general, nationwide operations—as well as its specific programs in other states—to redesign its Texas voter registration and [get out the vote] programs and utilize more expensive (and less effective) means of achieving its voter registration goals in the State.” *Id.* ¶ 20. These allegations establish an injury in fact based on a diversion of resources.¹

¹ The sufficiency of Vote.org’s allegations are underscored by a comparison with this Court’s decision in *Richardson*. There, the Court found organizational standing sufficiently pleaded where, in order to “counteract the effect of” an allegedly unlawful restriction, the plaintiff published videos, social media posts, emails, and web trainings to educate voters about the State’s signature-matching process. *Richardson*, 485 F. Supp. 3d at 762–63. Here, Vote.org has lost the use of software it designed specifically for use in the State, redeveloped its strategic plan and operations within the State and has been forced to rely on more expensive alternatives to ensure that voters are able to register to vote in accordance with the Wet Signature Rule—a diversion of resources of the same qualitative significance as the efforts described in *Richardson*.

There can also be no doubt that this injury is fairly traceable to Defendants’ conduct and can be redressed through a favorable decision. “To establish the ‘traceability’ causal connection between the injury and the conduct complained of, the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Mi Familia Vota v. Abbott*, 497 F. Supp. 3d 195, 210 (W.D. Tex. 2015) (cleaned up) (quoting *Lujan*, 504 U.S. at 560–61). Redressability, in turn, is satisfied if “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* (quoting *Friends of Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

While the Secretary “is the chief election officer of the state,” Tex. Elec. Code § 31.001(a), and “indisputably holds high-level responsibilities,” the Fifth Circuit recently explained that the Texas Election Code “input[es] certain responsibilities on the county registrars, such as the actual registering of voters.” *Tex. Democratic Party*, 2021 WL 2310010, at *1; *see also* Br. for Def.-Appellant at 3–4, *Tex. Democratic Party v. Hughs*, No. 20-50667 (5th Cir. Oct. 26, 2020) (brief of Secretary emphasizing that “[v]oter registration in Texas is handled at the county level”). As Vote.org explains in its complaint, Defendant Garza “serves as the voter registrar for Cameron County and oversees its voter registration activities,” including reviewing voter registration applications for compliance with Texas law. Compl. ¶ 23. Consequently, as the official who implements the Wet Signature Rule in Cameron County, Vote.org’s injuries stemming from the law’s enforcement in that jurisdiction are traceable to Defendant Garza. And a decision from this Court enjoining Defendants’ enforcement of the Wet Signature Rule would redress those injuries.

II. Vote.org has standing in its own right.

Defendant Garza’s only argument in support of dismissal is without merit. He argues that “[t]o establish standing, Plaintiff must properly plead that its members are faced with suffering an

injury in fact that is concrete and particularized.” Def. Remi Garza’s Mem. in Supp. of Mot. to Dismiss 4, ECF No. 31. That is not the law.

“An association or organization can establish an injury-in-fact through *either* of two theories.” *OCA-Greater Hous.*, 867 F.3d at 610 (emphasis added). First, as discussed above, “[t]he organization can establish standing in its own name if it ‘meets the same standing test that applies to individuals.’” *Id.* (quoting *ACORN v. Fowler*, 178 F.3d 850, 856 (5th Cir. 1999)). This theory of standing “does not depend on the standing of the organization’s members.” *Id.* Second, an organization can also sue on behalf of its members. This theory of “associational standing” is “derivative of the standing of the association’s members, requiring that they have standing and that the interests the association seeks to protect be germane to its purpose.” *Id.* As the Fifth Circuit has made emphatically clear, an organizational plaintiff need only satisfy one of these two theories to have standing. *See id.* Defendant Garza cites no legal authority to the contrary; there is none.²

As explained above, the direct injury to Vote.org alleged in its complaint is sufficient to establish standing. Defendant Garza’s argument for dismissal is foreclosed under settled Fifth Circuit precedent. Accordingly, his motion should be denied.

CONCLUSION

Vote.org has suffered a concrete organizational injury that is traceable to Defendant Garza and redressable by this Court. It has thus pleaded Article III standing, and the pending motion to dismiss should be denied.

² Vote.org does not concede that it lacks associational standing.

Dated: September 21, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/ Uzoma N. Nkwonta _____
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