No.

In the Supreme Court of the United States

ROSALIE WEISFELD AND COALITION OF TEXANS WITH DISABILITIES,

Petitioners,

v.

JOHN SCOTT, *in his official capacity as the Texas Secretary of State, et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Ex parte Young*'s exception to state sovereign immunity, a state official is suable in an action for prospective relief from enforcement of an allegedly unconstitutional state law so long as, "by virtue of his office, [he] has some connection with the enforcement of the" statute. 209 U.S. 123, 157 (1908). The category of state officials that may be sued under *Ex parte Young* thus includes those "who may or must take enforcement actions" with respect to the challenged law. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021); *Id.* at 544.

Petitioners challenged Texas's signature-comparison procedure for mail-in ballots on federal constitutional and statutory grounds, and named the Texas Secretary of State as a defendant. Although local officials carry out day-to-day tasks associated with the administration of elections, the Secretary of State is Texas's "chief election officer" and is charged with vast responsibilities and authority to enforce Texas election law, including duties to oversee and control the administration of elections in Texas.

In the decision below, the Fifth Circuit held that "the Secretary's general duties under the [Texas Election] Code" were insufficient to satisfy *Ex parte Young* as to the provisions of the Code challenged by Petitioners. App.7a.

The question presented is whether, in a suit seeking prospective relief relating to the enforcement of particular provisions of Texas's election law, Texas's chief election officer may invoke sovereign immunity solely because local officials carry out those provisions day-to-day, or whether a state official's

authority over enforcement of the entire statutory scheme is sufficient to trigger *Ex parte Young*'s exception, as the Second, Sixth, Seventh, Eighth, and Eleventh Circuits as well as this Court hold.

PARTIES TO THE PROCEEDING

Petitioners are Rosalie Weisfeld and the Coalition of Texans with Disabilities, Plaintiffs-Appellees in the court below.

Respondent is John Scott, in his official capacity as the Texas Secretary of State, Defendant-Appellant-Appellee in the court below.

Doctor George Richardson, MOVE Texas Civic Fund, the League of Women Voters of Texas, and Austin Justice Coalition are Plaintiffs in the district court below.

Trudy Hancock, in her official capacity as Brazos County Elections Administrator, and Perla Lara, in her official capacity as City of McAllen, Texas, Secretary, are Defendants in the district court below.

Federico Flores, Jr., Maria Guerrero, and Vicente Guerrero were Intervenors-Appellants in the court below.

CORPORATE DISCLOSURE STATEMENT

The Coalition of Texans with Disabilities has no parent company, and no publicly held company holds 10% or more of its shares.

RELATED PROCEEDINGS

This case is directly related to the following proceedings in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Western District of Texas:

U.S. Court of Appeals for the Fifth Circuit:

Richardson v. Tex. Sec'y of State, No. 20-50774, U.S. Court of Appeals for the Fifth Circuit. Opinion issued Oct. 19, 2020.

Richardson v. Flores, No. 20-50774, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Mar. 16, 2022.

U.S. District Court for the Western District of Texas:

Richardson v. Tex. Sec'y of State, No. SA-19-cv-00963-OLG, U.S. District Court for the Western District of Texas. Opinion issued Dec. 23, 2019.

Richardson v. Tex. Sec'y of State, No. SA-19-cv-00963-OLG, U.S. District Court for the Western District of Texas. Judgment entered Sept. 8, 2020.

Richardson v. Tex. Sec'y of State, No. SA-19-cv-00963-OLG, U.S. District Court for the Western District of Texas. Opinion issued Sept. 10, 2020.

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INTRODUCTION

This petition arises from a divided opinion of the Fifth Circuit that narrows *Ex parte Young*'s exception to exclude state officials who oversee enforcement of a statutory scheme from being sued over provisions within that scheme that are carried out day-to-day by local officials. 209 U.S. 123 (1908) [hereinafter *Young*]. In the decision below, the Fifth Circuit held that because Texas law assigns day-to-day enforcement authority over particular state election provisions to local officials, the Texas Secretary of State ("SOS") lacks a sufficient connection to the enforcement of those particular election provisions for purposes of *Young*, even though Texas law makes him the chief election officer of the state with general statutory authority over those particular election provisions. The Fifth Circuit's decision below directly conflicts with decisions from the Second, Sixth, Seventh, Eighth, and Eleventh Circuits as well as this Court's precedent.

Petitioners are an individual voter who mail-in votes and a non-partisan, non-profit organization that serves mail-in voters with disabilities. Both brought claims alleging that the enforcement of Texas's mail-in ballot signature-comparison procedure by the Texas SOS and two local election officials violates the Constitution and other federal law. Petitioners prevailed in the District Court, obtaining an injunction against the Texas SOS.

A divided Fifth Circuit panel reversed, holding that the Texas SOS was not a proper defendant under *Young* because he did not have an enforcement connection to the signature-comparison procedure,

even though he is Texas's chief election officer and has expansive responsibilities and authority over all of Texas's election laws, including the signature-comparison procedure.

The Fifth Circuit's decision is the latest in a string of recent cases excessively narrowing *Young*'s application. It directly conflicts with other circuits' applications of *Young* and this Court's *Young* precedent. This Court should grant review.

OPINIONS BELOW

The Fifth Circuit's opinion (App.1a) is reported at 28 F.4th 649. The Fifth Circuit's earlier decision (App.20a) to stay the injunction pending appeal is reported at 978 F.3d 220. The District Court's opinion (App.83a) granting partial summary judgment and issuing a partial permanent injunction is reported at 485 F. Supp. 3d 744. The District Court's order (App.70a) denying stay of the injunction pending appeal is unreported but available at 2020 WL 6279199. The District Court's order (App.224a) denying Respondent's motion to dismiss is unreported but available at 2019 WL 10945422.

JURISDICTION

The Fifth Circuit entered judgment on March 16, 2022. App.1a. On June 8, 2022, Justice Alito extended the time to file a petition for certiorari to August 13, 2022. (No. 21A789). August 13, 2022 being a Saturday, the time to file a petition for certiorari extends to and including Monday, August 15, 2022. Sup. Ct. R. 30.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of U.S. Const. art. I, § 4, cl. 1; U.S. Const. amend. I; U.S. Const. amend. XI; U.S. Const. amend. XIV; 42 U.S.C. § 1983; 42 U.S.C. § 12132; 29 U.S.C. § 794; and Tex. Elec. Code §§ 31.001–31.005, 64.012, 82.001–82.004, 84.007, 85.001, 86.005–86.006, 86.013, 87.002, 87.0221, 87.0222, 87.0241, 87.027, 87.0271, 87.041, 87.0411, 87.0431, 87.127, is set forth at App.270a-312a.

STATEMENT

I. Texas's Mail-in Voting Process

This case involves Texas's mail-in voting process. The Texas Election Code ("Election Code") permits mail-in voting if a voter is sixty-five or older, has a disability, is confined in jail or by childbirth, or is absent from their county of residence during an election. Tex. Elec. Code §§ 82.001–82.004.

To mail-in vote, voters must submit an application for ballot by mail ("ABBM") eleven days before Election Day. *Id*. § 84.007(c); ROA. 613–14. The Texas SOS prescribes the ABBM's design and content. Tex. Elec. Code § 31.002. Voters must submit completed ABBMs to the Early Voting Clerk ("EVC"). *Id*. § 84.007. Once accepted, the EVC sends voters mail-in voting materials, including a "Dear Voter" letter, ballot, ballot envelope, and carrier envelope, all of which are also prescribed in design and content by the Texas SOS. *Id*. § 31.002; App.85a–86a; ROA.5380.

To cast a mail-in ballot, voters must mark the ballot; place and seal it in the ballot envelope; place

and seal the ballot envelope within the carrier envelope; and sign a certificate on the carrier envelope, which includes a line for the voter's signature across the seal flap and the back of the envelope. Tex. Elec. Code §§ 86.005(a)–(c). Voters then submit their carrier envelopes to the EVC. *Id.* § 86.006(a).

Next, temporarily appointed layperson members of Early Voting Ballot Boards ("EVBBs") or Signature Verification Committees ("SVCs") compare mail-in voters' signatures—the ABBM and carrier envelope signatures and also possibly previous signatures in the voter file—for identity verification. *Id.* §§ 87.002, 87.027, 87.041. They are required to reject ballots if they ultimately determine the ABBM or carrier envelope was "executed by a person other than the voter." *Id.* §§ 87.027(i), 87.041(b)(2), (e), (f).

Voters have no recourse to challenge a signature-comparison rejection. ROA.2639–40; *cf.* Tex. Elec. Code § 87.127 (county EVCs have discretion to challenge a rejection in state court under certain specific circumstances); *but see* ROA.533–35, 5519 (Texas SOS could only identify one instance of Section 87.127's implementation ever). A rejection notice must be sent to an affected voter no later than ten days after Election Day. Tex. Elec. Code § 87.0431; ROA.5517 (noting that voters generally receive rejection notices after Election Day).[1]

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[1] The Texas SOS considers voting after receiving a rejection notice as felony illegal voting. ROA.2949 (filed separately under seal as District Court Dkt. 85-2 at 33); ROA.5108–11; Pub. Hearing Before the Tex. House of Representatives Comm. on Elections, 87th Leg., R.S. 58:34–59:11 (March 4, 2021) available at https://tlchouse.granicus.com/MediaPlayer.php?view_id=46

In 2021, Texas passed Senate Bill 1 ("SB1"), which provides correction processes prior to a signature-comparison rejection. However, these processes are either impracticable or discretionary. SB1 only requires EVBBs and SVCs to provide a correction process if they determine "it would be possible for the voter to correct the defect and return the carrier envelope before the time the polls are required to close on [E]lection [D]ay." *Id.* §§ 87.0411(b); 87.0271(b).

However, EVBBs cannot begin comparing signatures, in smaller political subdivisions, until after 7 p.m. the Friday before Election Day or, in larger political subdivisions, twelve days before Election Day. *Id.* §§ 87.0221(a), 87.0222(a), 85.001; Appellant's Rule 28(j) Letter Ex. B ("Election Advisory No. 2022-08"), at 55 *Richardson v. Tex. Sec'y of State*, No. 20-50774 (5th Cir. Feb. 18, 2022). According to a Texas SOS advisory citing U.S. Postal Service standards, an effective correction process by mail must begin prior to fourteen days before Election Day. Election Advisory No. 2022-08 at 52, 54. Because EVBBs convene later, it is impracticable for EVBBs to correct any ballot they review through Section 87.0411(b)'s "required" process. And, even though SVCs can meet up to twenty days before Election Day, SVCs are generally created at the discretion of EVCs and few counties have them. Tex. Elec. Code §§ 87.027(a), (a-1), (f). Further, while SB1's Sections

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&clip_id=19496 (Testimony of Keith B. Ingram of the Texas SOS) (testifying that voters whose mail-in ballots are rejected cannot vote in-person because that would be a "double vote"); Tex. Elec. Code § 64.012(a)(2). Thus, according to the Texas SOS, even voters who receive a rejection notice before the end of voting on Election Day cannot avoid disenfranchisement.

87.0271(c) and 87.0411(c) contemplate an email and phone correction process, that, too, is discretionary.

II. The Texas SOS's Duties Under the Election Code

Election Code Sections 31.001, 31.003, 31.004. As chief election officer, the Texas SOS "shall obtain and maintain uniformity in the application, operation, and interpretation" of election laws—both state and federal—across jurisdictions. Tex. Elec. Code §§ 31.001, 31.003. The Election Code commands the Texas SOS to maintain uniformity by providing written instructions and directives, *id.* § 31.003, and assistance, *id.* § 31.004, to local officials.

One way the Texas SOS instructs, directs, and assists local officials to comply with laws involving the signature-comparison procedure is by creating and distributing the EVBB and SVC Handbook for Election Judges and Clerks ("Handbook"). ROA.536–39, 594, 596, 660, 719–23. The text of the Election Code provides no guidance to local election officials on how to compare signatures to verify whether they are executed by a person other than the voter; it only requires that local election officials "compare" these signatures to determine whether they are signed by the voter. Tex. Elec. Code §§ 87.027(i), 87.041(b)(2), (e)–(f). Local election officials therefore rely solely on instructions from the Texas SOS on how to compare signatures. The Handbook, accordingly, instructs SVCs to "use their best judgment" to determine whether signatures "match" and are the "same," while noting that the Texas SOS "understand[s] that . . .

SVC[s] are not handwriting experts."[2] ROA.594, 596; App.87a.

Election Code Section 31.004 also requires the Texas SOS to advise local officials on election laws and "maintain an informational service for answering inquiries of election authorities relating to the administration of . . . election laws or the performance of their duties." His advisories are considered binding by local officials. App.122a, 177a, 212a; ROA.2764–67, 5380. In 2022 alone, the Texas SOS has issued four such advisories regarding mail-in voting.[3] The Texas SOS has also issued instructions and directives through advisories, including procedures for SB1's corrective processes[4] and directives to use updated rejection notices[5] and "Dear Voter" letters.[6] Tex. Elec. Code §§ 31.003–31.004.

The Texas SOS's instructions, directives, and advisories do not, however, include any of the

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[2] Likely in response to this lawsuit, the Texas SOS has removed specific instructions for local officials to determine whether signatures "match" and are the "same" from his most recent Handbook. *See* Handbook 2022 at 38, 40, *Texas Secretary of State*, https://www.sos.state.tx.us/elections/forms/ballot-board-handbook.pdf (last visited Aug. 10, 2022).

[3] *See* Elections Division Advisories, *Texas Secretary of State*, https://www.sos.state.tx.us/elections/laws/election-division-advisories.shtml (last visited July 5, 2022).

[4] *See infra* p. 9.

[5] During this litigation, the Texas SOS prescribed a new rejection notice form that instructs voters who believe their mail-in ballot was rejected in error to contact their EVC to determine remedies available to them. ROA.2764–67.

[6] Due to this litigation, the Texas SOS modified the "Dear Voter" letter to include a brief statement informing voters of the signature-comparison procedure's existence. App.177a; ROA.5380.

reasons—many innocuous—as to why a voter's signature may vary. As Petitioners' expert testified, a person's signature may vary due to, among other things, accidental occurrences; alternative styles; changes in the health or physical or mental condition of the writer; natural variations as a result of differences in neuro-muscular coordination; writing conditions, such as whether the person is in a moving vehicle or at a stationary table; writing instrument, such as a pen or a stylus; and writing surface, such as paper versus electronic screen. ROA.922–24, 971; *see also* ROA.924, 981–82; App.133a (citing studies that show that "elderly [and] disabled writers . . . have less pen control than most other writers" and, therefore, "have a greater range of variation in their signatures.").

Election Code Section 31.002. Under Election Code Section 31.002, the Texas SOS must additionally "prescribe the design and content . . . of the forms necessary for the administration" of the Election Code, including the ABBM and carrier envelope—forms requiring the signatures that local officials later compare—and the "Dear Voter" letter and rejection notice—forms that now notify voters of the signature-comparison procedure and forms that notify voters of signature-comparison rejections respectively. Local election officials are generally not authorized to prescribe their own version of these forms without the Texas SOS's approval. Tex. Elec. Code § 31.002(d); ROA.2640–41, 2844–45.

Election Code Section 31.005. The Texas SOS additionally has authority to "take appropriate action to protect the voting rights of the citizens of Texas from abuse by the authorities administering the

state's electoral processes," and may enforce that action through "a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general." Tex. Elec. Code § 31.005. The Texas SOS has exercised this enforcement authority over local officials administering the mail-in ballot process who use methods at odds with his guidance and interpretation. *See* App.121a–122a. n.19;[7] *infra* pp. 24–25.

SB1 Provisions. SB1 also allows the Texas SOS to "prescribe any procedures necessary to implement" SB1's impracticable and discretionary pre-rejection correction processes, including for signatures flagged for rejection. Tex. Elec. Code §§ 87.0411(f); 87.0271(f). The Texas SOS has used this authority and his authority under Election Code Sections 31.001 to 31.004, through an advisory, to prescribe mandatory

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[7] Pursuant to his power under Section 31.005 of the Election Code, on August 27, 2020, the Texas SOS's Director of Elections Keith Ingram sent a letter to the Harris County Clerk, citing his authority under Section 31.005, ordering Harris County to "halt any plan to send an [ABBM] to all registered voters" because sending out unsolicited [ABBMs] would have been "contrary to [the] office's guidance on [the] issue" and "an abuse of voters' rights." Letter from the Texas SOS's Director of Elections, Keith Ingram, Director of Elections for the Texas SOS's Office to Chris Hollins, Harris County Clerk (Aug. 27, 2020), *available at* https://static.texastribune.org/media/files/9078f160593 df832d2704969c73628c5/SOSLetter_HarrisCountyVBM.pdf. Mr. Ingram noted that if Harris County did not halt its plans immediately, the Texas SOS would "request that the Texas Attorney General take appropriate steps under Texas Election Code Section 31.005." *Id.* Four days later, the Texas Attorney General filed an application for a temporary restraining order against Harris County, citing his authority under Section 31.005 as the basis for the suit. *See Texas v. Hollins*, No. 2020-52383 (Tex. D. Ct. Harris Cnty.) (filed Aug. 31, 2020).

procedures and issue written instructions, directives, and advice on those procedures; and to prescribe the design and content of forms made to correct signatures flagged for rejection. *See* Election Advisory No. 2022-08 at 46–73.

Texas law does not expressly require a practicable and mandatory notice and opportunity to cure process for voters whose mail-in ballots undergo the signature-comparison procedure. Despite the vast responsibilities and authority set out above, the Texas SOS enforces the signature-comparison procedure in a way that does not comply with federal law. Additionally, in the absence of proper instructions, directives, assistance, or advice from the Texas SOS, local officials have no real standard for signature comparisons, resulting in local officials making arbitrary determinations.

III. **Petitioners' Case**

Petitioner Rosalie Weisfeld ("Weisfeld") mail-in voted during a 2019 city run-off election. App.89a. She was disenfranchised when her ballot was rejected based on a signature-comparison determination. *Id*. This occurred despite her knowledge of the process, having previously served as an administrator for local primary elections and on a local EVBB. *Id*.; App.152a. Weisfeld faces an ongoing threat of future disenfranchisement because she is eligible and plans to exclusively mail-in vote in future elections, as she is over 65, has a disability caused by a traumatic brain injury, and is sometimes out of the county during elections. ROA.1082; App.90a, 101a–102a. All her future ballots will undergo the signature-comparison procedure. ROA.1082; App.90a, 101a–102a.

Petitioner Coalition of Texans with Disabilities ("CTD") is an organization that serves mail-in voters with disabilities. CTD has been injured by the signature-comparison procedure because it diverts resources to educate mail-in voters with disabilities on how to sign voting materials in order to help reduce the chance of improper signature-comparison rejections. ROA.2276–77; App.90a.

Petitioners and four other plaintiffs filed their complaint in 2019, alleging that the Texas SOS violated the Constitution, under the *Anderson-Burdick* and procedural due process doctrines; the Americans with Disabilities Act of 1990 ("ADA"); and the Rehabilitation Act of 1973 ("RA"). ROA.27–52. The Texas SOS's subsequent motion to dismiss was denied. App.224a–269a. In May 2020, the parties filed cross-motions for summary judgment. App.92a–93a.

The District Court granted partial summary judgment on Petitioners' constitutional claims against the Texas SOS, denied the Texas SOS's motion for summary judgment on those claims, and issued a partial permanent injunction against him. App.217a–223a. It held in abeyance the other plaintiffs' claims, as well as Petitioners' ADA and RA claims. App.97a.

In October 2020, a Fifth Circuit motions panel granted the Texas SOS's request for a stay pending appeal. App.64a. In March 2022, the Fifth Circuit issued, without oral argument, a divided decision ruling that the Texas SOS was not a proper defendant under the Eleventh Amendment. App.9a–10a. The majority held that the Texas SOS did not satisfy the requirements of *Young* because he "has no enforcement role" in the signature-comparison procedure; rather, the "Election Code places those duties in the hands of local election officials." App.6a–9a. The majority reversed the District Court, vacated its injunction, and remanded for further proceedings. App.10a.

Judge Higginbotham dissented, criticizing the majority's "overly narrow reading[]" of the Texas SOS's duties as "chief election officer of the state" to enforce Texas and federal election laws, and noted that the Fifth Circuit was "split[ting] hairs regarding the level of enforcement authority" required under *Young*'s connectedness requirement. App.12a, 18a (citing Tex. Elec. Code §§ 31.001(a), 31.003).

REASONS FOR GRANTING THE PETITION

Under *Young*, when a plaintiff seeks injunctive relief to remedy an ongoing violation of federal law, and names as defendant a state official who has "some

connection" to enforcement of the challenged law, the state official is not entitled to sovereign immunity. Circuits and this Court have held that a state official's express authority to oversee enforcement of a specific state statutory scheme creates a connection to individual provisions within that statutory scheme to make the official a proper defendant. In the decision below, the Fifth Circuit broke from that precedent and announced a legal rule narrowing *Young* to require that, to be suable, a state official must have frontline enforcement authority over a challenged provision. Applying that erroneous standard, the Fifth Circuit held that the Texas SOS lacked connection to enforcement of the signature-comparison procedure, despite his status as Texas's chief election officer and his broad authority to enforce the entire Election Code as well as direct the conduct of all local election officials.

The Fifth Circuit's decision below, continuing a trend in recent cases of narrowing the application of *Young*, develops an unduly rigorous "connectedness" requirement that not only directly conflicts with election-related decisions from the Sixth, Eighth, and Eleventh Circuits, but also directly conflicts with other circuit decisions outside of the election context. It is also wrong on the merits and conflicts with this Court's *Young* jurisprudence. This Court should grant review to resolve this conflict.

I. The Decision Below Directly Conflicts with Decisions from Multiple Other Circuits Over the "Connectedness" Required for the *Young* Exception to Apply.

In direct conflict with the decision below, the Sixth, Eighth, and Eleventh Circuits have held that statewide officials overseeing the administration of state election law are suable under *Young*, even when the challenged provisions of state election law are administered day-to-day by local officials.

The Sixth Circuit. In *League of Women Voters of Ohio v. Brunner*, plaintiffs brought multiple constitutional challenges to Ohio's election processes and voting system, naming, among others, the Ohio SOS as a defendant. 548 F.3d 463, 466 (6th Cir. 2008). The Ohio SOS maintained she was not a "proper part[y] to th[e] action in that any alleged errors were the fault of local [county Boards of Election officials] rather than high-level state officials." *Id.* at 475 n.16. The Sixth Circuit rejected this argument, holding that the Ohio SOS is a proper defendant under *Young* because she "is the state's chief election officer *ex officio*" and has "the authority to control the [local county Boards of Elections]." *Id.*

In *Russell v. Lundergan-Grimes*, plaintiffs challenged a Kentucky statute prohibiting certain electioneering as violative of their First Amendment rights, and sued, among others, the Kentucky SOS and members of the Kentucky State Board of Elections ("KSBE"). 784 F.3d 1037, 1043–44 (6th Cir. 2015). As in *Brunner*, the Sixth Circuit held that the Kentucky SOS and KSBE were proper defendants

under *Young*, despite not administering the challenged statute on a day-to-day basis, because they were "empowered with expansive authority 'to administer the election laws of the state . . . [and] may adopt administrative regulations necessary to properly carry out its duties,'" *id.* at 1048 (quoting Ky. Rev. Stat. § 117.015(1)), as well as "train state and local personnel on how to implement Kentucky's election laws," *id.* (citing Ky. Rev. Stat. § 117.187(1)), "which apparently would include instructing other state actors on how to administer [the] allegedly unconstitutional" statute challenged, *id.*

The Eighth Circuit. In *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, the Eighth Circuit, in a challenge to Missouri laws denying the right to vote to residents under court-ordered guardianship because of mental incapacity, rejected the argument from Missouri's SOS that she was immune from suit because local election officials were also involved in the administration of the challenged laws. 499 F.3d 803, 807 (8th Cir. 2007). The court reasoned that, "[t]hough broad authority to register voters and to administer voting and elections [was] delegated to local 'election authorities,' . . . the [Missouri SOS]" was the "chief state election official responsible for overseeing of the voter registration process." *Id*. Moreover, the Sixth Circuit in its *Young* connectedness inquiry also noted that the Missouri SOS was obligated "to send local election authorities the names of persons who are adjudged incapacitated." *Id*.

The Eleventh Circuit. In *Grizzle v. Kemp*, Georgia residents brought suit against the Georgia SOS to enjoin the enforcement of a Georgia statute

that "preclude[d] relatives of certain employees of a school system from serving as members of that district's board of education," which plaintiffs alleged violated the Constitution. 634 F.3d 1314, 1316 (11th Cir. 2011). The Georgia SOS argued that he was an improper defendant because he played no role in the process; the candidate's party was tasked with determining the candidate's qualifications; only electors or the elections superintendent could mount a challenge to a candidate; and only the superintendent could certify the election results, which the Georgia SOS was required to accept. *Id.* at 1318–19.

The Eleventh Circuit rejected this argument because the Georgia election code granted the Georgia SOS the "power to issue orders . . . directing compliance [with Chapter 2 of the election code, governing 'Elections and Primaries Generally'] or prohibiting the actual or threatened commission of any conduct constituting a violation" of that Chapter. *Id.* at 1319. Accordingly, the court held that the Georgia SOS was a proper defendant because

> [a]lthough the [Georgia SOS] cannot directly qualify or challenge candidates for local boards of education or certify the results of those elections, as a member and the chairperson of the State Election Board, he has both the power and the duty to ensure that the entities charged with those responsibilities comply with Georgia's election code in carrying out those tasks.

Id. at 1319.

In *Democratic Executive Committee of Florida v. Lee*,[8] the Eleventh Circuit held that the Florida SOS was properly named in a challenge to Florida's strikingly similar mail-in ballot signature-comparison regime—materially indistinguishable in process from that at issue here, including that the signature comparison was carried out by local election officials—because she was "the state's chief election officer with the authority to relieve the burden on [p]laintiffs' right to vote." 915 F.3d 1312, 1316–18 (11th Cir. 2019) (citing Fla. Stat. § 97.012; *Fla. Democratic Party v. Detzner*, 2016 WL 6090943, at *4–5 (N.D. Fla. Oct. 16, 2016)); *see* Fla. Stat. §§ 97.012(1), (16), (14) (setting out election-related duties of Florida SOS, including the "responsibility to . . . [o]btain and maintain uniformity in the interpretation and implementation of the election laws," to "adopt by rule uniform standards for the proper and equitable interpretation and implementation of" the Florida Election Code;[9] to "[p]rovide written direction and opinions to the supervisors of elections on the performance of their official duties with respect to the Florida Election

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[8] *Lee* was decided by a motions panel, not a merits panel, and may not constitute binding precedent in the Eleventh Circuit. *See Jacobson v. Florida Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) (citation omitted) ("Nor need we decide whether *Lee*—which was issued by a motions panel instead of a merits panel—is even binding precedent.").

[9] The Florida Election Code limits this authority to "Chapters 97 through 102 and 105 of the Election Code." Those chapters contained the provisions at issue in *Lee*. In comparison, the Texas Election Code vests the Texas SOS with authority to "obtain and maintain uniformity in the application, operation, and interpretation" of the entirety of the Texas Election Code as well as "election laws outside" the Texas Election Code. Tex. Elec. Code § 31.003.

Code," and to "[b]ring and maintain such actions at law or in equity by mandamus or injunction" to "enforce compliance" with those laws).

The Sixth, Eighth, and Eleventh Circuits thus held that a state official's general duties to oversee the entirety of a state's relevant statutory scheme, like the general duties held by the Texas SOS, were enough under *Young* to connect them to a challenged provision within that scheme. Like the defendant SOSs in *Brunner*, *Carnahan*, and *Lee*, the Texas SOS is the chief election officer of his state. *See Brunner*, 548 F.3d at 466; *Carnahan*, 499 F.3d at 807; *Lee*, 915 F.3d at 1316–18; *supra* pp. 6–10. Like the Ohio SOS in *Brunner*, he has "the authority to control the [local county election officials]. *See* 548 F.3d 475 n.16; *supra* pp. 6–10. Like the Kentucky SOS in *Russell*, he is "empowered with expansive authority to administer the election laws of the state," and he provides local election officials with training on "how to implement [Texas's] election laws." *See* 784 F.3d at 1048 (cleaned up); *supra* pp. 6–10. Like the Georgia SOS in *Grizzle*, he has "both the power and the duty to ensure that the entities charged with" election administration in Texas "comply with [Texas's] election code in carrying out those tasks." *See* 634 F.3d at 1319; *supra* pp. 6–10. Like the Missouri SOS in *Carnahan*, he is "responsible for overseeing" mail-in voting, and, further, has specific "obligat[ions]" involving the signature-comparison procedure. *See* 499 F.3d at 807 (cleaned up); *supra* pp. 6–10. Finally, his duties and authority to maintain uniformity of the election laws, provide written direction to local election officials, and enforce compliance with election laws are nearly identical to the general duties held by the Florida

SOS. *See Lee*, 915 F.3d at 1316–18; *compare supra* pp. 17–18 *with supra* pp. 6–10.

In all of these cases, similar or materially indistinguishable general statutory duties and authority as those vested in the Texas SOS, and similar supervisory enforcement actions as those taken by the Texas SOS, led the Sixth, Eighth, and Eleventh Circuits to hold that the SOSs were properly named as defendants. Specific enforcement responsibility found in the specific provision challenged was not required, nor was a direct statutory responsibility for the day-to-day administration of the challenged provisions. The Fifth Circuit below held the opposite on this legal issue and, thereby, reached the opposite result, ruling that the Texas SOS is immune from suit. App.6a–9a. In applying a different rule than its sister circuits, the Fifth Circuit is in direct conflict with the Sixth, Eighth, and Eleventh Circuits.

Furthermore, the Fifth Circuit's decision below directly conflicts with other circuits' decisions about state officials other than SOSs. The Second and Seventh Circuits also have held that a state official's authority over the enforcement of a statutory scheme, even where local officials have concurrent or frontline enforcement duties, is sufficient to make that official a proper defendant under *Young* in an action relating to a particular provision within that scheme. *See, e.g.*, *CSX Transp., Inc. v. New York State Off. of Real Prop. Servs.*, 306 F.3d 87, 99 (2d Cir. 2002) (state agency defendants satisfied *Young*'s connectedness requirement because, even though they were not responsible for assessing local taxes, they had authority to remove assessors, monitor quality of local

assessments, and order compliance with directives); *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 645 (7th Cir. 2006) (attorney general's authority, concurrent with that of local officials, was sufficient to satisfy *Young*'s connectedness requirement).

Accordingly, this Court should grant Petitioners' petition for certiorari to resolve the direct conflict between the Fifth Circuit and the Sixth, Eighth, and Eleventh Circuits, and resolve the Fifth Circuit's direct conflict with other circuit decisions outside the elections context.

II. The Decision Below Directly Conflicts with This Court's Decisions in *Young* and *Papasan* and Is Wrong on Its Face.

In addition to creating a circuit split as set out above, the Fifth Circuit's decision below directly conflicts with this Court's decisions in *Young* itself and in *Papasan v. Allain*, 478 U.S. 265 (1986), because the Texas SOS has extensive general and specific duties substantially in excess of those found sufficient to connect the defendants to the challenged laws in those cases.

As this Court has noted, *Young* "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect." *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). In determining whether *Young* applies, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of*

Idaho, 521 U.S. 261, 296 (1997) [hereinafter *Coeur d'Alene*]). "[T]he inquiry into whether suit lies under *Young* does not include an analysis of the merits of the claim." *Id.*

In *Young*, this Court allowed a suit for injunctive relief to proceed against the Minnesota attorney general to prohibit his enforcement of an allegedly unconstitutional state statute setting railway rates. 209 U.S. at 148, 161. The Court explained that, in determining whether a state official is a proper defendant, "the important and material fact" is "that the state officer, by virtue of his office, has some connection with the enforcement of the act[;]" and whether the connection "arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *Id.* at 157. The Court ultimately found that, under the attorney general's "power existing at common law, and by virtue of . . . various statutes, [he] had a general duty imposed upon him, which include[d] the right and the power to enforce the statutes of the state . . ." *Id.* at 161. The attorney general's "power by virtue of his office" thus "sufficiently connected him with the duty of enforcement to make him a proper party . . . ." *Id.*

In *Papasan*, this Court affirmed that general duties are enough to satisfy the requisite enforcement connection of *Young*. *Papasan*, 478 U.S. 265, 282 n.14 (1986). The *Papasan* plaintiffs sued the Mississippi SOS, among others, alleging that Mississippi unequally distributed funds from specific lands held under statute in trust for the benefit of Mississippi's public schools. *Id.* at 271–72. The Mississippi SOS argued that the plaintiffs "ha[d] not sued any state officials who could grant the relief requested," and

that the suit was barred by the Eleventh Amendment. *Id.* at 282 n.14. This Court rejected that argument, holding that the Mississippi SOS's general duties satisfied *Young*'s connectedness inquiry because he was "by state statute, responsible for 'general supervision' of the administration by the local school officials" of the lands referenced under the challenged statute. *Id.* (quoting Miss. Code Ann. § 29-3-1(1) (Supp. 1985)).

Like the state officials in *Young* itself and *Papasan*, the Texas SOS has a duty to enforce a statutory scheme, specifically the Election Code. As chief election officer, the Texas SOS has a duty to maintain uniformity with federal law in his interpretation, operation, and application of the signature-comparison procedure, including a duty to provide assistance and written directives and instructions to local officials on the signature-comparison procedure that are in uniformity with federal law. *See supra* pp. 6–10; App.12a–13a (Higginbotham, J., dissenting); *Young*, 209 U.S. at 161; Tex. Elec. Code §§ 31.001, 31.003–31.004. He also has a duty to provide advice and guidance to local officials on the signature-comparison procedure that is in compliance with federal law. *See supra* pp. 6–10; Tex. Elec. Code § 31.004; *Young*, 209 U.S. at 157. These general duties satisfy *Young*'s connectedness inquiry.

Furthermore, the Texas SOS's duties under Election Code Section 31.002 evince a stronger connection to the enforcement of the signature-comparison procedure than each state official's enforcement connection to the challenged law in both *Young* itself and *Papasan*. The Texas SOS satisfies

Young's connectedness inquiry due to Section 31.002, because he has a duty to prescribe the design and content of mail-in voting forms used in the signature-comparison procedure in compliance with federal law.[10] *See supra* pp. 8–10. For instance, under the Election Code and in practice, were it not for the Texas SOS first fulfilling his statutory duty to prescribe the design and content of the ABBM and carrier envelope, local election officials would not have any signatures to compare, or the ability to make a signature-comparison rejection. *Id*. The Texas SOS also satisfies *Young*'s connectedness inquiry because he has a duty to prescribe procedures and the design and content of forms—pursuant to SB1's impracticable and discretionary pre-rejection correction processes—for the signature-comparison procedure that comply with federal law. *See supra* p. 9–10.

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[10] The Fifth Circuit stated that Petitioners waived their argument about the Texas SOS's role in prescribing the design and content of mail-in voting forms pursuant to Election Code Section 31.002. App.8a. However, Petitioners discussed the Texas SOS's duty to prescribe the design and content of mail-in voting forms when making their *Young* arguments in their motion for summary judgment briefing. ROA.2184 n.35; *see also* ROA.178–79 n.5 (citing to ABBM and Tex. Elec. Code §§ 86.013(d), (g)); ROA.5433–35. Petitioners did not specifically cite to Section 31.002 in their briefing because *Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020), which was the first Fifth Circuit case to rule that the Texas SOS satisfies the *Young* exception mainly based on his duty under Section 31.002, was issued over a month after the District Court's motion for summary judgment decision in Petitioners' case. *See infra* pp. 27–29. Accordingly, Petitioners cited to and discussed Section 31.002 on appeal in the Fifth Circuit because of that change in the Fifth Circuit's *Young* jurisprudence. Dkt. 00515781781 at 29–32.

Additionally, the Texas SOS has both threatened to use, and has used, his enforcement power under Election Code Section 31.005 to correct what he considers offending conduct. *See supra* p. 9 & note 7; *see* ROA.2793–94 (SOS 30(b)(6) deposition at 26:4–27:1); *see also Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 831 (S.D. Tex. 2012), *rev'd on other grounds sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (noting that the Texas SOS may order election officials to correct offending conduct in the administration of an election, and that "the [Texas SOS] admitted in this [c]ourt that—through the Texas Attorney General—[the Texas SOS] can [also] bring a suit in her name to obtain a writ of mandamus against any county official who refuses to follow her interpretations of the voting laws"); *La Unión Del Pueblo Entero, et al. v. Abbott, et al.*, 5:21-cv-844-XR at Dkt. 448 n.13 (W.D. Tex. 2022) (Bexar County EVC testifying that she followed the Texas SOS's interpretation of the challenged statute by refusing to provide voters with disabilities a reasonable modification only because she feared that the Texas SOS would request that the Texas Attorney General impose civil penalties against her); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59–60, 67–68 (1963) (finding a constitutional violation by a Rhode Island Commission created "to investigate and recommend" criminal proceedings against booksellers for circulating potentially "obscene" materials, even though the Commission argued that it lacked "power to apply formal legal sanctions," and citing *Young* for the proposition that "[t]he acts and practices of [the Commissioner] . . . were performed under color of state law and so constituted acts of the State," even though

the Commission had no law enforcement authority and was limited to informal sanctions).

The Fifth Circuit's decision below directly conflicts with this Court's precedent in *Young* and *Papasan*. This Court should accept this petition and reverse the Fifth Circuit's decision to hold that the Texas SOS's duties and authority to enforce the signature-comparison procedure are sufficient to satisfy the requisite enforcement connection of *Young*.

III. Certiorari Is Also Warranted Because the Fifth Circuit's Approach Seriously Undermines *Young*.

Beginning with *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), the Fifth Circuit has misapplied this Court's precedent and weakened the role played by *Young* in vindicating the supremacy of federal rights.

In *Okpalobi*, the en banc Fifth Circuit determined that providers of abortion services lacked Article III standing to sue the Louisiana governor and attorney general in order to challenge a state statute that created a private tort cause of action against doctors who performed abortions. *Id.* at 424–30. Before reaching the issue of standing, however, a seven-member plurality first determined that the governor and attorney general were insufficiently connected under *Young* to the enforcement of that statute. *Id.* at 410–24 (Jolly, J., plurality op. with regard to the *Young* analysis). In so finding, the plurality opined that *Young*'s requirement of "some connection with the enforcement of the [challenged] act" requires demonstrating that an official has a "special charge" or "particular duty to enforce the statute in question"

as well as "a demonstrated willingness to exercise that duty." *Id.* at 413, 416–17, 419.

The remaining seven members of the en banc panel, in a splintered set of concurrences and dissents, declined to join the plurality's treatment of *Young*. Judge Parker, writing for himself and three others, characterized the plurality's decision as "excessively narrow[ing] the scope of *Young*'s principles and undermin[ing] the supremacy of federal rights," and as "directly contradict[ed]" by this Court's decision in *Papasan*. *Okpalobi*, 244 F.3d at 445, 447 (Parker, J., dissenting) (citing *Papasan*, 478 U.S. at 282 n.14). Judge Benavides described it as "misconstruing" and "neglect[ing] our constitutional responsibility, expressed in *Young*, to redress ongoing violations of federal law and thus insure the supremacy of the Constitution." *Okpalobi*, 244 F.3d at 436–37 (Benavides, J., concurring in part and dissenting in part).

Judge Higginbotham, writing for himself and Judge King, also declined to join the plurality's treatment of *Young*. *Id.* at 429 & n.1 (Higginbotham, J., concurring). He stated that though "some apparently see [*Young*] as a threat to the sovereign role of states that must be tamed," in his view, standing doctrine was "more than adequate to its task of vindicating [the] . . . principles of federalism and separation of powers" while "*Young* poses no threat to the Eleventh Amendment or to the fundamental tenets of federalism." *Id.* at 431–32.

Since *Okpalobi*, the Fifth Circuit has increasingly narrowed *Young*, with recent decisions pushing the doctrine toward a case-by-case, piecemeal approach that all but replaces Article III standing analysis.

A. The Fifth Circuit's "Connectedness" Requirement Is Too Stringent and Weakens the Role that *Young* Plays in Protecting Federal Rights.

On October 14, 2020, the Fifth Circuit issued *Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020) [hereinafter *TDP*]. Although it acknowledged that *Okpalobi* was non-binding precedent and that "[t]his circuit has not spoken with conviction about all relevant details of the 'connection' requirement," it went on to declare that "the plaintiff *at least must* show the defendant has 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *TDP*, 978 F.3d at 179 (emphasis added) (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). By explicitly adopting this standard—taken from *Morris*, which had itself taken it directly from the *Okpalobi* plurality opinion—the Fifth Circuit made the *Okpalobi* plurality's *heightened* connectedness standard the new *floor* for establishing the applicability of *Young*. *TDP*, 978 F.3d at 179 (citation omitted); *Morris*, 739 F.3d at 746. Under this standard, determining "the requisite connection to the enforcement of the particular statutory provision that is the subject of the litigation" necessitates a "provision-by-provision analysis." *TDP*, 978 F.3d at 179; *see also Mi Familia Vota v. Abbott*, 977 F.3d 461, 468–69 (5th Cir. 2020) (also issued on October 14, 2020, and also engaging in a provision-by-provision analysis of the Texas SOS's connection to the use of paper ballots in counties participating in Texas's Countywide Polling Place program).

According to the panel, this followed from this Court's statement in *Coeur d'Alene* that "[a] case-by-case approach to the *Young* doctrine has been evident from the start." *TDP*, 978 F.3d at 179 (quoting *Coeur d'Alene*, 521 U.S. at 280). But this statement in the principal opinion, written by Justice Kennedy, was joined only by Justice Rehnquist. *See Coeur d'Alene*, 521 U.S. at 280; *see also Okpalobi*, 244 F.3d at 432 & n.14 (Higginbotham, J., concurring). The remaining seven justices in *Coeur d'Alene* explicitly rejected such a case-by-case framing of *Young*. 521 U.S. at 291 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he principal opinion reasons that federal courts determining whether to exercise jurisdiction over any suit against a state officer must engage in a case-specific analysis of a number of concerns. . . . This approach unnecessarily recharacterizes and narrows much of our *Young* jurisprudence."); *id.* at 297 (Souter, J., dissenting) ("The principal opinion would redefine the [*Young*] doctrine, from a rule recognizing federal jurisdiction to enjoin state officers from violating federal law to a principle of equitable discretion as much at odds with *Young*'s result as with the foundational doctrine on which *Young* rests.").

The Fifth Circuit relied heavily on *TDP*'s new framing of *Young* to find that the Texas SOS lacks a sufficient connection to the enforcement of the signature-comparison procedure in the decision below as well as to the Election Code provisions challenged in the companion cases of *Lewis v. Scott*, 28 F.4th 659, 663–64 (5th Cir. 2022), and *Texas Alliance for Retired Americans v. Scott*, 28 F.4th 669, 671–74 (5th Cir. 2022) [hereinafter *TARA*]. In doing so, the Fifth Circuit characterized the heightened standard from

the *Okpalobi* plurality as controlling—a "guidepost[]" from Fifth Circuit precedent. *See TARA*, 28 F.4th at 672. Applying this narrowed interpretation of *Young* in the case below, the Fifth Circuit held that the Texas SOS has no connection to the signature-comparison procedure even though, as set out above, the Texas SOS, at law and in fact, enforces the mail-in ballot process from start to finish, including the signature-comparison procedure. App.6a; *supra* pp. 6–10. Instead, the Fifth Circuit insisted that only local election officials are sufficiently connected to the enforcement of that procedure because the Texas SOS does not directly compare voter signatures himself. App.6a. This interpretation of this Court's precedent nullifies *Young*, which requires only "some connection" to enforcement of the challenged law.

Application of the provision-by-provision analysis exemplifies the Fifth Circuit's continued narrowing of the applicability of *Young* and undermines the ability of plaintiffs to vindicate the supremacy of federal rights. This Court should grant review to resolve this issue.

B. The Fifth Circuit's Approach Recharacterizes the *Young* Inquiry to Improperly Include Article III's Redressability Prong.

The Fifth Circuit has re-framed *Young* to require a plaintiff to demonstrate the defendant is capable of providing injunctive relief. In *Mi Familia Vota*, the Fifth Circuit characterized *Young*'s connectedness inquiry as including whether enjoining the Texas SOS would "afford the [p]laintiffs the relief that they seek." 977 F.3d at 468. Because the Fifth Circuit's answer

was no, the Texas SOS was not a proper defendant under *Young*. *Id.* The decision below and *TARA* relied on that framing, with the *TARA* going so far as to define "[t]he [*Young*] question" as being "whether th[e] injunction [sought by plaintiffs] would constrain election officials to restore straight-ticket voting, which is what [p]laintiffs want." *TARA*, 28 F.4th at 673 (citing *Mi Familia Vota*, 977 F.3d at 468); App.8a (citing *Mi Familia Vota*, 977 F.3d at 467–68).

In the decision below—despite the fact that Petitioners would be provided with relief were the Fifth Circuit to instruct the Texas SOS to take actions he is explicitly empowered by the Election Code to take[11]—the Fifth Circuit found that the Texas SOS's duties under the Election Code were insufficient to satisfy *Young*. App.8a. The Fifth Circuit specifically held that "[t]he code confers the duty to verify ballots on local officials, not the [Texas SOS] . . . . So, enjoining the [Texas SOS] to change the balloting forms 'would not afford the Plaintiffs the relief that they seek, and therefore, the [Texas SOS] is not a proper defendant.'" App.8a (citing *Mi Familia Vota v. Abbott*, 977 F.3d at 467–68).

But this Court has never indicated that the *Young* analysis involves asking whether the official can *provide* the requested injunctive relief, which is more appropriately—and logically—answered through the redressability prong of the standing inquiry. *Cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("Standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim

[11] For instance, to remove the signature lines from the ABBM and carrier envelope, or the signature-comparison rejection checkbox from the rejection notice.

that they press and for each form of relief that they seek (for example, injunctive relief and damages)." (cleaned up)); *Okpalobi*, 244 F.3d at 431 (Higginbotham, J., concurring) ("Treating the requisites of standing as requirements internal to [*Young*] is confusing" and "[i]f this is the same inquiry as standing, as it appears to be, we should be applying the doctrine of standing."); *id.* at 430–31 (noting that where officials without power to provide injunctive relief are sued, that "does not alter the relief sought. Rather, the flaw [for purposes of *Young*] is that if the suit is against the wrong officials, no claim for injunctive relief has been stated.").

By creating a "*Young*-redressability" requirement that in many cases will be narrower than that necessary to establish Article III standing, the Fifth Circuit has barred the courthouse door to many would-be plaintiffs seeking to protect their federal rights. *Compare* App.7a *with OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017) (citing Tex. Elec. Code 31.001) ("The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by . . . the [Texas SOS], who serves as the 'chief election officer of the state.'"). In doing so, the Fifth Circuit "continues [its] effort [begun in *Okpalobi*] to shrink the role of [*Young*] by overly narrow readings of the state officer's duty to enforce Texas's election laws." App.12a (Higginbotham, J., dissenting). The end result is to take *Young* far afield from the doctrine's purpose, of vindicating the supremacy of federal law, and from the straightforward inquiry set out by this Court—usurping the role of standing in the process. This Court should grant review to resolve this issue.

IV. The Question Presented Is Important and This Case Is an Excellent Vehicle for Resolving It.

As shown throughout this petition, the proper application of *Young* is an important question warranting this Court's review. This Court has repeatedly recognized *Young* "as necessary to 'permit the federal courts to vindicate federal rights.'" *See, e.g.*, *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254–55 (2011). The *Young* case, "'ostensibly only dealing with the jurisdiction of the federal courts, remains a landmark in constitutional law[,]' and its doctrine 'seems indispensable to the establishment of constitutional government and rule of law.'" Charles Alan Wright et al., The Law of Federal Courts § 48, at 314 (6th ed. 2002). *Young* is thus considered "one of the three most important decisions [this Court] has ever handed down." Michael E. Solimine, *An Interbranch Perspective*, 40 U. of Toledo Law Rev. 999 (2009) (quoting Charles Alan Wright et al., Federal Practice and Procedure § 4231, at 559 (2d ed. 1988)).[12]

This case presents the *Young* question in a particularly important context because it involves an elections issue. Since, under the Elections Clause of the Constitution, the states prescribe the "Times, Places and Manner of holding Elections" subject to federal law, chief election officers for states, like the Texas SOS, play a vital role in holding elections and avoiding or remedying constitutional violations

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[12] The other two decisions cited by Professor Wright were *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See* Solimine, *supra*, p. 32.

involving election administration. U.S. Const. art. I, § 4, cl. 1.

Moreover, if this Court were to allow the Fifth Circuit's decision to stand, its reasoning would almost certainly foreclose plaintiffs' ability to litigate most election law issues against Texas's chief election officer in federal court. *See supra* pp. 25–31. Indeed, the Texas SOS is already relying on the Fifth Circuit's decision below, its companion cases, and its other recent cases to argue he is an improper defendant in elections cases brought against him in federal court. *See, e.g.*, *La Unión Del Pueblo Entero, et al.*, 5:21-cv-844-XR at Dkt. 448 at 6–19. As explained above, a decision by this Court would also clarify the differences between the *Young* and standing doctrines. *See supra* pp. 25–31.

This petition presents an ideal vehicle to address the application of *Young* to state official action. The issue is squarely presented. The Fifth Circuit expressly decided the question presented in a published opinion. The District Court made detailed findings of fact that are undisputed and there is a complete record.

The question presented also warrants this Court's attention due to the staggering number of cases that *Young* affects. The decision below is not cabined to the elections context and has far-reaching implications for parties seeking redress against state officials who violate federal rights while enforcing any statutory scheme that delegates activities between state and local officials. Answering the question presented here would provide substantial guidance to the lower courts on how to apply *Young*'s connectedness inquiry

against state agency officials in the elections context and beyond.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 16, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

March 16, 2022, Filed

No. 20-50774

DOCTOR GEORGE RICHARDSON; ROSALIE WEISFELD; MOVE TEXAS CIVIC FUND; LEAGUE OF WOMEN VOTERS OF TEXAS; AUSTIN JUSTICE COALITION; COALITION OF TEXANS WITH DISABILITIES,

Plaintiffs-Appellees,

versus

FEDERICO FLORES, JR.; MARIA GUERRERO; VICENTE GUERRERO,

Movants-Appellants,

versus

JOHN SCOTT, in his official capacity as the Texas Secretary of State,

Defendant-Appellant-Appellee.

Appendix A

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:19-CV-963

Before HIGGINBOTHAM, WILLETT, and DUNCAN, C*ircuit Judges*. PATRICK E. HIGGINBOTHAM, *Circuit Judge,* dissenting.

STUART KYLE DUNCAN, *Circuit Judge*:

Plaintiffs challenged Texas's system for verifying the signatures on mail-in ballots. Based on purported constitutional defects in that system, the district court issued a detailed injunction against the Texas Secretary of State. But the Secretary does not verify mail-in ballots; that is the job of local election officials. Sovereign immunity therefore bars the injunction. We reverse the district court's order, vacate the injunction, and remand for further proceedings.

I.

A.

First, we sketch Texas's system for verifying mail-in ballots.[1]

1. For more detail, we refer the reader to the motions panel opinion. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 224-26 (5th Cir. 2020).

Appendix A

An eligible voter applies for a mail-in ballot by timely signing and mailing an application to the early voting clerk. TEX. ELEC. CODE[2] § 84.001(a), (b), (d).[3] Upon receiving a proper application, the early voting clerk mails the voter balloting materials, including the ballot, ballot envelope, and carrier envelope. §§ 86.001(b), 86.002(a), 86.003(a). The voter then fills out the ballot, seals the ballot envelope, places it in the carrier envelope, and timely returns it. §§ 86.005(c), 86.007. The voter must sign the certificate on the carrier envelope. §§ 86.005(c), 86.013(c).

The Early Voting Ballot Board ("EVBB") is responsible for processing mail-in ballots. § 87.001. The ballots are verified by the EVBB or initially by a Signature Verification Committee ("SVC"), if one is appointed. §§ 87.041(a), 87.021(2), 87.022-024, 87.027(a), (h). The EVBB and the SVC compare the signatures on the ballot application and the carrier envelope certificate, as well as signatures already on file. §§ 87.041(b)-(e), 87.027(h)-(i). Either body may accept or reject ballots based on signature comparisons. §§ 87.027(i), (j), 87.041(b), (d). The EVBB, however, may overrule the SVC's rejection of a ballot and accept the ballot. § 87.027(j).

Following its review, the EVBB secures rejected ballots and delivers them to the general custodian of election records. § 87.043(c). No more than ten days after

2. All references to statutory sections in this opinion are to the Texas Election Code as effective for the 2020 General Election.

3. A witness may sign if the applicant cannot "because of a physical disability or illiteracy." § 1.011(a).

an election, the EVBB must notify a voter in writing that his ballot was rejected. § 87.0431(a). No more than thirty days after an election, the early voting clerk must notify the Attorney General of the EVBB's rejections and provide certified copies of balloting materials. § 87.0431(b).

B.

In August 2019, Plaintiffs[4] filed suit challenging this verification system. They brought claims under the due process and equal protection clauses of the Fourteenth Amendment, as well as the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. The named defendants were the Secretary of State[5] ("the Secretary"), in her official capacity, as well as two local election officials.

After denying the Secretary's motion to dismiss and receiving cross-motions for summary judgment, in September 2020 the district court granted Plaintiffs partial summary judgment on their constitutional claims and ordered "detailed and lengthy" injunctive relief pertaining to the November 2020 election. *Richardson v. Tex. Sec'y of State* (*Richardson II*), 978 F.3d 220, 227

4. Plaintiffs are individuals (Dr. George Richardson and Rosalie Weisfeld) who claim their votes have been previously rejected based on signature mismatches, as well as organizations (Austin Justice Coalition, Coalition of Texans With Disabilities, Move Texas Civic Fund, and League of Women Voters of Texas) whose members or services are allegedly impacted by the challenged system.

5. Ruth Hughs, the Secretary when suit was filed, has been replaced by John Scott.

(5th Cir. 2020); *see also Richardson v. Tex. Sec'y of State* (*Richardson I*), 485 F. Supp. 3d 744, 801-03 (W.D. Tex. 2020).

The Secretary timely appealed, and a motions panel stayed the injunction. *Richardson II*, 978 F.3d at 224. While declining to reach standing or sovereign immunity, the panel found the Secretary likely to succeed on the merits because Texas's system did not implicate due process rights and survived the *Anderson / Burdick* test. *Id.* at 228-33, 235-41.[6] The panel also concluded that the injunction likely went beyond the remedy available under *Ex parte Young* by purporting to "control the Secretary in [the] exercise of *discretionary* functions." *Id.* at 241; *see Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Judge Higginbotham concurred on the grounds that the Supreme Court has "consistently counseled against court-imposed changes to 'election rules on the eve of an election.'" *Richardson II*, 978 F.3d at 244 (Higginbotham, J., concurring) (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, _U.S. _, 140 S. Ct. 1205, 1207, 206 L. Ed. 2d 452 (2020) (per curiam)).

6. Under *Anderson / Burdick*, a law that does not place a "severe" burden on voting rights will be upheld if it is a "reasonable, nondiscriminatory restriction" justified by "the State's important regulatory interests." *Richardson II*, 978 F.3d at 233 & n.26 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983); *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)). Instead of *Anderson / Burdick*, the district court applied the due process analysis from *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *Richardson I*, 485 F. Supp. 3d at 778. The motions panel held *Eldridge* was the wrong test. *Richardson II*, 978 F.3d at 233-34.

II.

"We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *Planned Parenthood of Greater Tex. v. Kauffman*, 981 F.3d 347, 354 (5th Cir. 2020) (en banc) (citation omitted). Similarly, "[w]e review the district court's jurisdictional determination of sovereign immunity *de novo*." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019), *cert. denied* __ U.S. __, 141 S. Ct. 1047, 208 L. Ed. 2d 519 (2021).

III.

The Secretary raises sovereign immunity as a threshold ground for reversal. He contends that, because he does not enforce the challenged ballot verification system, Plaintiffs' suit falls outside the *Ex parte Young* exception to sovereign immunity. *See Ex parte Young*, 209 U.S. at 157 (state officer defendant must have "some connection with the enforcement of the act"). We agree.

Plaintiffs claim the process of verifying signatures on mail-in ballots violates their rights under the Fourteenth Amendment and federal disability laws. But, as discussed, the Texas Election Code places those duties in the hands of local election officials: the early voting clerk, the EVBB, and the SVC. *See Richardson II*, 978 F.3d at 224-26. The Secretary has no enforcement role. *See Lewis v. Scott*, No. 20-50654, _ F.4th __, 2022 U.S. App. LEXIS 6795 at *6 (5th Cir. March 16, 2022) (holding "[i]t is local election officials, not the Secretary, who verify voters' signatures

and notify voters of a mismatch"). "Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, our *Young* analysis ends." *City of Austin*, 943 F.3d at 998 (citation omitted).

To find the required connection, the district court relied on the Secretary's broad duties to oversee administration of Texas's election laws. *See Richardson I*, 485 F. Supp. 3d at 771-72 (citing §§ 31.001-.005). Since then, however, our precedent has clarified that the Secretary's "general duties under the [Texas Election] Code" fail to make the Secretary the enforcer of specific election code provisions. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 180 (5th Cir. 2020) (citing §§ 31.003-.004).[7] More is needed—namely, a showing of the Secretary's "connection to the enforcement of the particular statutory provision that is the subject of the litigation." *Id.* at 179; *see also City of Austin*, 943 F.3d at 999-1000 (distinguishing "general duty" to implement state law from "particular duty to enforce the statute in question" (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014))). "Th[at] is especially true here because the Texas Election Code delineates between the authority of the Secretary of State and local officials." *Tex. Democratic Party*, 978 F.3d at 179. None of the general duties cited by the district

7. *See also Bullock v. Calvert*, 480 S.W.2d 367, 371-72 (Tex. 1972) (Reavley, J.) (rejecting argument that Secretary's role as "chief election officer" or his duty to "maintain uniformity" in application of election laws are "a delegation of authority to care for any breakdown in the election process"); *In re Hotze*, 627 S.W.3d 642, 649 (Tex. 2020) (Blacklock, J., concurring) (same).

court shows that the Secretary enforces the particular verification provisions challenged here. *See Lewis*, No. 20-50654, 2022 U.S. App. LEXIS 6795 [slip op.] at 5-7 (reaching same conclusion).[8]

Plaintiffs argue enforcement authority is evident in election code section 31.002, which requires the Secretary to prescribe the "design and content" of forms local officials use. Plaintiffs did not make this argument in the district court, so it is waived. *See Certain Underwriters at Lloyd's v. Axon Pressure Prods. Inc.*, 951 F.3d 248, 273 n.20 (5th Cir. 2020). But even had they not waived it, the argument would fail. Plaintiffs do not challenge the design or content of the forms associated with mail-in balloting. Rather, they challenge the processes of verifying mail-in ballots and notifying voters. The code confers the duty to verify ballots on local officials, not the Secretary. *See Lewis*, No. 20-50654, 2022 U.S. App. LEXIS 6795, [slip op.] at 5. So, enjoining the Secretary to change the balloting forms "would not afford the Plaintiffs the relief that they seek, and therefore, the Secretary of State is not a proper defendant." *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467-68 (5th Cir. 2020) (citation and internal quotation marks omitted).[9]

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8. For those reasons, we must respectfully disagree with our esteemed colleague's erudite dissenting opinion. *See post*, at 2.

9. For that reason, our decision in *Texas Democratic Party v. Abbott* is distinguishable. There, we held the Secretary enforced a challenged age restriction on mail-in voting, because she created the mail-in application form that local officials had to use. 978 F.3d at 180. Here, Plaintiffs challenge not the mail-in forms but how local officials verify the signatures on those forms. *See Tex. All.*

Plaintiffs also argue the Secretary's enforcement authority is shown because the Secretary has issued various advisories to local officials about ballot verification. We disagree. "Enforcement" for *Young* purposes means "compulsion or constraint." *City of Austin*, 943 F.3d at 1000 (quoting *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010)). Offering advice, guidance, or interpretive assistance does not compel or constrain local officials in fulfilling their duty to verify mail-in ballots. *See Tex. All. for Retired Ams. v. Scott*, No. 20-40643, __ F.4th __, 2022 U.S. App. LEXIS 6861, [slip op.] at 6 (5th Cir. March 16, 2022).

Nor, finally, is the Secretary's enforcement authority shown by the fact that the Secretary wrote a letter to Harris County about a different election code provision. Even assuming the letter showed the Secretary "enforced" some mail-in ballot provisions, an official's choice "to defend *different* statutes under *different* circumstances does not show that he is likely to do the same here." *City of Austin*, 943 F.3d at 1002.

In sum, the district court erred in finding the Secretary was the proper defendant under *Ex parte Young*.

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for Retired Ams. v. Scott, No. 20-40643, __ F.4th __, 2022 U.S. App. LEXIS 6861, [slip op.] at 7 (5th Cir. March 16, 2022) (distinguishing *Texas Democratic Party v. Abbott*).

IV.

We REVERSE the district court's order, VACATE the preliminary injunction, and REMAND for further proceedings consistent with this opinion.[10]

10. Also before us is an appeal of the district court's denial of permissive intervention to Appellants Federico Flores Jr., Maria Guerrero, and Vicente Guerrero, who challenged the same provisions in separate litigation. Finding no abuse of the district court's discretion, we DISMISS that appeal for lack of jurisdiction. *See Sommers v. Bank of Am., N.A.*, 835 F.3d 509, 512 (5th Cir. 2016).

Appendix A

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, dissenting:

I must dissent with this case as well as its companion cases.[1] None present an issue of sovereign immunity, as the Eleventh Amendment does not bar these claims under the Fourteenth Amendment. Our issue is rather the antecedent question of Article III standing, turning on injury and redressability.

I.

I write to remind failing memories of the signal role of *Ex parte Young* in directly policing the path of cases and controversies to the Supreme Court from our state and federal courts and warn against its further diminution.[2] As I explained over twenty years ago in *Okpalobi v. Foster*, "*Ex parte Young* poses no threat to the Eleventh Amendment or to the fundamental tenets of federalism. To the contrary, it is a powerful implementation of federalism necessary to the Supremacy Clause, a stellar companion to *Marbury* and *Martin v. Hunter's Lessee*."[3] Just as then, "the destination of the majority's trek today is inevitably a narrowing of the doctrine of *Ex parte Young* . . . I decline passage on that voyage. I decline because I am persuaded

1. *Tex. Alliance for Retired Americans v. Scott*, No. 20-40643, F.4th _, 2022 U.S. App. LEXIS 6861 (5th Cir. March 16, 2022); *Lewis v. Scott*, No. 20-50654, _ F. 4th _, 2022 U.S. App. LEXIS 6795 (5th Cir. March 16, 2022).

2. 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

3. *Okpalobi v. Foster*, 244 F.3d 405, 432 (5th Cir. 2001) (Higginbotham, J. *concurring*).

that familiar principles of standing are better suited to answer these questions with less risk to the vital role of *Ex parte Young*."[4]

The majority continues this Court's effort to shrink the role of *Ex parte Young*, by overly narrow readings of the state officer's duty to enforce Texas's election laws. Unlike in *Okpalobi* "where the defendants had no enforcement connection with the challenged statute,"[5] the Texas Secretary of State is the "chief election officer of the state" and is directly instructed by statute to "obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code."[6] Moreover, the Secretary is charged to "take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes" and "to correct offending conduct."[7] Although recent decisions by this Court have split hairs regarding the level of enforcement authority required to satisfy *Ex parte Young*,[8] the Secretary is charged to interpret both the

4. *Id.*

5. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017).

6. Tex. Elec. Code § 31.001(a) and Tex. Elec. Code § 31.003.

7. Tex. Elec. Code § 31.005(a), (b).

8. *Compare Mi Familia Vota v. Abbott*, 977 F.3d 461 (5th Cir. 2020); *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019); *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) *with Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020); *Texas*

Texas Election Code and the election laws outside the Code, including federal law, to gain uniformity, tasks it is clearly bound to do.[9] The allegation in these cases is that the Secretary is failing in that duty. This charge should satisfy our *Ex parte Young* inquiry.

II.

None other than the inimitable Charles Alan Wright saw *Ex parte Young* as "indispensable to the establishment of constitutional government and the rule of law."[10] Professor Wright's views, drawn as they were from a lifetime of disciplined study stand on their own, gaining their strength from years of recording judicial performance and the currency of our system by the teachings of the Constitutional Convention and the acts of our first Congress. This is the wisdom of a scholar and practitioner, here grounded by the reality that *Ex parte Young* brings the axis necessary for the courts to harness the power vested in them by the Constitutional Convention of 1787—the direction of the flow to the Supreme Court of challenges to the validity of state action, a function essential to the splitting of the atom of sovereignty in a sovereign nation of sovereign states in a young republic and today.

Democratic Party v. Abbott, 961 F.3d 389, 401 (5th Cir. 2020); *Fusilier v. Landry*, 963 F.3d 447, 455 (5th Cir. 2020); *OCA-Greater Houston*, 867 F.3d at 613-14.

9. *See Texas Democratic Party*, 961 F.3d at 401; *City of Austin*, 943 F.3d at 1002.

10. Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 14 (6th ed. 2002).

The three-judge district courts, with direct appeal to the Supreme Court, were quickly established as a needed counter to the reach of *Ex parte Young*.[11] And with this concern faded by the creation of three-judge district courts, there came a list of seminal decisions protecting civil liberties, long and distinguished.[12] Recall that it was a three-judge district court, with its injunctive power, that brought *Brown v. Board of Education* to the federal courts, sustaining the integration of public schools.[13]

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11. 36 Stat. 557; Michael E. Solimine, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1956-76*, 72 Case W. Res. L. Rev. __, *4-5 (forthcoming); Barry Friedman, *The Story of* Ex parte Young, *in* Federal Courts Stories 269-71 (Vicki C. Jackson and Judith Resnick ed., 2010).

12. *See e.g., Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), *aff'g Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary* 296 F. 928 (D. Ore. 1924); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), *aff'g Barnette v. W. Virginia State Bd. of Educ.*, 47 F. Supp. 251, 252 (S.D.W. Va. 1942); *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), *rev'g Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959); *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), *rev'g Harris v. Younger*, 281 F. Supp. 507, 508 (C.D. Cal. 1968); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), *rev'g Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281 (W.D. Tex. 1971); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *aff'g Roe v. Wade*, 314 F. Supp. 1217, 1219 (N.D. Tex. 1970).

13. 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 98 F. Supp. 797 (D. Kan. 1951), *rev'd sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio Law Abs. 584 (1955). *See also Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951) *and Davis v. County School Bd.*, 103 F. Supp. 337 (E.D. Va. 1952).

III.

Another strand of history completes the relevant frame for this state-federal tension. While the need for a Supreme Court was never an issue for the delegates at the Constitutional Convention, as its absence was a driving force for its convening, whether to create a tier of lower courts divided the delegates. The cornerstone Madisonian Compromise resolved the impasse—authorizing Congress to create the lower federal courts. And it did, over resistance born of a concern of potential federal court intrusion into state affairs, the work of its judiciary. That lingering concern of the Convention led the first Congress to enact the Anti-Injunction Act: providing that "a writ of injunction [shall not] be granted to stay proceedings in any court of a state," assuring direct review of state courts by the Supreme Court.[14] An exception clause later added: "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[15] And there it rested, through the Civil War with its attending Constitutional amendments.

With the turn of the century, we entered the *Lochner* period, characterized by federal injunctions blocking state efforts to address social issues in the rising industrial world.[16] It is significant that from Reconstruction to the

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14. 1 Stat. 333 § 5 (1793).

15. 28 U.S.C.A. § 2283 (West).

16. *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

Lochner era, lawyers seldom reached for § 1983 given its inclusion of the language of the Privileges and Immunities Clause, language neutered in the *Slaughterhouse* cases.[17] In more recent times, § 1983 came to be a major pathway to the lower federal courts, prompting challenges to its injunctive power as violating the Anti-Injunction Act. The Supreme Court's response sheds light on the wielding and melding of federal injunctions and our federalism.

From these threads of history, the Supreme Court in *Mitchum v. Foster* laid bare the subtle relationship of the Anti-Injunction Act, § 1983, and *Ex parte Young*. The Court saw the then sixty-four-year-old *Ex parte Young* as a critical valve to direct the flow of cases from the state courts to the Supreme Court.[18] Justice Stewart explained that "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted."[19] Congress was "concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts."[20] He continued:

17. 83 U.S. 36, 21 L. Ed. 394 (1872).

18. *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972).

19. *Id.*; 42. U.S.C. § 1983.

20. *Mitchum*, 407 U.S. at 242.

> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."[21]

Mitchum v. Foster is itself a contemporary example of the on-going allocation of the flow of cases to the Supreme Court from the state courts and the Congressionally created lower federal courts, as well as the role of *Ex parte Young* in that cast.

In sum, *Ex parte Young*, birthed as a tool of the *Lochner* period, proved its effectiveness in sustaining challenges to state efforts to protect workers. *Mitchum v. Foster* presents as a parallel—protecting civil rights—giving to civil rights claimants a § 1983 with the power of the injunction, albeit not always a path around the Eleventh Amendment.

IV.

Here however, as it was in *Okpalobi*, the threshold question is standing, the Article III door to the federal courthouse, which the majority stepped past. Standing doctrine was a product of the shift to the public law model. With its focus upon injury and redressability, it rejected

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21. *Id.* (quoting *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676 (1879)).

an ombudsman role for the federal courts. Here, as all three of our cases bring claims of constitutional violation under § 1983, there is no immunity issue, no necessary role for *Ex parte Young*.[22] As the state has no immunity from enforcement of the Fourteenth Amendment here,[23] the remaining inquiry is standing—itself a constitutional demand of injury and redressability.[24]

Under a proper Article III analysis, these suits have a redressable injury because the Secretary is directed by the election laws of Texas to interpret and conform the election code to other election laws (as federal law is state law). Power to interpret to gain uniformity with state and federal law is power to enforce.[25] And "our precedent suggests that the Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code . . . to support standing."[26] Again, the claim

22. These three cases also present claims under the Voting Rights Act and the Americans with Disabilities Acts, where Congress has specifically abrogated state sovereign immunity. *See e.g., Tennessee v. Lane*, 541 U.S. 509, 534, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004); *Fusilier*, 963 F.3d at 455; *OCA-Greater Houston*, 867 F.3d at 614.

23. *Reynolds v. Sims*, 377 U.S. 533, 537, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976).

24. *E.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

25. Tex. Elec. Code § 31.001(a) and Tex. Elec. Code § 31.003. *See Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947).

26. *Texas Democratic Party*, 961 F.3d at 401 (citing *OCA-Greater Hous.*, 867 F.3d at 613).

is that the Secretary failed to discharge that duty or has done so in an unconstitutional manner. These claims can proceed if there is standing with its requirement of injury and redressability.

In sum, I am persuaded that these cases ought not fail on standing or sovereign immunity grounds. Rather, we should have fully considered the merits of the plaintiffs' arguments, especially where these cases also present claims under the Voting Rights Act and Americans with Disabilities Act, thin though they all may be.[27]

V.

Even this quick glance back sheds light on threshold questions of the role of the Court in protecting the most vital Constitutional right of a democratic government: the right to vote. And so, I am troubled by this Court's narrowing of *Ex parte Young*. *Ex parte Young* is no culprit.[28]

About this we can agree, partisan views ought to prevail by persuading voters, not by denying their right to vote. With respect to my able colleagues, I must dissent.

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27. *See e.g., Lane*, 541 U.S. at 534; *Fusilier*, 963 F.3d at 455; *OCA-Greater Houston*, 867 F.3d at 614.

28. *Okpalobi*, 244 F.3d at 432.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 19, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-50774

DOCTOR GEORGE RICHARDSON; ROSALIE WEISFELD; MOVE TEXAS CIVIC FUND; LEAGUE OF WOMEN VOTERS OF TEXAS; AUSTIN JUSTICE COALITION; COALITION OF TEXANS WITH DISABILITIES,

Plaintiffs-Appellees,

v.

Texas Secretary of State, RUTH R. HUGHS,

Defendant-Appellant.

October 19, 2020, Filed

Appeal from the United States District Court
for the Western District of Texas.
No. 5-19-CV-963.

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges.*

JERRY E. SMITH, *Circuit Judge*:

Appendix B

The United States is a few days from the November 3, 2020, General Election. Texas officials are preparing for a dramatic increase of mail-in voting, driven by a global pandemic.[1] One of their many pressing concerns is to ensure the integrity of the ballot by adhering to the state's election-security procedures. And the importance of electoral vigilance rises with the increase in the number of mail-in ballots, a form of voting in which "the potential and reality of fraud is much greater . . . than with in-person voting." *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc). "Absentee ballots remain the largest source of potential voter fraud . . . ."[2]

In a well-intentioned but sweeping order issued less than two months before the election,[3] however, the district court minimizes Texas's interest in preserving the integrity of its elections and takes it upon itself to rewrite the Legislature's mail-in ballot signature-verification and voter-notification procedures. At a time when the need to ensure election security is at its zenith, the district court orders that, if the Secretary of State does not adopt its preferred procedures, election officials must stop altogether rejecting ballots with mismatched signatures.

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1. *See, e.g.*, John Engel, *'I'm worried': Texas election officials prepare for record-breaking mail-in voting*, KXAN (Aug. 13, 2020), https://www.kxan.com/news/texas-politics/im-worried-texas-election-officials-prepare-for-record-breaking-mail-in-voting/.

2. Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections 46 (2005) (bipartisan commission).

3. *Richardson v. Hughs*, No. 5-19-CV-963, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216 (W.D. Tex. Sept. 8, 2020).

Appendix B

Because Texas's strong interest in safeguarding the integrity of its elections from voter fraud far outweighs any burden the state's voting procedures place on the right to vote, we stay the injunction pending appeal.

I.

Though it is not constitutionally required to do so,[4] Texas offers qualifying citizens the option to vote by mail. *See* TEX. ELEC. CODE §§ 82.001-004.[5] Specifically, the state extends the privilege to over-65 voters, the disabled, and those either in jail or otherwise absent from their county on election day. *Id.* To further its compelling interest in safeguarding the integrity of the election process, Texas conditions the vote-by-mail privilege on compliance with various safeguards. One of those, at issue here, is signature verification.

To vote by mail, a voter must first apply for a mail-in ballot. § 84.001(a). The applicant must sign, § 84.001(b), and timely submit the application by mail to the early voting clerk, § 84.001(d). A witness may sign the application if the applicant cannot sign because of physical disability or illiteracy. § 1.011(a). Once a voter applies and is deemed

4. *See McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969); *Tex. Democratic Party v. Abbott ("TDP-II")*, No. 20-50407, 978 F.3d 168, 2020 U.S. App. LEXIS 32503, at *32 (5th Cir. Oct. 14, 2020) (revised opinion) (published).

5. All references to statutory sections in this opinion are to the Texas Election Code as effective for the 2020 General Election.

eligible to vote by mail, the Early Voting Clerk must provide the balloting materials to the voter by mail. §§ 86.001(b), 86.003(a). Included in those materials are the ballot, ballot envelope, and carrier envelope. § 86.002(a).

After receiving those materials, a voter who wishes to cast a ballot must fill out the ballot, seal the ballot envelope, place it in the carrier envelope, § 86.005(c), and timely return it, § 86.007. Additionally, the voter must sign[6] the certificate on the carrier envelope, § 86.005(c), which "certif[ies] that the enclosed ballot expresses [the voter's] wishes independent of any dictation or undue persuasion by any person," § 86.013(c).

The Early Voting Ballot Board ("EVBB") is responsible for processing the results of early voting. § 87.001.[7] The Early Voting Clerk may appoint, in addition to the EVBB, a Signature Verification Committee ("SVC"). § 87.027(a).[8]

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6. As with the signature required for the initial application, a witness may sign if the voter cannot sign for reason of physical disability or illiteracy. § 1.011(a).

7. The EVBB in each county has at least three members. § 87.002(a). In a general election, the Code guarantees representation on the board to any political party with a nominee on the ballot. § 87.002(c). Members must swear an oath attesting that, among other things, they "will work only in the presence of a member of a political party different from [their] own" when ballots are present. § 87.006(a).

8. Although the appointment of an SVC typically is discretionary, the Early Voting Clerk must appoint an SVC if he receives a timely written request from fifteen or more voters. § 87.027(a-1). SVCs have at least five members. § 87.027(d). Like the EVBB, the SVC must have representation that is politically diverse. *Id.*

Upon receipt of the mail-in ballots, the Early Voting Clerk must timely deliver the ballots to the SVC or, if no SVC is appointed, to the EVBB. §§ 87.027(h), 87.021(2), 87.022-024. If no SVC is appointed, the EVBB receives and reviews each ballot to determine whether to accept it. § 87.041(a).

Relevant here, the EVBB may accept a ballot "only if . . . neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness . . . ." § 87.041(b)(2). In making that determination, the EVBB compares the two signatures and "may also compare the signatures with any two or more signatures of the voter made within the preceding six years and on file with the county clerk or voter registrar." § 87.041(e). If the EVBB determines that a ballot is not acceptable—as a result of either the signature-verification procedure or another of § 87.041(b)'s requirements—the ballot is rejected, and the vote is not counted. §§ 87.041(d), 87.043(c).

If the Early Voting Clerk appoints an SVC, the committee receives the ballots and makes the signature-verification determination before delivering the ballots to the EVBB. § 87.027(h)-(i). The SVC follows a similar, though slightly more robust, procedure for verifying signatures than does the EVBB. *Compare* § 87.027(i) *with* § 87.041(b)(2). The Code instructs the SVC to compare the two signatures on the ballot application and the carrier envelope certificate "to determine whether the signatures are those of the voter." § 87.027(i). It also permits the SVC

to aid its determination by comparing the two signatures with "any two or more signatures of the voter made within the preceding six years and on file with the county clerk or voter registrar . . . ." *Id.* A determination that the signatures do not belong to the voter "must be made by a majority vote of the committee's membership." *Id.*[9]

Once the SVC has made its signature-verification determinations, the committee's chair delivers the ballots to the EVBB. *Id.* The EVBB follows the same procedures it otherwise would, except that it is bound by the SVC's determination that the signatures belong to the voter. § 87.027(j). Conversely, if the EVBB believes that the SVC erroneously determined that the ballot failed the signature-verification procedure, it may reverse that determination by a majority vote and accept the ballot. *Id.* Thus, if either body determines that the signatures belong to the voter, that determination is final, and the ballot may not be rejected on that basis.

If the EVBB rejects a ballot, it must note the reason on the carrier envelope. § 87.043(d). When its review is complete, the EVBB places the rejected ballots into an envelope or envelopes, records the number of rejected ballots in the envelope, and seals it. § 87.043(a). The EVBB then delivers the rejected ballots to the general custodian of election records. § 87.043(c).

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9. There is a small exception where the committee is comprised of twelve or more members, in which case the clerk may designate subcommittees. § 87.027(*l*). If that occurs, the signature-verification determination may be made by a majority vote of the subcommittee, as distinguished from the larger body. *Id.*

No later than ten days after the date of the election, the EVBB must provide written notice of its rejection to the voter at the address on the ballot application. § 87.0431(a). Not more than thirty days after the election, the Early Voting Clerk must notify the attorney general of the EVBB's rejections and provide the attorney general with certified copies of the rejected voters' carrier envelopes and corresponding ballot applications. § 87.0431(b)(3). Though a voter must receive notice that his ballot was rejected, the Code does not require an opportunity to challenge that decision.[10]

II.

The plaintiffs challenged Texas's absentee-ballot system in August 2019, suing the Secretary of State, Ruth Hughs; the Brazos County Elections Administrator, Trudy Hancock; and the City of McAllen's Secretary, Perla Lara. The plaintiffs—a group comprised of two persons who had absentee ballots rejected in previous elections and organizations involved in voter registration, education, outreach, and support—raised several claims. They maintain that Texas's signature-comparison and voter-notification procedures violate (1) the Due Process Clause of the Fourteenth Amendment, (2) the Equal Protection Clause of the Fourteenth Amendment, (3) the Americans with Disabilities Act, and (4) the Rehabilitation Act of 1973.

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10. *See* § 87.127(a) (providing that "a county election officer . . . may petition a district court for injunctive or other relief" if the officer "determines a ballot was incorrectly rejected or accepted").

Appendix B

The district court denied defendants' motions to dismiss, and the parties conducted discovery, which lasted until May 2020, after which both sides moved for summary judgment. In August 2020, the district court requested supplemental briefing regarding what relief it should provide if it found for the plaintiffs on the merits.

Describing their proposal as a "narrowly tailored remedy," the plaintiffs asked for an injunction requiring election officials to take various rapid affirmative steps to provide notice to voters whose ballots have been rejected, to loosen absentee voter-identification requirements, and to implement an elaborate and expedited process for challenges by voters with rejected ballots. If the court found that remedy to be "impossible, impractical, or overly burdensome," it instead should enjoin officials from engaging in a signature-comparison process at all.

The Secretary took several actions over recent months to facilitate the ability of qualifying voters to vote by mail. She provided guidance to local election officials, recommending that they notify voters of rejected ballots as quickly as possible. She reminded election officials of how early they may convene EVBBs. She also alerted local election officials that they may examine not only the signatures on a voter's application and carrier envelope, but also other signatures on file and made within the last six years. She published a letter providing mail-in voters with guidance on how properly to complete and send their ballots and giving notice of the signature-comparison process.

Appendix B

The district court granted the plaintiffs' summary judgment motion in part. In its detailed and lengthy memorandum opinion and order, the court "focus[ed] its analysis only on certain Plaintiffs' claims against" Secretary Hughs, addressing only the due process and equal protection claims of Weisfeld and the Coalition of Texans with Disabilities. *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *5.

The district court issued an injunction adopting many of the plaintiffs' proposed changes to Texas's election procedures. *See* 2020 U.S. Dist. LEXIS 163631, [WL] at *38-39. The injunction contained three main provisions pertaining to the 2020 election. 2020 U.S. Dist. LEXIS 163631, [WL] at *37-39. First, the court required the Secretary to issue an advisory, within ten days, notifying local election officials of the injunction. 2020 U.S. Dist. LEXIS 163631, [WL] at *38. The notification must inform them that rejecting ballots because of mismatching signatures is unconstitutional unless the officials take actions that go beyond those required by state law. *Id.*

Second, the district court gave the Secretary a menu of actions that she must take. The Secretary must either issue an advisory to local election officials requiring them to follow the court's newly devised signature-verification and voter-notification procedures, or else promulgate an advisory requiring that officials cease rejecting ballots with mismatched signatures altogether. *See id.*

Third, the court mandated that the Secretary take action against any election officials who fail to comply

with the district court's newly minted procedures. 2020 U.S. Dist. LEXIS 163631, [WL] at *39. Deeming those dictates "appropriate for the November 2020 elections," the court stated that it would hold a hearing after the election to consider imposing additional long-term election procedures. 2020 U.S. Dist. LEXIS 163631, [WL] at *45.

On September 9, the Secretary filed a notice of appeal and a motion requesting the district court to stay its order pending appeal. The district court denied a stay on September 10. On September 11, the Secretary filed in this court an emergency motion for a stay pending appeal. On September 11, this panel granted a temporary administrative stay in order to consider the motion.

III.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Tex. Democratic Party v. Abbott ("TDP-I")*, 961 F.3d 389, 397 (5th Cir. 2020) (Smith, J.) (quoting *Nken v. Holder*, 556 U.S. 418, 433, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)). "Whether to grant a stay is committed to our discretion." *Id.* (citing *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019)). We assess "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 426. "The first two factors are the most critical." *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (per curiam).

"The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997).

The Secretary is likely to succeed on the merits. At the very least, she is likely to show that the district court erred in its analysis of plaintiffs' claims. As we recently noted in two election-related opinions ruling on motions for stays pending appeal, because the Secretary is likely to succeed on one ground, we need not address the others.[11] We therefore express no opinion on the Secretary's arguments concerning standing or whether sovereign immunity bars the present suit against her. We do, however, examine whether the district court's remedy is barred by sovereign immunity.

A.

The Secretary contends that she is likely to succeed in showing that Texas's signature-verification procedures are constitutional. In particular, she asserts that (1) those procedures do not implicate the plaintiffs' due process rights, (2) the *Anderson/Burdick* framework—as distinguished from *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)—provides the appropriate test for the due process claims, and (3) the

11. *See Tex. League of United Latin Am. Citizens v. Hughs ("Tex. LULAC")*, No. 20-50867, 978 F.3d 136, 2020 U.S. App. LEXIS 32211, 2020 WL 6023310, at *4 (5th Cir. Oct. 12, 2020) (published); *Tex. All. for Retired Ams. v. Hughs*, No. 20-40643, 976 F.3d 564, 2020 U.S. App. LEXIS 31156, 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) (published).

signature-verification procedures withstand scrutiny under *Anderson/Burdick*. The Secretary will likely prevail on each point.

1.

We must first determine whether the plaintiffs have alleged any cognizable interests that warrant due process analysis.[12] They have not.

The plaintiffs bring procedural due process claims,[13] which require two inquiries: (1) "whether there exists a liberty or property interest which has been interfered with by the State" and (2) "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989). Because the

12. The Secretary asserts in a heading that "Texas's signature verification laws [do not] implicate . . . the right to vote," but she does not provide any precedent suggesting that the plaintiffs have failed to make out an equal protection claim. This is likely because the Supreme Court has recognized that many of its election cases have "appl[ied] the 'fundamental rights' strand of equal protection analysis" to voting restrictions. *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

13. *See Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *3 (describing the plaintiffs' demand for a "pre-rejection notice and an opportunity to cure to voters whose ballots are rejected on the basis of a perceived signature mismatch"). Although the district court avoided labeling much of its due process analysis as "procedural," it acknowledged that it applied the test for a "procedural due process analysis." 2020 U.S. Dist. LEXIS 163631, [WL] at *21 n.27.

plaintiffs "invoke [the Due Process Clause's] procedural protection," they had the burden in the district court of establishing a cognizable liberty or property interest. *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).[14]

The Fourteenth Amendment says that states may not "deprive any person of life, liberty, or property, without due process of law." In its conscientious 103-page order, the district court didn't cite the Fourteenth Amendment—the sole constitutional provision it purported to interpret on the merits—even once. It's no surprise, then, that the court also failed to identify the category of interest—life, liberty, or property—at stake in the right to vote. The plaintiffs' brief is similarly silent. And this court has never squarely addressed the issue.[15]

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14. Because she requests a stay, the Secretary has the burden to show that she is likely to succeed on the merits. *Clinton*, 520 U.S. at 708. The district court, however, granted summary judgment to the plaintiffs. *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *46. Because we review summary judgments *de novo*, we must ask whether the Secretary is likely to show that the plaintiffs failed to meet their burden on their summary judgment motions.

15. We have conducted due process analyses in two cases that involved voting. In *United States v. Atkins*, 323 F.2d 733, 743 (5th Cir. 1963), we concluded that a state "could not deprive a person of the right to register to vote on the basis of secret evidence" without due process. In *Williams v. Taylor*, 677 F.2d 510, 515 (5th Cir. 1982), we applied the *Eldridge* test to a felony-disenfranchisement statute, concluding that the due process claim was "without merit." Neither decision expressly concluded that the right to vote is a liberty or property interest. In fact, in *Williams* we concluded that a felon's "interest in retaining his right to vote is constitutionally

It is important, however, to identify a cognizable interest under the Due Process Clause, because we often dismiss due process claims where plaintiffs fail to identify a cognizable interest[16] and because "[t]he types of interests . . . for Fourteenth Amendment purposes are not unlimited." *Thompson*, 490 U.S. at 460. No protection of life is raised, so we examine property and liberty interests.

a.

Property interests "are not created by the Constitution." *Bd. of Regents of State Colls. v. Roth*, 408

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distinguishable from the 'right to vote' claims of individuals who are not felons." *Id.* at 514.

Because neither opinion squarely addressed voting as a cognizable due process interest, the rule of orderliness does not require us to conclude that voting constitutes a cognizable due process interest. *Thomas v. Tex. Dep't of Criminal Justice*, 297 F.3d 361, 370 n.11 (5th Cir. 2002) ("Where an opinion fails to address a question squarely, we will not treat it as binding precedent."). Even if our previous decision "implicitly" relied on the presence of a cognizable interest, that assumption is not binding if the adverse party "did not challenge" and "we did not consider" that issue. *Id.* To the extent that "[w]e have yet to definitively decide whether, pursuant to our rule of orderliness, a panel is bound by a prior panel's holding if the prior panel did not consider or address a potentially dispositive argument made before the later panel," we still address the Secretary's argument in order to determine her likelihood of success on the merits. *See United States v. Juarez-Martinez*, 738 F. App'x 823, 825 (5th Cir. 2018).

16. *See, e.g.*, *Nutall v. Maye*, 515 F. App'x 252, 254 (5th Cir. 2012) (per curiam); *Gant v. Riter*, 182 F. App'x 348 (5th Cir. 2006) (per curiam).

U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Instead, they "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* For instance, courts sometimes consider welfare payments and continued employment to be property interests. *Id.* at 578.

We have found no court that has held that the right to vote—much less the alleged right to vote by mail—is a property interest.[17] Neither the plaintiffs nor the district court expressly asserts that the right to vote is a property interest.[18] In fact, the complaint omits the word "property" when quoting the Fourteenth Amendment. Given the absence of argument or precedent on point, the Secretary is likely to show that plaintiffs alleged no cognizable property interest.

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17. Courts instead refer to the right to vote as a "liberty interest." *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990) (cleaned up).

18. The plaintiffs say that in *Atkins*, 323 F.2d at 743, we referred to the right to vote as a "private interest." *Atkins* described a formulation of a due process test, which predated *Eldridge* and examined the "private interest" at issue. *Atkins*, 323 F.2d at 743. *Atkins* described voting as an "important and powerful privilege[]," not as a property interest. *Id.* Likewise, the plaintiffs' citations to various cases noting the importance of voting under *Eldridge* are also inapposite. *See, e.g.*, *Williams*, 677 F.2d at 514-15. Though those cases reiterate the importance of the right to vote, none purports to determine whether the right to vote constitutes a cognizable property interest under the Due Process Clause. *See, e.g.*, *id.*

b.

Several district courts have concluded that the right to vote is a liberty interest. *See, e.g.*, *Raetzel*, 762 F. Supp. at 1357. Liberty interests arise from either "the Constitution itself, by reason of guarantees implicit in the word liberty," or from "an expectation or interest created by state laws or policies." *Wilkinson*, 545 U.S. at 221 (internal quotation marks omitted).

Liberty interests that arise from the Constitution extend beyond "freedom from bodily restraint." *Roth*, 408 U.S. at 572. They also include the right to contract, to engage in "the common occupations of life," to gain "useful knowledge," to marry and establish a home to bring up children, to worship God, and to enjoy "those privileges long recognized . . . as essential to the orderly pursuit of happiness of free men." *Id.* On the other hand, state-created liberty interests are "generally limited to freedom from restraint . . . ." *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).[19] This is "a narrow category of state-created liberty interests." *Jordan v. Fisher*, 823 F.3d 805, 810 (5th Cir. 2016). The plaintiffs cite no circuit precedent suggesting that state-created liberty interests exist outside the context of bodily confinement.

There are two problems with describing the right to vote as a liberty interest. First, the district court styled

19. For instance, there is a liberty interest in "avoiding withdrawal of [a] state-created system of good-time credits." *Wilkinson*, 545 U.S. at 221.

it as a state-created interest, concluding that, because "Texas has created a mail-in ballot regime," it must now provide "due process protections." *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *21.[20] But precedent demonstrates that state-created liberty interests are limited to particular sorts of freedom from restraint. *Sandin*, 515 U.S. at 484. And the plaintiffs cite no binding authority indicating that state-created liberty interests exist outside the context of bodily confinement. Thus, the Secretary is likely to show that voting does not implicate any state-created liberty interest under the Due Process Clause.

Second, setting aside the district court's treatment of the right at stake, it might seem intuitive, as the plaintiffs suggest, that the right to vote is a liberty interest that arises from the Constitution. After all, the right to vote is a fundamental constitutional right. *McDonald*, 394 U.S. at 807. But that helps the plaintiffs with their equal protection claim, not their procedural due process claim.[21]

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20. Verifying its reliance on a state-created liberty interest, the district court relied on *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 40 (1976)—particularly its examination of interests that are "initially recognized and protected by state law." *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *20 (quoting *Paul*, 424 U.S. at 710).

21. *See Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-CV-374, 482 F. Supp. 3d 673, 2020 U.S. Dist. LEXIS 156759, 2020 WL 5095459, *11 (M.D. Tenn. Aug. 28, 2020) ("[T]he right to vote is fundamental, but it is not a 'liberty' interest for purposes of procedural due process. . . ."), *aff'd*, No. 20-6046, 977 F.3d 566, 2020 U.S. App. LEXIS 32915, 2020 WL 6074331 (6th Cir. Oct. 19, 2020) (published).

For procedural due process, the question is not whether the plaintiffs assert a *fundamental right*, but instead whether the right they assert is a *liberty interest.*

Besides describing the right to vote as fundamental, the plaintiffs have not explained what there is about the right to vote that makes it a liberty interest. The right to vote does not immediately resemble the rights described in *Roth*, 408 U.S. at 572. The plaintiffs cite no circuit or Supreme Court precedent extending the label of "liberty interest" to the right to vote. The Sixth Circuit, the only circuit to squarely address this issue,[22] held that the right to vote does not constitute a liberty interest.[23]

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22. The Secretary cites *Johnson v. Hood*, 430 F.2d 610 (5th Cir. 1970). *Johnson* concluded that "the right to vote for a candidate for a state office achieved by state action . . . is not a denial of a right of property or liberty secured by the due process clause." *Id.* at 612 (cleaned up). Though *Johnson* squarely addressed the issue of cognizable liberty and property interests, it focused solely on the right to vote in a state election, which Supreme Court precedent at the time indicated was "not given by the Federal Constitution, or by any of its amendments." *Pope v. Williams*, 193 U.S. 621, 632, 24 S. Ct. 573, 48 L. Ed. 817 (1904), *overruled by Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). Some courts have conducted due process analyses based on the right to vote but have done so without examining whether it constitutes a liberty interest. *See, e.g.*, *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008).

23. *See League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) ("That Ohio's voting system impinges on the fundamental right to vote does not, however, implicate procedural due process . . . . [T]he League has not alleged a constitutionally protected interest."); *see also Memphis A. Phillip Randolph Inst.*, 2020 U.S. Dist. LEXIS 156759, 2020 WL 5095459, at *11 ("[T]he right to vote is fundamental, but it is not a 'liberty' interest for purposes

of procedural due process under *Brunner* or pertinent Supreme Court case law."); *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 918 (E.D. Va. 2018) (stating that "[p]laintiffs here point to no authority actually supporting the existence of a procedural due process claim in this context of election irregularities.").

The Sixth Circuit recently affirmed—without deciding the issue of a cognizable liberty interest—a district court that concluded there was no cognizable liberty interest at stake in a due process challenge to signature-verification procedures. *Memphis A. Philip Randolph Inst. v. Hargett*, No. 20-6046, 978 F.3d 378, 2020 U.S. App. LEXIS 32581, 2020 WL 6074331 (6th Cir. Oct. 15, 2020). Judge Moore dissented, claiming that the Sixth Circuit had previously established that state-created liberty interests exist outside the context of bodily confinement any time "a state places substantive limitations on official discretion." 2020 U.S. App. LEXIS 32581, [WL] at *20 (Moore, J., dissenting) (cleaned up) (quoting *Tony L. By and Through Simpson v. Childers*, 71 F.3d 1182, 1185 (6th Cir. 1995)).

There are two problems with that analysis. First, the Sixth Circuit authority that the dissent relied on concluded that there was no cognizable liberty interest at issue in those cases. *See Childers*, 71 F.3d at 1186 ("The claim of a state-created liberty interest fails."); *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1993) ("The Ohio victim impact law does not create a liberty interest."). Although those cases contemplate extending state-created liberty interests beyond the context of bodily confinement, neither did so. Thus, any persuasive value is diminished. If anything, the Sixth Circuit's decision to decline to extend the label of state-created liberty interest to situations outside the context of bodily confinement demonstrates the tenuous nature of that extension of Supreme Court precedent.

Second, both cases that the dissent cites rely on two Supreme Court decisions addressing liberty interests in the context of bodily confinement for their "substantive limitations on official discretion"

Though the plaintiffs will likely run into trouble in establishing that the right to vote is a liberty interest, they will have even greater difficulty showing that an alleged right to vote *by mail* constitutes a liberty interest. In the context of an absentee ballot statutory scheme, "[i]t is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." *McDonald*, 394 U.S. at 807. It would "stretch[] the concept too far to suggest that a person is deprived of liberty" when the Court has said that he has no right to the object of his alleged liberty interest. *Roth*, 408 U.S. at 572 (cleaned up).

Given the failure of the plaintiffs and the district court to assert that voting—or, for that matter, voting by mail—constitutes a liberty interest, along with the absence of circuit precedent supporting that position, the Secretary is likely to prevail in showing that the plaintiffs' motion for summary judgment on their due process claim should have been denied.

c.

Finally, we reject the district court's reasoning regarding any state-created liberty interest. The court

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standard. *See Pusey*, 11 F.3d at 656 (citing *Thompson*, 490 U.S. at 460, and *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983)); *Childers*, 71 F.3d at 1185 (citing *Olim*, 461 U.S. at 249, and *Thompson*, 490 U.S. at 462). By relying on precedent, in which the Court dealt only with cognizable interests in the context of bodily confinement, the Sixth Circuit was "flirting with . . . a novel alteration of [] constitutional doctrine." *Alvarez v. City of Brownsville*, 904 F.3d 382, 397 (5th Cir. 2018) (Ho, J., concurring), *cert. denied*, 139 S. Ct. 2690, 204 L. Ed. 2d 1103 (2019). We decline to adopt such an extension.

concluded that because "Texas has created a mail-in ballot regime . . . the State must provide those voters with constitutionally-sufficient due process protections before rejecting their ballots." *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *21. That notion originated in *Raetzel*, in which the District of Arizona acknowledged that absentee voting "is a privilege and a convenience," and yet concluded—without citation—"[y]et, such a privilege is deserving of due process." *Raetzel*, 762 F. Supp. at 1358. In its defense, *Raetzel*'s reasoning resembles the principle animating *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). *Goss* concluded that, "[h]aving chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures . . . ." *Goss*, 419 U.S. at 574. Although several district courts have regurgitated *Raetzel*'s reasoning,[24] the plaintiffs and the district court point to no circuit court that has embraced it.

And properly so. There is a problem with grafting *Goss*'s reasoning onto the voting context: *Goss* found two cognizable due process interests, namely a "property

24. *See Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of Georgia*, 18-14503-GG, 2018 U.S. App. LEXIS 37448, 2018 WL 7139247 (11th Cir. Dec. 11, 2018); *Zessar v. Helander*, No. 05 C 1917, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646, at *5 (N.D. Ill. Mar. 13, 2006); *Frederick v. Lawson*, No. 119CV01959SEBMJD, 481 F. Supp. 3d 774, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *12 (S.D. Ind. Aug. 20, 2020).

interest in educational benefits" and a "liberty interest in reputation." *Goss*, 419 U.S. at 576. In context, *Goss*'s language about the state's "[h]aving chosen to extend" benefits and being thus bound by due process came from its analysis of a "protected *property* interest." *Id.* at 579 (emphasis added). *Raetzel*, however, concluded that "the right to vote is a '*liberty*' interest." *Raetzel*, 762 F. Supp. at 1357 (emphasis added). Thus, *Raetzel* grafted the Supreme Court's reasoning concerning property interests onto a claimed liberty interest without providing any authority justifying that extension. We decline to adopt *Raetzel*'s extrapolation of Supreme Court precedent.

The Secretary is likely to show that the plaintiffs have alleged no cognizable liberty or property interest that could serve to make out a procedural due process claim. The Secretary is therefore likely to succeed in the dismissal of plaintiffs' due process claims.

2.

Even supposing that voting is a protected liberty or property interest, the Secretary is likely to show that the district court used the wrong test for the due process claim. The court applied *Eldridge*, 424 U.S. at 335, which provides the "general[]" test for determining what process is due.[25] On the other hand, *Anderson v.*

25. Under *Eldridge*, 424 U.S. at 335, "identification of the specific dictates of due process generally requires" a court to consider three factors: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value,

Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) announce a test to address "[c]onstitutional challenges to specific provisions of a State's election laws" under "the First and Fourteenth Amendments." *Anderson*, 460 U.S. at 789.[26] Neither *Anderson* nor *Burdick*, however, dealt with procedural due process claims, and both instead based their approach on the "fundamental rights strand of equal protection analysis." *Id.* at 787 n.7 (cleaned up).

For several reasons, the *Anderson/Burdick* framework provides the appropriate test for the plaintiffs' due process claims. First, because the plaintiffs challenge Texas's election laws under the Due Process Clause of the Fourteenth Amendment, *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *19, we must use the test that the Supreme Court prescribed for "[c]onstitutional challenges to specific provisions of a

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if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

26. The so-called *Anderson/Burdick* framework requires a "two-track approach." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) (Scalia, J., concurring). If a court deems a voting law to be a "severe" burden on the rights of voters, "the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (cleaned up). Conversely, if a court deems a voting law to be a "reasonable, nondiscriminatory restriction[]" on the rights of voters, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (cleaned up).

State's election laws" under "the First and Fourteenth Amendments," *Anderson*, 460 U.S. at 789. As several Justices have noted, "[t]o evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, *or the voting process*—we use the approach set out in *Burdick v. Takushi*." *Crawford*, 553 U.S. at 204 (Scalia, J., concurring) (emphasis added). The district court concluded otherwise only by relying on its own word associations—with abstract concepts such as "procedures" and "procedural safeguards," *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *20—and ignoring the Supreme Court's command that lower courts "considering a [Fourteenth Amendment] challenge to a state election law *must*" apply the *Anderson/Burdick* framework, *Burdick*, 504 U.S. at 434 (emphasis added).

Second, our sister circuits—some of which neglected to examine whether voting constitutes a cognizable liberty or property interest—apply *Anderson/Burdick* to all Fourteenth Amendment challenges to election laws.[27] Although several district courts have applied *Eldridge* to due process challenges of signature-comparison procedures, none of those courts provided reasoning for

27. *See, e.g.*, *Weber v. Shelley*, 347 F.3d 1101, 1105-07 (9th Cir. 2003) (analyzing a due process challenge to a county's use of touch screen voting systems under the *Anderson/-Burdick* framework); *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (concluding that *Anderson/Burdick* serves as "a single standard for evaluating challenges to voting restrictions"); *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (concluding that *Anderson/Burdick* applies "to *all* First and Fourteenth Amendment challenges to state election laws").

its selection of the *Eldridge* test.[28] Moreover, two of those opinions cite *Burdick* in their due process analyses,[29] and one—though still applying *Eldridge*—even agreed that *Anderson/Burdick* applies to "*all* First and Fourteenth Amendment challenges to state election laws." *Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *16 (emphasis added).[30]

Third, even if, *arguendo*, we had *carte blanche* to decide which test applies, the *Anderson/Burdick* approach is better suited to the context of elecion laws than is the more general *Eldridge* test. "There must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974). And "it is the state legislature—not . . . federal judges—that is authorized to establish the rules that govern" elections.[31]

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28. *See Saucedo*, 335 F. Supp. 3d at 214; *Martin*, 341 F. Supp. 3d at 1338; *Zessar*, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646, at *7; *Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *12.

29. *See Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *12 (citing *Burdick*, 504 U.S. at 433); *Zessar*, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646, at *7 (citing *Burdick*, 504 U.S. at 434)

30. In *Williams*, 677 F.2d at 514, we applied the *Eldridge* test when examining a felony-disenfranchisement statute. *Williams*, however, predated *Anderson* and *Burdick* and was abrogated by their laying out a more specific test for election laws.

31. *Tex. LULAC*, 2020 U.S. App. LEXIS 32211, 2020 WL 6023310, at *10 (Ho, J., concurring); *see also* U.S. Const. art. I,

The flaw in using *Eldridge* is that election laws, by nature, "inevitably affect[] . . . the individual's right to vote." *Anderson*, 460 U.S. at 788. Under *Eldridge*, however, courts may accord the private interest at stake, namely the right to vote, "significant weight." *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *21. Therefore, the *Eldridge* test would inevitably result in courts' "weigh[ing] the pros and cons of various balloting systems," *Weber*, 347 F.3d at 1107, thereby "t[ying] the hands of States seeking to assure that elections are operated equitably and efficiently," *Burdick*, 504 U.S. at 433. Unlike *Eldridge*, the *Anderson/Burdick* approach recognizes that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788. Because *Anderson/Burdick*—unlike *Eldridge*—appropriately accounts for the state's interest in regulating voting, it provides the appropriate test for procedural due process claims challenging election laws.

By using *Eldridge*, the district court's "judicial supervision of the election process . . . flout[s] the Constitution's express commitment of the task to the States." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring) (citing U.S. Const. art. I, § 4). The Secretary is thus likely to show that the district court applied the wrong test in analyzing the due process claims.

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§ 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); *Weber*, 347 F.3d at 1107 ("[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems.").

3.

The Secretary contends that Texas's signature-verification procedures withstand scrutiny under *Anderson/Burdick*. The parties appear to agree that *Anderson/Burdick* provides the appropriate framework to analyze the equal protection claims, and we have concluded that it is also the appropriate test to analyze the due process claims if the plaintiffs are able to prove a cognizable liberty or property interest. We thus analyze the equal protection and due process claims together.[32]

The *Anderson/Burdick* rubric requires us to examine two aspects of Texas's signature verification procedures: (1) whether the process poses a "severe" or instead a "reasonable, nondiscriminatory" restriction on the right to vote and (2) whether the state's interest justifies the restriction. *Burdick*, 504 U.S. at 434 (cleaned up). Texas's signature-verification procedures are reasonable and nondiscriminatory, and they survive scrutiny under *Anderson/Burdick*.

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32. The due process and equal protection claims challenge separate aspects of Texas's signature-verification procedures. The due process claims challenge the lack of notice and opportunity to cure after a ballot has already been rejected by the signature-verification procedures, but the equal protection claims focus on the existence and implementation of the signature-verification procedures. Though these differences could potentially warrant separate *Anderson/Burdick* analyses, the district court applied "the same analysis" to both claims. *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *31. Neither party asks us to conduct separate *Anderson/Burdick* analyses. Given the lack of argument on point, we conduct a single *Anderson/Burdick* analysis.

Appendix B

a.

The plaintiffs and the district court reason that Texas's signature-verification procedures impose a severe burden on the right to vote, because "voters who have their ballots rejected due to a perceived signature mismatch are provided untimely notice of rejection and no meaningful opportunity to cure." *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *33 (emphasis omitted). Consequently, the argument goes, these voters "face complete disenfranchisement." *Id.* This theory stems from two fundamental errors: It (1) mistakenly focuses only on the burden to the plaintiffs—instead of voters as a whole—and (2) neglects meaningfully to analyze binding precedent concerning what constitutes a "severe" burden on the right to vote.

First, the district court concluded that Texas's signature-verification procedures constitute "a 'severe' burden on *certain* voters' right to vote." 2020 U.S. Dist. LEXIS 163631, [WL] at *34 (emphasis added). But the severity analysis is not limited to the impact that a law has on a small number of voters. For instance, *Crawford*'s three concurring Justices concluded that "our precedents refute the view that individual impacts are relevant to determining the severity of the burden" that a voting law imposes. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring). Though *Crawford*'s three-Justice plurality did not go as far as the three-Justice concurrence, it too examined the burden on "most voters." *Id.* at 198.

Examining burdens on a plaintiff-by-plaintiff basis "would effectively turn back decades of equal-protection

jurisprudence." *Id.* at 207 (Scalia, J., concurring). Specifically, the district court's individualized assessment of burdens ignores *Burdick*—the very case that it purports to apply. For instance, in *Burdick*, 504 U.S. at 436-37, Hawaii's ballot access laws did not constitute a severe burden on the right to vote when any burden was borne "only by those who fail to identify their candidate of choice until days before the primary." In fact, the *Burdick* dissenters—whose views did not carry the day—asserted that the law's impact on only "some individual voters" could constitute a severe burden. *Id.* at 448 (Kennedy, J., dissenting).[33] Thus, if we were "[t]o deem ordinary and widespread burdens like these severe" based solely on their impact on a small number of voters, we "would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Clingman v. Beaver*, 544 U.S. 581, 593, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005).

Second, the plaintiffs and the district court neglect meaningfully to analyze binding precedent concerning what constitutes a "severe" burden on the right to

33. The Court's generalized approach in measuring the severity of burdens makes sense. If we were to find that a burden is severe based solely on a plaintiff's assertion that he or she might be disenfranchised, our Fourteenth Amendment analysis of voting laws would risk collapsing into a standing analysis: So long as a plaintiff could prove an injury, that plaintiff would also be able to prove a severe burden under *Anderson/Burdick*. Such reasoning flouts *Anderson*'s conclusion, 460 U.S. at 788, that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory [voting] restrictions."

vote. *Crawford* concluded that a photo-identification requirement was not a severe burden, even where "a somewhat heavier burden may be placed on a limited number of persons." *Crawford*, 553 U.S. at 199. But these burdens were "neither so serious nor so frequent as to raise any question about the constitutionality" of the requirement. *Id.* at 197.

Signature-verification requirements, like photo-ID requirements, help to ensure the veracity of a ballot by "identifying eligible voters." *Id.* Signature-verification requirements are even less burdensome than photo-ID requirements, as they do not require a voter "to secure . . . or to assemble" any documentation. *Id.* at 199. True, some voters may have difficulty signing their names on ballots. But in *Crawford*, even though some voters might find it "difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification," that difficulty did not render the photo-ID law a severe burden on the right to vote. *Id.*

Even if some voters have trouble duplicating their signatures, that problem is "neither so serious nor so frequent as to raise any question about the constitutionality" of the signature-verification requirement. *Crawford*, 553 U.S. at 197-98. "[N]o citizen has a Fourteenth . . . Amendment right to be free from the usual burdens of voting." *Veasey*, 830 F.3d at 316 (Jones, J., concurring) (cleaned up). And "mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect." *Tex. LULAC*, 2020 U.S. App. LEXIS 32211, 2020 WL 6023310, at *6.

Moreover, Texas mitigates the burden of its signature-verification requirement in three ways. First, for those who sign ballots, the Secretary has issued notice of the signature-comparison process and guidance on how to complete a ballot properly. *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *45. Second, for those who cannot sign a ballot "because of a physical disability or illiteracy," § 1.011(a), Texas prohibits rejection of a ballot for failed signature verification if the ballot is signed by a witness, § 87.041(b)(2). Third, for those who cannot sign a ballot or who are concerned that they will be unable to provide a matching signature, Texas provides in-person voting.[34] "In Texas, in-person voting is the rule . . . [and] voting by mail is the exception." *Tex. Democratic Party v. Abbott ("TDP-II")*, No. 20-50407, 978 F.3d 168, 2020 U.S. App. LEXIS 32503, at *1 (5th Cir. Oct. 14, 2020) (published) (citation omitted).

Because Texas's signature-verification requirement is no more burdensome on the right to vote than was the photo-ID mandate in *Crawford*, it does not constitute a severe burden. Instead, the signature-verification requirement is a "reasonable, nondiscriminatory restriction[]" on the right to vote. *Burdick*, 504 U.S. at 434.

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34. Absentee-voting statutes, "which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny [voters] the exercise of the franchise." *McDonald*, 394 U.S. at 807-08. As the district court rightly acknowledges, "in-person voting . . . could be used by many voters to avoid disenfranchisement." *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *28.

The district court, however, concluded that the signature-verification procedures constitute a severe burden because they provide "untimely notice of rejection and no *meaningful* opportunity to cure." *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *33. Texas could remedy that transgression, the court posited, if its mechanism for screening ballots "imposed *no risk* of uncorrectable rejection." 2020 U.S. Dist. LEXIS 163631, [WL] at *33 n.41. But the court failed to specify how a dearth of opportunities to cure transmogrifies Texas's signature-verification requirement into a severe burden. Similarly, the court did not cite any precedent suggesting that "no risk" of uncorrectable rejection is a constitutionally mandated standard for verifying ballots.[35] Nor could it.

Indeed, the Constitution does not demand such a toothless approach to stymying voter fraud. We have found no "authority suggesting that a State must afford every voter . . . infallible ways to vote." *Tex. LULAC*, 2020 U.S. App. LEXIS 32211, 2020 WL 6023310, at *6. For instance, *Crawford* upheld a photo-ID law even though a voter might be unable to cast a ballot on election day because he "may

35. The district court also sought to determine whether Texas's signature verification procedures were "an 'inconvenience' that would 'not qualify as a substantial, burden on the right to vote.'" *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *33 n.41 (quoting *Crawford*, 553 U.S. at 199). But the court mischaracterizes *Crawford*, which never stated that mere "inconvenience" was a constitutional standard. In fact, the Court recognized that voter-ID laws impose a "somewhat heavier burden" on many voters, yet the Court concluded that those laws are constitutional. *Crawford*, 553 U.S. at 199.

lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard." *Crawford*, 553 U.S. at 197. The risk that a voter might be unable to cast his vote on account of this restriction did not constitute a severe burden. Similarly, nowhere did *Crawford* mandate that Indiana provide voters with notice and an opportunity to cure before they were turned away from the polls.[36]

In fact, in *Crawford* the Court noted less burdensome methods of identification, including a requirement that voters "sign their names so their *signatures can be compared with those on file*." *Id.* (emphasis added). The dissent lauded as "significantly less restrictive" a voter-

36. Three Justices in *Crawford* did note that, although a "heavier burden may be placed on a limited number of persons . . . [t]he severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted" so long as the voter "travel[s] to the circuit court clerk's office within 10 days to execute the required affidavit." *Crawford*, 553 U.S. at 199. Those Justices, however, did not indicate that—absent this mitigating fact—the burden would be severe.

Moreover, Texas—like Indiana in *Crawford*—provides an alternative method of voting for those who do not believe they can provide the requisite signature: in-person voting. True, some voters may be unable to make the trip to the polls. But similarly, some voters in the *Crawford* situation might be unable to make the trip to the clerk's office. That inability of some voters to exercise the franchise, because they cannot comply with voting restrictions, does not render otherwise reasonable voting restrictions constitutionally infirm.

ID system in which a Florida voter who lacks photo ID may cast, at the polling place, a provisional ballot that will be counted if the state "determines that his *signature matches the one on his voter registration form*." *Id.* at 239 (emphasis added) (Breyer, J., dissenting). Nowhere did the dissent intimate that this "significantly less restrictive" voter-ID system required notice or an opportunity to cure before rejection. *See id.*

By concluding that Texas's signature-verification requirement does not constitute a severe burden—even without notice and an opportunity to cure—we join the Ninth Circuit, which agrees that "the absence of notice and an opportunity to rehabilitate rejected signatures imposes only a minimal burden on plaintiffs' rights." *Lemons*, 538 F.3d at 1104. This is so even where "county elections officials do not notify voters after rejecting non-matching signatures." *Id.*

b.

We next determine whether "the State's important regulatory interests are . . . sufficient to justify the restrictions," and they generally are, under *Burdick*, if the burden of the voting restriction is not severe. *Burdick*, 504 U.S. at 434 (cleaned up). We agree with the Secretary that Texas's interest in preventing voter fraud justifies its signature-verification requirement.

It is well established that the electoral process poses a risk of fraud. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013). "[N]ot only is the risk of voter

fraud real but . . . it could affect the outcome of a close election." *Crawford*, 553 U.S. at 196. Thus, "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id.* Texas "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989).

But Texas's signature-verification requirement is not designed to stymie voter fraud only in the abstract. It seeks to stop voter fraud where the problem is most acute—in the context of mail-in voting.[37] "[T]he potential and reality of fraud is much greater in the mail-in ballot context than with inperson voting."[38]

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37. *See Tex. LULAC*, 2020 U.S. App. LEXIS 32211, 2020 WL 6023310, at *7 ("Texas has an important regulatory interest in policing how its citizens' votes are collected and counted. This interest is acute when it comes to mail-in ballots.") (cleaned up).

38. *Veasey*, 830 F.3d at 239; *see also id.* at 263 (describing voter fraud as "far more prevalent" in the context of absentee ballots); *Veasey v. Abbott*, 888 F.3d 792, 815 n.13 (5th Cir. 2018) (Graves, J., concurring) (describing "mail-in ballots" as "the area where, by most accounts, [voter fraud] is more likely to occur . . . ."); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting."); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 390 (9th Cir. 2016) ("[A]bsentee voting may be particularly susceptible to fraud, or at least perceptions of it."); John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 513 (2003) (summarizing instances of "absentee ballots [that] were shown to be forged, coerced, stolen from mailboxes, or fraudulently

Appendix B

Texas's important interest in reducing voter fraud—and specifically in stymying mail-in ballot fraud—easily justifies its use of signature verification. In concluding otherwise, the district court made at least two errors: It (1) incorrectly suggested that Texas needed to provide evidence of voter fraud and (2) erroneously imposed a narrow-tailoring requirement on the state.

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obtained" from Florida, Alabama, Connecticut, Indiana, New York, and Pennsylvania).

Courts have documented instances of voter fraud around the country, many of which involve forgery of absentee ballots. *See, e.g.*, *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1036 (9th Cir. 2020) (describing "the recent case of voter fraud in North Carolina involving collection and forgery of absentee ballots by a political operative hired by a Republican candidate"); *Crawford*, 553 U.S. at 225 (Souter, J., dissenting) (referring to "absentee-ballot fraud, which (unlike in-person voter impersonation) is a documented problem in Indiana").

Texas is not immune from mail-in voter fraud. *See* The Heritage Foundation, *Election Fraud Cases*, https://www.heritage.org/voterfraud-print/search?combine=&state=TX&year=&case_type=All&fraud_type=24489 (last visited Sept. 30, 2020) ("Miguel Hernandez visited an elderly woman shortly before the 2017 Dallas City Council election, collected her blank absentee ballot, filled it out, and forged her signature before mailing it back. Hernandez was the first person arrested as part of a larger voter fraud investigation in the Dallas area, stemming from claims by elderly voters that someone was forging their signatures and the return of nearly 700 mail-in ballots all signed by the same witness using a fake name."); *id.* ("Charles Nathan Jackson, of Tarrant County, forged the name of a stranger, Mardene Hickerson, on an application for an early voting ballot.").

First, the district court deemed it relevant that "there is no evidence in the record demonstrating that any mismatched-signature ballots were submitted fraudulently." *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *34 n.44. But we do not force states to shoulder "the burden of demonstrating empirically the objective effects" of election laws. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986). States may "respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id.* at 195-96. States have thus "never been required to justify [their] prophylactic measures to decrease occasions for vote fraud." *Tex. LULAC*, 2020 U.S. App. LEXIS 32211, 2020 WL 6023310, at *7.

For instance, in *Crawford*, although "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history," the Court still concluded that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 194, 196. By intimating that Texas ought to provide the court with evidence of voter fraud, the district court ignored this court's binding conclusion that "Texas need not show specific local evidence of fraud in order to justify preventive measures." *Steen*, 732 F.3d at 394.

Second, the district court misapplied the *Anderson/Burdick* methodology by erroneously imposing a narrow-tailoring requirement. Under *Burdick*, 504 U.S. at 434, where a voting restriction imposes a severe burden, the state must show (1) that there is "a state interest of

compelling importance" and (2) that the regulation is "narrowly drawn to advance" that interest. But where the burden of an election law is reasonable—instead of severe—the state must show only a "legitimate interest[]" that is "sufficient to outweigh the limited burden" imposed by the regulation. *Id.* at 440.

The *Anderson/Burdick* framework does not impose a narrow-tailoring requirement on the state when dealing with reasonable burdens. *Id.* The Secretary satisfied her burden by proving that Texas's interest in thwarting voter fraud justifies signature verification. The district court even suggested as much. *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *35.

But instead of accepting this important interest and weighing it against the burden on the plaintiffs, the district court imposed an additional burden: The Secretary must show that Texas's interest in preventing voter fraud "is furthered by utilizing signature comparison procedures *that do not provide voters with a meaningful opportunity to avoid disenfranchisement by curing an improperly rejected ballot*." 2020 U.S. Dist. LEXIS 163631, [WL] at *29. According to the court, Texas failed in this endeavor because there is "no rational basis for providing robust cure procedures to voters who fail to show an ID when voting in person but not those whose signatures are perceived to mismatch when voting by mail." 2020 U.S. Dist. LEXIS 163631, [WL] at *35.

The district court cited no authority for this added burden on the Secretary. And for good reason.

In effect, the court required the Secretary to show that Texas could not have fashioned its regulations in a less burdensome manner. When we say that a state has not met its burden because we can imagine "less burdensome regulatory options [that] were available," we call that a "narrow tailoring requirement." *McConnell v. FEC*, 540 U.S. 93, 316, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (Kennedy, J., concurring in the judgment). But the *Anderson/Burdick* framework imposes a narrow-tailoring requirement only on restrictions that constitute *severe* burdens, not on *reasonable* voting restrictions. *Burdick*, 504 U.S. at 434. The district court thus misapplied *Anderson/Burdick* when purporting to analyze reasonable restrictions on the right to vote.[39]

Texas's important interest in preventing voter fraud in its mail-in ballot system is sufficient to justify its reasonable restrictions on the right to vote. The Secretary is likely to prove that the district court erred in granting the plaintiffs' summary judgment on the merits.

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39. The district court could have justified its narrow-tailoring requirement if it had rested its opinion on its conclusion that Texas's signature-verification procedures impose a severe burden. But the court explicitly concluded that its imposition of this narrow-tailoring requirement holds "irrespective of whether the burden is classified as 'severe,' 'moderate,' or even 'slight.'" *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *35. "Even assuming the Secretary need only satisfy a 'rational' basis review . . . the Secretary still could not do so." *Id.* (emphasis omitted). The court applied a narrow-tailoring requirement to even rational basis review and, in so doing, misapplied *Anderson/Burdick*.

Appendix B

B.

The Secretary is likely to prevail in her defense that sovereign immunity bars the district court's injunction requiring that she issue particular advisories and take specific potential enforcement action against noncomplying officials. Whether *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), bars all affirmative injunctions against an officer "is an unsettled question that has roused significant debate." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472 n.21 (5th Cir. 2020) (en banc). We need not settle that debate here. Although the question remains whether sovereign immunity bars *all* affirmative injunctions, the present injunction is impermissible because it would control the Secretary in her exercise of *discretionary* functions.

In *Young*, 209 U.S. at 158, the Court stated that "[t]here is no doubt that the court cannot control the exercise of the discretion of an officer." Analyzing the question whether sovereign immunity bars positive injunctions against officers, the D.C. Circuit stated that "an attempt to control an officer" in the exercise of a discretionary function would violate sovereign immunity under *Ex parte Young*, and "would place the court on the wrong side of the line thought to divide 'discretionary' from 'ministerial' functions." *Vann v. Kempthorne*, 534 F.3d 741, 753, 383 U.S. App. D.C. 14 (D.C. Cir. 2008) (citing *Hagood v. Southern*, 117 U.S. 52, 69, 6 S. Ct. 608, 29 L. Ed. 805 (1886)).

The D.C. Circuit further examined the Supreme Court's application of sovereign immunity in *Hawaii v.*

Gordon, 373 U.S. 57, 83 S. Ct. 1052, 10 L. Ed. 2d 191 (1963) (per curiam). *See Vann*, 534 F.3d at 753. In *Gordon*, 373 U.S. at 58, the Court held that a court could not require the Director of the Bureau of the Budget to withdraw a report advising the federal government regarding which land the United States should retain under the Hawaii Statehood Act. Such an order violated sovereign immunity because it "would require the Director's official affirmative action." *Id.* The D.C. Circuit explained that *Gordon* exemplifies "the principle" that a court may not compel officers to take affirmative official actions that are discretionary. *Vann*, 534 F.3d at 753.

We need not determine now whether affirmative injunctions are categorically barred by sovereign immunity. *See Green Valley*, 969 F.3d at 472 n.21. It is sufficient to note that, at the very minimum, a court may not "control [an officer] in the exercise of his discretion." *Young*, 209 U.S. at 158.

The district court's sweeping order requires that the Secretary take several positive actions. In addition to requiring her to issue an advisory notifying local election officials of the district court's constitutional judgment regarding the signature-mismatch laws, the order also gives the Secretary an ultimatum. It provides that she either must issue an advisory stipulating the detailed procedures that the district court imposed, or, alternatively, must promulgate an advisory requiring that local officials refrain at all from rejecting ballots based on mismatched signatures. *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *38.

Section 31.003 states that the Secretary "shall obtain and maintain uniformity in the application, operation, and interpretation of this code," and that in doing so she "shall prepare detailed and comprehensive written directives and instructions" regarding Texas election laws. Because the statute uses the mandatory language of "shall," § 31.003 imposes an affirmative duty on the Secretary to maintain uniformity regarding the application and interpretation of election laws. *See Lightbourn v. Cty. of El Paso*, 118 F.3d 421, 429 (5th Cir. 1997).

"If a statute, regulation, or policy leaves it to . . . [an] agency to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary." *St. Tammany Par. ex rel. Davis v. FEMA*, 556 F.3d 307, 323 (5th Cir. 2009). Though the Secretary has a duty to maintain uniformity, § 31.003 leaves her considerable discretion and latitude in how to do so. By prescribing detailed and specific procedures that the Secretary must include in her advisory, the district court impinges upon her discretionary authority in flat violation of *Young*.

The fact that the district court's mandated procedures were offered to the Secretary as one of two choices does not cure the order from infringing on her discretion. To the contrary, the very fact that the order gave her an ultimatum constitutes "an attempt to control the officer" and is, thus, plainly forbidden under *Young*. *See Vann*, 534 F.3d at 753.

The injunction also stipulates that the Secretary must reprimand any local officials who violate the district court's

procedures and must "correct the offending conduct" per § 31.005. *Richardson*, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *39. Again, the order far exceeds the limits of *Young*. A "[r]eview of the provisions of the Texas Election Code that refer to the Secretary's role in elections reveals that most give discretion to the Secretary to take some action." *Lightbourn*, 118 F.3d at 428-29. Interpreting § 31.005, we determined that the Secretary has considerable discretion under that provision. *Id.* at 429. Indeed, we observed that the law states that she "*may* take appropriate action to protect the voting rights of the citizens . . . from abuse . . . ." *Id.* (quoting § 31.005(a)).

The district court directs the Secretary to take action against non-onforming election officials under § 31.005(b), a provision that specifies how the Secretary can enforce the Code against violations of voting rights. As in § 31.005(a), the language in § 31.005(b) is discretionary, stipulating that the Secretary "*may* order the person to correct the offending conduct." (Emphasis added.) "Provisions merely authorizing the Secretary to take some action do not confer a legal duty on [her] to take the contemplated action." *Lightbourn*, 118 F.3d at 429.

Section 31.005 grants the Secretary discretion to take enforcement actions, and the district court cannot, therefore, compel such actions under *Young*. Thus, the Secretary is likely to prevail in her defense that the injunction is impermissible under *Young*.[40]

40. The Secretary contends that the injunction exceeds the district court's remedial authority because it is not narrowly tailored, in violation of Federal Rule of Civil Procedure 65(d), and because it

IV.

The other factors also counsel in favor of granting a stay pending appeal. As to whether the Secretary "will be irreparably injured absent a stay," *Nken*, 556 U.S. at 426, "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws," *Veasey*, 870 F.3d at 391. And as to "where the public interest lies," *Nken*, 556 U.S. at 426, when "the State is the appealing party, its interest and harm merge with that of the public," *Veasey*, 870 F.3d at 391. Moreover, "a temporary stay here, while the court can consider argument on the merits, will minimize confusion among both voters and trained election officials—a goal patently within the public interest given the extremely fast-approaching election date." *TDP-I*, 961 F.3d at 412 (cleaned up).

Finally, as to "whether issuance of the stay will substantially injure the other parties interested in the

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contravenes principles of federalism by requiring the Secretary and other election officials to disobey Texas law. The plaintiffs respond that the injunction is specific and narrow because the signature-matching procedure is implemented statewide and, thus, requires a state-wide injunction. The plaintiffs also counter that the injunction does not violate federalism principles because it merely brings the signature-comparison procedures into alignment with constitutional requirements and gives the Secretary a choice in how to revise the procedures. Because the Secretary is likely to prevail both in her argument that the injunction violates *Young* and on the merits in defending the current signature-matching procedures, we need not determine whether the injunction also exceeds the district court's remedial authority.

proceeding," *Nken*, 556 U.S. at 426, to whatever extent it might, it does not outweigh the other factors. "Our decision is limited to determining irreparable harm not in denying the plaintiffs' requested relief outright but in temporarily staying the injunction pending a full appeal." *TDP-I*, 961 F.3d at 412. Because of the likelihood that the Secretary will succeed on the merits, combined with the irreparable harm inflicted on the state and its citizens by the injunction, the balance of harms weighs in favor of the Secretary.

* * * *

The Secretary's motion to stay the injunction pending appeal is GRANTED. The injunction is STAYED in all its particulars pending further order of this court.[41]

41. We note that in *Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 U.S. Dist. LEXIS 171431, at *3 (D.S.C. Sept. 18, 2020), the district court issued a broad injunction barring South Carolina, *inter alia*, from "the requirement that another individual must witness a voter's signature on an absentee ballot envelope for the ballot to be counted." The plaintiffs had made many of the same legal and factual arguments that are presented here. The Supreme Court unanimously stayed the injunction pending appeal, *Andino v. Middleton*, No. 20A55, 141 S. Ct. 9, 208 L. Ed. 2d 7, 2020 U.S. LEXIS 4832 (U.S. Oct. 5, 2020), after the Fourth Circuit had declined to do so, *Middleton v. Andino*, No. 20-2022, 2020 U.S. App. LEXIS 31093 (4th Cir. Sept. 30, 2020) (en banc).

Appendix B

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, concurring in the stay:

In 1985, the Texas Legislature codified a revised state election code that included §§ 87.041(b) & (d), the provisions from which Plaintiffs seek relief.[1] Since codification, the Legislature has amended § 87.041(b) only once, in 1987.[2] Section 87.041(d) has not been amended. And while the Legislature has added to or amended other subsections of § 87.041 as recently as 2017, Texas's basic framework for verifying voter signatures has been in place for several decades. Plaintiffs filed this suit in August 2019, reaching this court a year later. We are asked to change those rules while voting in a presidential election is under way—in the three weeks remaining before Election Day. However federal courts might finally decide this case, it now hangs a cloud over the election.

I concur only in the decision to stay pending appeal of the district court's injunction changing the election rules. The Secretary of State has shown a substantial likelihood of success on the merits, and the district court's ruling has been stayed to allow this Court to decide the merits of the case. Well enough, but the reality is that the ultimate legality of the present system cannot be settled by the federal courts at this juncture when voting is already underway, and any opinion on a motions panel is

1. 1985 TEX. SESS. LAW SERV. 211, § 1.

2. *See* 1987 TEX. SESS. LAW SERV. 472, § 34.

essentially written in sand with no precedential value[3]—its reach is to delay, not to finally decide the validity of the state regulation. The Supreme Court has consistently counseled against court-imposed changes to "election rules on the eve of an election."[4] Caution is particularly appropriate where, as here, the challenged laws were in effect long before suit was filed.

I.

I would not attempt to settle our circuit's law on such complex and delicate questions in a preliminary ruling that has not benefitted from oral argument or collegial discussions. And a decision by this motions panel granting a stay settles no law. To the contrary, it has no precedential force and is not binding on the merits panel, leaving it as a writing in water—made the more empty by pretermitting the jurisdictional requisites of sovereignty and the reach of *Ex parte Young*. The matter is yet to travel its ordinary course to be settled by a fully considered opinion by the merits panel, perhaps then by the en banc Court. This reality is brought home by the changing opinions of my colleagues as the Court responds to legal challenges in the electoral process as conflicting opinions in other circuits indicate.[5] Here, we proceed without collegial conference

3. *Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988).

4. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207, 206 L. Ed. 2d 452 (2020) (per curiam).

5. *See Memphis A. Philip Randolph Inst. v. Hargett*, No. 20-6046, 978 F.3d 378, 2020 U.S. App. LEXIS 32581, 2020 WL 6074331 (6th Cir. Oct. 15, 2020); 2020 U.S. App. LEXIS 32581, [WL] at *9

on a motions panel and need not as a panel traverse numerous paths and crossroads engaging significant issues whose impact on our voting-rights jurisprudence remains contested, including standing and the reach of *Ex parte Young*, core principles of federalism. To do so would expose shifting views on these issues—a fluidity of view that unwittingly would present this Court as a volunteer in a political fight. In my view, the Secretary is a proper defendant under *Ex parte Young*. More to the point, it is the controlling law in this circuit. In pretermitting rather than accepting that reality, my colleagues cling to their view expressed last month that the Secretary lacks the enforcing authority under state law necessary to a federal suit enjoining her enforcement of an assertedly unconstitutional state statute[6] and casting doubt on whether the Court is bound by its recent case law because that case law might yet be considered en banc.[7] This fluidity counsels caution in wading into a change of election rules while voting is underway in an election charged with distrust of the political process—at its heart breeding doubt that one's vote will count.

(Moore, J., dissenting).

6. *See Tex. Democratic Party v. Hughs (TDP-I)*, No.20-50667, 974 F.3d 570, 2020 U.S. App. LEXIS 28793, 2020 WL 5406369, at*1 (5th Cir. Sept. 9, 2020).

7. *Id.; see Tex. Democratic Party v. Abbott (TDP-II)*, No. 20 50407, 2020 U.S. App. LEXIS 28799, 2020 WL 5422917, at *5 (5th Cir. Sept. 10, 2020).

II.

In 2016 and 2018, "approximately 5,000 [Texas] ballots were rejected on the basis of perceived signature mismatches."[8] Such "small" differences have the potential to decide both local and national elections. And with the large increase in votes cast by mail in our ongoing pandemic that error rate would toss out far greater numbers. There is much at stake here.

While Chief Justice Marshall's observation that the federal courts must decide is more than a truism, staying our hand is well within our compass here as we are asked to draw upon our injunctive powers. These must include an assessment of the real-world effect of when sought-for relief is granted. Plainly, the risks of now ordering changes in rules in effect for years would add to the uncertainties at every county seat across Texas, each facing the counting of votes cast by mail swelled by the pandemic beyond all past experience. There is yet another layer. A final decision from the judiciary is unlikely before voting in this presidential election year is completed. Again, it is now underway. Finally, while I cannot join Judge Smith's opinion, I join the grant of a stay for the reasons I here offer.

Relying on the old wisdom that looking to the path traveled can give direction to the road ahead, we see that while the road of right to vote has at times been nigh

8. *Richardson v. Tex. Sec'y of State*, No. SA-19-CV-00963-OLG, 2020 U.S. Dist. LEXIS 163631, 2020 WL 5367216, at *30 (W.D. Tex. Sept. 8, 2020).

impassable as it rolled past people of color, women, and the poor, it has in the long view tracked the expansion of civil rights, reflecting to these eyes a maturation of individual liberty. Sometimes one step forward with two steps back, but the arc has been its expansion with which partisans ought make peace, accepting the bedrock principle that disenfranchising citizens is not a fallback to a failure to persuade. It is a given both that states must protect citizens' fundamental right to vote, resisting in that effort tempting cover for partisan objectives, and that their efforts remain reviewable with the disinterest demanded by the architects of our Constitution, insisting that judges of federal courts it would create be as "independent as the lot of humanity will admit"[9]—counsel wise and prescient offered as it was before the arrival of political parties, a charge implicit in the oath of us all whether modern day federalists or Jeffersonians.

9. Mass. Const., Declaration of Rights, art. 29 (1780).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION, FILED SEPTEMBER 10, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-19-cv-00963-OLG

DR. GEORGE RICHARDSON, ROSALIE WEISFELD, AUSTIN JUSTICE COALITION, COALITION OF TEXANS WITH DISABILITIES, MOVE TEXAS CIVIC FUND, AND LEAGUE OF WOMEN VOTERS OF TEXAS,

Plaintiffs,

v.

TEXAS SECRETARY OF STATE, TRUDY HANCOCK, IN HER OFFICIAL CAPACITY AS BRAZOS COUNTY ELECTIONS ADMINISTRATOR, AND PERLA LARA, IN HER OFFICIAL CAPACITY AS CITY OF MCALLEN, TEXAS SECRETARY,

Defendants.

September 10, 2020, Decided;
September 10, 2020, Filed

Appendix C

ORDER

On September 8, 2020, this Court issued a Memorandum Opinion and Order in which it granted summary judgment in favor of Plaintiffs Rosalie Weisfeld ("Weisfeld") and Coalition of Texans with Disabilities ("CTD") on certain of their claims against Texas Secretary of State (the "Secretary"). *See* docket no. 99 (the "Summary Judgment Order"). In light of the Court's determination regarding the merits of those claims, the Summary Judgment Order also instructed the Secretary to implement certain forms of immediate relief in advance of the November 2020 elections. *See id.* On September 9, 2020, the Secretary filed an Opposed Motion for Stay Pending Appeal. *See* docket no. 101 (the "Motion for Stay").

When considering whether to grant a stay pending appeal, courts consider four factors: (1) the applicant's likelihood of success on the merits; (2) the applicant's irreparable harm in the absence of a stay; (3) the harm to other parties; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 425-26, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). The Secretary argues that a stay is appropriate both because the Secretary is likely to prevail on the merits and because the injunction is vague and overbroad, *See* docket no. 101.

With respect to the Secretary's first argument, the Court's Summary Judgment Order has explained in detail why two different Plaintiffs are entitled to summary judgment on two different theories of relief. Moreover, the Court's conclusion as to each such theory of relief is

consistent with that of numerous other district courts that have analyzed the constitutionality of similar signature-comparison procedures in the recent weeks, months, and years. *See, e.g., Frederick v. Lawson*, No. 1:19-cv-01959-SEB-MJD, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696 (S.D. Ind. Aug. 20, 2020); *Self Advocacy Sols. N.D. v. Jaeger*, 3:20-CV-00071, 464 F. Supp. 3d 1039, 2020 WL 2951012 (D.N.D. June 3, 2020); *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Georgia*, 18-14503-GG, 2018 U.S. App. LEXIS 37448, 2018 WL 7139247 (11th Cir. Dec. 11, 2018); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943 (N.D. Fla. Oct. 16,2016); *Zessar v. Helander*, No. 05 C 1917, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646 (N.D. 111. Mar. 13, 2006); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358(D.Ariz. 1990). The Court has also explained in detail its conclusions regarding Plaintiffs' standing, including why Plaintiffs' claims may properly be asserted against the Secretary. *See* docket no. 99, Section I. And those conclusions are consistent with several recent Fifth Circuit opinions, including some that have rejected similar or identical arguments by the Secretary. *See, e.g., Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020); *Lewis v. Hughs*, No. 20-50654 (5th Cir. Sep. 4, 2020);[1]

1. The Court understands that the Secretary has continued to litigate certain issues related to its assertion of sovereign immunity before the Fifth Circuit, The merits of the Secretary's appeals in its other cases are not in front of this Court, but with respect to this case, the Court points out that (i) Plaintiffs assert a facial challenge

OCA-Greater Houston v. Texas, 867 F.3d 604 (5th Cir. 2017). Thus, although the Court believes that the Fifth Circuit is in a better position to determine whether the Secretary is likely to prevail on the merits of its appeal in this case, this Court does not find that argument to be particularly persuasive with respect to the Secretary's request for a stay.

As recognized by the Summary Judgment Order, however, the scope of the appropriate injunction presented a more nuanced question for this Court. *See* docket no. 99 p. 79. For that reason, the Court issued narrowly-tailored relief, and each of the Secretary's arguments regarding the scope of the Court's injunction were addressed—and in several instances *credited*—in the Summary Judgment Order. *See id.* at pp. 80-82, 93-94. In fact, as described in the Summary Judgment Order, the Court's

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to the applicable Code provisions, and (ii) the Secretary has—in recent weeks—*actually taken* each of the actions it had argued that it did not have the authority to take in this case, *See* docket no. 99, Sections I.D & I.E (describing how—during this Court's consideration of the parties' motions for summary judgment—the Secretary (i) issued an advisory to local election officials related to the signature-comparison provisions, (ii) made edits regarding signature-comparison provisions to its "dear voter" letter, (iii) ordered Harris County officials to comply with the Secretary's interpretation of certain mail-in ballot provisions pursuant to Tex. Elec. Code. § 31.005, and (iv) engaged the Attorney General to pursue litigation against Harris County pursuant to § 31.005(b)). Thus, irrespective of whether the Secretary has "some connection" to the enforcement of *other* provisions of the Election Code, it is beyond question that the Secretary has a "sufficient connection" to the provisions at issue in this case for the purposes of satisfying *Exparte Young.*

immediate injunction was designed to *accommodate* the Secretary's stated concerns and implement the remedy that *the Secretary contended was already available under existing law. See id.* Thus, although the Secretary's general assertions may be applicable to some *other* pre-election injunctions issued by other courts, the Secretary's Motion to Stay does not demonstrate why the Secretary's general complaints are applicable to *this* immediate injunction. For the avoidance of doubt, the Court will briefly discuss those issues again.

As an initial matter, the Secretary's concerns about the implementation of Tex. Elec. Code § 87.127 were addressed in the Summary Judgment Order, Every brief filed by the Secretary related to the summary judgment motions indicated that the Secretary believed that § 87.127 provided an appropriate remedy for any voter who contended that his or her ballot was properly rejected. *See, e.g.*, docket no. 101 p. 4; docket no. 75 (arguing that "Texas's process is sound" because of the availability of the relief in § 87.127); docket no. 79 p. 9 (citing § 87.127 and asserting that there is "no probable value of any additional process" because plaintiffs' "means to obtain relief in state court is sufficient to satisfy procedural due process"). Notably, the Secretary's remedy briefing argued that the "potential benefit" of the completely new affidavit procedure suggested by Plaintiffs would not be justified in advance of the November 2020 elections *because* "[e]xisting remedial options" already existed in § 87.127(a). *See* docket no. 93 p. 17. When the Secretary made its prior arguments to this Court, it expressed no qualms that § 87.127 may be too "vague" or "burdensome"

to implement for the upcoming elections and/or that its implementation may depend on whether "the official has the resources to pursue such action" (or any other practical issue for that matter). *See* docket no. 101 p. 5. Indeed, the Court assumes the Secretary would have highlighted its concerns with the adequacy of the apparently existing remedial framework had it had those concerns at the time it made its prior arguments. Because those concerns were not raised, it appeared clear the Secretary *already knew* how to uniformly implement the relief it said was *already available* under the Election Code, and the Court took the Secretary's contentions at face value. The Court fails to understand how the Secretary will be "irreparably harmed" by ordering local election officials to implement the procedures the Secretary said were available.

However, even assuming that the Secretary does not have an existing plan or had not considered how § 87.127 may actually be implemented on a statewide basis for all categories of mail-in voters—which would itself raise concerns about the sincerity of the Secretary's prior arguments to this Court—the Court still believes the scope of the immediate relief is appropriate. The Secretary has several weeks (i) to determine how the existing statutory provisions should best be implemented and (ii) to provide such guidance to local officials. Importantly, those procedures do not need to be finalized at the time mail-in applications and carrier envelopes are first mailed to voters, as the procedures only impact the review and processing of the materials *following the return of voters' carrier envelopes*. Notably, the Secretary has provided no *specific* reason why its instructions regarding such

a procedure cannot be issued in this timeframe. And in the event, the Secretary's office itself needs guidance regarding the efficient implementation of the remedial procedures set forth in § 87.127, the record demonstrates that Caldwell County may be able to provide it.[2] Finally, as noted above, the Court did not order a "completely new" cure procedure *because* the Secretary contended that the existing procedures could be utilized. To the extent the Secretary now believes a different "cure" procedure—perhaps using an affidavit like those used by voters who fail to present a photo ID during in-person voting—would be more appropriate, the Secretary is welcome to propose such a procedure.[3] Indeed, if such a

2. The record demonstrates that Caldwell County previously implemented the procedures in § 87.127 such that five voters (who were able to provide adequate confirmation that they signed both their application and carrier envelope) had their votes reinstated, whereas one voter (who was apparently unable to provide such confirmation) did not, *See* docket no. 84, Ingram Dep. at 45:12-46:16, This also demonstrates that—contrary to the Secretary's assertion—the fact that a voter notifies a county election officer regarding an improper signature rejection does not mean that the voter's ballot must automatically be accepted. Instead, it merely means that the voter—at that point—is entitled to "process," through which it may be determined whether the ballot should be accepted or rejected.

3. The Court notes that the Secretary was previously given an opportunity to describe the "cure" procedure that it believed was appropriate. *See* docket no. 88 (stating that the "parties may have other proposals in mind that both protect mail-in voters' fundamental rights and the State's interests" and directing Defendants to "advise the Court if there are any remedies that Defendants would agree to in the event the Court finds that the Plaintiffs' constitutional claims have merit"). It was only after the Secretary failed to describe such

proposed procedure appears to adequately mitigate the risk of disenfranchisement to mail-in voters in advance of the November 2020 elections,[4] the Court would certainly consider lifting the portion of the immediate injunction requiring the instructions regarding the implementation of § 87.127.

The Secretary's arguments about "depriving [the State] of the opportunity to implement its legislature's decisions" are equally unavailing. Docket no. 101 p. 5. The Court is relieved to see that the Secretary agrees that the Texas legislature may ultimately be in a better position to design a long-term "cure" framework for signature-mismatch voters similar to the one provided for other types of voters. *See id.* (arguing that the injunction "[r]equires Texas to implement court-devised notice-and-cure procedures on a statewide basis, without allowing Texas to develop its own"). Indeed, *it is for this exact reason* that the Court determined it was appropriate to (i) merely order the Secretary to actually implement the apparently existing remedy *enacted by the legislature* in advance of the November 2020 election, and (ii) consider whether more appropriate relief-—such as enjoining the signature-matching requirement until the legislature implements a more robust "cure" framework—might

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a procedure that the Court determined it was most appropriate to order the Secretary to instruct local election officials to implement the remedy *that the Secretary said was already available.*

4. Any procedure would need to recognize that many mail-in voters are often (i) disabled, (ii) incarcerated in jail, and/or (iii) out of their county of residence on Election Day and/or when they receive notice of rejection.

be appropriate following the election. *See* docket no. 99, Section III. The Court determined that this was the best means of both (i) protecting voters' rights in the upcoming election, and (ii) showing deference to the legislative process, including the legislature's determination that signature-verification is an important means of preventing voter fraud. *See id.* Further, in the event the legislature convenes a special session in the coming weeks to design a new "notice-and-cure" procedure for signature-mismatch voters, the Court would certainly consider whether all or part of its immediate injunction should be lifted. But in the absence of such actions by the legislature, the Court has determined that ordering the implementation of the remedy that *the legislature already enacted* best provides the State with "the opportunity to implement its legislature's decisions."

Additionally, the fact that the "mail-in balloting process" is underway and materials have already been printed—and in some cases, distributed to voters—is wholly irrelevant with respect to the injunctive relief issued. *See* docket no. 101 p. 11. The Court's immediate relief specifically declined to include any relief that required (i) the reprinting of existing materials and/or (ii) any new actions by voters while filling out their applications or carrier envelopes. *See* docket no. 99 pp. 81-82, 98 n.62. Instead, the immediate injunction only impacts the review and processing of voters' materials *after carrier envelopes are returned by voters*, and that process does not begin for several weeks. It is unsurprising that the Secretary does not specifically explain how the immediate injunctive relief might create voter confusion

or depress turnout, especially when the alternative is potential disenfranchisement.

Additionally, the Secretary's contention that the immediate injunction "displaces the State's interests in ballot integrity" and "uniform election administration"—which is also not explained further—flips the scope of the injunction on its head. *See* docket no. 101 p. 4. The immediate relief ordered by the Court gives credit to the Secretary's arguments regarding the prevention of voter fraud, and for that reason, permits the continued use of signature-verification on mail-in ballots.[5] *See* docket no. 99 pp. 80-81. Moreover, this Court and numerous other courts have explained why providing a voter with an opportunity to confirm his or her identity prior to rejection actually *furthers* the State's interests in election integrity and the prevention of voter fraud.[6] *See, e.g., Saucedo*, 335 F. Supp.

5. The Secretary ignores this point in its reliance on *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-CV-00374, 482 F. Supp. 3d 673, 2020 WL 5095459, at *22 (M.D. Tenn. Aug. 28, 2020). As the Secretary's own briefing notes, the court in *Hargett* declined "to enjoin enforcement of the signature-verification system in advance of the upcoming general election" because doing so would "alter Tennessee's rules for that election." *See* docket no. 101 pp. 9-10. This Court has *also* declined to enjoin the enforcement of the signature-verification process, and has instead permitted that process to continue with additional safeguards for voters whose ballots may be improperly rejected.

6. As explained in note 2, *supra*, a voter's complaint to a local election official about an improperly rejected ballot does not mean that the ballot must automatically be accepted under the terms of the injunction. Indeed, Caldwell County's prior utilization of § 87.127 demonstrates that a voter's mail in ballot will not be reinstated if

3d at 220 ("[I]f anything, additional procedures further the State's interest in preventing voter fraud while ensuring that qualified voters are not wrongly disenfranchised."); *Self Advocacy Sols. N.D.*, 464 F. Supp. 3d 1039, 2020 WL 2951012, at *10 ("[A]llowing voters to verify the validity of their ballots demonstrably advances—rather than hinders—these goals [of preventing voter fraud and upholding the integrity of elections]."); *Fla. Democratic Party v. Detzner*, 2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943, at *7 ("[L]etting mismatched-signature voters cure their vote by proving their identity further prevents voter fraud—it allows supervisors of elections to confirm the identity of that voter before their vote is counted."). In addition, the immediate injunction *provides uniformity*, where before, there was none. Prior to the immediate injunction, one county's election officials could decide to provide voters with constitutional protections whereas other counties' officials could decline to do so. *See* docket no. 99 pp. 91, 95, n.59. The immediate injunction ensures that local officials no longer have the *sole* discretion to determine the extent to which each voter should have his or constitutional rights protected during the voting process. *See id.*

Finally, the injunction "upends the status quo" only to the extent the "status quo" has permitted the improper rejection of ballots without providing the affected voters with timely notice and a meaningful opportunity to avoid disenfranchisement. Again, the Court has determined

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the voter is unable to ultimately demonstrate that he or she signed both the application and carrier envelope.

that it is nonetheless appropriate to permit the State to utilize its signature-verification process because the State has an unquestioned interest in preventing voter fraud. *See* docket no. 99 pp. 80-81. Finally, the record makes clear that nothing will change with respect to local election officials' processing of the *vast* majority of mail-in ballots that officials receive. *See* docket no. 93-2 111; docket no. 99 pp. 92-94.

The Secretary's arguments in its Motion to Stay—and its application of any "balancing"—place the Secretary's and State's interests front and center, but completely *fail to acknowledge* voters' interest in avoiding disenfranchisement on the basis of an incorrect signature "mismatch" determination in the upcoming elections.[7] The applicable standard for injunctive relief requires "balancing," and the Court considered *both* the interests of voters—whose constitutional rights are being violated—and the interests of the State as it determined the scope of the appropriate immediate relief. *See* docket no. 99 p. 78. Finally, the fact that the Secretary may have to take *some* action in the next several weeks to mitigate the risks inherent with the State's existing signature-comparison procedures does not constitute "irreparable harm," and thus, it is not a basis for withholding *all* injunctive relief or issuing a stay of the Summary Judgment Order.

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7. Nor does it matter that the Plaintiffs' have only *proved* that two voters had their ballots improperly rejected, Indeed, the problems with the State's existing procedures are not Weisfeld nor Richardson-specific, and the record evidence demonstrates that there is a substantial risk that *many* voters—including Weisfeld and others—may have their ballots improperly rejected in the upcoming elections absent injunctive relief, *See* docket no, 99, Section II.B.2.

Thus, for the reasons set forth above and in the Court's Summary Judgment Order (docket no. 99), the Secretary's Motion for Stay (docket no. 101) is **DENIED**.

IT IS SO ORDERED.

SIGNED this 10 day of September, 2020.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
Chief United States District Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, FILED, SEPTEMBER 8, 2020

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

Civil No. SA-19-CV-00963-OLG

DR. GEORGE RICHARDSON, ROSALIE WEISFELD, AUSTIN JUSTICE COALITION, COALITION OF TEXANS WITH DISABILITIES, MOVE TEXAS CIVIC FUND, AND LEAGUE OF WOMEN VOTERS OF TEXAS,

Plaintiffs,

v.

TEXAS SECRETARY OF STATE, TRUDY HANCOCK, IN HER OFFICIAL CAPACITY AS BRAZOS COUNTY ELECTIONS ADMINISTRATOR, AND PERLA LARA, IN HER OFFICIAL CAPACITY AS CITY OF MCALLEN, TEXAS SECRETARY,

Defendants.

September 8, 2020, Decided;
September 8, 2020, Filed

Appendix D

MEMORANDUM OPINION AND ORDER

On this date, the Court considered Plaintiffs' Motion for Summary Judgment (docket no. 65) ("Plaintiffs' Motion") and the Texas Secretary of State's Motion for Summary Judgment (docket no. 70) (the "Secretary's Motion"). Having reviewed the complete record and for the reasons set forth below, Plaintiffs' Motion is granted in part, and the Secretary's Motion is denied in part. Specifically, Plaintiffs' Motion is granted to the extent Plaintiff Rosalie Weisfeld and Plaintiff Coalition of Texans with Disabilities seek summary judgment on their due process claims ("Count One") and "undue burden"/"right to vote" equal protection claims ("Count Two") against the Secretary, and the Secretary's Motion is denied as to those claims.[1] Based on those claims, the Court concludes that immediate, partial injunctive relief is also appropriate.[2]

BACKGROUND

This case arises from provisions of the Texas Election Code (the "Election Code" or "Code") related to the process of voting by mail, and specifically, the signature-

1. For the reasons set forth in Sections I and IV of this Order, the merits of Plaintiffs' other claims against the Secretary and all claims against the other defendants will be addressed by separate order, if necessary. For the same reasons, the other pending summary judgment motions will also be addressed by separate order, if necessary. *See* docket nos. 64, 65, 66 & 70.

2. For the reasons set forth in Section III of this Order, the Court will determine whether additional injunctive relief is appropriate following the November 3, 2020 elections.

comparison procedures utilized to determine whether a ballot should be accepted or rejected. Like many states, the State of Texas ("Texas" or the "State") offers certain voters the opportunity to vote by mail. Specifically, Texas offers the opportunity to vote by mail to voters who are outside of their county of residence during an election, voters with disabilities, voters 65 years-of-age or older, and certain voters confined in jail but otherwise eligible to vote. *See* Tex. Elec. Code §§ 82.001-.004.

In order to vote by mail, an eligible voter must first request a mail-in ballot by completing a mail-in ballot application at least 11 days before the election day. *Id.* at §§ 84.001, 84.007. As part of the application, the voter signs a certificate attesting that the voter "certif[ies] that the information given in this application is true" and "understand[s] that giving false information in this application is a crime." Docket no. 65-1, Ex. 6. If the voter's application complies with all requirements, local election officials provide the voter with an official ballot, ballot envelope and carrier envelope. *See* Tex. Elec. Code §§ 86.001(b), 86.002(a). In order to cast his or her vote by mail, the voter must mark the ballot, place it in the official ballot envelope provided by the county, seal the official ballot envelope, place the official ballot envelope in the carrier envelope provided by the county, seal the carrier envelope, and sign the certificate on the carrier envelope. *Id.* at § 86.005(a)-(c). Specifically, the carrier envelope certificate requires the voter to "certify that the enclosed ballot expresses [the voter's] wishes independent of any dictation or undue persuasion by any person," and includes a line for the voter's signature across the flap of

the envelope. *Id.* at § 86.013(c). The carrier envelope then must be returned to the county in a timely manner. *Id.* at § 86.006(a). As shown, neither the ballot application nor the carrier envelope (i) instruct the voter how to sign his or her name or (ii) notify the voter that the signatures on the application and carrier envelope will be used as part of any comparison process. *See* docket no. 84, Ingram Dep. at 32:25-35:4, 103:9-15.

Following the receipt of a voter's mail-in ballot, the Election Code instructs each local jurisdiction's Early Voting Ballot Board ("EVBB") or Signature Verification Committee ("SVC") to open the ballot envelope and determine whether to accept or reject the voter's ballot.[3] *See id.* at §§ 87.001, 87.027(a-1), 87.041. The Section states that a ballot may only be accepted if various conditions are satisfied. *Id.* at § 87.041(b). One such provision, which is central to this lawsuit, states that a ballot must be rejected if the EVBB or SVC concludes that the signature on the carrier envelope or ballot application was "executed by a person other than the voter, unless signed by a witness."

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3. The signature-comparison process is generally conducted by the Early Voting Ballot Board, a statutorily required board established in each county that includes representatives from county parties. *See generally* Tex. Elec. Code § 87.001. However, the local jurisdiction's Early Voting Clerk ("EVC") may determine that a Signature Verification Committee should be established, in which case the SVC will perform the signature reviews rather than the EVBB. *See generally id.* at § 87.027. An SVC is also mandatory if the EVC receives a timely petition of at least 15 registered voters requesting such a committee. *Id.* at § 87.027(a-1).

Id. at § 87.041(b)(2).[4] The Election Code provides guidance as to which signatures an EVBB or SVC should use for the purposes of comparison and states that the "committee shall compare the signature on each carrier envelope certificate . . . with the signature on the voter's ballot application." *See id.* at § 87.027(i); *see also id.* at § 87.041(b)(2). The Code provides that the "committee may also compare the signatures with any two or more signatures of the voter made within the preceding six years and on file with the county clerk or voter registrar." *Id.* at §§ 87.027(i), 87.041(e). However, the Election Code contains no guidance as to the appropriate procedure or standard for determining whether two signatures "match," and instead, signature reviewers are merely instructed to use their "best judgment." *See* docket no. 65-1, Ex. 4 p. 35; docket no. 84, Ingram Dep. at 50:15-51:5. Similarly, the Election Code does not require that EVBB or SVC members receive training in evaluating signatures. *See* docket no. 65-1, Ex. 4; docket no. 84, Ingram Dep. at 49:2-5; docket no. 84, Hancock Dep. at 31:8-19, 73:6-17. For that reason, one local election official agreed that—under the existing policies—whether a ballot is accepted or rejected very well may vary depending on which members of the review committee conduct the comparison. *See* docket no. 84, Hancock Dep. at 123:4-12.

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4. The relevant provision of the Election Code states that a ballot may only be accepted if "neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness." *Id.* at § 87.041(b)(2). The Election Code also sets restrictions as to which voters may utilize the witness alternative. *See, e.g., id.* at § 1.011(a).

If a ballot is rejected on the basis of the EVBB's or SVC's signature comparison, the Election Code only requires that the voter be notified about the rejection of his or her ballot within 10 days following the election. *Id.* at § 87.0431(a). Prior to a mail-in ballot's rejection, the Election Code does not *require* that local jurisdictions provide an opportunity for the voter to (i) verify his or her identity, (ii) demonstrate that he or she did indeed sign the relevant documents, or (iii) otherwise challenge the signature verification determination. Instead, the Election Code states that a "county election officer *may* petition a district court for injunctive or other relief as the court determines appropriate" if the county election officer "determines a ballot was incorrectly rejected or accepted by the [EVBB]." *Id.* at § 87.127(a) (emphasis added). Interestingly, Texas voters who make other mistakes during the voting process—including those who fail to bring photo identification for in person voting and those who forget to sign the carrier envelope altogether—are provided with a specific opportunity to "cure" under the Election Code prior to their ballot's rejection. *See* Tex. Elec. Code §§ 63.001(g), 65.0541, 86.011(d). Unsurprisingly, Plaintiffs assert—and the Texas Secretary of State's (the "Secretary") Director of Elections acknowledged—that the existing signature-comparison procedures may result in certain mail-in ballots being improperly rejected. *See* docket no. 84, Ingram Dep. 76:23-77:7. And as a result of the implemented procedures, the record demonstrates that Texas counties rejected at least 3,746 mail-in ballots during the 2018 general election and at least 1,567 mail-in ballots during the 2016 general election solely on the basis of mismatching signatures. *See* docket no. 65-1, Ex. 16.

Appendix D

Plaintiffs in this case include both individuals who had their votes rejected on the basis of signature "mismatches" and various organizations whose members and/or whose services are allegedly impacted by the State's mail-in voting signature-comparison procedures. Plaintiff Dr. George Richardson ("Richardson") had his mail-in ballot rejected by Brazos County officials during the 2018 general election. *See* docket no. 65-1, Ex. 25. Similarly, during a city run-off election in 2019, the City of McAllen rejected Plaintiff Rosalie Weisfeld's ("Weisfeld," and with Richardson, the "Individual Plaintiffs") mail-in ballot. *See* docket no. 65-1, Ex. 33. The record demonstrates that the Individual Plaintiffs were each eligible to vote by mail,[5] each mailed in his or her respective ballot well before the election date, and each complied with all instructions on both the application and carrier envelope, including by signing each document in the appropriate certification portion. *See* docket no. 65-1, Exs. 18-20, 25, 30-33. Notwithstanding those efforts, each Individual Plaintiffs ballot was nonetheless rejected on the basis of a perceived signature "mismatch," and each Individual Plaintiff was not notified until after the election that his or her respective ballot had been rejected. *See* docket no. 65-1, Exs. 21, 25, 30, 33. Notably, Weisfeld's ballot was rejected even though she had previously served as a member on the EVBB in Hidalgo County. *See* docket no. 84, Weisfeld Dep. at 68:22-71:20. And Richardson's ballot was rejected despite the fact that he specifically

5. Richardson was eligible to vote by mail as a voter over the age of 65, and Weisfeld was eligible to vote by mail as a voter who was outside of her county of residence on election day. *See* docket no. 65-1, Exs. 21 & 30.

contacted local Brazos County officials to notify them of their mistake following his receipt of his rejection notice. *See* docket no. 84, Richardson Dep. at 30:9-19, 31:21-32:1. The record demonstrates that each of the Individual Plaintiffs is qualified to—and intends to—vote by mail again in the future. *See* docket no. 65-1, Ex. 30 ¶¶ 3, 13-16; docket no. 84, Weisfeld Dep. at 22:20-23, 26:22-27:5; docket no. 65-1, Ex. 21 §§ 3, 12.

Whereas each of the Individual Plaintiffs have previously had a ballot improperly rejected as a result of the existing signature-comparison procedures, Plaintiffs Coalition of Texans with Disabilities ("CTD"), Austin Justice Coalition ("AJC"), MOVE Texas Civic Fund ("MOVE") and League of Women Voters ("LWV") (collectively, the "Organizational Plaintiffs") each undertake voter registration, voter outreach, voter support, and/or voter education efforts in Texas. *See generally* docket no. 65-1, Exs. 35,45,49, 60. Certain efforts made by the Organizational Plaintiffs have been conducted in response to the challenged signature-comparison procedures. For example, CTD specifically produces informational materials for voters—including its members with disabilities and others—that provide notice of the signature-comparison process, advise voters that they must be careful to ensure their signatures "match," and warn voters that any failure to adequately "match" their signatures may result in disenfranchisement. *See, e.g.*, docket no. 65-1, Exs. 46 & 47. The Organizational Plaintiffs argue that their missions are frustrated and that they are forced to expend additional resources as a result of the signature-comparison procedures utilized on mail-in ballots. *See* docket no. 74 p. 4.

Appendix D

In the instant lawsuit, the Individual Plaintiffs and Organizational Plaintiffs challenge the State's existing signature-comparison procedures. *See* generally docket no. 1. Plaintiffs specifically take issue with both (i) the inherent flaws in the signature-comparison process (including the lack of uniform comparison standards or training regarding signature "matching") that result in incorrect ballot rejections and (ii) the fact that voters are provided no meaningful notice of a rejected ballot nor a meaningful opportunity to cure an improper rejection based on a perceived signature-mismatch. *See id.* at ¶¶ 47, 50. Plaintiffs correctly note that—as a result of the challenged features of the existing signature-comparison process for mail-in ballots—voters who were eligible to vote by mail and who chose to do so suffered disenfranchisement. *See id.* at ¶ 57. Plaintiffs further argue that the disenfranchisement of eligible voters will continue to occur in the future absent changes to the applicable signature-comparison procedures. *See id.* Similarly, the Organizational Plaintiffs argue that they will continue to be forced to expend resources helping voters avoid disenfranchisement due to improper signature rejections so long as Texas's existing procedures remain unchanged. *See id.* at ¶¶ 14,18,23,26. On that basis, Plaintiffs filed the present action seeking declaratory and injunctive relief against Defendants.

Specifically, Plaintiffs seek relief against Defendant Texas Secretary of State (the "Secretary"), Defendant Trudy Hancock ("Hancock"), and Defendant Perla Lara ("Lara"). The Secretary is sued in her official capacity as the Chief Election Officer of the State of Texas. *See*

Tex. Elec. Code § 31.001(a). Hancock is sued in her official capacity as the Brazos County Elections Administrator ("Brazos EA"), and Lara is sued in her official capacity as the Secretary of the City of McAllen, Texas ("McAllen City Secretary," and, collectively with Brazos EA, the "Local Defendants"). Plaintiffs' Complaint asserts the following causes of action against each of the Defendants: (1) a claim by all Plaintiffs alleging violations of the Due Process Clause of the Fourteenth Amendment for Defendants' alleged failure to provide pre-rejection notice and an opportunity to cure to voters whose ballots are rejected on the basis of a perceived signature mismatch ("Count One"); (2) a claim by all Plaintiffs alleging violations of the Equal Protection Clause of the Fourteenth Amendment due to an allegedly severe burden that has been placed on the right to vote that is not justified by a legitimate government interest ("Count Two");[6] (3) a separate claim by all Plaintiffs alleging violations of the Equal Protection Clause of the Fourteenth Amendment due to the Secretary's, State's and/or Local Defendants' failure to provide any uniform guidelines or principles regarding the comparison of signatures ("Count Three"); and (4) a claim asserted only by Plaintiff CTD alleging violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, *et seq.*, and the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 794 ("Count Four"). *See* docket no. 1.

Following completion of discovery, each party filed a Motion for Summary Judgment seeking summary

6. Throughout this Order, this theory of relief will be referred to as Plaintiffs' "undue burden" and/or "right to vote" claim. *See* Section II.C, *infra*.

judgment on each of the pending claims. *See* docket no. 64 (the "McAllen Motion"); docket no. 65; docket no. 66 (the "Brazos Motion"); docket no. 70. Each party also filed responses and/or replies to the various summary judgment motions. *See* docket nos. 73, 74, 75,76, 77, 79 & 80. In support of their arguments, the parties attached voluminous appendices of deposition testimony, affidavits, and documentary evidence to their motions and responses. In addition to relying on the aforementioned materials, Plaintiffs also rely on the expert analysis of Dr. Linton Mohammed, Ph.D., a certified Forensic Document Examiner, whose research and professional experience focus upon handwriting, signature identification, and the scientific approach to analyzing questioned signatures,[7] *See generally* docket no. 65-1, Ex. 14 ¶¶ 1-12; docket no. 84, Mohammed Dep. at 13:22-14:1.

After completing its initial review of the materials provided by the parties, the Court requested that the parties provide the complete transcripts for each of

7. The Secretary's response to Plaintiffs' Motion explains why the Secretary believes Dr. Mohammed's opinions are "unhelpful" in this case. *See* docket no. 75 pp. 15-16. However, no party appears to explicitly challenge Dr. Mohammed's expertise or the substance of his testimony, and notably, the Secretary and Brazos EA also rely on Dr. Mohammed's testimony for other purposes in their briefing. *See* docket no. 70 p. 5 n.8; docket no. 73 p. 11. Additionally, a case law search demonstrates that courts have accepted Dr. Mohammed's expert opinions in other cases involving challenges to similar signature-comparison procedures used by other states *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 213 (D.N.H. 2018); *Frederick v. Lawson* 119CV01959SEBMJD, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at * 14 (S.D. Ind. Aug 20 2020)

the depositions cited in the motions. *See* docket no. 83. In response to the Court's order, the parties provided the Court with a helpful joint appendix containing the requested materials. *See* docket nos. 84 & 85. In addition, the Court issued an Order requesting additional briefing as to the appropriate remedy in the event Plaintiffs' constitutional claims were meritorious. *See* docket no. 88. In response to that Order, the parties provided the Court with detailed briefing. *See* docket nos. 89, 91, 92, 93, 96 & 98.

LEGAL STANDARD

Under the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(c). In making the determination of whether a genuine issue of material fact exists, the court reviews the facts and inferences to be drawn from them in the light most favorable to the non-moving party. *Reaves Brokerage Co., Inc. v. Sunbelt Fruit & Vegetable Co., Inc.*, 336 F.3d 410, 412 (5th Cir. 2003).

At the summary judgment stage, the movant bears the burden of identifying those portions of the record it believes demonstrate the "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). However, the movant need not negate the elements of the non-movant's case. *See*

Boudreaux v. Swift Transp. Co., 402 F.3d 536, 540 (5th Cir. 2005). The moving party may meet its burden "by pointing out 'the absence of evidence supporting the nonmoving party's case.'" *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir, 1995) (quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992)). If the movant satisfies its burden, the non-moving party must present specific facts which show "the existence of a genuine issue concerning every essential component of its case." *Am. Eagle Airlines, Inc. v. Airline Pilots Ass'n, Int'l*, 343 F.3d 401, 405 (5th Cir. 2003) (citation and internal quotation marks omitted); *see also Lincoln Gen. Ins. Co.*, 401 F.3d at 349. At the summary judgment stage, the non-movant cannot meet its burden with "conclusory allegations" or "unsubstantiated assertions." *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 399 (5th Cir. 2008). In the absence of any proof, the court will not assume that the non-movant could or would prove the necessary facts. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)).

A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Tamez v. Manthey*, 589 F.3d 764, 769 (5th Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "As to materiality, the substantive law will identify which facts are material." *Anderson,* 477 U.S. at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude

the entry of summary judgment." *Id.* "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

DISCUSSION

As noted above, presently pending before the Court are numerous claims asserted against each of the three Defendants, as well as four motions for summary judgment with respect to those claims. In light of the impact the pending claims and issues may have on the upcoming November 3, 2020 elections, and in order to promptly issue this Order, the Court has concluded that it is appropriate for it to focus its analysis only on certain Plaintiffs' claims against the Secretary. Indeed, as explained in subsequent Sections, narrowing the claims and issues that are addressed in this Order permits the Court to issue an order that both (i) addresses the relevant legal issues and (ii) affords time such that the appropriate remedy may be implemented prior to the November 2020 elections. *See* Section IV, *infra*.

Accordingly, although evidence related to each of the parties is relevant to the merits of the claims (and will be discussed in the Court's analysis), this Order will only specifically determine whether summary judgment is appropriate with respect to Plaintiff Weisfeld's and Plaintiff CTD's due process and "undue burden"/"right to vote" equal protection claims against the Secretary. *See* docket no. 1, "Count One" & "Count Two." For the reasons set forth in Sections I-III of this Order, the Court concludes that Plaintiffs Weisfeld and CTD are entitled to summary judgment on each of those claims.

The Court further concludes that immediate injunctive relief is appropriate in advance of the November 3, 2020 elections. Finally, for the reasons set forth in Section IV of this Order, all remaining claims and motions (including Plaintiff Weisfeld's and Plaintiff CTD's other claims and all claims against the Local Defendants) will be held in abeyance pending a hearing following the November 2020 elections and/or the resolution of any appeal of this Order.

I. Subject-Matter Jurisdiction and Standing

Before addressing the merits of Plaintiffs' claims, the Court will first address whether Plaintiffs' have standing to bring the asserted claims and whether the Secretary is a proper defendant with respect to those claims. The Secretary contends that Individual Plaintiffs lack Article III standing to seek injunctive relief because it is "speculative" as to whether they will again suffer the same "injury in fact" in the future. *See* docket no. 75 pp. 3-5. The Secretary argues that the Organizational Plaintiffs lack organizational standing and associational standing because they too cannot satisfy the "injury in fact" requirement. *See id.* at pp. 5-9; docket no. 70 pp. 15-20. Additionally, the Secretary argues that Plaintiffs lack standing as to claims against the Secretary because they cannot satisfy the traceability and/or redressability requirements for Article III standing as to the Secretary. *See* docket no. 70 pp. 13-15. The Secretary also contends that Plaintiffs' claims against the Secretary are barred by sovereign immunity. *See id.* at pp. 11-12. Finally, the Secretary argues that the Organizational Plaintiffs lack statutory standing under 42 U.S.C. § 1983 to assert

constitutional claims against the Secretary. *See id.* at pp. 20-21.

Having reviewed the record, it is apparent that Plaintiffs Rosalie Weisfeld and CTD have standing to seek the declaratory and injunctive relief against the Secretary sought by Plaintiffs. Accordingly, the Court will explain why those Plaintiffs have "individual" and "organizational" standing, respectively, and for the purposes of efficiency—given the upcoming election—the Court will decline to specifically analyze whether other Plaintiffs also have standing. Indeed, in a lawsuit for injunctive relief, the presence of one party with standing is sufficient to satisfy Article III's case or controversy requirement. *See Texas v. United States*, 945 F.3d 355, 377-78 (5th Cir. 2019) ("Only one plaintiff need succeed because one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.") (internal quotations omitted); *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015) (same); *see also 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); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (citing *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 585-86 (5th Cir. 2006)) (other citations omitted). Additionally, the Court will also explain why the Secretary is a proper defendant as to Plaintiffs' claims and why Plaintiffs' claims against the Secretary are not barred by sovereign immunity. Finally, the Court will discuss why Plaintiff CTD also has prudential standing under § 1983 to assert constitutional claims against the Secretary.

Appendix D

A. Legal Standard for Article III Standing

The constitutional requirement of standing contains three elements: "To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, ___ U.S. ___, 140 S.Ct. 1615, 207 L. Ed. 2d 85 (U.S. 2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The same requirements also apply to entities seeking to establish that they have "associational" or "organizational" standing. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 609-10 (5th Cir. 2017).

> "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. 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.

Id. at 610 (citations and some internal quotation marks omitted).

"[T]he injury in fact requirement under Article III is qualitative, not quantitative, in nature," and the injury "need not be substantial." *OCA-Greater Houston*, 867 F.3d at 612 (citations, internal quotation marks and brackets omitted). Thus, while an injury in fact must be (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical," *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted), "it need not measure more than an 'identifiable trifle.'" *OCA-Greater Houston*, 867 F.3d at 612 (quoting *Ass'n of Cmty Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999)).

B. Injury in Fact—Weisfeld's Individual Standing

The Fifth Circuit recently explained what an individual plaintiff must demonstrate in order to satisfy the "injury in fact" requirement for the purposes of seeking injunctive and declaratory relief. Specifically, in *Stringer v. Whitely*, the Fifth Circuit explained as follows:

> Because injunctive and declaratory relief cannot conceivably remedy any past wrong, plaintiffs seeking injunctive and declaratory relief can satisfy the redressability requirement only by demonstrating a continuing injury or threatened future injury. That continuing or threatened future injury, like all injuries supporting Article III standing, must be an injury in fact. To be an injury in fact, a threatened future injury must be (I) potentially suffered by the plaintiff, not someone else;

> (2) concrete and particularized, not abstract; and (3) actual or imminent, not conjectural or hypothetical. The purpose of the requirement that the injury be imminent is to ensure that the alleged injury is not too speculative for Article HI purposes. For a threatened future injury to satisfy the imminence requirement, there must be at least a substantial risk that the injury will occur.

942 F.3d 715, 720-21 (5th Cir. 2019) (internal quotations and citations omitted). Relying on the Fifth Circuit's *Stringer* opinion, the Secretary argues that the Individual Plaintiffs cannot satisfy this standard because it is "speculative that Individual Plaintiffs will vote this way" and "there is no basis to conclude that their hypothetical future ballots will be rejected." Docket no. 75 p. 4.

Having reviewed the record, the Court finds the Secretary's arguments to be misplaced as to Plaintiff Weisfeld.[8] As an initial matter, the Secretary's assertion completely ignores the record evidence demonstrating that Weisfeld has repeatedly voted by mail in the past and will continue to vote by mail in the future. *See* docket no. 65-1, Ex. 30 ¶¶ 3, 13-16; docket no. 84, Weisfeld Dep. at 22:20-23, 26:22-27:5. Specifically, the record demonstrates that Weisfeld recently suffered traumatic injuries in a car accident and that, as a result, she will be voting by mail

8. To be clear, the Court has not concluded that the Secretary's arguments have merit as to Plaintiff Richardson. For the reasons set forth above and in Section IV, *infra*, the Court has not conducted that analysis as part of this Order.

under the disability qualification in upcoming elections. *See* docket no. 65-1, Ex. 30 ¶ 16; docket no. 84, Weisfeld Dep. at 77:1-8. Moreover, Weisfeld is 63 years old, and she stated that when she turns 65, she will vote by mail for that reason as well. *See* docket no. 65-1, Ex. 30 ¶ 15. Finally, in the event she is absent from Hidalgo County (where she resides) in any upcoming elections—which may be the case given that her doctors and therapists are located in Houston—Weisfeld *also* plans to vote by mail for that reason as well. *See id*, at ¶ 16; docket no. 84, Weisfeld Dep. at *77:1-25*.

In this important way, the present circumstances are distinguishable from those in *Stringer*. In *Stringer*, the plaintiffs asserted that the State's motor voter online registration practices violated plaintiffs' equal protection rights and the National Voter Registration Act's provisions that require simultaneous driver's license and voter registration applications. *See Stringer v. Pablos*, 320 F. Supp. 3d 862 (W.D. Tex. 2018). Because the record—at *that time*-did not contain "[p]laintiff-specific evidence" that any of the plaintiffs would again become "both unregistered to vote and eligible to renew their driver's licenses using the [challenged] DPS system," the Fifth Circuit held that plaintiffs had not shown that there was a "substantial risk" that plaintiffs would again become unregistered and eligible to renew their driver's licenses online. *Stringer*, 942 F.3d at 722-23. In this case, the record clearly demonstrates that Weisfeld will again vote by mail in the future, and thus, she *will* again be subjected to the challenged voting procedures.

Further, although it is true that the "past wrong" of Weisfeld's improperly rejected 2019 ballot cannot be remedied by the declaratory and injunctive relief sought here, *see Stringer*, 942 F.3d at 720, the prior rejection of Weisfeld's ballot certainly may be considered when evaluating the risk that such harm will occur again. *See O'Shea v. Littleton*, 414 U.S. 488, 496, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) (stating that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury"). Incredibly, Weisfeld previously served as a member on the EVBB in Hidalgo County, and thus, she was aware of both the requirement that her signatures match and the applicable signature-comparison process. *See* docket no. 84, Weisfeld Dep. at 70:1-71:20. Notwithstanding her familiarity with the process, however, *even her* ballot was rejected for a perceived signature mismatch. Given that her efforts to comply with the signature requirement were apparently insufficient to satisfy the comparison standards that were being applied by the specific review committee on the date in question, there is clearly a realistic chance that such a rejection will occur again with respect to her ballot.

Because it is clear that Weisfeld will vote by mail in the near future as a disabled voter, a voter out of the county, and—beginning in less than two years—as a voter over the age of 65, the Secretary's argument appears to ultimately rest on the fact that Weisfeld's mail-in ballots in upcoming elections *might not* be rejected due to a signature mismatches. *See* docket no. 75 p. 4 (asserting that "there is no basis to conclude that [Individual Plaintiffs'] hypothetical future ballots will be rejected."). And of

course, that is true. But there is no "threshold" probability of disenfranchisement that a plaintiff must prove in order to demonstrate "substantial risk," and there certainly is no requirement that a plaintiff demonstrate that he or she is *certain* to have her ballot rejected. Indeed, if that were the case, no voter could challenge the signature-comparison procedures at issue, as no voter would be able to show with certainty that his or her "future ballots *will* be rejected" until after that harm has occurred.

To be clear, it is true that some Texas voters may not have standing to challenge the signature-comparison procedures at question. Indeed, a voter who is ineligible to vote by mail certainly could not demonstrate a substantial risk that his or her ballot may be rejected on the basis of a perceived signature mismatch on a mail-in ballot. But in this case, the record contains specific evidence demonstrating that (i) Weisfeld *will* again vote by mail on the basis of her disability (and on other bases), (ii) Weisfeld *will* again be subjected to the same challenged procedures, and (iii) Weisfeld has previously been unable to "match" her signatures (at least to the satisfaction of one prior review committee).[9] *See Self Advocacy Sol. N.D. v. Jaeger*, 3:20-CV-00071, 464 F. Supp. 3d 1039, 2020 U.S.

9. The Court's conclusion with respect to Weisfeld's standing is not *dependent* on the fact that Weisfeld's ballot was previously rejected. A plaintiff need not necessarily demonstrate that he or she suffered an injury in the past in order to seek an injunction to prevent threatened future harm. *See* note 33, *infra*. Instead, the evidence of the "past wrong" to Weisfeld merely solidifies the Court's conclusion that Weisfeld faces a "substantial risk" of the improper rejection of her ballot in the future. *See O'Shea*, 414 U.S. at 496 (stating that "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury").

Dist. LEXIS 97085, 2020 WL 2951012, at *5 (D.N.D. June 3, 2020) (finding that individual plaintiff had standing to challenge similar signature comparison procedures and stating that "[c]onsidering election officials incorrectly rejected [the] ballot [of a mail-in voter plaintiff with a disability] in the 2018 general election for a signature discrepancy—coupled with the fact that she will again have to vote by mail in the upcoming primary because of the COVID-19 pandemic—there is a realistic threat of an impending deprivation of her right to vote.").

In this way, this is not a case of Weisfeld attempting to remedy a "generalized grievance available to all Texans." *Stringer*, 942 F.3d at 722. Instead, there is "plaintiff-specific" proof demonstrating that Weisfeld faces a substantial risk that her ballot will again be improperly rejected, and thus, "[o]n these facts, the prospect of future [harm to Weisfeld] is far from imaginary or speculative." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (citation and internal quotations marks omitted). Thus, Weisfeld has shown "a continuing or threatened future injury to [herself]," *Stringer*, 942 F.3d at 721, and for that reason, she has satisfied the "injury in fact" requirement necessary to request the declaratory and injunctive relief sought by Plaintiffs in this case.

C. Injury in Fact—CTD's Organizational Standing

An "organization can establish standing in its own name if it meets the same standing test that applies to

individuals." *OCA-Greater Houston*, 867 F.3d at 610 (citations and internal quotation marks omitted). The Secretary argues that no Organizational Plaintiff can satisfy the injury in fact requirement for Article III standing because no Organizational Plaintiff can show a "cognizable interest" in the form of specific resources that the organization expended "to counteract" the impact of the challenged procedures. *See* docket no. 70 pp. 16-18.

Having reviewed the record, the evidence plainly demonstrates that Plaintiff CTD has satisfied the injury in fact requirement necessary to assert "organizational" standing in this case. The Court's conclusion is compelled by *OCA-Greater Houston*, 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. *See* 867 F.3d at 611-12. Specifically, in *OCA-Greater Houston* the Fifth Circuit affirmed the district court's determination that a non-profit, voter outreach organization had "organizational" standing to challenge provisions of the Texas Election Code related to voter-interpreter restrictions. *See id.* In explaining its conclusion, the Fifth Circuit stated the following with respect to the organization in that case ("OCA"):

> [OCA] went out of its way to counteract the effect of Texas's allegedly unlawful voter-interpreter restriction—not with a view toward litigation, but toward mitigating its real-world impact on OCA's members and the public. For instance, it undertook to educate voters about

> Texas's assistor-versus-interpreter distinction to reduce the chance that other voters would be denied their choice of interpreter in the way that [the named individual plaintiff] was—an undertaking that consumed its time and resources in a way they would not have been spent absent the Texas law. Hence, the Texas statutes at issue "perceptibly impaired" OCA's ability to "get out the vote" among its members.

Id. (footnote omitted).

Each portion of the Fifth Circuit's analysis in that passage could apply with equal force—if not more—to Plaintiff CTD in this case. The record demonstrates that CTD has "gone out of its way to counteract the effect of Texas's allegedly unlawful . . . restriction[,] not with a view toward litigation, but toward mitigating its real-world impact on CTD's members and the public." *Id.* The record is replete with evidence demonstrating CTD's efforts to *specifically* mitigate the effects that the State's signature-comparison procedures may have on both its members and the public. *See, e.g.*, docket no. 65-1, Ex. 47 (video produced by CTD (i) explaining the signature-comparison process, (ii) explaining that the Election Code does not provide for timely notice and an opportunity to cure if a ballot is rejected based on a perceived signature mismatch, (iii) explaining that signature-verification committees are not generally trained in signature comparison, and (iv) instructing viewers to "take special care to make sure your signature matches from the application to your ballot"); docket no. 80-1, Ex. 89 (social media post by CTD

explaining that "[s]ignature discrepancies may cause your vote to go uncounted" and instructing voters to "[m]ake sure the signature on your mail in ballot is as close as possible to the . . . signature on your voter registration form"); docket no. 65-1, Ex. 46 (social media post by CTD explaining that voters must "take care that the signature on your APPLICATION is as close as possible to the signature on your BALLOT" and attaching video with explanation of how existing signature-comparison procedures may lead to disenfranchisement); docket no. 65-1, Ex. 42 (2019 Annual Report containing reminder "to be very clear and consistent with your signatures, which can be used to toss a ballot"). In addition to that documentary evidence, CTD's corporate representative also testified that CTD trains voters on voting by mail, and when doing so, the group specifically instructs voters "to make sure your signature matches as close as possible." Docket no. 84, CTD 30(b)(6) Dep. at 71:5-25; *see also* docket no. 74-1, Ex. 74 ¶ 7 ("CTD must divert resources, such as staff and volunteer time and resources, to instruct voters (during trainings, through CTD's website, through CTD's reports, and through email or social media) to write out signatures neatly or to try to make signatures match when completing mail-in ballot applications and carrier envelopes in order to help reduce the chance of an improper rejection due to an alleged signature mismatch.").[10] CTD's

10. The Secretary argues that materials contained in the Plaintiffs' affidavits are inadmissible because the affidavits were obtained following the discovery deadline. *See* docket no. 75 p. 13. The Court finds the Secretary's argument to be misplaced, at least with respect to the affidavits cited in Section I of this Order. *See* docket no. 65-1, Ex. 30; docket no. 74-1, Ex. 74. As another district court explained:

testimony further indicated that this information is particularly important for its members, because some disabled voters use methods of signing documents that result in their signatures looking "different." Docket no. 84, CTD 30(b)(6) Dep. at 71:5-25. Finally, uncontroverted testimony demonstrates that CTD would be able to divert its focus to other issues if it did not have to "find a way to cure ... the signature issue." *Id*, at 73:17-74:6 (stating that the organization could "move on to the next issue that we're dealing with, be it attendant wages, transportation, [or] education"); *see also* docket no. 74-1, Ex. 74 (stating that "CTD specifically diverts these resources away from

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> Nearly every brief in support of or in opposition to a motion for summary judgment filed in this District Court relies on affidavits or declarations signed within days of that filing. If plaintiffs argument were correct, then all of these federal litigants flout the Federal Rules of Civil Procedure, and all declarations should be stricken unless they were executed prior to the discovery deadline and shared with opposing counsel at that time. This is not how Rule 26 works.

Woods v. Austal, U.S.A., LLC, 2011 U.S. Dist. LEXIS 42361, 2011 WL 1380054 at *2 n.4 (S.D. Ala. Apr. 11, 2011). *Even assuming* the affidavits were inadmissible as part of the summary judgment record, however, the evidence cited in the affidavits relied upon in Section I of this Order (docket no. 65-1, Ex. 30 & docket no. 74-1, Ex. 74) is *corroborated by* nearly identical, unrebutted testimony given by the same affiants in response to questioning by the Secretary at the respective affiant's deposition. Notably, the Secretary concedes that the Secretary's argument is only applicable "to the extent [the declarations] are not corroborated elsewhere in the record." Docket no. 75 p. 3. Thus, the i. appears moot with respect to CTD and Weisfeld's standing.

other projects, such as educating people with disabilities about other mail-in voting issues, or educating people with disabilities about attendant wages or accessibility issues related to transportation, education, or other forms of voting"). In sum, CTD has been forced to divert resources from other activities in order to specifically mitigate the effects of the challenged signature-comparison procedures in the Texas Election Code, and CTD intends to continue to divert resources towards the issue until it is remedied. *See* docket no. 84, CTD 30(b)(6) Dep. at 73:17-74:6. For that reason, the record makes clear that the challenged procedures "perceptibly impair" CTD such that it has suffered an "injury in fact" for the purposes of its assertion of "organizational" standing. *See Frederick v. Lawson*, No. 1:19-cv-01959-SEB-MJD, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *10 (S.D. Ind. Aug. 20, 2020) (finding that—even though the additional burdens identified by the plaintiff organization were not "overwhelming"—organization nonetheless had standing to challenge Indiana's mail-in ballot signature-comparison procedures because "it already has diverted and expects to continue in the future diverting their limited resources, including money, time, or both, away from other tasks and toward educating voters about the challenged statutes.").

In light of the aforementioned evidence and testimony, the Secretary's response appears to be mistaken when it asserts that "no Plaintiff Organization can prove that it went out of its way to counteract the effect of Texas's allegedly unlawful signature-comparison procedure," Docket no. 75 p. 8 (quotations and citations omitted). Contrary to the Secretary's position, the above examples demonstrate that

CTD conducts *specific* outreach regarding the signature-comparison procedures, and CTD was not merely engaged in "training on voter-registration in general." *Id.* at p. 6 (citing *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459-60 (6th Cir. 2014)).[11] Perhaps realizing that the record contains numerous examples of CTD's efforts directed *specifically* at the signature-comparison process *in particular*, the Secretary's response and reply are silent as to *CTD's* activities highlighted in Plaintiffs' motion and response. Instead, the Secretary's response and reply specifically focus on general "voter-education" and "voter-registration" efforts conducted by *other* organizations, *see* docket no. 75 pp. 6-9, and the Secretary appears to fold CTD into its sweeping assertion that the Organizational Plaintiffs "have done nothing to target those activities

11. In arguing that the Organizational Plaintiffs have not demonstrated an injury in fact, the Secretary relies primarily on *NAACP v. City of Kyle*, 626 F.3d 233, 238-39 (5th Cir. 2010) and *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014). The Court finds these references unpersuasive. *City of Kyle* is distinguishable in this case for all of the reasons the Fifth Circuit explained that same analysis was inapplicable in *OCA-Greater Houston. See* 867 F.3d at 611-12 (specifically distinguishing *City of Kyle* on the basis that OCA "went out of its way to counteract the effect of Texas's allegedly unlawful voter-interpreter restriction—not with a view toward litigation, but toward mitigating its real-world impact on OCA's members and the public"). And in *Husted*, the Sixth Circuit specifically noted that the "training" that constituted the alleged injury was already part of the scheduled activities and would have occurred regardless. *See* 770 F.3d at 459-60. In this case, it is clear that CTD created specific materials regarding the challenged signature-comparison procedures that are independent of its other voting-related activities and would not have been created absent the challenged processes.

specifically toward remedying the alleged wrong in this case: rejection of mail-in ballots during the signature-verification process." *See id.* at p. 9. Instead, the evidence of CTD's actual, specific efforts is unrebutted, and as noted above, that evidence includes detailed examples of CTD going "out of its way to counteract the effect of Texas's allegedly unlawful" signature-comparison procedure by producing specific materials in order to educate its members (and others) about the signature-matching requirements and the potential for a signature-mismatch to result in disenfranchisement because voters do not receive timely notice of a ballot's rejection. *OCA-Greater Houston*, 867 F.3d at 612. Moreover, although the Secretary's reply asserts that "[t]here is no evidence that, because of Texas's signature-verification requirement, any Plaintiff Organization had to 'spend more time' on voter interaction in a manner that 'perceptibly impaired' its ability to fulfill its mission," *see* docket no. 79 p. 3, that argument again ignores the unrebutted testimony in the record. Indeed, the record makes clear that CTD expends resources educating voters about the signature-comparison issue and those resources are diverted from other activities conducted on behalf of disabled Texans, including those related to transportation and education. *See, e.g*, docket no. 84, CTD 30(b)(6) Dep. at 73:17-74:6; docket no. 74-1, Ex. 74. Thus, at least with respect to CTD, the Secretary's attempt to write-off the organizational activities as routine, non-specific "voter-registration efforts" are wholly without merit.[12]

12. To be clear, the Court does not mean to imply that the Secretary's arguments necessarily have merit with respect to the other Organizational Plaintiffs, as the Court has not conducted

The Secretary's other arguments with respect to CTD's "organizational" standing do not fare any better. The Secretary first asserts that the Organizational Plaintiffs "cannot identify any expenditures specifically attributable to voter-registration activities—let alone resources dedicated to mail-in ballots generally or signature-matching in particular." Docket no. 70 p. 16. As an initial matter, there is no requirement that a Plaintiff must quantify a specific monetary cost in order to satisfy the injury in fact requirement. *See, e.g., Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (quoting *Crawford*, 472 F.3d at 951) ("[A]n organization suffers an injury in fact when a statute 'compel[s]' it to divert more resources to accomplishing its goals" and "'[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury.'"). But *even assuming* monetary expenditures are required—

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that analysis as part of this Order. However, activities intended to increase voter participation *may* satisfy the "diversion-of-resources" theory for Article III standing. *See OCA-Greater Houston*, 867 F.3d at 612 (holding that the "Texas statutes at issue 'perceptibly impaired' OCA's ability to 'get out the vote' among its members"). Additionally, the Court notes that the record appears to contain evidence of other Organizational Plaintiffs also taking actions *specifically* targeted toward mitigating the impacts of the signature-verification process. *See, e.g.*, docket no. 65-1, Ex, 62 ("Vote by Mail: Step by Step" PowerPoint presentation created by LWV reminding voters that "[y]our signature [on the Application for Ballot by Mail] MUST match the one on your voter registration card," to "[b]e sure this signature [on the carrier envelope] is *exactly the same* as the signature on your Application for Vote by Mail," and that a ballot may be rejected if "[t]he signature on the [carrier] envelope and on the Application for Mail Ballot are different").

and they are not—CTD testified that the amounts spent on its voter outreach (including a newsletter regarding the signature-comparison issue) would be included in the "salaries" and miscellaneous advocacy expenses represented on its annual budget.[13] *See* docket no. 84, CTD 30(b)(6) Dep. at 60:13-61:4, 62:17-63:3 & Ex. 4. Thus, the record does indicate that CTD has made financial expenditures due in part to Texas's signature-comparison procedures, and CTD is not required to place an exact dollar amount on those expenditures for the purposes of Article III standing. *See Fla. State Conf. of N.A.A.C.P.*, 522 F.3d at 1165 (11th Cir. 2008) (quoting *Crawford*, 472 F.3d at 951); *OCA-Greater Houston*, 867 F.3d at 612 (nothing that the injury in fact requirement is "qualitative, not quantitative, in nature").

The Secretary next contests CTD's (and other Organizational Plaintiffs') "organizational" standing on the basis that "[n]o Plaintiff Organization has evidence that any purported member has had a ballot rejected for signature mismatch, or that it has expended any resources assisting or registering any voter whose mail-in ballot was rejected for that reason." Docket no. 70 p. 17. The Secretary fails to explain why this fact is relevant

13. CTD's representative testified that the organizations expenditures are not broken down by to each individual advocacy issue. *See* docket no. 84, CTD 30(b)(6) Dep. at 60:13-61:4. However, with respect to the line items under which CTD's representative indicated that the signature-comparison related costs may be included, the organization's budget spreadsheet states the amounts spent on payroll and "miscellaneous expenses" in 2018 and in 2019. *See* docket no. 84, CTD 30(b)(6) Dep. at Ex. 4.

for the purposes of CTD's *organizational* standing, and importantly, it is not. Indeed, for the purposes of organizational standing, the relevant injury to CTD is its "diversion of resources" to counteract the challenged signature-comparison procedures, and it very well may be *because* of CTD's specific, signature-comparison related outreach efforts that CTD's representative was unable to name a specific CTD member who has had his or her ballot rejected due to a perceived signature mismatch.[14]

Finally, the Secretary's assertion that "the evidence indicates that Plaintiff Organizations will continue their existing voter-related activities without regard to any action by the Secretary related to mail-in ballot signature matching" is factually misleading as to CTD. *See* docket no. 70 p. 17 & n.76. The deposition testimony cited by the Secretary merely states that CTD intends to continue voter education into the future, and neither the question nor answer indicates whether the nature of those activities may be impacted by changes to the existing signature-matching procedures.[15] Importantly,

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14. To be clear, the record does not demonstrate that a CTD member has never had his or her mail-in ballot rejected based on a perceived signature mismatch. Instead, the deposition testimony cited by the Secretary merely indicates that CTD's representative did not know whether a member's ballot had been rejected on that basis. *See* docket no. 84, CTD 30(b)(6) Dep. at 66:1-4.

15. *See* docket no. 70 p. 17 & n.76 (citing docket no. 70-4, CTD 30(b)(6) Dep. at 72:21-25) (Q: "So does — and I think I know the answer based on what you just said, but does the Coalition of Texans with Disabilities intend to continue training voters on voting by mail?"; A: "Yes. Yes.").

although CTD intends to continue its voter-education efforts into the future irrespective of changes to the signature-matching procedures, that does not mean that the scope of CTD's activities may not be modified or reduced. The Fifth Circuit has repeatedly made clear that an organization that conducts voter-outreach as one of its core initiatives may still satisfy the injury in fact requirement if the organization is forced to expend resources on specific types of voter education that would not otherwise have been necessary absent the challenged procedure. *See Fowler*, 178 F.3d at 361 (although voter registration was one of plaintiff's central initiatives, organization "expended resources registering voters ... who would have already been registered if the [state] had complied with the requirement under the NVRA that [the state] must make voter registration material available at public aid offices."); *see also OCA-Greater Houston*, 867 F.3d at 610-12 (notwithstanding that OCA also conducted other "get out the vote" initiatives, OCA established injury in fact because it "undertook to educate voters about Texas's assistor-versus-interpreter distinction to reduce the chance that other voters would be denied their choice of interpreter[,] ... an undertaking that consumed its time and resources in a way they would not have been spent absent the Texas law"). In this case, unrebutted testimony demonstrates that CTD would redirect certain resources to other projects in the event voters were no longer subjected to the challenged signature-comparison procedures. *See* docket no. 84, CTD 30(b)(6) Dep. at 73:17-74:6. The Secretary's suggestion otherwise is without merit.

In sum, and irrespective of whether certain of the Secretary's arguments may have merit with respect to other Organizational Plaintiffs in this case,[16] the record makes clear that CTD has been and will continue to be "perceptibly impaired" by the signature-comparison procedures at issue such that that it has suffered an "injury in fact" for the purposes of its "organizational" standing to challenge those procedures. *OCA-Greater Houston*, 867 F.3d at 612.

D. Traceability and Redressability

Having determined that at least two Plaintiffs have satisfied the requisite showing of "injury in fact," the Court must now consider whether those Plaintiffs have also demonstrated that they have satisfied the traceability and redressability requirements of Article III standing as to the Secretary. The Secretary argues that those two prongs are not satisfied—at least with respect to the Secretary—because "whether a mail-in ballot is rejected or counted depends on the actions of local election officials, not the Secretary." Docket no. 70 p. 14.

The Secretary's argument is without merit, and recent Fifth Circuit guidance in a similar election case also involving the Secretary explains why. On June 4, 2020, less than three weeks before the Secretary's office filed its motion, the Fifth Circuit explained why complaints like Plaintiffs' are traceable to and redressable by the

16. The Court reiterates that it has not evaluated the Secretary's arguments with respect to the other Organizational Plaintiffs.

Secretary. *See Texas Democratic Party v. Abbott*, 961 F.3d 389, 399 (5th Cir. 2020). Specifically, the Fifth Circuit stated as follows:

> Texas's vote-by-mail statutes are administered, at least in the first instance, by local election officials. But the Secretary of State has the duty to "obtain and maintain uniformity in the application, operation, and interpretation of Texas's election laws, including by "prepar[ing] detailed and comprehensive written directives and instructions relating to" those vote-by-mail rules. Tex. Elec. Code § 31.003. And the Secretary of State has the power to "take appropriate action to protect" Texans' voting rights " from abuse by the authorities administering the state's electoral processes." [*Id.* at § 31.005(a) & (b)]. Based on that, the state officials have not shown—at least as to the Secretary of State—that they are likely to establish that the plaintiffs lack standing.

Tex. Democratic Party, 961 F.3d at 399 (certain citations in footnotes omitted). Although the Court recognizes that the Fifth Circuit's most recent guidance was issued by a motions panel rather than a merits panel, the Court finds the analysis to be directly applicable in this case.[17] Moreover, the analysis is also consistent with that from other recent Fifth Circuit precedent. *See OCA-Greater*

17. Notably, the recent *Texas Democratic Party* opinion is relied upon by the Secretary for other purposes in the summary judgment briefing. *See, e.g.*, docket no. 70 p. 22; docket no. 75 p. 18.

Houston, 867 F.3d at 613 (holding that the "invalidity of a Texas election statute is, without question, fairly traceable to and redressable by ... its Secretary of State, who serves as the 'chief election officer of the state.'" (quoting Tex. Elec. Code § 31.001(a))).

The Secretary attempts to distinguish *Texas Democratic Party* on the basis that "the Secretary has taken the available steps within her authority" in this case. Docket no. 79 p, 4 (noting that Secretary has advised local election officials "to mail notices of rejected ballots to affected voters as soon as possible"). The Secretary then appears to contend that there are no additional actions the Secretary could take to ensure that Texans' voting rights are not violated by the existing signature-comparison procedures. *See id.* This assertion is both (i) hard to believe in the abstract, and (ii) contradicted by other actions taken by the Secretary in the period since it filed its briefing.

In this case, Plaintiffs allege that the existing signature-comparison procedures are unconstitutional, and "the invalidity of a Texas election statute is, without question, fairly traceable to and redressable by ... its Secretary of State." *OCA-Greater Houston*, 867 F.3d at 613. Indeed, the Secretary is the State's chief election officer, Tex. Elec. Code § 31.001(a), and under the Code, the Secretary has the duty to "obtain and maintain uniformity in the application, operation, and interpretation of the code." *Id.* at § 31.003. Further, and notwithstanding that many voting processes are administered primarily by local authorities, the Election Code specifically vests in

the Secretary numerous powers that it may use to protect voters' rights, including those explicitly cited by the Fifth Circuit in *Texas Democratic Party*. *See* 961 F.3d at 399. As a specific example, Tex. Elec. Code § 31.005, which is titled "Protection of Voting Rights," states as follows:

> (a) **The secretary of state may take appropriate action to protect the voting rights of the citizens of this state** from abuse by the authorities administering the state's electoral processes.
>
> (b) If the secretary determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner that impedes the free exercise of a citizen's voting rights, **the secretary may order the person to correct the offending conduct;** If the person fails to comply, **the secretary may seek enforcement of the order** by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general.

Id. (emphasis added). Thus, in the event the Court determines that the Texas Election Code is being implemented by local officials in a way that violates certain mail-in voters' fundamental right to vote, the Secretary not only (i) has the authority to order the local official to

change course,[18] but (ii) also has the authority to seek enforcement through the Attorney General in the event the local official fails to comply with the Secretary's order. *See id.* Indeed, the Secretary's representative testified that the Secretary's office has previously threatened enforcement actions from the Attorney General pursuant to § 31.005(b) in order to obtain compliance with its orders. *See* docket no. 84, Secretary 30(b)(6) at 26:4-27:17. And in recent weeks, the Secretary has not only ordered compliance from local officials who allegedly acted "contrary to [the Secretary's] guidance" related to mail-in ballot provisions pursuant to § 31.005(b), but has also sought enforcement of its "order" through the Attorney General pursuant to the same section.[19]

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18. As an example, following remand in *OCA-Greater Houston*, the Secretary was ordered to notify all county elections departments that "they are not to enforce [certain provisions of the Texas Election Code]." *OCA Greater Houston v. Texas*, l:15-CV-679-RP, 2018 U.S. Dist. LEXIS 81376, 2018 WL 2224082, at *5 (W.D. Tex. May 15, 2018).

19. On August 27, 2020, Keith Ingram, the Secretary's Director of Elections sent a letter to the Harris County Clerk—pursuant to § 31.005—ordering Harris County to "halt any plan to send an application for ballot by mail to all registered voters" because such an action would be, according to the Secretary, "an abuse of voters' rights." Letter from Keith Ingram, Director of Elections to Chris Hollins, Harris County Clerk (August 27, 2020). The Secretary also stated that its office would "request that the Texas Attorney General take appropriate steps under Texas Election Code 31.005" in the event Harris County failed to comply with the Secretary's order. *Id.* Sure enough, on August 31, 2020, the Texas Attorney General filed an application for temporary restraining order against Harris County, and in doing so, cited § 31.005(b) as the authority under which it sought its requested relief. *See* Plaintiff's Original Verified Petition

Further, those procedures are separate from the Secretary's authority to issue election advisories to local election officials, an action which the Secretary routinely takes. *See* docket no. 79 p. 4; docket no. 84, Ingram Dep. at 17:16-18:3, 24:25-25:10, 83:3-13; docket no. 93-2, Exs. B & C. The Secretary's briefing highlights *two* such advisories its office has distributed related to signature-comparison procedures in recent months, *see* docket no. 93-2, Exs. B & C, and the Secretary certainly has the authority to issue *other* advisories related to the subject. Importantly, both local officials in this case testified that they viewed the Secretary's advisories as binding. *See* docket no. 84, Hancock Dep. at 81:7-11 (stating that she is obligated to comply with the Secretary's advisories as the Brazos County EA); docket no. 84, McAllen 30(b)(6) Dep. at 40:9-18 (stating that if the Secretary sends an advisory, "that's what we follow").

Finally, the inconsistency of the Secretary's argument is perhaps best demonstrated by the fact that—in the period since the Secretary stated that she had taken "the available steps within her authority" and that there was no additional "authority that the Secretary has exercised or could exercise" related to the challenged signature-comparison procedures—the Secretary has both (i) issued

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and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction at pp. 2-3, *Texas v. Hollins*, No. 2020-52383 (D. Ct. Harris Cnty.) (filed Aug. 31, 2020) (citing § 31.005(b) and stating that under § 31.005 the "proper defendant is 'a person performing official functions in the administration of any part of the electoral processes' who 'fails to comply' with an order from the Secretary of State").

a new advisory recommending that EVBBs convene "as early as possible" and describing the qualification and acceptance of mail-in ballots and (ii) made amendments to the State's "dear voter" letter such that it now informs voters of the signature-comparison process. *See* docket no. 93-2, Exs. A & B. Thus, it is apparent that the Secretary's arguments in this case are conflating the actions the Secretary *wishes* to take with the actions the Secretary is *able* to take under the Texas Election Code. *See, e.g.*, note 19, *supra* (describing (i) recent letter issued by Secretary's office pursuant to § 31.005 directing Harris County to cease its plan to send mail-in ballot applications to all registered voters and (ii) a lawsuit filed by the Texas Attorney General pursuant to § 31.005(b) seeking enforcement of Secretary's order).

In this case, the relevant Election Code provisions, binding Fifth Circuit precedent, and the Secretary's own conduct in recent months, make clear that Plaintiffs' alleged injuries are both traceable to and redressable by the Secretary.[20] Accordingly, the Court concludes that the traceability and redressability requirements for Article III standing are also satisfied, at least with respect to Plaintiffs' constitutional claims against the Secretary.[21]

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20. As noted above, the Court has not yet evaluated whether Plaintiffs' injuries are *also* traceable to and redressable by the Local Defendants.

21. It is not just repeated Fifth Circuit precedent that supports the Court's conclusion. In *Frederick v. Lawson*, a recent district court decision addressing the constitutionality of Indiana's mail-in ballot signature-comparison procedures, the court rejected a nearly identical argument made by Indiana's Secretary of State. *See* 2020

E. Sovereign Immunity

Next, the Secretary asserts that this Court lacks jurisdiction because Plaintiffs' claims against the Secretary are barred by sovereign immunity. *See, e.g.*, docket no. 70 pp. 11-13. As a general rule, sovereign immunity precludes suits against states and state officials in their official capacities. *See City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). However, the Supreme Court provided an exception to that general rule in *Ex parte Young*, 209 U.S. 123, 161, 28 S. Ct. 441, 52 L. Ed. 714 (1908), and pursuant to that exception, a suit alleging a constitutional violation against a state official in his or her official capacity for prospective injunctive relief is not a suit against the state and, therefore, does not violate the Eleventh Amendment. *See id.; see also Frew ex rel. Frew v. Hawkins*, **540** U.S. 431, 437, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004) (stating *Ex parte Young* exception permits only "suits for prospective. . . relief against state officials acting in violation of federal law"). "To be sued pursuant to the exception, state officials must have some connection to the state law's enforcement, which ensures that the suit is not effectively against the state itself." *Tex. Democratic*

U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *11. Specifically, the court noted that Indiana's Secretary of State is the "chief election official" of the state and heads the office responsible for "advis[ing] county election officials regarding the manner in which to implement the signature verification requirement." *Id.* For that reason, the court concluded that "although the Secretary does not personally review ballot signatures or make the comparisons herself. she is sufficiently connected with the duty of enforcement of the challenged provisions such that the alleged invalidity of those provisions is fairly traceable to and redressable by her." *Id.*

Party, 961 F.3d at 400 (internal quotations, citations, and alterations omitted).

The Secretary contends that there is not a "sufficient connection" between the Secretary and the enforcement of the vote-by mail election provisions at issue in this case. *See* docket no. 70 p. 12. Unfortunately for the Secretary, the Fifth Circuit has rejected the Secretary's same argument—twice—in recent months. First, in *Texas Democratic Party*, the Fifth Circuit noted that there is a "significant overlap" between the standing and *Ex parte Young* analyses. *See* 961 F.3d at 401. In that case, the Fifth Circuit's motions panel rejected the Secretary's argument that it lacked the "requisite connection" to be sued because "none of the state officials enforces the mail-in ballot rules." *Id.* Specifically, the Fifth Circuit concluded as follows:

> [O]ur precedent suggests that the Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to support standing. That, in turn, suggests that *Young* is satisfied as to the Secretary of State.

Id. (citing *OCA-Greater Houston*, 867 F.3d at 613 and City *of Austin*, 943 F.3d at 1002). The Secretary again asserted the same argument to the Fifth Circuit in recent weeks in relation to yet another case involving the Secretary's enforcement of mail-in ballot provisions. In *Lewis v. Hughs*, a challenge to various Texas mail-in ballot provisions (including *the same signature-comparison*

provisions at issue in this case), the Secretary sought an immediate appeal of the district court's denial of the Secretary's motion to dismiss on the grounds of sovereign immunity. No. 20-50654 (5th Cir. Sep. 4, 2020). The Fifth Circuit summarily affirmed the district court's determination, and stated that "we are convinced that no substantial question exists in this matter with respect to whether the Texas Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to satisfy *Ex parte Young's* 'some connection' requirement." *Id.*

The above analysis is directly applicable in this case. As described in the prior Section, the Texas Election Code provides the Secretary with broad authority to intervene if the Code is being implemented in "a manner that impedes the free exercise of a citizen's voting rights," including both by ordering compliance from local officials and by seeking intervention from the Attorney General if necessary to obtain compliance. *See* Section I.D, *supra;* Tex. Elec. Code § 31.005(a) & (b). And the prior Section notes that the Secretary has both (i) previously threatened to engage the Attorney General in order to ensure compliance with its orders pursuant to § 31.005, and (ii) in fact done so in recent weeks. *See* Tex. Elec. Code § 31.005(b); docket no. 84, Secretary 30(b)(6) at 26:4-27:1; note 19, supra.[22]

22. The Secretary's August 27, 2020 letter to Harris County indicates that the Secretary believes its office has a "sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions" such that it may order Harris County to implement those provisions in accordance with the Secretary's interpretation of the Code. *See* note 19, *supra; Tex. Democratic Party*, 961 F.3d at

In addition, the prior Section explains that the Secretary has the unquestioned authority to issue election advisories to local officials and that the Secretary routinely does so. *See* Section I.D, *supra;* docket no. 93-2, Exs. B & C; *see also Texas Democratic Party*, 961 F.3d at 399 (noting that Tex. Elec. Code § 31.003 imposes a duty on the Secretary of State "to 'obtain and maintain uniformity in the application, operation, and interpretation of' Texas's election laws, including by 'prepar[ing] detailed and comprehensive written directives and instructions relating to' those vote-by-mail rules"). Notably, the sovereign immunity portion of the Secretary's own brief highlights Election Advisory 2020-07, in which the Secretary recommended "mailing notices of rejected ballots to affected voters as soon as possible," *see* docket no. 70 p. 13, and the Secretary certainly has the authority to issue separate advisories with *different* instructions related to the signature-comparison procedures.[23] Finally, as noted in the prior Section, the record demonstrates that the Secretary can take other steps designed to partially mitigate the risk of disenfranchisement resulting from the challenged signature-comparison procedures. *See* Section I.D, *supra;* docket no. 93-2, Ex. A (describing Secretary's recent edits to State's form "dear voter" letter).

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401. For that reason, the Secretary's briefing strains credulity to the extent it asserts that the Secretary does not have a "sufficient connection to the enforcement" *of those same provisions* in the event the Secretary must order county officials to implement those provisions in accordance with the Constitution.

23. Indeed, as noted in Section I.D, *supra*, the Secretary recently issued another advisory related to EVBB procedures and the qualification and acceptance of mail-in ballots (including the signature-comparison procedures). *See* docket no. 93-2, Ex. B.

Ignoring those powers, the Secretary's Motion specifically asserts that sovereign immunity bars Plaintiffs' claims because the Secretary's office does not itself "review n signatures and accept[] ballots," "provide notice that a ballot has been rejected," or "act in the case of an improperly rejected ballot" pursuant to § 87.127. *See* docket no. 70 pp. 12-13. But this argument is a strawman, as Plaintiffs are not seeking an order instructing the Secretary herself to review ballots in any particular manner, mail notices of rejected ballots to voters, or reverse any specific "matching" determination by any particular EVBB. Importantly, the fact that local election officials have the sole authority to take *some actions* does not mean that the Secretary does not have the authority to take *other actions* in order to ensure that voters are provided timely notice of a mail-in ballot's rejection and a meaningful opportunity to cure an improper ballot rejection. Indeed, *even assuming* there are some forms of remedies sought by Plaintiffs that the Secretary lacks the authority to pursue, that would not mean that Plaintiffs' claims are completely barred. The Fifth Circuit, sitting *en banc*, recently made as much clear. Specifically, in *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, the Fifth Circuit stated as follows with respect to whether sovereign immunity bars an entire suit when certain forms of relief are unavailable:

> [E]ven if some of the relief sought is not available, it does not follow that *Young* bars [plaintiff's] entire suit. Because at least one form of prospective relief is possibly available to [plaintiff], its claims against the [state

> defendant] are not barred by the Eleventh Amendment.

18-51092, 969 F.3d 460, 2020 U.S. App. LEXIS 25005, 2020 WL 4557844, at *8 (5th Cir. Aug. 7, 2020). For that reason, it is irrelevant that the Secretary's office does not have the actual authority to conduct the initial signature comparison on any specific ballot, mail any specific rejection notice, or itself file a petition under § 87.127. Instead, the requisite "sufficient connection" is demonstrated by the numerous actions the Secretary *does have the authority* to take. And it is therefore unsurprising that the Fifth Circuit (and other courts) have rejected similar arguments and found that sovereign immunity does not bar claims against a state's "chief election officer" in cases regarding the enforcement of this State's or other states' election codes. *See Tex. Democratic Party*, 961 F.3d at 401; *Lewis*, No. 2050654 (5th Cir. Sep. 4, 2020); *OCA-Greater Houston v. Texas*, 115-CV-00679-RP, 2016 WL 9651777, at *7 (W.D. Tex. Aug. 12, 2016) (Secretary was proper *Ex parte Young* defendant in lawsuit challenging provisions of the Texas Election Code); *see also Democratic Executive Comm. of Florida v. Lee*, 915 F. 3d 1312, 1318 (11th Cir. 2019) (in lawsuit challenging similar mail-in ballot signature-comparison procedures, Florida Secretary of State was proper *Ex parte Young* defendant as "state's chief election officer" under Florida statute, which sets out similar powers and responsibilities for the Florida Secretary of State).

In sum, directly applicable Fifth Circuit precedent and the record in this case make clear that the Secretary

bears a "sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions" such that *Ex parte Young* applies with respect to Plaintiffs' claims in this case. *See Tex. Democratic Party*, 961 F.3d at 401; *Lewis*, No. 20-50654 (5th Cir. Sep. 4, 2020). Accordingly, the Court concludes that Plaintiffs' claims against the Secretary are not barred by sovereign immunity.

F. Prudential Standing Under § 1983

The Secretary next argues that the Organizational Plaintiffs, including CTD, do not have statutory standing under 42 U.S.C. § 1983 to seek relief with respect to the violation of voters' constitutional rights. *See* docket no. 70 pp. 20-21. Specifically, the Secretary states that "Plaintiff Organizations do not have voting rights," and thus, § 1983 does not provide CTD with a cause of action "claiming an injury based on the violation of a third party's rights." *Id.*

As an initial matter, the Secretary's argument is only applicable to the Organizational Plaintiffs, and the Secretary does not dispute that Weisfeld has statutory standing under § 1983 to seek relief for violations of her own constitutional rights. Thus, now the Court has concluded that Weisfeld has Article III standing to assert her constitutional claims against the Secretary, the Court's analysis of this issue could stop here. However, having reviewed the record and the applicable law, the Court will briefly explain why it concludes that CTD *also* has prudential standing to seek the requested relief.

Appendix D

As a general rule, "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Singleton v. Wulff* 428 U.S. 106, 114, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). In *Singleton*, the Supreme Court discussed the reasoning supporting the general rule against third-party standing, *see Singleton*, 428 U.S. at 113-16, and the principles set forth in *Singleton* have been summarized by another district court in this Circuit. *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, CIV.A.3:08-CV-0546-D, 2008 U.S. Dist. LEXIS 101240, 2008 WL 5191935, at *7 (N.D. Tex. Dec. 11, 2008). In *Inclusive Communities Project*, the district court summarized the reasoning behind the general rule:

> The Supreme Court in *Singleton* discussed the two principles that animate the rule against third-party standing. *See Singleton*, 428 U.S. at 113-16. First, the rule prevents courts from unnecessary or undesired adjudication of rights. Two "factual elements" help resolve this question in a particular case: the relationship between the litigant and the third party and the third party's ability to assert his own right. *Id.* at 114-16. If the litigant and the third party have a close relationship and the litigant is a part of the third party's exercise of the right, then the court's "construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." *Id.* at 114-15. Moreover, if a genuine obstacle prevents the third party from asserting the right, then his absence from court

> "loses its tendency to suggest that his right is not truly at stake, or truly important to him." *Id* at 116.
>
> Second, the rule against third-party standing tends to ensure that the most effective advocate for the right is before the court, which relies on the vigorous argument of litigants. Generally, "third parties themselves . . . will be the best proponents of their own rights." *Id.* at 114. This will not always be the case, however. Rather, "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 115.

2008 U.S. Dist. LEXIS 101240, 2008 WL 5191935, at *7. The limitation on "third-party standing" is not a constitutional mandate, but is merely a "salutary rule of self-restraint," *Craig v. Boren*, 429 U.S. 190, 193, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), and the *Singleton* Court noted that the rule "should not be applied where its underlying justifications are absent," 428 U.S. at 114. *See also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 333 (5th Cir. 1981) ("In cases where these justifications are inapplicable, the general rule should be excepted, and assertion of third party rights permitted.").

In this particular case, the Court concludes that precluding CTD from asserting its claims would not serve the purposes of the prudential rule against third-party standing. As an initial matter, the record indicates that

CTD may be the most effective party to challenge the signature-comparison procedures on behalf of disabled Texans who are disproportionately more likely to be affected by the signature-comparison processes.[24] CTD is the largest and oldest member-driven cross-disability organization in Texas, CTD's mission is "to advocate for [disabled individuals'] rights to access," and part of that work includes efforts to protect "the rights of all Texans with disabilities to participate fully in the voting process." *See* docket no. 65-1, Exs. 44 & 45; docket no. 84, CTD 30(b)(6) Dep. at 25:6-26:1. Further, the record demonstrates that there is a "close relationship" between CTD and the voters for whom it is seeking to protect the third-party rights. Indeed, the record contains specific evidence regarding multiple members of the organization who intend to vote by mail but expect to have difficulties complying with the existing signature-comparison procedures due to their disabilities. *See* docket no. 84, CTD 30(b)(6) Dep. at 13:615:15, 75:11-76:13. In sum, CTD's claims in this case are central to the organization's purpose, and this is not a case in which the organizational plaintiff is unlikely to vigorously advocate for the rights asserted. *Cf Hudson Valley Freedom Theater, Inc, v.*

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24. Dr. Mohammed opined that elderly and disabled voters are more likely to "have a greater range of variation in their signatures" because they may "have less pen control than most other writers." *See* docket no. 65-1, Ex. 14 P 42; docket no. 84, Mohammed Dep. at 66:14-67:16. As an example in this case, CTD's representative (and member) Chase Bearden testified that "so many times [his] writing looks different" because he must use his phone to hold down documents as he signs them given his disability. *See* docket no. 84, CTD 30(b)(6) Dep. at 71:5-25.

Heimbach, 671 F.2d 702, 706 (2d Cir. 1982) ("When a corporation meets the constitutional test of standing . . . prudential considerations should not prohibit its asserting that defendants, on racial grounds, are frustrating specific acts of the sort which the corporation was founded to accomplish.").

More fundamentally, however, there may be practical obstacles permitting certain voters from vindicating their rights with respect to the issues raised in this case. Importantly, the Supreme Court has stated the following:

> Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of jus tertii standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.

Sec'y of State of Md v. Joseph H Munson Co., Inc., 467 U.S. 947, 956, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984) (citing *Craig*, 429 U.S. at 193-94).

In this case, it is not *necessarily* apparent that many individual voters who *may* be impacted by the signature-comparison procedures would have Article III standing to vindicate their own rights and request the relief sought

in this case. As noted above, the Secretary appears to argue that an individual voter can only satisfy the injury in fact requirement in this case if the individual can demonstrate that the he or she *will* have his or her vote rejected in the upcoming elections due to the challenged procedures. *See* docket no. 75 p. 4. As explained above, that blanket argument is without merit, and Weisfeld has demonstrated that she faces a "substantial risk" of having her vote improperly rejected again based on the existing signature-comparison procedures utilized for mail-in ballots. However, the Court recognizes that not every voter has as strong an argument as Weisfeld on this issue, and although the Court declines to address whether *other* hypothetical mail-in voters would individually have standing, the Secretary certainly believes they do not. For that reason, if the Secretary's argument is accepted, the only means of protecting the constitutional rights of *those other voters* is for (i) voters like Weisfeld and/or (ii) "closely related" organizations to bring challenges to the existing procedures. In that way, the Secretary's argument concedes (and in fact asserts) that there may be "a genuine obstacle" preventing certain other voters from protecting their constitutional rights affected by the signature-comparison procedures, and thus, this is not necessarily a case in which "the third parties themselves. . . will be the best proponents of their own rights." *Singleton*, 428 U.S. at 114. Such findings counsel towards permitting CTD to assert its claims in this case.[25]

25. Of course, in the event the Court is found to be incorrect with respect to its conclusion regarding Weisfeld's Article III standing, the Court's findings with respect to CTD's statutory standing are even more apparent. Indeed, if Weisfeld does not have

On that basis, the Court therefore finds that neither underlying justification for the general doctrine against third-party standing is applicable with respect to CTD's claims against the Secretary in this case. Accordingly, the Court concludes that it would be improper to apply the prudential doctrine against third-party standing to preclude CTD's claims against the Secretary. *See id.; Deerfield Med. Ctr.*, 661 F.2d at 333.

Finally, *even assuming* that CTD could not invoke § 1983 to seek relief in this case, the Fifth Circuit's recent *en banc* opinion in *Green Valley Special Utility District* noted that plaintiffs such as CTD may nonetheless pursue forward looking injunctive relief in equity against state officials for violations of federal rights in cases in which *Ex parte Young* is satisfied. 2020 U.S. App. LEXIS 25005, 2020 WL 4557844, at *10 ("[Plaintiff] has a cause of action against [the state defendant] *at equity*, regardless of whether it can invoke § 1983. Because, as we discussed above, [plaintiff] has satisfied *Young*'s requirements, its suit for injunctive relief against the [state officials] may go forward.") (emphasis in original and footnote omitted); *see also Armstrong v. Exceptional Child Ctr., Inc., 575* U.S. 320, 326, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015) ("[A]s we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted."). Indeed, although there are questions about the origin of this apparent doctrine, the Supreme Court

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standing for the reasons set forth in Section I.B, *supra*, then it is hard to imagine *any* individual voter who would have Article HI standing to challenge the signature-comparison procedures at issue.

"has reaffirmed this cause of action as accepted fact." *See Green Valley Special Util. Dist.*, 2020 U.S. App. LEXIS 25005, 2020 WL 4557844, at *30 (Oldham, J., concurring) (citations omitted). Thus, it appears CTD could pursue its constitutional claims under this alternative doctrine—given that *Ex parte Young* is satisfied with respect to the Secretary—even if § 1983 were unavailable due to any non-jurisdictional prudential doctrine against third-party standing.

II. Merits of Plaintiffs' Constitutional Claims

Having concluded that at least two Plaintiffs have standing to assert constitutional claims against the Secretary, the Court will next address the merits of those claims. Plaintiffs first assert as applied and facial challenges to the State's existing mail-in ballot signature-comparison procedures on the basis that the State's existing process—which does not include adequate pre-rejection notice and/or a meaningful opportunity to cure an improperly rejected ballot—violates the Due Process Clause of the Fourteenth Amendment. *See* docket no. 1 ¶¶ 52-61. Plaintiffs also contend that the same procedures violate the Equal Protection Clause of the Fourteenth Amendment because they impose a severe burden on certain voters' right to vote that is not justified by a legitimate government interest. *See id.* at ¶¶ 62-70.[26]

26. Plaintiffs also assert a separate equal protection claim in "Count Three" of the Complaint, but for the reasons discussed in Section IV, *infra*, the merits of that claim are not addressed in this Order.

Appendix D

A. Applicable Legal Frameworks

Plaintiffs and the Secretary appear to agree that Plaintiffs' "undue burden"/"right to vote" equal protection claim is governed by the "*Anderson/Burdick*" standard set forth by the Supreme Court. *See* docket no. 65 p. 37 & docket no. 70 pp. 21-22 (each citing *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)). However, the parties are in disagreement as to whether the "*Mathews*" standard or the same "*Anderson/Burdick*" standard governs the analysis of Plaintiffs' due process claim. *See* docket no. 65 pp. 29-30 (citing *Mathews v. Eldridge*, 424 U.S. 319, 325, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)); docket no. 70 pp. 21-22.

Plaintiffs contend that the Mathews framework should apply to any due process analysis, *see* docket no. 65 pp. 29-30, and note that numerous courts evaluating due process claims related to signature-comparison procedures for mail-in ballots have evaluated those claims under that framework, which instructs the Court to balance the following considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the

> additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

The Secretary, on the other hand, contends that the more flexible "*Anderson/Burdick*" test applies to the constitutional analysis of all state laws that allegedly burden the right to vote, including any due process claim. *See* docket no. 70 pp. 21-22. Under the *Anderson/Burdick* test, a court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). The severity of the challenged restriction dictates whether strict scrutiny review, rational basis review, or some intermediate standard applies. *See Burdick*, 504 U.S. at 434; *see also Anderson*, 460 U.S. at 788.

The argument for applying the *Mathews* test to Plaintiffs' due process claim is a strong one, as the framework explicitly references both "procedures" and potential "procedural safeguards." *Mathews*, 424 U.S. at 335. For that reason, the standard appears to be more directly applicable to due process claims premised on mail-in ballot procedures and/or the lack of procedural safeguards related to the mail-in voting process. Notably, it appears that multiple courts have applied the *Mathews* framework to substantially similar claims involving due process challenges to similar mail-in ballot signature-

comparison procedures. *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214 (D.N.H. 2018); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec 'y of State of Georgia*, 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018); *Zessar v. Helander*, No. 05 C 1917, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646, at *7 (N.D. Ill. Mar. 13, 2006); *Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *12.

On the other hand, certain courts have stated that the *Anderson/Burdick* framework is meant to apply to all constitutional challenges involving voting restrictions, including both due process claims and equal protection claims. *See, e.g., Duncan v. Husted*, 125 F. Supp. 3d 674, 679-80 (S.D. Ohio 2015), *aff'd* (Mar. 7, 2016) (stating that in the Sixth Circuit, "the *Anderson-Burdick* test serves as single standard for evaluating challenges to voting restrictions" including "First Amendment, Due Process Clause of the Fourteenth Amendment, and Equal Protection Clause of the Fourteenth Amendment claims"); *Weber v. Shelley*, 347 F.3d 1101, 1105-06 (9th Cir. 2003) (analyzing equal protection and due process challenges to touchscreen voting system without voter-verified paper trail under *Anderson* and *Burdick*). However, the Secretary has failed to cite any cases in which the *Anderson/Burdick* framework has been applied to an evaluation of a due process claim related to mail-in ballot signature-comparison procedures.

For that reason, and having reviewed the various approaches, the Court concludes that the *Mathews* standard should govern this Court's due process

analysis. However, the Court concludes that the question is ultimately immaterial, because as shown below in Section II.C, *infra*, the challenged signature-comparison procedures do not pass constitutional muster under any of the potentially-applicable standards.

B. Plaintiffs' Due Process Claim Under the *Mathews* Framework

As an initial matter, the Secretary is correct in noting that there is no federal constitutional right to vote by mail-in ballot. *See generally McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969) (rejecting assertion that there was constitutional right to vote by absentee ballot). However, it is undisputed that the right to vote is a fundamental right under the United States Constitution. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666-70, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966); *see also Reynolds v. Sims*, 377 U.S. 533, 554, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."). For that reason, once a state creates a certain type of election regime, the state "must administer it in accordance with the Constitution." *Zessar*, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646, at *6; *see also Paul v. Davis*, 424 U.S. 693, 710-12, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (stating that "there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause" and holding that an otherwise protected interest can attain "constitutional status by

virtue of the fact that [it has] been initially recognized and protected by state law" if "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished"). Thus, "[c]ourts around the country have recognized that '[w]hile it is true that absentee voting is a privilege and a convenience to voters, this does not grant the state the latitude to deprive citizens of due process with respect to the exercise of this privilege.'" *Martin*, 341 F. Supp. 3d at 1338 (quoting *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990)); *see also Zessar*, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646, at *6 (stating that "approved absentee voters are entitled to due process protection").

Because it is clear that Texas has created a mail-in ballot regime through which qualified voters may exercise their fundamental right to vote, the State must provide those voters with constitutionally-sufficient due process protections before rejecting their ballots.[27] *See Raetzel*,

27. The Secretary's remedy briefing directed the Court to one district court that recently determined that eligible voters who risk having their votes improperly rejected on the basis of a perceived signature mismatch may not challenge Tennessee's signature-verification procedures under a procedural due process theory. *See* docket no. 98 p. 10 (citing *Memphis A. Phillip Randolph Inst. v. Hargett*, 3:20-CV-00374, 2020 U.S. Dist. LEXIS 156759, 2020 WL 5095459, at *11 (M.D. Tenn. Aug. 28, 2020)). This Court respectfully declines to follow that analysis. For one, the *Hargett* court also determined that the same voters could not challenge Tennessee's signature-comparison procedures under an "undue burden"/"right to vote" theory *because* a complaint about the State's "signature-verification procedure" is one "sounding exclusively in procedural

762 F. Supp. at 1358 ("While the state is able to regulate absentee voting, it cannot disqualify ballots, and thus disenfranchise voters, without affording the individual appropriate due process protection."); *Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *12 (internal alterations and quotations omitted) ("[O]nce a

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due process." *See* 2020 U.S. Dist. LEXIS 156759, [WL] at *15. In any event, the Fifth Circuit and other circuit courts have indicated that violations of the right to vote are (i) actionable under the Due Process Clause and (ii) governed by the *Mathews'* procedural due process analysis. *See, e.g., Williams v. Taylor*, 677 F.2d 510, 514-15 (5th Cir. 1982) (applying the *Mathews* test to Mississippi's felony disenfranchisement statute); *Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1270-71 (11th Cir. 2019) (Pryor, J., concurring) (in due process challenge to state's signature-comparison procedures, applying *Mathews* test and stating "[i]t is undeniably true that the interest in voting absentee implicates the right to vote"); *Lemons v. Bradbury*, 538 F.3d 1098, 1104-05 (9th Cir. 2008) (analyzing *Mathews* factors as part of due process challenge to Oregon's referendum signature verification process). Notably, every other district court to consider a due process challenge to similar signature-comparison procedures (at least that this Court has identified) has held that the affected voters are entitled to due process protections. *See Raetzel*, 762 F. Supp. at 1358; *Saucedo*, 335 F. Supp. 3d at 214; Martin, 341 F. Supp. 3d at 1338; *Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at *12; *Self Advocacy Sol. N.D.*, 2020 U.S. Dist. LEXIS 97085, 2020 WL 2951012, at *8; *Zessar*, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646, at *6. Accordingly, the Court concludes that voters who have their mail-in ballots improperly rejected on the basis of an incorrect (but perceived) signature mismatch are entitled to assert a claim based on a violation of their due process rights. Finally, even if the Court assumes that Plaintiffs may not pursue relief under a "procedural due process" theory, Section LC of this Order explains in detail why Plaintiffs are also entitled to summary judgment and injunctive relief under their "undue burden"/"right to vote" theory of relief

state creates an absentee voting regime, the state has enabled a qualified individual to exercise her fundamental right to vote in a way that she was previously unable to do and [the state] then must administer that regime in accordance with the Constitution and afford appropriate due process protections . . . before rejecting an absentee ballot."). In order to determine whether constitutionally-sufficient process has been afforded, the Court has determined that it is appropriate to apply the balancing framework set forth by the Supreme Court in *Mathews v. Eldridge*. See Section II.A., *supra.* The application of the *Mathews* framework requires the Court to balance (i) "the private interest that will be affected by the official action," (ii) the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (iii) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. The Court discusses each consideration below.

1. Private Interest Affected by the Official Action

With respect to the "private interest" at issue in this case, the Court affords this factor significant weight. Indeed, at stake here, is the fundamental right to vote. *See Harper*, 383 U.S. at 667 (1966) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.")). Moreover, that

"private interest" is not minimized by the fact that there is no constitutional right to vote by mail. The State has provided qualified voters with an opportunity to vote by mail, and the record demonstrates that the challenged processes result in disenfranchisement for some voters who elect to utilize that method of voting. It is therefore unsurprising that multiple courts that have evaluated similar signature-comparison regimes under the *Mathews* framework have afforded this first factor significant weight. *See, e.g., Martin*, 341 F. Supp. 3d at 1338 ("Here, the Court agrees with Plaintiffs that the private interest at issue implicates the individual's fundamental right to vote and is therefore entitled to substantial weight."); *Saucedo*, 335 F. Supp. 3d at 217 ("Plaintiffs argue that the individual interest at issue is the fundamental right to vote ... The court accords this factor significant weight."). This Court concludes it is appropriate to do the same.

2. Risk of Erroneous Deprivation and Probable Value of Procedural Remedies

The record demonstrates that Texas counties rejected more than 5,000 ballots on the basis of perceived mismatching signatures during the 2016 and 2018 general elections. See docket no. 65-1, Ex. 16. More importantly, the record contains undisputed evidence that qualified, registered voters have had their votes improperly discarded—and have suffered disenfranchisement—as a result of the State's procedures. See, e.g., docket no. 65-1, Exs. 25 & 33. Although the existence of even a single improperly rejected ballot demonstrates some risk of erroneous deprivation, the record demonstrates both

that (i) the existing signature-comparison procedures pose a significant risk to the fundamental right to vote and (ii) there is probable value in implementing additional procedural safeguards to protect voters' rights.

a. Existing Signature-Comparison Process Creates Risk of Erroneous Deprivation

As an initial matter, Plaintiffs and the Secretary's Director of Elections both agree that the existing signature-comparison processes make it possible for local officials to reject a ballot based on a perceived signature mismatch when the ballot and application were in fact signed by the same person. *See* docket no. 84, Ingram Dep. at 77:8-15. That fact is inherently troublesome, and it would be enough by itself to weigh this initial consideration in Plaintiffs' favor. Nonetheless, the Court believes it is appropriate to discuss the specific flaws with the existing signature-comparison procedures in order to highlight why the risk of erroneous deprivation is so significant and acute in this case.

First, the record makes clear that there is no specific standard set forth by the State with respect to determining whether a "signature" matches. Instead, the state-issued handbook providing guidance to EVBB members merely states that signature reviewers should "check the signatures of the applicant on the application and on the carrier envelope to confirm that both signatures have been executed by the voter." Docket no. 65-1, Ex. 4 p. 14; *see also* Tex. Elec. Code § 87.041(b)(2) (stating that

a ballot should be rejected if the EVBB concludes that a signature on the carrier envelope or ballot was "executed by a person other than the voter"). In Brazos County, for example, that means reviewers apply a "reasonable person" standard, whereas in McAllen city elections, reviewers are instructed to accept a ballot so long as the signatures "resemble each other." Docket no. 84, Hancock Dep. at 121:24-122:9; docket no. 84, Brazos 30(b(6) Dep. at 47:25-48:4; docket no. 84, Lara Dep. at 45:13-25, 81:5-19. Moreover, members of EVBBs do not receive any specific training as to how to determine whether two signatures match. *See* docket no. 84, Brazos 30(b)(6) Dep. at 15:19-16:6; docket no. 84, Lara Dep. at 39:1-6, 81:5-19; docket no. 84, Ingram Dep. at 48:2-5. Instead, whether two signatures "match" depends solely on the determination of laypersons on the EVBB and/or SVC who are advised to use their "best judgment." *See* docket no. 84, Lara Dep. at 79:9-80:21 ("I always remind them that we are not handwriting experts."); docket no. 84, Brazos 30(b)(6) Dep. at 48:15-49:2 (stating that Brazos County does "nothing" to "ensure that EVBB members are using their best judgment"). Unsurprisingly, the determinations reached by laypersons—absent any meaningful guidance—varies among EVBB members, and the record demonstrates that whether a ballot is accepted or rejected often depends on which members on each EVBB review the ballot. *See* docket no. 84, Hancock Dep. at 122:18-123:12 & Brazos 30(b)(6) Dep. at 48:18-49:8 (indicating that Brazos County's EVBB generally has 6 to 10 two-person "teams" of reviewers and that it is "possible for different teams to reach a different conclusion with respect to the same ballot"); docket no. 84, Lara Dep. at 137:7-21 (indicating

that McAllen EVBB members have previously had "a hard time agreeing on signatures."). In sum, under the exiting signature-comparison procedures, it is clear that chance plays a non-negligible role in determining whether any given voter's mail-in ballot is counted.

Other record evidence explains why it should not be surprising that legitimate ballots are rejected under the existing procedures. Dr. Linton Mohammed explained that laypersons—like untrained members of EVBBs or SVCs—are more likely to reject signatures provided by the same individual than are trained handwriting experts. *See* docket no. 84, Mohammed Dep. at 65:9-66:6. Specifically, Dr. Mohammed explained that individuals often have "variations" of signatures, and individuals often use different signatures based on the type of document that is being signed. *Id.* at 28:7-25, 84:25-85:22. As a result, individuals "tend to write more carefully" when signing certain types of documents. *Id.* (describing how the same individual often has a "mixed-style signature" for documents that are routinely signed and a "readable, text-based styled signature" for more formal documents).[28] Dr. Mohammed explained that layperson reviewers "incorrectly interpret a variation as a difference" whereas experts would know not to directly compare two different "styles" of signatures. *Id.* at 65:9-66:6. According to Dr. Mohammed, the more appropriate way to compare multiple signatures is to compare those of the same "style."

28. As an example, Dr. Mohammed explained that an individual will generally sign his or her formal will and testament more carefully than he or she would sign for a package at his or her doorstep. *See* docket no. 84, Mohammed Dep. at 42:13-43:22.

See id. at 47:2-11 (testifying that one cannot accurately compare signatures of different "styles").

These problems are specifically exacerbated by three aspects of the State's mail-in voting regime and related signature-comparison procedures. First, the mail-in ballot application and ballot carrier envelope do not inform the voter (i) that the signature on the application and the signature on the carrier envelope will be used for signature comparison or (ii) that failure to match the two signatures will result in a rejected ballot. *See* docket no. 84, Ingram Dep. at 32:25-35:4, 103:9-15.[29] Instead, those documents

29. The Secretary's most recent briefing indicates that the Secretary updated its form "dear voter" letter in August 2020 so that it now contains one sentence regarding the signature-comparison process. *See* docket no. 93-2, Ex. A. For the avoidance of doubt, this small act—while a step in the right direction—does not significantly reduce the risk of erroneous rejection nor does it otherwise mean that the State's existing procedures are now constitutionally sound. For one, providing information regarding the signature-matching requirement on the documents *actually being signed* appears to be a far more appropriate method for ensuring that voter is aware of the requirement *as he or she is signing the document*. More importantly, however, the record demonstrates that ballots are improperly rejected based on perceived signature mismatches even when voters are fully informed of the requirements and attempt to comply. *See* docket no. 84, Weisfeld Dep. at 45:4-17; 50:5-9; 56:18-57:5; 68:22-71:20. Thus, *even assuming* details about the signature-comparison procedures were included on both the application and carrier envelope as well, that alone would be insufficient to render the challenged signature-comparison procedures constitutionally sound in the absence of pre-rejection notice and a meaningful opportunity to cure. Indeed, at least one court has found similar signature-comparison procedures unconstitutional even after the

state that the voter is providing his or her signature only as a certification that the information is true and/or that the enclosed ballot represents the voter's intentions. *See* docket no. 65-1, Ex. 6; Tex. Elec. Code § 86.013(c). This is important because, as noted above, voters often sign documents "more carefully" when they believe it is necessary to do so. Notably, Richardson's deposition testimony demonstrates that he believed his signatures were used for purposes other than for signature matching. *See* docket no. 84, Richardson Dep. at 25:16-22, 28:2-7. And as a result of the existing information provided, voters like Richardson *who fully comply with every instruction* on the application and carrier envelope may still have their vote rejected based on perceived mismatching signatures.

Second, EVBB members generally make their determinations based only on two signatures: the one provided on the application and the one provided on the flap of the carrier envelope. *See* Tex. Elec. Code § 87.041(b)(2). Although the Election Code permits EVBB members to consider any voter signature from the prior six years that is on file with the county clerk or voter registrar, the Code *does not require* that the EVBB members consider multiple comparison signatures (if available) before rejecting a ballot. *See* Tex. Elec. Code § 87.041(e).

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state agreed to provide information about signature-comparison on both the ballot application and carrier envelope, because the state had not provided adequate notice of rejection or an opportunity to cure. *See Saucedo*, 335 F. Supp. 3d at 218, 222 (holding that New Hampshire's procedures were still unconstitutional notwithstanding the state's recent changes to the information provided to voters on their applications and ballots).

As a result, the record indicates that EVBB members generally do not request any additional signatures on file as part of their review. *See, e.g.*, docket no. 84, McAllen 30(b)(6) at 26:6-17 (testifying that McAllen EVBB has never requested additional signatures during its review during Lara's tenure); docket no. 84, Brazos 30(b)(6) Dep. at 43:2-46:13 (testifying that Brazos County did not find records indicating that EVBB had requested additional signatures for any voter during any election in the prior 22 months). This increases the likelihood of erroneous rejections, as the voter may have used other "styles" of his or her own signature on prior occasions which may provide a more proper baseline for verifying the signature on the application and/or carrier envelope. *See* docket no. 84, Mohammed Dep. at 47:2-11.

Finally, older voters and disabled voters are two categories of voters that are permitted to vote by mail, and the record indicates that—as a general rule—these categories of voters are exactly the type of voters that are most likely to face difficulties matching their signatures. *See* note 24, *supra*. As a specific example in this case, CTD's representative (and member) Chase Bearden testified that "so many times [his] writing looks different" because he must use his phone to hold down documents as he signs them given his disability. *See* docket no. 84, CTD 30(b)(6) Dep. at 71:5-25. Thus, the impacts of Texas's error-prone signature comparison process are most likely to be acutely felt by the exact types of voters Texas permits to vote by mail.

Appendix D

Perhaps the best demonstration in the record of the real risk to voting rights created by the existing procedures are the personal experiences of the Individual Plaintiffs in this case. Both Weisfeld and Richardson properly registered to vote by mail, and after receiving their ballots, they cast their ballots by mail, Weisfeld's ballot was submitted by mail at the end of May 2019 for a June 22, 2019 contest. *See* docket no. 84, Weisfeld Dep. at 19:4-11. Richardson's ballot was received by Brazos County officials on October 17, 2018 for a November 6, 2018 contest. *See* docket no. 84, Richardson Dep. 28:8-15. Notwithstanding that each Individual Plaintiff was qualified to vote by mail and did so well before the date of the election, neither had his or her vote counted in the elections in question. Instead, laypersons—none of whom had received training in handwriting analysis or been provided uniform standards regarding signature comparison from the State—determined that Weisfeld and Richardson had not adequately matched their prior signatures, and as a result, their ballots were rejected. The infirmity of the existing signature-comparison analysis is best demonstrated by the rejection of Weisfeld's ballot, specifically. Indeed, Weisfeld was unable to satisfy whatever apparent "matching" standards were being applied on the date in question notwithstanding the fact that she (i) was aware of the signature-comparison requirement, (ii) had herself previously served on local EVBBs, (iii) had previously served as the election administrator for local primary elections, and (iv) had sent other handwritten communications to the election officials in the period leading up to the election. *See* docket no. 84, Weisfeld Dep. at 45:4-17; 50:5-9; 56:18-57:5; 68:22-71:20.

b. Existing "Remedies " Do Not Provide Adequate Protections, Notice or a Meaningful Opportunity to Cure

The rejection of ballots based on signature comparison might present less of a risk of erroneous deprivation if there was an effective means to cure an improperly rejected ballot. But in this case, as in the other cases in which courts have found similar processes to violate due process, the improper rejection of a ballot appears to be irremediable for all practical purposes. *See Saucedo*, 335 F. Supp. 3d at 218 (citing *Zessar*, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646, at *8-9) ("It cannot be emphasized enough that the consequence of a moderator's decision—disenfranchisement—is irremediable.").

Of course, the Secretary disagrees with the assertion that the existing procedures do not provide adequate notice and an opportunity to cure. In support, the Secretary asserts the Texas Election Code already provides for procedural remedies in the event a vote is improperly rejected. Specifically, the Secretary cites to § 87.127 of the Texas Election Code, which empowers county election officials to "petition a district court for injunctive or other relief if the election officials "determine[] that a ballot was incorrectly rejected or accepted by the [EVBB] before the time set for convening the canvassing authority." Docket no. 75 p. 10. Additionally, the Secretary assets that "Texas law provides means to contest the outcome of an election" in the event a candidate contends that ballots were improperly accepted or rejected. *See* docket no. 75 p. 10 (citing Tex. Elec. Code §§ 221.001-243.013,

221.003(a)). Finally, the Secretary asserts that the risk of improper rejection is mitigated because voters are offered an alternative under which a witness signs their ballot in lieu of signature matching. *See* docket no. 70 pp. 23-24.

None of the existing "remedies" cited by the Secretary protect voters from the improper rejection of their mail-in ballots, at least as they are presently implemented. As an initial matter, the Texas Election Code does not require a voter to be notified that his or her ballot was rejected until ten days after the election. *Id.* at § 87.0431(a). Notwithstanding that Richardson and Weisfeld each voted by mail weeks before the election date, neither received notice of his or her ballot's rejection until following the election. *See* docket no. 84, Weisfeld Dep, at 19:4-11, 45:18-20; docket no. 84, Richardson Dep. 28:8-15, 29:2-12; docket no. 65-1, Exs. 21 & 30. Although the Secretary has sent an advisory to election officials advising them to notify voters of a rejected ballot as soon as possible, the record indicates that—even after local officials implemented that advisory—voters still generally receive "notice" after the election date. *See* docket no, 84, Hancock Dep. at 89:3-90:21 (stating that Brazos County's rejection notices generally go out the day before election day, but that "the way the mail service is, there's not really a benefit to mailing it out as soon as possible, because they're not going to get it prior to election day"); docket no. 84, McAllen 30(b)(6) Dep. at 32:8-33:7 (stating that City elections happen on Saturdays and the rejection notices go out on Monday two days after election). Indeed, because the date each county conducts its canvassing of ballots may occur between three and fourteen days following the election date but

voters only must be notified of a rejected ballot within ten days of the election, the Code expressly permits voters to receive notice of their rejected ballot *after* the county has conducted its final canvass of election results. *See* Tex. Elec. Code § 67.003; docket no. 84, Ingram Dep. at 87:11-88:10.

This timing feature of the required notice is only the *first* reason why the State's asserted "remedy" in Texas Election Code § 87.127 is inadequate, at least as it is presently understood and implemented by local election officials. Specifically, Section 87.127(a) provides:

> If a county election officer . . . determines a ballot was incorrectly rejected or accepted by the early voting ballot board before the time set for convening the canvassing authority, the county election officer *may* petition a district court for injunctive or other relief as the court determines appropriate.

Id. (emphasis added). Because (i) voters who have had their ballots improperly rejected are notified that they may contact their local election officials and (ii) § 87.127 provides the election official with discretion to file a lawsuit if the official determines the ballot was erroneously rejected, the Secretary contends that adequate protections exist. *See* docket no. 70 pp. 24-25. As noted above, however, the Election Code specifically contemplates that voters may receive notice of their rejected ballot after the county has already convened its canvassing authority, and a local official's authority to seek relief in the district court

expires once canvassing has occurred. *See* § 87.127(a); docket no. 84, Ingram Dep. at 87:11-88:10. Thus, *even assuming* that local election officials were *required* to seek judicial relief on a voter's behalf following any complaint by a disenfranchised voter, the remedy would *still* be inadequate for voters who do not receive notice before canvassing has occurred.

More importantly, however, the record demonstrates that the existing procedures provided in § 87.127 are often inadequate even in cases in which a voter promptly notifies county officials of an improper rejection prior to the county's canvassing activities. Crucially, the petitioning process in § 81.127 is a *discretionary* process and not a procedural process to which voters are *entitled*. The local officials in this case testified that they have *never* utilized the procedure despite receiving complaints from voters about improperly rejected ballots. *See* docket no. 84, Hancock Dep. at 103:4-104:10; docket no. 84, McAllen 30(b)(6) Dep. at 53:6-19, 56:5-13. Notably, McAllen City Secretary testified that she did not believe that she qualified as a "county election officer" for the purposes of utilizing § 87.127 on a voter's behalf. *See* docket no. 84, McAllen 30(b)(6) Dep. at 53:20-25. And the Brazos County election official in this case questioned how she was even supposed to "determine" that a ballot was "incorrectly rejected" by the EVBB, and as a result, testified that her office did not investigate the accuracy of any EVBB signature-matching determinations. *See* docket no. 84, Hancock Dep. at 103:25-106:23 ("I don't do that determination ... I feel that that's the board's responsibility, and I do not check their work. It's not

my responsibility to do that."); *see also* docket no. 84, McAllen 30(b)(6) Dep. at 56:14-24 (stating that McAllen election officials do not perform an additional review to determine if a ballot was incorrectly rejected). Thus, the Brazos County official testified that, as a practical matter, it would be "impossible" for her to seek relief on behalf of a voter under § 87.127. *See* docket no. 84, Hancock Dep. at 107:9-19; *see also id.* at 96:4-97:22 (stating that even if a voter contacts election officials following notice of a ballot's rejection, "there's really no remedy for that voter" if "election day has passed"). Tellingly, the Secretary's Director of Elections testified that he was only aware of the procedure being used on a single occasion by a single county official. *See* docket no. 84, Ingram Dep. at 44:22-46:1. In sum, the record makes clear that the discretionary procedures in § 87.127—at least to the extent they are presently understood and implemented by local election officials—do not afford protection for the vast majority of voters who have their ballots improperly rejected on the basis of a signature-mismatch determination.[30]

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30. The Secretary contends that this case is distinguishable from the other district court cases analyzing the constitutionality of other similar signature-comparison procedures because Texas's "existing statutory framework specifically provides an avenue for court intervention in the case of a mail-in ballot." Docket no., 79 p. 9. But the record shows that § 87.127 is not a *meaningful* avenue for court intervention, especially given that *both* election officials in this case testified that it was not possible for them to utilize the referenced procedures on a voter's behalf. *See* docket no. 84, Hancock Dep. at 107:9-19; docket no. 84, McAllen 30(b)(6) Dep. at 53:20-25. The same is true with respect to election contests, which are discussed in the next paragraph.

The Secretary's second proposed remedy—the possibility of an "election contest"—is even more unrealistic. *See* docket no. 75 p. 10 (citing Tex. Elec. Code §§ 221.001-243.013, 221.003(a)). The Secretary's own description of "election contests"—as a remedy "available to *candidates* where miscounted mail-in ballots *impact the result of an election*"—perhaps best summarizes the multiple reasons why "election contests" do not provide an adequate "cure" for voters who have their mail-in ballots improperly rejected during the signature-comparison process. *See* docket no. 93 p. 5 n.5 (emphasis added). For one, the remedy is available to *candidates, not voters. See id.*; Tex. Elec. Code § 232.002. Equally importantly, "election contests" may only be pursued if the contestant demonstrates that the challenged process materially affected the outcome of the election. *See Willet v. Cole*, 249 S.W.3d 585, 589 (Tex. App.—Waco 2008, no pet.). Plaintiffs in this case are not seeking to overturn the results of any election, but instead are solely seeking to protect the *fundamental right to vote.* An individual's right to vote does not depend on any candidate's margin of victory, and if the Secretary's theory was correct, no Texas election procedure—or any resulting disenfranchisement—could offend due process so long as some candidate on the ballot could challenge an election's ultimate result. Finally, such a challenge also requires the contestant to demonstrate that a violation of the Election Code occurred. *See Willet*, 249 S. W.3d at 589. Indeed, in this case, Plaintiffs challenge the existing provisions of the Election Code *because* the Code apparently *perm its* violations of voters' constitutional rights. For all these reasons, the availability of such a challenge to the election outcome

neither mitigates voters' risk of erroneous deprivation nor does it reduce the probable value of additional remedies.

The Secretary's reliance on the "witness" alternative is similarly insufficient. *See* docket no. 70 pp. 23-24 (citing Tex. Elec. Code. § 84.011(a)(4)(B)). The Secretary asserts that the option "ensur[es] that voters who cannot make their signatures match receive notice of the witness option before deciding to vote by mail." *Id.* As an initial matter, the Secretary's argument ignores that a witness can only sign for an individual voting by mail "if the person required to sign cannot do so because of a physical disability or illiteracy." Tex. Elec. Code § 1.011(a). Thus, many mail-in voters are ineligible to use the apparent witness "alternative" set forth by the Secretary. Further, many voters will not know that they apparently "cannot make their signatures match" to whatever standard is necessary until their ballot has already been rejected. Certainly Weisfeld—who had herself previously served on EVBBs—believed she "[could] make [her] signature match" when she submitted her carrier envelope. Further, the Secretary's assertion ignores that even those who are permitted to utilize the witness signature option may not have access to a person who could serve as a witness, due to other restrictions set forth in the Election Code.[31]

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31. The Texas Election Code permits a person to serve as a witness only one time for applications to vote by mail absent narrow exceptions, making it difficult to facilitate the efficient use of witnesses, *Id.* at § 84.004. For example, if a nursing home attendant serves as a witness for a single resident's application, that attendant can no longer serve as a witness for any other nursing home residents who must submit an application.

Finally, the Secretary asserts that the Individual Plaintiffs did not raise "their concerns of improper rejection to their county election officer" and "therefore cannot demonstrate whether [the procedures available] are effective for remediation." Docket no. 70 pp. 27-28; docket no. 75 pp. 11-12. The Secretary's argument is belied by the factual record, and indeed, perhaps the best indication of the inadequate nature of the existing remedies is the evidence demonstrating that Richardson *did* try to seek relief from Brazos County election officials following the rejection of his ballot.[32] *See* docket no. 84, Richardson Dep. at 30:9-19, 31:21-32:1. Rather than taking action to ensure that his vote was properly counted following his complaint, Brazos County officials instead wrote a letter to Richardson notifying him that the mistaken rejection of his ballot (and his resulting disenfranchisement) was fully in compliance with the Election Code. *See* docket no. 65-1, Ex. 25. Further, even if the Court ignored that the Secretary's assertion is contradicted by the evidentiary record, the Secretary's argument is also both (i) a non-sequitur with respect to the Individual Plaintiffs,[33] and (ii)

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32. To the extent it is the Secretary's contention that Richardson did not *properly* notify the correct Brazos County election official, the record makes clear that Hancock would not have pursued relief pursuant to § 87.127 on Richardson's behalf for the various reasons stated in her testimony. *See* docket no. 84, Hancock Dep. at 96:4-97:22, 103:4-106:23, 107:9-19. And to the extent the Secretary faults Richardson and Weisfeld for not instituting an "election contest," *see* docket no. 75 p. 10, the Secretary ignores that such a remedy is available to candidates, not voters. *See* Tex. Elec. Code § 232.002.

33. Notwithstanding the Secretary's assertion that Individual Plaintiffs' past injuries cannot serve as evidence of the likelihood of future harm, *see* docket no. 75 p. 4, the Secretary apparently contends that the Individual Plaintiffs are not entitled to argue that

wholly inapplicable to CTD and the other Organizational Plaintiffs that have asserted claims against the Secretary.

In sum, the record makes clear that the existing procedural "remedies" do not protect voters from the risk of disenfranchisement created by the State's error-prone signature-comparison process.

c. There is Probable Value in Providing Additional Safeguards

In light of the evidence demonstrating the inadequacy of the existing procedural protections, it is unsurprising that the record also demonstrates that there is probable

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the existing procedures will violate their due process rights in the future if they do not demonstrate that they attempted to exhaust all remedies in the past. That assertion presupposes that a plaintiff *must* have suffered an injury in the past in order to challenge the future enforcement of an unconstitutional regulation, and of course, that is not the law. Each case cited by the Secretary for that proposition is inapposite in this case, because in those cases, (i) the plaintiff was actually provided pre-rejection notice and an opportunity for a pre-deprivation hearing and (ii) the plaintiff sought relief for *past injuries*. *See Santana v. City of Tulsa*, 359 F.3d 1241 (10th Cir. 2004) (seeking damages for deprivation of due process after defendant confiscated plaintiff's property); *Dubuc v. Twp. of Green Oak*, 406 F. App'x 983 (6th Cir. 2011) (seeking damages for deprivation of due process after defendant rezoned plaintiff's property); *Herrell v. Benson*, 261 F. Supp. 3d 772 (E.D. Ky. 2017) (seeking relief on due process claim premised on university's failure to confer plaintiff's degree). It is similarly irrelevant that Individual Plaintiffs "did [not[contact the Secretary's office regarding the allegedly erroneous rejections of their ballots," *see* docket no. 70 p. 28, especially given that the rejection notice does not advise voters to contact the Secretary. *See, e.g.*, docket no. 65-1, Exs. 25 & 33.

value in providing additional procedural protections for voters. Both Individual Plaintiffs in this case state that they would have taken steps to correct any mistake had they been notified of the signature-mismatch prior to their ballots' official rejections. *See* docket no, 65-1, Ex. 21 ¶ 11; docket no. 65-1, Ex. 30 ¶ 12. But the Court need not take Individual Plaintiffs' word for it, as the existing procedures set forth in the Election Code and/or those provided to voters in other circumstances demonstrate the probable value of providing additional procedural protections, including meaningful opportunities to correct signature-comparison errors.

For one, the record contains evidence demonstrating the probable value of providing additional signatures for EVBB members to consider for comparison purposes before rejecting a ballot. As noted above, EVBB members generally make their rejection decision based only on two signatures: the one provided on the application and the one provided on the flap of the carrier envelope. *See* docket no. 65-1, Ex. 4 p. 16. Although the Election Code *permits* EVBB members to consider any voter signature on file from the prior six years, the Code *does not require* that the EVBB members consider multiple comparison signatures before rejecting a ballot. *See* Tex. Elec. Code § 87.041(b)(2), (e). Unsurprisingly, Dr. Mohammed testified that a review of additional signatures improves the accuracy of any signature comparison, as it increases the likelihood that reviewers may compare multiple signatures of the same "style." *See* docket no. 84, Mohammed Dep. at 42:4-43:9. Indeed, it is for this reason that experts in Dr. Mohammed's field generally consider *at least* ten signatures before reaching a determination regarding the

authenticity of a signature. *See id.* Further, the EVBB handbook itself appears to specifically acknowledge that additional signatures may assist EVBB members in "confirming" their initial determination to accept or reject a ballot. *See* docket no. 65-1, Ex. 4 p. 16 (stating that "[t]hese additional signatures may be used to confirm that the signatures are either those [or] not those of the same person."). Thus, it is clear that advising EVBB members that they should utilize this procedure to compare any apparently "mismatched" signature *with other signatures on file* from the voter—before officially rejecting any ballot—appears to be an obvious way of improving the accuracy of the signature-comparison process. And doing so is fully compliant with the existing procedures in the Election Code.

The record also contains strong evidence demonstrating the probable value of providing more-timely notice of rejection to voters whose signatures are determined to be "mismatched." *See* docket no. 84, Hancock Dep. at 99:15-23 (agreeing that "the timing of the notice is important to whether or not the ballot can be corrected"). For example, the record makes clear that if a voter is notified that his or her mail-in ballot is rejected prior to election day, that voter is permitted to vote in person on election day. *See id.* at 96:4-20 ("If [notice is provided] prior to election day, then they would be able to cast a ballot in person."). While the in-person voting "remedy" would be insufficient for some mail-in voters,[34] such an alternative could be used

34. For example, voters who are out of the county, voters who are incarcerated in jail, or voters who are unable to travel to a polling place due to disability would be unable to utilize such an approach.

by many voters to avoid disenfranchisement if they are provided early notice of their ballot's improper rejection. This is especially true for voters, like Richardson, who submitted his mail-in ballot weeks before the election date. Finally, a procedure involving a more-timely comparison of signatures (and notice of rejection) is wholly consistent with the existing provisions of the Election Code. Nothing in the Election Code prohibits EVBBs from beginning the signature-comparison process in the days leading up to the election. *See* docket no. 65-1, Ex. 4 p. 41 (stating that EVBB may meet to review signatures up to 12 days before the election date in counties with more than 100,000 residents and up to 3 days before the election date in counties with less than 100,000 residents); docket no. 84, Ingram Dep. 46:25-48:1 (testifying that each county determines when its EVBB meets and that there is no limit as to number of times EVBB may meet). And unsurprisingly, one local official in this case agreed both that (i) rejection letters could go out earlier if the respective EVBBs met earlier in the permissible window and (ii) voters' phone numbers (if provided on the application) could be used to provide additional, earlier notice of the rejection. *See* docket no. 84, McAllen 30(b)(6) Dep. at 35:3-17, 51:24-52:10.

Finally, with respect to providing additional opportunities to "cure" for voters whose ballots are rejected for a signature "mismatch," the value of those alternatives is best demonstrated by existing procedures that are *already* used to provide an opportunity to "cure" to voters under other circumstances. For example, under the Texas Election Code, and in-person voter who fails to comply with the photo ID requirement at the polling site

on election day is permitted to cast a provisional ballot and is provided six days to confirm his or her identity with the country registrar. *See* Tex. Elec. Code § 65.0541. Most tellingly, if a voter completely forgets to sign his or her carrier envelope (as opposed to signing with a "mismatched" signature), the Texas Election Code and EVBB Handbook state as follows:

> [T]he clerk may deliver the carrier envelope in person or by mail to the voter and may receive, before the deadline, the corrected carrier envelope from the voter, or the clerk may notify the voter of the defect by telephone and advise the voter that the voter may come to the clerk's office in person to correct the defect or cancel the voter's application to vote by mail and vote on election day.

Tex. Elec. Code. § 86.011(d); docket no. 65-1, Ex. 4 p. 43. Indeed, Hancock testified that such a procedure is already implemented for "defective" carrier envelopes in Brazos County. *See* docket no. 84, Hancock Dep. at 48:5-14. To be clear, these forms of recourse would not necessarily provide an opportunity for *every* voter to avoid disenfranchisement following a signature-mismatch, including those who return their mail-in ballots on the eve of election day. But these "remedies" utilized elsewhere under the Election Code nonetheless demonstrate the value in providing a second opportunity for a voter to confirm his or her identity when the alternative is the complete disenfranchisement of that voter. *See Saucedo*, 335 F. Supp. 3d at 219-20.

In sum, based on the undisputed facts in the record, this Court finds that under the current statutory system, voters face a serious risk that their mail-in ballots will be improperly rejected based on a perceived signature mismatch. Further, because the existing "remedies" are inadequate (at least as presently implemented), those same voters face the wholesale deprivation of their right to vote. The Court therefore finds that there is both a meaningful risk of erroneous deprivation of certain voters' rights and probable value in providing additional procedures to protect those voters' right to vote.

3. Government's Interest and Burden

The third *Mathews* factor involves consideration of the government's interests, which may include "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. With respect to the State's "interest," the Secretary defends the existing procedures by noting that the State has an undeniable interest in avoiding voter fraud by "ensuring that only eligible voters cast ballots." *See* docket no. 70 p. 26. In support, the Secretary notes that many states utilize signature matching as a method for preventing voter fraud through the use of mail-in ballots. *See id*. The Secretary's Motion, in passing, also references the State's interest in the "orderly and efficient administration of elections" and "safeguarding public confidence in election integrity." Docket no. 70 p. 23. Finally, with respect to the burden involved with implementing additional procedures, the Secretary notes that "Texas law contains specific

timeframes, in which election results must be canvassed," and "[t]here is potential for an additional step to work chaos into this process, including by potentially preventing the timely canvassing of election results." Docket no. 75 pp. 12-13.

The Secretary's first asserted "interests" are unpersuasive, at least insofar as they are intended to respond Plaintiffs' challenge. Of course, the Court agrees with the Secretary's general assertion that Texas has a compelling interest in preserving the integrity of its election process by preventing voter fraud. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989); *Purcell* v. *Gonzalez*, 549 U.S. 1,4, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006). But in this case, the relevant question is whether that interest is furthered by utilizing signature-comparison procedures *that do not provide voters with a meaningful opportunity to avoid disenfranchisement by curing an improperly rejected ballot*. Unsurprisingly, the Secretary's briefing offers no explanation as to how the State's interest in preventing voter fraud is furthered by a process that does not provide pre-rejection notice and an opportunity to cure. As other district courts have pointed out while rejecting similar arguments, the Secretary's stated concerns regarding voter fraud instead appear to be *inconsistent* with the Secretary's apparent objections to the implementation of additional procedural protections. *See, e.g., Saucedo*, 335 F. Supp. 3d at 220 ("[I]f anything, additional procedures further the State's interest in preventing voter fraud while ensuring that qualified voters are not wrongly disenfranchised.");

Self Advocacy Sol. N.D., 2020 U.S. Dist. LEXIS 97085, 2020 WL 2951012, at *10 ("[A]llowing voters to verify the validity of their ballots demonstrably advances—rather than hinders—these goals [of preventing voter fraud and upholding the integrity of elections]."); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943, at *7 (Oct. 16, 2016) ("[L]etting mismatched-signature voters cure their vote by proving their identity further prevents voter fraud—it allows supervisors of elections to confirm the identity of that voter before their vote is counted."). Notably, the State no doubt also has a compelling interest in preventing in-person voter fraud, and yet Texas presently provides pre-rejection notice and an opportunity to cure to voters who fail to comply with certain requirements for in-person voting. *See* Tex. Elec. Code. §§63.011, 65.0541 (providing that voters who lack identification on election day may cast a provisional ballot and provide photo identification or sworn affidavit within six days of the election in order to have their ballot counted). Here, the Secretary offers "no satisfying explanation for why [the State] cannot have both a robust signature-match protection and a way to allow every eligible voter-by mail and provisional voter whose ballot is mistakenly rejected an opportunity to verify their identity and have their votes count." *Democratic Executive Comm. of Florida*, 915 F. 3d at 1322. In sum, it is clear that the Secretary's legitimate interest in preventing voter fraud actually weighs *in favor* of the implementation of additional procedural safeguards. And to the extent the Secretary separately asserts an interest in "safeguarding public confidence in election integrity," that interest is similarly *furthered* by implementing

procedures that ensure that valid mail-in ballots are not improperly rejected. *See, e.g., Self Advocacy Sol. N.D.*, 2020 U.S. Dist. LEXIS 97085, 2020 WL 2951012, at *10.

Finally, a review of other existing procedures already utilized by election officials demonstrates that the implementation of additional safeguards will not result in the "chaos" or "burden" asserted by the Secretary, nor will it interfere with the "orderly and efficient administration of elections." As noted above, the State already has existing procedures through which in-person voters who fail to present a valid identification at the polls can verify their identity prior to the canvassing process. *See* Tex. Elec. Code §§ 63.001(g), 63.011, 65.0541. Additionally, the record demonstrates that local officials already provide notice and an opportunity to cure to voters who make other mistakes on the carrier envelope and/or who forget to sign the carrier envelope altogether. Tex. Elec. Code § 86.011(d). Importantly, although Plaintiffs highlight the existence of these procedures in their motion, *see* docket no. 65 p. 8, the Secretary's briefing provides no explanation as to why these existing procedures and/or an analogous process could not be extended to mail-in voters whose signatures appear to mismatch. *See Martin*, 341 F. Supp. 3d at 1339 ("Defendants fail to explain why it would impose a severe hardship to afford absentee voters a similar process for curing mismatched signature ballots as for curing qualification challenges or casting a provisional ballot."). Given that these existing procedures are already in place, the record makes clear that the "burden" created by adding additional safeguards will not be so substantial as to outweigh the fundamental disenfranchisement

that results in the alternative.[35] *See Saucedo*, 335 F. Supp. 3d at 221 ("[T]his is a case not of foisting wholly novel procedures on state election officials, but of simply refining an existing one to allow voters to participate and to ensure that the process operates with basic fairness."); *Martin*, 341 F. Supp. 3d. at 1339-40 ("Because many of the procedures Plaintiffs request are already in place, the Court finds that additional procedures would involve minimal administrative burdens while still furthering the State's asserted interest in maintaining the integrity of its elections.").

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35. The record indicates that existing procedures may also be utilized to provide mail-in voters with more timely notice of a ballot's rejection based on a perceived signature mismatch. Mail-in ballot applications already offer voters the opportunity to provide a phone number and email address, and the record demonstrates that local election officials are permitted to contact voters via telephone to correct other errors with the ballot carrier envelope. *See* Tex. Elec. Code § 86.011(d). In addition, the record further indicates that local officials already utilize email to communicate with voters who provide that information under other circumstances. *See, e.g.*, docket no. 84, Hancock Dep. at 125:20-126:8. Moreover, the City of McAllen has even utilized text messages to promptly notify voters of errors in their mail-in ballot applications. *See* docket no. 84, Lara Dep. at 107:10-110:7 (describing sending text message to voter informing voter of mistake in application, in place of written notice of application rejection). For that reason, it appears that existing processes and infrastructure could be utilized to provide more-timely notice of rejection via telephonic or electronic means (at least for voters who provide that information), and at least one local official testified that there would be no additional costs associated with implementing such a process. *See* docket no. 84, McAllen 30(b)(6) Dep. at 33:8-34:18, 35:3-17.

Further, to the extent the Secretary is concerned about delays to the canvassing procedure, *see* docket no. 75 pp. 12-13, the Texas Election Code provides that the canvassing process may occur up to fourteen days after the date of the election. *See* docket no. 84, Ingram Dep. at 87:11-88:10; Tex. Elec. Code § 67.003. Indeed, the relevant provision of the Code makes clear that such time is provided—in part—*so that* the EVBB can complete its verification of the identities of voters who cast provisional ballots. *Id.* at § 67.003(b)(2). For that reason, the provision that the Secretary claims imposes tight deadlines for canvassing activities actually provides flexibility *specifically so that* local officials can conduct the types of voter verification analogous to the relief sought by Plaintiffs in this case.

Lastly, any purported "burden" involved with adding additional procedures is belied by the evidence in the record regarding the number of ballots rejected due to signature mismatches, As discussed above, the record indicates that approximately 5,000 ballots were rejected on the basis of perceived signature mismatches during the 2016 general election and 2018 general election.[36] Those rejections span 254 Texas counties, and thus, to the extent the Secretary directs local officials to provide additional procedural protections for voters whose signatures are deemed to "mismatch," that evidence demonstrates that

36. *See* docket no. 65-1, Ex. 16 (noting that 1,567 mail-in ballots were rejected statewide due to perceived signature mismatches during the 2016 general election and 3,746 mail-in ballots were rejected statewide due to perceived signature mismatches during the 2018 general election).

the vast majority of Texas's county election officials are unlikely to face any substantial burden if instructed to provide additional protections to a small subset of voters. *See, e.g.*, docket no. 93-2 (Ingram affidavit stating that "[t]he number of mail ballots rejected because the early voting ballot board determined the signatures were not made by the same person is relatively small"); docket no. 84, Brazos 30(b)(6) Dep. at 38:9-14 (stating that Brazos County rejected 29 mail-in ballots due to perceived signature mismatches during the 2018 general election).

4. *Conclusion*

In light of the fundamental importance of the right to vote, Texas's existing process for rejecting mail-in ballots due to alleged signature mismatching fails to guarantee basic fairness. Specifically, the record demonstrates that the State's existing system results in *de facto* unreviewable determinations resulting from a comparison that is inherently fraught with error, and voters are provided with no meaningful opportunity to cure improperly rejected ballots. As a result, the existing signature-comparison procedures are unconstitutional. *See Raetzel*, 762 F. Supp. at 1358 ("[The state] cannot disqualify ballots, and thus disenfranchise voters, without affording the individual due process protection [such as] advising the individual of the disqualification and the reason therefor[ ], and providing some means for the individual to make his or her position on the issue a matter of record before the appropriate election official."). Thankfully, it appears that, if implemented, already existing procedures—perhaps with minor refinements—will reduce the risk

that qualified voters are wrongfully disenfranchised *and* bolster the State's proffered interests.

Accordingly, the Court finds that a balancing of the *Mathews* factors demonstrates that Plaintiff Rosalie Weisfeld and Plaintiff CTD are entitled to summary judgment on their due process claims against the Secretary. This Court's conclusion is similar to that of numerous district courts that have addressed similar due process challenges to signature-comparison procedures under the same framework in recent years *See, e.g.*, *Saucedo*, 335 F. Supp. 3d 202; *Zessar*, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646; *Martin*, 341 F. Supp. 3d 1326; *Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696; *Self Advocacy Sol. N.D.*, 2020 U.S. Dist. LEXIS 97085, 2020 WL 2951012.[37] In any event, the next Section

37. In addition to *Hargett, see* note 27, *supra*, the Secretary directs the Court to *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), in which the Ninth Circuit rejected due process and equal protection challenges to Oregon's signature-matching procedures for verifying citizens' signatures *on petitions for ballot referenda. See* docket no. 70 pp. 26-27. As an initial matter, a review of *Lemons* indicates that Oregon provided numerous additional safeguards during the signature-comparison process used for its referendum petition signatures that are not provided by the Texas Election Code for mail-in ballots. *Id.* at 1104-05 (noting that (i) Oregon's referendum signature-comparison procedures are "weighted in favor of accepting questionable signatures," (ii) rejected signatures are subject to multiple levels of review by county officials, (ni) referendum petition cover sheets specifically instruct voters to "[s]ign your full name, as you did when you registered vote," and (iv) members of the public are permitted "to observe the signature-verification process and challenge decisions by county election officials."). More importantly, the Ninth Circuit noted that the "administrative burden of verifying

explains why the same result holds true even assuming the *Anderson/Burdick* framework and/or a "rational basis" review is applied to the analysis of the same claim and/or to Plaintiffs' "undue burden"/"right to vote" Equal Protection Clause claim.

C. Plaintiffs' "Undue Burden"/"Right to Vote" Equal Protection Claim and Due Process Claim Under the *Anderson/Burdick* and/or "Rational Basis" Frameworks

Plaintiffs assert an equal protection claim against the Secretary on the basis that the existing signature-comparison framework places a burden on voters that is not justified by any legitimate government interest. *See* docket no. 1 ¶¶ 62-70. The parties appear to agree that such a claim should be analyzed under the *Anderson/Burdick* framework, though they disagree as to the exact level of scrutiny that should be applied. *See* docket no. 65 p. 37 & docket no. 70 pp. 21-22. The Court will address those issues below-and explain why Plaintiffs are entitled to summary judgment on that theory of relief. Additionally, to the extent the Secretary argues that Plaintiffs' due process claim should have been analyzed under *Anderson/Burdick* because it is a "Fourteenth Amendment challenge[] predicated on voting rights," *see* docket no. 70 pp. 21-23,

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a referendum petition signature is significantly greater than the burden associated with verifying a vote-by-mail election signature." *Id.* at 1104. For that reason, the Court finds the other cases cited throughout this Order—that addressed nearly identical issues with respect to nearly identical claims regarding similar *mail-in ballot* signature-comparison procedures—to be far more persuasive.

the same analysis will also demonstrate why Plaintiffs are entitled to summary judgment on their due process claim even assuming that framework is applicable.

When applying the *Anderson/Burdick* test, a court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). Strict scrutiny applies only when the right to vote is "subjected to 'severe' restrictions." *Burdick*, 504 U.S. at 434. In those cases, any regulation at issue "must be 'narrowly drawn to advance a compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992)). On the other hand, if the right to vote is not burdened at all, then "rational basis" review applies. *See Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) (citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-09, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969)). In challenges that fall between either end of the extremes, in which the challenged regulations impose only "reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters," relevant and legitimate state interests "are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434; *see also Anderson*, 460 U.S. at 788.

The Secretary contends that rational basis review is appropriate with respect to Plaintiffs' constitutional claims. *See* docket no. 70 pp. 22-23. In support, the

Secretary cites to *Texas Democratic Party* for that proposition that rational basis applies in cases in which the "right to vote is not at stake," 961 F.3d 389, 2020 WL 2982937, at *10, and contends that is the case here. *See* docket no. 70 pp. 22-23. Plaintiffs on the other hand argue that heightened scrutiny applies because procedures that result in disenfranchisement constitute a "severe" burden on the right to vote, *See* docket no. 74 pp. 42-43.

The Secretary's assertion that "rational basis" review applies is unpersuasive. For rational basis review to be applicable, the Court would have to find that the procedures in question impose *no burden* on the right to vote. *See Husted*, 696 F.3d at 592; *Texas Democratic Party*, 961 F.3d 389, 2020 WL 2982937, at *10 (stating that rational basis applies in cases in which the "right to vote is not at stake"). That conclusion would be untenable in this case. *By design*, the challenged procedures result in rejected ballots, and the undisputed record in this case demonstrates that more than 5,000 voters had their ballots rejected as a result of perceived signature mismatches during the 2016 and 2018 general elections.[38] *See* Section II.B.l, *supra*. The undisputed record in this case also shows that qualified, registered voters have had their

38. For this reason, the Secretary's reliance on *Texas Democratic Party* is unpersuasive, at least insofar as the Secretary contends that *Texas Democratic Party* demonstrates that "rational basis" review is appropriate in this case. In *Texas Democratic Party*, a Fifth Circuit motions panel considered a challenge to a statute that allowed voters age 65 or older to vote by mail without extending that opportunity to voters under the age of 65. *See* 961 F.3d 389, 2020 WL 2982937. The Fifth Circuit did not consider a case in which voters utilized a form of voting for which they were eligible and yet nonetheless had their ballots rejected.

mail-in ballots improperly discarded—and have suffered disenfranchisement—as a result of the State's existing procedures. *See, e.g.*, docket no. 65-1, Exs. 25 & 33. Thus, irrespective of whether reasonable parties could debate whether the resulting burden is "severe" or "moderate," there is simply no credible basis to support the Secretary's assertion that the challenged procedures in question impose "no" burden on the right to vote.

Further, with respect to determining the applicable "burden," the Secretary is misplaced to the extent that its briefing asserts that any burden is "minimal" because (i) "mail-in voters are notified that their signatures are required and must match" at the time that they cast their ballot, and (ii) Texas provides other forms of voting, including in-person voting or by mail with a witness signature. *See* docket no. 70 pp. 23-24. Even assuming the Secretary's first assertion is now accurate,[39] the fact that voters are notified of the signature-comparison

39. At the time the Secretary's brief was filed on June 22, 2020, it appears that the Secretary's assertion was inaccurate. The Secretary cites to Tex. Elec. Code § 87.041(b)(2) for the proposition that voters are notified that their signatures must match. But the Section contains no such notice requirement, and the Secretary's Director of Elections testified that voters are *not informed* of the signature-matching requirement on the mail-in ballot application or on the carrier envelope. *See* docket no. 84, Ingram Dep. at 32:25-35:4, 103:9-15; *see also* Secretary 30(b)(6) Dep. at 76:25-78:4 (stating that existing "dear voter" letter did not contain information regarding signature-comparison procedures). As discussed in note 29, *supra*, the Secretary's most recent briefing indicates that the Secretary has now (as of August 2020) included a sentence about the signature-comparison requirement in its new "dear voter" letter. However, there is no indication that similar language has been included on mail-in ballot applications and/or on carrier envelopes.

process is irrelevant if there is nonetheless uncertainty as to whether the EVBB or SVC will accept a voter's signatures as "matching." *See* Section II.B.2.a, *supra* (noting error-prone nature of existing signature-comparison procedures and highlighting that Weisfeld's ballot was rejected notwithstanding her familiarity with the signature-comparison process). And the Secretary's second assertion ignores the very reason that Texas permits certain voters to vote by mail. Indeed, certain voters are unable to vote in person (*e.g.*, Weisfeld was out of town on election day) and other voters are ineligible to use the "witness" signature option. *See* Tex. Elec. Code § 1.011(a); Section II.B.2.b, *supra*. Having made the mail-in option available for eligible voters, Texas must ensure it is implemented in compliance with the Constitution. And because there is no way for a voter to know whether his or her signature will be deemed "mismatching" until after that determination has occurred, the Secretary must be able to justify its decision not to provide the affected voters (those who have their ballots improperly rejected) with additional procedural protections, including a meaningful opportunity to "cure."

Thus, for the reasons set forth in Sections II.B.2.a and II.B.2.b, *supra*[40] the Court concludes that the existing signature-comparison procedures constitute a "severe" restriction on the right to vote for mail-in voters who are

40. Rather than rehashing the various reasons why (i) the State's existing signature-comparison process is error-prone, (ii) the State's existing "remedies" (at least as presently implemented) are wholly inadequate, and (iii) the State's existing procedures create the risk of wholesale disenfranchisement for a subset of eligible voters, the Court incorporates its analysis from Section II.B.2.a and Section II.B.2.b, *supra*.

unable to "match" their signatures to the satisfaction of their local EVBB or SVC members. To be clear, the Court's conclusion with respect to the applicable burden is not premised on the mere existence of a vote-by-mail regime or the signature requirement itself.[41] Instead, the Court concludes that the challenged processes create a "severe" burden because voters who have their ballots rejected due to a perceived signature mismatch are provided untimely notice of rejection and no *meaningful* opportunity to cure. *See* Section II.B.2.b; note 30, *supra*. As a result, those voters face complete disenfranchisement, and thus, their right to vote *is* at stake.[42] Further, this Court's

41. For example, if the Election Code merely required voters to sign their mail-in ballots (with an alternative available for those who are unable)—and imposed *no risk* of uncorrectable rejection following compliance with that instruction—the Court agrees with the Secretary that a different level of scrutiny might be appropriate. Under such circumstances, the requirement would be more analogous to an "inconvenience" that would "not qualify as a substantial, burden on the right to vote." *Crawford v. Marion County Election Bd*, 553 U.S. 181, 199, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008).

42. None of the cases cited in the Secretary's Motion for the proposition that "rational basis" review applies involved the actual rejection of ballots submitted by eligible voters. *See* docket no. 70 pp. 22-23 (citing *Texas Democratic Party*, 961 F.3d 389, 2020 WL 2982937, at *10 (applying rational basis review to statute allowing voters 65 or older to vote by mail without extending that opportunity to voters under 65); *McDonald*, 394 U.S. at 808 n.7, 807 (applying rational basis to challenge regarding right to vote by absentee ballot); *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004) (applying rational basis review to ballot access restriction); *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 350 (6th Cir. 2018) (applying rational basis review to statute outlawing straight-ticket voting)), On this basis, each case cited is distinguishable, and the Secretary's argument that relies on those cases in inapposite.

conclusion with respect to the appropriate level of scrutiny is consistent with that of two other courts that have also analyzed similar signature-comparison procedures under the *Anderson/Burdick* framework. *Detzner*, 2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943, at *7 (classifying burden as "severe"); *Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696, at * 16 (classifying burden as "significant" and "substantial").[43]

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43. In *Hargett*—a case cited by the Secretary for other purposes—the district court recently reached a different conclusion, albeit after the parties provided only minimal briefing as to the issue. *See* 2020 U.S. Dist. LEXIS 156759, 2020 WL 5095459, at *11 ("Neither side did itself, or the Court, any favors in treating this claim with such brevity."). Specifically, in *Hargett*, the district court held that the burden associated with Tennessee's signature-verification requirement was "moderate at most." *See* 2020 U.S. Dist. LEXIS 156759, 2020 WL 5095459, at *18. But in that case, the district court had determined that its analysis of plaintiffs' Fourteenth Amendment "undue burden"/"right to vote" claim should consider only the burden imposed by the signature-verification requirement itself, rather than any burden imposed by the fact that the state's procedures provided no meaningful notice nor an opportunity to cure. *See* 2020 U.S. Dist. LEXIS 156759, [WL] at *15 (stating that "Plaintiffs' complaint about the signature-verification procedure... is not properly considered in connection with their right-to-vote claim"). This Court respectfully disagrees with the district court in *Hargett* as to this point. In this case, the Secretary has repeatedly argued (and cited Supreme Court precedent for the proposition) that—in determining the magnitude of the burden on the right to vote—the Court must consider a state's election regime in its entirety, including the existence of cure procedures, if any. *See* docket no, 30 p. 13 & docket no. 70 p. 22 (each citing *Crawford*, 553 U.S. at 199). This seems intuitive, as the extent to which a voter's "fundamental right to vote" is burdened by the State's signature-comparison requirement necessarily depends— at least in part—on the extent to which a voter is provided pre-rejection notice and an opportunity to "cure" an improper rejection. Indeed, the Supreme Court has made clear that the adequacy of "cure"

Because the existing procedures create a "severe" burden on certain voters' right to vote, the challenged procedures must be "narrowly drawn to advance a

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procedures should be considered during the evaluation of whether a challenged restriction is justified by a legitimate state interest. *See Crawford*, 553 U.S. at 199 (finding that the "severity of [the] burden is . . . mitigated by the fact that. . . voters without photo identification may cast provisional ballots that will ultimately be counted"). For that reason, the relevant analysis in this case is not whether the State's interests justify imposing a signature-matching requirement, *see Hargett*, 2020 U.S. Dist. LEXIS 156759, [WL] at *15-19, but instead whether the State's interests justify imposing procedures that implement that requirement *but do not provide voters with pre-rejection notice and/or a meaningful opportunity to cure*. Similarly, the Court also respectfully disagrees with the *Hargett* court's determination that a complaint regarding signature-verification procedures "is one sounding *exclusively* in procedural due process." 2020 U.S. Dist. LEXIS 156759, 2020 WL 5095459, at *15 (emphasis added) (declining to consider plaintiffs' "undue burden"/"right to vote" claim to the extent plaintiffs "complain[] about the signature-verification procedure" but considering the claim to the extent plaintiffs complain about "the existence of the signature-verification requirement"). Again, the Secretary has repeatedly argued that an "undue burden"/"right to vote" claim is the exact type of claim under which the constitutionality of the "entirety" of its signature-comparison procedures must be evaluated. *See, e.g.*, docket no. 30 p. 13; docket no. 70 pp. 21-22; docket no. 75 p. 11. Further, the fact that Plaintiffs challenge the State's signature-comparison "procedures" does not mean that the challenge must *only* be asserted as a "procedural due process" claim. *See, e.g., Husted*, 696 F.3d at 591-97 (applying *Anderson/Burdick* to plaintiffs' "undue burden"/"right to vote" claim challenging Ohio's rule that automatically disqualified wrong-precinct provisional ballots without providing an opportunity to cure), In sum, the Court finds the "undue burden"/"right to vote" analyses conducted by the courts in *Frederick* and *Detzner* —which are consistent with the analytical approach advanced by the Secretary in this case—to be more persuasive than the analysis conducted in *Hargett*.

compelling importance." *Norman*, 502 U.S. at 289. The Secretary's briefing does not attempt to satisfy that test, and—for the reasons set forth in Section II.B.3, *supra*—it is clear that the Secretary could not do so. In this case, the only interests set forth by the State are the avoidance of voter fraud, the "orderly and efficient administration of elections" and "safeguarding public confidence in election integrity." Docket no. 70 p. 23. With respect to the State's interest in avoiding voter fraud and "safeguarding public confidence in election integrity,"[44] the prior Section explains why there is no rational relationship between those interests and the implementation of procedures that do not provide voters with an opportunity to cure an

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44. As a separate issue, there is no evidence in the record demonstrating that any mismatched-signature ballots were submitted fraudulently. Unlike the Secretary, the Court does not interpret the vague statement contained in the affidavit of Jennifer Anderson to be evidence that Hays County's Elections Administrator has proof of "several" instances in which an individual committed voter fraud by signing another individual's application or ballot. *See* docket no. 93 p. 3 (citing docket no. 93-1 ¶ 2). Instead, the only clear evidence on the issue related to the rejected ballots demonstrates that the procedures in place lead to the improper rejection of valid ballots submitted by eligible voters. *See* docket no. 65-1, Exs. 25 & 33. Of course, there is no requirement that the Secretary necessarily demonstrate past instances of voter fraud in order to have an interest in preventing voter fraud in the future, and the Court's holdings in this case do not turn on the absence of such evidence. Finally, *even assuming* the evidence established that voter fraud ran rampant with the mail-in ballots at issue, "that would not be determinative," given that additional [notice and cure] procedures would *both* protect legitimate ballots from improper rejection *and* help prevent voter fraud. *Detzner*, 2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943, at *7.

improperly rejected ballot (little less are the challenged procedures narrowly-tailored to those interests). *See* Section II.B.3, *supra*. As the Court in *Detzner* correctly explained:

> [A]t issue is not the accuracy of each individual county canvassing board's review process; it is that [the State] denies mismatched-signature voters the opportunity to cure. Indeed, this Court is not being asked to order that *any* specific vote be counted, let alone those that are fraudulent. Rather, this Court is simply being asked to require that mismatched-signature voters have the same opportunity to cure as no-signature voters. In fact, letting mismatched-signature voters cure their vote by proving their identity *further* prevents voter fraud—it allows supervisors of elections to confirm the identity of that voter before their vote is counted.

2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943, at *7. Similarly, public confidence in the integrity of elections is also furthered by providing voters an opportunity to cure errors that result from the "currently opaque, unreviewable process." *Saucedo*, 335 F. Supp. 3d at 220-21. As examples, the Individual Plaintiffs in this case have expressed their anger and frustration at the treatment of their votes—and the resulting disenfranchisement—that resulted from the application of the procedures presently in place. *See* docket no. 84, Weisfeld Dep. at 45:4-9; docket no. 84, Richardson Dep. at 29:19-30:8; docket no. 65-1, Ex. 24.

Nor are the existing procedures tailored to the State's interest in the "orderly and efficient administration of elections." In support of its position, the Secretary's briefing summarily asserts that "[t]here is potential for an additional step to work chaos into this process, including by potentially preventing the timely canvassing of election results." Docket no. 75 pp. 12-13. But the Court has explained that the Texas Election Code already provides flexibility as to the date of canvassing specifically so that other voters may be provided an opportunity to avoid an improper ballot rejection. *See* Section II.B.3, *supra*. Indeed, existing "cure" procedures (such as those utilized for voters who fail to provide a photo ID at the polling place) are already implemented under the Code, and those procedures have not wreaked havoc on counties' canvassing processes. Thus, there is simply no compelling (or even rational) justification for relying on the canvassing deadline as the basis for denying a similar process to the small fraction of voters whose mail-in ballots are improperly rejected due to a perceived signature "mismatch." Further, the Secretary's argument ignores that the Texas legislature explicitly contemplated that it may be necessary to conduct canvassing up to fourteen days after an election so that all ballots may be accurately processed. *See* Tex. Elec. Code §§ 67.003(b)(2), (c). Thus, to the extent a county must conduct canvassing on that fourteen-day timeframe—rather than on the county's existing timeframe—so that additional procedures may be utilized to accurately process ballots, that is not "chaos." Instead, it is the exact procedure the legislature enacted. Finally, the Secretary's arguments regarding the "orderly and efficient administration of elections"

and canvassing "chaos" ignore that there are numerous available procedural protections that will have no or little impact on the timing of election activities. *See, e.g.*, note 29, *supra* (discussing inclusion of information regarding signature-matching requirement on ballot application and carrier envelope); note 35, *supra* (discussing use of telephone, text message, or email to provide more-timely notice of rejection to voters).

Although the State's proffered interests may justify the use of signature comparison as one method of preventing voter fraud, the Secretary has failed to show how any relevant and legitimate state interest justifies the use of signature-comparison procedures *that do not provide timely notice of rejection and a meaningful opportunity to cure*. If anything, the record makes clear that the implementation of additional procedural protections would actually *further* the State's asserted interests. For that reason, Plaintiffs are entitled to summary judgment on their "undue burden"/"right to vote" Equal Protection Clause claim and their Due Process Clause claim under the *Anderson/Burdick* framework as well.

Finally, in the event the above analysis does not make it clear, the Court's conclusion is not dependent on the application of "strict," "heightened," or even "intermediate" scrutiny. Importantly, irrespective of whether the burden is classified as "severe," "moderate," or even "slight," "it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation," *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Crawford*, 553 U.S. at 191), and the evidence

presented by the Secretary regarding its interests does not satisfy that standard regardless of how the Court classifies the burden. Importantly, *even assuming* the Secretary need only satisfy a "rational" basis review—which is not the case—the record makes clear that the Secretary still could not do so. With respect to the nearly identical issue in *Detzner*, the Court explained:

> Even assuming that some lesser level of scrutiny applied (which it does not), [the State's] statutory scheme would still be unconstitutional. It is illogical, irrational, and patently bizarre for the [State] to withhold the opportunity to cure from mismatched-signature voters while providing that same opportunity to no-signature voters. And in doing so, the [State] has categorically disenfranchised thousands of voters arguably for no reason other than they have poor handwriting or their handwriting has changed over time. Thus, [the State's] statutory scheme does not even survive rational basis review.

2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943, at *7. The same analysis is equally applicable here. The Secretary has provided no rational reason why it is appropriate to withhold meaningful "cure" procedures from mismatched-signature voters while providing a cure opportunity to no-signature voters. Similarly, there is ho rational basis for providing robust cure procedures to voters who fail to show an ID when voting in person but not those whose signatures are perceived to mismatch

when voting by mail. Indeed, the Election Code provides flexibility as to the timing of various election procedures *so that* protections like these can be implemented. In sum, there simply is no rational reason *to withhold procedural protections* from voters whose ballots are mistakenly flagged for rejection under the State's existing error-prone signature-comparison process.

Thus, *even if* the Court accepts the Secretary's assertion that Plaintiffs' constitutional claims should be analyzed under a "rational basis" review—and, to be clear, that is not the case given that the disenfranchisement of eligible voters certainly constitutes *some* burden on the right to vote—Plaintiffs are still entitled to summary judgment on their due process claims and "undue burden"/"right to vote" equal protection claims.

III. Appropriate Relief

As noted above, the Court has concluded that Plaintiffs Rosalie Weisfeld and CTD are entitled to summary judgment as to the merits of their Fourteenth Amendment Due Process Clause and "undue burden"/"right to vote" Equal Protection Clause claims. Whether the *Mathews* framework or *Anderson/Burdick* framework applies, it is clear that the State's asserted interests are outweighed by—and/or fail to justify—the threat the existing procedures pose to voters' fundamental right to vote.

The Court also concludes that injunctive relief is both appropriate and necessary, and below, the Court addresses the appropriate scope of that relief.

Appendix D

A. Legal Standard, Applicable Considerations, and the Parties' Proposals

To be entitled to permanent injunctive relief, a plaintiff must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006).

For the reasons set forth in Section II of this Order, the Court concludes that each factor of this analysis is satisfied. Indeed, a violation of one's right to vote is an irreparable injury, and monetary damages are not adequate to compensate for that injury. A balance of the hardships also favors entry of an injunction *of an appropriate scope*, as the Court has found that the applicable government interests and/or burden—if any—do not outweigh the severe harm facing mail-in voters who have their ballots improperly rejected. Finally, given the importance of the fundamental right to vote and the risk posed to that right by the existing procedures, the Court finds that the public interest will be furthered by the issuance of injunctive relief that is *tailored* to protect that right.

However, although the existing implementation of the State's signature-comparison procedures plainly violates certain voters' constitutional rights, the appropriate

scope of the resulting injunctive relief is a more difficult question. Plaintiffs assert that one of two remedies is appropriate. Plaintiffs first contend that the Court may order the Secretary to implement a detailed "notice and cure or challenge process," and Plaintiffs' brief describes a detailed proposed remedy that Plaintiffs contend could be implemented in advance of the November 2020 elections. *See* docket no. 89 pp. 3-5.[45] In the alternative, and specifically in the event the Court concludes that Plaintiffs' proposed notice and cure procedures would be overly burdensome and/or otherwise inappropriate, Plaintiffs contend that the Court should "enjoin[] implementation of the signature comparison procedure entirely unless and until the legislature implements appropriate safeguards." *Id.*, at pp. 1-2.

Among other complaints with Plaintiffs' relief proposals, the Secretary responds that the detailed procedures set forth in Plaintiffs' briefing would (i) "not protect election integrity or ballot security," (ii) impose "practical burdens" and costs on the Secretary and local election officials, (iii) require the reprinting of election

45. Plaintiffs' specific proposed remedy requests that the Court: (1) mandate dates on which EVBB/SVC teams must complete signature comparisons (and thus implicitly mandate when canvassing may occur); (2) order that notice of a ballot rejection based on a perceived signature mismatch be provided within 24 hours of rejection by mail, as well as by phone, text message and email (if that contact information has been provided by the voter); (3) order the creation of a new "cure" procedure that permits a voter to prevent the rejection of his or her ballot by providing certain information and/or documentation to county election officials; and (4) order the Secretary to create a "Notice of Provisional Rejection" form that allows voters to provide the affirmation and verifying information required by the new "cure" procedures. *See* docket no. 89 pp. 3-5.

materials, and (iv) cause confusion with respect to the implementation of any "cure" procedure. *See generally* docket no. 93 pp. 10-18. The Secretary also asserts that Plaintiffs' specific remedial plan is not justified because mail-in voters have existing remedial options including the procedures provided in § 87.127. *See* docket no. 93 p. 17; docket no. 98 p. 6 n.7. Additionally, the Secretary argues that any order enjoining the implementation of signature verification during this election would "sweep[] far more broadly than Plaintiffs' alleged injury" and would give "short shrift to the State's interests" in preventing voter fraud and ensuring the orderly administration of elections. *See id.* at pp. 2-9. Finally, the Secretary asserts that *any* injunctive relief prior to the November 2020 elections would be inappropriate because the election date is "impending." *See id.* at pp. 18-19.

Many of the Secretary's concerns regarding Plaintiffs' proposals ignore a plain fact: as presently implemented, the challenged signature-comparison procedures violate certain voters' constitutional rights. Those rights are vitally important to a functioning democracy, and the Secretary cannot avoid the implementation of *any form* of injunctive relief merely because *some* burden or inconvenience may result. Moreover, the prior Section of this Order explains that *certain* remedies—such as those that provide eligible voters with an opportunity to confirm that he or she submitted the mail-in ballot in question—actually *advance* the State's interests in avoiding voter fraud and safeguarding the public's confidence in elections. Finally, although the Court recognizes that it is not its duty to draft provisions of the Election Code in the first instance, the Court has both the authority and duty to

ensure that the *existing* Code provisions are implemented in a manner that is consistent with the Constitution,

On the other hand, the Court believes that certain of the Secretary's arguments have merit. For one, the State does have an unquestionable interest in preventing voter fraud, *Purcell*, 549 U.S. at 4, and the Court must give weight to that interest. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, 2020 U.S. App. LEXIS 25831, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020) (stating that court's "categorical elimination" of witness requirement applicable to absentee ballots "gives no effect to the state's substantial interest in combatting voter fraud"). Further, the Court agrees with the Secretary that the Court should aim to implement a narrowly-tailored remedy—*if one exists*—that both protects voters' rights and protects the State's interest in utilizing signature comparison to verify the identities of mail-in voters. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."). The Court also agrees with the Secretary that any relief implemented this close to an election should be devised in a way to avoid voter confusion and substantial burdens on election officials. *See Purcell*, 549 U.S. at 4.

For that reason, the Court has concluded that it would be inappropriate to order *certain* aspects of the specific relief requested by Plaintiffs *in advance of the November 2020 elections*. For example, the Court does not believe it is appropriate to instruct the Secretary to design and implement *completely new* "cure" forms, affidavits, or

identification verification procedures in advance of the November 2020 elections. In addition, the Court does not believe it is appropriate—at this stage—to notify local election officials that they must modify existing dates for EVBB/SVC meetings and/or their counties' timeframes for canvassing procedures for the upcoming elections.[46] The Court concludes that these types of relief very well may result in a substantial burden on election officials and/or voter confusion if implemented quickly in advance of the November 2020 elections.[47]

Accordingly, having reviewed the briefing and the record, the Court believes it is appropriate to (i) issue narrow, immediate injunctive relief in advance of the November 2020 elections utilizing *existing procedures* in the Election Code, and (ii) set a hearing following the November 2020 elections to determine whether broader injunctive relief is appropriate at that time.[48]

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46. The Court does not mean to suggest that Plaintiffs' concern regarding certain dates and deadlines is not well-founded. Indeed, the Court has made clear that the Code's existing timing provisions regarding signature review, notice of rejection, cure procedures and/or canvassing are inherently problematic. *See* Sections II.B.2.a and II.B.2.b, *supra*. However, in light of the health risks and uncertainty created by the ongoing Covid-19 pandemic and the fact that certain counties have already made arrangements for these processes, *see, e.g.*, docket no. 93-1, the Court believes it would be inappropriate to mandate when each county's EVBB/SVC teams must meet and/or when canvassing must be conducted *for the November 2020 elections*.

47. To be clear, these types of relief may be appropriate for subsequent elections. *See* Section III.C., *infra.*.

48.The Court understands that plaintiffs in a separate litigation related to the State's signature-comparison procedures would

like the Court to stay this case and withhold the issuance of any judgment or relief until the court in the separate action can (i) address the merits of those plaintiffs' claims and (ii) determine to what extent those plaintiffs are entitled to relief. *See* docket no. 86, filed by plaintiffs in *Flores, et al. v. Hughs, et al.* No. 7:18-ev-00113 (S.D. Tex.). The Court believes doing so would be inappropriate for several reasons. First, it was fewer than three weeks ago that this Court was first notified of the separate litigation, notwithstanding that the *Flores* litigation had been pending since this case was filed. Indeed, the *Flores* plaintiffs knew of this case at least in October of last year, *see* docket no. 86-3, and the *Flores* plaintiffs only sought participation in this case on the eve of summary judgment in this action as well as on the eve of the November 2020 general election. The Court finds that the *Flores* plaintiffs' intervention request is untimely—at least for the purposes of seeking a stay in this action—as Plaintiffs in this action would be prejudiced. *See Adam Joseph Res. v. CNA Metals Ltd.*, 919 F.3d 856, 865 (5th Cir, 2019) (stating that a court determining whether to permit intervention should consider the "length of time during which the intervenor actually knew or reasonably should have known of his interest in the case" and "the extent of prejudice to the existing parties to the litigation," among other factors). Importantly, the parties in this case have taken substantial steps to litigate the merits of their claims, and this Court has expended vast judicial resources addressing summary judgment motions in this case, This is simply not an instance in which "efficiency" or "judicial administration" favors delay of this action. Moreover, it is unclear whether the *Flores* court plans to address the merits of the *Flores* plaintiffs' claims in advance of the November 2020 elections. The *Flores* court has not yet resolved the summary judgment issues in that case, notwithstanding that (i) the *Flores* plaintiffs' motion has been pending since April 1, 2020 and (ii) the *Flores* plaintiffs' filed renewed motions for judgment filed on June 1, 2020 and August 26, 2020. Additionally, the *Flores* court stated on the record that it would "gladly" wait for this Court to address the substantive issues first. *See* docket no. 86-3 (Oct. 16, 2019 hearing transcript). Thus, it appears that the *Flores* court is fully aware that

Appendix D

B. Immediate Injunctive Relief in Advance of November 2020 Elections

To avoid confusion and minimize the burdens in advance of the November 2020 elections, the Court will

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this Court may address the pending issues in the first instance, and it has not taken action to delay these proceedings. *See Save Power Ltd. v. Syntek Finance Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) ("[T]he court in which an action is first filed is the appropriate court to determine whether subsequently filed cases involving substantially similar issues should proceed."). Additionally, this Court has waited nearly three weeks since the *Flores* plaintiffs stated that a ruling in that case was "imminent," *see* docket no. 86 p. 10, and no judgment or relief has been issued. The Court has determined that Plaintiffs in this case are entitled to immediate partial relief, and the Court simply cannot wait any longer to issue its order in light of the upcoming November 2020 election date. Third, the Court—at this time—is merely issuing partial injunctive relief in advance of the November 2020 elections. In the event the *Flores* plaintiffs believe that the relief issued by this Court does not go far enough, they are welcome to make that argument to the *Flores* court, and the *Flores* court has the authority to issue broader injunctive relief in the event it concludes that doing so is necessary and appropriate. Thus, the *Flores* plaintiffs *do* have a remedy to the extent they believe that they are prejudiced by this Court's Order, whereas the Plaintiffs in this case would have *no remedy* in the event this Court withheld all relief in this case and the *Flores* court ultimately declined to issue relief in advance of the November 2020 elections. In sum, the Court finds that it would be inappropriate to permit intervention at this late stage solely for the purposes of delaying this case. However, in the event the *Flores* plaintiffs would like to intervene for the purposes of participating at the hearing at which the Court determines whether additional permanent injunctive relief is appropriate, the *Flores* plaintiffs may file a separate motion seeking participation in this case for those purposes.

order narrow, immediate injunctive relief that is fully consistent with *existing procedures* set forth in the Texas Election Code. Specifically, the Court will order the following immediate injunctive relief as part of this Order:

> (1) The Secretary must—within *ten (10) days* of this Order—provide a copy of this Order to all local election officials and issue an advisory notifying all local election officials that the rejection of a voters' ballot on the basis of a perceived signature mismatch is unconstitutional if the voter is not provided with (a) pre-rejection notice of a perceived mismatched signature and (b) a meaningful opportunity to cure his or her ballot's rejection.
>
> (2) Further, in order to protect voters' rights in the upcoming November 2020 elections, the Secretary must—within *ten (10) days* of this Order—*either*:[49]
>
> > (a) Issue an advisory to all local election officials notifying the election officials that—in light of the Court's determination as to the constitutionality of the existing procedures—mail-in ballots may not be rejected on the basis of a

49. In order to maintain statewide uniformity, the Secretary must issue the *same* advisory (either the one described in (2)(a) or the one described in (2)(b)) to all local election officials.

perceived signature mismatch under Texas Election Code § 87.041(b)(2) during the upcoming November 2020 elections; *or*

(b) Issue an advisory to all local election officials notifying the election officials that—in light of the Court's determination as to the constitutionality of the existing procedures—the Constitution *requires* the following:

(i) Before *rejecting* a ballot on the basis of a perceived signature "mismatch," any EVBB and/or SVC *must* compare the signatures on the voter's application and carrier envelope with all other signatures from the prior six years that are on file with the county clerk or voter registrar so that the EVBB and/or SVC can "confirm" its initial determination that a ballot should be rejected;

(ii) Voters whose signatures are perceived to be mismatching following the comparison in (2)(b)(i) *must* be mailed notice of a

rejected ballot within *one day* of the EVBB's and/or SVC's rejection determination,[50] and the notice *must* (a) advise the voter that—in the event the voter believes his or her ballot was improperly rejected—the voter may seek relief by contacting an appropriate election official and (b) provide the appropriate local election official's (or officials') telephone number and mailing address;

(iii) In the event a voter whose signatures are perceived to be mismatching provided his or her phone number on the voter's ballot application, local election officials must make *at least one* phone call to that number within *one day* of the EVBB's and/or SVC's rejection determination, and on the call, the election official must (a) notify the voter of his or her ballot's pending rejection

50. For the purposes of the "one day" requirement in (2)(b)(ii) and (2)(b)(iii), notice must be provided by the day following the day on which the EVBB and/or SVC makes its rejection determination, unless that determination occurs on a Saturday, in which case notice must be provided by the following Monday.

based on a perceived signature mismatch, (b) advise the voter that—in the event the voter believes his or her ballot was improperly rejected—the voter may seek relief by contacting an appropriate election official, and (c) provide the appropriate local election official's (or officials') telephone number and mailing address;[51] and

(iv) In the event any voter notifies the appropriate local election official(s) that his or her ballot was improperly rejected based on a perceived signature mismatch or claims that he or she signed both the application and the carrier envelope,[52] the

51. In the event the voter does not answer at the number provided, the local election official must leave a voicemail—if that function is available—with the same information.

52. To the extent local election officials seek guidance from the Secretary as to this requirement, a voter need not specifically request that a county election official file a lawsuit on the voter's behalf or reference § 87.127 in order to trigger the local election official's duty to pursue relief. The Court provides this clarification for the avoidance of doubt, as the Secretary's summary judgment briefing appears to repeatedly fault Richardson and Weisfeld for not specifically citing § 87.127 to local election officials and/or

appropriate county election officer *must* pursue a challenge on behalf of the voter pursuant to § 87.127,[53] *unless* the voter *explicitly* informs the county election officer that he or she does not wish for the official to pursue relief on the voter's behalf.

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demanding that local officials pursue such relief. *See* docket no. 70 pp. 27-28; docket no. 75 pp. 11-12; docket no. 93 p. 5 n.5. But a voter need not learn every nuanced subsection of the Election Code in order to exercise his or her right to vote. Instead, the Constitution requires that the appropriate county election officer pursue relief under § 87.127 if a voter notifies the appropriate official that he or she signed both the application and the carrier envelope, *unless* the voter also *explicitly* informs the official that he or she does not wish for the official to pursue relief on the voter's behalf. Finally, the Secretary should advise local election officials to keep records detailing, at minimum, (i) the voters who provided notice of an improperly rejected ballot, (ii) the date on which the voter contacted local officials, and (iii) the subsequent actions taken by local officials on the voter's behalf.

53. This remedy must be available to *all* categories of voters who are eligible to vote by mail who contact the local election official regarding an improper rejection, including those who are (i) disabled, (ii) over the age of 65, (iii) out of the county at the time notice of rejection is received, and/or (iv) confined in jail at the time notice of rejection is received. In light of the Secretary's repeated contentions regarding the sufficiency of the existing "cure" opportunity provided by § 87.127, the Court expects that the Secretary can provide guidance to local officials, if necessary, regarding the appropriate implementation of § 87.127 in this manner.

> (3) Finally, in the event any local election official fails to comply with any of the Secretary's advisories described above, the Secretary must advise the local election official that he or she is "imped[ing] the free exercise of a citizen's voting rights" in violation of the Constitution, and the Secretary must order "the person to correct the offending conduct" pursuant to § 31.005.

The Court will briefly explain why it concludes that the above injunctive relief best balances the State's interests with those of Plaintiffs, in light of the fact that the November 2020 elections are less than two months away.

Injunctive Relief (1): With respect to the first advisory that the Secretary must issue, Section II.B.2 of this Order explains the various reasons that the existing signature-comparison procedures are likely to lead to ballots being improperly rejected based on an incorrect determination that a voter's application and carrier envelope were signed by different individuals. Given the inherent inaccuracies and inconsistencies involved with signature comparison conducted by laypersons without training, it is unconstitutional to reject a ballot on that basis if a voter is not provided with pre-rejection notice and a meaningful opportunity to "cure" an improper rejection. The first portion of this Court's injunction ensures that local election officials are notified of those general requirements, and it is intended to provide context for the subsequent portions of the Court's injunction.

Appendix D

Injunctive Relief (21(a): Because the existing signature-comparison procedures are unconstitutional as presently implemented, the Secretary may advise local election officials that mail-in ballots are not to be rejected on this basis during the November 2020 elections. The Court understands that the Secretary may not prefer this approach. *See generally* docket no. 93 pp. 2-9. But in the event the Secretary believes that the relief provided in (2)(b) is unduly burdensome or otherwise inappropriate (notwithstanding that it merely instructs the Secretary to advise local election officials to implement *existing protections* in the Election Code), the Secretary may instead protect voters' fundamental rights by instructing local officials that ballots should not be rejected based on perceived signature mismatches during the November 2020 elections.

Injunctive Relief (2)(b)(i): The next four portions of the Court's injunction require the Secretary to inform local election officials that certain actions that are each *permissible* under the Election Code are in fact *required* under the Constitution in the event officials intend to reject ballots pursuant to §§ 87.041(b)(2). As noted in Section II.B.2.a of this Order, the existing signature-comparison process is inherently error prone. *See id.* Indeed, under the existing procedures, reviewers are provided no uniform standard or instruction as to what constitutes a "matching" signature, and as a result, untrained laypersons conduct a review that even trained experts find difficult. *See id.* Unsurprisingly, the record indicates that whether a ballot is accepted or rejected often depends on which two-person team of reviewers receives the ballot. *See id.*

Fortunately, the evidence in the record demonstrates that a review committee's consideration of additional signatures is one meaningful way of reducing the risk of an improper rejection. *See* Section II.B.2.c, *supra*. Further, the Election Code already sets forth procedures under which committee members can review additional signatures from the voter, and the EVBB handbook already advises committee members that additional signatures can be utilized to "confirm" any rejection determination. *Id.* at §§ 87.027(i), 87.041(e); docket no. 65-1, Ex. 4 p. 16. Conceding the apparent value of such an approach, the Secretary's response notes that the Secretary has used the EVBB handbook to "remind" EVBBs and SVCs that they can "go beyond the signatures on the carrier envelope and application for ballot by mail (ABBM) to consider any signature made by the voter within the past six years and on file with the clerk or voter registrar." Docket no. 93 pp. 8-9. However, a "reminder" is constitutionally insufficient considering (i) the fundamental rights at stake, (ii) the record evidence indicating that signature reviewers generally do not consider the additional signatures under the existing procedures, and (iii) the inherent limitations to the "notice" and "cure" remedies discussed in subsections (2)(b)(ii), (2)(b)(iii), and (2)(b)(iv). Instead, in light of those considerations, the Constitution *requires* that signature reviewers use these additional signatures, if available, to "confirm" any decision to reject a ballot based on a perceived mismatch between the signatures provided on the voter's application and carrier envelope.

Injunctive Relief (2)(b)(ii) and (2)(b)(iii): In order for a voter to be able to take actions to "cure" an improper

ballot rejection based on a perceived signature mismatch, it is vital that the voter receive prompt notice of a ballot's potential rejection. The Secretary recognizes as much, and for that reason, the Secretary has previously issued an advisory instructing local election officials "to mail notices of rejected ballots to affected voters as soon as possible." *See* docket no. 93-2, Ex. C. However, the Secretary's prior advisory ultimately leaves the timing of that notice to the discretion of local officials (at least insofar as local officials may notify the voter as late as ten days after the election), and in order for mail-in voters to have *any* opportunity to utilize the relief set forth in (2)(b)(iv), the voter must receive notice of any rejection before local canvassing has occurred. *See* Tex. Elec. Code § 87.127.

For that reason, the Constitution does not permit unreasonable delays in a county election officials' transmission of rejection notices, and in order to provide a voter due process, the Court concludes that local officials must mail notice of a ballot's rejection based on a perceived signature-mismatch to the voter within one day of the EVBB's and/or SVC's determination. Moreover, in order for mail-in voters to have a *meaningful* opportunity to "cure" any improper rejection in the limited time available, the Court concludes that it is necessary to include on the rejection notice (i) a sentence advising the voter that he or she may contact local election officials in order to challenge any rejection on the basis of a perceived signature mismatch and (ii) the contact information for the local election official who the voter should contact.

Moreover, the Court concludes that constitutionally-sufficient "notice" also requires that local election officials make *at least one* attempt to provide notice of rejection to the voter by telephone if the voter has provided that information on his or her ballot application. This requirement recognizes that notice by mail may take several days to arrive, and thus, it very well may arrive too late for some voters to seek relief from county election officials if the county's canvassing procedures have already commenced. Additionally, this directive merely instructs election officials to provide the same form of "notice" that is implemented for voters who altogether forget to sign their carrier envelope. *See* Tex. Elec. Code. § 86.011(d); docket no. 65-1, Ex. 4 p. 43.

Injunctive Relief (2)(b)(iv): In light of the error-prone nature of the signature-comparison process, the Constitution *requires* that a voter be provided a *meaningful* opportunity to "cure" the improper rejection of his or her ballot based on a perceived signature mismatch. In every brief that the Secretary has filed in relation to the pending motions, the Secretary has asserted that the existing signature-comparison procedures are constitutionally sound and/or that additional remedies are unnecessary *because* Texas Election Code § 87.127 already provides mail-in voters with an opportunity to cure a mistakenly rejected ballot. *See* docket no. 70 pp. 24-25; docket no. 75 p. 10; docket no. 79 p. 9; docket no. 93 p. 17; docket no. 98 p. 6 n.5. The Court has explained in detail why § 87.127 does not provide a *meaningful* opportunity to "cure" for voters who have their mail-in ballots improperly rejected, at least as it is *presently* understood and implemented

by local election officials. *See* Section II.B.2.b, *supra*. In addition to other flaws with the existing implementation of § 87.127, a voter presently may receive relief under that Section *only if* the local election official exercises his or her *discretion* to seek relief on a voter's behalf. *See id.* Because that remedy (as presently understood) is discretionary and only applies to "county election officers," the record evidence demonstrates that the procedure is unavailable for the vast majority of voters who have their votes rejected based on a perceived signature mismatch.[54] And whether a voter whose ballot is improperly rejected can pursue relief—in order to freely exercise his or her right to vote—may not be left to the unchecked discretion of a local official, especially if those officials *believe* that seeking relief on a voter's behalf under § 87.127 is presently "impossible." Docket no. 84, Hancock Dep. at 107:9-19.

Notably, however, the inherent flaws with § 87.127 are largely premised on the remedy's general unavailability to aggrieved voters under *existing guidance*. On the other hand, if local officials are informed that they are *required* to pursue relief on behalf of an aggrieved voter under § 87.127, the Court can see how those procedures may—in some instances—mitigate the risk of an improperly rejected ballot.[55] Accordingly, the Court believes it is

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54. *See* Section II.B.2.b, *supra; see also* docket no. 84, Hancock Dep. at 103:4-106:23, 107:9-19; docket no. 84, McAllen 30(b)(6) Dep. at 53:20-25.

55. The record demonstrates that the procedure—if actually pursued—may protect voters from disenfranchisement. Although

appropriate for the Secretary to inform local election officials that the Constitution *requires* that they *must* pursue the relief set forth in § 87.127 that the Secretary asserts is already available to *any* mail-in voter who contends that his or her vote has been improperly rejected. *See* notes 52 & 53, *supra*.

Injunctive Relief (3): Section 31.005(a) of the Texas Election Code provides the Secretary with authority to "take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral process." *Id.* As described above, the Constitution requires that voters be provided certain procedural safeguards if their mail-in ballots are going to be subjected to the State's error-prone signature-comparison process. The above instructions describe the constitutionally-required safeguards that must be implemented for the November 2020 elections, and in the event any local election official fails to comply with the above instructions, that local election official will be "imped[ing] the free exercise of a citizen's voting rights." *Id.* at § 31.005(b). Although the Texas Election Code states that the Secretary *may* order local election officials to correct their conduct in the event a local official acts in a manner that violates a voter's constitutional rights, the Court concludes that the Constitution *requires* that the Secretary *at least try* to protect such voters' rights

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the Secretary's Director of Elections testified that he was only aware of § 87.127 being utilized by a single county official on a single occasion, the record demonstrates that the use of the procedure on that occasion resulted in five voters having their ballots reinstated. *See* docket no. 84, Ingram Dep. at 44:22-46:1.

by issuing such an order. Thus, in the unlikely event any local election official fails to comply with the advisories described in this Section, the Secretary must immediately notify the local election official that he or she is violating voters' constitutional rights and order that the official comply with its advisory.[56]

The Court recognizes that there will be *some* burden resulting from this immediate relief, but the record demonstrates that the resulting burden will not be substantial. With respect to the requirement that EVBB and/or SCV members review additional signatures in (2)(b)(1), this supplemental procedure will not be necessary for the *vast majority* of mail-in ballots that are received. Indeed, the, Secretary's Director of Election's has confirmed that only a small fraction of mail-in ballots are typically rejected based on the initial determination that the signatures on the carrier envelope and application do not match, *see* docket no. 93-2 ¶ 11, and it is only for these voters that the Constitution requires that the reviewers "confirm" their original determination using the additional signatures on file. Further, both local officials in this case testified that they are familiar with the procedures involved with comparing additional signatures on file (and how these procedures are implemented), notwithstanding the fact that they also testified that EVBBs have not frequently used the procedures in their respective jurisdictions. *See* docket no. 84, McAllen 30(b)(6) Dep. at 26:6-17; docket no. 84, Brazos 30(b)(6) Dep. at 43:2-46:13.

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56. The Secretary's office has recently demonstrated its authority and willingness to utilize § 31.005 to protect voters' rights from "abuse" from local election officials. *See* note 19, *supra*.

With respect to the "notice" requirements set forth by the Court in (2)(b)(ii) and (2)(b)(iii), the Court reiterates that such notice will only be required for a small fraction of voters who submit ballots by mail. As to those voters, the available evidence in the record demonstrates that the "one day" requirement is reasonable and not overly burdensome. Indeed, both local officials in this case testified that their jurisdictions already mail rejection notices within one business day of any rejection determination by the EVBB. *See* docket no. 84, Hancock Dep. at 89:3-89:8; docket no. 84, McAllen 30(b)(6) Dep. at 32:8-33:7. Moreover, given that the Election Code provides for notice by phone in the event a voter makes other errors on his or her carrier envelope and/or ballot application, the record indicates that (i) local election officials are familiar with contacting voters by phone (if a number is provided on the voter's application), *see* note, 35, *supra*, and (ii) requiring a single phone call per perceived signature mismatch would not impose any significant burden on local officials. *See* docket no. 84, Hancock Dep. at 48:5-14; *See* docket no. 84, McAllen 30(b)(6) Dep. at 33:8-34:18, 35:3-17. The minimal burden imposed by the Court's instruction regarding "notice" is perhaps best demonstrated by the alternative available to the Court for ensuring that voters are provided "notice" such that a "cure" may be pursued in advance of a county's canvassing deadlines. Indeed, Plaintiffs requested that the Court order the Secretary to direct local election officials to modify the dates of their upcoming EVBB/SVC meetings (and/or canvassing procedures to the extent those are impacted by the review process). *See* docket no. 93 p. 3. However, local officials and the Secretary responded that doing so

at this late stage would be infeasible and/or prohibitively expensive.[57] *See, e.g.*, docket no. 93-1 ¶¶ 3, 13-14; docket no. 93-2 ¶¶ 14-15. The Court credits this evidence from local officials, at least with respect to the November 2020 elections, and the Court believes that the "notice" provided by the procedures in (2)(b)(ii) and (2)(b)(iii)-which utilizes infrastructure already in use by local election officials—reflects an appropriate compromise in advance of the upcoming elections.

To the extent the Secretary contends that the procedures set forth in (2)(b)(iv) would be overly burdensome, the Secretary may not have it both ways. The Secretary cannot argue both (i) that § 87.127 provides the existing "cure" for any voter who allegedly suffers an improper ballot rejection[58] and (ii) that the pursuit of relief under § 87.127 for each voter who allegedly suffers an improper ballot rejection would be unduly burdensome. To the extent local election officials contend that the required implementation of § 87.127 would be overly burdensome, the Court notes that the procedure will be required only for the small fraction of mail-in voters who (i) have their ballots rejected based on a perceived

57. To be clear, this type of injunctive relief, in which the dates for the signature-review meetings and/or canvassing process are Court-imposed, may be appropriate, if necessary, for subsequent elections.

58. The Court notes that the Secretary also contends that the "election contest" procedure provides an adequate existing remedy. *See* docket no. 93 p. 5 n.5. There are *numerous* reasons why that procedure is wholly inadequate and unrealistic. That topic is addressed in more detail in Section II.B.2.b, *supra*.

signature mismatch and (ii) contact local election officials regarding an improper rejection. Further, it is the State's chief election officer's position that § 87.127 provides the appropriate remedy for aggrieved voters who contend that their ballots were improperly rejected. Thus, the Court expects that the Secretary can provide guidance to local election officials as to the most appropriate and efficient means for implementing that existing remedy on voters' behalves should any voter contend that his or her ballot was improperly rejected on the basis of a signature mismatch. *See* notes 52 & 53, *supra*.

Additionally, the Court notes that many of the Secretary's arguments regarding the purported impropriety, of injunctive relief are wholly inapplicable with respect to the remedies set forth above. For one, the partial immediate injunction in this case in no way "deprives the State of the opportunity to implement its own legislature's decisions." *Moore v. Tangipahoa Parish Sch, Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013). The State may continue utilizing signature-comparison during the November 2020 election under the Court's partial immediate relief, and the relief itself "implements [the Texas] legislature's decisions." Indeed, under the terms of the Court's injunction, local officials are merely being directed to *actually utilize* certain protections that the Texas legislature believed were appropriate to include when the existing Code provisions were enacted. Nor will the above procedures cause confusion among voters or depress turnout. *See* docket no. 93 p. 7 (citing *Purcell*, 549 U.S. at 4-5). Importantly, the immediate injunctive relief does not change anything about the steps a voter must take

when submitting his or her application or carrier envelope. And providing a voter whose ballot was improperly rejected "notice" and an opportunity to "cure" is certainly less likely to depress turnout than the existing risk of wholesale disenfranchisement. Finally, to the extent the Secretary is concerned about "uniformity," *see* docket no. 93 pp. 6-7, the immediate injunctive *relief promotes* uniformity. Specifically, the above relief ensures that all mail-in voters are provided the *same* protections, rather than leaving local officials the discretion to determine the extent to which each voter should have his or constitutional rights protected.[59]

The Court reiterates that the above immediate remedy merely directs the Secretary to instruct local election officials to interpret and implement *existing procedures* in the Election Code in a manner that is consistent with the Constitution. And as the Court has stressed throughout this Order in response to various arguments by the Secretary, nothing in the remedy requires the Secretary to do anything outside of its authority. *See, e.g.*, Sections I.D & LE, *supra*. Indeed, the Secretary has recently

59. Under the Secretary's existing guidance, one county's EVBB may choose to compare additional signatures on file with the registrar (and thus, reduce a voter's risk of rejection) whereas officials from an adjacent county may choose to forgo those protections. Similarly, under the Secretary's existing guidance, one county election official may choose to pursue relief for aggrieved voters under § 87.127 whereas another may believe that "it's not [his or her] responsibility to do that." *Compare* docket no. 84, Hancock Dep. at 103:25-106:23 *with* docket no. 84, Ingram Dep. at 44:22-46:1. The Court's order ensures that mail-in voters are provided the same procedural safeguards irrespective of their county of residence.

issued advisories to local election officials about the mail-in voting procedures and the signature-comparison requirement, and the Secretary frequently does so in the days and weeks leading up to elections.[60] *See, e.g.*, docket no. 93-2, Exs. B & C. Notably, this is not the first time that the Secretary has been ordered to issue advisories to local election officials in order to ensure that the Election Code is not being implemented in a way that violates voters' rights. *OCA-Greater Houston*, 2018 U.S. Dist. LEXIS 81376, 2018 WL 2224082, at *5 (ordering Secretary to

60. The Secretary claims that any injunction ordering the issuance of an advisory is inappropriate because local officials may choose to disregard the Secretary's advisory. *See* docket no. 93 pp. 6-7. Although the Court is hesitant to even engage with the Secretary's hypothetical, the Court will briefly explain why it would be an inappropriate basis to withhold injunctive relief, *even assuming* such blatant disregard for the law might occur. For one, the record demonstrates that local election officials view the Secretary's advisories as binding instructions. *See* docket no. 84, Hancock Dep. at 81:7-11; docket no. 84, McAllen 30(b)(6) Dep. at 40:9-18. In addition, the Secretary's argument presupposes that local election officials would choose to *knowingly* violate voters' constitutional rights and, in doing so, risk litigation, termination and/or other consequences. It also ignores that the Secretary may order compliance and seek an enforcement action from the Attorney General in the event local officials are violating voters' constitutional rights. *See* Tex. Elec. Code § 31.005. Indeed, the Secretary utilized those procedures in the recent weeks in order to protect the right to vote from alleged "abuse" by Harris County officials. *See* note 19, *supra*. Finally, the risk that certain local election officials may ignore the Secretary's guidance is a risk that the Secretary has apparently taken *every time* its office issues an election advisory, and to date, it has not stopped the Secretary from issuing election advisories. Similarly, that unlikely risk provides no basis for preventing the Court from ordering the Secretary to issue such advisories in this case.

"distribute notice to all county elections departments clarifying that they are not to enforce [certain provisions of the Texas Election Code]" and stating that "[t]he notice should explicitly explain" various types of assistance that a voter is entitled to receive).

In sum, the Court believes that—at least for the purposes of the upcoming November 2020 elections—the above framework is narrowly tailored to both provide additional protections for voters and protect the State's interests in preventing voter fraud and ensuring the orderly administration of elections. However, in the event the Secretary ultimately concludes that State and/or local election officials are not in a position to implement the Election Code's *existing remedies* in advance of the November 2020 elections in a manner that is consistent with the Constitution, the Secretary may instead provide the advisory to local election officials set forth in (2)(a).

C. Injunctive Relief for Subsequent Elections

The Court recognizes that the above-injunctive relief is not perfect and may not provide completely infallible protections such that every eligible voter who casts a mail-in ballot avoids disenfranchisement in the November 2020 elections. For example, although the Secretary must advise local officials to provide prompt notice of rejection as set forth above, there are various reasons why some voters may not receive their notices of rejection prior to the implementation of a county's canvassing procedures.[61]

61. For example, a voter who is away from his or her home

For this reason, the "cure" procedures available to voters under § 87.127—via local election officials—will be unavailable to these voters in the upcoming election. Thus, a long-term solution that addresses these timing issues—by perhaps modifying the dates governing the signature-comparison process, notice provisions and/or canvassing procedures—may ultimately be more appropriate for subsequent elections.

In addition, and notwithstanding the Secretary's recent decision to add a sentence regarding signature comparison to the State's "dear voter" letter, it may be necessary to add information regarding signature comparison to the ballot application and carrier envelope as well.[62] *See* note, 29, *supra*. Even following the Secretary's revisions to the State's general "dear voter" letter, there remains a substantial risk that voters will submit their applications and carrier envelopes without knowing that the signatures on each document must match. *See id.* Providing information regarding the signature-matching requirement on the documents *actually being signed* appears to be a far more appropriate method for ensuring that each voter is aware of the requirement *as he or she signs the documents*. It is therefore unsurprising that at least one other state has added language regarding the

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county on Election Day may not receive "notice" that is transmitted by mail or by telephone until he or she returns.

62. The Court has determined that such a remedy would be inappropriate as part of the immediate injunctive relief ordered in this case because the record indicates that local election officials have already printed the ballot applications and carrier envelopes for the November 2020 elections. *See* docket no. 93-2 ¶ 10; docket no. 93-1 ¶ 6.

signature-comparison procedures to ballot applications and carrier envelopes in response to similar challenges. *See Saucedo*, 335 F. Supp. 3d at 218.

Finally, a "notice" and "cure" procedure that is more robust than the remedy provided in the existing Code provisions may be appropriate for subsequent elections. Moreover, the Texas legislature may be in a better position to design those specific procedures. Indeed, the legislature has set forth step-by-step "cure" procedures for voters who make other mistakes while voting, and ultimately, a similar legislative framework for signature "mismatch" voters may ultimately be the most appropriate solution for addressing the procedural deficiencies inherent in the existing process.

Thus, although the Court believes a narrowly-tailored solution is appropriate for the November 2020 elections in order to (i) protect voters' rights and the State's interests, and (ii) avoid substantial confusion and/or burdens on the eve of the elections, it is clear that additional safeguards may be required once the State's arguments regarding the impending nature of the November 2020 elections are no longer part of the requisite balancing analysis. Importantly, a declaration submitted by the Secretary's Director of Elections concedes that a detailed framework of relief similar to that requested by Plaintiffs "would not necessarily impose a significant burden on the Secretary of State's office" under "normal circumstances." Docket no. 93-2 ¶ 9. Accordingly, the Court will hold a hearing following the November 2020 elections to determine whether it is appropriate to enjoin the signature-

comparison process during subsequent elections absent more robust procedural protections for voters who cast their ballots by mail.

IV. The Parties' Other Claims and Motions

In this case, the Court has determined that it is appropriate to limit the scope of this Order to the adjudication of Plaintiff Weisfeld's and Plaintiff CTD's due process and "undue burden"/"right to vote" equal protection claims against the Secretary. Specifically, the Court has determined that it is appropriate to focus this Order on the theories against the Secretary that numerous Courts have found to be meritorious in analogous challenges to similar mail-in ballot signature-comparison procedures. *See Saucedo*, 335 F. Supp. 3d 202; *Zessar*, 2006 U.S. Dist. LEXIS 9830, 2006 WL 642646; *Martin*, 341 F. Supp. 3d 1326; *Detzner*, 2016 U.S. Dist. LEXIS 143620, 2016 WL 6090943; *Frederick*, 2020 U.S. Dist. LEXIS 150995, 2020 WL 4882696; *Self Advocacy Sol. N.D.*, 2020 U.S. Dist. LEXIS 97085, 2020 WL 2951012; *Raetzel*, 762 F. Supp. 1354. The Court understands that time is of the essence in this case, and a complete analysis of each Plaintiffs' standing and/or the merits of the other claims at this time would only serve to delay this Court's Order, without *significantly* impacting the scope of the appropriate relief. Indeed, the Court need only find that one Plaintiffs due process and/or equal protection claim against the Secretary has merit in order to issue the injunctive relief described in Section III. And the Court is cognizant that any unnecessary delay in the issuance of this Order may impact both the implementation of the

appropriate relief and/or the Secretary's ability to appeal this Order, in the event the Secretary believes doing so is appropriate.

Thus, based on the adjudication of the claims addressed in this Order, Plaintiffs' Motion will be granted in part and the Secretary's Motion will be denied in part, and as set forth above, and partial, immediate injunctive relief will be ordered based on the claims addressed in this Order. To the extent Plaintiffs' Motion and the Secretary's Motion address other claims and/or seek other relief, the motions will be held in abeyance. Similarly, all other pending Motions for Summary Judgment in this case will also be held in abeyance.

Following the November 2020 elections and/or the resolution of any appeal of this Order, the Court will set a hearing at which the parties may address whether additional injunctive relief is appropriate based on Plaintiff Weisfeld's and Plaintiff CTD's due process and "undue burden"/"right to vote" equal protection claims against the Secretary. At the same hearing, the parties may also address the extent to which it is necessary for the Court to resolve the merits of the pending motions for summary judgment (to the extent they are not resolved by this Order) and/or otherwise adjudicate the parties' other remaining claims.

CONCLUSION AND ORDER

For the reasons set forth in Sections I and II of this Order, Plaintiffs' Motion for Summary Judgment (docket

no. 65) is **GRANTED IN PART**, and the Secretary's Motion for Summary Judgment (docket no. 70) is **DENIED IN PART**. Specifically, Plaintiffs' Motion is **GRANTED** to the extent Plaintiff Rosalie Weisfeld and Plaintiff Coalition of Texans with Disabilities seek summary judgment on their due process claims ("Count One") and "undue burden"/"right to vote" equal protection claims ("Count Two") against the Secretary, and the Secretary's Motion is **DENIED** as to those claims.

As set forth in Section III of this Order,[63] the Court hereby **ENJOINS** the Secretary to implement an immediate remedial plan for the November 3, 2020 elections consistent with the following terms:

> (1) The Secretary must—within *ten (10) day*s of this Order—provide a copy of this Order to all local election officials and issue an advisory notifying all local election officials that the rejection of a voters' ballot on the basis of a perceived signature mismatch is unconstitutional if the voter is not provided with (a) pre-rejection notice of a perceived mismatched signature and (b) a meaningful opportunity to cure his or her ballot's rejection.
>
> (2) Further, in order to protect voters' rights in the upcoming November 2020 elections,

63. Additional details regarding the required scope of the immediate injunctive relief are provided in Section III.B of this Order, *supra*. *See also* notes 49, 50, 51, 52 & 53.

the Secretary must—within *ten (10) days* of this *Order—either*:

(a) Issue an advisory to all local election officials notifying the election officials that—in light of the Court's determination as to the constitutionality of the existing procedures—mail-in ballots may not be rejected on the basis of a perceived signature mismatch under Texas Election Code § 87.041(b)(2) during the upcoming November 2020 elections; *or*

(b) Issue an advisory to all local election officials notifying the election officials that—in light of the Court's determination as to the constitutionality of the existing procedures—the Constitution *requires* the following:

(i) Before *rejecting* a ballot on the basis of a perceived signature "mismatch," any EVBB and/or SVC *must* compare the signatures on the voter's application and carrier envelope with all other signatures from the prior six years that

are on file with the county clerk or voter registrar so that the EVBB and/or SVC can "confirm" its initial determination that a ballot should be rejected;

(ii) Voters whose signatures are perceived to be mismatching following the comparison in (2)(b)(i) *must* be mailed notice of a rejected ballot within *one day* of the EVBB's and/or SVC's rejection determination, and the notice *must* (a) advise the voter that—in the event the voter believes his or her ballot was improperly rejected—the voter may seek relief by contacting an appropriate election official and (b) provide the appropriate local election official's (or officials') telephone number and mailing address;

(iii) In the event a voter whose signatures are perceived to be mismatching provided

his or her phone number on the voter's ballot application, local election officials must make *at least one* phone call to that number within *one day* of the EVBB's and/or SVC' s rejection determination, and on the call, the election official must (a) notify the voter of his or her ballot's pending rejection based on a perceived signature mismatch, (b) advise the voter that—in the event the voter believes his or her ballot was improperly rejected—the voter may seek relief by contacting an appropriate election official, and (c) provide the appropriate local election official's (or officials') telephone number and mailing address; and

(iv) In the event any voter notifies the appropriate local election official(s) that his or her ballot was improperly rejected based on a perceived signature

> mismatch or claims that he or she signed both the application and the carrier envelope, the appropriate county election officer *must* pursue a challenge on behalf of the voter pursuant to § 87.127, *unless* the voter *explicitly* informs the county election officer that he or she does not wish for the official to pursue relief on the voter's behalf.
>
> (3) Finally, in the event any local election official fails to comply with any of the Secretary's advisories described above, the Secretary must advise the local election official that he or she is "imped[ing] the free exercise of a citizen's voting rights" in violation of the Constitution, and the Secretary must order "the person to correct the offending conduct" pursuant to § 31.005.

For the reasons set forth in Section IV of this Order, all pending Motions for Summary Judgment (including Plaintiffs' Motion and the Secretary's Motion to the extent they are not resolved by this Order) (docket nos. 64, 65, 66 & 70) are hereby **HELD IN ABEYANCE** until further notice from the Court.

Appendix D

Following the November 2020 elections and/or the resolution of any appeal of this Order, the Court will set a hearing in this case. At the hearing, the parties should be prepared to address (i) whether additional injunctive relief is appropriate based on Plaintiff Weisfeld's and Plaintiff CTD's due process and "undue burden"/"right to vote" equal protection claims against the Secretary *(see* Section III.C, *supra)*, and (ii) the extent to which it is necessary for the Court to resolve the merits of the pending motions for summary judgment and/or otherwise adjudicate the parties' other remaining claims *(see* Section IV, *supra)*.

IT IS SO ORDERED.

SIGNED this 8th day of September, 2020.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
Chief United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, FILED DECEMBER 23, 2019

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

Civil No. SA-19-cv-00963-OLG

DR. GEORGE RICHARDSON, ROSALIE WEISFELD, AUSTIN JUSTICE COALITION, COALITION OF TEXANS WITH DISABILITIES, MOVE TEXAS CIVIC FUND, LEAGUE OF WOMEN VOTERS OF TEXAS, AND AMERICAN GI FORUM OF TEXAS, INC.,

Plaintiffs,

v.

TEXAS SECRETARY OF STATE, TRUDY HANCOCK, IN HER OFFICIAL CAPACITY AS BRAZOS COUNTY ELECTIONS ADMINISTRATOR, AND PERLA LARA, IN HER OFFICIAL CAPACITY AS CITY OF MCALLEN, TEXAS SECRETARY,

Defendants.

December 23, 2019, Decided;
December 23, 2019, Filed

Appendix E

ORDER

On this date, the Court considered Defendants' motions to dismiss (docket nos. 27, 29 & 30). Having considered the pending motions and the parties' briefing, the Court concludes that the motions should be DENIED.

BACKGROUND

This case arises from provisions of the Texas Election Code (the "Election Code") related to the process of voting by mail. Before addressing the merits of the pending motions, the Court will briefly describe the parties and the relevant allegations.[1]

I. Alleged Rejection of Mail-In Ballots

Like many states, Texas offers certain voters the opportunity to vote by mail. Specifically, Texas offers the opportunity to vote by mail to voters who are outside of their county during elections, voters with disabilities, voters 65 years-of-age or older, and certain voters confined in jail but otherwise eligible to vote. *See* Tex. Elec. Code §§ 82.001-.004.

In order to vote by mail, an eligible voter must first request a mail-in ballot by completing a mail-in ballot application at least 11 days before the election day. *Id.*

1. The background provided in this Section is based on the allegations asserted in Plaintiffs' Original Complaint. *See* docket no. 1 (the "Complaint").

at §§ 84.001 & 84.007. In order to cast his or her vote by mail, the voter must mark the ballot, place it in the official ballot envelope provided by the county, seal the official ballot envelope, place the official ballot envelope in the carrier envelope provided by the county, seal the carrier envelope, and sign the certificate on the carrier envelope. *Id.* at § 86.005(a)-(c). Specifically, the carrier envelope certificate requires the voter to "certify that the enclosed ballot expresses [the voter's] wishes independent of any dictation or undue persuasion by any person," and includes a line for the voter's signature across the flap of the envelope. *Id.* at § 86.013(c). The carrier envelope then must be returned to the county in a timely manner. *Id.* at §§ 86.006(a) & 86.013(c).

Upon receipt of a mail-in ballot, the Election Code instructs each local jurisdiction's Early Voting Ballot Board ("EVBB") or Signature Verification Committee ("SVC") to open the ballot envelope and determine whether to accept or reject the voter's ballot.[2] *See id.* at

2. The signature-comparison process is generally conducted by the Early Voting Ballot Board, a statutorily required board established in each county that includes representatives from county parties. *See generally* Tex. Elec. Code § 87.001. However, the local jurisdiction's Early Voting Clerk ("EVC") may determine that a Signature Verification Committee should be established, in which case the SVC will perform the signature reviews rather than the EVBB. *See generally id.* at § 87.027. An SVC is also mandatory if the EVC receives a timely petition of at least 15 registered voters requesting such a committee. *Id.* at § 87.027(a-1). An SVC is composed of at least five members and, "[i]n an election in which party alignment is indicated on the ballot," must include at least two members designated by each county party on the ballot in equal

§§ 87.001, 87.027(a-1) & 87.041. The Section states that a ballot may only be accepted if various conditions are satisfied. *Id.* at § 87.041(b). One such provision, which is central to this lawsuit, states that the ballot may only be accepted if "neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness." *Id.* at § 87.041(b)(3). As a result of that provision, each EVBB or SVC is instructed to reject a ballot if the EVBB or SVC concludes that a signature on the carrier envelope or ballot was "executed by a person other than the voter." *Id.* The Election Code provides guidance as to which signatures an EVBB or SVC should use for the purposes of comparison, *see id.* at § 87.027(i), (j), but the Election Code contains no guidance as to the appropriate procedure or standard for determining that two signatures do not match, nor does it require that EVBBs' or SVCs' members receive training in evaluating signatures. *See* docket no. 1 ¶ 41. As a result, Plaintiffs allege that the standard for evaluating signature matches will necessarily vary from county to county, panel to panel, and even from meeting to meeting or ballot to ballot within the same committee panel. *See id.* Plaintiffs further note that the review process cannot be performed anonymously, as the EVBB or SVC necessarily knows the identity of the voter when determining whether a ballot should be accepted or rejected. *See id.* at ¶ 42.

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numbers. *Id.* at § 87.027(d). According to the Complaint, SVCs are usually established in larger counties, but may also appear in many smaller ones. *See* docket no. 1 ¶ 38.

If a ballot is rejected on the basis of the EVBB's or SVC's signature comparison, the Election Code only requires that the voter be notified about the rejection of his or her ballot within 10 days following the election. *Id.* at § 87.0431(a). The Election Code does not require local jurisdictions to provide a specific opportunity for the voter to verify or prove that he or she did indeed sign the relevant documents or challenge the signature verification at any time before rejection.[3] *See* docket no. 1 ¶ 47. Thus, according to Plaintiffs, a "voter whose ballot is rejected is not given any notice of [his or her] rejection prior to the rejection, any opportunity to cure [his or her] ballot, or any ability to contest the decision of the EVBB or SVC since counties have until 10 days after the Election Day to notify the voter of a rejected mail-in ballot." *Id.*

Through these procedures, Plaintiffs allege that Texas counties rejected at least 1,873 mail-in ballots during the 2018 general election and at least 1,567 mail-in ballots during the 2016 general election solely on the basis of mismatching signatures. *See* docket no. 1 ¶ 1. Plaintiffs allege that these procedures (and the resulting improper rejection of votes) disenfranchise certain members of the groups who are explicitly eligible by statute to vote by mail. Finally, Plaintiffs note that certain of those specific

3. Instead, the Election Code states that a "county election officer may petition a district court for injunctive or other relief as the court determines appropriate" if the county election officer "determines a ballot was incorrectly rejected or accepted by the [EVBB]." *Id.* at § 87.127(a). However, the language of the code appears to give the election officer discretion as to whether to file such a petition on a voter's behalf.

groups, namely the elderly and people who are disabled, are those most likely to have signature variations that could cause improper rejection of a ballot. *See id.* at ¶ 46.

II. The Parties

Plaintiffs in this case include both individuals who had their votes rejected on the basis of alleged signature mismatches and various organizations whose members or whose services are allegedly affected by Texas' mail-in voting procedures.

According to the Complaint, Plaintiff Dr. George Richardson ("Richardson") had his ballot rejected by Brazos County officials during the 2018 general election on the basis of an alleged signature mismatch.[4] *See* docket no. 1 ¶ 10. Similarly, during a city run-off election in 2019, the City of McAllen rejected Plaintiff Rosalie Weisfeld's ("Weisfeld," and with Richardson, the "Individual Plaintiffs") mail-in ballot on the same basis. *See id.* at ¶ 11. The Complaint alleges that Richardson and Weisfeld each received a letter following the respective election notifying them that their ballot had been rejected on the basis of an alleged signature mismatch. *See id.* at ¶¶ 10-11. The Individual Plaintiffs allege that they would have confirmed that the signatures on the ballots were their own had they been given timely notice and the opportunity to do so. *See id.*

4. The Complaint further alleges that Richardson is a doctor and that his signature "has been used to prescribe countless medications." *See* docket no. 1 ¶ 10.

Appendix E

Plaintiff Austin Justice Coalition ("AJC") is a non-partisan, non-profit organization that—among other services—operates the #ProjectOrange campaign, which involves registering eligible voters incarcerated at the Travis County Jail and providing support in requesting and submitting mail-in ballots. *See id.* at ¶ 12. Plaintiff Coalition of Texans with Disabilities ("CTD") is an organization that "works to ensure that people with disabilities may live, work, learn, play, and participate fully in the community of their choice." *See id.* at ¶ 16. Among other things, CTD expends resources informing voters statewide about their ability to vote by mail-in ballot and explaining the rules and procedures for doing so. *See id.* Plaintiff MOVE Texas Civic Fund ("MOVE") is a non-partisan, non-profit organization that, among other things, actively works to register eligible young people to vote at various college campuses and to assist them with voting. *See id.* at ¶ 20. Because college students are often eligible for mail-in voting because they are away from their counties of residence while attending school, MOVE provides various types of support to students wishing to vote by mail. *See id.* at ¶¶ 20-22. Plaintiff League of Women Voters of Texas ("LWV") is a non-partisan, non-profit organization that works to register eligible individuals to vote and to ensure that they actually cast a ballot that counts. *See id.* at ¶ 24. Among other activities, LWV expends resources to educate Texans about mail-in ballots and to provide support to eligible voters using such ballots. *See id.* at ¶¶ 24-25. Finally, Plaintiff American GI Forum of Texas, Inc. ("GI Forum") is an organization whose membership includes significant numbers of voters who are eligible to vote by mail because

they are: (1) classified as disabled veterans; (2) military retirees 65 years-of-age or older; and/or (3) active duty service members (and/or their family members) who are stationed away from their county of residence in Texas. *See id.* at ¶ 28. GI Forum and its constituent chapters expend resources to register eligible Texas veterans and servicemembers (and their family members) to vote and to ensure that they actually cast a ballot that counts. *See id.* at ¶¶ 28-29.

Defendant Texas Secretary of State (the "Secretary") is the Chief Election Officer of the State of Texas (the "State"). Tex. Elec. Code § 31.001(a). In this role, Plaintiffs allege that the Secretary is responsible for enforcing the State's elections statutes. *See* docket no. 1 ¶ 32. Plaintiffs also allege that the Secretary routinely issues guidance to the county registrars of all 254 Texas counties on various elections procedures. *See id.* Defendant Trudy Hancock ("Hancock") is the Brazos County Elections Administrator ("Brazos EA"), and she is sued in her official capacity for the manner in which she implements the voting procedures that are at issue in this action. *See id.* at ¶ 33. Finally, Defendant Perla Lara ("Lara") is the Secretary of the City of McAllen, Texas ("McAllen City Secretary," and, collectively, with Brazos EA, the "Local Defendants"). *See id.* at ¶ 34. The McAllen City Secretary is responsible for the administration of elections conducted within the City of McAllen, and Lara is sued in her official capacity for the manner in which she implements the voting procedures that are at issue in this action. *See id.*

III. The Pending Claims and Motions

On August 7, 2019, Plaintiffs filed the present action seeking declaratory and injunctive relief against Defendants. *See* docket no. 1. Plaintiffs' Complaint asserts the following causes of action: (1) a claim alleging the violation of the Due Process Clause of the Fourteenth Amendment for Defendants' alleged failure to provide pre-rejection notice and an opportunity to cure to voters whose ballots are rejected on the basis of an alleged signature mismatch; (2) a claim alleging the violation of the Equal Protection Clause of the Fourteenth Amendment due to an alleged severe burden that has been placed on voters that is not justified by a legitimate government interest; (3) a separate claim alleging the violation of the Equal Protection Clause of the Fourteenth Amendment due to the Secretary's, State's and/or Local Defendants' failure to provide any uniform guidelines or principles regarding the comparison of signatures; and (4) a claim asserted only by Plaintiff CTD alleging violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, *et seq.*, and the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 794.

In response to Plaintiffs' claims, each Defendant filed a motion to dismiss. The McAllen City Secretary's Motion to Dismiss essentially asserts that the McAllen City Secretary is an improper defendant. *See* docket no. 27 (the "McAllen Motion"). Specifically, the McAllen Motion states that the McAllen City Secretary merely complies with and enforces state laws and regulations and "has no role in interpreting or litigating the constitutionality

of state law" nor does she "have the authority to defend it." *See* docket no. 27 ¶ 2.9. The McAllen City Secretary therefore asserts that the claims should proceed only against state officials. *See id.* at ¶ 2.8. Similarly, the Brazos EA's Motion to Dismiss also essentially argues that the Brazos EA is an improper defendant. *See* docket no. 29 (the "Brazos Motion"). Specifically, the Brazos Motion contends that the Complaint specifically fails to assert claims against the Brazos EA, and that the Brazos EA is an improper Defendant because the allegations "do not allege that [the Brazos EA] did anything other than follow the law." *Id.* at p. 4. Thus, the Brazos Motion asserts that the Brazos EA has no authority to remedy the Plaintiffs' complaints. *See id.* Finally, the Secretary's motion to dismiss essentially *also* argues that the Secretary is an improper Defendant because "Plaintiffs' alleged injuries are neither caused by nor redressable through her." Docket no. 30 (the "Secretary's Motion"). Thus, the Secretary argues that Plaintiffs' claims against the Secretary should be dismissed for lack of standing, as local election authorities have the authority to provide Plaintiffs with the relief requested. *See id.* at pp. 6-11. Additionally, the Secretary argues that—even assuming Plaintiffs have standing—the claims should be dismissed on the basis that Plaintiffs' Complaint fails to state any plausible claim for relief. *See id.* at pp. 12-20. Plaintiffs filed a combined response in opposition to the three motions, and each Defendant filed a reply brief in support of the respective motions. *See* docket nos. 32, 33, 34 & 35.

Below, the Court addresses the merits of each motion.

Appendix E

DISCUSSION

I. Defendants' Motions to Dismiss for Lack of Standing

The Secretary's Motion contends that Plaintiffs lack standing to bring claims against the Secretary, and thus, the motion seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(1). *See* docket no. 30 pp. 6-11. The Brazos Motion also raises standing arguments, but states that its motion is filed pursuant to Fed. R. Civ. P. 12(b)(6). *See* docket no. 29 p. 4. The McAllen City Secretary similarly moves pursuant to Rule 12(b)(6), but also asserts arguments disputing whether the McAllen City Secretary is a proper defendant in this action. *See* docket no. 27 pp. 3-6. All three motions either explicitly or implicitly implicate Article III, and thus, the Court will address them together pursuant to Rule 12(b)(1) before moving to any analysis pursuant to Rule 12(b)(6). *See, e.g., Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011) (noting the proper vehicle to challenge Article III standing, i.e., a jurisdictional question, is a motion to dismiss under Rule 12(b)(1)).

A. Legal Standard

The constitutional requirement of standing contains three elements: (1) the plaintiff must have suffered an injury-in-fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560-61(1992). The same requirements also apply to entities seeking to establish that they have "associational" or "organizational" standing. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 609-10 (5th Cir. 2017).

> "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. 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.

Id. at 610 (citations and some internal quotation marks omitted).

To show standing "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [a court may] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. "[T]he injury in fact requirement under Article III is qualitative, not quantitative, in nature," and the injury "need not be substantial." *OCA-Greater Houston*, 867 F.3d at 612 (citations, internal quotation marks and brackets omitted). Thus, while an injury-in-fact must be (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical," *Lujan*, 504 U.S. at 560 (internal citations and quotation marks

omitted), "it need not measure more than an 'identifiable trifle.'" *OCA-Greater Houston*, 867 F.3d at 612 (quoting *Ass'n of Cmty Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999)).

B. Plaintiffs' Injury-in-Fact

The Secretary's Motion asserts that Plaintiffs AJC, MOVE, CTD, LWV and GI Forum do not have standing to assert their constitutional claims because they have failed to allege that they suffered an injury-in-fact such that they can assert claims against the Secretary. *See* docket no. 30 pp. 6-8. Plaintiffs AJC, MOVE, CTD, LWV, and GI Forum contend that they have organizational standing to assert constitutional claims against Defendants. *See* docket no. 1 ¶¶ 12, 15, 20, 24 & 28. Additionally, Plaintiffs CTD, LWV and GI Forum also appear to contend that they have associational standing to assert certain claims on behalf of their members. *See id.* at ¶¶ 15, 24 & 28.

As discussed above, Plaintiffs do not have a difficult standard to satisfy in order to adequately *allege* an injury-in-fact at the motion to dismiss stage. With respect to "organizational standing," the Fifth Circuit has held that "an organization has standing to sue on its own behalf where it devotes resources to counteract a defendant's allegedly unlawful practices." *Fowler*, 178 F.3d at 360. Indeed, if a defendant's actions "perceptibly impair" an organization in its provision of services, "there can be no question that the organization has suffered injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Here, Plaintiffs AJC, MOVE, CTD, and LWV have each alleged that they have been forced to expend "additional resources" in order to help counteract the impacts of Texas' allegedly unlawful mail-in ballot procedures.[5] *See* docket no. 1 ¶¶ 13, 14, 18, 23 & 26. Such efforts help reduce the chance of an improper ballot rejection, and Plaintiffs allege that they would not have to expend these resources if the mail-in ballot procedures provided the safeguards of uniform application, pre-rejection notice, and an opportunity to cure. *See id.; see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1335 (N.D. Ga. 2018), *appeal dismissed*, sub nom. *Martin v. Sec'y of State of Georgia*, 2018 WL 7139247 (11th Cir. Dec. 11, 2018) (finding organizations had standing because the groups "will not bear the same

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5. Defendant Secretary asserts that this is a mere "threadbare recital" which is insufficient to satisfy the requisite pleading standard. *See* docket no. 35 p. 3. To the contrary, however, Plaintiffs' Complaint provides examples of certain specific activities in which Plaintiffs engage allegedly as a result of the Texas mail-in voting procedures. As but one example, the Complaint specifically alleges the following with respect to Plaintiff LWV:

> LWV must expend additional staff and volunteer time and resources instructing voters to write out signatures neatly and have the signatures match each other as much as possible in PowerPoint presentations and scripts prepared for its members and local-area League of Women Voters organizations to use when educating and providing support to mail-in ballot voters. The resources diverted for these purposes are transferred away from LWV's other voting-related activities.

Docket no. 1 ¶ 26.

burden of assisting and warning voters once the State is required to assist voters whose ballots are challenged as illegitimate and once the urgency of warning voters is diminished by way of due process protections"). Defendant Secretary appears to contest the exact extent to which the plaintiff organizations' activities were "perceptibly impaired" by the State's mail-in ballot procedures, *see* docket no. 35 p. 3, but the argument ignores that the Court must accept Plaintiffs' allegations as true at this stage. Thus, it is not appropriate at this stage for the Court to delve into the precise extent to which each organization has actually expended resources outside of those that would otherwise be spent in order to counteract the State's mail-in ballot procedures. Instead, the Court must accept the allegation that Plaintiffs AJC, MOVE, CTD, and LWV have been forced to expend "additional resources" when "providing instruction and support on mail-in ballots" in order to counteract the State's policies.[6] *See* docket no. 1 ¶¶ 14, 18, 23 & 26. And based on those allegations, Plaintiffs AJC, MOVE, CTD, and LWV have each adequately alleged that they have organizational standing

6. The Court notes that Plaintiff GI Forum does not allege that it must expend additional resources in light of Texas' allegedly unlawful mail-in voting procedures. For that reason, the allegations in the Complaint less clearly support Plaintiffs' position that GI Forum has suffered an injury-in-fact such that it has organizational standing to assert its claims in this case. However, the practical impact of this conclusion is minimal because, as explained in the next paragraph, the Court concludes that GI Forum has adequately *alleged* that it has associational standing to assert claims on behalf of its members who have allegedly suffered an injury-in-fact.

to pursue the asserted claims.[7] *See, e.g., Fla. State Conf of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (quoting *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("[A]n organization suffers an injury in fact when a statute 'compel[s]' it to divert more resources to accomplishing its goals" and "'[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury.'")).

Similarly, with respect to Plaintiffs CTD's, LWV's and GI Forum's assertion of "associational standing," the Court concludes that each has satisfied the requisite *pleading* standard. Defendant Secretary correctly notes that Plaintiffs have not alleged that *specific* members each organization had their votes improperly rejected due to Texas' mail-in ballot procedures. *See* docket no. 35 p. 4. Therefore, the Secretary's Motion asserts that Plaintiffs CTD, LWV, and GI Forum "ha[ve] failed to allege facts establishing that [their] members otherwise have standing to sue in their own right."[8] Docket no. 30 p. 11-12. But

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7. The Court notes that Defendant may move again at later stages of the litigation if the evidentiary record ultimately supports the Secretary's contention that certain or all of the organizational Plaintiffs do not have organizational standing because they have not suffered a cognizable injury in-fact.

8. Plaintiffs' response correctly notes that Defendant Secretary's Motion only explicitly challenges Plaintiff CTD's associational standing. *See* docket no. 32 p. 5. However, in its reply, the Secretary makes clear that it intended such an argument to apply equally to Plaintiffs LWV and GI Forum. *See* docket no. 35 p. 4 n.4. Ultimately, the exact scope of the Secretary's Motion need not be addressed because the Court concludes that each of the three parties adequately alleges an injury in-fact for the purposes

having reviewed the Complaint, it is clear that Plaintiffs allege that the individual members of CTD, LWV and GI Forum "regularly vote by mail." Docket no. 1 ¶¶ 19, 27 & 31. The allegations also make clear that the membership of these organizations is comprised in significant part by individuals who are likely to be impacted by the relevant policies at issue. *See, e.g.*, docket no. 1 ¶ 28. Thus, because the Court must assume that these "general allegations embrace those specific facts that are necessary to support the claim," *Lujan*, 504 U.S. at 561, the Court will infer at this stage that at least certain members of CTD, LWV and GI Forum have suffered an injury-in-fact as a result of Texas' mail-in ballot signature-comparison procedures. For that reason, the Court finds that the allegations plausibly support a claim for which Plaintiffs CTD, LWV, and GI Forum have associational standing based on injuries allegedly suffered by their members.[9]

Accordingly, the Court concludes that each Plaintiff has adequately alleged injury-in-fact such that each Plaintiff may assert claims on its own behalf and/or on the behalf of its members.[10] Thus, the Court will consider the

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of associational standing.

9. Again, Defendants certainly may move again on this issue if discovery indicates that CTD, LWV, and GI Forum are not in a position to assert claims on behalf of injured members, including because their members have not or will not suffer an injury in the form of an improperly rejected ballot.

10. The Secretary's Motion does not contend that the Individual Plaintiffs did not suffer an injury in-fact, and thus, the Court will not address that issue as part of this Order.

other relevant factors with respect to Plaintiffs' standing.

C. Causation and Redressability—Texas Secretary of State

Defendant Secretary asserts that no Plaintiff has asserted that any applicable injury-in-fact was caused by the Secretary's actions because any alleged injury resulted from local determinations of signature mismatch rather than any action by the Secretary. *See* docket no. 30 pp. 9-10. Thus, the Secretary's Motion asserts that "Plaintiffs' alleged injuries turn on the actions of local election officials and are not traceable to the Secretary." *Id.* Similarly, the Secretary asserts that it is the local election officials who are in a position to provide Plaintiffs with redressability by (i) ceasing the rejection of ballots, (ii) providing pre-rejection notice, and/or (iii) acting in the case of an improperly rejected ballot. *See id.* at pp. 11.

Having reviewed the allegations and Plaintiffs' facial challenges to Texas' mail-in ballot signature-comparison procedures, the Court concludes that Plaintiffs have satisfied the causation and redressability pleading requirements such that Defendant Secretary is a proper defendant in the lawsuit. The Texas Election Code names Defendant Secretary as the "chief election officer of the state" and empowers her to (i) "assist and advise all election authorities with regard to the application, operation, and interpretation of [the] code" and (ii) "obtain and maintain uniformity in the application, operation, and interpretation of [the] code and of the election laws outside [the] code." Tex. Elec. Code §§ 31.001(a), 31.003

& 31.004. For that reason, the Fifth Circuit has held that "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State." *OCA-Greater Houston*, 867 F.3d at 613 (citing Tex. Elec. Code §§ 31.001(a)). Importantly, the Fifth Circuit has also made clear that this is true irrespective of whether a local official is also responsible for enforcing the statute in question. *See, e.g., OCA-Greater Houston*, 867 F.3d at 612-13 (rejecting Secretary's argument that the plaintiffs had standing only against local government officials who enforced election code restrictions regarding eligibility to serve as interpreter). Texas law plainly states that it is the Secretary's duty to "assist and advise all election authorities" and to "obtain and maintain uniformity" in the interpretation and application of the Election Code, and such duties no doubt include the obligation to ensure that the provisions of the Election Code are being enforced in a way that is consistent with the United States Constitution and federal law. For that reason, it is apparent that—if valid—Plaintiffs' alleged complaints are both traceable to the action (or inaction) of the Secretary and redressable by the Secretary.

Accordingly, the Court concludes that Plaintiffs have satisfied the causation and redressability requirements as to their claims against Defendant Secretary such that—at least at the present stage—Defendant Secretary is a proper defendant in the litigation.

D. Causation and Redressability—Brazos EA and McAllen City Secretary

The Brazos Motion and McAllen Motion take the opposite position from that of the Secretary's Motion. Specifically, the Brazos Motion argues that the Brazos EA was not the cause of Plaintiffs' injuries because she "did not review the signatures in question" or create the state policies in question. *See* docket no. 5. Indeed, the Brazos Motion states that "Plaintiffs do not make a single allegation of wrongdoing against Hancock, other than that she followed Texas law." *Id.* at p. 5. Additionally, the Brazos Motion argues that the Brazos EA "has no authority to remedy the complaint" because she could not provide Plaintiffs with the relief they request "without violating Texas law." *Id.* at p. 6. Similarly, the McAllen Motion states that the Complaint "points to Defendant Lara's adherence to state laws" and is "completely devoid of any allegation of wrongdoing on the part of the McAllen City Secretary." Docket no. 27 p. 4. The McAllen Motion further argues that the "McAllen City Secretary does not have the authority to revise or defend state law," and thus, that "the suit should be brought against state officials." *Id.* at p. 5.

Having reviewed the record, the Court finds that Defendants Brazos EA's and McAllen City Secretary's arguments are—at least at this stage—without merit. Defendants Brazos EA's and McAllen City Secretary's assertions ignore that "constitutional challenges are often brought against local entities or officials enforcing statewide laws they played no role in creating." *Voting for America, Inc. v. Andrade*, 888 F. Supp. 2d 816, 832-33 (S.D. Tex. 2012), *rev'd on other grounds*, sub nom. *Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013)

(collecting cases). More specifically, courts have routinely held that both state-level and local officials may be proper defendants when both play a role in the implementation and enforcement of a challenged election law. *See id.* at 829-33 (holding that county registrar and Secretary of State were both proper defendants for plaintiffs' claims regarding voter registration drives); *see also True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 712 (S.D. Miss. 2014) (holding that both county defendants and the Secretary of State were properly named in National Voter Registration Act lawsuit); *Mark Wandering Med. v. McCulloch*, CV 12-135-BLG-DWM, 2014 WL 12588302, at *3-4 (D. Mont. Mar. 26, 2014) (finding that plaintiffs had standing to bring voting rights claims against both county officials and the Secretary of State). Importantly, because it is the local official who often "enforces the laws that [the plaintiffs] contend cause them injury, an injunction against [the local official] would directly redress [the] alleged injury." *Voting for Am.*, 888 F. Supp. 2d at 832-33. For that reason, and as the Fifth Circuit has clearly explained, a defendant may still satisfy the causation and redressability standards for Article III standing if the defendant has "definite responsibilities relating to the application [of the statute]" even if the defendant may be "far from the sole participant in the application of [a] challenged statute." *K.P. v. LeBlanc*, 627 F.3d 115, 123-24 (5th Cir. 2010).

Applying these standards, it is clear that Plaintiffs' allegations satisfy both the causation and redressability requirements necessary to make Brazos EA and McAllen City Secretary proper defendants in this litigation. The allegations in the Complaint indicate that Brazos EA and

McAllen City Secretary have a designated role as the county election officer for all elections ordered by their county and city respectively. *See* docket no. 1 ¶¶ 33 & 34; Tex. Elec. Code § 83.002, 83.005 & 31.043.[11] Importantly, the allegations indicate both that the Election Code provides the county election officer with broad authority over the mail-in ballot voting process and that Defendants Brazos EA and/or McAllen City Secretary have the authority to implement additional safeguards that may have prevented Plaintiffs' injuries in this case and may provide forms of relief going forward.[12] *See, e.g.*, docket

11. As part of its analysis of the pending motions, the Court may consider all relevant provisions of the Texas Election Code. *See United States v. Schmitt*, 748 F.2d 249, 255-56 (5th Cir. 1984). Section 83.002 of the Texas Election Code states that the county clerk is the EVC for "the general election for state and county officers and any other countywide election held at county expense," and Section 31.043 of the Election Code states that the county elections administrator shall perform "the duties and functions placed on the county clerk by this code." Similarly, Section 83.005 of the Election Code states that "the city secretary is the early voting clerk for an election ordered by an authority of a city."

12. Plaintiffs' response appears to confirm that indication. Specifically, the response asserts that the Election Code does not prohibit Brazos EA and/or McAllen City Secretary from (i) taking steps (such as training) to ensure uniformity with respect to signature comparisons and/or (ii) providing voters with pre-rejection notice of a signature mismatch and an opportunity to cure before actually rejecting the ballot. *See* docket no. 32 pp. 16-17. Indeed, although the EVBB and/or SVC are responsible for comparing signatures and sending formal notice of a ballot's rejection, the county election officer is generally responsible for most aspects of the mail-in ballot process. As an example, it appears that the Election Code formally gives the county election officer the ability to file a lawsuit

no. 1 ¶¶ 38 & 60. Accepting that inference with respect to the Local Defendants' authority, as the Court must do at this stage, it is clear that the Local Defendants satisfy the redressability and causation pleading requirements for Plaintiffs' Article III standing. Indeed, at least one other court has found this type of authority is sufficient to render local defendants *liable* for the application of unconstitutional state laws governing mail-in ballot signature-comparison procedures. *See, e.g., Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646 (N.D. Ill. March 13, 2006) (finding county clerk who was responsible for most aspects of the mail-in ballot process, except matching signatures, liable for violating Fourteenth Amendment by failing to provide pre-deprivation notice and hearing to mail-in ballot voters).

Accordingly, because the Court finds that Plaintiffs' alleged injuries are both traceable to actions (and/or inaction) by the Local Defendants and potentially redressable by the Local Defendants' future conduct, the Court finds that Plaintiffs have adequately alleged standing to assert their claims against Defendants Brazos EA and McAllen City Secretary in this action.

II. Defendants' Motions to Dismiss for Failure to State a Claim

The various Defendants each also assert numerous bases on which they contend Plaintiffs' claims should

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challenging the EVBB or SVC's determination regarding a voter's signature. *Id.* at §§ 87.127(a).

be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). The Secretary's Motion argues that Plaintiffs' due process and equal protection claims must be dismissed because the provisions of the Election Code at issue (i) do not impose a severe burden on the right to vote and/or (ii) are justified by the State's legitimate interests. *See* docket no. 30 pp. 14-19. The Secretary also seeks dismissal of Plaintiff CTD's claim asserted pursuant to the ADA and RA, contending that Texas law already provides reasonable accommodations to disabled voters. *See id.* at p. 20. Defendants Brazos EA and McAllen City Secretary seek dismissal of Plaintiffs' claims pursuant to Rule 12(b)(6) because certain claims fail to specifically name the Local Defendants and/or identify their alleged wrongdoing. *See* docket no. 27 pp. 4-5; docket no. 29 pp. 5-6. Finally, the Brazos Motion also argues that Plaintiff's prayer request is improper. *See* docket no. 29 pp. 6-7.

A. Legal Standard

Under Fed. R. Civ. P. 8(a), a complaint is considered well pled if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a) is considered in conjunction with Fed. R. Civ. P. 12(b)(6), which provides that a complaint may be dismissed if it "fails to state a claim upon which relief can be granted." Courts apply these rules through the process outlined by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Dismissal is appropriate under Fed. R. Civ. P. 12(b)(6)

if, assuming the truth of all facts alleged in the complaint, it fails to state a "claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In order to state a plausible claim to relief, the complaint must include "allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Those allegations may be "either direct or inferential." *Id.* In applying Rule 12(b)(6), the Court must distinguish between pleadings of fact, which are presumed as true, and statements of legal conclusion, which are not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 679. "A plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief,' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265 (1986)). Throughout the Rule 12(b)(6) analysis, "[t]he complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff." *Morgan v. Swanson*, 659 F.3d 359, 370 n.17 (5th Cir. 2011) (en banc) (quoting *Woodard v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005)).

B. Plaintiffs' Due Process Claim

Plaintiffs' due process claim alleges that Defendants have violated the Due Process Clause of the Fourteenth Amendment by failing to provide pre-rejection notice and an opportunity to cure to mail-in voters who have their votes rejected on the basis of an alleged signature

mismatch. *See* docket no. 1 ¶¶ 52-61. Defendant Secretary asserts that the claim is subject to dismissal because (i) the relevant Election Code provisions do not impose a severe burden, (ii) any burden imposed is justified by the State's interest, and that (iii) in any event, Plaintiffs failed to avail themselves of the post-election processes available to them. *See* docket no. 30 pp. 12-18.

As an initial matter, the parties dispute whether Plaintiffs' due process claim is governed by the "*Matthews*" standard or "*Anderson/Burdick*" standard. *See Matthews v. Eldridge*, 424 U.S. 319, 225 (1976); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Plaintiffs contend that the *Matthews* framework should apply to the due process analysis, *see* docket no. 32 pp. 23-25, and Plaintiffs note that numerous courts evaluating due process claims related to mail-in voting procedures have evaluated the claims under that framework, which instructs the Court to balance the following considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews, 424 U.S. at 335. The Secretary, on the other hand, contends that a more flexible standard—known as the "*Anderson/Burdick*" test—applies to the constitutional analysis of all state laws that allegedly burden the right to vote. Under the *Anderson/Burdick* test, a court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). Strict scrutiny applies only when the right to vote is "subjected to 'severe' restrictions." *Burdick*, 504 U.S. at 434. Where a law "imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.; see also Anderson*, 460 U.S. at 788. The parties appear to agree that such a standard should apply to the analysis of Plaintiffs' equal protection claims, but the Secretary asserts that the *Anderson/Burdick* standard should also govern the analysis of Plaintiffs' due process claim. *See* docket no. 30 pp. 13-14.

The argument for applying the *Matthews* test to Plaintiffs' due process claim is a strong one, as the framework explicitly references both "procedures" and potential "procedural safeguards." *Matthews*, 424 U.S. at 335. For that reason, the standard appears to be more directly applicable to due process claims premised on mail-in ballot procedures and/or the lack of procedural safeguards related to the mail-in voting process. Notably,

it appears that multiple courts have applied the *Matthews* framework to substantially similar claims involving due process challenges to mail-in ballot signature-comparison procedures. *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214 (D.N.H. 2018); *Martin*, 341 F. Supp. 3d at 1338; *Zessar*, 2006 WL 642646 at *7. On the other hand, certain courts have stated that the *Anderson/Burdick* framework is meant to apply to all constitutional challenges to voting restrictions, including both due process claims and equal protection claims. *See, e.g., Duncan v. Husted*, 125 F. Supp. 3d 674, 679-80 (S.D. Ohio 2015), *aff'd* (Mar. 7, 2016) (stating that in the Sixth Circuit, "the *Anderson-Burdick* test serves as single standard for evaluating challenges to voting restrictions" including "First Amendment, Due Process Clause of the Fourteenth Amendment, and Equal Protection Clause of the Fourteenth Amendment claims"); *Weber v. Shelley*, 347 F.3d 1101, 1105-06 (9th Cir. 2003) (analyzing equal protection and due process challenges to touchscreen voting system without voter-verified paper trail under *Anderson* and *Burdick)*. However, the Secretary has failed to cite any cases in which the *Anderson/Burdick* framework has been applied to an evaluation of a due process claim related to mail-in ballot procedures.

In any event, the Court need not specifically decide the issue at this stage, as the Court concludes that Plaintiffs have adequately alleged a due process claim against Defendants regardless of whether the *Matthews* or *Anderson/Burdick* framework applies.[13] As an initial

13. Although the Court need not make such a determination

matter, the Court notes that most of the Secretary's arguments for dismissal would require the Court to balance and evaluate the parties' asserted burdens, interests and justifications at the motion to dismiss stage. Doing so would be improper, however, as the Court must accept Plaintiffs' factual allegations as true at as part of the 12(b)(6) analysis, and no factual record has been developed at this stage.

With respect to the specific application of the *Anderson/Burdick* framework, the first step in the analysis requires the Court to consider the burden—if any—created by the relevant Texas Election Code provisions and/or their enforcement.[14] Based on the allegations in Plaintiffs' Complaint, the burden created by the State's mail-in ballot procedures is a substantial one. Here, Plaintiffs allege that thousands of voters have been disenfranchised as a result of Texas' mail-in voting process and signature-matching procedures. Unsurprisingly, courts have held that the lack of an opportunity to cure mail-in ballot rejections, which disenfranchises thousands of voters, is a "serious burden on the right to vote." *Florida Democratic Party v.*

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as part of this Order, the parties should be prepared to provide additional briefing and/or argument as to the issue as the case progresses.

14. As discussed in the prior note, the Court has not determined that the *Anderson/Burdick* standard is the appropriate standard for analyzing the merits of Plaintiffs' due process claim. The Court is merely demonstrating that Plaintiffs have adequately *alleged* a due process claim against Defendants irrespective of whether the *Matthews* or *Anderson/Burdick* framework is applicable. *See also* note 20, *infra*.

Detzner, No. 4:16-cv-607-MW/CAS, 2016 WL 6090943, at *6 & n.11 (N.D. Fla. Oct. 16, 2016) (citing *Ne. Ohio Coal. For the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012)). Although the Secretary asserts that there are various safeguards that reduce any burden, each of the State's referenced procedures is alleged to have flaws that result in (or fail to prevent) disenfranchisement.[15] Perhaps the most telling allegations are those indicating that at least one of the named Individual Plaintiffs tried to cure the improper rejection of his ballot following post-election notice, and yet was unable to do so under the State's current procedures. *See* docket no. 1 ¶ 10; docket no. 32 p. 28. On that basis, this Court concludes that Plaintiffs have adequately alleged that the procedures in question impose a substantial burden on the right to vote.

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15. For example, the Secretary argues that a provision that permits a witness signature—in lieu of the signature matching requirement—reduces the burden of the State's signature-comparison provisions. *See* docket no. 30 pp. 14-15. However, a review of the provision indicates that only certain individuals who vote by mail—namely those who certify that they are unable to sign the ballot "because of a physical disability or illiteracy"—are able to utilize the witness signature procedure. *See* Tex. Elec. Code § 1.011(a). Plaintiffs' response also notes that many voters may not have access to such a witness. *See* docket no. 32 p. 30. Moreover, although the Secretary notes that a voter is entitled to notice of a ballot's rejection within ten days following the election, such notice may be of little use to a voter whose ballot has *already* been rejected if it does not provide the voter with sufficient opportunity to seek relief. Tex. Elec. Code § 87.0431; docket no. 1 ¶ 44. And although it is true that a local election officer "may petition a district court for injunctive relief," such relief is discretionary, and the law does not appear to require election officers to pursue such action. *See id.* at § 87.127.

The allegations—if accepted as true—also indicate that the State has no compelling justification for the existing voting procedures, such that the second factor of the *Anderson/Burdick* test is also satisfied for the purposes of the Rule 12(b)(6) analysis. To be clear, the Court agrees with the Secretary's general assertion that Texas "indisputably has a compelling interest in preserving the integrity of its election process" by preventing voter fraud. *Eu v. San Francisco CO/. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). But Plaintiffs' due process allegations do not wholesale challenge Texas' decision to use signatures as one method for preventing voter fraud on certain mail-in ballots. Instead, Plaintiffs challenge the fact that Texas has instituted procedures that result in disenfranchisement because voters are not provided a meaningful opportunity to cure if a ballot is improperly rejected on the basis of mismatched signatures. Importantly, the Secretary's Motion offers no argument as to how the State's interest in preventing voter fraud is furthered by failing to provide pre-rejection notice and an opportunity to cure.[16]

16. The Secretary directs the Court to *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), in which the Ninth Circuit rejected due process and equal protection challenges to Oregon's signature-matching procedures for verifying citizens' signatures on petitions for ballot initiatives. *See* docket no. 30 pp. 16-17. In *Lemons*, however, the Ninth Circuit noted that signatures on petitions for "initiative and referenda . . . are often gathered by privately hired signature gatherers" which may be more likely to lead to fraudulent signatures. 538 F.3d at 1104. Moreover, a review of *Lemons* indicates that Oregon provided additional safeguards during the signature-comparison process that are not provided under the Texas Election Code. *Id.* at 1105. In light of the differences between the specific circumstances

Indeed, Plaintiffs' allegations indicate that there is no compelling justification for Defendants' failure to provide an opportunity to cure, as the Secretary's stated concerns regarding voter fraud appear to be *inconsistent* with the State's apparent objections to the due process protections sought by Plaintiffs.[17] Notably, although the State no doubt also has a compelling interest in preventing in-person voter fraud, the Complaint alleges that Texas presently provides pre-rejection notice and an opportunity to cure to voters who fail to comply with certain requirements for in-person voting. *See* docket no. 1 ¶ 59 (citing Tex. Elec. Code. § 65.0541, which states that voters who lack identification on election day may cast a provisional ballot and provide photo identification within six days of the election in order to have their ballot counted). The Secretary's briefing fails to explain why a form of pre-rejection notice and an opportunity to cure cannot be provided to mail-in voters as well.

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in *Lemons* and those at issue in this case, the Ninth Circuit's opinion in *Lemons* does not provide a basis for dismissing Plaintiffs' due process claims at this stage.

17. Here, "Defendants offer no satisfying explanation for why [the State] cannot have both a robust signature-match protection and a way to allow every eligible voter-by mail and provisional voter whose ballot is mistakenly rejected an opportunity to verify their identity and have their votes count." *Democratic Executive Comm. of Florida v. Lee*, 915 F.3d 1312, 1322 (11th Cir. 2019). If anything, "letting mismatched-signature voters cure their vote by proving their identity further prevents voter fraud—it allows supervisors of elections to confirm the identity of that voter before their vote is counted." *Fla. Democratic Party v. Detzner*, 2016 WL 6090943, at *7.

Additionally, the Secretary's argument that "Plaintiffs disregarded the process available to them" would be an improper basis for dismissing the claim at this stage. *See* docket no. 30 p. 17. Specifically, the Secretary asserts that Tex. Elec. Code §§ 87.127(a) provided Plaintiffs with protection, such that "Plaintiffs could have raised their concerns of improper rejection to their county election officer" who could have then—at his or her discretion—chosen to file a lawsuit on the voter's behalf. *See* docket no. 30 p. 17. As an initial matter, the Secretary fails to cite precedent for the proposition that an election officer's *discretionary* ability to seek judicial relief affords process sufficient to cure the deprivation of the fundamental right to vote. Additionally, the Secretary's argument depends on the Court adopting the Secretary's assertion of the facts at the motion to dismiss stage, which would be improper *even if* the Secretary provided evidentiary support for its contentions. *See Iqbal*, 556 U.S. at 678. Instead, however, the Secretary's assertion appears to ignore specific factual allegations contained in Plaintiffs' Complaint which directly *contradict* the Secretary's contention. Indeed, the Complaint alleges that Plaintiff Richardson did specifically notify an election official of Brazos County's error, and county officials declined to pursue any relief on Richardson's behalf. *See* docket no. 1 ¶ 10. Thus, at least at this stage, the Secretary's argument lacks both legal and factual support.

Finally, to the extent either Local Defendant argues that Plaintiffs' Complaint fails to state a due process claim against Brazos EA and/or McAllen City Secretary,

such an argument is without merit.[18] As an initial matter, Plaintiffs' Complaint references conduct by "Defendants," such that it is clear that the claim is asserted against the Local Defendants as well as the Secretary. *See, e.g.*, docket no. 1 ¶¶ 54, 56-57 & 60. Moreover, and as discussed in Section I.D, *supra*, it is the local election officers, such as Defendant Brazos EA and/or Defendant McAllen City Secretary, who allegedly enforce Texas election laws in a manner that has violated Plaintiffs' due process rights. Further, Plaintiffs contend that the Local Defendants have broad powers under the Election Code that provide them with the authority to afford Plaintiffs additional procedural protections such as pre-rejection notice and/or an opportunity to cure. Accordingly, the Court concludes that Plaintiffs have adequately alleged a due process claim against the Local Defendants in addition to stating a claim against the Secretary.[19]

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18. The Brazos Motion asserts that "Hancock" is not specifically named in Count I, and that "Plaintiffs do not make a single allegation of wrongdoing against Hancock." *See* docket no. 29 p. 5. Meanwhile, the McAllen Motion generally asserts that the Complaint is "devoid of any allegation of wrongdoing on the part of the McAllen City Secretary" and again asserts that state officials are the proper Defendants. *See* docket no. 27 pp. 4-5.

19. To the extent that the Brazos Motion asserts that Plaintiffs' prayer request is improper, *see* docket no. 29 pp. 6-7, the Court need not specifically consider the argument at this stage. Importantly, a Rule 12(b)(6) motion "tests the legal sufficiency of allegations," and *even assuming* Plaintiffs' specific request for relief is in some way improper, that request is not fatal to Plaintiffs' pleading so long as the statement of the claim indicates that the Plaintiffs may be entitled to some form of relief. *See, e.g., Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1108 (8th Cir. 2011) (emphasis in original) (citations omitted) (reversing dismissal of complaint and

Accordingly, the Court finds that—even if the *Anderson/Burdick* standard is applied—Plaintiffs have adequately alleged a due process claim related to Defendants' failure to provide Plaintiffs with pre-rejection notice and an opportunity to cure the improper rejection of mail-in ballots based on the State's signature-comparison process.[20]

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noting that Rule 12(b)(6) dismissal is only appropriate "if it is clear that *no* relief could be granted under *any* set of facts that could be proved consistent with the allegations"); *Carcano v. Cooper*, 350 F. Supp. 3d 388, 422 n.27 (M.D.N.C. 2018) ("[A]n improperly-stated request for relief is not normally grounds for dismissal of a complaint."); *Zurich Am. Ins. Co. v. Southern-Owners Ins. Co.*, Case No. 3:15-cv-01041-J-34PDB, 2018 WL 1071939, at *3 (M.D. Fla. Feb. 26, 2018) ("Indeed, a well-pleaded claim ought not be dismissed because a party misconceives the appropriate remedy."). Because the Complaint in this case adequately alleges that Plaintiffs may be entitled to some relief, the Brazos Motion is denied to the extent it takes issue with Plaintiffs' prayer request.

20. In the event the *Matthews* test is the appropriate standard, it is even more apparent that Plaintiffs have adequately alleged a due process claim against Defendants. Indeed, multiple courts have awarded *judgment* in plaintiffs' favor under similar factual circumstances after applying the *Matthews* test. *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214 (D. N.H. 2018) (granting plaintiffs' request for summary judgment and permanent injunctive relief as to their procedural due process challenge against a New Hampshire mail-in ballot signature matching law); *Martin*, 341 F. Supp. 3d at 1338 (granting plaintiffs' request for injunctive relief against a Georgia mail-in ballot signature matching law pursuant to procedural due process requirements); *Zessar*, 2006 WL 642646 at *7 (employing the *Mathews* test to strike down a mail-in ballot signature matching law on due process grounds). Based on the Complaint's allegations, the private interest—here, the deprivation of the fundamental right to vote—weighs heavily in Plaintiffs' favor. Moreover, Plaintiffs' allegations indicate that the risk of erroneous

C. Plaintiffs' Equal Protection Claims

Plaintiffs' first equal protection claim generally asserts that the implementation of Texas' signature-matching provisions for mail-in ballots has placed an undue burden on certain voters' right to vote that is not justified by any state interest. *See* docket no. 1 ¶¶ 62-70. Plaintiffs' second equal protection claim generally targets the non-uniformity of the application of the law, and asserts that because neither uniform standards nor training is required with respect to signature comparison, the State's procedures are enforced in an "arbitrary" manner based on "ad hoc" standards. *See id.* at ¶¶ 71-74. Thus, Plaintiffs assert that the procedures for evaluating signatures "vary from county to county, from SVC to SVC in counties with multiple committees, and even from meeting to meeting and ballot to ballot." *Id.* at ¶ 73. In response, Defendant Secretary argues that (i) the State is permitted to treat mail-in voters differently than in-person voters, and (ii) the standard for comparing signatures is "sufficiently uniform to ensure equal treatment of voters." Docket no. 30 pp. 18-19.

For reasons similar to those set forth in the prior Section, the Court finds that Plaintiffs have adequately alleged a violation of the Equal Protection Clause in the

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deprivation of their rights is significant, as is the probable value of the procedural remedies that may be available. Finally, the allegations—especially those indicating that the State already affords similar safeguards to other groups of voters—indicate that the threat to government interests and the cost of remedial procedures are not significant.

Fourteenth Amendment.[21] As an initial matter, the Court does not necessarily disagree with the Secretary's general assertion that a State may use different procedures for mail-in ballots as those used for in-person voting. *See ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (noting that voting by mail "is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures."). Here, however, the crux of Plaintiffs' equal protection claim is not a complaint that the Election Code contains different provisions for in-person and mail-in voting. Instead, Plaintiffs allege that the State's mail-in

21. The Court interprets the first equal protection claim (Count II) to largely overlap with Plaintiffs' due process claim, in which Plaintiffs contend that the Texas Election Code is unconstitutional to the extent it does not require that mail-in voters receive pre-rejection notice of a signature mismatch and an opportunity to cure an improper rejection. The Court interprets the second equal protection claim (Count III) to assert that the Texas Election Code places an undue burden on the right to vote to the extent it does not require the promulgation of uniform standards and/or training with respect to signature comparison such that signature comparisons are conducted in a consistent manner. Although Plaintiffs assert the claims separately, the Court will consider them together in this Section, in light of the fact that the Supreme Court has indicated that it is appropriate to consider the statutory framework as a whole in determining whether an undue burden has been placed on the right to vote. *See generally Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199 (2008). Moreover, Plaintiffs' first equal protection claim (in Count II) appears to also incorporate many of the allegations from the second (in Count III), including that the current mail-in ballot procedures involve "an error-prone signature comparison procedure conducted by election officials who are not trained in signature verification." Docket no. 1 p. 70.

voting procedures (and their implementation by local officials) result in the disenfranchisement of eligible voters who attempt to vote by mail. This injury allegedly results both from the provisions' and local officials' failure to provide voters with pre-rejection notice and an opportunity to cure, as well as from the State's and local officials' failure to promulgate standards regarding signature comparison and/or training for EVBB and/or SVC members. Moreover, this type of alleged injury (*i.e.*, the improper rejection of a voters' ballots and the resulting disenfranchisement) places a significant burden on the voting rights of individuals who are eligible to and elect to vote by mail. *See* Section II.B., *supra; see also Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d at 1030 ("Disenfranchisement of approximately 5,000 voters based on signature mismatch is a substantial burden.").

The Court must compare this burden to Defendants' justification for the design and implementation of the mail-in ballot signature-matching procedures,[22] and based on the allegations in the Complaint, Plaintiffs have adequately alleged that such a burden is not outweighed by any compelling justification. To the extent the Secretary asserts its interest in preventing voter fraud as a justification for the existing procedures, the prior Section explains how providing pre-rejection notice and an opportunity to cure may actually *further* that interest. *See* Section I.B & note 17, *supra*. In addition, to the extent that any party asserts that providing an opportunity to

22. As noted in Section II.B, *supra*, the parties appear to agree that the *Anderson/Burdick* standard governs the analysis of Plaintiffs' equal protection claims.

cure defects with a signature would result in unjustified costs or delays, the Complaint alleges that Defendants already provide such an opportunity to cure to in-person voters who fail to properly comply with in-person photo ID requirements. *See* docket no. 1 ¶ 59 (citing Tex. Elec. Code. § 65.0541). Moreover, at this stage, the Court is in no position to evaluate (i) the cost or burdens associated with promulgating standards and/or mandating training related to signature comparisons or (ii) the extent to which the existing provisions already result in uniformity,[23] and thus, neither evaluation is a basis for dismissal. Accordingly, at least based on Plaintiffs' allegations, the Court cannot conclude that any state interest outweighs the disenfranchisement that results from the existing mail-in ballot procedures and signature verification process.[24]

Additionally, at least one court has applied the *Anderson/Burdick* framework to a similar equal protection claim targeting Florida's signature-comparison framework for mail-in ballots that failed to provide (i)

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23. Defendant Secretary directs the Court to Tex. Elec. Code §§ 87.041(e), (1) & 87.027(i) for the proposition that "local election officials employ a uniform standard provided by statute" when comparing signatures. *See* docket no. 30 p. 19. However, these sections provide guidance as to which signatures an EVBB or SVC should use for the purposes of signature comparison, but the sections provide no guidance as to the appropriate procedure or standard for determining that a voter's signatures do not match.

24. Of course, Defendants may certainly develop a record on these issues and move again on these issues if the record supports their contention.

pre-rejection notice and an opportunity to cure and/or (ii) uniform procedures for conducting signature comparisons, and that court issued injunctive relief after finding that the plaintiffs were likely to succeed on the merits of their claim. *See Florida Democratic Party v. Detzner*, 2016 WL 6090943, at *1, *3 ("The issue in this case is whether Florida's statutory scheme, which provides an opportunity to cure no-signature ballots yet denies that same opportunity for mismatched-signature ballots, is legally tenable. The answer is a resounding 'no."). Although this Court fully recognizes that the Florida litigation challenged a different set of mail-in signature-comparison procedures, Plaintiffs' burden at the motion to dismiss stage is much lower in this case. Thus, the court's determination in the Florida litigation further enforces this Court's conclusion that Plaintiffs have adequately *alleged* a potentially viable equal protection claim in this case. Accordingly, the Secretary's Motion is denied to the extent it seeks dismissal of Plaintiffs' equal protection claim.

Finally, much like with their due process claim, the Court concludes that Plaintiffs have also adequately asserted an equal protection claim against the Local Defendants. As an initial matter, the Court interprets the Complaint to assert its equal protection claims against both the Local Defendants and the Secretary.[25]

25. The Brazos Motion correctly notes that Count III does not include a specific reference to "Defendants" or "Hancock," and thus, the Brazos EA asserts that Count III does not state an equal protection claim against the Brazos EA. *See* docket no. 29 p. 6. As an initial matter, the Complaint contains general allegations regarding

As discussed above, the Court recognizes that the Local Defendants did not draft the Texas Election Code and their alleged conduct may have been consistent with the explicit requirements of the Election Code. However, the allegations indicate that—through the enforcement of the Election Code's provisions—the Local Defendants played an active role in the disenfranchisement of Plaintiffs and/or Plaintiffs' members. Further, the allegations indicate that nothing in the Texas Election Code prohibits the Brazos EA and/or McAllen City Secretary from providing pre-rejection notice of a signature mismatch and/or an opportunity to cure, nor does any provision prohibit local election officials from providing training such that—at least locally—signature reviews are conducted in a uniform and non-arbitrary basis. Accordingly, the allegations in the Complaint do indicate that the Local Defendants were actors in Plaintiffs' alleged equal protection violation, and thus, the Brazos Motion and

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the non-uniformity of the signature-comparison process, including at the local level, and thus, the assertion of such allegations against the Local Defendants is hardly a surprise. *See* docket no. 1 ¶ 73. Moreover, as discussed in note 21, *supra*, the two equal protection claims overlap, and Plaintiffs' allegations regarding the lack of uniformity and/or training regarding signature comparison are included both in Count II (which repeatedly identifies "Defendants" and describes their alleged conduct) and Count III (which describes local officials' alleged conduct but does not specifically reference "Defendants"). Thus, for the practical purposes of this litigation, the Court concludes that Plaintiffs have adequately asserted a claim against the Local Defendants related to the uniformity of the signature-review process and/or the lack of training involving signature comparison, irrespective of whether the Brazos EA or McAllen City Secretary are specifically identified by name in Count III.

McAllen Motion are also denied to the extent they seek dismissal of Plaintiffs' equal protection claims pursuant to Rule 12(b)(6).

D. Plaintiff CTD's ADA & RA Claims

A plaintiff asserting a claim under Title II of the ADA must allege: "(1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability." *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011). The elements of a reasonable accommodation claim under Title II of the ADA and the RA are practically the same. *See* 29 U.S.C. § 794 (a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of [] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity"); *Hainze v. Richards*, 207 F.3d 795, 799. (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000) (noting that "Congress' intent was that Title II extend the protections of the Rehabilitation Act").

Plaintiff CTD alleges that "[d]efendants' refusal to reasonably accommodate [] mail-in ballot voters with disabilities—either by allowing them to contest and cure a ballot rejected for signature mismatch or by not applying the signature-comparison requirements to their ballots—discriminates against said voters and excludes them from participation in and unfairly denies them the benefits of the mail-in ballot process." Docket no. 1 ¶ 6. Defendant Secretary argues that Plaintiff CTD fails to state a claim under the ADA or RA and CTD fails to allege discrimination because the Texas Election Code provides for reasonable accommodations that prevent

disabled individuals from being denied benefits. *See* docket no. 30 p. 20. Specifically, the Secretary states that "any disabled voter can avoid having the signature-comparison requirements applied to their ballots [if he or she] sign[s] through a witness." *See id.* (citing Tex. Elec. Code § 97.041(b)(1)-(2)). The Secretary also asserts that disabled voters have the right to vote in-person at the curbside of a polling place if the voter is unable to enter the polling place. *See* docket no. 35 (citing Tex. Elec. Code § 64.009).

As an initial matter, the Court notes that Defendant Secretary has asked the Court to conclude—at the motion to dismiss stage—that the State has provided disabled plaintiffs with reasonable accommodations as a matter of law. The Secretary's request again ignores that the Court must accept Plaintiffs' allegations at this stage. The Secretary is welcome to make this argument at later stages in the litigation after an evidentiary record has been developed, but it would be improper for the Court to rely on these assertions as a basis for dismissal. Instead, upon a review of the allegations, the Court concludes that Plaintiff CTD has adequately alleged that disabled voters who are unable to duplicate their signatures are not provided an opportunity to vote that is equal and equally effective as the opportunity provided to others.[26]

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26. Plaintiff CTD argues that the witness signature option deprives a disabled voter of the ability to vote privately. *See* docket no. 32 p. 40. The Secretary responds to CTD's assertion by noting that a disabled voter may still vote in private before having a witness sign the envelope. *See* docket no. 35 p. 10. Even assuming the Secretary's assertion is true, however, the framework still requires a disabled voter to locate and then seek the assistance of a witness, a burden

Accordingly, the Secretary's Motion is denied to the extent it seeks dismissal of the Plaintiff CTD's ADA and RA claims.

Finally, the Brazos Motion argues that the Complaint does not "state that [Hancock] did anything wrong" with respect to Plaintiff CTD's alleged ADA and RA violations. *See* docket no. 29 p. 6. Although the Brazos Motion contends that Hancock merely complied with state law, CTD alleges that Hancock's (and other local officials') enforcement of the Election Code violated the ADA and RA. *See, e.g.*, docket no. 1 ¶ 81. Accordingly, the Court finds that Plaintiff CTD has also adequately alleged a claim against Brazos EA with respect to violations of the ADA and RA, notwithstanding the Brazos Motion's contention that Hancock merely followed state law.[27]

CONCLUSION AND ORDER

For the reasons set forth above, Defendants' motions to dismiss (docket nos. 27, 29 & 30) are **DENIED**.

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that is not imposed on non-disabled voters. The same is also true to the extent a disabled voter must seek assistance in reaching the polling place before he or she is even able to vote curbside. Thus, the Court concludes that Plaintiff CTD states a claim pursuant to the ADA and RA even if the Secretary's assertions regarding accommodations are given weight at this stage.

27. The McAllen Motion does not specifically address Plaintiff CTD's ADA and RA claim, but for the same reason, the Court concludes that Plaintiff CTD has also adequately alleged such a claim against the McAllen City Secretary.

IT IS SO ORDERED.

SIGNED this 23 day of December, 2019.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
Chief United States District Judge

APPENDIX F — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.C.A. Const. Art. I § 4, cl. 1

Section 4, Clause 1. Congressional Elections; Time, Place, and Manner of Holding

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. Const. Amend. XI

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States

by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or

other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix F

29 U.S.C.A. § 794

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

> **(1)(A)** a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

> **(i)** if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
>
> **(ii)** which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in

the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

Appendix F

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 12132

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Appendix F

Texas Election Code Sections 31.001-31.005

Sec. 31.001. CHIEF ELECTION OFFICER. (a) The secretary of state is the chief election officer of the state.

(b) The secretary shall establish in the secretary's office an elections division with an adequate staff to enable the secretary to perform the secretary's duties as chief election officer. The secretary may assign to the elections division staff any function relating to the administration of elections that is under the secretary's jurisdiction.

Sec. 31.002. OFFICIAL FORMS. (a) The secretary of state shall prescribe the design and content, consistent with this code, of the forms necessary for the administration of this code other than Title 15. The design and content must enhance the ability of a person to understand the applicable requirements and to physically furnish the required information in the space provided.

(b) The secretary shall furnish samples of the forms to:

(1) the appropriate authorities who have administrative duties under this code; and

(2) other persons who request a form for duplication.

(c) The samples of forms shall be furnished without charge.

(d) An authority having administrative duties under this code shall use an official form in performing the administrative functions, except in an emergency in which an official form is unavailable or as otherwise provided by this code. Other persons are not required to use an official form unless expressly required to do so by this code.

Sec. 31.0021. CERTAIN OFFICIAL FORMS: INCLUSION OF NEPOTISM INFORMATION. (a) On forms designed and furnished by the secretary of state for an application for a place on the ballot, the secretary shall include a brief summary of:

(1) the nepotism prohibition imposed by Chapter 573, Government Code; and

(2) a list of the specific kinds of relatives that are included within the prohibited degrees of relationship prescribed by Chapter 573, Government Code.

(b) Any other authority that designs and furnishes an application for a place on the ballot shall include on that form the same summary included on forms prescribed by the secretary of state under Subsection (a).

Sec. 31.003. UNIFORMITY. The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based

on this code and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws.

Sec. 31.004. ASSISTANCE AND ADVICE. (a) The secretary of state shall assist and advise all election authorities with regard to the application, operation, and interpretation of this code and of the election laws outside this code.

(b) The secretary shall maintain an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties.

Sec. 31.005. PROTECTION OF VOTING RIGHTS; ENFORCEMENT. (a) The secretary of state may take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes.

(b) The secretary of state may order a person performing official functions in the administration of any part of the electoral processes to correct offending conduct if the secretary determines that the person is exercising the powers vested in that person in a manner that:

(1) impedes the free exercise of a citizen's voting rights; or

(2) unless acting under an order of a court of competent jurisdiction, delays or cancels an election that the person does not have specific statutory authority to delay or cancel.

(c) If a person described by Subsection (b) fails to comply with an order from the secretary of state under this section, the secretary may seek enforcement of the order by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general.

Texas Election Code Section 64.012

Sec. 64.012. ILLEGAL VOTING. (a) A person commits an offense if the person knowingly or intentionally:

(1) votes or attempts to vote in an election in which the person knows the person is not eligible to vote;

(2) votes or attempts to vote more than once in an election;

(3) votes or attempts to vote a ballot belonging to another person, or by impersonating another person;

(4) marks or attempts to mark any portion of another person's ballot without the consent of that person, or without specific direction from that person how to mark the ballot; or

(5) votes or attempts to vote in an election in this state after voting in another state in an election in which a federal office appears on the ballot and the election day for both states is the same day.

(b) An offense under this section is a Class A misdemeanor.

(c) A person may not be convicted solely upon the fact that the person signed a provisional ballot affidavit under Section 63.011 unless corroborated by other evidence that the person knowingly committed the offense.

(d) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

Texas Election Code Sections 82.001-82.004

Sec. 82.001. ABSENCE FROM COUNTY OF RESIDENCE. (a) Subject to Subsection (b), a qualified voter is eligible for early voting by mail if the voter expects to be absent from the county of the voter's residence on election day and during the regular hours for conducting early voting at the main early voting polling place for that part of the period for early voting by personal appearance remaining after the voter's early voting ballot application is submitted to the early voting clerk.

(b) If a voter's early voting ballot application is submitted on or after the first day of the period for early voting by personal appearance, the voter is ineligible for early voting by mail unless the voter is absent from the county when the application is submitted and satisfies the requirements prescribed by Subsection (a).

Sec. 82.002. DISABILITY OR CONFINEMENT FOR CHILDBIRTH. (a) A qualified voter is eligible for early voting by mail if the voter:

(1) has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health; or

(2) is expecting to give birth within three weeks before or after election day.

(b) The following do not constitute sufficient cause to entitle a voter to vote under Subsection (a):

(1) a lack of transportation;

(2) a sickness that does not prevent the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health; or

(3) a requirement to appear at the voter's place of employment on election day.

(c) To be eligible for an early voting ballot by mail under Subsection (a)(1), an applicant must affirmatively indicate that he or she agrees with the statement prescribed by Section 84.002(c).

Sec. 82.003. AGE. A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day.

Sec. 82.004. CONFINEMENT IN JAIL. (a) A qualified voter is eligible for early voting by mail if, at the time the voter's early voting ballot application is submitted, the voter is confined in jail:

(1) serving a misdemeanor sentence for a term that ends on or after election day;

(2) pending trial after denial of bail;

(3) without bail pending an appeal of a felony conviction; or

(4) pending trial or appeal on a bailable offense for which release on bail before election day is unlikely.

(b) A voter confined in jail who is eligible for early voting is not entitled to vote by personal appearance unless the authority in charge of the jail, in the authority's discretion, permits the voter to do so.

Appendix F

Texas Election Code Section 84.007

Sec. 84.007. SUBMITTING APPLICATION FOR BALLOT VOTED BY MAIL: GENERAL RULE. (a) Except as provided by Sections 84.008 and 84.009, an application for a ballot to be voted by mail must be submitted as provided by this section.

(b) An application must be submitted to the early voting clerk by:

(1) mail;

(2) common or contract carrier;

(3) subject to Subsection (b-1), telephonic facsimile machine, if a machine is available in the clerk's office; or

(4) subject to Subsection (b-1), electronic transmission of a scanned application containing an original signature.

(b-1) For an application for ballot by mail submitted by telephonic facsimile machine or electronic transmission to be effective, the application also must be submitted by mail and be received by the early voting clerk not later than the fourth business day after the transmission by telephonic facsimile machine or electronic transmission is received.

(c) Except as provided by Section 86.0015(b), an application may be submitted at any time in the year of the election for which a ballot is requested, but not later than the close of regular business in the early voting clerk's office or 12 noon, whichever is later, on the 11th day before election day unless that day is a Saturday, Sunday, or legal state or national holiday, in which case the last day is the first preceding regular business day.

(d) An application is considered to be submitted at the time of its receipt by the clerk.

(e) The early voting clerk shall designate an e-mail address for receipt of an application under Subsection (b)(4). The secretary of state shall include the e-mail address designated by each early voting clerk on the secretary of state's website.

Texas Election Code Section 85.001

Sec. 85.001. EARLY VOTING PERIOD. (a) The period for early voting by personal appearance begins on the 17th day before election day and continues through the fourth day before election day, except as otherwise provided by this section.

(b) For a special runoff election for the office of state senator or state representative or for a runoff primary election, the period begins on the 10th day before election day.

(c) If the date prescribed by Subsection (a) or (b) for beginning the period is a Saturday, Sunday, or legal state holiday, the early voting period begins on the next regular business day.

(d) If because of the date for which an election is ordered it is not possible to begin early voting by personal appearance on the prescribed date, the early voting period shall begin on the earliest date practicable after the prescribed date as set by the authority ordering the election.

(e) For an election held on the uniform election date in May and any resulting runoff election, the period for early voting by personal appearance begins on the 12th day before election day and continues through the fourth day before election day.

Texas Election Code Sections 86.005, 86.006, 86.013

Sec. 86.005. MARKING AND SEALING BALLOT. (a) A voter must mark a ballot voted by mail in accordance with the instructions on the ballot envelope.

(b) A voter may mark the ballot at any time after receiving it.

(c) After marking the ballot, the voter must place it in the official ballot envelope and then seal the ballot envelope, place the ballot envelope in the official carrier envelope and then seal the carrier envelope, and sign the certificate on the carrier envelope.

(d) Failure to use the official ballot envelope does not affect the validity of the ballot.

(e) After the carrier envelope is sealed by the voter, it may not be opened except as provided by Chapter 87.

(f) Expired.

Sec. 86.006. METHOD OF RETURNING MARKED BALLOT. (a) A marked ballot voted under this chapter must be returned to the early voting clerk in the official carrier envelope. The carrier envelope may be delivered in another envelope and must be transported and delivered only by:

(1) mail;

(2) common or contract carrier; or

(3) subject to Subsections (a-1) and (a-2), in-person delivery by the voter who voted the ballot.

(a-1) The voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day. A voter who delivers a marked ballot in person must present an acceptable form of identification described by Section 63.0101.

(a-2) An in-person delivery of a marked ballot voted under this chapter must be received by an election official at the time of delivery. The receiving official shall record

the voter's name, signature, and type of identification provided under Section 63.0101 on a roster prescribed by the secretary of state. The receiving official shall attest on the roster that the delivery complies with this section.

(b) Except as provided by Subsection (c), a carrier envelope may not be returned in an envelope or package containing another carrier envelope.

(c) The carrier envelopes of persons who are registered to vote at the same address may be returned in the same envelope or package.

(d) Each carrier envelope that is delivered by a common or contract carrier must be accompanied by an individual delivery receipt for that particular carrier envelope that indicates the name and residence address of the individual who actually delivered the envelope to the carrier and the date, hour, and address at which the carrier envelope was received by the carrier. A delivery of carrier envelopes is prohibited by a common or contract carrier if the delivery originates from the address of:

(1) an office of a political party or a candidate in the election;

(2) a candidate in the election unless the address is the residence of the early voter;

(3) a specific-purpose or general-purpose political committee involved in the election; or

(4) an entity that requested that the election be held, unless the delivery is a forwarding to the early voting clerk.

(e) Carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk. The secretary of state shall prescribe appropriate procedures to implement this subsection and to provide accountability for the delivery of the carrier envelopes from the voting place to the early voting clerk.

(f) A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, this subsection does not apply to a person who, on the date of the offense, was:

(1) related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code;

(2) physically living in the same dwelling as the voter;

(3) an early voting clerk or a deputy early voting clerk;

(4) a person who possesses a ballot or carrier envelope solely for the purpose of

lawfully assisting a voter who was eligible for assistance under Section 86.010 and complied fully with:

(A) Section 86.010; and

(B) Section 86.0051, if assistance was provided in order to deposit the envelope in the mail or with a common or contract carrier;

(5) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or

(6) a common or contract carrier working in the normal course of the carrier's authorized duties if the official ballot is sealed in an official carrier envelope that is accompanied by an individual delivery receipt for that particular carrier envelope.

(g) An offense under Subsection (f) is a Class A misdemeanor unless the defendant possessed the ballot or carrier envelope without the request of the voter, in which case it is a felony of the third degree. If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

(g-1) An offense under Subsection (g) is increased to the next higher category of offense if it is shown on the trial of an offense under this section that:

(1) the defendant was previously convicted of an offense under this code;

(2) the offense involved an individual 65 years of age or older; or

(3) the defendant committed another offense under this section in the same election.

(h) A ballot returned in violation of this section may not be counted. If the early voting clerk determines that the ballot was returned in violation of this section, the clerk shall make a notation on the carrier envelope and treat it as a ballot not timely returned in accordance with Section 86.011(c). If the ballot is returned before the end of the period for early voting by personal appearance, the early voting clerk shall promptly mail or otherwise deliver to the voter a written notice informing the voter that:

(1) the voter's ballot will not be counted because of a violation of this code; and

(2) the voter may vote if otherwise eligible at an early voting polling place or the election day precinct polling place on presentation of the notice.

(i) In the prosecution of an offense under Subsection (f):

(1) the prosecuting attorney is not required to negate the applicability of the provisions of Subsections (f)(1)-(6) in the accusation charging commission of an offense;

(2) the issue of the applicability of a provision of Subsection (f)(1), (2), (3), (4), (5), or (6) is not submitted to the jury unless evidence of that provision is admitted; and

(3) if the issue of the applicability of a provision of Subsection (f)(1), (2), (3), (4), (5), or (6) is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

Sec. 86.013. OFFICIAL CARRIER ENVELOPE. (a) "Carrier Envelope for Early Voting Ballot," the name and official title of the early voting clerk as addressee, and the clerk's official mailing address must be printed on the face of each official carrier envelope for a ballot to be voted by mail.

(b) Spaces must appear on the reverse side of the official carrier envelope for:

(1) indicating the identity and date of the election;

(2) entering the signature, printed name, and residence address of a person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier; and

(3) indicating the relationship of that person to the voter.

(c) A certificate in substantially the following form must be printed on the reverse side of the official carrier envelope in a manner that requires the voter to sign across the flap of the envelope:

"I certify that the enclosed ballot expresses my wishes independent of any dictation or undue persuasion by any person.

_____
Signature of voter

By: _____
Signature of person assisting voter, if applicable (see Ballot Envelope for restrictions and penalties)

_____
Printed name of person assisting voter, if applicable

_____
Residence address of person assisting voter, if applicable"

(d) The following textual material, as prescribed by the secretary of state, must be printed on the reverse side of the official carrier envelope or on a separate sheet accompanying the carrier envelope when it is provided:

(1) the prohibition prescribed by Section 86.006(b);

(2) the conditions for delivery by common or contract carrier prescribed by Sections 81.005 and 86.006;

(3) the requirements for the legal execution and delivery of the carrier envelope, including the prohibition on compensation for depositing carrier envelopes containing ballots voted by other persons under Section 86.0052;

(4) the prohibition prescribed by Section 86.006(e); and

(5) the offenses prescribed by Sections 86.006(f) and 86.010(f).

(e) The following notice must be printed on the reverse side of the official carrier envelope, near the space provided for the voter's signature: "This envelope must be sealed by the voter before it leaves the voter's hands. Do not sign this envelope unless the ballot has been marked by you or at your direction."

(f) The oath of a person assisting a voter must be included on the official carrier envelope as part of the certificate prescribed by Subsection (c).

(g) The secretary of state by rule shall require that a notice informing voters of the telephone number

established under Section 31.0055 and the purpose of the telephone number be printed on:

(1) the official carrier envelope; or

(2) an insert enclosed with the balloting materials for voting by mail sent to the voter.

Texas Election Code Sections 87.002, 87.0221, 87.0222, 87.0241, 87.027, 87.0271, 87.041, 87.0411, 87.0431, 87.127

Sec. 87.002. COMPOSITION OF BOARD. (a) The early voting ballot board consists of a presiding judge, an alternate presiding judge, and at least one other member.

(b) Except as provided by Subsection (d), the presiding judge and the alternate presiding judge are appointed in the same manner as a presiding election judge and alternate presiding election judge, respectively. Except as provided by Subsection (c), each other member is appointed by the presiding judge in the same manner as the precinct election clerks.

(c) In the general election for state and county officers, each county chair of a political party with nominees on the general election ballot shall submit to the county election board a list of names of persons eligible to serve on the early voting ballot board in order of the county chair's preference. The county election board shall appoint at least one person from each list to serve as a member of the early voting ballot board. The same number of members must be appointed from each list. The county election board

shall appoint persons as members of the early voting ballot board in the order of preference indicated on each list.

(d) In addition to the members appointed under Subsection (c), the county election board shall appoint as the presiding judge the highest-ranked person on the list provided under that subsection by the political party whose nominee for governor received the most votes in the county in the most recent gubernatorial general election and as the alternate presiding judge the highest-ranked person on the list provided under that subsection by the political party whose nominee for governor received the second most votes in the county in the most recent gubernatorial general election.

Sec. 87.0221. TIME OF DELIVERY: PAPER BALLOTS. (a) In an election in which regular paper ballots are used for early voting by personal appearance or by mail, the materials may be delivered to the board between the end of the period for early voting by personal appearance and the closing of the polls on election day, or as soon after closing as practicable, at the time or times specified by the presiding judge of the board.

(b) The early voting clerk shall post notice of each delivery of materials under this section that is to be made before the time for opening the polls on election day. The notice shall be posted at the main early voting polling place continuously for at least 24 hours immediately preceding the delivery.

(c) At least 24 hours before each delivery, the early voting clerk shall notify the county chair of each political party having a nominee on the ballot of the time the delivery is to be made.

Sec. 87.0222. TIME OF DELIVERY: BALLOTS VOTED BY MAIL. (a) Notwithstanding Section 87.024, in an election conducted by an authority of a county with a population of 100,000 or more, or conducted jointly with such a county or conducted with such a county through a contract for election services, the jacket envelopes containing the early voting ballots voted by mail may be delivered to the board between the end of the ninth day before the last day of the period for early voting by personal appearance and the closing of the polls on election day, or as soon after closing as practicable, at the time or times specified by the presiding judge of the board.

(b) The early voting clerk shall post notice of each delivery of materials under this section that is to be made before the time for opening the polls on election day. The notice shall be posted at the main early voting polling place continuously for at least 24 hours immediately preceding the delivery.

(c) At least 24 hours before each delivery, the early voting clerk shall notify the county chair of each political party having a nominee on the ballot of the time the delivery is to be made.

Sec. 87.0241. PROCESSING BALLOTS BEFORE POLLS OPEN. (a) The early voting ballot board may

determine whether to accept early voting ballots voted by mail in accordance with Section 87.041 at any time after the ballots are delivered to the board.

(b) The board may not count early voting ballots until:

(1) the polls open on election day; or

(2) in an election conducted by an authority of a county with a population of 100,000 or more, or conducted jointly with such a county or conducted with such a county through a contract for election services, the end of the period for early voting by personal appearance.

(c) The secretary of state shall prescribe any procedures necessary for implementing this section in regard to elections described by Subsection (b)(2).

Sec. 87.027. SIGNATURE VERIFICATION COMMITTEE. (a) Except as provided by Subsection (a-1), a signature verification committee may be appointed in any election. The early voting clerk is the authority responsible for determining whether a signature verification committee is to be appointed. If the clerk determines that a committee is to be appointed, the clerk shall issue a written order calling for the appointment.

(a-1) A signature verification committee shall be appointed in the general election for state and county officers on submission to the early voting clerk of a written request for the committee by at least 15 registered voters

of the county. The request must be submitted not later than the preceding October 1, and a request submitted by mail is considered to be submitted at the time of its receipt by the clerk.

(b) The following authority is responsible for appointing the members of a signature verification committee:

(1) the county election board, in an election for which the board is established;

(2) the county chair, in a primary election; and

(3) the governing body of the political subdivision, in an election ordered by an authority of a political subdivision other than a county.

(c) Not later than the fifth day after the date the early voting clerk issues the order calling for the appointment of a signature verification committee, or not later than October 15 for a committee required under Subsection (a-1), the appropriate authority shall appoint the members of the committee and designate one of the appointees as chair, subject to Subsection (d). The authority shall fill a vacancy on the committee by appointment as soon as possible after the vacancy occurs, subject to Subsection (d). The early voting clerk shall post notice of the name and residence address of each appointee. The notice must remain posted continuously for the period beginning the day after the date of the appointment and ending on the last day of the committee's operation in the election.

(d) The early voting clerk shall determine the number of members who are to compose the signature verification committee and shall state that number in the order calling for the committee's appointment. A committee must consist of not fewer than five members. In an election in which party alignment is indicated on the ballot, each county chair of a political party with a nominee or aligned candidate on the ballot shall submit to the appointing authority a list of names of persons eligible to serve on the signature verification committee in order of the county chair's preference. The authority shall appoint at least two persons from each list in the order of preference indicated on each list to serve as members of the committee. The same number of members must be appointed from each list. The authority shall appoint as chair of the committee the highest-ranked person on the list provided by the political party whose nominee for governor received the most votes in the county in the most recent gubernatorial general election. The authority shall appoint as vice chair of the committee the highest-ranked person on the list provided by the political party whose nominee for governor received the second most votes in the county in the most recent gubernatorial general election. A vacancy on the committee shall be filled by appointment from the original list or from a new list submitted by the appropriate county chair.

(e) To be eligible to serve on a signature verification committee, a person must be eligible under Subchapter C, Chapter 32, for service as a presiding election judge, except that the person must be a qualified voter:

(1) of the county, in a countywide election ordered by the governor or a county authority or in a primary election;

(2) of the part of the county in which the election is held, for an election ordered by the governor or a county authority that does not cover the entire county of the person's residence; or

(3) of the political subdivision, in an election ordered by an authority of a political subdivision other than a county.

(f) The early voting clerk shall determine the place, day or days, and hours of operation of the signature verification committee and shall state that information in the order calling for the committee's appointment. A committee may not begin operating before the 20th day before election day.

(g) The early voting clerk shall post a copy of the order calling for the appointment of the signature verification committee. The copy must remain posted continuously for at least 10 days before the first day the committee meets.

(h) If a signature verification committee is appointed for the election, the early voting clerk shall deliver the jacket envelopes containing the early voting ballots voted by mail to the committee instead of to the early voting ballot board. Deliveries may be made only during the period of the committee's operation at times scheduled in

advance of delivery by the early voting clerk. The clerk shall post notice of the time of each delivery. The notice must remain posted continuously for at least two days before the date of the delivery.

(i) The signature verification committee shall compare the signature on each carrier envelope certificate, except those signed for a voter by a witness, with the signature on the voter's ballot application to determine whether the signatures are those of the voter. The committee may also compare the signatures with any known signature of the voter on file with the county clerk or voter registrar to determine whether the signatures are those of the voter. Except as provided by Subsection (l), a determination under this subsection that the signatures are not those of the voter must be made by a majority vote of the committee's membership. The committee shall place the jacket envelopes, carrier envelopes, and applications of voters whose signatures are not those of the voter in separate containers from those of voters whose signatures are those of the voter. The committee chair shall deliver the sorted materials to the early voting ballot board at the time specified by the board's presiding judge.

(j) If a signature verification committee is appointed, the early voting ballot board shall follow the same procedure for accepting the early voting ballots voted by mail as in an election without a signature verification committee, except that the board may not determine whether a voter's signatures on the carrier envelope certificate and ballot application are those of the same person if the committee has determined that the

signatures are those of the same person. If the committee has determined that the signatures are not those of the same person, the board may make a determination that the signatures are those of the same person by a majority vote of the board's membership.

(k) Postings required by this section shall be made on the bulletin board used for posting notice of meetings of the commissioners court of a county that does not maintain an Internet website, in an election for which the county election board is established or a primary election, or of the governing body of the political subdivision in other elections.

(k-1) If the county maintains an Internet website, postings required by this section shall be made on the county's Internet website in an election for which the county election board is established or a primary election.

(l) If more than 12 members are appointed to serve on the signature verification committee, the early voting clerk may designate two or more subcommittees of not less than six members. If subcommittees have been designated, a determination under Subsection (i) is made by a majority of the subcommittee.

(m) If ballot materials or ballot applications are recorded electronically as provided by Section 87.126, the signature verification committee may use an electronic copy of a carrier envelope certificate or the voter's ballot application in making the comparison under Subsection (i).

Appendix F

Sec. 87.0271. OPPORTUNITY TO CORRECT DEFECT: SIGNATURE VERIFICATION COMMITTEE. (a) This section applies to an early voting ballot voted by mail:

(1) for which the voter did not sign the carrier envelope certificate;

(2) for which it cannot immediately be determined whether the signature on the carrier envelope certificate is that of the voter;

(3) missing any required statement of residence;

(4) missing information or containing incorrect information required under Section 84.002(a)(1-a) or Section 86.002; or

(5) containing incomplete information with respect to a witness.

(b) Not later than the second business day after a signature verification committee discovers a defect described by Subsection (a) and before the committee decides whether to accept or reject a timely delivered ballot under Section 87.027, the committee shall:

(1) determine if it would be possible for the voter to correct the defect and return the carrier envelope before the time the polls are required to close on election day; and

(2) return the carrier envelope to the voter by mail, if the committee determines that it would be possible for the voter to correct the defect and return the carrier envelope before the time the polls are required to close on election day.

(c) If the signature verification committee determines under Subsection (b)(1) that it would not be possible for the voter to correct the defect and return the carrier envelope before the time the polls are required to close on election day, the committee may notify the voter of the defect by telephone or e-mail and inform the voter that the voter may request to have the voter's application to vote by mail canceled in the manner described by Section 84.032 or come to the early voting clerk's office in person not later than the sixth day after election day to correct the defect.

(d) If the signature verification committee takes an action described by Subsection (b) or (c), the committee must take either action described by that subsection with respect to each ballot in the election to which this section applies.

(e) A poll watcher is entitled to observe an action taken under Subsection (b) or (c).

(f) The secretary of state may prescribe any procedures necessary to implement this section.

(g) Notwithstanding any other law, a ballot may not be finally rejected for a reason listed in Section 87.041(b)(1), (2), or (6) before the seventh day after election day.

Appendix F

Sec. 87.041. ACCEPTING VOTER. (a) The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to accept the voter's ballot.

(b) A ballot may be accepted only if:

(1) the carrier envelope certificate is properly executed;

(2) neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness;

(3) the voter's ballot application states a legal ground for early voting by mail;

(4) the voter is registered to vote, if registration is required by law;

(5) the address to which the ballot was mailed to the voter, as indicated by the application, was outside the voter's county of residence, if the ground for early voting is absence from the county of residence;

(6) for a voter to whom a statement of residence form was required to be sent under Section 86.002(a), the statement of residence is returned in the carrier envelope and

indicates that the voter satisfies the residence requirements prescribed by Section 63.0011;

(7) the address to which the ballot was mailed to the voter is an address that is otherwise required by Sections 84.002 and 86.003; and

(8) the information required under Section 86.002(g) provided by the voter identifies the same voter identified on the voter's application for voter registration under Section 13.002(c)(8).

(c) If a ballot is accepted, the board shall enter the voter's name on the poll list unless the form of the list makes it impracticable to do so. The names of the voters casting ballots by mail shall be listed separately on the poll list from those casting ballots by personal appearance.

(d) A ballot shall be rejected if any requirement prescribed by Subsection (b) is not satisfied. In that case, the board shall indicate the rejection by entering "rejected" on the carrier envelope and on the corresponding jacket envelope.

(d-1) If a voter provides the information required under Section 86.002(g) and it identifies the same voter identified on the voter's application for voter registration under Section 13.002(c)(8), the signature on the ballot application and on the carrier envelope certificate shall be rebuttably presumed to be the signatures of the voter.

(e) In making the determination under Subsection (b)(2), to determine whether the signatures are those of the voter, the board may also compare the signatures with any known signature of the voter on file with the county clerk or voter registrar.

(f) In making the determination under Subsection (b)(2) for a ballot cast under Chapter 101 or 105, the boa rd shall compare the signature on the carrier envelope or signature cover sheet with the signature of the voter on the federal postcard application.

(g) A person commits an offense if the person intentionally accepts a ballot for voting or causes a ballot to be accepted for voting that the person knows does not meet the requirements of Subsection (b). An offense under this subsection is a Class A misdemeanor.

Sec. 87.0411. OPPORTUNITY TO CORRECT DEFECT: EARLY VOTING BALLOT BOARD. (a) This section applies to an early voting ballot voted by mail:

(1) for which the voter did not sign the carrier envelope certificate;

(2) for which it cannot immediately be determined whether the signature on the carrier envelope certificate is that of the voter;

(3) missing any required statement of residence;

(4) missing information or containing incorrect information required under Section 84.002(a)(1-a) or Section 86.002; or

(5) containing incomplete information with respect to a witness.

(b) Not later than the second business day after an early voting ballot board discovers a defect described by Subsection (a) and before the board decides whether to accept or reject a timely delivered ballot under Section 87.041, the board shall:

(1) determine if it would be possible for the voter to correct the defect and return the carrier envelope before the time the polls are required to close on election day; and

(2) return the carrier envelope to the voter by mail, if the board determines that it would be possible for the voter to correct the defect and return the carrier envelope before the time the polls are required to close on election day.

(c) If the early voting ballot board determines under Subsection (b)(1) that it would not be possible for the voter to correct the defect and return the carrier envelope before the time the polls are required to close on election day, the board may notify the voter of the defect by telephone or e-mail and inform the voter that the voter may request to have the voter's application to vote by mail canceled in the manner described by Section 84.032 or come to the early

voting clerk's office in person not later than the sixth day after election day to correct the defect.

(d) If the early voting ballot board takes an action described by Subsection (b) or (c), the board must take either action described by that subsection with respect to each ballot in the election to which this section applies.

(e) A poll watcher is entitled to observe an action taken under Subsection (b) or (c).

(f) The secretary of state may prescribe any procedures necessary to implement this section.

(g) Notwithstanding any other law, a ballot may not be finally rejected for a reason listed in Section 87.041(b)(1), (2), or (6) before the seventh day after election day.

Added by Acts 2021, 87th Leg., 2nd C.S., Ch. 1 (S.B. 1), Sec. 5.14, eff. December 2, 2021.

Sec. 87.0431. NOTICE OF REJECTED BALLOT. (a) Not later than the 10th day after election day, the presiding judge of the early voting ballot board shall deliver written notice of the reason for the rejection of a ballot to the voter at the residence address on the ballot application. If the ballot was transmitted to the voter by e-mail under Subchapter C, Chapter 101, the presiding judge shall also provide the notice to the e-mail address to which the ballot was sent.

(b) The early voting clerk shall, not later than the 30th day after election day, deliver notice to the attorney general, including certified copies of the carrier envelope and corresponding ballot application, of any ballot rejected because:

(1) the voter was deceased;

(2) the voter already voted in person in the same election;

(3) the signatures on the carrier envelope and ballot application were not executed by the same person;

(4) the carrier envelope certificate lacked a witness signature;

(5) the carrier envelope certificate was improperly executed by an assistant; or

(6) the early voting ballot board or the signature verification committee determined that another violation of the Election Code occurred.

(c) The attorney general shall prescribe the form and manner of submission under Subsection (b). The secretary of state shall adopt rules as necessary to implement the requirements prescribed under this subsection.

Appendix F

Sec. 87.127. RESOLUTION OF INCORRECT DETERMINATION BY EARLY VOTING BALLOT BOARD. (a) If a county election officer, as defined by Section 31.091, determines a ballot was incorrectly rejected or accepted by the early voting ballot board before the time set for convening the canvassing authority, the county election officer may petition a district court for injunctive or other relief as the court determines appropriate.

(b) In an election ordered by the governor or by a county judge, the county election officer must confer with and establish the agreement of the county chair of each political party before petitioning the district court.