

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

LETICIA GARZA GALVAN, et al.	§	
Plaintiffs,	§	
	§	
	§	Civil Case No. 7:18-cv-00113
v.	§	
	§	
ROLANDO PABLOS, in his official	§	DECLARATORY AND INJUNCTIVE
capacity as Texas Secretary of State, et	§	RELIEF REQUESTED
al.,	§	
Defendants.	§	

PLAINTIFFS’ JOINT MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs LETICIA GALVAN, MARTIE GARCIA VELA, FEDERICO FLORES, MARIA GUERRERO, VICENTE GUERRERO, and AMELIA MARTINEZ,¹ jointly move for summary judgment for the reasons that follow and for any additional reasons that may appear of record at any hearing on this motion.

Factual and Statutory Background

I. The Plaintiffs

Plaintiff Amelia Martinez is legally blind. **Exhibit 1** (Martinez decl.). However, she is lucid, she takes pride in voting, and she insists on writing her own name when she votes by mail. *Id.* Martinez signed her own name on her application and carrier envelope for the March 2018 primary elections. *Id.* Ms. Martinez’s daughter, Magaly Serna, resides with her and has assisted her in voting for approximately the last five years. **Exhibit 2** (Serna decl.). Ms. Serna was with her mother when she voted in the March 2018 primary election and witnessed her sign the carrier envelope. *Id.* Ms. Martinez always insists on signing her own ballot in her hand; she loves to sign

¹ The four voter Plaintiffs have been added via the First Amended Complaint, which was filed November 30, 2018 with the written consent of counsel for all Defendants. See Fed. R. Civ. P. 15(a)(2).

her name when she votes. Exhibit 2. She was very upset when she learned after the election that her ballot was rejected. Exhibit 2.

Plaintiffs Maria and Vicente Guerrero are married and reside together at their home. **Exhibit 3** (Maria Guerrero decl.). They both signed their own name on their applications and carrier envelopes for the March 2018 primary elections. *Id.*; **Exhibit 4** (Vicente Guerrero decl.). When Maria was signing her application to vote by mail, she was worried about running out of space to write her whole name because she wanted to be careful not to write over the word “Date” printed in the box for the signature. Exhibit 3. Therefore, she consciously left two letters out of her name as she signed the application. *Id.*

Plaintiff Federico Flores, Jr. signed his own name on his application and carrier envelope for the March 2018 primary elections. First Amd. Compl. ¶9.²

All four of these voter Plaintiffs’ ballots were rejected for perceived signature discrepancy by the Starr County Early Voting Ballot Board. **Exhibit 5.**

The initial two plaintiffs in this matter, Galvan and Garcia Vela, were candidates in the March 2018 Democratic primary elections. The final (post-recount) canvass was certified on April 2, 2018, and shows:

Starr County Judge

Leticia Garza Galvan **7,032**
 Eloy Vera **7,191**

Judge, 229th Dist. Ct.

	Starr	Jim Hogg	Duval	Total
Martie Garcia Vela	6619	898	1928	9445

² The undersigned counsel was not able to visit Plaintiff Flores to secure his signed declaration before filing this motion.

Baldemar Garza 6961 798 1792 **9551**

Accordingly, Plaintiff Galvan's opponent, Eloy Vera, was declared the winner because he purportedly received 159 more votes than Galvan, and Plaintiff Garcia Vela's opponent, Baldemar Garza, was declared the winner because he purportedly received 106 more votes than Garcia Vela. *See Galvan v. Vera*, 04-18-00309-CV, 2018 WL 4096383, *1 (Tex. App.—San Antonio Aug. 29, 2018) (mem. op.). The candidate-Plaintiffs litigated an election contest in state court, which was unsuccessful. *See id.* The candidate-Plaintiffs did not raise the constitutional claims at issue in the instant case in their election contest, nor could they have under established Texas law. (Indeed, this is why they filed the constitutional claims in a separate lawsuit, which the Defendants then removed to this Court.)

II. Summary of Texas framework for applying for, and returning, ballot by mail, and delivery of timely-returned ballots to the Early Voting Ballot Board

Eligible voters in Texas may request a ballot to be voted by mail starting with the beginning of the year of the election. Tex. Elec. Code § 84.007(c). Election administrators must send the mail ballot to the voter within seven days after the clerk accepts the application (if the ballots are already available) or seven days after the ballots become available, as applicable. *Id.* § 86.004(a).³ After completing the ballot, the marked ballot must be mailed back such that it arrives at the elections office before the polls close on Election Day, or by 5:00 p.m. on the day after Election Day, if the carrier envelope was postmarked for delivery by 7:00 p.m. on Election Day. *Id.* § 86.007(a).

Because ballots are generally available approximately several weeks before a given primary election day, voters commonly return marked mail ballots to the elections administrators several weeks before Primary Election Day. However, the ballots are not received and reviewed

³ Some details are left out of this summary, for example, regarding earlier deadlines for sending mail ballots to overseas and military voters.

by the Early Voting Ballot Board (EVBB), to determine whether they meet the requirements for being counted, until much later.

When a carrier envelope is received by the early voting clerk, the clerk determines whether it is timely and, if so, “the clerk shall enclose the carrier envelope and the voter’s early voting ballot application in a jacket envelope.” *Id.* 86.011(a), (b). The clerk shall also include in the jacket envelope a copy of the voter’s federal postcard application if the ballot is voted under chapter 101, and the signature cover sheet, if the ballot is voted under Chapter 105. *Id.* 86.011(b). The early voting clerk holds the jacket envelopes for the timely-delivered mail ballots until they are delivered to the EVBB, along with the other materials required to be delivered to the EVBB (like the ballot boxes, poll lists, list of registered voters, etc.) at a later date determined by statute. Tex. Elec. Code 87.021 - .024. The date of delivery to the EVBB can vary depending on the type of election equipment used and the population of the county conducting the election.

While the “general rule” states that “the materials” shall be delivered to the EVBB during the time the polls are open on election day, *id.* § 87.022, it appears that, in most elections, the materials may be delivered beginning when early voting by personal appearance concludes, with an earlier delivery date possible in elections conducted by populous counties.

In elections using paper ballots for early voting in person or by mail, elections in which early voting in-person is done on “voting machines,” and elections in which early voting ballots are to be “counted by automatic tabulating equipment at a central counting station,” the jacket envelopes 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[.]” *Id.* § 87.0221; *see also* §§ 87.023, 87.024.

In an election conducted by authority of a county with a population of 100,000 or more (or conducted jointly with such a county), the jacket envelopes may be delivered to the EVBB between

the end of the *ninth* day before the conclusion of early voting and the close of polls on Election Day. *Id.* 87.0222.

III. Procedure for appointment of Early Voting Ballot Board

The EVBB consists of a presiding judge and at least two other members. Tex. Elec. Code § 87.002(a).

In a primary election, the county chair of the political party appoints the presiding judge. *See* § 87.002(b) (“Except as provided by Subsection (d) [dealing with general election for state and county officers], the presiding judge is appointed in the same manner as a presiding election judge.”); § 32.001, .006 (each precinct must have a presiding and alternate election judge, and in a primary, “the judges for each precinct” are appointed by county chair).

The presiding judge then appoints the other members of the EVBB. 87.002(b) (“Except as provided by Subsection (c) [dealing with general election for state and county officers], the other members are appointed by the presiding judge in the same manner as the precinct election clerks.”); § 32.031 (“The presiding judge for each election precinct shall appoint the election clerks to assist the judge in the conduct of an election at the polling place served by the judge.”).

IV. Qualifying ballots voted by mail

The Election Code distinguishes the process of reviewing mail-in ballots to determine whether to accept them from the process of counting the ballots, once they have been accepted. Tex. Elec. Code 87.0241.

“The [EVBB] 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.” *Id.* 87.0241(a).

Therefore, only after the ballots are delivered to the EVBB may it examine them to determine if the particular ballots will be accepted or rejected. Election Code § 87.041, “Accepting Voter,” describes the EVBB’s review:

(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; and

(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.

(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.

(e) In making the determination under Subsection (b)(2), the board 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 to determine whether the signatures are those of the voter.

(f) In making the determination under Subsection (b)(2) for a ballot cast under Chapter 101 or 105, the board 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.

Tex. Elec. Code Ann. § 87.041 (emphasis added).

Accepted ballots are removed from the carrier envelope (while remaining within the “ballot envelope”) and set aside to be counted, and rejected carrier envelopes are placed into a larger envelope and sealed. *Id.* § 87.043(a), (b).

The presiding judge of the EVBB is required to provide written notice to the voter of the reason a mail ballot was rejected, but is only required to do so within 10 days after the election. *Id.* 87.0431.

While notice is thus provided for the reason a ballot was rejected, there is no process afforded *the voter* to rectify any deficiency with the carrier envelope that caused the rejection.

While the voter is afforded no means of challenging the rejection of his or her own ballot, the 85th Legislature added a provision permitting a “county election officer” a very limited means of challenging a determination made by the EVBB, but only with court process and, in many cases, only after securing permission from the county chair of all political parties:

(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.

Tex. Elec. Code § 87.127.

V. The EVBB’s effectively unreviewable authority to reject mail ballots contrasted with the process for review of provisional ballots.

Voters may vote provisionally pursuant to Election Code § 63.011.

The presiding judge of each precinct in which provisional ballots were cast is required to personally deliver them to the EVBB. *Id.* § 65.053. The statute specifically directs the “secretary

of state” to “prescribe procedures by which the early voting ballot board may have access to the provisional ballots as necessary to implement this chapter.” *Id.*

If a voter is accepted for provisional voting because he or she does not meet the voter ID requirements of Section 63.001(b), the voter has six days after the election day in which to either present an acceptable form of ID “to the voter registrar for examination,” or execute an affidavit in the voter registrar’s presence. *Id.* 65.0541. Here again, the Legislature directed the Secretary of State to prescribe procedures necessary to implement this section. *Id.*

The EVBB must then “verify and count provisional ballots as provided by this subchapter” within either thirteen days (general election for state and county officers) or nine days after election day. *Id.* 65.051(a), (a-1).

The EVBB’s review of provisional ballots to determine whether a ballot is acceptable involves the application of somewhat complex statutes/regulations and requires the board to make factual determinations:

- (a) The early voting ballot board shall examine each affidavit executed under Section 63.011 and determine whether to accept the provisional ballot of the voter who executed the affidavit.
- (b) A provisional ballot shall be accepted if the board determines that:
 - (1) from the information in the affidavit or contained in public records, the person is eligible to vote in the election and has not previously voted in that election;
 - (2) the person:
 - (A) meets the identification requirements of Section 63.001(b) at the time the ballot was cast or in the period prescribed under Section 65.0541;
 - (B) notwithstanding Chapter 110, Civil Practice and Remedies Code, executes an affidavit under penalty of perjury that states the voter has a religious objection to being photographed and the voter has consistently refused to be photographed for any governmental purpose from the time the voter has held this belief; or
 - (C) executes an affidavit under penalty of perjury that states the voter does not have any identification meeting the requirements of Section 63.001(b) as a result of a natural disaster that was declared by the president of the United States or the governor, occurred not earlier than 45 days before the

date the ballot was cast, and caused the destruction of or inability to access the voter's identification; and

(3) the voter has not been challenged and voted a provisional ballot solely because the voter did not meet the requirements for identification prescribed by Section 63.001(b).

(c) If a provisional ballot is accepted, the board shall enter the voter's name on a list of voters whose provisional ballots are accepted.

(d) If a provisional ballot is rejected, the board shall indicate the rejection by marking "rejected" on the envelope containing the provisional ballot.

Tex. Elec. Code Ann. § 65.054.

Because deciding whether a provisional vote is acceptable can necessitate review of voter registration records, the Election Code directs the Secretary of State to prescribe procedures by which the voter registrar shall provide assistance to the EVBB in reviewing the ballots. (In elections held on the date of the general election for state and county officers, "the procedures must allow for seven calendar days for the voter registrar to review a provisional voter's eligibility."). *Id.* 65.052.

Accepted provisional ballots are then to be counted in the manner provided for counting of other early voting ballots. *Id.* 65.057.

VI. Signature rejections in Starr County, and other counties, in the March 2018 Primary Elections.

In the March 2018 Primary election in Starr County, 1123 mail-in ballots were submitted by Starr County voters. **Exhibit 6.** Of those, 976 were accepted and 147 were rejected. *Id.* (see Excel spreadsheets listing all ballots accepted and rejected). Of the 147 rejects, all but one of them were rejected for perceived signature mismatch. *Id.* (see notices of rejected ballot letters). Thus, of all mail ballots submitted in Starr County, more than 13% were rejected for perceived signature discrepancies.

Plaintiffs secured records from the March 2018 primaries from a selection of certain other counties—some large, some of small population—for purposes of comparison. The following table summarizes the numbers for all ballots by mail (BBM) in each county:

County	BBM received	BBM Accepted	BBM Rejected	Rejected-signature mismatch	% of all received BBM rejected for signature mismatch
Starr	1125	976	147	146	13.06%
Duval ⁴	955	920	35	4	0.42%
Jim Hogg ⁵	367	364	3	3	0.82%
Hidalgo ⁶	2758	2716	42	3	0.11%
Dallas ⁷	7826	7746	40	13	0.17%
Galveston ⁸	3927	3859	68	41	0.61%

Armandina Martinez and Yolanda Martinez, both members of the Starr County EVBB, testified by deposition, including as to the severe time constraints. Exhibits 16, 17. Plaintiffs Galvan and Garcia Vela further testified as to the composition and review of the EVBB. Exhibit 14, 15.

VII. Testimony of Dr. Linton Mohammed

Plaintiffs designated Dr. Linton Mohammed, an expert in handwriting and forensic document examination. **Exhibit 12** (Dr. Mohammed expert decl.).⁹ Dr. Mohammed reviewed the Texas statutes and concluded that “elections officials are likely to make erroneous signature-comparison determinations.” *Id.* ¶29. Dr. Mohammed attests that determining whether a signature is genuine is a “difficult task for even a trained FDE (Forensic Document Examiner).” *Id.* ¶30. Laypersons have been determined to have a significantly higher rate of error, even under controlled

⁴ **Exhibit 7** (Duval records). The county record exhibits are being filed by disk with the district clerk’s office due to their size.

⁵ **Exhibit 8** (Jim Hogg records).

⁶ **Exhibit 9** (Hidalgo records).

⁷ **Exhibit 10** (Dallas records).

⁸ **Exhibit 11** (Galveston records).

⁹ Dr. Mohammed’s CV is at **Exhibit 13**.

conditions with appropriate lighting, equipment including magnification, and time, as compared to trained FDEs, *id.*, and “laypersons are also more likely to wrongly determine that authentic signatures are not genuine than to make the opposite error.” *Id.*; *see also id.* ¶43. Dr. Mohammed notes that a person’s signature can vary from time to time for “myriad reasons, including age, health, native language, and writing conditions, and that laypersons incorrectly perceive normal variation due to such factors to be a “difference” indicating that another person signed. *Id.*; *see also id.* ¶36 (further discussing variation versus differences), ¶¶38-40 (further detail as to the differences in types of signatures and explaining how the same individual’s signature can vary significantly, and why training is required to identify variation versus differences that indicate a non-genuine signature). Laypersons’ “failure to properly account for signature *variability* leads to erroneous *inauthenticity* determinations, which are particularly pronounced in populations with greater signature variability, such as elderly, disabled, ill, and non-native English signatories.” *Id.* ¶31 (emphasis added).

Dr. Mohammed further notes that ten signature samples are required for an accurate signature determination to account for an individual’s signature variability, and faults Texas law for requiring a comparison of only one other signature to the signature on the ballot envelope. *Id.* 33.

Dr. Mohammed further notes that FDEs are tested for “form blindness,” a type of impairment in visual perception that affects an individual’s ability to accurately authenticate handwriting. *Id.* 32. Ballot board members are not examined for form blindness.

Further, insufficient time examining signatures is conducive to making errors. *Id.* 37. He concluded that reliable signature comparison is impossible for even trained FDEs under the time constraints and other limitations of the Texas system. *See id.* ¶47-50.

Argument

I. Summary Judgment Standard

Summary judgment is appropriate “where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Breen v. Texas A&M Univ.*, 485 F.3d 325, 331 (5th Cir. 2007) (citing Fed. R. Civ. P. 56(c)). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1423 n.11 (5th Cir. 1996) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The nonmoving party’s bare allegations, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Id.* at 247-48. Moreover, conclusory allegations unsupported by specific facts will not prevent an award of summary judgment; the nonmovant cannot rest on his allegations to get to a jury without any significant probative evidence tending to support his position. *Nat’l Ass’n of Gov’t Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 713 (5th Cir. 1994). If a reasonable jury could not return a verdict for the nonmoving party, then summary judgment is appropriate. *Liberty Lobby, Inc.*, 477 U.S. at 248. The nonmovant’s burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (internal quotations omitted). Furthermore, it is not the function of the court to search the record on the nonmovant’s behalf for evidence which may raise a fact issue. *Topalian v. Ehrman*, 954 F.2d 1125, 1137 n.30 (5th Cir. 1992). Therefore, “although we consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmovant, the nonmoving party may not rest on the mere allegations or denials of its pleadings, but must respond by setting forth specific facts indicating a genuine issue for trial.” *Goodson v. City of Corpus Christi*, 202 F.3d 730, 735 (5th Cir. 2000) (internal quotation omitted).

II. The Lack of An Opportunity to Cure by Validating the Ballot Violates the Right to Vote and Procedural Due Process.

a. Procedural due process standard

To determine what process is due, courts, including the Fifth Circuit, analyze the three factors identified in *Mathews v. Eldridge*:

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.

424 U.S. 319, 334-35 (1976); *see Wilson v. Birnberg*, 667 F.3d 591, 601 (5th Cir. 2012) (applying *Mathews* factors in analyzing candidate's challenge to Texas statute governing rejection of application for place on the ballot). Texas's ballot by mail rejection scheme affords constitutionally insufficient process for the same reasons that similar statutes in other states have been invalidated. *See Martin v. Kemp*, ___ F. Supp. 3d ___, 2018 WL 5276242 (N.D. Ga. Oct. 24, 2018), *appeal docketed* [18-14503] (11th Cir. Oct. 29, 2018); *Saucedo v. Gardner*, ___ F. Supp. 3d ___, 2018 WL 3862704 (D. N.H. Aug. 14, 2018); *Zessar v. Helander*, 05-C-1917, 2006 WL 642646 (N.D. Ill. Mar. 13, 2006).

b. Private interest

The private interest involved here is the fundamental right to vote, which is denied to a voter who finds herself disenfranchised due to a perceived signature mismatch. "It is beyond dispute that the right to vote is of the most fundamental significance under our constitutional structure." *Saucedo, supra*, *10 (internal quotations omitted). While there is no fundamental right to vote *by mail*, "the privilege of absentee voting is certainly deserving of due process," and once the state provides a means of voting by mail, it must be administered in accordance with due process. *Id.* (internal quotations omitted); *Zessar*, 2006 WL 642646, at *6 ("There is no question

that the federal constitution does not require states to create absentee voting regimes...[b]ut once they create such a regime, they must administer it in accordance with the Constitution.”). This Court should accord significant weight to this factor, as the *Saucedo* court did, 2018 WL 3862704, at *10, because in the event of an erroneous deprivation under current law, “there is no recourse for the voter and no way to remedy the loss of that vote in that election.” *Zessar*, 2006 WL 642646, at *7.

c. Risk of erroneous deprivation and probable value of additional or substitute procedures

There is a substantial risk of an erroneous determination of a signature mismatch that will disenfranchise a voter, given that lay election officials are empowered to reject ballots based on a simple eyeball comparison of signatures. Ballot board members under Texas law are required to have no training in handwriting analysis, and the State does not provide any. Even in the absence of any expert testimony as to handwriting analysis, federal courts have recognized that “the task of handwriting analysis by laypersons...is fraught with error.” *Kemp, supra* at *9 (quoting *Saucedo, supra*, at *11, which featured the deposition testimony of Dr. Mohammed).

Plaintiffs here have produced the same expert from *Saucedo*, whose testimony establishes that, even if ballot board members were to undergo some training, it still would be insufficient to allow a sufficient handwriting analysis. Dr. Mohammed avers that even an expert handwriting analyst requires ten signature samples and sufficient time, in appropriate conditions including proper lighting and magnification equipment, to make a reliable determination whether a given signature is genuine.

Not only is the risk of erroneous deprivation high, but it is exceedingly simple to protect against this risk with additional procedures. A perceived signature mismatch flagged by the ballot board would require no more than a simple phone call, email, or letter to the voter, who could

verify that she indeed cast the ballot in question. Even where federal courts have acknowledged that the risk of erroneous deprivation may be *minimal*, they have still found this factor favors the plaintiffs challenging such statutes because the remedy is so very simple. *E.g.*, *Martin*, 2018 WL 5276242 at *9 (“While the Court recognizes that the risk of an erroneous deprivation is by no means enormous, permitting an absentee voter to resolve an alleged signature discrepancy nevertheless has the very tangible benefit of avoiding disenfranchisement.”); *Zessar*, 2006 WL 642646, at *9 (“It is apparent that the risk of erroneous deprivation of the protected interest in absentee voting is not enormous, but the probable value of an additional procedure is likewise great in that it serves to protect the fundamental right to vote.”).

d. Government’s interest

The courts that have declared mail-ballot rejection regimes like Texas’s invalid, and mandated additional procedures to comply with the constitution, have recognized the strong interest the State has in “maintaining the integrity of elections” and avoiding unnecessary burdens, *Martin*, 2018 WL 5276242 at *9, they have held that providing voters a means of curing or validating a perceived signature mismatch imposes minimal burdens that are justified. *Id.*; *Saucedo*, 2018 WL 3862704 at *14; *Zessar*, 2006 WL 642646 at *9.

Texas already provides a means for those who cast provisional ballots to provide certain documentation to election officials within a period of days after Election Day, for example, documents reflecting their true residency and eligibility to vote. This necessarily already tasks election officials in every county in Texas with making factual determinations as to whether a provisional voter was eligible to vote and whether their vote should be counted, during a certain period after the election. There is no reason Texas cannot afford the same period of time for those whose ballots are identified as perceived signature mismatch to confirm that they indeed submitted the ballot and signed the envelope, so that the ballot may be counted. Voters are already invited,

when they apply to vote by mail, to supply their “phone number and/or email address,” “in case our office has questions.” *See, e.g.*, Exhibit 4 (V. Guerrero provided his phone number). The only question at issue is confirming the voters’ identity—that they did submit the ballot, not somebody else pretending to be them. Affording this process would actually assist in combatting fraudulent voting, by requiring the contacting of voters with questionable signatures, which would permit the validation of valid ballots and assist state authorities in identifying those instances in which the voter did not actually sign the envelope attributed to them. If the Court believes a more formal process would be appropriate, it may require some kind of written reply from the voter, or even a personal visit to the voting office (for those who can do so). Whatever level of formality is judged to be necessary, some manner of simply verifying that the voter cast the ballot that was submitted in her name can be easily implemented.

III. The Lack of Uniform Standards for Reviewing Voter Signatures Violates Equal Protection.

a. Equal Protection Standard

“[O]ne source of [the] fundamental nature [of the right to vote] lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). “[T]he State may not, by...arbitrary and disparate treatment, value one person's vote over that of another.” *Id.* at 104-05. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”). It must be remembered that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The Florida recount procedure at issue in *Bush* required the recount teams to consider the “intent of the voter” as to whether to count an incompletely-perforated chad. *Bush*, 531 U.S. at 530. Like that requirement, the Texas requirement to examine the application and carrier envelope signatures to determine whether one was “executed by a person other than the voter,” Tex. Elec. Code § 87.041(b)(2), may be “unobjectionable as an abstract proposition and a starting principle.” *Bush*, 531 U.S. at 530. But, also like in *Bush*, the “problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.” *Id.*

b. Texas process

Texas imposes no uniform standards governing the review and acceptance of carrier envelopes, which determines whether a ballot is going to be accepted for counting or rejected.

Not only are there no standards governing this review across counties, but there is no training required for EVBB members who will be performing the review. The EVBB members are tasked with, among other things, reviewing voters’ handwriting in the signatures on the carrier envelopes to see if it matches the signature on the voter application. Like the county canvassing boards at issue in *Detzner*, these EVBBs “are staffed by laypersons that are not required to undergo—and many do not participate in—formal handwriting-analysis education or training.” *Detzner, supra*, at *2. The federal district court in *Detzner* further pointed out that “handwriting experts are often challenged under *Daubert*. There is no way that any member of a canvassing board could survive a *Daubert* challenge yet the State of Florida empowers them to declare ballots illegal.” *Id.* at *2 n.3.

Subjecting voters’ mail-ballots to review that in many cases disenfranchises the voter but is guided by no statewide standards or training of those performing the review violates equal protection of the law, as the review inescapably will vary from county to county. A voter’s ballot

that may be rejected by the Starr County EVBB in the March 2018 primary might have been accepted and counted if reviewed by another county's EVBB, or even by the Starr County EVBB when it is staffed by different members in the November election.

The disparities summarized above between counties indicates unequal application is a problem in Texas.

IV. The Manner In Which the Starr County EVBB Reviewed Carrier Envelopes for Acceptance in This Election Violates Equal Protection.

While the procedures challenged herein are unconstitutional even when implemented as required under the statutes and regulations, the Starr County EVBB worsened the constitutional infirmities in the March 2018 primaries by the particular manner in which it undertook review of the carrier envelopes.

Under no circumstances is it permissible under Texas law for an individual member of an EVBB to be vested with the authority to unilaterally determine whether a carrier envelope meets the requirements for acceptance. But that is exactly what happened here. The Starr County EVBB in the March 2018 primaries divided the mail ballot carrier envelopes they received into stacks for each individual member, and each individual member decided whether to accept or reject a given ballot in their stack. **Exhibits 16, 17.**

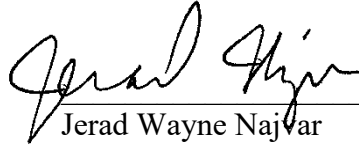
Thus, in this case, the Plaintiffs and the voters whose ballots were cast in Starr County were subjected to unequal treatment within the EVBB itself, as the standards of review applied by each member of the board inarguably varied.

Conclusion

For the above reasons, Plaintiffs respectfully request that the Court grant this motion for summary judgment and enter a declaratory judgment declaring the challenged statutes and procedures unconstitutional. Plaintiffs further request that, after any consideration the Court

deems necessary of the particular additional procedures appropriate, the Court enter a permanent injunction by separate order, requiring that constitutionally sufficient procedures be afforded to voters. Plaintiffs further request any additional relief to which they are justly entitled.

Respectfully submitted,



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Certificate of Service

The undersigned counsel hereby certifies that on November 30, 2018, the foregoing document, and any accompanying exhibits and proposed order, was served on the counsel of record in this matter by means of the court's CM/ECF system:

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