

No. 20-50407

**In the United States Court of Appeals
for the Fifth Circuit**

Texas Democratic Party, Gilbert Hinojosa, Chair of the Texas Democratic Party,
Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia,
Plaintiffs-Appellees,

v.

Greg Abbott, Governor of the State of Texas,
Ruth Hughs, Texas Secretary of State, Ken Paxton, Texas Attorney General,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

**AMICI CURIAE BRIEF OF PUBLIC INTEREST LEGAL FOUNDATION
AND LANDMARK LEGAL FOUNDATION IN SUPPORT OF
APPELLANTS**

Kaylan L. Phillips
Counsel of Record
Public Interest Legal Foundation
32 E. Washington St., Suite 1675
Indianapolis, Indiana 46204
(317) 203-5599
(888) 815-5641 (facsimile)
kphillips@publicinterestlegal.org

J. Christian Adams
Public Interest Legal Foundation
1555 King St. Ste. 200
Alexandria, VA 22314
(317) 203-5599
adams@publicinterestlegal.org

Michael J. O'Neill
Matthew C. Forsys
Landmark Legal Foundation
19415 Deerfield Ave., Ste. 312
Leesburg, VA 20176
(703) 554-6100
mike@landmarklegal.org
matt@landmarklegal.org

Richard P. Hutchison
Landmark Legal Foundation
3100 Broadway, Ste. 1210
Kansas City, MO 64111
(816) 931-5559
pete.hutch@landmarklegal.org
Counsel for Amici

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

In accordance with Fifth Circuit Rule 29.2, *Amici* disclose that no one has an interest in this brief beyond the named *Amici*.

/s/ Kaylan L. Phillips
Counsel of Record

TABLE OF CONTENTS

	Page
Supplemental Statement of Interested Parties	i
Table of Authorities	iv
Interest of <i>Amici Curiae</i>	1
Summary of Argument	2
Argument.....	2
I. Plaintiffs’ Allegations Are Insufficient to State a Claim Under Section 11(b) of the VRA.....	2
A. Plaintiffs Failed to Plead a Violation of the VRA	3
B. Courts Have Rejected Much More Serious Allegations Under Section 11(b)	4
II. Vote-By-Mail Is More Vulnerable to Fraud than Traditional Voting and Should Therefore Be Used Only in Limited Cases	6
A. Vote-By-Mail Is More Vulnerable to Fraud than Traditional Voting.....	7
B. Expanding Vote-By-Mail Will Expose Texas’s Voting System to Ballot Harvesting	10
C. California Serves as a Warning of the Dangers of Unchecked and Unregulated Vote-By-Mail Voting	12
III. History and Case Law Do Not Support Plaintiffs’ Arguments Under the Twenty-Sixth Amendment	18

Conclusion21

Certificate of Service22

Certificate of Compliance23

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Crawford v. Marion County Election Bd.</i> , 553 U.S. 181 (2008).....	10
<i>Gremillion v. Rinaudo</i> , 325 F. Supp. 375 (E.D. La. 1971)	4-5
<i>Jolicoeur v. Mihaly</i> , 5 Cal. 3d 565, 96 Cal. Rptr. 697, 488 P.2d 1 (Cal. 1971)	20
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	18-19
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	17
<i>Tex. Democratic Party v. Abbott</i> , No. 20-438, 2020 U.S. Dist. LEXIS 94953 (W.D. Tex. May 19, 2020)	18
<i>United States v. Brown</i> , 494 F. Supp. 2d 440 (S.D. Miss. 2007)	4, 8
<i>United States v. New Black Panther Party for Self-Defense, et al.</i> , Case No. 2:09-CV-00065-SD (E.D. Pa. 2009)	5-6
<i>United States v. Texas</i> , 445 F. Supp. 1245 (S.D. Tex. 1978)	19-20
Constitutional Provisions:	
U.S. Const. Art I, § 4.....	2
U.S. Const. amend. XXVI	18
Statues and Regulations:	
52 U.S.C. § 10307(b)	3

	Page
52 U.S.C. § 20507	9
2016 Cal. Stat. AB-1921	13
2016 Ca. Stat. SB-450.....	13
 Cal. Elec. Code:	
§ 354.5	15
§ 3011	14
§ 3017	13
 Miss. Code Ann. § 23-15-575.....	 4
 Tex. Elec. Code:	
§ 82.001 <i>et seq</i>	10
§ 82.003	18
§ 84.001	10
§ 84.0041	10
§ 86.001	11
§ 86.007	11
§ 276.012	11
§ 276.013	10-11
 Other Authorities:	
 Cong. Research Service, <i>The Eighteen-Year Old Vote: The Twenty Sixth Amendment and Subsequent Voting Rates of Newly Enfranchised Age Groups</i> , May 20, 1983, Report No. 83-103	
	19
 Chuck DeVore, <i>Harvesting votes to win in 2020</i> , Forbes (Feb. 12, 2020)	
	11
 Holly Hansen, <i>Alleged ballot harvesting in Harris County prompts investigation request by Secretary of State</i> , The Texan, May 8, 2020.....	
	11-12

	Page
John Myers, <i>Nearly 84,000 duplicate voter records found in audit of California’s ‘motor voter’ system</i> , Los Angeles Times (Aug. 9, 2019)	14
Pew Center on the States, <i>Inaccurate, Costly and Inefficient: Evidence that America’s Voter Registration System Needs an Upgrade</i> (February 2012)	9
Senate Report No. 26, 92 Cong. 1st Sess. (1971)	20
Stanford University, <i>Signature Verification, and Mail Ballots: Guaranteeing Access While Preserving Integrity, A Case Study of California’s Every Vote Count Act</i> (May 15, 2020)	14-15
Texas Secretary of State, <i>Referral letter from Keith Ingram, Director of Elections to David Maxwell, Director of Law Enforcement, Office of Attorney General</i> , April 23, 2020	11
<i>The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration</i> (2014)	8-9
<i>U.S. Elections: Report of the Commission on Federal Election Reform 46</i> (2005) (“Carter–Baker Report”)	7, 10
U.S. House of Representatives Committee on House Administration Republicans, <i>Political Weaponization of Ballot Harvesting in California 2</i> (May 14, 2020)	15-17

INTEREST OF *AMICI CURIAE*

Landmark Legal Foundation is a national public interest law firm dedicated to defending the original meaning of the U.S. Constitution and promoting individual liberty. Landmark commits significant resources to issues related to integrity in the election system. Landmark often works in collaboration with grassroots organizations and individuals who share the goal of protecting the sanctity of the ballot box.

The Public Interest Legal Foundation's charitable missions include working to protect the fundamental right of individuals and persons to engage in constitutionally protected speech, ensuring the enforcement of voter qualification laws and election administration procedures, and providing assistance to states that seek to exercise their constitutional powers to determine the rules and laws pertaining to their own state elections. The Public Interest Legal Foundation has sought to advance the public's interest in balancing state control over elections with Congress's constitutional authority to protect the public from racial discrimination in voting. This is best done by ensuring that the Voting Rights Act and other federal election laws are preserved and followed as the drafters intended not as those who are opposed to truthful speech would prefer.

Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored

this brief in whole or in part nor did any person, other than *Amici* or their counsel, contribute money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The district court’s decision in this case improperly interferes with the State of Texas’s authority under the U.S. Constitution to regulate the time, place, and manner of elections. U.S. Const. Art. I, § 4. *Amici* submit this brief in support of Defendants-Appellants to make three points: (1) Plaintiffs’ allegations of voter intimidation fail to state a claim under Section 11(b) of the Voting Rights Act (VRA); (2) Vote-by-mail is more vulnerable to fraud than traditional voting and should therefore only be used in limited cases; (3) History and case law do not support the district court’s conclusion that the Attorney General’s actions violate the 26th Amendment.

For reasons set forth in Defendants-Appellants brief and presented below, *Amici* urge the Court to reverse the district court’s order and vacate the preliminary injunction.

ARGUMENT

I. Plaintiffs’ Allegations Are Insufficient to State a Claim Under Section 11(b) of the VRA.

By characterizing the Attorney General’s communications as “threats,” Motion for Preliminary Injunction p. 26, the Plaintiffs present an alarming attack

on free speech, the rule of law, and the authority of public officials to participate in public discourse about the reasonable exercise of their duties. Simply providing guidance on the Attorney General's interpretation of state law cannot constitute violations of the VRA in this circumstance. Plaintiffs' allegations that the communications at issue in this case constituted threats and voter intimidation in violation of Section 11(b) of the VRA are in reality an attack on both constitutionally protected speech and on the authority of a state official to communicate about state law. The district court's ruling on these points is an unconstitutional application of the VRA.

A. Plaintiffs Failed to Plead a Violation of the VRA.

As an initial matter, Plaintiffs cannot be likely to succeed on a claim that they did not assert in their complaint. The Plaintiffs did not plead a violation of the VRA Section 11(b), 52 U.S.C. § 10307(b). Plaintiffs' Amended Complaint alleges a violation of "Title 42 U.S.C. § 1985, part of the Civil Rights Act of 1871," not 52 U.S.C. § 10307(b). Plaintiffs' Amended Complaint p. 19. Yet, in their motion for preliminary injunction, Plaintiffs claimed that they were seeking "a preliminary injunction pursuant to its as-applied claims relating to: ... (3) voter intimidation in violation of 52 U.S.C. § 10307(b)." Motion for Preliminary Injunction p. 14. However, even if Plaintiffs did plead a violation of Section 11(b) of the VRA, their claims fall woefully short.

B. Courts Have Rejected Much More Serious Allegations under Section 11(b).

Courts have been unwilling to apply Section 11(b) even in cases with more serious allegations of threatening behavior. For example, in *United States v. Brown*, Defendant Brown, acting as the administrator of a county primary election, issued a press release listing 174 voters who he said “might be challenged under the authority of Miss. Code Ann. § 23-15-575 if they attempted to vote in the Democratic primary.” *United States v. Brown*, 494 F. Supp. 2d 440, 474 (S.D. Miss. 2007), *aff’d*, 561 F.3d 420 (5th Cir. 2009). “Each of the 174 voters he identified is white.” 494 F. Supp. 2d at 474 n.53.

The Department of Justice argued “that Brown’s public ‘threat’ to challenge persons on the list of 174 white voters if they attempted to vote in the 2003 Democratic primary violates Section 11(b).” *Id.* at 477 n. 56. The district court disagreed. “Although the court does conclude that there was a racial element to Brown’s publication of this list, the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b).” *Id.*

In *Gremillion v. Rinaudo*, the plaintiff alleged “that the Chief-of-Police of New Roads, Louisiana (the parish seat), Mr. Kerby Aguillard, who was neither a voting commissioner nor a poll watcher, assisted...voters in the voting machines while attired in his police uniform.” *Gremillion v. Rinaudo*, 325 F. Supp. 375, 376 (E.D. La. 1971). The court dismissed the complaint in part because it was “unable

to perceive why assistance from a uniformed police officer, without anything more, should on its face be held to be coercion and intimidation in violation of the 1965 Voting Rights.” *Id.* at 379.

Plaintiffs’ allegation that an Attorney General’s guidance letter is voter intimidation raises the important issue of what constitutes protected free speech versus “intimidation” and “coercion.” Plaintiffs’ theories of liability abuse Section 11(b) of the VRA. This case is part of a broader national strategy to use Section 11(b) to intimidate and silence organizations and officials who seek to improve the integrity of American elections. To the Plaintiffs, mere public discussion of election integrity or laws that prohibit electoral fraud is seen as threatening or coercive. Plaintiffs’ allegations seek to expand the reach of Section 11(b) of the VRA beyond what the drafters intended and what courts have allowed. Moreover, Plaintiffs’ version of Section 11(b) would intrude into the power reserved to the States to administer their own elections and speak truthfully about state election administration laws.

A factual circumstance more suited to Section 11(b) than Plaintiffs’ allegations arose in the Eastern District of Pennsylvania in 2009. That case, *United States v. New Black Panther Party for Self-Defense, et al.*, saw two members of the defendant’s party standing outside of a polling location wearing paramilitary uniforms, shouting racial slurs, and brandishing a weapon – a nightstick – in front

of a polling place. Complaint at 2-3, *United States v. New Black Panther Party*, Case No. 2:09-CV-00065-SD (E.D. Pa., filed Jan. 7, 2009). The Department of Justice alleged that the defendants engaged in the following activities towards “protected individuals: brandishing a deadly weapon toward them, directing racial slurs and insults at them, and attempting to prevent their authorized ingress and egress at the polling locations.” *Id.* at 7.¹ Injunctive relief was entered against the defendant who brandished a weapon but not against the identically dressed defendant who stood by.

A guidance letter from a state attorney general’s office does not come close to the level of genuine threats and intimidation prohibited by Section 11(b).

II. Vote-By-Mail Is More Vulnerable to Fraud than Traditional Voting and Should Therefore Be Used Only in Limited Cases.

The vote-by-mail process contains opportunities for fraud not available in traditional voting. Unlike in-person voting, ballots are not under the direction and control of trained poll workers. Ballots are mailed to voters (sometimes without their request or knowledge) and are left in unsecured mailboxes. Opportunities to illicitly collect and complete these ballots abound. Once ballots are completed, these ballots can sit in mailboxes for hours before collection. While Texas has significant protections in place to deter and punish fraud that may occur within the

¹ A default judgment was entered against two of the defendants in the case enjoining them from repeating the behavior.

vote-by-mail process, the system still contains vulnerabilities. These vulnerabilities may have been exploited in 2018 when ballot harvesting appeared to occur in Harris County. Expanding vote-by-mail will undoubtedly expose this system to other fraudulent and illegal ballot harvesting schemes.

A. Vote-By-Mail Is More Vulnerable to Fraud than Traditional Voting.

Nonpartisan, national commissions have concluded that vote-by-mail is more vulnerable to fraud than traditional voting. *See U.S. Elections: Report of the Commission on Federal Election Reform* 46 (2005) (“Carter–Baker Report”).² Voting occurs outside the strictly regulated confines of the precinct, where election officials guard against undue influence and electioneering, ensure compliance with voting laws and maintain chain of custody of ballots. Thus, the vote-by-mail process “remains the largest source of potential voter fraud.” *Id.* Fraud occurs in several ways. First, blank ballots mailed to wrong addresses or apartment buildings can be intercepted. *Id.* Second, voters are particularly susceptible to pressure or intimidation when voting at home or in a nursing home. *Id.* Finally, third-party organizations can operate illicit “vote buying schemes” that are “far more difficult to detect when citizens vote by mail.” *Id.*

² Available at <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf> (last visited July 6, 2020).

Even a study skeptical of the incidence of voter fraud generally acknowledges the dangers in vote-by-mail. It notes that – when fraud does occur, “absentee ballots are often the method of choice.” *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 56 (2014).³

In *Brown*, for example, the district court found that an absentee/mail voting scheme existed in Mississippi that replaced the will of the voter with the votes of harvester-notaries. 494 F. Supp. 2d 440, at 457. “This was undeniably done on a large scale in Noxubee County. Nearly every local candidate running for office had one or more notaries doing absentee ballot work for them, traveling around and collecting ballots from persons they considered supporters.” *Id.* After a trial with dozens of witnesses, the district court’s opinion provides a rare account of the mechanics of illegal vote harvesting that occurred in this Circuit. *Brown*, at 457-61. One witness credited by the district court testified that a vote harvester “actually marks Wood’s ballot for her and selects candidates when Wood does not know whom she wants to vote for because, as Wood put it, Windham ‘knows folks’ better than Wood does.” *Brown* at 460.

³ Available at https://elections.delaware.gov/pdfs/PCEA_rpt.pdf (last visited July 6, 2020).

Other administrative failures exacerbate the problems of an election conducted outside the view of election official supervision. Millions of voters' names appear on multiple state voter registration lists because states do not routinely share registration data. *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* at 28. In 2012, Pew Research Center found that about 24 million (one in eight) voter registrations were no longer valid or contained significant inaccuracies with 1.8 million deceased individuals listed on voter rolls and 2.75 million names on registrations in more than one state. Pew Center on the States, *Inaccurate, Costly and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (February 2012).⁴

These inaccuracies can, in part, be traced to states' failures to enforce the provisions of the National Voter Registration Act (NVRA), which require state election officials to ensure the accuracy of registration lists by confirming residency and periodically removing the names of dead or out of state residents from voter rolls. 52 U.S.C. § 20507.

These registration errors make an already vulnerable voting system even more susceptible to fraud. Should ineligible individuals receive vote-by-mail

⁴ Available at https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.pdf (last visited July 6, 2020).

ballots, harvesting groups can easily exploit the situation and commit wholesale voter fraud. Such exploitation has occurred in the past. In 2004, for example, 1,700 voters registered in both New York and California requested vote-by-mail ballots to be mailed to their home in the other state with no investigation. Carter-Baker Report at 12.

Vote-by-mail ballots mailed to addresses of those who have moved or died are vulnerable to ballot harvesting. Unaccounted-for ballots are currency to harvesters. The U.S. Supreme Court has recognized incidents of voting fraud that have occurred in vote-by-mail scenarios. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-196 (2008). The court noted that fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – “perpetrated using absentee ballots” demonstrated “that not only is the risk of voter fraud real but that it could affect the outcome of a close election.” *Id.*

B. Expanding Vote-by-Mail Will Expose Texas’s Voting System to Ballot Harvesting.

Texas has certain protections to help ensure the integrity of the vote-by-mail ballot in place. These include, among other things: limiting who may cast vote-by-mail ballots (Tex. Elec. Code §§ 82.001 *et seq.*); criminalizing conduct that encourages voters who are not eligible to apply to vote-by-mail (Tex. Elec. Code §§ 84.0041, 276.013); requiring voters to submit an application to vote-by-mail (Tex. Elec. Code. §§ 84.001 *et seq.*); screening those applications to ensure

eligibility (Tex. Elec. Code § 86.001); establishing an election day deadline for returning vote-by-mail ballots (Tex. Elec. Code. § 86.007); and criminalizing ballot harvesting (Tex. Elec. Code. §§ 276.012, 276.013).

Despite these protections, ballot harvesting apparently still occurs. In Harris County, suspicions were raised when around 32,000 more votes were cast by mail than would be expected based on the age of voters residing in the county. Chuck DeVore, *Harvesting votes to win in 2020*, Forbes (Feb. 12, 2020).⁵ Indeed, in April 2020, Secretary of State Ruth R. Hughs recently referred a complaint alleging ballot harvesting to the Texas Attorney General for criminal investigation. In the referral, Texas Director of Elections Keith Ingram notes that “people with prior forgery convictions picked up large batches of ballot by mail applications for local campaigns and a number of voter ballots were marked identically.” Texas Secretary of State, *Referral letter from Keith Ingram, Director of Elections to David Maxwell, Director of Law Enforcement, Office of Attorney General*, April 23, 2020.⁶

The complaint includes recorded audio where individuals discuss gaining access to nursing homes where harvesters “will get them to absentee vote for who

⁵ Available at <https://www.forbes.com/sites/chuckdevore/2020/02/12/harvesting-votes-to-win-in-2020/#fb1062136e9d> (last visited July 6, 2020).

⁶ Available at https://www.scribd.com/document/460483905/SOS-Letter-to-AG-on-Harvesting-Complaint#fullscreen&from_embed (last visited July 6, 2020).

we’re working for.” Holly Hansen, *Alleged ballot harvesting in Harris County prompts investigation request by Secretary of State*, The Texan, May 8, 2020.⁷

Documentation supporting the complaint also includes “electronic copies of applications for ballots by mail, returned ballot carrier envelopes, and even actual ballots from 2018.” *Id.* What appeared to be identical handwriting was found on 32 absentee ballot applications that were submitted in identical pre-printed envelopes using the same postage stamp style. *Id.* All resided in Precinct 259 in Harris County. *Id.*

Radically expanding vote-by-mail will increase the likelihood that this type of activity will occur during the 2020 election.

C. California Serves as a Warning of the Dangers of Unchecked and Unregulated Vote-By-Mail Voting.

Vote-by-mail can serve as a useful tool to ensure that certain voters with specified limitations have a chance to participate in the political process. States, however, must be allowed to exercise their Article I authority to enact and enforce certain reasonable protective measures to ensure their election system is not exploited. That includes limiting those eligible to vote-by-mail. The district court’s decision eviscerates Texas’s reasonable efforts to protect the integrity of its voting

⁷ Available at <https://thetexan.news/alleged-ballot-harvesting-in-harris-county-prompts-investigation-request-by-secretary-of-state/> (last visited July 6, 2020).

system by opening vote-by-mail to every person. It also exposes Texas to the same types of election issues that have recently plagued California.

While Texas's robust voter protection laws prohibit much of the activity that creates chaos in California, the district court's interference opens the door for the possibility of voting fraud. California stands as a warning to all states of what happens when states – or in this case courts – revoke reasonable protections on voting and when officials shirk their responsibility to enforce the law.

In 2016, California amended its election laws to permit any individual to return the mail ballot of another with no limitation as to the number of ballots collected or relationship to the voter. 2016 Cal. Stat. AB-1921. Ballot collectors can be paid by any source so long as compensation is not based on the number of ballots collected. Cal. Elec. Code § 3017(e)(1). Next, California's Voter's Choice Act (VCA) encouraged counties to shift to vote-by-mail. 2016 Ca. Stat. SB-450.

California's liberal ballot-collection laws and its failure to maintain accurate voter registration records and properly implement the VCA combined to create the perfect storm on election day 2018. First, counties were overwhelmed with requests by voters who never received their vote-by-mail ballots, forcing the state

to implement a “Where’s My Ballot?” app to allow voters to track their vote-by-mail ballots.⁸

Election officials in California acknowledged widespread registration errors leading to frustration, confusion, and possible disenfranchisement in the 2018 election. An independent audit of voting registration practices, commissioned by the state, concluded that California’s efforts to automate voter registration resulted in close to 84,000 duplicate registrations with more than double the number with faulty political party designations. John Myers, *Nearly 84,000 duplicate voter records found in audit of California’s ‘motor voter’ system*, Los Angeles Times (Aug. 9, 2019).

In California, individuals who witness the execution of a vote-by-mail ballot are required to write their name, signature, and relationship to the voter on the vote-by-mail envelope. A failure to provide this information, however, will not cause a disqualification of the ballot. Cal. Elec. Code. §3011(a) – (c).

Laws requiring signature verification on vote-by-mail ballots are not enough to prevent fraud as some states have “limited statewide uniform criteria or standards for signature verification, and what ‘counts’ as a matching signature varies enormously from county to county.” Stanford University, Signature

⁸ Available at <https://www.sos.ca.gov/elections/ballot-status/wheres-my-ballot/> (last visited July 6, 2020).

Verification, and Mail Ballots: *Guaranteeing Access While Preserving Integrity, A Case Study of California’s Every Vote Counts Act 2* (May 15, 2020).⁹

Compounding the problems associated with lack of uniform standards for signature verification, states like California permit voters who are unable to sign a vote-by-mail ballot to mark their ballot with an “X.” Cal. Elec. Code. § 354.5(a). A witness must sign near the mark but does not have to provide his/her name, relationship to the voter or other identifying information. *Id.*

Unscrupulous individuals exploited lack of substantive voter protections in California’s election law to collect and deliver vote-by-mail ballots in 2018. “[P]olitical operatives, known as ‘ballot brokers,’ ...identify specific locations, such as large apartment complexes or nursing homes” to exploit the voting process. U.S. House of Representatives Committee on House Administration Republicans, *Political Weaponization of Ballot Harvesting in California 2* (May 14, 2020) (“Committee Report”).¹⁰ After establishing relationships with persons in these locations, ballot brokers would “encourage, and even assist, these unsuspecting voters in requesting a mail-in ballot; weeks later when the ballot arrives in the mail

⁹ Available at https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/SLS_Signature_Verification_Report-5-15-20-FINAL.pdf (last visited July 6, 2020).

¹⁰ Available at <https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL.pdf> (last visited July 6, 2020).

the same ballot brokers are there to assist the voter in filling out and delivering the ballot.” *Id.* As noted in the Committee Report, “[t]his behavior can result in undue influence in the voting process and destroys the secret ballot, a long-held essential principle of American elections intended to protect voters.” *Id.* It continued, “These very scenarios are what anti-electioneering laws at polling locations are meant to protect against. A voter cannot wear a campaign button to a polling location, but a political operative can collect your ballot in your living room?” *Id.*

Ballot harvesting appeared to affect the outcome of several races for the U.S. House of Representatives in California. For example, in the 39th Congressional district, Young Kim, the Republican candidate, led the vote count on election night and in the week following election day. Ms. Kim even traveled to Washington D.C. for orientation as a new member of the House. “Two weeks later, the Democrat challenger was declared the winner after 11,000 mail ballots were counted, many of which were harvested.” *Id.* at 3. In the 21st Congressional district, Republican David Valadao led by almost 5,000 votes on election night. The final tally of votes led to Mr. Valadao’s Democratic challenger winning by 862 votes – a swing of 5,701 votes. *Id.* These votes, “heavily favored the Democrat candidate at a much higher rate than previously counted ballots.” *Id.* The swing in counted votes was due largely to large numbers of vote-by-mail ballots that had been dropped off at the polls and were processed and counted in the days following

the election. “In Orange County alone, 250,000 mail ballots were turned in on Election Day.” *Id.* at 4. Such last-minute actions can overwhelm election officials’ ability to properly validate every ballot before the certification deadline.

California’s insufficient signature verification standards only add to this post-election chaos.

This uncertainty and after-the-fact results undermine the public’s confidence in the integrity of the election process. And “[c]onfidence in the integrity of our election process is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The Supreme Court continued, “Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.” *Id.*

Inherent vulnerabilities in vote-by-mail systems require limiting who votes by mail. As voter rolls are not accurate (either because of state’s unwillingness to share registration data or its failure to follow the mandates of the NVRA) and as voting by mail is the method of choice for those who seek to commit fraud, Texas’s reasonable limitations on vote-by-mail should be permitted.

California differs from Texas in that it does not limit who may handle ballots and places few restrictions on ballot collection. This does not mean, however, that Texas should adopt no-excuse vote-by-mail. The best way to avoid these problems (and to avoid compounding the illicit activities that apparently occurred in 2018) is

to limit the number of persons voting by mail. Texas does this and will continue to do this provided the Court overturns the lower court's decision.

III. History and Case Law Do Not Support Plaintiffs' Arguments Under the Twenty-Sixth Amendment.

Plaintiffs justified their request for a preliminary injunction by claiming that the Attorney General's interpretation of state election law discriminates against young voters because of age in violation of the Twenty-Sixth Amendment. The district court agreed. *Tex. Democratic Party v. Abbott*, No. 20-438, 2020 U.S. Dist. LEXIS 94953, *11 (W.D. Tex. May 19, 2020).

The Twenty-Sixth Amendment lowered the voting age from 21 years to 18 years. U.S. Const. amend. XXVI. It prohibits the denial of the right to vote because of age. *Id.* It does not prohibit reasonable protections used by states to ensure the integrity of the vote. The Attorney General's interpretation of Tex. Elec. Code § 82.003 does not deny any person the right to vote because of age. It is a commonsense condition imposed by the state to ensure an orderly election process and protect the integrity of the vote.

Before the enactment of the Twenty-Sixth Amendment, Congress passed certain amendments to the VRA that lowered the voting age from 21 to 18. As part of its findings, Congress noted that while the law imposed certain "national defense responsibilities" upon 18-year-olds, it denied those individuals the right to vote. *See Oregon v. Mitchell*, 400 U.S. 112, 223 (1970). Congress considered such

treatment “particularly unfair” and should thus be remedied by lowering the voting age. *Id.* These amendments did not create a universal ban on any secondary age requirements placed on absentee voting – they simply ensured those 18 and over the right to vote. Congress justified such prohibitions because the law obligated 18-year-olds to serve in the military but denied those individuals the right to vote. Congress, therefore, never considered whether an absentee voting requirement based on age would unduly burden the right to vote.

Because the VRA amendments only applied to federal elections (not state and local elections), Congress, with support from the states, proposed an amendment to the Constitution for universal voting for all citizens over 18. *See Oregon v. Mitchell*, 400 U.S. 112 (1970). Ratification occurred after extensive debates on the abilities of 18-year-olds to conscientiously participate in the election process. Congress explained that most people between 18 and 21 had completed high school, most 18-year-olds bear all or most of an adult’s responsibilities and that younger voters should be extended the opportunities to influence in a constructive manner. *See* Cong. Research Service, *The Eighteen-Year Old Vote: The Twenty Sixth Amendment and Subsequent Voting Rates of Newly Enfranchised Age Groups*, May 20, 1983, Report No. 83-103.

The debates describe absentee voting not as a privilege or inherent right but as a “special burden” used by states to “dissuade [young voters] from participating

in the election.” *United States v. Texas*, 445 F. Supp. 1245, 1254 (S.D. Tex. 1978) (citing Senate Report No. 26, 92 Cong. 1st Sess. (1971)). Congress labeled absentee voting laws a tool used to suppress young voters – not as an automatic right subject to the same scrutiny and protections as the general right to vote. Plaintiffs, in other words, have it exactly backwards. Congress never intended the Twenty-Sixth Amendment to apply within the context of absentee voting.

In earlier litigation, the Twenty-Sixth Amendment has been used to invalidate laws designating college students as domiciliaries of their parents’ homes. These cases all involve the right to vote – not a perceived right to cast an absentee ballot. *See United States v. Texas*, 445 F. Supp. 1245. Nowhere in these cases do courts rule that age restrictions as applied to absentee voting are improper under the Twenty-Sixth Amendment. Rather, parties characterized absentee voting as a tool used by states to suppress college-age citizens from voting. *See Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 575, 96 Cal. Rptr. 697, 702, 488 P.2d 1, 7 (Cal. 1971) (“[R]espondents have abridged petitioners’ right to vote in precisely one of the ways that Congress sought to avoid--by singling minor voters out for special treatment and effectively making many of them vote by absentee ballot.”).

The ratification history and case law pertaining to the Twenty-Sixth Amendment do not support Plaintiffs’ expansive interpretation. To the contrary, the debates suggest that Congress considered absentee voting a barrier erected by

states to dissuade young people from voting, not a matter subject to the Amendment's protections on the right to vote.

CONCLUSION

For these reasons, the Court should reverse the district court's order and vacate the preliminary injunction.

Dated: July 6, 2020

Respectfully Submitted,

/s/Kaylan L. Phillips
Counsel of Record
Public Interest Legal Foundation
32 E. Washington St., Suite 1675
Indianapolis, Indiana 46204
(317) 203-5599
(888) 815-5641 (facsimile)
kphillips@publicinterestlegal.org

J. Christian Adams
Public Interest Legal Foundation
1555 King St. Ste. 200
Alexandria, VA 22314
(317) 203-5599
adams@publicinterestlegal.org

Michael J. O'Neill
Matthew C. Forys
Landmark Legal Foundation
19415 Deerfield Ave., Ste. 312
Leesburg, VA 20176
(703) 554-6100
mike@landmarklegal.org
matt@landmarklegal.org

Richard P. Hutchison
Landmark Legal Foundation
3100 Broadway, Ste. 1210
Kansas City, MO 64111
(816) 931-5559
pete.hutch@landmarklegal.org
Counsel for Amici

CERTIFICATE OF SERVICE

I certify that on July 6, 2020, I electronically filed the foregoing Brief of *Amici Curiae* Public Interest Legal Foundation and Landmark Legal Foundation with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, causing it to be served on all counsel of record.

Dated: July 6, 2020

/s/Kaylan L. Phillips

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4451 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

Dated: July 6, 2020

/s/Kaylan L. Phillips