AN ASIAN AMERICAN CHALLENGE TO RESTRICTIVE VOTING LAWS: ENFORCING SECTION 208 OF THE VOTING RIGHTS ACT IN TEXAS

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ABSTRACT

Under Section 208 of the Voting Rights Act ("VRA"), any voter who is blind, disabled, or unable to read or write is entitled to assistance to vote by a person of the voter's choice. Section 208 guarantees that such voter may choose a person they trust to assist them in navigating the voting process and cast a ballot, with only two limitations: To prevent financial influence on the voter's ballot choices, the assistor cannot be the voter's employer or union representative. In Texas, this law protects millions of limited-English proficient ("LEP"), disabled, and illiterate citizens. In 2015, the Asian American Legal Defense and Education Fund ("AALDEF") filed suit against Texas under Section 208 of the VRA, challenging the state's voter assistance laws. These laws prohibited interpreters from providing voter assistance if they were not registered to vote in the same county as the voter needing assistance. The laws also limited

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voter assistance solely to marking and reading the ballot; this limitation prohibited assistors from answering clarifying questions about the ballot or otherwise providing basic information about the voting process as a whole, information upon which many Asian Americans and voters who are LEP, disabled, or illiterate relied.

In 2017, the Fifth Circuit ruled on Texas's appeal of AALDEF's successful 2015 Section 208 challenge to Texas's voter assistance laws. Preempting Texas's county residence requirement for voter assistance, the Fifth Circuit also rejected Texas's narrow interpretation that Section 208 assistance was only permissible for marking and reading the ballot. On remand, the district court permanently enjoined Texas from enforcing its voter assistance laws, among other forms of relief, that limited assistance to merely marking and reading the ballot. Three years later, in the wake of the 2020 election, Texas legislators enacted another broad set of voting restrictions through Senate Bill 1 ("S.B. 1"). Brazenly, S.B. 1 required assistors to take an oath limiting their assistance to merely marking and reading the ballot and used identical language from the Texas Election Code that the district court had enjoined in 2018. This Article delves into AALDEF's 2022 success modifying the 2018 permanent injunction to strike down S.B. 1's voter assistance restriction.

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INTRODUCTION

Under Section 208 of the Voting Rights Act ("VRA"), any voter who is blind, disabled, or unable to read or write is entitled to assistance by a person of the voter's choice.[1] In Texas, this law protects millions of limited-English proficient ("LEP"), disabled, and illiterate citizens.[2]

In 2015, the Asian American Legal Defense and Education Fund ("AALDEF") filed suit against Texas under Section 208 of the VRA on behalf of plaintiffs, Asian Pacific American Advocates (previously known as the Organization of Chinese Americans) - Greater Houston ("OCA-GH") and Indian American voter Mallika Das, challenging Texas's election assistance laws.[3] Mallika Das is a limited-English-speaking voter, and Williamson County election officials did not permit her adult son to assist her because he was registered to vote in neighboring Travis County and not Williamson County.[4] This same-county assistor restriction limited who could provide assistance to a voter in Texas.

In addition to limiting who was permitted to provide assistance, Texas's election provisions also limited the kind of assistance that voters could receive while in the presence of their ballot and carrier envelope.

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[1] Voting Rights Act of 1965, Pub. L. No. 89-110, Title II Section 208, amended by 52 U.S.C.A. § 10508 (1982) ("Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.").

[2] *See* sources cited *infra* n.57.

[3] Complaint, OCA-Greater Houston v. Texas, No. 1:15-CV-00679-RP, 2016 WL 9651777 (W.D. Tex. Aug. 12, 2016), *aff'd*, 867 F.3d 604 (5th Cir. 2017). AALDEF and its pro bono counsel, David Hoffman of Fish & Richardson, P.C., represented OCA-GH and Mallika Das. *Id.*

[4] OCA-Greater Houston, 867 F.3d at 608; OCA–Greater Houston v. Texas, 2016 WL 9651777, at *1 (W.D. Tex. Aug. 12, 2016) (referring to Ms. Das's son's registration in Travis County, Texas).

Under Texas's election laws, a voter's assistor was limited to merely "reading the ballot to the voter," "directing the voter to read the ballot," "marking the voter's ballot," and "directing the voter to mark the ballot."[5] These restrictive provisions prohibited voters' assistors from answering clarifying questions about the ballot or otherwise providing basic information about the voting process as a whole, upon which many Asian Americans[6] and voters who are LEP, disabled, or illiterate relied.

In 2017, the Fifth Circuit ruled on Texas's appeal of AALDEF's successful 2015 Section 208 challenge to these assistance-related election provisions.[7] Though Texas argued that the VRA provides for only a limited right to voting assistance, the Fifth Circuit rejected Texas's narrow reading of Section 208 that would have limited who could provide assistance and in what form.[8] The Fifth Circuit stated that voters are entitled to assistance while voting and that voting "plainly contemplates more than the mechanical act of filling out the ballot sheet."[9] In 2018, on remand, the district court permanently enjoined Texas's election provisions that limited Section 208 assistance.[10]

Three years later, in 2021, Texas once again threatened voter assistance protections guaranteed by Section 208. In response to the false rumors of voter fraud during the 2020 election, Texas legislators enacted a broad set of voting restrictions through Senate Bill 1 ("S.B. 1"), including restricting assistance for LEP, disabled, and illiterate voters at polling places.[11] Brazenly, S.B. 1 required assistors to take an oath limiting their assistance to merely marking and reading the ballot, and it used identical

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[5] TEX. ELEC. CODE ANN. § 64.0321 (West 2003). As explored in this Article, this provision was invalidated by *OCA Greater Houston v. Texas*, No. 15-CV-679-RP, 2018 WL 2224082 (W.D. Tex. May 15, 2018), *modified in part*, No. 15-CV-679-RP, 2022 WL 2019295, at *5 (W.D. Tex. June 6, 2022).

[6] *See* ELEC. § 64.0321. This Article uses the phrase "Asian Americans" as a political identity while recognizing that the phrase encompasses a wide variety of ethnic groups and has resulted in the marginalization of certain ethnicities who face health, education, and other socioeconomic disparities. Regardless, the legal right under Section 208 protects all LEP voters without regard to ethnicity. *See* Voting Rights Act Section 208.

[7] *OCA-Greater Houston,* 867 F.3d at 606-07, 614-15.

[8] *Id.* at 614-15.

[9] *Id.* at 615.

[10] *OCA Greater Houston*, 2018 WL 2224082.

[11] *See* Kevin Morris & Coryn Grange, *Records Show Massive Disenfranchisement and Racial Disparities in 2022 Texas Primary*, BRENNAN CTR. FOR JUST. (Oct. 20, 2022), https://perma.cc/8QM9-FAU4.

language from the Texas Election Code that the district court had enjoined in 2018 to do so.[12]

This Article delves into AALDEF's 2022 success modifying the 2018 permanent injunction to strike down S.B. 1's voter assistance restriction.[13] Given that approximately 40% of Texans who speak an Asian language at home are LEP,[14] AALDEF's Section 208 litigation was a massive victory for Asian American voters in Texas. In addition to Asian American LEP voters who need assistance to vote, this victory also extends to all voters in Texas who are disabled, LEP, or illiterate and require voting assistance.[15] While acknowledging that other provisions of S.B. 1 continue to threaten Texas voters' access to the ballot, this Article demonstrates that challenges to laws encroaching on Section 208 rights, like the recent assistance-related challenge to S.B. 1, can both succeed and serve as a model elsewhere to protect the voting rights of LEP, disabled, and illiterate voters across the country from illegal restrictions.

I. PROTECTIONS UNDER SECTION 208 OF THE VOTING RIGHTS ACT

In 1982, Congress amended the VRA and added Section 208, which states that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice."[16] Although LEP status is not explicit in the

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[12] *See* Election Integrity Protection Act of 2021, S. 1, 87th Leg., 2d Spec. Sess. (Tex. 2021); OCA Greater Houston v. Texas, 2022 WL 2019295, at *3 (modifying the 2018 permanent injunction to cover Texas Election Code § 64.031, newly added by Senate Bill 1 ("S.B. 1"), as well as parts of § 64.034, which includes the same language as § 64.0321).

[13] OCA Greater Houston, 2022 WL 2019295 (W.D. Tex. June 6, 2022).

[14] *See* sources cited *infra* n.57.

[15] According to the 2021 American Community Survey one-year estimate, people with disabilities comprise over 12% of Texas's total population. U.S. CENSUS BUREAU, *American Community Survey Table S1810: Disability Characteristics in Texas* (2021), https://perma.cc/LL5D-QGGA. As of 2017, approximately 19% of Texas's total population is illiterate. *Literacy Statistics*, THINKIMPACT, https://perma.cc/8WCH-P8AA (last visited Sept. 24, 2023). *See also infra* n.78, which finds that approximately 13% of Texans are LEP.

[16] Voting Rights Act of 1965, Pub. L. No. 89-110, Title II Section 208, amended by 52 U.S.C.A. § 10508 (1982). The 1975 amendments modified § 2 of the VRA and added § 203. Pub. L. No. 94-73, Pub. L. No. 94-73, Aug. 6, 1975, 89 Stat. 400. The newly amended § 2 prohibited any voting qualifications or prerequisites that result "in denials or abridgements of the right of any citizen of the United States to vote on account of race or color, or *in contravention of the [language minority] guarantees set forth in § [10303](f)(2)*." 42 U.S.C. § 1973(a) (emphasis added). The newly added Section 203 provided: "Whenever any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language." 42 U.S.C. § 1973aa-1a(c). The 1982 amendment to the VRA adding Section 208 further built on the prior 1975 amendments to the VRA, which were enacted

VRA's text, courts and the Department of Justice ("DOJ") have repeatedly interpreted "inability to read or write" as providing coverage for LEP voters.[17] The DOJ has also brought multiple enforcement actions under Section 208 on behalf of LEP voters.[18] Finally, state attorneys general and state statutes have also affirmed that Section 208 provides coverage for LEP voters.[19]

As discussed extensively in congressional reports, the basis for this addition of LEP voters was that "[c]ertain discrete groups of citizens are

after Congress found "a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English." S. REP. NO. 94-295, at 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 790; *see* James T. Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195, 220-21 (2006) (explaining how the broad mandates of Section 208 of the VRA and Section 203 apply "at every stage of the voting process," but noting that Section 208 applies "nationwide" to protect "LEP and other protected voters" while Section 203 does not).

[17] *See* OCA-Greater Houston v. Texas, 867 F.3d 604, 607-09, 615 (5th Cir. 2017) (holding that Section 208's choice-of-assistor provision applies to LEP Texas voters); Arkansas United v. Thurston, 517 F. Supp. 3d 777, 786 (W.D. Ark. 2021) (holding that the "plain language of the statute encompasses voters who cannot read or write in English"); Consent Order, United States v. Miami-Dade County, No. 02-21698 (S.D. Fla. June 7, 2002) (resulting after the DOJ investigated Miami-Dade County for violating Section 208 for failing to provide Haitian LEP voters with assistance at the polls during the 2000 election); Angelo N. Ancheta, *Language Accommodation and the Voting Rights Act*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION AND POWER 293, 304-06 (Ana Henderson ed., 2007) (discussing the VRA's amendments and case precedents that show Section 208's importance as a broad remedial measure that can offer a degree of protection to LEP voters where § 2 or Section 203 of the VRA may not cover their claims).

[18] For VRA Section 208 enforcement actions brought by the DOJ on behalf of LEP voters, see, for example, Consent Decree, Judgement, and Order, United States v. Fort Bend County, No. 4:09-CV-01058 (S.D. Tex. Apr. 13, 2009); Settlement Agreement and Proposed Order, United States v. Salem County, No. 1:08-CV-03276 (D.N.J. July 24, 2008); Memorandum of Agreement, United States v. Kane County, No. 1:07-CV-0451 (N.D. Ill. Nov. 7, 2007); Settlement Agreement, United States v. City of Philadelphia, No. 2:06-CV-4592 (E.D. Pa. June 4, 2007); Revised Agreed Settlement Order, United States v. City of Springfield, No. 3:06-CV-30123 (D. Mass. Sept. 15, 2006); Consent Decree, Judgment, and Order, United States v. Brazos County, No. H-06-2165 (S.D. Tex. June 29, 2006); Consent Decree, United States v. Orange County, No. 6:02-cv-737-ORL-22JGG (M.D. Fla. Oct. 9, 2002); Consent Decree (Modified), Judgment, and Order, United States v. Hale County, No. 5:06-cv-0043 (N.D. Tex. Apr. 27, 2006); Order, United States v. Berks County, No. 03-CV-1030 (E.D. Pa. Aug. 20, 2003); Consent Order, United States v. Miami Dade County, No. 02-21698 (S.D. Fla. June 7, 2002); Proposed Consent Decree, Judgment, and Order, United States v. Ector County, No. 7:05-cv-131 (W.D. Tex. Aug. 26, 2005).

[19] *See, e.g.*, IND. CODE ANN. § 3-11-9-2 (West 2015) (codifying Section 208 and including voters "who [are] unable to read or write English"); Letter from Minn. Op. Att'y Gen. to Steve Simon, Minn. Sec'y of State, 28A-6, 3 (May 7, 2020), https://perma.cc/F2QT-G4VR (stating that "the purpose and objective of Section 208 . . . is to assure trusted and meaningful assistance for voters who cannot read English").

unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth."[20] Although these voters already technically had the right to "pull the lever of a voting machine," Congress provided further protections to ensure these citizens could exercise their right to vote "without fear of intimidation or manipulation."[21] The Senate Judiciary Committee concluded that it was only through the assistance of "a person whom the voter trusts and who cannot intimidate [the voter]" that "blind, disabled, or illiterate voters" could cast a "meaningful" ballot.[22] Specifically, the Committee believed in the importance of a voter's freedom of choice in selecting their assistor so that voters would not be "overborne by the influence of those assisting them or be misled into voting for someone other than the candidate of their choice."[23] Congress also prohibited assistance by a voter's employer or union officer for similar reasons.[24] Importantly, Congress had recognized that many states had already begun providing similar kinds of assistance and thus determined that Section 208 was "the most effective method of providing assistance while at the same time conforming to the pattern already in use in many states."[25]

While Section 208 does not impose any affirmative obligations to provide language assistance, it permits a legal challenge if election officials impede or deny a voter's access to an assistor.[26] Both the courts and the Attorney General agree that Section 208 effectively creates a private right of action.[27] Additionally, Congress explicitly preempted state election provisions that unduly burden voters from enjoying the protections

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[20] S. REP. NO. 97-417, at 62 (1982); *see also* H.R. REP. NO. 97-227, at 14 (1981) (stating that "numerous practices and procedures," including the "failure to provide or abusive manipulation of assistance to illiterates[,] . . . act as continued barriers to registration and voting").

[21] S. REP. NO. 97-417, at 63.

[22] *Id*. The term "meaningful" is derived from its usage in the Senate Reports that accompanied the passage of Section 208 in which the Senate Committee believed that the assistance of a person of the voter's choice was "the only way to assure *meaningful* voting assistance" and that the only type of assistance "that will make fully *'meaningful'* the vote of the blind, disabled, or illiterate voters" is one where a voter can bring a person whom they trust into the voting booth. *Id.* (emphasis added).

[23] *Id.*

[24] *See id.* at 62-63; 42 U.S.C. § 1973aa-6 (current version at 52 U.S.C. § 10508) ("Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice*, other than the voter's employer or agent of that employer or officer or agent of the voter's union.*") (emphasis added)).

[25] S. REP. NO. 97-417, at 63-64.

[26] Voting Rights Act of 1965, Pub. L. No. 89-110, Title II Section 208, amended by 52 U.S.C.A. § 10508 (1982). For a list of legal challenges by the DOJ, see *supra* note 18.

[27] *See* Fla. State Conf. of NAACP v. Lee, 576 F. Supp. 3d 974, 989 (N.D. Fla. 2021); *see also* OCA-Greater Houston v. Texas, 867 F.3d 604, 609-15 (5th Cir. 2017); Ark. United v. Thurston, 517 F. Supp. 3d 777, 790, 798 (W.D. Ark. 2021); New Ga. Project v. Raffensperger,

provided by Section 208: "For example, a procedure could not deny the assistance at some stages of the voting process during which assistance was needed, nor could it provide that a person could be denied assistance solely because he could read or write his own name."[28] Overall, Section 208 has been a powerful tool to protect LEP, disabled, and illiterate voters because of its clear text and congressional history.

II. THE VOTER SUPPRESSION THREAT FROM SENATE BILL 1 ("S.B. 1")

In the wake of the 2020 election, a number of states with Republican-controlled legislatures—fueled by former President Trump's claims of voter fraud[29]—rushed to pass sweeping election reform laws.[30] Generally, lawmakers framed these bills as voter protection and anti-fraud measures,[31] but many of these laws are so onerous that they effectively suppress the vote of large swaths of the country.[32] A May 2022 report identified that, since 2021, there had been 34 newly enacted voter suppression laws across 18 states.[33] These laws masked as "anti-fraud"

484 F. Supp. 3d 1265, 1301-02 (N.D. Ga. 2020); Democracy N.C. v. N.C. State Bd. of Elections, 476 F. Supp. 3d 158, 233-36 (M.D.N.C. 2020); La Unión del Pueblo Entero v. Abbott, 618 F. Supp. 3d 388, 433-34 (W.D. Tex. Aug. 2, 2022), *appeal filed*, 2022 WL 270611 (5th Cir. Aug. 31, 2022) ("Section 3 . . . plainly provides that a private plaintiff may initiate a lawsuit under any statute that enforces the Fourteenth and Fifteenth Amendments . . . . [S]ince Section 208 is, by its terms, a statute designed for enforcement of the guarantees of the Fourteenth Amendment, 'Congress must have intended it to provide private remedies.'" (internal citations omitted)), *appeal on other grounds filed*, No. 22-50778 (5th Cir. Aug. 31, 2022)).

[28] S. REP. NO. 97-417, at 63 (describing state provisions as limited "to the extent that they unduly burden" the rights created by Section 208 on a factual analysis). Although many courts have held that a state's provisions limiting voter assistance were preempted, *see, e.g.*, Carey v. Wis. Elections Comm'n, 624 F. Supp. 3d 1020, 1020, 1033 (W.D. Wis. Aug. 31. 2022), an Arkansas district court recently ruled that requiring poll workers to maintain a list of assistors and their addresses was not preempted while limiting the number of people any one assistor could help to only six people was preempted, Ark. United v. Thurston, No. 5:20-CV-5193, 2022 WL 4097988, at *1064, *1070, *1087-88 (W.D. Ark. Sept. 7, 2022) (appeal stayed on other issues). The court reasoned that the recordkeeping does not prevent any voter from selecting an assistor of her choice. *Ark. United*, 2022 WL 4097988, at *1070, *1087-88.

[29] *See* Michael Wines, *In Statehouses, Stolen-Election Myth Fuels a G.O.P. Drive to Rewrite Rules*, N.Y. TIMES (Mar. 2, 2021), https://perma.cc/GZG5-EVCA; Nolan D. McCaskill, *After Trump's Loss and False Fraud Claims, GOP Eyes Voter Restrictions Across Nation*, POLITICO (Mar. 15, 2021, 4:30 AM), https://perma.cc/9SDU-5XLL; Edward Helmore, *Trump and His Allies Push New Republican Effort to Restrict Voting Laws,* GUARDIAN (Mar. 27, 2021, 8:58 AM), https://perma.cc/5Z5G-SKHZ.

[30] *See* Amy Gardner et al., *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), https://perma.cc/LZJ2-79ZZ.

[31] *Id.*

[32] *See* Wesley N. Watts, *Trumped: Intentional Voter Suppression in the Wake of the 2020 Election*, 73 MERCER L. REV. 395, 399 (2021).

[33] *See Voting Laws Roundup: May 2022*, BRENNAN CTR. FOR JUST. (May 26, 2022), https://perma.cc/Z4PX-XJLW.

measures have, among other things, shortened early and absentee voting periods, reduced polling hours, added heightened identification (ID) requirements, banned drive-through voting, and restricted get-out-the-vote efforts, including ballot collection bans.[34] Some of the most striking laws have gone so far as to enact line-warming bans,[35] which prohibit the distribution of food and water to voters waiting in line at the polls. Through the recent passage of S.B. 1, Texas in particular has led some of the most egregious voter suppression efforts in the country.

A. The Passage of S.B. 1

In September 2021, Texas enacted a broad set of voting restrictions through S.B. 1.[36] Though Texas Governor Greg Abbott stated that S.B. 1 would "mak[e] it easier to vote,"[37] the bill did anything but ease the voting process. As a result of S.B. 1, Texas voters faced new onerous restrictions on when, where, and how to vote in the immediately subsequent 2022 primary election.[38] As long as these restrictions remain in place, they will continue to suppress the votes of Texans well into the future—until they are repealed or struck down by courts.[39]

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[34] Brendan Williams, *Blocking the Ballot Box: The Republican War on Voting Rights*, 28 WM. & MARY J. OF RACE, GENDER, & SOC. JUST. 389, 408-15 (2022) (listing the myriad voter suppression laws passed in 2021, including in Arizona, Florida, Georgia, Iowa, and Montana); Caroline Sullivan, *Checking In with the Major Voter Suppression Laws*, DEMOCRACY DOCKET (Apr. 12, 2022), https://perma.cc/L9ND-RBJM. Proponents championed these bills under the banner of election integrity. *See Voting Laws Roundup*, *supra* note 33.

[35] These states include Georgia, Florida, and Arkansas. *See* S. 202, 2021-2022 Reg. Sess. § 33 (Ga. 2021); S. 90, 2021 Legis. Sess. § 102.031(4)(b) (Fla. 2021); S. 486, 93rd Gen. Assemb., Reg. Sess. § 1 (Ark. 2021); *see also* David Wickert & Mark Niesse, *Voting Law a Rorschach Test for a Divided Georgia*, ATLANTA J.-CONST. (Apr. 3, 2021), https://perma.cc/3FU3-LFG4 (explaining Georgia's restrictive voting bill further, which President Joe Biden called "Jim Crow in the 21st century").

[36] Tex. S. 1, 87th Leg., 2d Called Sess. (Tex. 2021). The restrictions were passed after a contentious battle in the state legislature, where Texas Democrats famously participated in an eleventh-hour walk-out and separately forced a 38-day session break by leaving the state to break quorum. *See* Paul J. Weber & Acacia Coronado, *Dems Walk, Stop Texas GOP's Sweeping Voting Restrictions*, ASSOCIATED PRESS (June 1, 2021), https://perma.cc/369S-5RXE; Paul J. Weber & Acacia Coronado, *Texas Democrats Return, End 38-Day Holdout over Voting Bill*, ASSOCIATED PRESS (Aug. 19, 2021), https://perma.cc/D6S2-8QQW; Ashley Lopez, *Here's What's in Texas Republicans' New Voting Law*, NPR (Sept. 7, 2021), https://perma.cc/VMB3-JUJ6.

[37] Press Release, Governor Abbott Signs Election Integrity Legislation into Law, Office of the Tex. Governor (Sept. 7, 2021), https://perma.cc/G29J-J94M.

[38] *See* Watts, *supra* note 32, at 405-06.

[39] *See* Gardner, *supra* note 30 (explaining that Texas's new restrictive voting law has already impacted subsequent elections in the state); Ashley Lopez, *Here's What the March 1 Primary Taught Us About Texas' New Voting Law*, KUT 90.5 (Mar. 7, 2022), https://perma.cc/NS7J-CJBF.

The suppression tactics in S.B. 1 were extensive.[40] Local election officials now face criminal penalties for preemptively sending mail-in ballots to voters who do not first request them.[41] For the first time, mail-in voters also were required to provide their driver's license numbers or partial social security numbers in their mail-in ballot applications and again on the carrier envelope containing their mail-in ballots.[42] These numbers had to perfectly match the state's voter registration file, a requirement that increased the likelihood of ballot rejections.[43] In the 2022 Texas primary, county officials across the state rejected about 12% of all mail-in ballots—a 12-fold increase from the prior election.[44] Overwhelmingly, S.B. 1's voter ID requirements caused the majority of these mail ballot application rejections, and Texas was more likely to reject Latinx, Asian, and Black voters' applications than those of white voters.[45]

The high absentee ballot rejection rate demonstrates that these "perfect match" requirements result in voter suppression. Sometimes, a voter registration file only includes one of either the driver's license number or social security number. Under S.B. 1, in this instance, the county will reject an absentee ballot or absentee ballot application if a voter had regis-

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[40] This Article focuses on S.B. 1's voter assistance provisions, but we briefly summarize some of the bill's other provisions here for context. Some of these provisions are the subject of ongoing litigation. The provisions challenged include those that make it easier for election officials to remove voters from the voter registration list (§§ 2.05, 2.07); impose new civil penalties for voter registrars upon noncompliance (§ 2.06); ban drive-through, 24/7, and straight-ticket voting (§§ 3.04, 3.09, 3.10, 3.15); empower partisan poll watchers (§§ 4.01-4.02, 4.09); heighten absentee voting requirements (§§ 4.12, 5.01-5.04, 5.07-5.08, 5.12-5.15); restrict the assistance that voters can receive when voting by mail or at polling sites, including new criminal penalties for assistors (§§ 6.01, 6.03-6.07); and impose new criminal penalties on certain activities such as purported "vote harvesting" (§ 7.04). Tex. S. 1 §§ 2.05-2.07, 3.04, 3.09, 3.10, 3.15, 4.01-4.02, 4.09, 4.12, 5.01-5.04, 5.07-5.08, 5.12-5.15, 6.01, 6.03-6.07, 7.04). Additionally, while the suppression efforts are sweeping, we note that S.B. 1 has promulgated other changes as well, including creating a system for voters to correct their mail-in ballots and expanding early voting hours in smaller counties that generally skew Republican. Tex. S. 1 § 3.09 (requiring longer voting hours for areas with "fewer than 1,000 registered voters"); *see also* Alexa Ura, *The Hard-Fought Texas Voting Bill Is Poised to Become Law. Here's What It Does.*, TEX. TRIB. (Aug. 30, 2021), https://perma.cc/CQ6E-42VC (describing the provisions in S.B. 1).

[41] Tex. S. 1 § 7.05; Ura, *supra* note 40.

[42] Tex. S. 1 § 5.02; Ura, *supra* note 40.

[43] Tex. S. 1 § 5.08; Ura, *supra* note 40; Ashley Lopez, *Almost 25,000 Mail-In Ballots Were Rejected in Texas for Its March 1 Primary Election*, NPR (Apr. 6, 2022), https://perma.cc/M7HU-CEMX. For further discussion on the voter suppression and disparate racial impacts that voter ID laws can have, see generally Jennifer Darrah-Okike et al., *The Suppressive Impacts of Voter Identification Requirements*, 64 SOCIO. PERSPS. 536 (2020).

[44] *See* Lopez, *supra* note 43.

[45] *See* Morris & Grange, *supra* note 11.

tered to vote with their driver's license number but the mail-in ballot application or the carrier envelope containing the mail-in ballot displayed their social security number instead, or vice versa.[46] In other words, a voter who correctly inputs their identification into their absentee ballot application or the envelope containing their absentee ballot can still be rejected. Other times, voters may incorrectly input the information or misunderstand that the information is required.[47] The Asian American community is at a particularly high risk of this form of rejection because many have difficulty understanding election materials that are only in English.[48] In fact, a recent study of the 2022 Texas primary revealed that Asian Americans had the highest absentee ballot application rejection rates, which were 40% higher than those of white voters.[49]

Some of S.B. 1's other provisions include bans on both drive-through and 24/7 voting.[50] These options had previously created flexibility that greatly benefited voters of color, who were more likely than early voters as a whole to take advantage of such opportunities.[51] This makes sense: Voters of color are more likely to experience longer wait times at the polls, yet they are also least likely to have the time and resources to spend voting, based in part on being more likely to have inflexible work schedules.[52] In response to these bans, various civil rights and voting rights organizations filed challenges to S.B. 1 as mentioned in Part IV.[53]

Most notably for the purposes of this Article, S.B. 1 also severely limited the kinds of assistance that LEP and disabled voters could receive

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[46] *Id.* (explaining further that many residents may have registered to vote "over a decade ago" and likely do not remember which form of identification they had originally used). Sections 5.07 and 5.13 of S.B. 1 require a clerk to reject any absentee ballot or absentee ballot application if the required information does not perfectly match the "voter identified on the applicant's application for voter registration." Tex. S. 1 §§ 5.07, 5.13.

[47] *See* Lopez, *supra* note 43.

[48] Asian LEP voters whose native languages do not use Arabic numbers (e.g., 1, 2, 3) or Roman letters (e.g., a, b, c) have difficulty filling out absentee ballots properly. *See* Second Amended Complaint of OCA-GH at 40, 42, La Unión del Pueblo Entero v. Abbott, No. 5:21-CV-0844-XR, 2022 WL 3052489 (W.D. Tex. Jan. 18, 2022).

[49] Morris & Grange, *supra* note 11; *see also* Natalia Contreras, *Voters of Color Had Mail-In Ballots Rejected at Higher Rates Than White Voters in Texas' March Primary*, TEX. TRIB. (Oct. 20, 2022), https://perma.cc/L2SM-267V.

[50] Tex. S. 1 §§ 3.04, 3.09, 3.10, 3.12-3.13; Ura, *supra* note 40.

[51] *Hearing on S.B. 1 Before the Tex. Senate Comm. on State Affairs*, 87th Leg. 2-3 (Tex. 2021) (testimony of Emily Eby, Tex. C.R. Project).

[52] *See id.* at 3; HANNAH KLAIN ET AL., BRENNAN CTR. FOR JUST., WAITING TO VOTE: RACIAL DISPARITIES IN ELECTION DAY EXPERIENCES 8-13 (2020), https://perma.cc/K33F-PDP8.

[53] *See infra* text accompanying n.195 (describing that AALDEF on behalf of OCA-GH is part of a plaintiff group that filed a challenge to S.B. 1).

at the ballot box. It specified that voters who require assistance under Section 208 could receive assistance only in "marking and reading the ballot."[54] Consequently, the bill prescribed only four actions that a person assisting an LEP or disabled voter could take, which were to read the ballot to the voter, direct the voter to read the ballot, mark the voter's ballot, or direct the voter to mark the ballot.[55] Moreover, S.B. 1 required anyone assisting a voter, other than an election officer, to swear an oath affirming that they would adhere to these four limitations.[56] As discussed further in Section II.B, given the large portion of Asian Americans who are LEP, these specific restrictions have an outsized impact on Asian Americans.

B. The Impact of S.B. 1's Assistance Provisions on Asian American Voters

Roughly one in every ten LEP speakers in Texas is Asian American, and roughly one-quarter of the Asian American population in Texas is LEP.[57] Moreover, while the number of Asian Americans who speak an Asian language at home in Texas is smaller than the number of Asian Americans as a whole in Texas,[58] nearly 40% of those who do speak an Asian language at home in Texas are LEP.[59] Ultimately, the proportion of Asian American Texans who are LEP is quite large, no matter how the math breaks down.[60]

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[54] Tex. S. 1 § 6.02.

[55] *Id.* § 6.04.

[56] *Id.*

[57] These estimates were calculated based on two census tables: *2021 American Community Survey One-Year Estimates, Table B16001: Language Spoken at Home by Ability to Speak English for the Population of 5 Years and Over in Texas*, U.S. CENSUS BUREAU, https://perma.cc/8NYU-Y4G2 (last visited Sept. 25, 2023) [hereinafter *Table B16001*]; *2021 American Community Survey One-Year Estimates, Table B02011: Asian Alone or in Combination with One or More Other Races*, U.S. CENSUS BUREAU, https://perma.cc/3DHA-HHD4 (last visited Sept. 25, 2023) [hereinafter *Table B02011*]. Please note four disclaimers about these estimates. First, neither *Table B16001* (language ability) nor *Table B02011* account for citizenship status or voting age. Second, *Table B16001* accounts only for individuals who are at least five years old, while *Table B02011* has no age constraint. Third, the data roughly equates individuals who identify as Asian American in *Table B02011* and individuals who speak an Asian language at home in *Table B16001*, but these populations differ. Fourth, the data identifies a *Table B16001* language as Asian if it was native to East, Southeast, South Asia, or the Pacific Islands. As a result, the analysis here does not include Western Asian languages such as Arabic that other analyses may include.

[58] There are approximately 1.8 million Asian Americans in Texas and approximately 1.1 million Texans who speak an Asian language at home. *See Table B16001*, *supra* note 57; *Table B02011*, *supra* note 57.

[59] *See Table B16001*, *supra* note 57; *Table B02011*, *supra* note 57.

[60] *See Table B16001*, *supra* note 57; *Table B02011*, *supra* note 57. We can look at foreign-born and first-time voter numbers in the Texas Asian American population for further evidence

LEP voters face a variety of challenges navigating the political process that are exacerbated by S.B. 1. LEP voters are "less likely to register and less likely to vote [without] oral assistance . . . or bilingual ballots" in the language of their choice.[61] In addition to practically addressing immediate language barriers, oral assistance and translated ballots also foster a more inclusive environment that helps bring LEP voters into the political process.[62] Further, without adequate LEP assistance, LEP voters are more likely to make mistakes on their ballots.[63] A recent 2021 study found that, when faced with English-only ballots, LEP voters are more likely to vote in a way that does not match their stated political preferences compared to non-LEP voters.[64]

S.B. 1 only makes it even more difficult for LEP voters to cast an effective and informed ballot. As outlined below, by restricting voting assistance to the mere "marking and reading" of the ballot at the ballot box, S.B. 1 prohibits assistors from answering clarifying questions or otherwise

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that many Asian Americans are unfamiliar with the voting process and may need voter assistance. There are approximately 670,000 foreign-born, naturalized Asian Americans in Texas. *2021 American Community Survey, Table B05002: Place of Birth by Nativity and Citizenship Status*, U.S. CENSUS BUREAU, https://perma.cc/AAA2-K8AV (last visited Sept. 25, 2023). According to exit polls of Asian American voters in the November 2020 general election that surveyed 5,424 Asian American voters in 48 cities and 13 states across the country, almost three quarters of the Asian American voters surveyed were foreign born, nearly 30% were first-time voters, and more than one third described themselves as LEP. *See* ASIAN AM. LEGAL DEF. & EDUC. FUND, THE ASIAN AMERICAN VOTE IN THE 2020 PRESIDENTIAL ELECTION 1-9 (2021), https://perma.cc/GB3U-B3A5. It is also notable that, in the decade leading up to the 2020 census, the Texas Asian American population grew by nearly two-thirds to over 1.5 million. Alexa Ura et al., *People of Color Make Up 95% of Texas' Population Growth, and Cities and Suburbs Are Booming, 2020 Census Shows*, TEX. TRIBUNE (Aug. 12, 2021), https://perma.cc/JJ22-REUY.

[61] Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 272 n.118 (2007). LEP voters have demonstrated that they would be more comfortable voting in the language of their choice. *See, e.g.*, *id.* at 272.

[62] *Id.* at 274-75 ("[A]ccomodations for some LEP voters therefore suggest that such policies have led to the empowerment and inclusion of historically excluded citizen groups, and an increase in their engagement in and integration with the overall American community.").

[63] *Id.* at 272.

[64] Stacy Ulbig & Shauna Reilly, *Compounded Confusion? Ballot Language Complexity, English Proficiency, and Minority Language Voter Behavior*, 49 J. POL. SCI. 35 (2021). Interestingly, this study further found that, when faced with both simple and difficult ballot questions, LEP voters were more likely than non-LEP voters to vote on the difficult questions as measured by the estimated level of education required to understand a question under the Flesh-Kincaid Grade Level index. *See id.* at 48-49. Ulbig and Reilly suggest that LEP voters may not have been able to perceive that some questions were noticeably more difficult (unlike non-LEP voters who appeared more likely to perceive the heightened difficulty and deliberately avoid it), choosing to cast votes on the difficult questions regardless of whether those votes matched their political preference. *Id.* at 49-51. For examples of the sample ballots that this study used, see *id.* at 46.

providing basic, necessary information about the voting process as a whole. But the mere in-language reiteration of the ballot's language is not sufficient. Below, we have outlined three of the most immediate voting assistance problems that S.B. 1 presented in the 2022 Texas primary.

First, ballots are incredibly complex and tricky instruments,[65] and they can consequently bring up more questions than answers for many LEP voters. LEP voters need answers to these questions to make informed choices at the ballot box, and an assistor who is effectively limited to only reciting the language of the ballot by S.B. 1 can often frustrate rather than meaningfully assist LEP voters. Often, ballots include double negatives, multiple embedded clauses, and the ability to choose more than one candidate for a position, making them confusing to even native English speakers.[66] Moreover, one study scored the readability of Texas "state-wide ballot referenda and propositions" as "very difficult to read."[67] Specifically, they were written for college-educated voters with at least 19 years of education, an amount that far exceeds the average educational background of the general Texas population, which is at the high school graduate level.[68]

Second, because a voter and their assistor will not have access to a bilingual ballot in most instances,[69] assistance that is limited to only mark-

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[65] *See id.* at 38-39.

[66] Rachel Hvasta, *Ballot Measure Inaccessibility: Obscuring Voter Representation*, 45 AM. BAR ASS'N 22, 23 (2020); Expert Report of Dr. William G. Eggington at 27-28, La Unión del Pueblo Entero v. Abbott, No. 5:21-CV-0844-XR, 2022 WL 3052489 (W.D. Tex. Feb. 28, 2022) [hereinafter Eggington Expert Report]; *cf.* Shauna Reilly & Sean Richey, *Ballot Question Readability and Roll-Off: The Impact of Language Complexity,* 64 POL. RSCH. Q. 59, 62 (2011).

[67] Eggington Expert Report, *supra* note 66, at 25.

[68] *Id.* at 25-26. These findings align with other studies of the readability of ballots. *See, e.g.*, Reilly & Richey, *supra* note 66, at 62-63 (finding that Texas ballots require a mean reading level of 19.9 years of education to comprehend); *see* Kathryn Summers et al., *Making Voting Accessible: Designing Digital Ballot Marking for People with Low Literacy and Mild Cognitive Disabilities*, 2 USENIX J. ELECTION TECH. & SYS. 11, 11 (2014) (discussing the importance of voting systems' "usability" for voters because voting systems are otherwise subject to voter error and can create disproportionate burdens among different voting populations); Hvasta, *supra* note 66, at 23 (explaining that 2019 ballot initiatives required "on average . . . 15 years of formal U.S. education in order to comprehend both the measure title and the summary listed on the ballot [Ballotpedia]"). For a simple state-by-state overview of ballot readability scores, see Ballotpedia's annual reports. *Ballot Measure Readability Scores, 2022*, BALLOTPEDIA, https://perma.cc/76P9-4YZM (last visited Mar. 13, 2023). According to Ballotpedia, the level of education required to comprehend the ballot questions in Texas's 2022 ballot measures ranked sixth most difficult in the country (tying with Georgia) and required the U.S. equivalent of a college graduate level of education for readability. *Id.*

[69] *How Do Non-English-Speaking Americans Vote?*, USA FACTS (Oct. 21, 2022), https://perma.cc/2HAN-BCMG.

ing and reading the ballot makes it unrealistic for assisted voters to meaningfully vote. It requires an assistor, often the child of the voter who is untrained in the translation of election terminology, to perfectly translate an English ballot into an Asian language on the spot. Moreover, the voter would have no opportunity to ask follow-up or clarifying questions about the ballot and voting process, how to operate a voting machine, or how to navigate the polling place.[70]

Currently, in Texas, Section 203's bilingual ballot requirements under the VRA fall far short for Asian Americans, extending to only a small fraction of Asian American voters statewide. Section 203 requires Texas and 83 counties to provide election materials in Spanish, but it only requires three counties to provide election materials in an Asian language: Vietnamese in Dallas County, Chinese and Vietnamese in Harris County, and Vietnamese in Tarrant County.[71] Many Asian American LEP speakers reside outside of these three counties, and, even within these counties, there are many other Asian languages commonly spoken but not covered. Approximately three-fourths of the Texas LEP population that speaks an Asian language at home is not covered by Section 203.[72] Furthermore, a covered jurisdiction may not always fully comply with Section 203.[73] While "[a] jurisdiction is more likely to achieve compliance with [Sections 203(c) and 4(f)(4) of VRA] requirements if it has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group,"[74] such compliance is not always attained by the covered jurisdictions—as evidenced by the record

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[70] Second Amended Complaint of OCA-GH, *supra* note 48, at 51-53; *see also* Eggington Expert Report, *supra* note 66, at 12 ("[W]hen confounded by a [complex] sentence . . . a natural response is to unpack the meaning through interaction . . . that may enable translation into an individual's native language. . . . [I]nteraction needs to be in the form of an unrestrained dialog [sic] between participants with an emphasis on checking and rechecking for comprehension.").

[71] Voting Rights Act Amendments of 2006, Determinations Under § 203, 233 Fed. Reg. 69611, 69616-17 (Dec. 8, 2021).

[72] There are approximately 100,000 LEP Texans who speak Asian languages covered by Section 203 (Vietnamese and Chinese, including Taiwanese) at home between Dallas County (about 17,000), Harris County (about 70,000), and Tarrant County (about 15,000). *See Table B02011*, *supra* note 57. In Texas, there are approximately 440,000 LEP total Texans who speak an Asian language at home. *See id.* Thus, approximately three-fourths of LEP Texans who speak an Asian language are not covered under § 203.

[73] For recent resolutions of evidenced non-compliance, see, for example, Consent Decree, Detroit Action v. City of Hamtramck, No. 21-11315, 2021 WL 4239572 (E.D. Mich. July 13, 2021); *AALDEF and Local Asian American Community Secure Commitment from Malden, MA to Provide Chinese Language Assistance in Compliance with Voting Rights Act*, ASIAN AM. LEGAL DEF. & EDUC. FUND (Aug. 26, 2022), https://perma.cc/4HE6-C7FG.

[74] 28 C.F.R. § 55.16.

of Section 203 enforcement actions brought by the DOJ against covered jurisdictions.[75]

Third, the voting process does not start and end at the ballot box, so it does not make sense for voter assistance to start and end there, either. LEP voters often need voting assistance "before entering the ballot box," including help with registration, orienting themselves upon arrival at the polling place, "communicating with election officials," navigating the polling place, and preparing to vote.[76] S.B. 1 strips LEP voters of this direly needed assistance.

Given these three issues, S.B. 1 clearly fails to deliver on its promise to "promote voter access."[77] Instead, it heightens the voting and language barriers that LEP voters face when voting. And, these barriers present real harms to Asian American voter participation. At the same time, while Asian Americans have critical language justice needs, it is clear that such voter suppression also likely extends far beyond the LEP Asian American population to other LEP voters[78] as well as disabled voters.[79] S.B. 1's voter suppression is therefore widespread, defying the principle that all voters deserve equitable access to the election process.

III. ORGANIZATION OF CHINESE AMERICANS-GREATER HOUSTON ("OCA-GH") LITIGATION AND ITS IMPLICATIONS

On October 31, 2014, Ms. Mallika Das arrived at her polling site in Williamson County, Texas, to vote.[80] She was an American citizen and a registered voter of that county.[81] In the past, she had found it difficult to vote because of her limited English skills, so this time, she brought along

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[75] The litigation filed by DOJ to enforce Section 203 can be found at *Voting Section Litigation*, U.S. DEP'T OF JUST. (Mar. 2, 2023), https://perma.cc/P3LN-V27U.

[76] OCA-Greater Houston v. Texas, 867 F.3d 604, 614-15 (5th Cir. 2017).

[77] Tex. S. 1 § 1.0015.

[78] In total, there are approximately 3.56 million LEP speakers in Texas, which represents approximately 13% of all Texans. *See Table B16001*, *supra* note 57; Contreras, *supra* note 49.

[79] There are at least 3 million voting-age Texans living with disabilities. Expert Report of Douglas L. Kruse at 5, La Unión del Pueblo Entero v. Abbott, No. 5:21-CV-0844-XR, 604 F. Supp. 3d 512 (W.D. Tex. Feb. 28, 2022). Like LEP voters, voters with disabilities can face a number of obstacles when attempting to vote, such as requiring assistance to travel to the polls, navigate the poll site, and read and mark the ballot. *Id.* at 5-6, 18. In 2020, approximately 20% of in-person voters with disabilities required an assistor or had trouble voting nationwide, whereas only approximately half as many voters without disabilities experienced the same. *Id.* at 6.

[80] Amended Complaint at 6, OCA-Greater Houston v. Texas, Case No. 1:15-cv-00679, 2016 WL 9651777 (W.D. Tex. Sept. 21, 2015).

[81] *See id.* at 6.

her son, who was a registered voter in Travis County.[82] At the polling station, her son told the local poll worker that his mother requested a translator and that he had agreed to help because they spoke the same language, Bengali.[83] The local poll worker then asked if Mallika's son was a registered voter in Williamson County. Mallika's son replied that he was registered in the neighboring Travis County.[84] The local poll worker responded by forbidding Mallika's son to translate for her, his own mother, because he was not also registered in Williamson County.[85] Ultimately, Mallika was unable to vote properly for all of the electoral races because she was unable to sufficiently comprehend the ballot without this translation.[86]

As a result of this incident, Mallika and OCA-GH sued the State of Texas and the Secretary of State in his official capacity on August 6, 2015,[87] alleging that the State of Texas had violated Section 208 of the VRA by restricting a voter's choice of interpreter. Founded in 1979, OCA-GH is a nonprofit membership organization that advocates for the rights of Asian Americans and promotes civic participation by educating its members about the voting process.[88] Mallika argued in this case that she suffered harm because Texas denied her voter assistance under Section 208 of the VRA.[89] OCA-GH also alleged harm to its organization as a consequence of Texas's voter assistance limitations.[90] Although Mallika unfortunately passed away during the course of the litigation, OCA-GH eventually succeeded in obtaining two injunctions from the district court, along with a Fifth Circuit ruling affirming that Texas and its Secretary of State violated Section 208 of the VRA by placing restrictions on voter assistance.

Aug. 12, 2016	J. Pitman (W.D. Tex.) grants OCA-Greater Houston's Motion for Summary Judgment.

[82] *Id.*

[83] *Id.*; *see also* Plaintiff's Motion for Summary Judgment at 6, OCA-Greater Houston v. Texas, 2016 WL 9651777 (W.D. Tex. Aug. 12, 2016); Molly Smith, *Language Can Be a Barrier at the Polls for Some Asian American Voters*, REPORTING TEX. (Nov. 2, 2016), https://perma.cc/8KUZ-PUAH.

[84] Amended Complaint, *supra* note 80, at 6.

[85] *Id.*

[86] *Id.*

[87] Initial Complaint, OCA-Greater Houston v. Texas, Case No. 1:15-cv-00679 (W.D. Tex. Aug. 6, 2015).

[88] *Id.*

[89] *Id.*

[90] *Id.*

Aug. 30, 2016	J. Pitman (W.D. Tex.) clarifies Aug. 12, 2016, order, and enjoins Texas Election Code Sections 61.032, 61.033, and 64.0321.
Sept. 7, 2017	Fifth Circuit reviews Aug. 30, 2016 order.
May 15, 2018	J. Pitman (W.D. Tex.) issues injunction enjoining Texas Election Code Sections 61.033 and 64.0321.
Sept. 7, 2021	S.B. 1 is signed into law.
June 6, 2022	J. Pitman (W.D. Tex.) expands injunction to enjoin Texas Election Code Section 64.031 and partially enjoin Section 64.034.

Table 1. Timeline of Court Rulings and Impacts on Tex. Elec. Code

The following sections describe this litigation in chronological order (Table 1), both prior to and in the wake of the passage of S.B. 1. As mentioned above, OCA-GH sued Texas in 2015.[91] This initial lawsuit resulted in a 2016 district court injunction in Mallika Das's favor.[92] In 2017 on appeal, the Fifth Circuit affirmed the broad scope of Section 208 of the VRA but also remanded the case to the district court to narrow the scope of the injunction.[93] From this remand order, the district court in 2018 issued its final permanent injunction.[94]

Section III.A.1 will discuss the Fifth Circuit's 2017 decision affirming the scope of Section 208, after which Section III.A.2 will discuss the resulting 2018 permanent injunction. Section III.A.3 will then discuss how, following Texas's 2021 enactment of S.B. 1, OCA-GH secured another victory for LEP and disabled voters through its 2022 motion to modify the 2018 permanent injunction to cover the challenged provisions of S.B. 1. Lastly, Section III.B discusses additional elements of this litigation that are related to Texas's repeated and unsuccessful defenses under Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam), standing, and state sovereign immunity.

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[91] Initial Complaint, OCA-Greater Houston v. Texas, 2016 WL 9651777 (W.D. Tex. Aug. 12, 2016).

[92] OCA-Greater Houston v. Texas, Order, No. 1:15-CV-679-RP, WL 9651777 (W.D. Tex. Aug. 12, 2016) (original 2016 permanent injunction).

[93] OCA-Greater Houston v. Texas, 867 F.3d 604, 615-16 (5th Cir. 2017) (affirming the Section 208 violation but remanding the decision to the district court to further tailor the injunction).

[94] OCA Greater Houston v. Texas, No. 1:15-CV-679-RP, 2018 WL 2224082 (W.D. Tex. May 15, 2018).

A. The Implications of OCA-GH's Section 208 Voting Assistance Litigation

The assistance provisions of Section 208 provide especially powerful voting rights protection where Section 203 falls short. While Section 203 provides for bilingual election materials and oral assistance, this is limited to very specific jurisdictions that satisfy the following criteria:

> (2)(A)(i)(I) [where] more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient; (2)(A)(II) [where] more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or (2)(A)(III) in the case of a political subdivision that contains all or any part of an Indian reservation, [where] more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and (2)(A)(III)(ii) [where] the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.[95]

In contrast, Section 208 fills a key gap for LEP voters because it applies to all jurisdictions, languages, and voters who are unable to see or read the ballot that do not fall into these limited Section 203 categories.[96] It is therefore the primary form of voting rights protection for most LEP voters as well as a key protection for disabled and illiterate voters who require assistance when voting.[97]

Despite the protections provided under Section 208, voting can still be difficult and confusing for LEP voters. In the many jurisdictions not covered by Section 203 where the election materials are only provided in English, LEP voters have difficulty fully understanding election materials without assistance and may not vote as a result.[98] As Congress has noted,

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[95] 52 U.S.C. § 10503(b)(2)(A).

[96] Voting Rights Act of 1965 Section 208, 52 U.S.C. § 10508 ("Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.").

[97] Asian Am. Legal Def. Fund, Asian American Access to Democracy in the 2022 Elections 8 (2022), https://perma.cc/8TFW-CYYE.

[98] Matthew Higgins, *Language Accommodations and Section 203 of the Voting Rights Act: Reporting Requirements as a Potential Solution to the Compliance Gap*, 67 STAN. L. REV. 917, 935-36 (2015) (showing that "English proficiency has an 'enormous effect' on voting participation rates of certain LEP voters"); Abigail Hylton, *Ballots in an Unfamiliar Language*

numerous federal courts have found that "English-only elections in areas with substantial non-English speaking citizens operate[] as a test or device to keep citizens from voting."[99] Thus, vigilantly protecting Section 208 from restrictive state election provisions is vitally important to ensure that the voting process is meaningfully accessible for LEP voters..[100]

1. Fifth Circuit Ruling Affirming Broad Scope of Voting Assistance Under Section 208

By requiring that the assistor be registered in the same county as their voter, Texas restricted the choice of assistor that Section 208 affords to LEP and disabled voters.[101] The Section 208 assistance provisions clearly apply to the ability of a voter "to vote," but at issue before the Fifth Circuit was whether the act of voting was merely marking the ballot or whether it also encompassed other activities.[102] Within this framework, Texas argued that voting under Section 208 only referred to the "literal act of marking the ballot" inside of the voting booth.[103] In other words, Texas argued that Section 208 did not protect the supplemental assistance and "interpretation" that occurred *outside* the ballot box and instead claimed that voters had "near-unfettered choice of assistance inside the ballot box."[104] Texas restricted its definition of "assistance" to:

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and Other Things That Make No Sense: Interpreting How the Voting Rights Act Undermines Constitutional Rights for Voters with Limited English Proficiency, 30 WM. & MARY BILL RTS. J. 505, 505-06, 516-17 (2021) (explaining that LEP voters may find it difficult to find an interpreter to assist them because Section 208 does not "create an affirmative duty for the government to locate, train, and pay qualified [interpreters]" and LEP voters' interpreters sometimes face "blatant xenophobic denials [by poll workers]").

[99] H.R. REP. NO. 97-227, at 23 (1981)*; see, e.g.*, Consent Order at 1-3, United States v. Miami-Dade County, No. 02-21698 (S.D. Fla. 2002) (finding that LEP Haitian Creole speakers fell within the protection of Section 208); *see generally* Hylton *supra* note 98, at 514-19 (describing how LEP voters not covered by Section 203 may need to rely on Section 208 while asserting that denying LEP voters of their right to interpreters "functionally deprive[s] them of their right to vote").

[100] *See* Brief for United States as Amicus Curiae at 2-3, OCA-Greater Houston v. Texas, 867 F.3d 604 (5th Cir. 2017) (No. 16-51126) (finding that the wide coverage of Section 208 allows LEP citizens who "reside in jurisdictions that are not required to conduct multilingual election programs [under Section 203 of the VRA] – or who reside in jurisdictions that conduct multilingual election programs but who speak a language other than that of the predominant language minority group" are able to "access the election process and cast a meaningful ballot by obtaining the necessary assistance from a person of the voter's choice").

[101] *OCA-Greater Houston*, 867 F.3d at 615 (concluding "that the limitation on voter choice expressed in Tex. Elec. Code § 61.033 impermissibly narrows the right guaranteed by Section 208 of the VRA").

[102] *Id.* at 607-08.

[103] *Id.* at 614.

[104] *Id.*

> conduct by a person other than the voter that occurs while the person is in the presence of the voter's ballot or carrier envelope . . . [that] includes only "reading the ballot to the voter," "directing the voter to read the ballot," "marking the voter's ballot," and "directing the voter to mark the ballot."[105]

In response, OCA-GH asserted that voting was more comprehensive in its scope: "'[T]he only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter' is to secure the voter's right to choose" an assistor that they trust.[106] OCA-GH argued that "to vote" under Section 208 should be broadly defined as protecting the *entire* voting process.[107] In advancing this argument, OCA-GH relied on the plain language of Section 208,[108] its congressional intent,[109] and precedent that "the right to vote means more than the mechanics of marking a ballot or pulling a lever."[110] The United States as amicus curiae agreed that "the text, purpose, and legislative history[111] of Section 208 of the VRA" clearly indicate that "the federal guarantee of assistance in voting applies to the entire voting process and not merely ballot-box activities."[112]

Ultimately, the Fifth Circuit agreed with OCA-GH and the United States that "to vote" under Section 208 "plainly contemplates more than the mechanical act of filling out the ballot sheet."[113] In doing so, the Fifth

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[105] *Id.* at 608 (emphasis omitted).

[106] Brief of Appellee at 24, *OCA-Greater Houston*, 867 F.3d 604 (5th Cir. 2017) (No. 16-51126); *see* also *OCA-Greater Houston*, 867 F.3d at 614.

[107] *OCA-Greater Houston*, 867 F.3d at 614.

[108] "The VRA . . . [broadly] defines the term 'vote' and 'voting' to encompass 'all action necessary to make a vote effective' [including, but not limited to,] 'registration or other action required by [State] law prerequisite to voting, casting a ballot, and having such ballot counted . . . .'" Brief for United States as Amicus Curiae, *supra* note 100, at 11 (quoting 52 U.S.C. § 10508).

[109] Texas's narrow interpretation "would frustrate the broad protections that Congress intended to afford to covered voters under Section 208. It also would undermine the VRA's overarching purpose to ensure an electoral process equally open to all voters and free from discrimination." Brief for United States as Amicus Curiae, *supra* note 100, at 9-10; S. REP. NO. 94-295, at 8-10 (1975); H.R. REP NO. 97-227, at 6-7 (1981).

[110] United States v. Berks County, 250 F. Supp. 2d 525, 536 (E.D. Pa. 2003) (quoting Arroyo v. Tucker, 372 F.Supp. 764, 767 (E.D. Pa. 1974)).

[111] "The Senate Report expressly stated that 'a procedure could not deny the assistance at some stages of the voting process during which assistance was needed'" and "[i]f Congress had intended for Section 208 to apply only to the voting booth, there would have been no need for it to reference a voting process comprised of multiple stages or to specify that voting assistance 'include[ed]' aid within the voting booth." Brief for United States as Amicus Curiae, *supra* note 100, at 8-9, 12 (quoting S. REP. NO. 97-417, at 62 (1982)).

[112] *Id.*

[113] *OCA-Greater Houston*, 867 F.3d 604, 615 (5th Cir. 2017).

Circuit relied on the "unambiguous language of the VRA" and the statutory definition of voting in 52 U.S.C. Section 10310(c)(1).[114] The court agreed that the right "to vote" under Section 208 encompasses more than voting mechanics:

> It includes steps in the voting process before entering the ballot box, "registration," and it includes steps in the voting process after leaving the ballot box, "having such ballot counted properly." Indeed, the definition lists "casting a ballot" as only one example in a nonexhaustive list of actions that qualify as voting.[115]

Thus, the court held that Texas's limitation on voter assistance and requirement that an interpreter be registered in the same county as the voter "impermissibly narrows the right guaranteed by Section 208 of the VRA."[116] By allowing a voter the right to choose their assistor only inside the voting booth and then limiting the kind of assistance the voter could receive apart from of marking the ballot, the court concluded that Texas was ultimately attempting to restrict a voter's federal right by "tracking the plain language of [Section] 208 . . . [and] then defining terms more restrictively than as federally defined."[117]

2. 2018 Permanent Injunction

In its 2016 injunction, the district court broadly enjoined Texas from enforcing any provision of its Election Code that was inconsistent with Section 208 of the VRA.[118] Specifically, the district court enjoined Sections 61.032, 61.033, and 64.0321 of the Texas Election Code for being inconsistent with the VRA because each of these provisions infringed upon the affirmative rights given to LEP voters under the VRA. Section 61.032 was inconsistent "to the extent it precludes a limited-English voter from selecting an interpreter if an election officer who attempts to communicate with the voter understands the language spoken by the voter"; Section 61.033 was "wholly inconsistent . . . because it restricts a limited-English voter's choice of interpreter to those persons registered to vote in the county in which the voter needing the interpreter resides"; and, Section

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[114] *Id.* at 614-15. The statute defined the terms "vote" and "voting [as] includ[ing] all action necessary to make a vote effective in any . . . election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly." 52 U.S.C. § 10310(c)(1).

[115] *OCA-Greater Houston*, 867 F.3d at 615 (emphasis omitted).

[116] *Id.*

[117] *Id.*

[118] OCA-Greater Houston v. Texas, No. 1:15-CV-00679-RP, 2016 WL 9651777, at *10 (W.D. Tex. Aug. 12, 2016), *aff'd*, 86 7 F.3d 604 (5th Cir. 2017).

64.0321 was inconsistent . . . "to the extent it restricts a voter from obtaining assistance when at a polling location, but outside the presence of the voter's ballot or carrier envelope."[119]

On appeal in 2017, the Fifth Circuit agreed that Texas's election provisions had violated the VRA, as stated in Section III.A.1, but found the initial injunction too broad.[120] Because an injunction must be "narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order," the Fifth Circuit found that the district court's sua sponte enjoinment of multiple provisions in the Texas Election Code beyond Section 61.033 "exceed[ed] the scope of the OCA's harm."[121] Consequently, the Fifth Circuit directed the district court to order a new injunction on remand.[122]

The district court subsequently issued a more narrowly tailored order that still enjoined Section 61.033, because the Fifth Circuit had affirmed their ruling that 61.033 violates the VRA. The district court's narrower injunction did not include Section 61.032, because it was outside of the scope of OCA's complaint.[123] However, the district court's newly narrowed permanent injunction also still enjoined Section 64.0321, a section upon which the Fifth Circuit relied in its ruling that Texas's definition of assistance was more restrictive than Section 208.[124] Section 64.0321 stated that an assistor could only engage in the following activities: "reading the ballot to the voter," "directing the voter to read the ballot," "marking the voter's ballot," or "directing the voter to mark the ballot."[125] While upholding the mandate to keep the injunction "narrowly-tailed," the district court reasoned that OCA-GH's injury "cannot appropriately [be] redress[ed] . . . without including Section 64.0321 in its injunction."[126] The district court emphasized the additional need to enjoin Section 64.0321 because such a restrictive definition of assistance in Section 64.0321 was

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[119] OCA-Greater Houston v. Texas, No. 1:15-CV-00679-RP, 2016 WL 9651777, at *2-3 (W.D. Tex. Aug. 30, 2016), *aff'd*, 86 7 F.3d 604 (5th Cir. 2017).

[120] *OCA-Greater Houston*, 867 F.3d at 615-16.

[121] *Id.* The district court had held that § 61.032 implicated Section 208 because the court believed it only allowed a voter to use an interpreter when an election official did not speak the same language as the voter. *Id.; see also OCA-Greater Houston*, 2016 WL 9651777, at *4, *10.

[122] *See OCA-Greater Houston*, 867 F.3d at 616. The court noted that this new injunction was up to the discretion of the district court because Texas has already been acting as if § 61.033 was invalid at the time of the Fifth Circuit decision. *Id.*

[123] *See id.*; OCA Greater Houston v. Texas, No. 1:15-CV-679-RP, 2018 WL 2224082, at *4-5 (W.D. Tex. May 15, 2018), *modified in part*, No. 1:15-CV-679-RP, 2022 WL 2019295 (W.D. Tex. June 6, 2022).

[124] *Id.*; *OCA-Greater Houston*, 867 F.3d at 608, 616.

[125] Texas Election Code Section 64.0321 discusses voter assistance "by a person other than the voter that occurs while the person is in the presence of the voter's ballot or carrier envelope." TEX. ELEC. § 64.0321.

[126] *OCA-Greater Houston*, 2018 WL 2224082, at *2.

a "consistent feature of the parties' presentation of their dispute" and "contributed to the injury suffered by every plaintiff in this action."[127]

This decision was consistent with the Fifth Circuit's ruling that voting under Section 208 of the VRA "plainly contemplates more than the mechanical act of filling out the ballot sheet."[128] Both the Fifth Circuit decision and the district court's final 2018 permanent injunction were major victories for OCA-GH and for all voters who need assistance to cast their ballot. The decisions clarified and reinforced the voter assistance protections afforded under Section 208 by permanently enjoining two election provisions that had sought to significantly limit the rights of LEP, illiterate, and disabled voters. As a result of the order, Texas had to revise its training and instructional materials.[129] Specifically, the court expressly ordered Texas to: (1) remove the language that restricted an assistor's permitted assistance to merely marking and reading the ballot in the ballot box; and (2) clarify that a voter is entitled to assistance regardless of whether the voter identifies the person as an "assistor" or "interpreter" and regardless of whether the person providing assistance is registered to vote in a different county, is not 18, or is not a citizen.[130]

3. 2022 Modification of the Permanent Injunction for S.B. 1

Unchastened by the clear guidance from the Fifth Circuit and the lower court's subsequent permanent injunction, Texas attempted to reinstate new election provisions in 2021 that were practically identical to those that the Fifth Circuit and the district court established as unlawful under Section 208 of the VRA. The 2021 bill, S.B. 1, once again specifically limited an assistor's assistance to marking or reading the ballot.[131] S.B. 1 also required assistors to swear an oath affirming, among other things, that their assistance would be confined to only marking or reading the ballot.[132] Given S.B. 1's blatant repetition of the election provision language that the Fifth Circuit struck down and that the lower court subsequently permanently enjoined, OCA-GH once again challenged these provisions. This time, OCA-GH sought a modification of the existing

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[127] *Id.* at *3.

[128] *See OCA-Greater Houston*, 867 F.3d at 604, 615.

[129] *OCA Greater Houston*, 2018 WL 2224082, at *3-5; TEX. ELEC. §§ 61.033, 64.0321.

[130] *OCA Greater Houston*, 2018 WL 2224082, at *3-5; TEX. ELEC. §§ 61.033, 64.0321.

[131] TEX. ELEC. § 64.031; S. 1, 87th Leg., 2d Spec. Sess. (Tex. 2021).

[132] TEX. ELEC. § 64.034; Tex. S. 1. Part of this oath used the exact language that the Fifth Circuit had previously held violated Section 208 of the VRA because voting is not limited to the ballot box. *See OCA-Greater Houston*, 867 F.3d at 615. The district court subsequently enjoined Section 64.0321. *OCA Greater Houston*, 2018 WL 2224082, at *4.

2018 permanent injunction to encompass the newly numbered, but practically identical, language in S.B. 1 via Sections 64.031, 64.034, and 64.0322.[133]

In June 2022, Judge Pitman of the U.S. District Court for the Western District of Texas modified the 2018 injunction—that he himself had previously granted—to expand its reach to some of the contested S.B. 1 provisions.[134] The 2022 district court opinion highlighted both the language from the Fifth Circuit and Judge Pitman's original 2016 district court order enjoining Texas from enforcing the prior election provisions.[135] Judge Pitman reiterated that Section 208 protects "more than the mechanical act of filling out the ballot sheet" and that it extends to "all other activities required of voters at a polling place to meaningfully and effectively exercise their right to vote."[136]

Regarding S.B. 1's assistor oath requirement, Judge Pitman ruled that "the amended provision essentially re-ratifie[d] the same restrictions [to assistance] that the Court enjoined" and "limits assistance-eligible voting to an impermissibly narrow set of activities."[137] Judge Pitman further found that "[a]side from changes in punctuation," the new provision used the exact language from the previously enjoined statute.[138] Essentially, the court's reasoning in enjoining Texas's 2021 S.B. 1 Section 64.0321 oath provision was the same reasoning stated by the court in its 2018 injunction.[139]

Similarly, the 2022 district court opinion swiftly invalidated Section 64.031 and the portions of Section 64.034 that also replicated the language from the previously enjoined election code.[140] Judge Pitman stated that a voter is "entitled to receive assistance from a person of their choosing, so long as that person is eligible to provide assistance [under] Section 208, and that assistance is not limited to marking or reading the ballot or otherwise limited to conduct that occurs in the voting booth."[141] Upon the

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[133] *See* OCA Greater Houston v. Texas, No. 1:15-CV-679-RP, 2022 WL 2019295, at *3-5 (W.D. Tex. June 6, 2022).

[134] *Id.*

[135] *Id.*

[136] *Id.* at *3.

[137] *Id.* at *4.

[138] *Id.*

[139] OCA Greater Houston v. Texas, No. 1:15-CV-679-RP, 2018 WL 2224082, at *3-5 (W.D. Tex. May 15, 2018).

[140] *See OCA Greater Houston*, 2022 WL 2019295, at *4-5.

[141] *Id.* at *5.

order of the 2022 modified injunction, Texas subsequently declined to appeal the district court's proper authority to enforce its own order.[142]

Ultimately, the 2022 expanded injunction granted in June was an important victory for Texas voters who need assistance to exercise their right to vote, and, critically, occurred just in time for Texas's 2022 midterm election in November. In the midst of the wave of voter suppression laws,[143] the 2022 modified permanent injunction was a swift rebuttal and takedown of at least some of the tactics that lawmakers across the country are employing. Not only did this victory serve as a warning to other jurisdictions similarly seeking to restrict the right to voting assistance under Section 208 of the VRA, it also ensured that LEP and disabled voters could retain the Section 208 protections that the VRA guaranteed to them for Texas's 2022 midterm elections.

Moreover, the modified injunction highlights the importance of challenging unconstitutional voting provisions early on and wherever possible. Here, OCA-GH effectively and swiftly leveraged its prior challenge to strike down parts of the new S.B. 1 voter suppression provisions. While large portions of S.B. 1 are still embroiled in ongoing litigation, OCA-GH was able to carve out a clear and quick path to alleviate its central Section 208 concern about S.B. 1: that voters who need assistance to cast their ballot would be restricted to a mere marking and rote reading of the ballot in the voting booth without the opportunity to ask clarifying questions or obtain necessary assistance in navigating the entire voting process. As a result, the court's expansion of the 2018 OCA-GH injunction addressed and therefore rendered moot[144] OCA-GH's principal Section 208 challenge of S.B. 1's Section 6.04.[145]

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[142] For further explanation of the standards that Texas would have had to satisfy to appeal the 2022 modified injunction, see PNC Bank, N.A. v. 2013 Travis Oak Creek GP, LLC, No. 1:17-CV-560-RP, 2018 WL 6433312, at *2-3 (W.D. Tex. Sept. 27, 2018) (denying defendants' motion to clarify or modify the preliminary injunction because the defendants did not establish "'a significant change in factual conditions or in law' [that] render[ed] continued enforcement 'detrimental to the public interest'"); *see also* Exxon Corp. v. Tex. Motor Exch. of Houst., 628 F.2d 500, 503 (5th. Cir. 1980) (stating that courts may "modif[y] [and] impose more stringent requirements on the defendant 'when the original purposes of the injunction are not being fulfilled in any material respect'").

[143] *See* Brennan Ctr. for Just., *supra* note 33.

[144] La Unión del Pueblo Entero v. Abbott, 618 F. Supp. 3d 388, 417 n.18, 434 (W.D. Tex. Aug. 2, 2022), *appeal filed*, 2022 WL 270611 (5th Cir. Aug. 31, 2022).

[145] *Id.* at 388 n.3. Of note, however, is that the 2022 modified injunction did not include some contested portions of Section 64.034 (S.B. 1 § 6.04), and it did not include any part of Section 64.0322 (S.B. 1 § 6.03). *OCA Greater Houston*, 2022 WL 2019295, at *4-5. For both of these challenged S.B. 1 provisions, the district court declined to modify the injunction because the provisions were beyond the scope of OCA-GH's original challenge and the 2018 injunction. *Id.* at *5. At the same time, the court left open the possibility that these provisions

B. Courts' Treatment of State Defenses: Purcell, Standing, and Sovereign Immunity

1. The *Purcell* Principle: When Is Too Close to the Election?

Among Texas's defenses against OCA-GH's 2021 Motion to Modify the 2018 permanent injunction was judicial deference to states' laws in administering elections under the *Purcell* principle. The Supreme Court held in *Purcell* that courts should not change election rules too close to an upcoming election.[146] As an election draws closer, the risk increases that court orders "can themselves result in voter confusion and consequent incentive to remain away from the polls."[147] Thus, *Purcell* instructs courts to weigh "harms attendant upon issuance or nonissuance of an injunction" as well as "considerations specific to the election cases."[148] Yet, the cyclical nature of elections means that there will inevitably be an election approaching when a party asks the court to adjudicate controversial election measures.

The district court ultimately affirmed the rights of OCA-GH's voters by granting the 2022 modified injunction. Although Texas cited to *Purcell* in characterizing OCA-GH's motion to modify the 2018 injunction as "[h]asty [r]elief" and a "late-in-the-day addition of claims,"[149] the Court flatly held that OCA-GH seeking the injunction eight months prior to Texas's November 2022 election was sufficiently "far from" the "eve of an election."[150] In making this argument, Texas also relied on four cases where the Fifth Circuit stayed injunctions to challenged election laws that were not analogous to the OCA-GH's actions because it applied for an injunction far ahead of the election rather than mere weeks or days before election day.[151] In fact, in the 2022 modified injunction, the district court

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may also violate Section 208 of the VRA if debated on the merits. *Id.* at *4. Although OCA-GH is not litigating these two provisions further, the district court opinion leaves room to challenge the provisions in the future if necessary. The OCA-GH's plaintiff group continues to litigate S.B. 1 Section 6.06 (creating a criminal offense for assistors to receive compensation and, unless assistors are an attendant or caregiver, assist with mail-in ballots) and other S.B. 1 provisions. *See* Second Amended Complaint of OCA-Greater Houston, *supra* note 48.

[146] Purcell v. Gonzalez, 549 U.S. 1, 5-6 (2006) (per curiam).

[147] *Id.* at 4-5.

[148] *Id.* at 4.

[149] Defendants' Response to Plaintiff's Motion to Modify the 2018 Permanent Injunction at 6-7, *OCA-Greater Houston*, No. 1:15-cv-679 (citing Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28 (2020)); Response to Motion at 6, *OCA-Greater Houston*, No. 1:15-cv-679 (W.D. Tex. Feb. 23, 2022), ECF No. 101.

[150] *OCA Greater Houston*, 2022 WL 2019295, at *3 n.8.

[151] In doing so, Texas cited cases from the 2020 election cycle that resulted in stayed injunctions; however, these cases' stayed injunctions occurred far closer to election day than

cited two of the cases that Texas unsuccessfully raised under the *Purcell* principle, which OCA-GH also raised.[152] Supreme Court case precedents also stayed challenges to election laws approximately up to two months before an election under *Purcell*.[153] Essentially, the Court held, the harm S.B. 1 inflicted upon the OCA-GH's voters outweighed Texas's interests in upholding S.B. 1.[154] The Court referenced the cyclical nature of elections and stated that if it "dismissed every election challenge within 8 months of an election, it would allow the Defendants to violate the VRA and the injunction indefinitely as long as regular elections are held."[155]

Furthermore, facts in the record demonstrated that previous court orders did not prejudice the state's interests in administering elections and actually undermined the Texas defendants' *Purcell* claim. The state election officials did not report any difficulty with swiftly complying with additional court order requirements to update and disseminate the new elections regulations guidance to all 254 counties in Texas.[156] Indeed, after the modification of the permanent injunction on June 6, 2022, the Secretary of State revised the "Qualifying Voters on Election Day 2022" section in

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eight months. *See* OCA-Greater Houston Reply in Support of Motion to Modify 2018 Injunction at 7, OCA-Greater Houston v. Texas, No. 1:15-cv-00679 (W.D. Tex. 2022) (citing Mi Familia Vota v. Abbott, 834 F. App'x 860, 864 (5th Cir. 2020) (per curiam)) (occurring four days before election day); Richardson v. Tex. Sec'y of State, 978 F.3d 220, 244 (5th Cir. 2020) (Higginbotham, J., concurring) (occurring three weeks before election day); Tex. All. for Retired Ams. v. Hughs, 976 F.3d 564, 567 (5th Cir. 2020) (per curiam) (occurring 18 days before early voting started); Tex. Democratic Party v. Abbott, 961 F.3d 389, 411 (5th Cir. 2020) (occurring "a matter of weeks" before in-person voting started).

[152] *OCA Greater Houston*, 2022 WL 2019295, at *3 n.8. The two cases used by Texas and OCA-GH that the district court also cited were *Tex. All. for Retired Ams*., 976 F.3d 564, and Tex. Democratic Party v. Abbott, 461 F.Supp. 3d 406 (W.D. Tex. 2020), which was the underlying case to *Tex. Democratic Party*, 961 F.3d. *Id.;* Defendants' Response to Plaintiff's Motion to Modify the 2018 Permanent Injunction, *supra* note 150, at 7; OCA-Greater Houston Reply in Support of Motion to Modify 2018 Injunction, *supra* note 152, at 7. The district court also cited *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020), which OCA-GH had raised to assert that challenging an election law six months before a general election was not too close to the eve of an election. *OCA Greater Houston*, 2022 WL 2019295, at *3 n.8; OCA-Greater Houston Reply in Support of Motion to Modify 2018 Injunction, *supra* note 152, at 7.

[153] *See* Husted v. Ohio State Conf. of NAACP, 573 U.S. 988 (2014) (staying a lower court order that sought to change election laws 60 days before the election); *see also* North Carolina v. League of Women Voters of N.C., 574 U.S. 927 (2014) (staying a lower court order that sought to change election laws 35 days before the election).

[154] *OCA Greater Houston*, 2022 WL 2019295, at *3-5.

[155] OCA-Greater Houston Reply in Support of Motion to Modify 2018 Injunction, *supra* note 152, at 8.

[156] *See*, *e.g.*, State Defendants' Response to Plaintiff's Motion for Permanent Injunction at 2-5, OCA-Greater Houston v. Texas, No. 1:15-cv-00679 (W.D. Tex. 2022).

its handbook for election judges and clerks within one month.[157] Earlier in 2022, the Secretary of State issued its updated guidance to county election officials on the newly enacted S.B. 1 six weeks prior to the March 1, 2022 primary election.[158] Following the district court's first August 12, 2016 broad injunction ruling that Section 61.033 along with other sections conflicted with the VRA and prohibited the State Defendants from enforcing Section 61.033, it was Texas that opposed any modification of injunctions because state officials were already modifying election judge handbook and training materials with tight internal deadlines.[159] State defendants imposed deadlines to distribute updates to election officials and share them on their website by "within the next week," update the Office of the Secretary of State website by August 29, 2016, and update online poll worker training materials by September 19, 2016.[160] This demonstrated ability of the Texas Election Board and the Secretary of State to swiftly update election guidance, whether to carry out S.B. 1 or remedy S.B. 1's violations of Section 208 of the VRA, belied the state's *Purcell* claim and demonstrated that the state's election officials were not unduly burdened by the 2022 modified injunction.

2. Article III Standing: When Does an Organization Have Organizational Standing and Who Can an Injury Be Traced to and Redressed By?

Another Texas defense against OCA-GH's 2021 S.B. 1 motion to modify the 2018 injunction related to standing and Texas's enforcement power. As with Texas's perennial *Purcell* defense, the court again was not convinced by Texas's defense that the plaintiff's injury could not be traced to the defendants and redressed by them. In its 2022 permanent injunction, the court held that "[j]ust as it did previously, the Court finds Defendants to be proper parties to this action in light of the Secretary of State's obligations in enforcing and administering election laws."[161]

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[157] *See* ELECTIONS DIV., OFF. OF THE TEX. SEC'Y OF STATE, HANDBOOK FOR ELECTION JUDGES AND CLERKS 46-47 (2022), https://perma.cc/4QHX-5HWF; *OCA Greater Houston*, 2022 WL 2019295.

[158] OCA-Greater Houston Reply in Support of Motion to Modify 2018 Injunction, *supra* note 152, at 7.

[159] *See* State Defendants' Response to Plaintiff's Motion for Permanent Injunction at 2-3, 6, OCA-Greater Houston v. Texas, No. 1:15-cv-679 (W.D. Tex. Aug. 12, 2016).

[160] *Id.* at 2-4.

[161] *OCA Greater Houston*, 2022 WL 2019295, at *4 n.10 ("'[T]he secretary of state is the chief election officer of the state' whose enforcement responsibilities oblige the Secretary to 'prescribe the design and content . . . of the forms necessary for the administration of this code,' and to prepare 'instructions relating to and based on this code and the election laws' to 'distribute . . . to the appropriate state and local authorities' to 'maintain uniformity in the application, operation, and interpretation of this code.'").

The Fifth Circuit's 2017 OCA-GH decision established favorable precedent on standing. Under Article III of the U.S. Constitution, courts are limited to adjudicating "cases" and "controversies."[162] To satisfy the cases and controversies requirement, plaintiffs must demonstrate standing.[163] Under *Lujan v. Defenders of Wildlife*, a "plaintiff must have suffered an 'injury in fact'" which must be: (1) "concrete," "particularized," and "actual or imminent"; (2) "causal[ly] connect[ed] to or otherwise "fairly . . . traceable" to the defendant, and neither a generalized grievance nor an assertion of third party rights; and (3) "likely . . . redress[able] by a favorable [judicial] decision," "as opposed to merely 'speculative.'"[164] In short, the Article III standing elements are: (1) injury-in-fact; (2) causation; and (3) redressability.

Ultimately, OCA-GH prevailed under the organizational standing theory. Under the organizational standing theory, an organization itself seeks standing in its own name and must "meet[] the same standing test that applies to individuals."[165] Because Mallika had passed away during the course of the litigation, OCA-GH relied on "organizational standing."[166] Texas argued that OCA-GH had not suffered a cognizable injury-in-fact that was traceable to or redressable by the Secretary of State.[167] However, the Fifth Circuit critically held that OCA-GH suffered an injury-in-fact because the organization had to divert time, personnel, and financial resources to educate its LEP members on how to properly vote according to Texas's then newly enacted election assistance laws.[168] Furthermore, the Fifth Circuit affirmed that the plain language of the Texas Election Code defeated Texas's challenges to OCA-GH's injury based on the causation or redressability elements of standing because the Texas Secretary of State is the "chief election officer of the state."[169]

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[162] U.S. CONST. art. III, § 2.

[163] Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016).

[164] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

[165] OCA-Greater Houston v. Texas, 867 F.3d 604, 610 (5th Cir. 2017).

[166] *Id.* at 609-10, 614. OCA-GH initially alleged standing on the theory of injury to both Mallika and OCA-GH as an organization. *Id.* In contrast to organizational standing, associational standing is a derivative of the standing of the organization's members; it requires that "the interests the association seeks to protect [be] germane to [its] purpose, . . . and neither the claim asserted nor the relief requested requires participation of individual members." *Id.* at 610 n.20; Tex. Democratic Party v. Benkiser, 459 F.3d 582, 587 (5th Cir. 2006) (citing Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977)).

[167] *OCA-Greater Houston*, 867 F.3d at 609.

[168] *See id.* at 610-12.

[169] *See id.* at 612-14 (citing TEX. ELEC. CODE § 31.001(a)).

A. Injury-in-Fact

OCA-GH suffered an injury-in-fact because S.B. 1's provisions caused the organization to engage in rapid response activities that deviated from its typical operations so that its LEP members could exercise their right to vote. As an organization whose primary mission includes "voter outreach and civic education," the "additional time and effort [that OCA-GH] spent explaining the [then-new] Texas [election] provisions at issue" to LEP voters "frustrate[d] and complicate[d OCA-GH's] routine community outreach activities."[170] OCA-GH's membership base consists substantially of LEP voters, each of whom required an additional explanation in their primarily spoken language from OCA-GH regarding Texas's new voter assistance laws.[171] Importantly, OCA-GH's LEP voters needed in-depth instructions to identify their interpreters as their "'assistor' rather than as an 'interpreter' in order to avoid being turned away."[172]

The crux of Texas's challenge to OCA-GH's injury-in-fact relied on defining OCA-GH's activities as routine lobbying and litigation-related expenses that were insufficient to confer standing. Texas sought to analogize OCA-GH's activities to those of the plaintiffs' in *NAACP v. City of Kyle*, a prior Fifth Circuit decision.[173] In *Kyle*, the plaintiffs sought to enjoin the city's enforcement of new ordinances under the Fair Housing Act, claiming that the ordinances disproportionately disadvantaged Black and Hispanic residents.[174] The plaintiffs sought organizational standing on the theory that their activities prior to litigation in response to the ordinances amounted to a cognizable injury-in-fact.[175] The Fifth Circuit held that the plaintiffs had failed to satisfy organizational standing because responding to the ordinances did not differ from the organization's "routine lobbying activities."[176] Furthermore, the plaintiffs could not identify specific tradeoffs associated with the organization's "conjectured" diversion of resources that "concretely and 'perceptibly impaired' [the organization] from carry[ing] out its purpose."[177]

Ultimately, in OCA-GH's litigation, the Fifth Circuit rejected Texas's efforts to heighten the *Lujan* requirements for injury-in-fact for organizational standing based on *Kyle*. The Fifth Circuit distinguished

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[170] *Id.* at 610.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 611 (citing NAACP v. City of Kyle, 626 F.3d 233, 238-39 (5th Cir. 2010)).

[174] *See id.* (citing *Kyle*, 626 F.3d at 236).

[175] *Id.* (citing *Kyle*, 626 F.3d at 236-39). These activities included a commissioned study that sought to persuade the city to reverse course on the ordinances and other significant work on the ordinances.

[176] *Id.*

[177] *Id.* (citing *Kyle*, 626 F.3d at 238-39).

Kyle from OCA-GH's lawsuit and held that OCA-GH had organizational standing.[178] The court concluded that every injury alleged in *Kyle* was either "undertaken to prepare for litigation" or "no different from the plaintiffs' daily operations."[179] Spending resources to commission a study to show that the ordinances had a disproportionate impact on Black and Hispanic prospective home buyers constituted prelitigation expenses when the plaintiffs used the study at trial according to the court.[180] Reviewing new legislation also was viewed by the court as part of the routine, daily operations of a lobbying group.[181] In contrast, the court did not view OCA-GH's claimed injuries as either prelitigation efforts or routine daily operations. The Fifth Circuit clarified that not every expense undertaken prior to litigation is necessarily, by virtue of its timing, a prelitigation expense for use during litigation.[182] The court subsequently held that, unlike in *Kyle*, Texas failed to demonstrate that the expenses were truly related to the litigation; Texas had merely shown that OCA-GH's activities were temporally antecedent to the litigation.[183] Moreover, the court found that the then new Texas assistance laws necessitated that OCA-GH depart from its routine operations because educating its LEP members about Texas's new assistor-interpreter laws "'perceptibly impaired' OCA-GH's ability to 'get out the vote' among its members" for the next election.[184]

The Fifth Circuit's decision in OCA-GH's favor represented a significant victory for organizations seeking standing. OCA-GH prevailed at a time when the Fifth Circuit's decisions appeared to trend towards heightened injury-in-fact requirements. Crucially, the Fifth Circuit also affirmed that *Kyle* did not heighten requirements of the *Lujan* test for standing, and it clarified that organizations' claimed Article III injuries "need not be substantial" or "quantitative[ly]" large because they are "qualitative, not quantitative in nature."[185] Rather, as OCA-GH showed, an organization can allege resource diversion as a cognizable injury when a defendant's conduct requires the organization to divert resources to activities outside of its typical business activities.[186]

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178 *Id.* at 611-13.
179 *Id.* at 611-12 (citing *Kyle*, 626 F.3d at 238).
180 *Id.*
181 *Id.*
182 *Id.* at 612.
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.*

Subsequently, a number of other plaintiff organizations that advance voting rights and racial justice issues have successfully satisfied organizational standing by relying on the Fifth Circuit's OCA-GH decision.[187] These organizations have prevailed despite Texas's efforts to raise the standard in the OCA-GH Fifth Circuit 2017 decision to require an organization to "go[] out of its way"[188] to satisfy organizational standing.

B. Causation and Redressability

Next, OCA-GH prevailed in satisfying causation and redressability for Article III standing because OCA-GH's injury was traceable to the Secretary of State's official duties and was redressable. Texas asserted that OCA-GH's injury did not result from the Texas Election Code but rather from local election officials misunderstanding election law.[189] Texas also sought to insulate the Secretary of State from challenges to election laws that implicated his official duties. Texas argued that satisfying causation and redressability of OCA-GH's injury from its election laws "simply by virtue" of the Secretary of State's "status as the 'chief election officer'" was erroneous when local election officials executed the election laws.[190] Simply invoking the Secretary of State's position to satisfy causation and redressability would make him "vulnerable to suit any time a provision of the Election Code is challenged, even where, as here, the conduct at issue occurs at the local level."[191]

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[187] *See* Arkansas United v. Thurston, 626 F. Supp. 3d 1064, 1078 (W.D. Ark. 2022), *appeal filed*, No. 22-2918 (8th Cir. Sept. 12, 2022) (finding that Arkansas United suffered a resource-diversion injury during the 2020 election similar to that of OCA-GH); Common Cause Ind. v. Lawson, 937 F.3d 944, 952-53 (7th Cir. 2019) (citing cases from the Fifth, Sixth, Ninth, and Eleventh Circuits) ("Our sister circuits have upheld the standing of voter-advocacy organizations that challenged election laws based on similar drains on their resources."); L .State Conf. of NAACP v. Louisiana, 490 F. Supp. 3d 982, 1015, 1018 (M.D. La. 2020), *aff'd sub nom.*, Allen v. Louisiana, 14 F.4th 366 (5th Cir. 2021); La. State Conf. of NAACP v. Louisiana, 495 F. Supp. 3d 400 (M.D. La. 2020) (finding that the plaintiff organization sufficiently pleaded injury-in-fact based on diversion of resources from its usual voter education, registration, and turnout services).

[188] *See e.g.*, Clark v. Edwards, 468 F. Supp. 3d 725, 746 (M.D. La. 2020). In *Clark*, the Power Coalition for Equality and Justice was an organization that supported voter turnout and offered rides to the polls. The court effectively held that Power Coalition for Equality and Justice did not satisfy organizational standing because monitoring changes in Louisiana's election laws during the COVID-19 pandemic and "anticipat[ing] demand" for rides to polls were not a diversion of resources that impaired the organization's mission. Rather, the court held, such activities were consistent with the organization's mission. *Id.*

[189] *See* Brief of Defendants-Appellants at 19-21, OCA-Greater Houston v. Texas, No. 16-51126, 2016 WL 9651777 (W.D. Tex. Aug. 12, 2016); *OCA-Greater Houston*, 867 F.3d at 612-13.

[190] *See* Brief of Defendants-Appellants, *supra* note 190, at 18.

[191] *Id.* at 19.

The Fifth Circuit dismissed Texas's argument in two ways. First, the Fifth Circuit stated that, even if the "conduct at issue occur[ed] at the local level" and local election officials rather than the Secretary of State were directly "prevent[ing] voters from using a particular interpreter," Texas's argument conflated the issue of merits—whether S.B. 1's provisions violated Section 208 of the VRA—with the question of standing.[192] The Fifth Circuit concluded that Texas could not challenge OCA-GH's standing by asserting that the statute is "facially valid, just misapplied by the county officials" because the court can only reach such a defense of the statute on the merits after OCA-GH satisfied standing.[193]

Second, under statutory interpretation, the Secretary of State's oversight of election laws was not discretionary, so the plaintiff's injuries were traceable and redressable to his official duties. Texas asserted that the Secretary of State "may take action to correct any official conduct impeding a citizen's voting rights" but had no duty and "no power to compel local election officials to comply" with VRA Section 208.[194] The plain language of the Texas Election Code rendered Texas's reliance on *Okpalobi v. Foster*[195] inapplicable.[196] *Okpalobi* stands for the proposition that defendants who lack power to enforce statutes fail to meet causation traceability requirements.[197] Unlike the tort statute in *Okpalobi*, Texas's Election Code creates no private right of action where state officials have no enforcement connection to the statute. The Fifth Circuit held that Texas's Election Code applies to every Texas election, so the Secretary of State has an enforcement connection to challenged election laws because he is the "chief election officer of the state."[198] The Texas Election Code instructs the Texas Secretary of State to "obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws

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[192] *Id.*; *OCA-Greater Houston*, 867 F.3d at 613.

[193] *OCA-Greater Houston*, 867 F.3d at 613.

[194] *See* Brief of Defendants-Appellants, *supra* note 190, at 20.

[195] Okpalobi v. Foster, 244 F.3d 405, 426-27 (5th Cir. 2001).

[196] *OCA-Greater Houston*, 867 F.3d at 613-14 (citing *Okpalobi*, 244 F.3d at 426-27).

[197] The Fifth Circuit held that *Okpalobi*, a case about a Louisiana tort law that imposes unlimited liability on doctors for any damage caused by abortion procedures, is inapplicable because the en banc court relied on the lack of power by the defendants to enforce the statute and its nature as a tort law, which meant that "no state official has *any* duty or ability to do anything." *OCA-Greater Houston*, 867 F.3d at 613. However, the Fifth Circuit found that the Secretary of State had both the power and duty to enforce the Texas Election Code in this case. *Id.* Specifically, unlike the defendants in *Okpalobi,* the "Secretary of State is not powerless to provide the requested relief, but uniquely empowered to do so." Brief for Appellee at 22, OCA-Greater Houston v. Texas, 867 F.3d 604 (5th Cir. 2017).

[198] *See OCA-Greater Houston*, 867 F.3d at 613-14 nn.34, 38 (first citing TEX. ELEC. CODE § 1.002 (describing the applicability of the code to all elections in the state); and then citing TEX. ELEC. CODE § 31.001 (describing the secretary of state as the chief election officer of the state)).

outside this code."[199] In accordance with this statute, the Secretary carried out his official duties because his office published forms, election handbooks, and web pages that provided guidance regarding the challenged voter assistance provisions.[200] Because the Secretary of State carried out his official election duties, he had an enforcement connection to the restrictive voter assistance provision that violated VRA Section 208.[201] Therefore, the plaintiff's injuries were traceable and redressable to the Secretary of State.[202]

3. Texas Sovereign Immunity: Can Private Actors Sue the State of Texas Under Section 208?

The Fifth Circuit holding in *OCA-Greater Houston v. Texas* set out clearly that Texas may not bar lawsuits over the assistance provisions guaranteed by Section 208 of the VRA against the Secretary of State based on state sovereign immunity.[203] Because Congress passed the VRA based on the Fifteenth Amendment's enforcement power, the VRA "validly abrogated state sovereignty [and] [t]he immunity from suit that Texas and its officials otherwise enjoy in federal court offer[ed] no shield here."[204] The Fifth Circuit declined to consider Texas's argument that state sovereign immunity barred OCA-GH's claims against the Secretary of State under the *Ex Parte Young* exception.[205] In the subsequent consolidated S.B. 1 case, the district court and Fifth Circuit affirmed, on separate occasions, that the VRA "validly abrogated state sovereign immunity."[206] Finally, in similar litigation, the Fifth Circuit's *OCA-GH* decision has continued to uphold the principle that sovereign immunity does not shield

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[199] *Id.* at 614 n.44 (citing TEX. ELEC. CODE § 31.003).

[200] Brief for Appellee, *supra* note 198, at 22.

[201] *See OCA-Greater Houston*, 867 F.3d at 613-14.

[202] *Id.*

[203] *Id.* at 614. Texas did not raise this defense in response to OCA-GH's 2021 Motion for Modification of the 2018 Permanent Injunction but continues to assert sovereign immunity as a jurisdictional defense. *See* Defendants' Response to Plaintiff's Motion to Modify the 2018 Permanent Injunction, *supra* note 150. In recent litigation, the district court held the same. *See* La Unión del Pueblo Entero v. Abbott, 618 F. Supp. 3d 388, 400-01 (W.D. Tex. Aug. 2, 2022), *appeal filed*, 2022 WL 270611 (5th Cir. Aug. 31, 2022).

[204] *See OCA-Greater Houston*, 867 F.3d at 614.

[205] *Id.* Texas argued that, because OCA-GH had sued the Secretary of State in his official capacity for injunctive relief, the *Ex Parte Young* exception to sovereign immunity applied. *See* Reply Brief of Defendants-Appellants at 5 n.3, OCA-Greater Houston v. Texas, No. 16-51126 (5th Cir. Sept. 13, 2016); *OCA-Greater Houston*, 867 F.3d at 614.

[206] *Abbott*, 618 F. Supp. 3d at 427; Order Denying Appellant Kim Ogg's Motion for Stay Pending Appeal at 4, La Unión del Pueblo Entero v. Abbott, No. 5:21-cv-0844-XR, at 4 (5th Cir. Oct. 7, 2022) (holding that "the VRA explicitly abrogated sovereign immunity" and that the Harris County District Attorney "has no likelihood of succeeding on the merits of a sovereign immunity defense").

states and its officers from claims brought under the VRA, including Section 208.[207]

IV. OCA-GH'S CONTINUING S.B. 1 LAWSUIT

OCA-GH is the name of the plaintiff group comprising OCA-GH, the League of Women Voters of Texas, and Register! Educate! Vote! Use Your Power! (REVUP-Texas),[208] and is represented by the American Civil Liberties Union Foundation, Texas Civil Rights Project, Asian American Legal Defense and Education Fund, Jenner & Block LLP, Disability Rights Texas, and ACLU Foundation of Texas.[209] As of January 2024, the gravamen of the OCA-GH plaintiffs' VRA Section 208 claim against S.B. 1's Section 6.04 is moot following OCA-GH's separate action to enforce its 2018 permanent injunction. During a six-week trial, which concluded in October of 2023, the OCA-GH plaintiff group challenged provisions of S.B. 1 that criminalize certain types of mail-voting assistance and certain types of political speech in the "physical presence" of a ballot. The group presented evidence that these provisions violate the Voting Rights Act, the Americans with Disabilities Act, the Rehabilitation Act, and the U.S. Constitution.[210]

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[207] *See*, *e.g.*, *Arkansas United*, 626 F. Supp. 3d at 1084 (citing directly to the Fifth Circuit's holding in *OCA-Greater Houston*, 867 F.3d at 614).

[208] Texas Organizing Project was one of the original plaintiffs. *See* Plaintiffs' Amended Complaint, OCA-Greater Houston v. Scott, No. 5:21-CV-0844-XR (W.D. Tex. Dec. 1, 2021). The court granted its motion to withdraw on April 13, 2022. *See* Unopposed Motion to Withdraw Texas Organizing Project, OCA-Greater Houston v. Abbott, No. 5:21-cv-0844-XR (W.D. Tex. Apr. 13, 2022). The Workers Defense Action Fund was the other original plaintiff that withdrew. The court granted its motion to withdraw on March 6, 2023. *See* Unopposed Motion to Withdraw Workers Defense Action Fund, OCA-Greater Houston v. Abbott, No. 5:21-cv-0844-XR (W.D. Tex. Mar. 6, 2023).

[209] This lawsuit is one of six lawsuits challenging S.B. 1 brought by civil voting rights groups and the Department of Justice that was consolidated under La Unión del Pueblo Entero v. Abbott, 5:21-CV-0844XR (W.D. Tex. Sept. 30, 2021) (appeal pending). The other cases were: (1) OCA-Greater Houston v. Esparza, No. 1:21-CV-0780-XR (W.D. Tex. Sept. 3, 2021); (2) Houston Justice v. Abbott No. 5:21-CV-0848-XR, 2022 WL 4397142 (W.D. Tex. Feb. 11, 2022); (3) LULAC Texas v. Esparza, No. 1:21-CV-0786-XR (W.D. Tex. Sept. 7, 2021); (4) Mi Familia Vota v. Abbott, No. 5:21-CV-0920-XR; and (5) United States v. Texas, 5:21-cv-1085-XR (W.D. Tex. Nov. 4, 2021). These other lawsuits raised additional claims against S.B. 1.

[210] Second Amended Complaint of OCA-GH, *supra* note 48, at 45-50. We note that, on August 17, 2023, the court issued a summary ruling in favor of the plaintiffs, including the OCA-GH plaintiff group. Specifically, the district court ruled in favor of the plaintiffs challenging S.B. 1's ID matching requirement for mail-in ballots and their carrier envelopes. The court found that the ID matching requirements violated the Materiality Provision of the Civil Rights Act of 1964, then it moved forward at trial only on the remaining claims. La Unión del Pueblo Entero v. Abbott, 2023 LEXIS 144442 (W.D. Tex. Aug. 17, 2023); *see also Major*

CONCLUSION

Section 208 of the Voting Rights Act entitles voters to assistance of their choice if they have a disability or limited English language proficiency. This lawsuit in Texas, brought on behalf of an Asian American community organization and an Asian American voter is an example of how one mother's assertion of her right to choose her son as her assistor in the voting booth in 2015 critically defended the rights of many voters in 2022. Texas's unrelenting partisan efforts in S.B. 1 to suppress voting rights, including its unabashed attempt to enforce a previously enjoined voter restriction, point to the continuing need to monitor state legislative encroachments on the right to voter assistance under the VRA. While organizations continue to challenge other S.B. 1 voter suppression laws on other grounds, the Fifth Circuit's decision in *OCA-GH* and the subsequent permanent injunction provide clear bases to fight against future Section 208 violations.[211]

Victory in Lawsuit Against Texas Anti-Voter Law, ASIAN AM. LEGAL DEF. FUND (Aug. 22, 2023), https://perma.cc/SUN8-2CNN. After the district court handed down its final order in the case, La Unión del Pueblo Entero v. Abbott, 2023 LEXIS 211960 (W.D. Tex. Nov. 29, 2023), the state appealed. Currently, the Fifth Circuit has stayed the district court's order pending the state's appeal. United States v. Paxton, No. 23-50885 (5th Cir. Dec. 15, 2023) (order granting stay pending appeal). Like OCA-GH's challenge to Texas's Section 208 restrictions, materiality challenges to restrictive ID matching requirements on mail-in ballots must be persistently challenged.

[211] *See, e.g.*, Emergency Motion for Temporary Restraining Order, Kwon v. Crittenden, No. 1:18-cv-5405 at 14-15 (N.D. Ga. Nov. 27, 2018) and Consent Order, Kwon v. Crittenden, No. 1:18-cv-5405-TCB (N.D. Ga. Nov. 29, 2018) (describing Asian Americans Advancing Justice-Atlanta's 2018 lawsuit, which challenged a voter assistance limitation in the Georgia election code under Section 208 of the VRA and referenced the OCA-GH Fifth Circuit 2017 decision, and resulted in a swift settlement that permanently enjoined enforcement of the restrictive provision).