IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

JOLT INITIATIVE, INC.,

Plaintiff,

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,

Defendant.

Case No.: 1:24-cv-01089-RP

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

In its Complaint and Amended Motion for a Preliminary Injunction, Jolt detailed Defendant's efforts to intimidate Latino-focused nonprofits in Texas. And Jolt described the expressive and associational harms that it will suffer if it is required to comply with the RTE. Defendant barely disputes these points, and he spends fewer than three pages on Jolt's First Amendment and Voting Rights Act claims. *See* Defendant's Br. 15–18.

Instead, Defendant focuses on trying to substantiate his investigation and on sidestepping the merits of Jolt's claims based on threshold issues of ripeness and standing. *See id.* at 6–15. Defendant has failed, however, to identify any barriers to this Court's jurisdiction. And Defendant's attempts to justify his investigation merely confirm that it is groundless. In its Motion, Jolt surmised that the RTE was

motivated by a debunked tweet from a television personality and a video posted by a far-right activist that depicts no illegal activity. *See* Compl. ¶¶ 28–31; Am. PI Mot. 3. Defendant has now confirmed that his decision to investigate Jolt was driven by these pieces of "evidence," along with an unfounded report filed by an undercover officer whose allegations depend on a misreading of Texas election law. *See* MTD Ex. A. Despite having three weeks to respond to the Complaint, Defendant has not come up with a single legitimate reason for investigating Jolt.

This Court should recognize this case for what it is: an unlawful attempt to bully a voting rights organization out of doing the civic engagement work that forms the core of its mission. Jolt respectfully requests that the Court deny Defendant's motion to dismiss and preliminarily enjoin Defendant from enforcing the RTE.

ARGUMENT

I. Jolt's Claims Are Ripe

The doctrine of ripeness "separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). Ripeness "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Cath. Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993). Whether a case is ripe turns on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).

Jolt's challenge to the RTE "easily satisfie[s]" that governing test, which

Defendant fails to even mention in his brief. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). On the fitness prong, Jolt's arguments are "purely legal" and thus "will not be clarified by further factual development." *Id.* (internal quotation marks omitted). Jolt's First Amendment claims are particularly fit for review, given the risk that the RTE will chill protected expression. *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). As for hardship, failure to produce documents in response to the RTE would immediately subject Jolt to forfeiture of its "right . . . to do business in this state," Tex. Bus. Org. Code § 12.155, and would constitute a criminal offense for its officers, *id.* § 12.156. "Where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, hardship has been demonstrated." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 545 (5th Cir. 2008) (internal quotation marks and alteration omitted). Indeed, "denying prompt judicial review would impose a substantial hardship on" Jolt by "forcing [it] to choose between refraining from" asserting its constitutional rights "on the one hand" and "risking costly [charter revocation] proceedings and criminal prosecution on the other." *Susan B. Anthony List*, 573 U.S. at 167–68.

As Defendant points out, the Fifth Circuit has held that pre-enforcement lawsuits challenging administrative subpoenas are unripe if the subpoenas are not self-executing. *See* Defendant's Br. 6–8 (citing *Atl. Richfield Co. v. F.T.C.*, 546 F.2d 646 (5th Cir. 1977); *In re Ramirez*, 905 F.2d 97 (5th Cir. 1990); *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016)). But the RTE in this case, issued pursuant to

Defendant's visitorial powers over corporations rather than under any "subpoena" power, is self-executing in the relevant sense, so that precedent does not apply.

In the three cases on which Defendant relies, failure to comply with the subpoenas had no legal consequence before the issuing agency or official sought judicial enforcement. In *Atlantic Richfield*, for instance, the FTC could enforce its subpoenas only by going to federal court and seeking an order requiring production of documents. *See* 546 F.2d at 649 & n.3. Because the recipient of the subpoenas could raise its due process objections in the context of that enforcement action, the Fifth Circuit held that it "ha[d] an adequate remedy at law and w[ould] suffer no undue hardship from [the court's] withholding judicial consideration." *Id.* at 648. Essential to the court's decision was the fact that the recipient would "not be forced to comply with the subpoenas *nor subjected to any penalties for noncompliance* until ordered to comply." *Id.* at 650 (emphasis added); *see Ramirez*, 905 F.2d at 98–100 & n.2 (preemptive suit was unripe where subpoena could be enforced only through action seeking order requiring compliance). In *Google*, the Fifth Circuit reached the same conclusion with respect to a subpoena issued by the Mississippi Attorney General. There too, the relevant statute contemplated an enforcement action by the Attorney General to compel compliance with the subpoena, and state law imposed no consequences before the Attorney General filed such an action. *See* 822 F.3d at 225 (explaining that, as in *Atlantic Richfield* and *Ramirez*, "if the recipient refuses to comply, the Attorney General 'may, after notice, apply' to certain state courts 'and, after hearing thereon, request an order' granting injunctive or other relief and

enforceable through contempt" (quoting Miss. Code Ann. § 75-24-17)).

The Texas visitorial statutes under which Defendant issued the RTE in this case work much differently. As noted above, it is a crime for corporate officers to "fail[] or refuse[] to permit the attorney general to make an investigation of the entity or to examine or to make copies of a record of the entity." Tex. Bus. Org. Code § 12.156. And an "entity that fails or refuses to permit the attorney general to examine or make copies of a record . . . forfeits the right of the entity to do business in this state." *Id.* § 12.155. It would be a criminal offense for Jolt's officers to allow the RTE deadline to pass without complying, and Jolt's charter would be subject to immediate revocation. These consequences could result without Defendant first bringing any action seeking to enforce compliance.

The RTE is thus self-executing, and the prospect of immediate prosecution or charter revocation means that Jolt lacks "an adequate remedy at law" and would suffer "undue hardship" if this Court withholds review. *Atl. Richfield Co.*, 546 F.2d at 649. Defendant misleadingly suggests that the RTE is not self-executing because his "civil authority to enforce noncompliance with the RTE requires [him] to file a *quo warranto* suit in state court." Defendant's Br. 8. But such a suit would seek forfeiture of Jolt's charter, not enforcement of the RTE. And nothing in Texas law suggests that production of documents, as opposed to revocation of Jolt's charter, would be a potential remedy. To the contrary, Defendant has taken the position in another case involving a similar RTE that he may seek to revoke the recipient's charter "on the grounds that it has violated the law and failed to permit [Defendant]

to inspect, examine, and make copies of [the recipient's] records in response to a valid Request to Examine." Defendant's Plea to the Jurisdiction, Answer, and Motion for Leave to File Counterclaim in the Nature of Quo Warranto ¶ 16, *Annunciation House, Inc. v. Paxton*, No. 2024DCV0616 (Tex. Dist. Ct. Feb. 16, 2024). Defendant also claimed governmental immunity in that case, suggesting that precompliance review may not be available in state court at all. *Id.* ¶ 3.[1]

In any event, even if the RTE were not deemed self-executing, this case would be ripe because the Fifth Circuit's decision in *Google*, which extended the reasoning of *Atlantic Richfield* and *Ramirez* to state-issued subpoenas, was abrogated by the Supreme Court's decision in *Knick v. Township of Scott*, 588 U.S. 180 (2019). In *Knick*, the Court overruled precedent holding that a plaintiff must bring a "just compensation" claim in state court before filing a federal action alleging a violation of the Takings Clause. *Id.* at 184–85. The Court rejected the notion that ripeness can require a plaintiff to present a federal constitutional claim to a state court in the first instance. *Id.* at 185. "The Civil Rights Act of 1871, after all, guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials, and the settled rule is that exhaustion of state remedies is *not* a prerequisite to an action" in federal court under § 1983. *Id.* (internal quotation marks omitted). The

[1] Defendant represents that he previously "stated that [he] would not 'dispute the availability of judicial review' if Jolt filed suit in state court." Defendant's Br. 3 (quoting Bastard Decl. Ex. B at 2). But the RTE says nothing about filing in state court. *See* Bastard Decl. Ex. B at 2 ("[Y]ou may attempt to obtain judicial review of the RTE before September 19, 2024 through a suit for a declaratory judgment or a suit for injunctive relief." (internal quotation marks and citations omitted)). And Defendant's representation is inconsistent with his position in *Annunciation House*.

Court has since reiterated that its ruling in *Knick* reflects "the ordinary operation of civil-rights suits," *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 479 (2021) (per curiam), and lower courts have applied *Knick* to First Amendment claims, *see, e.g.*, *Jamgotchian v. Ferraro*, 93 F.4th 1150, 1156–57 (9th Cir. 2024).

The Court in *Knick* was particularly concerned with the "preclusion trap" that would result from forcing the plaintiff to start in state court: "He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court." *Knick*, 588 U.S. at 184–85. *Google* creates the same trap for plaintiffs seeking to challenge administrative subpoenas that are not self-executing. As Defendant admits, under *Google*, "[i]f a dispute ever does ripen, it would belong in Texas state court." Defendant's Br. 1. But if Jolt waits to raise its constitutional claims until Defendant brings an action in state court to revoke its charter, the resolution of Jolt's defenses in state court will preclude it from later raising them in federal court. *See, e.g.*, *Smith & Wesson Brands, Inc. v. Att'y Gen. of New Jersey*, 105 F.4th 67, 70 (3d Cir. 2024) (holding that claim preclusion barred federal lawsuit contesting subpoena following resolution of state enforcement action). Because *Google* "hands authority over federal [constitutional] claims to state courts," it is no longer good law; Jolt is "guaranteed a federal forum" for its federal claims. *Knick*, 588 U.S. at 189 (internal quotation marks and alteration omitted).[2]

[2] Defendant argues in the ripeness section of his brief that the RTE is "an administrative subpoena," not "an administrative search" or "*instanter* subpoena." Defendant's Br. 8. This goes to the merits, not ripeness, so Jolt responds below.

II. Jolt Has Standing

"To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List*, 573 U.S. at 157–58 (internal quotation marks and alteration omitted). Jolt has identified several injuries that it will suffer if it is required to comply with the RTE. First, the RTE violates Jolt's right to be free from unreasonable searches. *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) (where plaintiff alleged that "intrusive searches" of its business "violated its own right to be free from unreasonable searches," its "standing to assert" Fourth Amendment claim was "plain"). Second, disclosure pursuant to the RTE will chill Jolt's expression and association. *See Justice v. Hosemann*, 771 F.3d 285, 291–92 (5th Cir. 2014) (plaintiffs had standing where disclosure laws chilled speech). And third, Jolt is intimidated by the RTE. *Cf. Allee v. Medrano*, 416 U.S. 802, 819 n.13 (1974) (union had standing to "complain of . . . intimidation").

Defendant does not dispute that Jolt's injuries are traceable to the RTE and would be redressed by an injunction against enforcement. Instead, Defendant argues that Jolt lacks a cognizable injury because its "alleged harms are speculative and based on hypothetical future events and conjecture." Defendant's Br. 11. Jolt's harms, however, are "certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013), as Jolt will be required to comply with the RTE on November 4 absent a court order enjoining enforcement.

Defendant's arguments to the contrary fail to appreciate the nature of Jolt's injuries. Defendant argues, for example, that "Jolt cannot allege harm from the disclosure of the Attorney General's investigation." Defendant's Br. 11. But Jolt's injuries are caused by the threatened disclosure of the materials the RTE seeks, not by disclosure of the fact of the RTE. Defendant also misunderstands Jolt's harms when he contests Jolt's standing "[t]o the extent Jolt's alleged injury is rooted in the possible consequences of noncompliance with the RTE." *Id.* at 12. Although the consequences of noncompliance are relevant to the ripeness of this suit, *see supra* pp. 3–6, Jolt is seeking redress for injuries that will result from *compliance* with the RTE. Defendant's references to *Laird v. Tatum*, 408 U.S. 1 (1972), are likewise misplaced, *see* Defendant's Br. 12–13, as the Court there considered injuries "allegedly caused, not by any specific action of the [government] against [plaintiffs], but only by the existence and operation of the intelligence gathering and distributing system," 408 U.S. at 3 (internal quotation marks and alterations omitted). Here, Defendant has undoubtedly taken a "specific action" against Jolt.

Defendant's arguments also misunderstand the relevant case law. He contends that Jolt has failed to demonstrate a sufficient injury because "Texas law provides that [RTE responses are] not subject to the public information act and may not be disclosed except in the course of legal proceedings or in law enforcement investigations." Defendant's Br. 12. The Supreme Court has made clear, however, that compelled disclosure can inflict constitutional injury "even if there is no disclosure to the general public." *Americans for Prosperity Found. v. Bonta*, 594

U.S. 595, 616 (2021) (*AFP*) (internal quotation marks and alterations omitted). And in any event, Defendant has recently tried to make public even highly sensitive records that he received in response to an RTE. *See* Compl. ¶ 53; Mead Decl. Ex. K.

Defendant also contends that "Jolt's allegations are almost entirely reflecting concerns [about] individuals and organizations who are not before this Court." Defendant's Br. 12. But Jolt has asserted its own protected interests. As the recipient of the RTE, Jolt has its own Fourth Amendment interest in being free from unreasonable searches. *See supra* p. 8. And Jolt seeks to vindicate its own expressive and associational rights, as well as its right to be free from intimidation. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (confirming that corporate entities have free speech rights); *AFP*, 594 U.S. at 611 (holding that disclosure requirement violated nonprofits' freedom of association). That Jolt VDRs and voters might also have standing to bring claims does not prevent Jolt from bringing claims for its own injuries as well.

III. Jolt Has Stated Claims and Is Likely to Succeed on the Merits

A. The RTE Violates the Fourth Amendment

Defendant has now conceded that the RTE was issued as part of a criminal investigation. *See, e.g.*, Defendant's Br. 1. As explained in Jolt's Motion, that means Defendant must get a warrant supported by probable cause if he wants to obtain the requested documents. *See* Am. PI Mot. 6–9. Defendant argues that the RTE is an administrative subpoena and not an administrative search. *See* Defendant's Br. 8–11. But that argument is nonresponsive, unless Defendant

means to contend that searches in criminal investigations can proceed by administrative subpoena rather than by warrant and probable cause.[3] If that is Defendant's contention, then he offers no authority to support it.

Even if the RTE were not issued as part of a criminal investigation, but were instead issued as part of an administrative search regime, it would violate the Fourth Amendment because it does not provide Jolt with an adequate opportunity for precompliance review. Defendant argues that the RTE "afforded Jolt three weeks to either comply, seek precompliance review in state court, or raise challenges to the subpoena during any subsequent enforcement proceedings." Defendant's Br. 11. But the statutes on which Defendant relied in issuing the RTE do not provide for precompliance review. *See* Am. PI Mot. 8–9 (citing Tex. Bus. Org. Code §§ 12.151, 12.152). And, as noted above, *see supra* p. 5, if Jolt waits to raise challenges in an enforcement proceeding, its charter will be subject to immediate revocation, and its officers will be subject to immediate prosecution. *Contra Patel*, 576 U.S. at 421 (noting that the subject of an administrative search must have an opportunity to obtain review "before he or she faces penalties for failing to comply").

In any event, the RTE is patently unreasonable under any standard for conducting precompliance review. *Compare* Am. PI Mot. 8 (reciting standard from *See v. City of Seattle*, 387 U.S. 541 (1967)), *with* Defendant's Br. 13 (reciting standard from *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485

[3] Also, the Supreme Court has described administrative subpoenas as tools used in administrative searches. *See City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015).

(5th Cir. 2014)). Most significantly, Defendant has not shown that his investigation is being "conducted pursuant to a legitimate purpose," or that the information sought is "relevant to the purpose." *Transocean*, 767 F.3d at 489 (internal quotation marks omitted). And given the sweep of the RTE and the chilling effect compliance would have, Defendant has also failed to establish that "the demand is not unreasonably broad or burdensome." *Id.* at 488 (internal quotation marks omitted).

It is striking how weak Defendant's support is for his investigation. The sum total of his justification for the RTE is: (1) an X post from Maria Bartiromo, Mead Decl. Ex. E; (2) a video taken by a self-described "Alpha MAGA Male," *id.* Ex. A; and (3) a misleading incident report from an officer who appears to be unfamiliar with Texas election law, MTD Ex. A. In addition to being sparse, none of this "evidence" provides any reason to suspect that Jolt or its VDRs have done anything wrong.

Beginning with the Bartiromo post, which alleged unlawful voter registration by unidentified organizations at DPS offices near Fort Worth, Defendant does not dispute that the substance of the post was immediately debunked by the Parker County Republican chair and election administrator. *See* Compl. ¶ 29. Defendant instead insists that "there is no practical benefit for an organization to attempt to register persons directly outside of a DPS office." Defendant's Br. 2. But Jolt has already explained why this view is wrong. *See* Bastard Decl. ¶ 14.

Moving to the video, Defendant quotes a Jolt VDR—whom Jolt has now identified as its former employee A.R., *see* A.R. Decl.—saying that a noncitizen could theoretically fill out a voter registration application because VDRs do not ask

for proof of citizenship. *See* Defendant's Br. 2 n.1. This is correct but irrelevant. It is of course true that "Texas law mandates that applicants registering to vote certify that they are U.S. citizens," *id.*, but it is also true that Texas law *prohibits* VDRs from verifying the certifications that applicants provide, *see* Am. PI Mot. 20; *see also* A.R. Decl. ¶ 14. Indeed, the VDR training that Defendant cites, *see* Defendant's Br. 2 n.1, which is materially identical to the VDR training that A.R. completed, *see* A.R. Decl. Ex. B, says in bold, capital letters that VDRs "**MAY NOT** . . . determine if the applicant is actually qualified to register to vote." *Training for Texas Volunteer Deputy Registrars* 25, https://perma.cc/54WT-TCFG. It is confounding that Defendant would rely on this training as evidence that A.R. acted improperly, let alone that Defendant would suggest that A.R. "coerc[ed] or induc[ed]" anyone to "mak[e] false statements on a voter registration application." Defendant's Br. 14.[4]

Finally, with respect to the incident report, Defendant again misrepresents Texas election law. In the report—which also involved A.R., *see* A.R. Decl. ¶ 1—the undercover officer said that he "stated in a question format that [he] couldn't have" a registration application for his daughter and that A.R. "replied that since [the officer] ha[d] her information, [he] could register her to vote, alluding to being a parent and that [he] had that right." MTD Ex. A. The officer then expressed his belief that "[t]his is not only incorrect but illegal per election code." *Id.* The

[4] A.R. clearly says in the video that it is illegal for noncitizens to vote, that they should not do it, and that he has never encountered someone trying to vote illegally. *See* hernando arce (@hernandoarce), X (Aug. 20, 2024, 1:53 PM), https://x.com/hernandoarce/status/1825954284858417608 (video at 0:18–0:32, 1:25–1:32).

problem for the officer (and Defendant) is that Texas law *does* allow parents to register their children to vote. *See* Tex. Elec. Code § 13.003. Once again, Jolt refers the Court to the VDR trainings cited by Defendant and completed by A.R., which explain that VDRs "may allow another registered voter (or anyone who has submitted a registration application) to fill out and sign an application for his/her spouse, parent or child," so long as the person "ha[s] the permission of the applicant" and "sign[s] the application as 'agent' and state[s] the relationship to the applicant on the application." *Training for Texas Volunteer Deputy Registrars* 21; *see* A.R. Decl. ¶¶ 20–21. Had the officer more carefully "read the statements at the bottom of the card related to swearing and affirming the information on the card," MTD Ex. A, he would have seen that the application asked for the signature of the "Applicant *or Agent*," A.R. Decl. Ex. A (emphasis added). It is beyond the pale for Defendant to rely on a mistaken incident report to justify the RTE, and to accuse A.R. of illegally "attempt[ing] to induce an undercover investigator to register his daughter," Defendant's Br. 15, when A.R. provided only accurate information.

Defendant has thus failed to show that the RTE was issued pursuant to a legitimate purpose, or that the information sought by the RTE is relevant to any such purpose. *See Transocean*, 767 F.3d at 489. Defendant has identified two instances in which a single Jolt VDR provided accurate information to people who confronted him under false pretenses. This cannot possibly justify a request for the identifying information of all Jolt VDRs and all voters registered by those VDRs, or of all materials provided to those VDRs regarding registration.

Defendant says that the information sought by the RTE "is reasonably relevant to the inquiry into whether Jolt's VDRs hold effective appointments." *Id.* at 15. But he has identified nothing (not even misinformed social media posts) suggesting the existence of "individuals posing as Jolt VDRs without effective appointments." *Id.* And Defendant argues that the information sought by the RTE is relevant to whether "Jolt's VDR training materials conflict with those prescribed by the Secretary of State," or whether Jolt VDRs have "submitted voter registration applications on behalf of non-citizens." *Id.* But (as noted) Jolt's conduct is fully consistent with the Secretary of State's VDR training, and Jolt VDRs are precluded by law from checking applicants' citizenship status. *See supra* p. 13.

The lack of legitimate purpose and relevance is fatal to each of Defendant's requests. Each request is also "unreasonably broad" and "burdensome." *Transocean*, 767 F.3d at 488 (internal quotation marks omitted). The RTE seeks information on *all* VDRs and voters. *See United States v. Zadeh*, 820 F.3d 746, 758 (5th Cir. 2016) (fact that "subpoena did not include all of Dr. Zadeh's patients" supported "district court's conclusion that the subpoena was not unduly broad or burdensome"); Defendant's Br. 14 (discussing this holding approvingly). And as discussed in Jolt's Complaint and Motion, disclosure of that information would severely impair Jolt's expression and association. Defendant suggests that administrative subpoenas cannot be unreasonably broad or burdensome if the recipient "is only required to provide information that it already stores and maintains in the ordinary course of business." Defendant's Br. 15. But he cites

nothing in support of that rule, which would make reasonableness review toothless.

B. The RTE Violates Jolt's Freedom of Association

Defendant's opposition to Jolt's association claim rests entirely on a misreading of the Fifth Circuit's decision in *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013). Defendant cites *Steen* for the proposition that "[v]oter registration applications are individual, not associational," and that registration drives are not "'expressive conduct' protected by the First Amendment." Defendant's Br. 16 (quoting 732 F.3d at 390–91). And he concludes from this that "Jolt cannot state a freedom [of] association claim based on registering voters." *Id.*

But Defendant's selective quotations from *Steen* tell only part of the story. Although the Fifth Circuit held that "the mere mechanics of registration performed by VDRs" are not expressive, 732 F.3d at 395, it contrasted those ministerial actions with other "voter registration activities"—from "'urging' citizens to register" to "'helping' voters to fill out their forms"—which are "constitutionally protected speech" and thus receive heightened scrutiny, *id.* at 389. Jolt's efforts to promote civic engagement among Latinos, including through encouraging voter registration, fall within this latter category of clearly expressive activity.

It is those expressive activities that form the basis of Jolt's association claim. *See* Compl. ¶ 74. And by forcing disclosure of VDR and voter identities, Defendant's RTE chills this expressive association. The RTE is therefore subject to at least exacting scrutiny, which—as Jolt explained in its Motion—Defendant cannot satisfy. *See* Am. PI Mot. 11–13. Defendant has not made, and has therefore

forfeited, any argument to the contrary. *See Parsons v. Sager*, No. 1:18-CV-1014-RP, 2019 WL 5243190, at *2 n.1 (W.D. Tex. Apr. 30, 2019).

C. The RTE Retaliates Against Protected Expression

As explained in Jolt's Complaint and Motion, the RTE was substantially motivated by Jolt's protected expression and would chill a person of ordinary firmness from engaging in that expression. Defendant barely responds to this, resting instead on the Fifth Circuit's rule against "retaliatory investigation claims." Defendant's Br. 16 (quoting Am. PI Mot. 14). Defendant also suggests that the RTE was motivated by Jolt's alleged misconduct rather than by its speech. *Id.* at 17.

Again, Jolt does not claim retaliation based on the existence of Defendant's investigation, which is what Fifth Circuit precedent forbids.[5] Jolt instead claims retaliation based on the demand that it produce documents that would expose its VDRs and the voters they register to harassment. And there is no rule against retaliation claims based on actions taken pursuant to an investigation. *See, e.g.*, *Linzy v. Cedar Hill Indep. Sch. Dist.*, 37 F. App'x 90 (5th Cir. 2002) ("We do not rule out the possibility that government use of [a pre-suit deposition] procedure could potentially serve as the basis for a viable First Amendment retaliation claim.").

Even in the Fifth Circuit, moreover, a plaintiff can state a claim for retaliation based on an investigation undertaken in "bad faith." *Izen v. Catalina*,

[5] Jolt reserves the right to challenge this precedent, which is inconsistent with Supreme Court case law. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 n.8 (1990) (First Amendment bars "even an act of retaliation as trivial as failing to hold a birthday party for a public employee" (internal quotation marks omitted)).

398 F.3d 363, 367 n.5 (5th Cir. 2005) (internal quotation marks omitted). Defendant argues that his investigation was spurred by the video and incident report discussed above, but Jolt has already explained that this "evidence" reveals nothing unlawful. Defendant is also unable to get his story straight, thus casting further doubt on his motives. He says the video led to the undercover investigation, which in turn led to the RTE. *See* Defendant's Br. 17. But the undercover investigation happened on August 19, MTD Ex. A, and the video was posted on August 20, Mead Decl. Ex. A; *see Hager v. Brinker Texas, Inc.*, 102 F.4th 692, 704 (5th Cir. 2024) ("[W]e have long held that a defendant's shifting, inconsistent reasons for objectionable conduct can provide sufficient evidence of pretext.").

D. The RTE Violates Section 11(b) of the Voting Rights Act

Defendant does not dispute that threats of legal action and dissemination of personal information can constitute violations of § 11(b) of the Voting Rights Act. Instead, Defendant suggests that Jolt has failed to state a claim because the RTE is part of "a lawful investigation by the Attorney General." Defendant's Br. 17. This argument assumes a false premise: as Jolt has explained at length, Defendant's investigation is *unlawful* under the First and Fourth Amendments.

Moreover, the Fifth Circuit has left no doubt that even an otherwise lawful investigation becomes unlawful if it undermines the "right to engage in assisting others to register to vote" in violation of § 11(b). *Whatley v. City of Vidalia*, 399 F.2d 521, 526 (5th Cir. 1968). "[I]t is unimportant what the state prosecuting officer may denominate the conduct" of plaintiffs in such cases. *Id.* Section 11(b) extends to—

and prohibits—"official acts of harassment" by the state, including "'attempts to punish'" that would "otherwise" be appropriate under state law. *Id.* The Fifth Circuit has reached the same conclusion with respect to the anti-intimidation provision of the Civil Rights Act of 1957—a provision interpreted largely in parallel with § 11(b). *See United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967) (Civil Rights Act of 1957 prohibits "[a]cts otherwise entirely within the law").

Defendant further argues that Jolt cannot state a claim for unlawful intimidation because Jolt itself "disclosed the existence of the RTE to the public." Defendant's Br. 18. But Jolt's claim is not that disclosure of the investigation amounts to voter intimidation. It is that the RTE's demand for Jolt's sensitive information is intimidating, as disclosure to Defendant alone risks exposing Jolt and its associates to abuses of Defendant's law enforcement authority. *See McLeod*, 385 F.2d at 741 (recognizing the substantial "chilling effect" of "baseless" law enforcement action on "voter registration drive[s]"). And as described above, Defendant's conduct in other cases suggests that he is careless with the confidential information he has obtained through similar RTEs. *See supra* p. 10.

IV. The Remaining Factors Weigh in Favor of a Preliminary Injunction

The remaining factors also favor Jolt. Defendant argues that Jolt is not harmed by his "lawful" investigation. Defendant's Br. 20. But that assumes he is right on the merits. To the contrary, because Jolt is likely to succeed, the irreparable harm, balance of equities, and public interest factors support granting injunctive relief. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279,

295–98 (5th Cir. 2012); *Netflix, Inc. v. Babin*, 88 F.4th 1080, 1100 (5th Cir. 2023).

Defendant asserts that Jolt faces no threat of irreparable injury because Jolt "cannot show that VDR information is 'confidential.'" Defendant's Br. 19. In support of this argument, Defendant cites statutory provisions requiring county registrars to maintain lists of VDRs. *Id.* at 19–20 (citing Tex. Elec. Code. §§ 13.034–.035). But Defendant misrepresents the nature of Jolt's associational interest. The likelihood of irreparable harm comes not from disclosure of VDRs' status as VDRs, but rather from disclosure of VDRs' affiliation with Jolt, which is generally not a matter of public record. Although VDRs make their affiliation known at voter registration events, they do so only to a particular group of people and for a limited period of time. *See* Bastard Decl. ¶¶ 14–16. Regardless, even if some information about Jolt's VDRs is already public, "each governmental demand for disclosure brings with it an additional risk of chill." *AFP*, 594 U.S. at 618.

Disclosure to Defendant in particular presents a special risk of harm, given his ongoing intimidation campaign against organizations that promote civic engagement among Latinos, as well as his attempt to reveal confidential information obtained through a similar RTE in another case. *See supra* p. 10. Once Jolt's affiliations with VDRs and voters are disclosed, that information cannot be clawed back, underscoring the irreparable nature of the injury.

CONCLUSION

This Court should deny Defendant's motion to dismiss and grant Jolt's motion for a preliminary injunction.

Respectfully submitted this October 11th, 2024,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 11, 2024, I electronically filed and served the foregoing using the Court's CM/ECF system.

/s/ Mimi Marziani
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