No. 06-41573

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIE RAY; JAMILLAH JOHNSON; GLORIA MEEKS; REBECCA MINNEWEATHER; PARTHENIA MCDONALD; WALTER HINOJOSA; TEXAS DEMOCRATIC PARTY,

Plaintiffs-Appellees,

v.

GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS; ROGER WILLIAMS, SECRETARY OF STATE FOR THE STATE OF TEXAS,

Defendants-Appellants.

On Appeal from the United States District Court
Eastern District of Texas, Marshall Division

BRIEF FOR APPELLEES

OTIS W. CARROLL
IRELAND, CARROLL & KELLEY, P.C.
6101 South Broadway, Suite 500
Tyler, TX 75703
Telephone: (903) 561-1600
Facsimile: (903) 581-1071
otiscarroll@icklaw.com

ERIC M. ALBRITTON
ALBRITTON LAW FIRM
P.O. Box 2649
Longview, TX 75606
Telephone: (903) 757-8449
Facsimile: (903) 758-7397
ema@emafirm.com

Counsel for Plaintiffs-Appellees
(additional counsel listed on next page)

J. GERALD HEBERT
Attorney at Law
J. GERALD HEBERT, P.C.
5019 Waple Lane
Alexandria, VA 22304
Telephone: (703) 628-4673
jghebert@comcast.net

ART BRENDER
Attorney at Law
600 Eighth Avenue
Ft. Worth, TX 76104
Telephone: (817) 334-0171
brenderlawfirm@artbrender.com

BRUCE V. SPIVA
KATHLEEN R. HARTNETT
SPIVA & HARTNETT LLP
1776 Massachusetts Avenue, N.W.
Suite 600
Washington, D.C. 20036
Telephone: (202) 785-0601
Facsimile: (202) 785-0697
bspiva@spivahartnett.com
khartnett@spivahartnett.com

Counsel for Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees: Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Parthenia McDonald, Walter Hinojosa, Texas Democratic Party

Witnesses for Plaintiffs-Appellees: Ruben Hernandez, Jane Hamilton, Rep. Norma Chavez, Rep. Pete Gallego, Rep. Pete Laney, Rep. Garnet Coleman, Sen. Leticia Van de Putte, Sen. Rodney Ellis

Counsel for Plaintiffs-Appellees: Eric M. Albritton, Otis W. Carroll, J. Gerald Hebert, Bruce V. Spiva, Kathleen R. Hartnett, Art Brender

Defendants-Appellants: State of Texas, Texas Attorney General Greg Abbott, Texas Secretary of State Roger Williams

Witnesses for Defendants-Appelles: Ann McGeehan, David Boatright, Adrienne McFarland

Counsel for Defendants-Appellants: Edward D. Burbach, R. Ted Cruz, Robert B. O'Keefe, Kathlyn C. Wilson, Philip A. Lionberger, Adam W. Aston

Kathleen R. Hartnett

STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully state that oral argument is not necessary in this case. In its present posture – an interlocutory appeal from a narrow preliminary injunction – this case does not, as Appellants ("the State") erroneously suggests, concern "multiple claims" to "several Texas Election Code provisions." State Br. at iii. The State's present appeal must be rejected because substantial evidence received at an evidentiary hearing supports the trial court's exercise of its broad discretion to craft a limited and carefully tailored preliminary injunction.

The other two issues purportedly presented by the State concern denied motions to dismiss and transfer venue which are not properly before this Court on interlocutory appeal and which, in any event, lack merit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

This lawsuit concerns federal constitutional and statutory challenges by Appellees to several unprecedented provisions of the Texas Election Code that authorize a variety of sweeping criminal penalties for those who seek to provide legitimate and necessary aid to elderly and infirm voters who vote by mail. For example, Section 86.006(f) of the Texas Election Code – the provision partially enjoined by the District Court – subjects individuals, including Appellees, to criminal prosecution merely for *possessing* another's sealed mail-in ballot with the voter's consent. Violations of that Section result in the complete denial of the right to vote, as a ballot returned in violation of Section 86.006(f) "may not be counted." *Id.* § 86.006(h). This law as well as other challenged provisions are not necessary to serve the legislature's purported goal of preventing voter fraud, and instead have the intent and effect of deterring individuals and organizations from legitimate political association and expression. In addition, the provisions have had an overwhelming and disproportionate deterrent effect on minorities and Democrats, which have been the targets of Appellants' ("the State's") enforcement.

Although Appellees' lawsuit entails multiple claims to various statutory provisions, the issue presented by this interlocutory appeal is far narrower. In October 2006, Appellees filed a motion for preliminary injunction on certain counts of their Complaint in advance of the November 6, 2006 general election.

Appellees focused their request for preliminary relief on Section 86.006(f), whose ambiguity and breadth created a devastating chilling effect on Appellees' get-out-the vote efforts. The District Court received substantial oral testimony and documentary evidence from Appellees to support their position that Section 86.006(f) caused irreparable harm to constitutionally protected political activities and expression. Thereafter, the District Court issued a carefully tailored partial injunction against Section 86.006(f), barring the State from prosecuting individuals who do no more than possess a voter's mail-in ballot with the voter's consent. The District Court expressly preserved, pending full adjudication on the merits, the State's right to enforce Sections 86.006(f) and 86.0051 against individuals who mail a voter's mail-in ballot in the mail without providing identifying information.

The State's appeal fails to address the substantial evidence presented by Plaintiffs below supporting the District Court's carefully crafted injunction. Moreover, the State ignores the controlling legal framework under the First and Fourteenth Amendments upon which the District Court's order is soundly based. In contrast to Appellees' evidentiary presentation below, the State offered *no* proof of actual voter fraud combated with Section 86.006(f) and utterly failed to rebut Appellees' evidence that Section 86.006(f) had a substantial chilling effect.

Accordingly, the State's position that the limited injunction granted below should be reversed must be rejected, because the preliminary injunction is firmly

based in law and fact. The State's other two arguments on appeal also must fail because they are not properly before this Court on interlocutory appeal and, in any event, are meritless.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over Appellees' fundamental right to vote constitutional claim that is the subject of the District Court's preliminary injunction pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 786 & n.7 (1983). This Court has jurisdiction of the State's appeal of that preliminary injunction under 28 U.S.C. § 1291(a)(1).

As discussed below, the other issues raised by the State are not properly before this Court. The State's Issue One, which concerns the District Court's denial of a motion to dismiss or transfer for lack of venue, is not properly before this Court because it is a non-final order that has not been certified under 28 U.S.C. § 1292(b), that is not otherwise appealable as a collateral order, and that is not inextricably bound up with the preliminary injunction ruling so as to justify interlocutory review. The State's Issue Two – concerning the State's motion to dismiss Appellees' claims under 42 U.S.C. § 1971 for lack of jurisdiction – is not properly before this Court because the District Court has not yet ruled on this issue. Furthermore, Section 1971 was not a basis for the District Court's limited

injunction. In any event, even if the District Court had denied this motion, interlocutory review would be inappropriate because such a ruling has not been certified for interlocutory appeal and is unrelated to injunction under review.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the State's motion to dismiss and/or transfer based on lack of venue is properly before this Court on interlocutory appeal, should be resolved by the District Court in the first instance, and, in any event, is meritless.

2. Whether the State's motion to dismiss Appellees' claims under 42 U.S.C. § 1971 is properly before this Court on interlocutory appeal, is premature because it neither was ruled on by the District Court nor was the basis of the District Court's injunction, and, in any event, is meritless.

3. Whether the District Court acted within its broad discretion in issuing a narrow preliminary injunction against an overbroad provision of the Texas Election Code that criminalized mere possession of another's absentee ballot, based on undisputed record evidence that the provision needlessly chilled protected political expression, confused voters, and was susceptible of arbitrary and discriminatory enforcement.

STATEMENT OF THE CASE

Appellees' Complaint, filed on September 21, 2006, challenged several unduly restrictive provisions of Texas law concerning mail-in balloting. Appellees

are the Texas Democratic Party, an organization that has long engaged in legitimate efforts to assist mail-in voters (particularly disabled and elderly voters) exercise their right to vote, as well as several voters (Appellees Ray, Johnson, Meeks, Minneweather, and Hinojosa) who assisted disabled and elderly voters in the past and wish to continue assisting them in the future. 1.R.11-14¶¶ 2-6,8-9; 1.R.75-83; Tr.62-70,72-76,80-81; PX15@8-14,17-20.[1] Appellee Parthenia McDonald is a 78-year old, homebound voter who depends on the assistance of others to apply for and cast her mail-in ballot. 1.R.137; Tr.119-21.

On October 13, 2006, Appellees moved for a preliminary injunction based on the emerging deterrent effects that the challenged provisions were having on Appellees' get-out-the-vote efforts, and in light of State's stepped-up enforcement efforts in advance of the November 6, 2006 election. 1.R.46-74. The State filed a Motion to Dismiss on October 16, 2006. 1.R.85-126. The District Court set a hearing date of October 30, 2006 for both motions. 1.R.130. Between October 23 and October 30, 2006, the parties deposed witnesses whose testimony they intended to offer at the hearing. Appellees took four depositions, all defended by the State. PX12-19. The State took none.

[1] For ease of reference, this brief will use the same conventions used by the State for citing to the appellate record: R = Record; Tr. = Transcript; PX = Plaintiffs' Exhibit; DX = Defendants' Exhibit; RE = State's Record Excerpt. The Declaration of Ruben Hernandez, Executive Director of the Texas Democratic Party, was submitted with Appellees' Preliminary Injunction Motion and was also admitted as an Exhibit (PX20) at the District Court Hearing, *see* Tr.89,117. For ease of reference, this brief will use the Record cite for the Hernandez Declaration (1.R.75-83).

The District Court held an hours-long evidentiary hearing on October 30, 2006. Appellees presented two live witnesses – Ruben Hernandez, Executive Director of Appellee Texas Democratic Party, and Appellee Willie Ray, Tr.70-84,85-116 – and two witnesses via videotaped deposition – Appellees Rebecca Minneweather and Parthenia McDonald, Tr.59-70,119-28. Appellees also submitted 26 exhibits, including transcripts and CDs of the four videotaped depositions, the Declaration of Ruben Hernandez, and six declarations of Texas State legislators. PX1-26. All were admitted into evidence. Tr.117; 4.R.842. The State did not present any live witnesses or deposition testimony. Instead, the State submitted three declarations from State officials – Director of Elections Ann McGeehan, Chief of the Criminal Investigations Division David Boatright, and Chief of Criminal Law Enforcement Division Adrienne McFarland. DX1-3.

On October 31, 2006, the District Court issued a narrow preliminary injunction against certain enforcement of Sections 86.006(f) and (h) of the Texas Election Code. 4.R.843-44; 2.R.E.843-44.[2] This injunction was supported by fourteen pages of factual findings and conclusions of law. 4.R.846-59; 3.R.E.846-59. Based on the substantial evidence introduced by Appellees at the hearing that the Court "found to be persuasive," the Court concluded that Section 86.006

[2] The District Court made clear that its preliminary injunction ruling pertained solely to Appellees' challenge to Section 86.006, because "even assuming that [Appellees' other] claims are meritorious, the court could not award meaningful relief in the form of a preliminary injunction given the current timetable governing the election." 4.R.850¶23; 3.R.E.850¶23.

"prevents [Plaintiffs] and dissuades others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout." 4.R.852¶27; 3.R.E.852¶27. The District Court enjoined the State from enforcing Sections 86.006(f) and (h) "in circumstances in which a person, other than the voter, has merely possessed the official ballot or official carrier envelope and such possession is with the actual consent of the voter." 4.R.843; 2.R.E.843. The Court preserved the State's ability to require identifying information from those *mailing* ballots for voters, stating that the State was not prevented "from enforcing Tex. Elec. Code § 86.0051 under the circumstances in which a person, other than the voter, deposits the carrier envelope in the mail or with a common or contract carrier and does not provide the person's signature, printed name, and residence address on the reverse side of the envelope." 4.R.843-44; 2.R.E.843-44.

In addition to granting Appellees' motion for a preliminary injunction in part, the Court ruled on aspects of the State's motion to dismiss necessary to the disposition of the Court's injunctive order. 4.R.853¶5; 3.R.E.853¶5. The Court granted in part the State's motion to dismiss the State as a Defendant, determining it was immune from suit on the constitutional claims. 4.R.853¶1; 3.R.E.853¶1. The Court also stated that it had subject matter jurisdiction over Appellees' constitutional and Voting Rights Act claims, 4.R.853¶2; 3.R.E.853¶2, although it relied only on the constitutional right to vote claim as a basis for granting the

injunction, 4.R.856-57¶20; 3.R.E.856-57¶20. Finally, the Court rejected the State's motion to dismiss or transfer for lack of venue based on *Heck v. Humphrey*, 512 U.S. 477 (1994), concluding that *Heck* did not bar the claims of Appellees Ray and Johnson or warrant transfer. 4.R.853¶¶3-4; 3.R.E.¶¶3-4.

The State moved this Court for a stay pending appeal of the injunction on November 1, 2006. The State remarkably claimed that the "district court's injunction has the *immediate* effect of enjoining Appellants from preventing voter fraud," incorrectly describing the injunction as having "enjoined any enforcement of §§ 86.006(f) & (h) of the Texas Election Code." Stay Mot. at 3, 15 (filed Nov. 1, 2006). Appellees opposed the stay motion on November 2, 2006.

On November 3, 2006, this Court granted the State's motion to stay, but denied the State's motion to expedite the appeal. 4.R.905. Judge Dennis concurred, but found it "difficult . . . to say that the district court abused its discretion in its carefully drawn preliminary injunction of what appears to be the state's overly broad criminalization of conduct intended to assist disabled voters and its resulting disqualification of disabled voters' mail-in ballots." 4.R.905-06.

Appellees thereafter sought emergency relief from the Supreme Court, which denied review, over the dissent of Justice Souter. This appeal followed.

STATEMENT OF FACTS

A. Appellees And Others Have A History Of Legitimate Efforts To Assist Texas Voters With Mail-In Balloting.

Voting by mail is a part of Texas's established system of "early voting," whereby individuals may cast ballots before Election Day in person or by mail. Tex. Elec. Code § 81.001 *et seq.* Texas law provides a statutory right to cast a mail-in ballot for any qualified voter who is 65 years or older on Election Day, who will be absent from the county of residence on Election Day, or who is disabled or ill. *Id.* §§ 82.001-82.003. As Appellant Williams has recognized, casting a ballot by mail in Texas is synonymous with "exercis[ing] your right to vote." PX8.

To vote by mail, an eligible registered voter "must make an application for an early voting ballot to be voted by mail." *Id.* § 84.001(a). After receiving a mail-in ballot, a voter must "mark a ballot voted by mail in accordance with the instructions on the ballot envelope," *id.* § 86.005(a), and then "place it in the official ballot envelope and then seal the ballot envelope, place the ballot envelope in the official carrier envelope and then seal the carrier envelope, and sign the certificate on the carrier envelope," *id.* § 86.005(c). The marked ballot "must be returned to the early voting clerk in the official carrier envelope." *Id.* § 86.006(a).

Because many voters who vote by mail-in ballot are elderly or physically impaired, there is a longstanding practice in Texas – by Appellees and others

similarly situated – of providing assistance to mail-in voters. Tr.61-65,72-76,86-87; PX14@10-17; PX15@8-14; 1.R.75-76¶2. Efforts to assist mail-in voters have been conducted by both major political parties and other civic organizations. Tr.86-87; PX14@10-17; 1.R.78¶8. For example, Appellee Texas Democratic Party has long undertaken efforts to assist mail-in voters in order to maximize voter turnout, particularly among the elderly and disabled, Tr.86-87; 1.R.75-76¶2. In 2006, the Party expected to spend approximately $100,000 in efforts to assist mail-in voters. 1.R.76¶3. The Party has also implemented efforts to increase voter turnout in minority communities, including black and Hispanic communities in Texas, because turnout there is typically lower than in Anglo communities, due in large part to the long history of voting discrimination by the State. 1.R.78¶9.

Assisting voters with mail-in voting takes many forms. For example, the efforts of Appellee Texas Democratic Party have included: providing assistance to voters in completing applications for mail-in ballots, including mailing "pre-filled" applications to voters, who then need only sign and return the application; helping voters who have received mail-in ballots with marking their ballots (particularly voters who are blind or cannot read or write); and physically placing sealed ballots in the mail or otherwise delivering the ballots to election officials. Tr.61-65,72-76, 86-87; PX14@10-17; PX15@8-14; 1.R.75¶2. Some voters need assistance for the entire application and voting process. 1.R.76¶ 4. In all cases, the assistor merely

provides whatever help the voter requests. 1.R.77¶6. Where the assistance needed involves reading the ballot to a voter or providing instruction in marking the ballot, the voter's decision is made by the voter without influence or pressure from the assistor. 1.R.77¶6.

In many cases, an assistor is specifically asked to take the voter's completed ballot, which must be sealed in the carrier envelope, and mail that ballot for the voter. Tr.63-64,75,86-87,122-23; PX14@13-17; PX15¶¶11-12; 1.R.77-78¶¶5,7. Because it was often infeasible or inefficient to immediately deposit a completed ballot in the mail or with a common carrier, the Party's practice before 2003 was to allow assistors to accumulate completed ballots during the day, and, at the end of the day, a Party representative – not necessarily the assistor who interacted with the voter – would deliver the ballots to the clerk. Tr.86-87; 1.R.77-78¶7.

In past years, a significant number of individuals working on behalf of campaigns and the Democratic Party at the county level have been involved in assisting mail-in voters, including mailing voters' ballots. Tr.61-65,72-76,86-87; PX14@10-17; PX15@8-14; 1.R.75-76¶2. Mail-in voters regularly inform the Party that they appreciate this assistance. Tr.65; 1.R.76¶3. Absent such efforts by the Party and the individual Appellees to assist mail-in voters, many potential mail-in voters would find it difficult or impossible to receive a mail-in ballot or properly complete and cast a ballot. Tr.64,68,86-87,123; PX14@17; PX15@12; 1.R.78¶8.

That voters rely on such assistance is exemplified by Appellee Parthenia McDonald, who is 78-years old, homebound, and severely physically handicapped, and who requires assistance to receive and cast her mail-in ballot. Tr.119-23.

B. Texas Voter Fraud Law And The Challenged Provisions.

As noted, the injunction under review in this appeal was limited to one provision – Section 86.006(f). To place the injunction in context, Appellees briefly explain the other provisions challenged in their preliminary injunction motion.

Texas law – like the law of other states – has long provided for criminal and other penalties to combat voter fraud. In provisions applicable to both in-person and mail-in voting, Texas criminalizes "illegal voting" – *i.e.*, voting by ineligible individuals, multiple voting, and voting while impersonating another person. Tex. Elec. Code § 64.012. Texas law also makes it an offense to provide "unlawful assistance" to voters in completing their in-person or mail-in ballots – *i.e.*, by assisting ineligible voters, by acting against the will of the voter, or by suggesting to the voter how to vote. *Id.* §§ 64.036(a) (1)-(3). Texas also criminalizes the provision of false information on an application for a mail-in ballot. *Id.* § 84.0041.

Despite these broad provisions empowering Texas officials to combat actual voter fraud, the Texas Legislature amended the Texas Election Code in 2003 to create a series of novel, vague and broad additional prohibitions related to mail-in voting. *See* House Bill 54, 2003 Tex. Gen Laws 393 (78th Legislature 2003). At

the time that the Legislature considered House Bill 54, it was in the midst of one of the fiercest battles in Texas legislative history – the mid-decade redistricting of the Texas congressional districts. PX25-26¶2. Accordingly, the Bill proceeded through the Legislature quickly and without extensive debate. PX25-26¶2. As several legislators explain, "the hasty process and the vague wording of some of the provisions of House Bill 54 may have left it unclear how those provisions would be applied in practice." PX25-26¶3.

As the legislative hearings concerning these provisions indicate, the Texas Legislature received no evidence of fraud concerning individuals and organizations who provided assistance to voters with mail-in ballots, such as Appellees. *See, e.g.*, PX21-24¶5, PX25-26¶4. Many witnesses simply assumed that such fraud was a problem. For example, Representative Wolens, the Bill's sponsor, indicated that he was acting on unproven suspicions that fraud had occurred in elections involving him and his wife and newspaper accounts alleging voter fraud. 3.R.660-61. As he explained, what motivated him was eliminating any *appearance* of fraud: "I'm not here complaining that there is widespread fraud, I just am saying that there are minimum improprieties that on the face of it look wrong." 3.R.672; *see* 3.R.667 (seeking to "absolutely eliminate the appearance of impropriety"); 3.R.671-72 ("[w]hen I read about it anecdotally in the newspapers, I don't need to go make certain that there is a fraud or not a fraud, it is announced that it just looks

bad"). Ultimately, Representative Wolens sought to stop what he described as "pushy" people, R.3.777, not "vote harvesters," proof of which did not exist.[3]

Throughout the proceedings, there was questioning from some legislators concerning whether the provisions were targeted at legitimate get-out-the-vote efforts, particularly those of African-Americans and Hispanics. *See, e.g.*, 3.R.735. Nonetheless, the understanding of legislators (including Democrats) voting for the legislation "was that the amendments would be used to investigate and prosecute actual instances of voter fraud" and would not be used to prosecute those who simply mailed ballots for other voters or to otherwise deter people from providing assistance to voters in need. PX22¶4; PX25¶3; PX26¶3. In contrast, Democrats opposing the Bill feared that its provisions, including 86.006, would "have a chilling effect on [their] constituents' [right] to vote in cases where voter fraud had not and would not be an issue." PX24¶5; *see* PX21¶4; PX23¶4.

The 2003 legislation added several restrictions whose primary effect is to deter legitimate and constitutionally protected voting and expressive activity:

Section 64.036(a)(4): The 2003 legislation added a new, broad category of "unlawful assistance," providing for criminal penalties if an individual "provides

[3] "Vote harvesting" is not a recognized term under Texas law, but, according to a news article quoting Representative Wolens, "vote harvesting" occurs when "the mail-in ballots of elderly or other vulnerable citizens are illegally collected by campaign operatives." 2.R.501.

assistance to a voter who has not requested assistance or selected the person to assist the voter." Tex. Elec. Code § 64.036(a)(4).

Section 84.003(b): The 2003 legislation created a restriction of unclear and potentially broad scope, establishing penalties for anyone who "in the presence of an applicant *otherwise assists* an applicant in completing an early voting ballot application" without following the documentation procedure for witnesses. Tex. Elec. Code § 84.003(b) (emphasis added). The term "otherwise assists" in this provision is undefined, and to make matters even more confusing for voters and assistors, the specific definition of "assisting a voter" set forth in the 2003 legislation does *not* apply to Section 84.003(b). *See id.* § 64.0321.

Section 84.004: The 2003 legislation criminalized witnessing more than one mail-in ballot application in the same election, even if all the required information for a witness is provided. Tex. Elec. Code § 84.004.

Section 86.0051: Section 86.0051 establishes criminal penalties for legitimate assistance provided to voters related to the "carrier envelope" that holds a mail-in ballot. Relevant here, Section 86.0051 provides that it is a criminal offense if "[a] person other than the voter . . . deposits the carrier envelope in the mail or with a common or contract carrier" without "provid[ing] the person's signature, printed name, and residence address on the reverse side of the envelope." Tex. Elec. Code §§ 86.0051(b), (c). It is no defense "that the voter

voluntarily gave another person possession of the voter's carrier envelope." *Id.* § 86.0051(c), although there is a narrow exception for immediate family members and individuals registered to vote at the same address, *id.* § 86.0051(e).

Section 86.006: Most relevant here, the 2003 legislation added Sections 86.006(f) and (g) to the Texas Election Code, criminalizing the mere *possession* of another's mail-in ballot or carrier envelope:

> (f) A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, it is an affirmative defense to prosecution under this subsection that the person, on the date of the offense, was:
>
> (1) related to the voter within the second degree of affinity or the third degree of consanguinity, as determined under Subsection B, chapter 573, Government Code;
>
> (2) registered to vote at the same address as the voter;
>
> (3) an early voting clerk or a deputy early voting clerk;
>
> (4) a person who possesses the carrier envelope in order to deposit the envelope in the mail or with a common or contract carrier and who provides the information required by Section 86.0051(b) in accordance with that section;
>
> (5) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or
>
> (6) a common or contract carrier working in the normal course of the carrier's authorized duties if the official ballot is sealed in an official carrier envelope that is accompanied by an individual delivery receipt for that particular carrier envelope.

(g) An offense under subsection (f) is:

(1) a Class B misdemeanor if the person possesses at least one but fewer than 10 ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a state jail felony;

(2) a class A misdemeanor if the person possesses at least 10 but fewer than 20 ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a felony of the third degree; or

(3) a state jail felony if the person possesses 20 or more ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a felony of the second degree.

Tex. Elec. Code §§ 86.006(f), (g).[4]

Critically, violations of Section 86.006 result in the complete denial of voters' right to vote: "[a] ballot returned in violation of this section *may not be counted*." *Id.* § 86.006(h) (emphasis added).

C. In Advance of the 2006 Election, The Challenged Provisions Were Used To Target Legitimate Activities Of Disfavored Groups, Creating A Chilling Effect On Protected Expression And Association.

Defendants have enforced the challenged provisions – particularly Section 86.006(f) – in a discriminatory manner, targeting Democrats and members of

[4] Newly amended Section 86.006 also restricts political parties' ability to return carrier envelopes for voters, prohibiting return from any "office" of a political party, *id.* § 86.006(d)(1), and requiring that "[c]arrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk." *Id.* § 86.006(e). Section 86.006 also now provides that a carrier envelope may be delivered to officials only by mail or common carrier, and not methods (*e.g.*, hand-delivery) traditionally used by political parties. *Id.* § 86.006(a).

minority groups for prosecution. Indeed, through public statements, website postings, and testimony before legislative oversight committees, the Attorney General has acknowledged that all 13 individuals prosecuted under the 2003 legislation were Democrats. 1.R.81¶14. In addition, it appears that all but one of those prosecuted was African-American or Hispanic. 1.R.21¶30. In contrast, the Attorney General's office has refused to properly investigate violations of the election laws allegedly committed by Republicans, such as those involving the improper and illegal handling of ballots. 1.R.81-82¶¶15-16.

This selective enforcement of the challenged provisions is unsurprising, given that the State's own training materials for local election officials encourage targeting enforcement on a racially discriminatory basis by making the unfounded suggestion that a correlation exists between membership in a minority group and engaging in voter fraud. For example, a PowerPoint presentation prepared by the office of Attorney General Abbott contains a photograph of African-American voters standing in line to vote to emphasize that "all laws apply" to early voting. PX10@25. That same presentation uses a graphic of the "sickle cell stamp" – a postage stamp used widely by African Americans, whom sickle cell disease

particularly affects – to exemplify "unique stamps" associated with voter fraud, despite no legitimate basis for making that connection. PX10@61.[5]

In early 2006, Appellees Ray and Johnson, both of whom are African-American, were indicted by State officials for possessing and mailing ballots for voters who required assistance with their mail-in ballots, and they pleaded guilty to violating Tex. Elec. Code § 86.006(f). PX1. There was no allegation or proof of any actual voter fraud. Tr.78-79; PX1. The Attorney General widely publicized these indictments in 2006. PX9, PX11. Appellees Meeks and Minneweather, both also African-American, were contacted by officials concerning their involvement in efforts to assist mail-in voters, leading them to believe that they may be subjects of an investigation. Tr.65-66; PX15@16-18.

As the early and mail-in voting period neared for the November 6, 2006 election, the chilling effect of the challenged provisions materialized acutely, as Texas voters and volunteers – including many affiliated with the Texas Democratic Party – reported being intimidated and chilled by the State's enforcement of the challenged provisions. Tr.66,88; PX14@23-31; PX15@17-18; 1.R.78-81,82-83¶¶10-14,17. Democratic voters and volunteers were confused about what activities would trigger investigation and prosecution, despite the Texas

[5] Appellees' preliminary injunction motion did not ask for relief on their claims alleging racial discriminatory enforcement. Nevertheless, the discriminatory implementation of the challenged provisions was relevant to show that those provisions are unnecessary and overbroad to combat vote fraud, and provide an extremely broad basis to target disfavored groups.

Democratic Party's efforts to educate its members about the challenged provisions. Tr.66,88; PX14@23-31; PX15@17-18; 78-71,82-83¶¶10-14,17. This confusion and fear was exacerbated by the fact that all but one of the State's voting prosecutions since 2003 had been targeted at black or Hispanic individuals, and all were Democrats, 1.R.21¶30; 1.R.81¶14, and in light of public comments by State officials, such as the Texas Solicitor General's false and defamatory statements about the individual Plaintiffs in this case, 1.R.80-83¶¶13,17.

In particular, Section 86.006(f), which criminalizes the mere possession of another's mail-in ballot, had a chilling effect on those who sought to assist mail-in voters. Although the Section provided for several affirmative defenses to prosecution, including for an individual who deposits the envelope in the mail and provides identifying information, there was no defense for an individual who merely possessed another's carrier envelope with the voter's consent. Tex. Elec. Code § 86.006(f).[6] Notably, the carrier envelope generated by the State does not contain language indicating that anyone who possesses the envelope – regardless whether they deposit it in the mail – must provide their identifying information. PX2. The envelope also contains no separate signature area for individuals *mailing* ballots for voters – as opposed to individuals *assisting* voters in completing or

[6] As the State recognizes, the Texas Legislature is presently considering an amendment to Section 86.006(f) that would transform the affirmative defenses into exemptions from prosecution. State Br. at 14-15 n.28. Although that is a positive step, such amendment would leave Section 86.006(f) constitutionally defective, because the statute contains no exception for one who possesses the ballot of another voter with that voter's consent.

marking the ballot. PX2. In official correspondence to mail-in voters, Appellant Williams similarly failed to advise voters that possession of another's ballot is a crime and that identifying information must be provided to avoid prosecution, not only by those who assist but also by those simply mailing ballots. PX8.

Thus, as Early Voting for the 2006 general election got underway, the Texas Democratic Party found that many of its members were unable or unwilling to provide assistance to mail-in voters, for fear of investigation or prosecution by State officials, even in the complete absence of any fraudulent activity. Tr.66,88; PX14@23-24,26-31; PX15@17-18; 1.R.78-80¶¶10-11,13. Accordingly, the Party foresaw a substantial decline in such assistance as compared to previous years. Tr.88; 1.R.77-78,80-81¶¶7,13. Party officials, worried about encouraging activities that could lead to investigation or prosecution, were forced to curtail their ordinary get-out-the-vote efforts, with some voter turnout programs starting later than planned or not at all. Tr.88; 1.R.81-83¶¶13,17. The Party sought clarification from State officials about the interpretation and enforcement of the challenged provisions, but the State did not adequately respond, leaving such matters to local election administrators and individual citizens. Tr.88; 1.R.82-83¶17.

Absent assistance from Appellees and others like them who wish to assist mail-in voters, many elderly and disabled voters were not able to receive and cast mail-in ballots in the 2006 election, resulting in lost votes. Tr.68,81; PX14@23-

24,31; PX15@25-26; 1.R.78-81¶¶8,13. Even for those mail-in voters able to cast ballots, not all were able to rely on the assistance of the person of their choosing. Tr.125-26; PX15@17-19.

D. The District Court's Injunction Order.

As noted above, Appellees filed suit in the Eastern District of Texas in late September 2006 and moved for a preliminary injunction on certain of their claims on October 13, 2006. The District Court held a hearing on October 30, 2006.

The injunction hearing included testimony from several witnesses describing the chilling effect created by Section 86.006(f) on voting and voter assistance. The District Court also received substantial documentary evidence, including confusing materials from State officials concerning Section 86.006(f). PX8-10. Ruben Hernandez, the Executive Director of the Plaintiff Texas Democratic Party, testified about the devastating effect that Section 86.006's broad prohibition was having on get-out-the-vote efforts. Tr.87089; 1.R.78-83¶¶10-14,17. Several of the Appellees testified live (Ray) or via videotaped deposition (Minneweather, Meeks and McDonald) to explain how Section 86.006 restricted the provision of needed assistance to consenting voters. Tr.65-70,81,122-26; PX15@17-20. Campaign manager Jane Hamilton further explained by videotaped deposition the chilling effect created by Section 86.006. PX14@24-25. Based upon this evidence, the District Court made the considered factual finding that "§ 86.006 prevents

[Plaintiffs] and dissuades others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout." 4.R.852¶27; 3.R.E.852¶27.

On October 31, 2006, the District Court issued a narrow preliminary injunction against certain enforcement of Sections 86.006(f) and (h). The Court ruled that, pursuant to the First and Fourteenth Amendments, which protect the fundamental right to vote, the State is barred from enforcing Sections 86.006(f) and (h) "in circumstances in which a person, other than the voter, has merely possessed the official ballot or official carrier envelope and such possession is with the actual consent of the voter." 4.R.843; 2.R.E.843. Notably, the statute provided no affirmative defense in such a situation. 4.R.856-57¶¶17-20; 3.R.E.856-57¶¶17-20. However, the District Court also stated: "Nothing in this order should be read to enjoin the defendants from enforcing the provisions of Tex. Elec. Code § 86.006(f) or (h) under any other circumstances." 4.R.843; 2.R.E.843. In particular, the State was not prevented "from enforcing Tex. Elec. Code § 86.0051 under the circumstances in which a person, other than the voter, deposits the carrier envelope in the mail or with a common or contract carrier and does not provide the person's signature, printed name, and residence address on the reverse side of the envelope." 4.R.843-44; 2.R.E.843-44.

Notably, the Court recognized the legitimacy of the State's purported interest in identifying those who mail others' absentee ballots and created a narrowly tailored injunction that leaves Section 86.0051 and other anti-fraud provisions of the Election Code fully operative. 4.R.11,12-13¶¶14,19-21; 3.R.E.11,12-13¶¶14,19-21. Yet, in light of the First and Fourteenth Amendment rights at issue, and the demonstrated chilling effect on legitimate political activity, 4.R.852¶27; 3.R.E.852¶27, the District Court also clearly delineated the permissible scope of 86.006(f): if an individual merely possesses a ballot for a voter with that voter's consent (an activity for which there is no affirmative defense in the statute), no identifying information is necessary.

The injunction provided much-needed clarity concerning when assistors must identify themselves on the carrier envelope. Counsel for Appellees prepared a "Memorandum to Interested Parties," which was widely distributed on November 1, 2006 to over 500 leaders in the state Democratic Party, including Democratic county chairs and candidates, and which accurately summarized the injunction:

> For example, a community activist or campaign worker can go to the home of an elderly voter who is unable to mail their ballot on their own and assist that voter by picking up the ballot and mailing it for them. The person assisting the voter in this way must have the consent of the voter, and the person mailing the ballot must provide their name, address and signature on the back of the carrier envelope for each ballot they assist in delivering.

Ex. 3 to Appellees' Opp. to 5th Cir. Stay Mot. (filed Nov. 2, 2006).

Despite the limited nature of the injunction, the State moved for a stay pending appeal on November 1, 2006. This Court granted the stay, with Judge Dennis noting in concurrence that it was "difficult . . . to say that the district court abused its discretion in its carefully drawn preliminary injunction." 4.R.905-06.

SUMMARY OF THE ARGUMENT

The State first claims that the District Court erred in denying the State's Rule 12(b)(3) motion to dismiss or transfer based on lack of venue. The denial of that motion is not properly before this Court on interlocutory review, however, because it is neither independently appealable nor bound up with the issues presented by the injunction properly before this Court. The State's appeal on this issue also fails on the merits because Appellees Ray and Johnson seek prospective injunctive relief and are thus not barred from challenging Section 86.006 under *Heck v. Humphrey*, 512 U.S. 477 (1994). Even were *Heck* to bar their challenge to 86.006(f) (the provision they admitted violating), *Heck* would not bar their status as Plaintiffs with respect to the numerous other provisions of the Texas Election Code challenged in this suit. The State's entire venue argument relies on its erroneous reading of *Heck* and thus fails. Finally, venue is proper in the Eastern District regardless whether Ray and Johnson are Plaintiffs, an issue on which the District Court should be permitted to rule in the first instance, if necessary.

The State also inappropriately seeks review of the District Court's denial of its Rule 12(b)(1) motion to dismiss Appellees' claims under 42 U.S.C. § 1971, a provision that bars state actors from denying individuals' right to vote based on immaterial errors or omissions on records or papers "requisite to voting." This issue is not properly presented on appeal because the District Court did not expressly rule on this aspect of the State's motion to dismiss. Moreover, the denial of a Rule 12(b)(1) motion to dismiss is not properly before this Court on interlocutory review, particularly where, as here, that motion has nothing to do with the merits of the injunction at issue in this appeal. On the merits, the State has sensibly backed away from the only argument that it raised below – that Section 1971 does not create a private right of action – because Fifth Circuit precedent, recently reaffirmed by the Eleventh Circuit, correctly holds that it does. The State's new argument – that Section 1971 applies only to registration, not voting itself – is waived because it was not raised below, and is also erroneous, because neither the statutory text nor precedent interpreting the statute is so limited.

Finally, the State's appeal of the District Court's injunction presents no basis for reversal. The District Court received substantial evidence and reasonably weighed the well-established factors relevant to preliminary injunctive relief before issuing a carefully tailored injunction. The District Court took into account relevant precedent, including the well-established body of fundamental right to

vote cases and the absentee balloting cases presented by the State. Moreover, the District Court heeded the Supreme Court's most recent pronouncement concerning the "considerations specific to election cases" involving preliminary injunctive relief. *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006). Because the District Court's injunction constitutes a reasonable and restrained exercise of its discretion and is necessary to prevent irreparable harm to political association and expression, it should remain in place pending full adjudication of this case below.

ARGUMENT

I. THE STATE'S VENUE CHALLENGE IS NOT PROPERLY BEFORE THIS COURT AND LACKS MERIT.

The State claims that the District Court erred in ruling that *Heck v. Humphrey*, 512 U.S. 477 (1994), does not provide a ground for dismissal or transfer of this lawsuit. This argument fails, for several reasons.

A. Standard Of Review.

A determination concerning whether to dismiss or transfer for lack of proper venue is committed to the District Court's sound discretion. *See, e.g.*, *Caldwell v. Palmetto State Sav. Bank*, 811 F.2d 916, 919 (5th Cir. 1987) (a "district court has broad discretion in deciding whether to order a transfer").

B. The *Heck*/Venue Issue Is Not Properly Before The Court On This Interlocutory Appeal.

This Court should not reach the merits of the State's *Heck* argument because it was made in the context of the State's Rule 12(b)(3) Motion to Dismiss.[7] It is settled law in this Circuit that an interlocutory appeal of an order denying a motion to dismiss or transfer for improper venue is impermissible, absent certification under 28 U.S.C. § 1292(b). *See, e.g., Louisiana Ice Cream Distrib., Inc. v. Carvel Corp.*, 821 F.2d 1031, 1033 (5th Cir. 1987) ("The denial of a motion to dismiss for improper venue is not a final order under 28 U.S.C. § 1291. Rather, it is an interlocutory order which is not subject to immediate appeal." (citing, *inter alia*, *Catlin v. United States*, 324 U.S. 229 (1945)). Not only is such an order non-final for purposes of 28 U.S.C. § 1291, but it does not "fall[] within the ambit of the collateral order doctrine," which allows immediate appeal of a "narrow band of cases." *Louisiana Ice Cream Distrib.*, 821 F.2d at 1033.

The State understandably does not address this precedent, which bars the appeal of its Issue One. Rather, the State alludes to two other lines of precedent that purportedly permit immediate review in the circumstances of this case. Neither of these arguments is correct.

[7] The State also couched its *Heck* argument as part of a Rule 12(b)(1) motion to dismiss Appellees Ray and Johnson for lack of subject matter jurisdiction. However, even were they dismissed, five other Plaintiffs would indisputably remain in this case, and thus there could be no outright Rule 12(b)(1) dismissal under the State's own argument. Rather, the question would be whether to transfer for lack of proper venue under Rule 12(b)(3).

First, the State suggests that under *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), and its progeny, jurisdiction exists "over the District Court's Rule 12(b) rulings" where, as here, a preliminary injunction is properly before the Court on interlocutory appeal. State Br. at 2-3. *Deckert* does not support the State's broad position. As the Supreme Court has recently made clear, *Deckert* and other cases stand for what is now the settled rule that an appellate court may assume "pendant appellate jurisdiction" only where the non-appealable order is "inextricably intertwined with that court's decision" properly subject to interlocutory review or where "review of the former decision was necessary to ensure meaningful review of the latter." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995) (citing *Deckert*).[8] Thus, in *Deckert*, the appeals court appropriately reviewed a denied Rule 12(b)(6) motion to dismiss along with a preliminary injunction order because the motion to dismiss concerned whether the Court had subject-matter jurisdiction over the very claim that was the subject of the injunction order and whether that claim was legally cognizable. *See Deckert*, 387 U.S. at 287-88. Similarly, in the only other post-*Swint* case cited by the State, *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46 (1st Cir. 2007), the First Circuit interpreted *Deckert* to permit concurrent interlocutory appeal of a Rule

[8] As the Supreme Court explained in *Swint*, this restricted approach to "pendant appellate jurisdiction" is mandated by statute, which contains an express mechanism – certification under 28 U.S.C. § 1292(b) – for interlocutory review of nonfinal orders that are not appealable under 28 U.S.C. § 1292(a) or via the *Cohen* collateral order doctrine. *Swint*, 514 U.S. at 45-48.

12(b)(6) motion to dismiss for failure to state a claim that pertained to the very claim supporting the request for injunctive relief. *Id.* at 51.

These rulings are consistent with related Fifth Circuit precedent, which, as the Supreme Court noted in *Swint*, requires an otherwise non-appealable order to be "inextricably entwined" with the appealable order in order to permit immediate review, *Swint*, 514 U.S. at 44 (quoting *Silver Star Enters. v. M/V SARAMACCA*, 19 F.3d 1008, 1014 (5th Cir. 1994)). As this Court has recognized, it is not enough that the non-appealable order is merely "related, even closely related, to the appealable order." *Silver Star*, 19 F.3d at 1014 (internal quotation marks and citation omitted). Rather, in the ordinary appeal of a preliminary injunction – as here – the proper procedure for seeking interlocutory review of a denial of a Rule 12(b) motion to dismiss is certification pursuant to 28 U.S.C. § 1292(b). *See, e.g.*, *Monk v. Huston*, 340 F.3d 279, 281 (5th Cir. 2003); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102-03 (5th Cir. 1981) (refusing to adjudicate the denial of a motion to dismiss contained within the same ruling as the preliminary injunction properly before the Court on interlocutory review); *see also Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991).

Second, the State asserts that "[t]his Court has held that it has jurisdiction to address a *Heck* claim in an interlocutory appeal." State Br. at 42 n.142. However, the cases cited by the State arise in the qualified immunity context, in

which the *Heck* issue may be inextricably entwined with the immediately appealable qualified immunity issue and, indeed, can be dispositive of the entire case based on a lack of subject matter jurisdiction. *See Wells v. Bonner*, 45 F.3d 90, 94 (5th Cir. 1995). In contrast, here the *Heck* issue does not relate to whether Appellees have properly stated a claim that is the subject of the appealable order or whether there is federal jurisdiction of Appellees' claims, but rather is used by the State as a purported basis for removing two of the several plaintiffs from this lawsuit, and then, as a purported basis for dismissal or transfer for lack of proper venue. Because the *Heck* issue is not inextricably entwined with the question whether the preliminary injunction order can be sustained on appeal, interlocutory consideration is inappropriate.[9]

C. The State's *Heck* Argument Fails On The Merits.

The State vastly overstates the constraints upon Section 1983 lawsuits erected by the Supreme Court under *Heck*. *Heck* and its progeny present no bar to the claims of Appellees Ray and Johnson, because they do not use this suit to challenge the lawfulness of their guilty pleas to past violations of Section 86.006. To the contrary, Appellees Ray and Johnson seek prospective injunctive relief

[9] Moreover, the State's venue motion also hinges on other factual issues – such as whether a substantial portion of the events took place in the Eastern District. *See infra* Section I.C. Because the State's venue motion does not hinge completely on a question of law under *Heck*, there can be no analogy to the qualified immunity line of cases. *Cf. Sappington v. Bartee*, 195 F.3d 234, 236 (5th Cir. 1999) ("The denial of a motion for summary judgment based on qualified immunity is immediately appealable if the denial turns on an issue of law.").

concerning Section 86.006, as well as several other provisions of the Texas Election Code, so that they can assist mail-in voters in the future. At the very least, the State's argument fails because Ray and Johnson plainly have standing under *Heck* to bring suit against all of the challenged provisions other than Texas Election Code Section 86.006(f) – the only provision underlying their convictions.

As the Supreme Court recently explained, its *Heck* line of cases provides "that a § 1983 suit for damages that would 'necessarily imply' the invalidity of the fact of an inmate's conviction, or 'necessarily imply' the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence." *Nelson v. Campbell*, 541 U.S. 637, 646 (2004). "[T]his 'favorable termination' requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute." *Id.* at 646-47. Thus, *Heck* and its progeny bar an individual from seeking damages or declaratory relief based on a past criminal conviction from using 42 U.S.C. § 1983 as an end-run around habeas corpus procedures. *Heck* does not, however, bar a previously convicted individual from challenging a new, *prospective* violation of his or her constitutional rights by the State. Indeed, the Supreme Court has

expressly recognized that its *Heck* jurisprudence permits claims under § 1983 for prospective injunctive relief from violations of federal law. *See, e.g.*, *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (explaining that "ordinarily," a prisoner's "prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983"). *Heck* applies to past criminal conduct, not future activity.

Here, Appellees Ray and Johnson do not seek an end-run around habeas rules to invalidate their past guilty pleas under Section 86.006, but seek an injunction so that they can provide future mail-in balloting assistance. Were the State's argument correct, it would lead to the absurd conclusion that because Ray and Johnson had previously pleaded guilty to one count of violating Section 86.006(f), they would be forever barred from instituting a suit to challenge the lawfulness of the challenged provisions, and thus could never again engage in new acts related to mail-in balloting without fear of criminal prosecution. Because Ray and Johnson bring this case as individuals who seek to engage in prohibited behavior in the future, the *Heck* prohibition does not apply.

Moreover, even assuming that *Heck* were applicable to Ray and Johnson's challenge to Section 86.006, the State incorrectly concludes that *Heck* bars *all* of Ray and Johnson's Section 1983 claims in this lawsuit. State Br. at 42. Ray and Johnson pleaded guilty only to violating § 86.006(f), PX1, whereas Appellees

claim that *multiple* provisions of the Texas Election Code are unlawful. 1.R.9n.1. (challenging Sections 64.036(a)(4), 84.003(b), 84.004, 86.0051, and 86.006). Because Ray and Johnson are indisputably proper Plaintiffs for the majority of claims in this case, the State's venue argument – which is premised entirely on completely removing Ray and Johnson as Plaintiffs – must fail.

Finally, even if, contrary to precedent, the claims of Ray and Johnson were barred in their entirety by *Heck*, venue in the Eastern District is proper because "a substantial part of the events or omissions giving rise to the claim occurred" in this District. 28 U.S.C. § 1391(b)(2); *see, e.g., Langton v. Cbeyond Commc'ns., L.L.C.*, 282 F. Supp. 2d 504, 508 (E.D. Tex. 2003). Because of the District Court's *Heck* ruling, it did not reach this question, and it should be permitted to decide it in the first instance if necessary. *See, e.g.*, *Caldwell*, 811 F.2d at 919. In any event, regardless whether Ray and Johnson are Plaintiffs, evidence of the chilling of their protected activities in the Eastern District and of the State's discriminatory investigation and prosecution of them and others in the Eastern District is relevant to all of Appellees' causes of action. Moreover, other similarly situated individuals in the Eastern District, including members of the Plaintiff Texas Democratic Party, have experienced the ill effects of the challenged provisions. Tr.81;85-86; 1.R.1-17¶¶15,21. Thus, venue in the Eastern District is proper, regardless whether Ray and Johnson are formally named as Plaintiffs.

II. THE STATE'S 28 U.S.C. § 1971 DISMISSAL ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND LACKS MERIT.

For the reasons just discussed, the State's Rule 12(b)(1) challenge to this Court's jurisdiction under 28 U.S.C. § 1971 also should not be entertained on this interlocutory appeal. Appellees' Section 1971 claims are independent from the basis for the preliminary injunction that is properly before this Court. Moreover, the District Court did not expressly rule on the State's Section 1971 argument, and it must be allowed to do so before this Court takes up the issue. In any event, the State's Section 1971 argument lacks merit. As this Circuit has long recognized, Section 1971 provides an individual cause of action not limited to infractions involving voter registration, as opposed to the actual act of voting itself.

A. The State's Dismissal Argument Concerning 28 U.S.C. § 1971 Is Not Properly Before This Court.

The District Court did not expressly rule on the State's motion to dismiss Appellees' Section 1971 claim, and review by this Court is therefore unwarranted. The State claims that the District Court "effectively den[ied]" the entirety of the Officials' 12(b)(1) motion," State Br. at 6, referring to one line of the District Court's opinion: "The court has subject matter jurisdiction over the plaintiffs' constitutional and Voting Rights Act claims," 4.R.853¶2; 3.R.E.¶2. But because the District Court's injunction was based on Appellees' fundamental right to vote claim, it had no reason to reach the Section 1971 dismissal motion. As the District

Court itself stated, it was "unnecessary to consider the defendants' other arguments for dismissal, except as they may be relevant to the plaintiffs' showing on the merits of the motion for preliminary injunction." 4.R.853¶5; 3.R.E.¶5 .

Where, as here, the District Court has not expressly ruled on an issue, this Court should dismiss the appeal or remand to permit the District Court to rule. *See, e.g., American Guar. & Liab. Ins. Co. v. Anco Insulations, Inc.*, 408 F.3d 248, 252 n.17 (5th Cir. 2005) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983) ("ordinarily, we would not expect the Court of Appeals to pass on issues not decided by the District Court")); *Khurana v. Innovative Health Care Sys.*, 130 F.3d 143, 156 (5th Cir. 1997).

Immediate review of the State's Section 1971 motion to dismiss is also inappropriate because such a ruling is not independently appealable and the State did not seek certification to appeal pursuant to 28 U.S.C. § 1292(b). *See supra* Section I.B. The State's Section 1971 motion has no bearing on the basis for the District Court's injunction order – Appellees' claim that their constitutionally protected right to vote is infringed by criminalizing legitimate voter assistance activity. Not only is the State's Section 1971 motion not "inextricably entwined" with the injunction order, but it is totally unrelated to that injunction.

B. Appellees' Section 1971 Claims Should Not Be Dismissed.

1. Section 1971 May Be Enforced By Private Parties.

Section 1971 protects against the denial of voting rights by state agents based on errors or omissions that are immaterial to a voter's qualifications. *See* 42 U.S.C. § 1971(a)(2)(B). As part of their racial discrimination causes of action, Appellees have pleaded Section 1971 – in addition to Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments – as a basis for relief from the State's discriminatory and unlawful mail-in ballot regulations and enforcement thereof. 1.R.32,34¶¶68,74. Notably, the counts of the Complaint citing Section 1971 were *not* part of Appellees' preliminary injunction motion.

Before the District Court, the State's motion to dismiss Appellees' Section 1971 claim was based solely on its argument that the provision is not enforceable by private plaintiffs, but must be enforced by the Attorney General. The State repeats that argument here, however only as a secondary point, perhaps in recognition that this argument is foreclosed in the Fifth Circuit. As the Eleventh Circuit recently held, citing Fifth Circuit precedent, Section 1971 is privately enforceable via Section 1983. *Schwier v. Cox*, 340 F.3d 1284, 1294-97 (11th Cir. 2003). The Eleventh Circuit cogently explained that the mere fact that Section 1971 provides for enforcement by the Attorney General does not foreclose private enforceability because the Supreme Court has found that analogous sections of the

Voting Rights Act "could be enforced by a private right of action, even though those sections also provide for enforcement by the Attorney General." *Id.* at 1294. Moreover, the provision authorizing suit by the Attorney General was not added to Section 1971 until 1957, and thus there is a long history of preexisting enforcement of Section 1971 by private plaintiffs via Section 1983 – including in the Fifth Circuit. *See id.* at 1295 (citing, *inter alia*, *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946)). Reviewing the legislative history, the Eleventh Circuit demonstrated that Congress could not have "intended the provision granting the Attorney General authority to bring suit to foreclose the continued use of § 1983 by individuals." *Schwier*, 340 F.3d at 1295.[10]

The Eleventh Circuit's reasoning – involving a detailed review of the statutory text, legislative history, the Supreme Court's precedent concerning analogous provisions of the Voting Rights Act, and the Supreme Court's private right of action precedent – is unassailable. In contrast, nearly all of the cases relied upon by the State contain no extended analysis, and merely assert a lack of enforceability without engaging the Supreme Court's recent private right of action

[10] After determining that Congress did not intend to foreclose private enforcement of Section 1971, the Eleventh Circuit proceeded to the next analytical step required by Supreme Court precedent – determining "whether the statute creates rights enforceable by individuals under § 1983," *Schwier*, 340 F.3d at 1296 – and concluded that "the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983," *id.* at 1297.

precedent. *See, e.g., Schwier*, 340 F.3d at 1294. Appellees thus have standing to claim that the challenged provisions violate Section 1971.[11]

2. Section 1971 Is Not Limited To Practices Related To Voter Registration.

The State also argues that Section 1971(a)(2)(B) applies only to practices that "encumber an individual's ability to *register* to vote" and not to practices that prevent an individual from voting. State Br. at 46. The State did not make this argument below, and it is thus waived on appeal. *See, e.g., Lemaire v. Louisiana*, 480 F.3d 383, 387 (5th Cir. 2007) (noting this Court's "precedent that arguments not raised before the district court are waived and cannot be raised for the first time on appeal"); *Horton v. Bank One, N.A.*, 387 F.3d 426, 435 (5th Cir. 2004) (citing *In re Liljeberg Enters., Inc.*, 304 F.3d 410, 427 n.29 (5th Cir. 2002)).[12]

This argument also clearly lacks merit. The language of Section 1971 does not limit coverage to errors and omissions in *registration*, but covers immaterial errors and omissions "on any record or paper relating to any application, registration, *or other act requisite to voting*." 42 U.S.C. § 1971(a)(2)(B) (emphasis added). This very point is recognized by *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004), the primary case cited by the State in purported support of

[11] Regardless whether Section 1971 is privately enforceable, the District Court has subject-matter jurisdiction over all of Appellees' claims in this suit because *none* of those claims relies solely on Section 1971 as a basis for subject-matter jurisdiction.

[12] Particularly because the District Court has not expressly ruled on the Section 1971 issue, the State's appeal of the Section 1971 issue should be dismissed, thereby permitting consideration of that issue by the District Court.

limiting Section 1971(a)(2)(B) to voter registration. State Br. 46-47. Although *Friedman* noted that the caselaw generally pertains to the registration context, it nonetheless, "based on the express language of the provision," conducted a Section 1971(a)(2)(B) analysis concerning a state time cutoff for the receipt and counting of absentee ballots. 345 F. Supp. 2d at 1371. *Friedman* is thus of no help to the State because it does not limit Section 1971(a)(2)(B) to claims involving registration, but instead requires that Section 1971(a)(2)(B) claims involve "an error or omission *on any record or paper*." *Friedman*, 345 F. Supp. 2d at 1372. Indeed, *Friedman* expressly contemplates that a Section 1971(a)(2)(B) claim would lie where – as here – Plaintiffs "allege that their ballots were rejected because of some error or omission in filling out the absentee ballots." *Id.* Thus, *Friedman* actually supports Appellees' Section 1971 challenge, which entails the omission of immaterial written information on the mail-in ballot's carrier envelope.

Nor do the other cases cited by the State stand for the proposition that Section 1971 is limited to the registration context. *See, e.g., Good v. Roy*, 459 F. Supp. 403, 405 (D. Kan. 1978) ("[t]he purpose of Section 1971 is to prevent racial discrimination *at the polls*" (emphasis added)); *McKay v. Altobello*, No. 96-3458, 1996 U.S. Dist. LEXIS 16651, *3 (E.D. La. Oct. 31, 1996) (holding Section 1971(a)(2)(B) inapplicable to intentional omissions by voters but not limiting the provision's reach to the registration context). Although the State's own cases

prove Appelles' point, other cases ignored by the State similarly demonstrate that Section 1971(a)(2)(B) is not limited to the registration context. *See, e.g.*, *Brown v. Post*, 279 F. Supp. 60, 64 (W.D. La. 1968) (stating, in the context of a challenge to absentee balloting practices, that "42 U.S.C. § 1971(a) forbids any distinctions in the voting process, including the casting of a ballot, based upon race or color").

III. THE DISTRICT COURT'S NARROW PRELIMINARY INJUNCTION IS JUSTIFIED UNDER CONTROLLING LAW.

Appellees should prevail on the only issue properly before this Court – whether to affirm the District Court's narrow injunction. The District Court, citing serious constitutional concerns and irreparable harm to constitutionally protected activity, held that Sections 86.006(f) and (h) could not be enforced where a person merely possessed another's absentee ballot with the consent of the voter – conduct for which the statute provides no affirmative defense. The District Court permitted the State to enforce Section 86.006(f) against those who deposit another's absentee ballot in the mail without permission or without including identifying information. As explained below, the State's arguments for reversal are substantially different from their arguments below and ignore relevant lines of precedent and the evidentiary record before the District Court. For example, the State now criticizes the District Court for refusing to adopt an interpretation of the statute that the State itself refused to condone below. Because the injunction represents a reasonable exercise of the District Court's discretion, it should not be disturbed on appeal.

A. Standard Of Review.

As the District Court recognized, a preliminary injunction may be ordered upon a showing of : "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from the injunction to the non-movant; and (4) that the injunction will not undermine the public interest." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997); *Canal Auth. of Florida v. Callaway*, 489 F.2d 569, 572 (5th Cir. 1974).

This Court reviews the grant of a preliminary injunction for abuse of discretion, whereby "[i]f the underlying constitutional question is close," the Court should uphold the injunction. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). Entry of a preliminary injunction "rests in the discretion of the district court," *Canal Auth.*, 489 F.2d at 572, and "must not be disturbed unless grounded upon a clearly erroneous factual determination, an error of law, or an abuse of discretion," *Valley*, 118 F.3d at 1051.

In addition, as the Supreme Court explained in *Purcell*, courts faced with injunction applications "just weeks before an election" are "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases." 125 S. Ct. at 7. Where, as here, the District Court has weighed such factors, *Purcell* underscores the need for

deference to the District Court's decision whether to grant an injunction. *Id.* (explaining that it was "necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court").

B. The District Court Properly Issued A Partial Injunction Of Sections 86.006(f) And (h) Because Appellees Are Likely To Succeed On The Merits Of Their Claim That These Provisions Unjustifiably Infringe On The Fundamental Right To Vote.

1. Section 86.006 (f) And (h) Are Subject To Strict Scrutiny And Violate The Fundamental Right To Vote.

Simply ignored by the State is that the Supreme Court and this Court have long recognized that "[v]oting is of the most fundamental significance in our constitutional system," *Texas Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)), implicating "basic constitutional rights" under the First and Fourteenth Amendments, *Anderson v. Celebrezze*, 460 U.S. 780, 786 & n.7 (1983). To ensure the right to vote is not compromised by burdensome State election regulations and procedures, "[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Kirk*, 84 F.3d at 182 (citing *Burdick* and *Anderson*). "Only after weighing all these factors is a reviewing court in a position

to decide whether the challenged provision is unconstitutional." *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988) (quoting *Anderson*, 460 U.S. at 789).

The Supreme Court has cautioned that this balancing is not "automatic," because "there is 'no substitute for the hard judgments that must be made.'" *Anderson*, 460 U.S. at 789-90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Nonetheless, both the Supreme Court and this Court have described basic guidelines. When First and Fourteenth Amendment rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); *accord, e.g.*, *Kirk*, 84 F.3d at 182. In contrast, if a challenged "provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434; *accord, e.g.*, *Kirk*, 84 F.3d at 182.

Here, the strictest scrutiny should apply because Sections 86.006(f) and (h) bear several hallmarks of a severe" restriction on First and Fourteenth Amendment rights. *See, e.g.*, *Pilcher*, 853 F.2d at 336. First, they create a substantial burden as an empirical matter by curtailing longstanding efforts at providing assistance to mail-in voters. *Supra* pp. 17-23; *see, e.g.*, *Kirk*, 84 F.3d at 182-83 (discussing the "substantial" burden in *Anderson*, where the challenged law "hampered

independent candidates' organizing efforts," such as "volunteer recruiting"). Because everyone who possesses a mail-in ballot with the voter's consent is susceptible to criminal liability, and only a certain group of such possessors may invoke an affirmative defense by signing the envelope and providing information, *see* Tex. Elec. Code §§ 86.0051, 86.006(f), far less assistance will take place and far less voting by qualified mail-in voters will occur. *Cf. Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 707 (N.D. Ohio 2006) (striking down, as an "extreme" burden, a provision requiring signatures on a voter registration form for anyone who provided, received, or assisted in filling out the form"). Evidence before the District Court indicated a substantial decline in the Texas Democratic Party's ability to get out the vote among mail-in voters, based on exacting requirements such as Section 86.006. 4.R.852¶27; 3.R.E.852¶27

Second, heightened scrutiny is warranted because Sections 86.006(f) and (h) impose the most severe of burdens by operating to deny the vote outright. Ballots submitted in violation of Section 86.006 procedures "may not be counted." Tex. Elec. Code § 86.006(h). Where, as here, a regulation results in a decline of voting activity by qualified voters, courts find a severe burden. *See, e.g., Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1350 (N.D. Ga. 2006).

Third, Sections 86.006(f) and (h) are unprecedented. Appellees are aware of no other jurisdiction that criminalizes mere *possession* of another's absentee ballot.

Courts recognize that a "severe" burden is more likely to exist when a state election restriction is unique. *See, e.g.*, *Pilcher*, 853 F.2d at 336 ("no other state requires voter registration numbers on minor party petitions"); *Lee v. Keith*, 463 F.3d 763, 765, 768-69 (7th Cir. 2006) (applying strict scrutiny and striking down a ballot access law that was "the most restrictive in the nation").

Fourth, Sections 86.006(f) and (h) require heightened scrutiny because they are targeted at organized efforts of political parties – in particular, the Democratic Party. *Burdick*, 504 U.S. at 434 (heightened scrutiny for discriminatory regulations); *Kirk*, 84 F.3d at 182 (same). This targeting is shown not only by the practical effect and enforcement history of Section 86.006(f), but also by closely related provisions, which forbid sending mail-in ballots from any political party office, *see* Tex. Elec. Code § 86.006(d)(1), and prohibit the accumulation of ballots for delivery to election officials, *id.* § 86.006(e), thereby thwarting longstanding, legitimate logistics used by political parties.

Because Sections 86.006(f) and (h) create a "severe burden," they fail constitutional scrutiny absent a compelling state interest and a narrowly tailored means of achieving that interest. *Burdick*, 504 U.S. at 434; *Kirk*, 84 F.3d at 182. The State's proffered justification is preventing voter fraud. Although that is an important state interest in theory – as the District Court recognized – Sections 86.006(f) and (h) do not pertain to any actual fraudulent practices, but instead

restrict legitimate efforts to assist voters in obtaining and casting mail-in ballots. Moreover, Section 86.006(f) is not narrowly tailored, but rather criminalizes a wide range of completely unobjectionable and non-fraudulent conduct – including, as the District Court observed, the mere possession of another voter's ballot with that voter's consent. Notably, there are many other provisions of the Texas Election Code that enable the prosecution of actual fraud related to mail-in voting. *See, e.g.*, Tex. Elec. Code § 64.012 (illegal voting); *id.* §§ 64.036(1)-(3) (unlawful assistance, such as acting against the will of the voter or telling the voter how to vote); *id.* § 84.0041 (false information on a mail-in ballot application).

2. Even If Strict Scrutiny Does Not Apply, Appellees Are Likely To Prevail On The Merits.

As the District Court held, even if strict scrutiny does not apply, the application of Section 86.006(f) to individuals possessing a ballot with the voter's consent fails under *Anderson*/*Burdick* because that restriction does not serve "important regulatory interests" of the State, *Burdick*, 504 U.S. at 434; *Kirk*, 84 F.3d at 182, that "make it necessary to burden the plaintiff's rights," *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789. *See, e.g.*, *Cotham v. Garza*, 905 F. Supp. 389, 398 (S.D. Tex. 1995) ("The Supreme Court and the Fifth Circuit have consistently refused to uphold election statutes found to impose even limited burdens on Constitutional rights without a showing of necessity.").

For example, in *Cotham v. Garza*, the Southern District of Texas struck down a provision of the Texas Election Code that banned the voter's possession of written communications while marking a ballot, despite the Court's determination that the provision did not "severely" burden voters' rights. 905 F. Supp. at 398, 400-01; *see* 4.R.855¶12; 3.R.E.855¶12. As *Cotham* explained, although preventing fraud is a legitimate state interest in the abstract, the challenged law was not necessary to achieve that interest, particularly because the state's myriad anti-electioneering statutes already protected the integrity of the polling place by prohibiting voters from sharing, exchanging or displaying campaign materials at the polling place. 905 F. Supp. at 400. Similarly here, the broad terms of Section 86.006(f) are not necessary to prosecute fraud related to mail-in balloting, because many pre-existing provisions of Texas law prohibit voters from exercising undue influence on mail-in voters and engaging in other forms of mail-in ballot fraud. *See, e.g.*, Tex. Elec. Code §§ 64.012, 64.036(1)-(3), 84.0041.

The District Court justified applying less than strict scrutiny based on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), stating that *McDonald* and other cases hold that "there is no corresponding fundamental right to receive and cast an absentee ballot." 4.R.855¶¶11-12; 3.R.E.855¶¶11-12. On appeal, the State has abandoned its *McDonald* argument with respect to likelihood of success on the merits. The State continues to invoke

McDonald, however, in arguing against irreparable harm. State Br. at 56-59. *McDonald* does not support the State's claim that burdensome restrictions on mail-in or absentee balloting do not implicate a fundamental right.[13]

In *McDonald*, the Supreme Court held that strict scrutiny did not apply to prisoners' claimed right to vote by absentee ballot where there was *no evidence* that prisoners could not otherwise exercise the franchise. *See* 394 U.S. at 808. Moreover, in a series of subsequent cases interpreting *McDonald*, the Supreme Court struck down unreasonable absentee ballot restrictions, despite *McDonald's* holding that strict scrutiny did not apply. For example, in *O'Brien v. Skinner*, 414 U.S. 524 (1974), the Supreme Court explained that *McDonald* merely "rested on a failure of proof," and thus struck down a New York law restricting the use of absentee ballots by prisoners as "unconstitutionally onerous," where the prohibition "denied any alternative means of casting their vote although they are legally qualified to vote." *Id.* at 530. Similarly, in *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court rejected the lower court's use of *McDonald* to sanction absentee ballot restrictions on minority parties, holding that "it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances,

[13] Notably, the State's *McDonald* argument is contradicted by Appellant Williams, whose official proclamations recognize that casting a ballot by mail in Texas is synonymous with "exercis[ing] your right to vote." PX8

without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause." *Id.* at 795. Thus, it is simply untrue that *McDonald* permits the State to impose whatever restrictions it desires on absentee balloting or that absentee balloting does not implicate First and Fourteenth Amendment rights. Rather, where, as here, voters are significantly restricted in their right under State law to cast an absentee ballot, courts must ensure that such restrictions are not arbitrary, unjustified, or unduly onerous.

The District Court applied *Anderson/Burdick* in light of *McDonald*, carefully considering all the factors at hand. The Court concluded that the State has a "well-recognized and compelling interest" in "curtailing voter fraud." 4.R.856¶14; 3.R.E.856¶14. Although the District Court noted that several preexisting provisions of the Texas Election Code already enable the State to combat voter fraud related to mail-in balloting, the Court also accepted – for preliminary injunction purposes – the State's claim that "a disclosure provision of reasonable scope is necessary to prevent voting fraud occurring in connection with early mail-in voting." 4.R.857¶19; 3.R.E.857¶19. Thus, the Court concluded that Section 86.0051, which requires individuals depositing other voters' mail-in ballots in the mail to provide a signature and identifying information, likely was justified by the State's interest in preventing fraud. 4.R.857¶19; 3.R.E.857¶19. In contrast, Section 86.006(f)'s broad ban on possession with the voter's consent – an offense

with no affirmative defense where the possessor does not mail the ballot – likely "goes too far" because it is "not necessary to achieve the State's interest in curtailing fraud when possession occurs with the voters' consent." 4.R.857¶19; 3.R.E.857¶19. These rulings – which are not ultimate merits determinations but holdings concerning likelihood of success – should not be disturbed on appeal.

The State now chides the District Court for distinguishing between possession with consent and possession with consent in order to mail a ballot, claiming that the District Court should have employed the canon of constitutional avoidance to read an affirmative defense into the statute for *all* consensual possession. State Br. at 53. But the State did not make a constitutional avoidance argument below, and that argument is therefore waived on appeal. *See supra* Section II.A. To the contrary, and as the District Court noted, "the defendants' able counsel recognized that the statute provides for an offense for mere possession of an official ballot or carrier envelope of another" and "stopped short" of "representing that the language of the statute would not allow such a prosecution" – even if an affirmative defense could be satisfied. 4.R.856-57¶17; 3.R.E.856-57¶17. Although the Court was willing to assume that the State would not institute a prosecution were one of the affirmative defenses satisfied, the Court concluded – based on the express wording of the statute and the State's own arguments – that the statute *would* permit the State to prosecute someone for possessing a ballot

with the voter's consent where none of the affirmative defenses applied. 4.R.857¶18; 3.R.E.857¶18. As the District Court observed, "what makes this statute particularly burdensome is that it does not provide for any exception to criminal liability if the person possessing the official ballot or carrier envelope has the consent of the voter," which "is the only fair reading of the statute," particularly because Section 86.006 provides for enhanced penalties if someone possesses a ballot *without* the consent of a voter, *see* Tex. Elec. Code § 86.006(h) – indicating that consensual possession is an offense (albeit a less serious one). 4.R.857¶18; 3.R.E.857¶18. Thus, whereas the District Court found a state interest in requiring disclosure of a reasonable scope, such disclosure cannot reasonably be required of all consensual possessors. 4.R.857¶19; 3.R.E.857¶19.

In sum, the District Court's injunction was carefully crafted to balance First and Fourteenth Amendment rights with the State's interest in combating fraud. The District Court gave ample weight to *McDonald* and other relevant caselaw. That careful weighing should not be disturbed on appeal.

3. The State's Facial Challenge Argument Is Erroneous.

Given that the injunction entails a reasonable and limited exercise of the District Court's discretion, the State relies heavily on a newly minted and erroneous argument that because Appellees could not show that Section 86.006 was unconstitutional in every application, it could not prevail in a facial challenge

to Section 86.006(f). State Br. at 50-51. This novel argument is wrong: fundamental right to vote claims are regularly adjudicated as facial challenges by applying the *Anderson/Burdick* framework because the nature of the inquiry is whether the restriction, in the aggregate, is justified – not whether the restriction makes sense on a case-by-case basis. *See, e.g.*, *Pilcher*, 853 F.2d at 335, 337 (enjoining enforcement of an unconstitutional provision of Texas election law).

The First Amendment exception to facial challenges recognized by the State also applies here. *See* State Br. at 51 n.151. As this Court has recognized, "[w]ith regard to facial First Amendment challenges, the challenger need only show that a statute or regulation 'might operate unconstitutionally under some conceivable set of circumstances.'" *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). A fundamental right to vote challenge is based on the First and Fourteenth Amendments and implicates fundamental expressive and associational rights. *See, e.g.*, *Anderson*, 460 U.S. at 786 & n.7. Accordingly, Appellees were not required to show that the challenged provisions were unconstitutional in every application.[14]

[14] As the State notes, the District Court did not base its preliminary injunction on Appellees' overbreadth claim. *See* State Br. at 151; 4.R.858¶25; 3.R.E.858¶25. That ruling does not mean, however, that the First Amendment standard for facial challenges does not apply. To the contrary, because courts regularly adjudicate facial challenges under *Burdick/Anderson* without considering whether the challenged provision could ever be applied in a valid manner, the District Court had no reason to rely on Appellees' separate overbreadth claim to supply the proper standard for adjudicating Appellees' facial challenge to Section 86.006(f).

In any event, even if the State's proposed facial challenge standard were to apply, the portions of Section 86.006 (f) and (h) enjoined by the District Court do fail on their face because they are unconstitutional in every application. In other words, with respect to the class of people who merely possess another's ballot with consent, but who do not deposit that ballot into the mail (and thus are not susceptible to one of the statute's affirmative defenses), Section 86.006 is unconstitutional across the board. Because the portion of Section 86.006 enjoined by the District Court is facially unconstitutional under any standard, the State's facial challenge argument must fail.

C. The District Court Properly Apprehended The Irreparable Harm To Appellees And Balanced The Equities.

The District Court correctly concluded that the other requirements for injunctive relief were satisfied. Irreparable harm is presumed where, as here, the denial of constitutional rights is at stake. *See, e.g.*, *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Moreover, contrary to the State's assertion, the District Court's finding of irreparable harm was not merely based on "a single citation to *Ingebretsen*." State Br. at 54. Rather, the District Court concluded, based on a substantial evidentiary record, that Sections 86.006(f) and (h) chill individuals' and organizations' expressive and associational rights and hamper (or eliminate) many mail-in voters' ability to exercise their fundamental right to vote. 4.R.852¶27;

3.R.E.852¶27 (explaining that "[t]he evidence found to be persuasive indicates that § 86.006" "prevents [Appellees] and dissuades others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout"). The State simply ignores the evidence presented below, instead mounting a new irreparable harm argument based on *McDonald*. State Br. at 56-59. As discussed above, however, that argument is meritless: *McDonald* does not hold that absentee ballot restrictions do not implicate constitutional rights; at most, *McDonald* affects the level of scrutiny under the *Burdick/Anderson* framework. *See supra* Section III.B.2.

Moreover, the balance of interests and the public interest are served by the injunction, as it protects the exercise of constitutional rights, while at the same time ensuring that the State is able to investigate and prosecute actual fraudulent activities related to mail-in balloting. 4.R.857-58¶¶19,24; 3.R.E.857-58¶¶19, 24. Most significantly, the District Court left intact Section 86.0051, which requires individuals mailing ballots of another voter to provide identifying information.

The District Court also carefully weighed "the possibility that qualified voters might be turned away from the polls" with the need to ensure "[c]onfidence in the integrity of our electoral processes." *Purcell*, 127 S. Ct. at 7. *Purcell* did not hold, as the State suggests, that election-related injunctions may never be issued in advance of an election. State Br. at 62. To the contrary, the Supreme

Court contemplated such injunctions, but required courts to review "considerations specific to election cases" in determining whether injunctive relief is appropriate. *Id.* As shown by the evidence below, as Election Day approached, the unclear scope of Section 86.006 had a substantial chilling effect on activists and voters alike, particularly in light of the State's discriminatory application of Section 86.006 against minorities and Democrats. By bringing needed clarity to Section 86.006, the District Court' limited injunction serves the very interests discussed by *Purcell*. *See* 125 S. Ct. at 8 (discussing the "the necessity for clear guidance").

The State's bare speculation that the injunction will give license to "unscrupulous" and "nefarious persons" to commit fraud is unfounded. State Br. at 60-61. The State has not pointed to any evidence – because there is none – of how the District Court's injunction actually impedes the State's efforts to combat voter fraud. As noted in this brief, those Texans who may now be prosecuted for simply helping their elderly and disabled neighbors vote by mailing the ballot for them have not committed any type of voter fraud. The State's argument of harm is also belied by the fact that the District Court did not enjoin Section 86.0051, nor the entirety of Sections 86.006(f) and (h), nor *any* other provision of the Texas Election Code. The State has simply not explained why these other existing provisions are inadequate to combat any voter fraud.

CONCLUSION

For the foregoing reasons, and all others apparent to the Court, the District Court's decision to grant a limited injunction should be affirmed, and the remainder of the State's appeal should be dismissed.

Respectfully submitted,

OTIS W. CARROLL
IRELAND, CARROLL & KELLEY, P.C.
6101 South Broadway, Suite 500
Tyler, TX 75703
Telephone: (903) 561-1600
Facsimile: (903) 581-1071
otiscarroll@icklaw.com

J. GERALD HEBERT
Attorney at Law
J. GERALD HEBERT, P.C.
5019 Waple Lane
Alexandria, VA 22304
Telephone: (703) 628-4673
jghebert@comcast.net

ART BRENDER
Attorney at Law
600 Eighth Avenue
Ft. Worth, TX 76104
Telephone: (817) 334-0171
brenderlawfirm@artbrender.com

ERIC M. ALBRITTON
ALBRITTON LAW FIRM
P.O. Box 2649
Longview, TX 75606
Telephone: (903) 757-8449
Facsimile: (903) 758-7397
ema@emafirm.com

BRUCE V. SPIVA
KATHLEEN R. HARTNETT
SPIVA & HARTNETT LLP
1776 Massachusetts Avenue, N.W.
Suite 600
Washington, D.C. 20036
Telephone: (202) 785-0601
Facsimile: (202) 785-0697
bspiva@spivahartnett.com
khartnett@spivahartnett.com

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

The undersigned certifies that two true and correct copies of the foregoing Brief for Appellees and one electronic version in PDF form were sent by U.S. Certified Mail, return receipt requested, on this 18th day of May, 2007, to:

R. Ted Cruz
Solicitor General
Philip A. Lionberger
Assistant Attorney General
P.O. Box 12548, Capitol Station (MC 059)
Austin, TX 78711-2548

The undersigned further certifies that seven true and correct copies of the foregoing Brief for Appellees and one electronic version in PDF form were sent to the Clerk of Court, as addressed below, by U.S. Certified Mail, return receipt requested, on this 18th day of May, 2007:

Mr. Charles R. Fulbrudge III
Clerk, U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

_____
Kathleen R. Hartnett

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rules 32.2 and 32.3, undersigned counsel certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7), the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

1. Exclusive of the portions exempted by Fifth Circuit Rule 32.2 and Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 13,656 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word 2007 software.

3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Federal Rule of Appellate Procedure 32(a)(7) and Fifth Circuit Rule 32.2, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

_____

Kathleen R. Hartnett