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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

In 2003, the Texas Legislature amended the State's Election Code in part to curb fraudulent voting practices associated with early voting by mail. Section 86.006(f) was one of the amended provisions and became the focus of the Partisans' multifaceted challenge to the 2003 Amendments. They convinced the District Court to grant them a preliminary injunction against §86.006(f) and this interlocutory appeal followed.

The State Officials have raised three points of error in this appeal. First, the injunction never should have been granted because the case should have been dismissed under *Heck v. Humphrey*, 512 U.S. 477 (1994). Second, the Partisans' connected 28 U.S.C. §1971 claims should have been dismissed for lack of subject-matter jurisdiction. And, finally, the Court should dissolve the District Court's preliminary injunction because the Partisans cannot satisfy the requirements for such relief.

The Partisans throw up several procedural challenges to each of the Officials' arguments on appeal. None of these challenges have merit. The Officials have properly raised each of the issues presented here and nothing has been waived.

As to the substance of the Partisans' counter-arguments: (1) the *Heck* Doctrine does apply to their claim for injunctive relief; (2) they lack standing to bring their §1971 claims; and (3) when the proper analytical framework is applied (not strict scrutiny, as the Partisans contend), there can be no question that the record supports the State's asserted interest in preventing voting fraud, that §86.006(f) & (h) are not an unconstitutional infringement on the privilege of early voting by mail, and that the State's interest outweighs the Partisans' asserted interests in the privilege and convenience of casting and assisting voters with casting an early-voting, mail-in ballot.

Lastly, a recent enactment has amended §86.006(f) and resolved the Partisans' complaint that the section was unduly burdensome because it afforded only affirmative defenses and not exemptions to prosecution. With the 2007 amendment, the affirmative-defense language has been eliminated and replaced with language that makes the provision's requirement no longer applicable in what were the previous affirmative-defense categories. This has reduced the complaints of the Partisans and their amici to simply that it is unconstitutional for a State to prohibit the possession of a completed absentee ballot by someone who has the voter's consent to do so. But that cannot be correct, as there is no fundamental right to cast, much less receive assistance with casting, an early mail-in ballot.

ARGUMENT

I. THE OFFICIALS HAVE PROPERLY RAISED THE *HECK* DOCTRINE IN THIS APPEAL, *HECK* BARS RAY'S AND JOHNSON'S CLAIMS, AND THE DISTRICT COURT SHOULD HAVE DISMISSED OR TRANSFERRED THE PARTISANS' LAWSUIT FOR IMPROPER VENUE UNDER RULES 12(B)(1) AND (B)(3).

The Partisans argue that the State Officials have not properly appealed the issue of the *Heck* Doctrine and the dismissal of this case under Federal Rules of Civil

Procedure 12(b)(1) and (b)(3).[1] They further contend that the *Heck* Doctrine does not apply here.[2] They are incorrect on both counts.

A. The Court Has Jurisdiction over the Officials' Rule 12(b) Motions Regarding the *Heck* Doctrine.

The Officials have brought the *Heck* issue before the Court under the rule from *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). The rule provides that on appeal of an interlocutory order granting or denying an injunction, an appellate court may properly determine whether there is an "insuperable objection to maintaining the bill" and hence whether dismissal is required. *Id*. In *Deckert*, the Supreme Court held that a federal court of appeals reviewing an interlocutory injunctive order may pass on the correctness of a denial of a motion to dismiss for want of jurisdiction and for failure to state a cause of action. *Id*. This principle applies with full force to the Officials' 12(b)(1) and (b)(3) motions based on the *Heck* Doctrine.

Nevertheless, the Partisans assert that the rule in *Deckert* "does not support the [Officials'] broad position."[3] The gist of their argument is that the Supreme Court's decision in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), has clarified

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1. *See* Appellees' Br. at 28-31.

2. *See id*. at 31-34.

3. *Id*. at 29.

Deckert to mean that there can be "pendent appellate jurisdiction" of a nonappealable interlocutory order when the order is either "inextricably intertwined" with the appealable order or when "review of the former decision was necessary to ensure meaningful review of the latter."[4] They argue that the Officials cannot satisfy *Swint*.

They are wrong. First off, the Supreme Court in *Swint* was careful to note that its decision there was "not definitively or preemptively settl[ing] . . . whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." 514 U.S. at 50-51. Thus, contrary to the Partisans' claim that *Swint* now states the "settled rule,"[5] *Swint's* actual holding is far narrower: the Court of Appeals did not have "'*pendent party*' appellate jurisdiction" to take up the denial of a County's motion for summary judgment in an appeal brought by individual defendants seeking review of the lower court's refusal to grant them summary judgment on their pleas of qualified immunity. *See* 514 U.S. at 38, 41 (emphasis added). *Swint* neither diminishes nor significantly alters the principle announced in *Deckert*.

That is probably why in *First Medical Health Plan, Inc. v. Vega-Ramos*—a 2007 case applying *Deckert*—the First Circuit's opinion makes no reference to *Swint*.

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4. *Id*. (quoting *Swint*, 514 U.S. at 51).

5. *Id*.

See 479 F.3d 46, 50-51 (1st Cir. 2007). There, the First Circuit summarized the *Deckert* test as follows:

> Appellate review of the denial of a motion to dismiss as part of an interlocutory appeal from the grant of a preliminary injunction is permissible where the underlying facts are undisputed, the parties have had a fair opportunity to brief the legal issues, and the court of appeals can resolve the case as a matter of law.

Id. at 50 (citing, *e.g.*, *Magnolia Marine Transp. Co. v. Laplace Towing Corp.*, 964 F.2d 1571, 1580 (5th Cir. 1992)).

Here, all three of these factors are present. The material facts are not in dispute and only legal questions are presented.[6] Plus, the parties have had ample opportunity to brief the issues concerning the *Heck* Doctrine, §86.006, and the preliminary injunction, and these issues can be resolved as a matter of law.

In addition, regardless of whether the Partisans have correctly apprehended *Swint's* effect, if any, on the *Deckert* rule, the Officials' *Heck* issue is still properly before the Court under *Swint's* "inextricably intertwined" standard. In *Magnolia*

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6. The Partisans contend that there are "other factual issues" involved with the Officials' venue motion. *See id*. at 31 n.9. This assertion is incorrect. The Partisans brought suit in the Eastern District of Texas based on events surrounding only the claims of Ray and Johnson who reside in Texarkana, Texas. None of the other claims asserted by the Partisans occurred in that judicial district—their allegations all arose from events occurring in either Fort Worth (Tarrant County) or Austin (Travis County), Texas, which are in the Northern District of Texas and the Western District of Texas, respectively. *See* 1.R.9-44. There are no factual issues for purposes of the Officials' 12(b) motions regarding Ray and Johnson.

Marine, this Court, in discussing pendent appellate jurisdiction and *Deckert*, stated that it may consider issues contained in collateral orders that are related to an appealable order when there is "sufficient overlap in the factors relevant to [the appealable and nonappealable] issues to warrant [the] exercise of plenary authority over the appeal." 964 F.2d at 1580 n.8. The Court further noted that "'inextricably bound up' with the injunction" could be operative when (1) "the injunction requires the appellant to comply with th[e nonappealable] order," (2) "separate consideration would involve sheer duplication of effort by the parties and [the] court," or (3) "the propriety of the injunction depends on the correctness of issues resolved in the other order summary[.]" *Id*.

In this case, there is "sufficient overlap" between the *Heck* issue and the injunction enjoining enforcement of §86.006 in that the very essence of the Officials' *Heck* argument is that the Partisans' lawsuit, if successful in nullifying §86.006, would necessarily imply the invalidity of Ray's and Johnson's guilty pleas and sentences under §86.006. *See Heck*, 512 U.S. at 486-87. And separate consideration of the *Heck* issue would involve an unnecessary duplication of effort by the parties and the District Court. The 12(b) orders are inextricably intertwined with the preliminary injunction, and therefore, the *Heck* issue is properly before the Court.

B. The *Heck* Doctrine Applies Here.

Under the *Heck* Doctrine, a civil suit may not proceed if the result of that suit would necessarily imply the invalidity of a criminal conviction or sentence. *See* 512 U.S. at 486-87. Here, Ray's and Johnson's guilty pleas and probations under §86.006 would necessarily be invalidated if the Partisans prevail in their lawsuit. Thus *Heck* bars Ray's and Johnson's claims here. Still, the Partisans insist that *Heck* does not apply here because their lawsuit merely seeks prospective injunctive relief rather than a retrospective examination of Ray's and Johnson's convictions and probations.[7]

But they grossly understate the effect that their lawsuit will have, if successful, on Ray's and Johnson's guilty pleas and probated sentences under §86.006. What they are seeking is an adjudication that §86.006, which Ray and Johnson pleaded guilty to violating, is facially unconstitutional. If the District Court so concludes, the necessary consequence of that will be that the crime they pleaded guilty to and for which they were punished was invalid and unconstitutional and their probations would likewise be invalid.

But the time to assert that challenge was before this lawsuit. Ray and Johnson had two prior opportunities to make this challenge. First, they could have chosen to bring it up in the direct criminal prosecution as a defense to that claim, and they could

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7. *See* Appellees' Br. at 31-33.

have appealed any decision all the way up to the Supreme Court. They didn't do so. Instead, they chose to plead guilty. They could have also filed an application for writ of habeas corpus. But they didn't do this either. And, now, they are trying to use a civil lawsuit to reach precisely the same adjudication that they would get through a habeas-corpus proceeding. This is improper.

Ray and Johnson point to the Partisans' additional challenges to other Election Code provisions as a reason for avoiding the *Heck* bar, saying that *Heck* does not bar all of the claims being asserted here and thus jurisdiction still remains. But Ray's and Johnson's claims are obviously focused on §86.006 and their probations,[8] and if they are barred, the basis for maintaining venue in the Eastern District disappears. The Partisans' pleadings confirm this: "*In levying criminal enforcement* against Plaintiffs RAY and JOHNSON *under Section 86.006*, the Defendants acted under color of state law, and subjected these Plaintiffs, or caused them to be subjected, to a deprivation of their rights, privileges, and immunities under the United States Constitution."[9] No other conduct vis-á-vis Ray and Johnson has been alleged or shown that would give them standing to challenge the other Election Code provisions at issue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating that a plaintiff "must have

8. *See* 1.R.36-37.

9. *Id*. at 37 (emphasis added).

suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical" [citations and internal quotation marks omitted]).

Lastly, the Partisans suggest that *Heck* is inapplicable because Ray and Johnson seek only prospective injunctive relief and because the *Heck* bar does not "ordinarily" apply to claims involving "future activity."[10] Their suggestion misses the mark for two reasons.

For one thing, Ray's and Johnson's claims are not limited to only prospective injunctive relief. They also seek a declaration that §86.006 is unconstitutional.[11] The *Heck* bar applies to claims for declaratory relief. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *accord Koger v. Florida*, 130 Fed. App'x 327, 333 (11th Cir. 2005) (unpublished op.); *Muhammad v. Weston*, 126 Fed. App'x 646, 648 (5th Cir. 2005) (unpublished op.). The Partisans' claims for declaratory and injunctive relief are inseparable, are necessarily intertwined, and are therefore *Heck* barred.

For another thing, the Partisans assert that *Edwards v. Balistok* holds that *Heck* has no application to a claim for prospective injunctive relief. But *Edwards* is not as

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10. *See id*. at 32-33.

11. *See id*. at 37.

definitive as the Partisans suggest.[12] *Edwards* left open the issue whether *Heck's* rationale might apply in a situation where a criminal defendant seeks injunctive relief that necessarily implies the invalidity of his conviction. *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002); *Clarke v. Stalder*, 154 F.3d 186, 189 (5th Cir. 1998) (en banc). The Supreme Court did not hold—as the Partisans suggest—that the *Heck* Doctrine *never* applies to claims for prospective injunctive relief. Quite the contrary: it may be so applied, and it has been used to bar such relief. *See*, *e.g.*, *Harvey*, 278 F.3d at 375; *Clarke*, 154 F.3d at 189.[13]

Rather than the Partisans' over-simplified take on *Edwards* and the applicability of *Heck* to certain types of claims, the proper focus of the inquiry after *Edwards* is on the *nature of the challenge*, not on *the type of relief sought*. *See Beck v. Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999) (noting that *Heck*

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12. In *Edwards*, the plaintiff's claim for prospective relief was based on the prison's failure to date-stamp witness statements and did not "necessarily imply" the invalidity of a previous loss of good-time credits, which was the punishment that the prisoner received. *See* 520 U.S. at 648. In other words, the prospective injunctive relief sought in *Edwards* was not *Heck* barred because it did not imply the invalidity of the prisoner's punishment, unlike the situation here.

13. *See also*, *e.g.*, *Lawson v. Engleman*, 67 Fed. App'x 524, 526 n.2 (10th Cir. 2003) (unpublished op.) (holding that *Heck* applied to plaintiff's claims for monetary, declaratory, and injunctive relief); *Poor Bear v. Nesbitt*, 300 F.Supp.2d 904, 912 (D. Neb. 2004) (holding that *Heck* barred §1983 claims for monetary, declaratory, and injunctive or equitable relief and that not applying *Heck* "would elevate form over substance" to limit *Heck's* applicability to claim for monetary damages when the same allegedly unconstitutional conduct formed the basis for all of the plaintiff's requested relief).

should generally apply "when the concerns underlying *Heck* exist," which include "those claims that "would necessarily imply the invalidity of [the] conviction"); *see also Clarke*, 154 F.3d at 189-90 (distinguishing *Edwards* from claim for prospective relief that was "so intertwined with" claims for damages and reinstatement of lost good-time credits that a favorable ruling on the former would necessarily imply the invalidity of the disciplinary conviction); *Sheldon v. Hundley*, 83 F.3d 231, 233 (8th Cir. 1996) (indicating that under *Heck*, court disregards form of relief sought and instead looks to essence of plaintiff's claims). Despite the Partisans' suggestion to the contrary, the *Heck* question is not answered by merely looking at the type of relief sought by the plaintiff. Instead, the Court must look to *Edwards's* rationale and ask whether Ray's and Johnson's claims for prospective injunctive relief would necessarily imply the invalidity of their guilty pleas and sentences. The answer to that question is: "Yes, they do."

The District Court erred by denying the Officials' motion to dismiss based on the *Heck* Doctrine.

II. THE OFFICIALS HAVE PROPERLY RAISED THE §1971 ISSUE AND SUCH CLAIMS OF THE PARTISANS' SHOULD HAVE BEEN DISMISSED.

The Partisans argue that the Officials' Rule 12(b)(1) challenge to the Partisans' claims under 28 U.S.C. §1971 "should not be entertained" because that challenge is

not "properly before this Court."[14] They further assert that, even if they are wrong and the Officials' challenge to the Partisans' §1971 claims is properly before this Court, these claims still should not be dismissed because the Officials waived their argument and because the Partisans had standing to bring such claims.[15] The Partisans are wrong on all fronts.

For starters, the gist of the Partisans' first argument is that the District Court's denial of the Officials' Rule 12(b)(1) challenge is not cognizable in this interlocutory appeal from the preliminary injunction,[16] because the Officials' §1971 motion is not "inextricably entwined" with the injunction order.[17] But this argument falters because its premise is inaccurate; the Officials' §1971 challenge is intertwined with the preliminary injunction. As referenced in the Officials' opening brief, the Partisans'

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14. *See* Appellees' Br. at 35-36.

15. *See id*. at 37-41.

16. The Partisans' do not dispute (because they cannot dispute) that the District Court's conclusions of law contain a ruling that denies the Officials' Rule 12(b)(1) motion. Nevertheless, despite this broad and unconditional ruling, the Partisans assert that the District Court did not actually rule on the Officials' Rule 12(b)(1) challenge to the §1971 claim and suggest that the District Court avoided the §1971 issue because that court concluded that 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.¶5@853; 3.R.E.¶5@853. The problem with this argument is that this statement refers to the Officials' Rule 12(b)(6) motions. The court's 12(b)(1) ruling—including its ruling on the §1971 claim—was dealt with conclusively in the separate conclusion of law about subject-matter jurisdiction. *See* 4.R.¶2@853; 3.R.E.¶2@853.

17. *See* Appellees' Br. at 36.

§1971 claims are entwined with the ruling on the preliminary injunction through the Partisans' allegation that §86.006(h) invalidates a mail-in ballot that does not comply with the requirements of §86.006(f)(4).[18] Thus, the §1971 issue is properly before this Court.

Next, the Partisans argue that the Officials have waived at least part of their §1971 argument by not first raising it in the District Court.[19] Specifically, the Partisans are referring to the Officials' argument that §1971 claims were not intended to apply to the counting of ballots by individuals already deemed qualified to vote, which is what the Partisans' §86.006(f), (h) attack is about.[20] But the record reflects that the Officials did in fact raise this argument in the District Court.[21] This waiver argument has no merit.

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18. *See* Appellants' Br. at 45-47.

19. *See* Appellees' Br. at 39.

20. *See* Appellants' Br. at 47. The Partisans incorrectly contend that the Officials argue that §1971 applies only to errors and omissions in voter registration. *See* Appellees' Br. at 39. But that is not exactly what the Officials argued. The Officials pointed out that §1971 "forbids the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote," which is what the Partisans are alleging has occurred (i.e., the failure to meet §86.006(f)'s informational requirements should not disqualify a ballot) *See* Appellants' Br. at 46 (citing *Friedman v. Snipes*, 345 F.Supp.2d 1356, 1371 (S.D. Fla. 2004)). The argument was not just about voter registration, as the Partisans assert, but about their allegation that votes may be improperly disqualified.

21. 1.R.108.

As to the merits of the Officials' argument about §1971, the Partisans have no answer to the Officials' contention that §86.006(h) does not run afoul of §1971 because §86.006(h) merely disqualifies the ballot of someone who has already been deemed qualified to vote—which is not a §1971 violation. The Court should therefore sustain the Officials' jurisdictional challenge to the Partisans' §1971 claims.

Finally, the Partisans dispute whether only the U.S. Attorney General may enforce §1971 instead of private parties like the Partisans.[22] Despite the section's plain language and the vast weight of authority that says only the Attorney General may enforce the provision,[23] the Partisans suggest that this Court should join the Eleventh Circuit in holding that private parties may enforce §1971.[24] The Court should decline that invitation.[25]

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22. *See* Appellees' Br. at 37-39.

23. *See* Appellants' Br. at 48-49.

24. *See* Appellees' Br. at 37-39.

25. The Partisans point to *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946), as supporting private-party enforcement of §1971. But even the Partisans recognize that *Chapman* was decided before the enactment of §1971's provision that authorizes suit by only the Attorney General.

III. THE DISTRICT COURT'S PRELIMINARY INJUNCTION WAS UNJUSTIFIED BECAUSE THE PARTISANS FAILED TO CARRY THEIR BURDEN FOR INJUNCTIVE RELIEF.

At the outset, the Officials must correct an inaccuracy in Appellees' Brief regarding the Legislature's intent behind the enactment of §86.006(f), as well as the rest of the 2003 Amendments, and the enforcement of these provisions by the State Officials. In the introduction to their brief, the Partisans assert that the Legislature's intent was to "deter[] individuals and organizations [i.e., Democrats and minorities in Texas] from legitimate political association and expression."[26] That statement is insupportable.

In fact, the record shows that the main author and sponsor of the legislation was a Democrat and that numerous Democratic legislators voted in favor of the legislation.[27] It is not remotely credible to claim that these legislators acted with the purpose and intent of suppressing the votes of Democrats and minorities and creating a chilling effect on Democrats' political activities and expression. It also bears mentioning that the AARP, the Partisans' amicus, registered in support of the legislation in 2003 before its enactment. Tex. H.B. 54, 78th Leg., R.S. (2003),

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26. Appellees' Br. at 1.

27. *See* Appellants' Br. at 15-25 nn.29-33.

http://www.capitol.state.tx.us/tlodocs/78R/witlistmtg/html/C2402003030514001.HTM.

The Partisans also claim that their motion for preliminary injunction was necessitated at least in part by the "State's stepped-up enforcement efforts [of the 2003 Amendments] in advance of the November 6, 2006 election."[28] The Partisans are attempting to suggest an improper political motivation behind the Officials' enforcement of the 2003 Amendments. The only record citation that they have provided to support for this suggestion of political impropriety is to their own motion for preliminary injunction; they provide no specific record cite to evidence of "stepped-up enforcement" by the Officials prior to election day. Nor can they support that contention, because it is simply not true.[29] In any event, the Court should ignore this claim and any discussion of enforcement[30] because it is irrelevant to the facial constitutional challenge presented here, and because the Partisans did not seek preliminary injunctive relief on this claim.[31]

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28. *Id*. at 5.

29. *See* DX1-DX3.

30. *See* Appellees' Br. at 17-19.

31. 1.R.47 n.2.

Moreover, as pointed out in the Officials' opening brief, §86.006(f) has been amended to eliminate the nomenclature of affirmative defenses. It now reads in relevant part:

> (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 does not apply to a [~~that the~~] person who, on the date of the offense, was: . . . (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 . . . .

Tex. H.B. 1987, 80th Leg., R.S. (2007), http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/HB01987F.pdf. On May 25, 2007, the Governor signed the bill into law and it becomes effective September 1, 2007. *See id.*, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=HB1987. No Democrats opposed the bill, and a representative of the Texas Democratic Party even registered in support of the bill. *See id.* http://www.capitol.state.tx.us/tlodocs/80R/witlistmtg/html/C2402007032114001.HTM. With this amendment, the affirmative-defense language has been eliminated and replaced with language that makes the provision's requirement no longer applicable in what were the previous affirmative-defense categories. This fact

totally undermines the Partisans' argument that the statute is unduly burdensome because of the affirmative-defense language.

Finally, as to the merits (or lack thereof) of the Partisans' request for injunctive relief, the preliminary injunction is improper and should be vacated because the Partisans have not satisfied the requirements for such relief. They cannot establish: (1) that Texas Election Code §86.006(f), (h) is an unconstitutional infringement which irreparably harms their ability to exercise, and assist others in exercising, the privilege of early voting by mail; and (2) that their interests outweigh the State's compelling interest in preventing voting fraud.

A. Strict Scrutiny Is Not the Test for Determining Whether §86.006(f) Imposes an Unconstitutional Burden on the Convenience of Early Voting by Mail.

The Partisans repeatedly suggest that §86.006(f) unduly burdens the fundamental right to vote under the First and Fourteenth Amendments to the Constitution.[32] They are wrong. As a corollary to this argument, they further suggest that, because the opportunity to early vote by mail vote is an absolute right guaranteed by the Constitution and that §86.006(f) affects that right, the provision must pass strict scrutiny to be constitutional.[33] This argument is wrong, too.

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32. *See* Appellees' Br. at 1, 3, 9, 26-27, 43-56.

33. *See id*. at 43-47.

What is at stake here is not the fundamental right to vote, but only *the mere privilege of early voting by mail*. The Supreme Court has been crystal clear that there is no absolute or fundamental right to vote by absentee ballot. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969); *see also O'Brien v. Skinner*, 414 U.S. 524, 529-30 (1974) (reaffirming *McDonald*). Rather, absentee voting is a mere privilege that is afforded to qualified voters *as a matter of convenience*. *See*, *e.g.*, *Prigmore v. Renfro*, 356 F.Supp. 427, 432 (N.D. Ala. 1972); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1186 (Ill. App. Ct. 2004).

And the Supreme Court has never endorsed the view that all voting regulations (especially measures concerning absentee balloting like §86.006) must receive strict scrutiny. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Instead, courts must employ "a more flexible standard." *Burdick*, 504 U.S. at 434. That standard weighs "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id*. (quoting *Anderson*, 460 U.S. at 789; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)).

Given this, the Partisans' facial challenge to §86.006(f) is not sustainable on the grounds that the section fails strict scrutiny and unduly burdens the fundamental right to vote.[34] The Court should reject any attempt by the Partisans to avoid well-established Supreme Court precedent and raise the analytical bar higher than the Supreme Court has said it should be. The Court should instead employ the *Anderson/Burdick* framework and vacate the District Court's preliminary injunction.

B. Section 86.006(f) Passes the *Anderson/Burdick* Test.

The Partisans and their amici incorrectly maintain that even if strict scrutiny is not applied and the *Anderson/Burdick* framework is employed, §86.006(f) is still constitutionally infirm, entitling them to the preliminary injunction.[35] First, they assert that, when it comes to mail-in ballots, the Officials cannot show that §86.006(f) is necessary to achieve the State's admittedly legitimate interest in curbing voting fraud because there are other Election Code provisions that might apply to mail-in ballot fraud.[36] But, as the legislative history reveals, §86.006(f)—in conjunction with

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34. The Partisans also argue that the usual standard involving a facial challenge to a statute is inapplicable here because, they claim, their fundamental right to vote is threatened. *See* Appellees' Br. at 52-54. And they assert that irreparable harm must be presumed because "the denial of constitutional rights is at stake." *Id*. at 54. Both of these arguments flounder because the fundamental-right-to-absentee-vote premise is fallacious.

35. *See id*. at 47; *Amici Curiae* Br. at 4-5.

36. *See* Appellants' Br. at 48.

§86.0051(b)—provides a previously-unavailable tracking mechanism to identify persons who assist voters with their mail-in ballots.[37] And this measure assists government officers to prosecute persons who might collect and sell voting-by-mail ballots—something which was not a crime before the advent of the 2003 Amendments.[38] So it is not accurate to say that other Election Code provisions are adequate and make §86.006(f) mere surplusage.

Nor is Texas required to adopt any of the approaches suggested by the amici in order for §86.006(f) to be constitutional.[39] Despite their protestations that they are not presuming to say what is right for Texas when it comes to early voting by mail,[40] they attempt to do just that. Section 86.006(f), (h) is necessary to fulfill the Legislature's intent of monitoring, investigating, and combating voting fraud associated with mail-in ballots and the possessors of such ballots.

The Partisans also argue that §86.006 fails the *Anderson/Burdick* test because "voters are significantly restricted in their right under State law to cast an absentee ballot" and the section "goes too far" by banning a person from possessing a voter's

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37. 2.R.230, 325, 371, 460.

38. 2.R.230.

39. *See Amici Curiae* Br. at 19-21.

40. *See id*. at 21.

mail-in ballot with the voter's consent.[41] But it simply cannot be true that requiring an assistor to provide his or her signature, printed name, and residence address on the carrier envelope of a mail-in ballot is an exceedingly difficult burden of constitutional proportions. *See* TEX. ELEC. CODE §§86.0051(b), .006(f)(4). That argument just doesn't wash.

Nevertheless, the Partisans insist that §86.006(f)(4)'s signature requirement is no safe harbor for absentee voters and their assistors because §86.006(f) still contains a "broad ban on possession with the voter's consent—an offense with no affirmative defense where the possessor does not mail the ballot[.]"[42] In other words, there is no affirmative defense available to a person who has the voter's consent to possess the voter's ballot when they collect and hold the ballot and then give it to someone else to dispatch. There are a couple of problems with this argument.

First, both the language of the statute and legislative history indicate that §86.006(f)(4) is applicable to both a mere possessor of a ballot and a possessor of the ballot who performs the physical act of mailing the ballot. The language against possessing a voter's mail-in ballot in §86.006(f) merely states a general prohibition and subsections (1) through (6) that follow are exemptions from the general

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41. *See* Appellees' Br. at 50-51.

42. *Id*.

prohibition. As pointed out in the opening brief, it is absurd to read the statute as allowing the person who mails the ballot to be exempted by the signature requirement but not exempting someone who possessed the ballot but then gave it to someone else to dispatch to the early voting clerk.[43]

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43. The Partisans incorrectly argue that the Officials have waived this argument by not asserting it in the District Court. *See id*. at 51. The Officials' counsel specifically argued to the District Court:

> The Plaintiffs are basing their argument on essentially legal word play. If one looks at the text of 86.006(f), it says, if a — a person commits an offense if the person knowingly possesses an official ballot or carrier envelope, it is an affirmative defense if, and it lists several . . . . Now, the Plaintiffs' argument is that every one of those has committed a criminal offense and it is merely an affirmative defense . . . . The statute explicitly provides in the very same section that it is an affirmative defense, a complete and total defense if you meet any one of those specific provisions . . . . The practical import of the statute is no reasonable prosecutor would ever even open an investigation . . . . against someone who wrote his or her name on the envelope and signed it . . . . And all of the arguments that the Plaintiffs have pre[sented] about ensuring that people can vote, ensuring that people can vote is an incredibly important interest, but this statute fully provides for that if the individuals write their name and address on the carrier envelope . . . .

Tr.153-55, 57-58.

In addition, the Officials' response to the Partisans' motion for preliminary injunction stated:

> . . . Plaintiffs offer no explanation as to why their alleged constitutional rights to receive and provide assistance when returning mail-in ballots are unduly burdened by *merely having to provide their names, residence addresses, and signatures on the envelopes*, as required by the section. *See id*. §86.006(f)(4). By performing this uncomplicated act, an assistor may easily comply with the law. It is not an undue burden, as Plaintiffs claim.

Such a reading would only serve to frustrate the Legislature's intent. The legislative history plainly reflects that the Legislature did consider that possessors of a carrier envelope—any possessor who did not otherwise fall within another subsection under §86.006(f)—could comply with subsection (f)(4):

> If a voter voluntarily gave the person a carrier envelope, the person would commit an offense by not providing his or her signature, printed name, and residence address on the envelope . . . . [But] a person could possess the ballot or envelope lawfully if the person was: [] someone who put his or her name and address on the carrier envelope as the person who would deposit the envelope in the mail or with a common or contract carrier . . . .[44]

Not to mention that perhaps the primary focus of §86.006(f) is to monitor, control, and prevent the practice of vote harvesting or brokering whereby persons might buy or sell mail ballots or simply not mail the ballots in order to alter election outcomes.[45] A way to do this is to have an assistor who possesses a mail-in ballot, whether or not that person deposits the ballot in the mailbox or with a common or

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2.R.183 (emphasis in original); *see also* 2.R.206 ("Plaintiffs offer no explanation as to why a provision that *simply requires a person assisting an early voter by mail to provide their name, residence address, and signature on the back of a carrier envelope* in order to comply with the law is unconstitutionally vague. *See* TEX. ELEC. CODE §86.006(f)(4)." [emphasis in original]); 1.R.120 ("As to [§86.0051(b)], it applies to all voters equally, and all that someone needs to do to obey the law is to simply print their name and address on the carrier envelope and sign the envelope. *See* TEX. ELEC. CODE §86.006(f)(4).").

44. 2.R.228-29.

45. *See* 2.R.221, 230-31, 325, 471, 486, 488.

contract carrier, sign the carrier envelope, and provide their printed name and residence address. That way, a chain of custody and tracking mechanism is established—as the Legislature intended. It only thwarts the statute's purpose if the exemption does not apply to all possessors in the chain of custody of a voter's mail-in ballot.

Second, the Partisans' assumption that it is unconstitutional infringement on the right to vote for the Legislature to prohibit the possession of a mail-in ballot even if the possessor has the voter's consent to do so is unsupportable. They cite no case where a voter's consent may nullify a voting regulation like the one here. But, under their logic, a voter could give consent to someone selling their ballot to the highest bidder and that would be okay. That is obviously improper but would be all right if consent were an absolute defense. Consent simply cannot always immunize any activity related to a voter's ballot. Consensual possession of a mail-in ballot by a person cannot be a panacea for voting fraud related to early-voting, mail-in ballots, as the Partisans and their amici suggest. Otherwise, any attempt at controlling and monitoring the chain of custody and opportunities for voting fraud related to an absentee ballot could always be easily circumvented.

C. The Record Shows That the State's Interest in Combating Fraud Outweighs the Partisans' Interest in Assisting Voters to Early Vote by Mail.

The Partisans and their amici assert that the Officials presented no proof and have proffered nothing but "bare speculation" that §86.006 combats voting fraud.[46] To the contrary, the Officials presented extensive anecdotal and empirical evidence of voting fraud in the form of the legislative history.[47] This evidence is thoroughly discussed and referenced in Appellants' Brief at pages 15-24, and for the sake of brevity and to avoid needless repetition will not be repeated here.

Belying their argument that no evidence of voting fraud exists to support the enactment of §86.006(f), the Partisans take great pains in attempting to discredit the legislative history on voting fraud behind the enactments. Their attempts to discredit the legislative history involves at least one mischaracterization of the record and the use of several after-the-fact affidavits given by some Democratic legislators.

First, the Partisans assert that State Representative Wolens, the sponsor of H.B. 54, "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."[48]

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46. *See* Appellees' Br. at 2, 56; *see also Amici Curiae* Br. at 17.

47. *See* 3.R.548-837.

48. Appellees' Br. at 13 (citing 3.R.660-61).

They also claim that Representative Wolens was not actually concerned about "vote harvesting."[49]

Those assertions fly in the face of direct quotes by Representative Wolens—one of which, to their credit, the Partisans reference in their brief.[50] Representative Wolens has been quoted as saying that his legislation was intended to curb "vote harvesting"[51] and that both he and his wife had been victimized as political candidates by "rigged elections with people harvesting votes."[52] These public statements by Representative Wolens demonstrate (1) that he had personal knowledge of voting fraud concerning early voting by mail, and (2) that vote harvesting was a concern of his.

Second, the Partisans rely on the affidavits of several Democratic legislators to discredit the legislative history of voting fraud.[53] But these affidavits were generated by the Partisans only after the Officials had presented the District Court with the legislative-history materials on voting fraud and the purpose behind the 2003

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49. *See id*. at 14 ("Ultimately Representative Wolens sought to stop what he described as 'pushy' people, R.3.777, not 'vote harvesters," proof of which did not exist.").

50. *See id.* at 14 n.3.

51. 2.R.501.

52. 2.R.505.

53. Appellees' Br. at 13-14 (citing PX21-PX26).

Amendments. It is well-accepted that post-enactment, retrospective statements of intent are to be looked upon with caution and that isolated statements of individual legislators regarding their motives are not relevant to the issue of what the whole Legislature actually did. *See Maher v. Strachan Shipping Co*., 68 F.3d 951, 957 (5th Cir. 1995); *Quarles v. St. Clair*, 711 F.2d 691, 705 (5th Cir. 1983).[54] Indeed, "post-passage remarks of legislators, however, explicit, cannot serve to change the legislative intent of [the Legislature] expressed before the Act's passage . . . . Such statements 'represent only the personal views of the[] [individual] legislators, since the statements were made after passage of the Act." *Goolsby v. Blumenthal*, 581 F.2d 455, 460 (5th Cir. 1978) (quoting *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974)).

Here, the legislative record is clear that past instances of voting fraud connected to early voting mail-in ballots and persons providing improper assistance to such voters were the impetus behind §86.006(f) and the 2003 Amendments.[55] The Court should ignore, or at least accord very little weight to, the post-enactment

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54. The same cannot be said of a legislative sponsor's statements such as those of Representative Wolens, which "deserve[] to be accorded substantial weight[.]" *Mattox v. FTC*, 752 F.2d 116, 120-21 (5th Cir. 1985) (quoting *FEA v. Algonquin SNG, Inc*., 426 U.S. 548, 564 (1976)).

55. *See*, *e.g.*, 2.R.221, 230, 325-26.

statements contained in the affidavits of the State legislators proffered by the Partisans.

Putting aside, then, the Partisans' attempts to discredit the legislative record of voting fraud, the legislative history amply demonstrated that voting fraud was, and still is, a legitimate concern with mail-in ballots. No more evidence was required of the Officials. Indeed, as the Supreme Court has admonished in voting cases, "elaborate, empirical verification of the weightiness of the State's asserted justifications" is not required. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). And "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986); *cf. FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) (regarding rational-basis review of an equal-protection challenge "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

All of this evidence was sufficient to outweigh the Partisans' minimal interests in assisting and receiving assistance with the exercise of the mere privilege and

convenience of early voting by mail. The District Court's injunction therefore should be vacated.

CONCLUSION

For these reasons, this case should be dismissed under the *Heck* Doctrine, the Partisans' §1971 claims should be dismissed for lack of subject-matter jurisdiction, and the District Court's preliminary injunction against Texas Election Code §86.006(f), (h) should be dissolved.

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Under Fifth Circuit Rule 32.2 and 32.3, the undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7):

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