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December 20, 2007

Via Overnight Delivery

Charles R. Fulbruge III, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: Case No. 06-41573, *Ray, et al., Plaintiffs-Appellees v. Abbott, et al., Defendants-Appellants*

Dear Mr. Fulbruge:

Plaintiffs-Appellees ("Plaintiffs") submit this post-submission letter as directed by the Court, in response to the letter submitted by Defendants-Appellants ("State") on December 14, 2007. Please forward this letter to the panel assigned to this case.

TO THE HONORABLE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT:

During the rebuttal portion of the State's oral argument of this case on December 4, 2007, the State asserted – for the first time – that it intended to alter the carrier envelope that Texas uses for the return of mail-in ballots. Plaintiffs welcome the State's effort at attempting to begin to rectify the failings of Texas election law identified by Plaintiffs in this case. However, the State's eleventh-hour effort to alter the carrier envelope does not address the basis for the District Court's narrow injunction of a portion of Sections 86.006(f) and (h) of the Texas Election Code. To the contrary, the State's proposed changes to the carrier envelope do not alter the problematic underlying statute. That statute imposes criminal liability for mere possession of another's mail-in ballot and it does not

exempt from liability all individuals who have signed the carrier envelope, including those providing assistance or incidentally possessing the ballot or carrier envelope. Moreover, as explained below, the State's proposed changes do not provide adequate notice of the underlying criminal provisions – including the fact that certain possession of the ballot or carrier envelope can never be cured by merely signing the envelope. Nor do these proposed changes take immediate, or even certain, effect, including for the upcoming primary elections.

Accordingly, the State's proposed changes to the carrier envelope provide no basis for reversing the District Court's injunction. That injunction should be affirmed. To the extent that the State intends to alter the carrier envelope, Plaintiffs respectfully submit that a factual record concerning those proposed changes, as well as concerning the many other aspects of Texas election law at issue in this case, should be developed fully in the first instance by the trial court. The District Court can make any necessary modifications to its injunctive order. Notably, since oral argument before this Court, the District Court has scheduled a status conference for January 8, 2008, indicating its intention to move the case along. Attached to this letter as Exhibit A is a copy of the District Court's Notice of Scheduling Conference and Proposed Deadlines for litigating this case in advance of the 2008 general election. As the proposed schedule makes clear, the District Court stands ready to adjudicate this case in a speedy manner, including disposition of any issues concerning the carrier envelope.

I. The State's Proposed Revision Of The Carrier Envelope Does Not Provide A Basis For Overturning The District Court's Injunction, Which Was Based On The Deficiency Of The Underlying Statute.

Section 86.006(f) of the Texas Election Code subjects individuals to criminal liability for the consensual possession of the mail-in ballot or carrier envelope of another person, subject to only six narrow categories of exemption. In full, Section 86.006(f) provides:

> (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, this subsection does not apply to a person who, on the date of the offense, was:
>
> (1) related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter 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.

Tex. Elec. Code § 86.006(f).[1]

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[1] This text is the version of Section 86.006(f) as amended effective September 1, 2007. The State claimed in its Reply Brief and at oral argument that the recent amendment of Section 86.006(f) corrects the problem rectified by the District Court's preliminary injunction. As Plaintiffs have argued, the State is incorrect. The only difference between the previous and current versions of Section 86.00(f) is that what had been six categories of affirmative defenses are now six categories of exemptions. The amendment is a welcome change for individuals who fall within those six categories, as they no longer bear the burden of proving an affirmative defense. However, the amendment does not address at all the problem identified by the District Court: that Section 86.006(f) subjects to criminal liability all individuals (other than those in the six narrow categories of exemption) who consensually possess another's mail-in ballot or carrier envelope, including those providing legitimate assistance, and provides no means for such individuals to "cleanse" their possession, including by signing the carrier envelope. *See infra.*

Punishment for violation of Section 86.006(f) ranges from, at the "low" end, up to 180 days in jail and up to a $2,000 fine for consensual possession of a single ballot or carrier envelope, through the "high" end of a term of 180 days to two years in jail and up to a $10,000 fine for consensual possession of 20 or more ballots or envelopes. *See id.* § 86.006(g); Tex. Penal Code §§ 12.22, 12.35. In addition, any ballot returned in violation of this Section "may not be counted." *Id.* § 86.006(h). For the Court's reference, a copy of the current version of the entirety of Chapter 86 of the Texas Election Code is attached as Exhibit B.

The District Court's injunction addressed a narrow but significant problem with Section 86.006(f). As Plaintiffs explained in their briefs and at oral argument, the District Court partially enjoined Section 86.006(f) because that provision criminalizes all consensual possession of the mail-in ballot or ballot envelope of another person, unless a possessor happens to fall into one of the six narrow categories of exemption. Critically – and contrary to the State's claims – the clear terms of Section 86.006(f) do not authorize all consensual possessors to provide identifying information on the carrier envelope. Nor does the statute provide exemption from criminal liability so long as consensual possessors provide such information. Rather, the only individuals who are authorized by Section 86.006(f) to provide identifying information as a means of exempting themselves from criminal liability are those who "possess[] the carrier envelope *in order to deposit the envelope in the mail or with a common or contract carrier* and who provide[] the information required by Section 86.0051(b)." Tex. Elec. Code § 86.006(f)(4) (emphasis added).

Thus, under the plain terms of Section 86.006(f), individuals are not exempted from liability – even if they provide identifying information – unless they are a mailer of a ballot or fall within one of the other five narrow categories of exemption. Thus, for example, a person is subject to liability under Section 86.006(f) and has no exemption from criminal prosecution: (1) if she provided "assistance" to an elderly voter and provided identifying information on the carrier envelope, *see* Tex. Elec. Code § 86.010, but did not mail the ballot for the voter, or (2) if she handed the unmarked ballot and carrier envelope to a disabled voter and provided identifying information on the carrier envelope, but did not mail the ballot for the voter.

At oral argument, the panel posed hypothetical questions to counsel regarding assistance to a person in a nursing home. If a janitor or nursing home attendant hands an elderly or disabled voter a piece of mail containing the person's unmarked mail-in ballot, then such a handler of the ballot is not exempt from prosecution under Section 86.006(f), even if the handler signs the carrier envelope. That is so because a person merely handling the ballot with the voter's consent does not fit within any of the categories of exemption. Under the District Court's narrow injunction, such an inadvertent non-mailer of the mail-in ballot of another would be exempt from prosecution. The District Court's injunction equally protects someone who provides actual assistance in voting to a nursing home resident and signs the carrier envelope, but does not mail the ballot. Such an individual would otherwise be susceptible to prosecution under Section 86.006(f).

Notably, the District Court's injunction did not prohibit enforcement of Sections 86.006(f) and (h) against non-consensual possessors. 4.R.843; 2.R.E.843. Moreover, the District Court expressly held that its injunction does not bar enforcement of Section 86.0051 of the Texas Election Code, which separately criminalizes mailing a ballot for another person without providing identifying information. 4.R.843-44; 2.R.E.843-44.[2] Indeed, the relatively limited scope of the District Court's injunction was grounded in its view, based on the limited preliminary record, "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. However, as the District Court recognized, while the statute authorizes a mechanism of providing identifying information by which mailers can legally possess the ballot or carrier envelope with the consent of the voter, *see* Tex. Elec. Code § 86.0051, the statute went "too far" by providing no means of exemption for all consensual possessors, 4.R.857¶19; 3.R.E.857¶19.

At oral argument, counsel for the State asserted that the State would not prosecute any consensual possessor who signs the carrier envelope – regardless

[2] As the District Court correctly recognized, in light of the existence of Section 86.0051 and the many other provisions of Texas law regulating and criminalizing aspects of the mail-in balloting process – provisions unaffected by the preliminary injunction – the State would not suffer harm from the District Court's narrow partial injunction of Sections 86.006(f) and (h).

whether such an individual actually has any statutory basis for an exemption from prosecution. Of course, the state statute challenged here provides that such a person may be prosecuted; that is why the injunction should be affirmed. The District Court properly enjoined, in part, Section 86.006(f) because of its excessive breadth, and due to the absence of exemptions for all consensual possessors, including for non-mailers who provide identifying information on the carrier envelope. Particularly in light of the credible evidence of a chilling effect on constitutional rights caused by Section 86.006(f), 4.R.852¶27; 3.R.E.852¶27 – a factual finding by the District Court which is not clearly erroneous – and the State's history of discriminatory implementation identified by Plaintiffs, 1.R.21¶30; 1R.81¶14, it is the statutory language and the practical effect of the State's enforcement history that was properly the touchstone of the District Court's narrow injunction.

As noted, the District Court's injunction was based on the terms and effect of Section 86.006(f) – not the format of the carrier envelope. Accordingly, the State's surprise declaration at oral argument of its intent to change the carrier envelope, as well as the State's subsequent proposed changes, do not alter the basis for the District Court's injunction: the excessive breadth of Section 86.006(f). Indeed, the State's entire submission concerning the carrier envelope is based on the false premise that the State's proposed changes to the carrier envelope merely reflect what is "explicit on the face of the statute: that anyone possessing another person's ballot or carrier envelope (and not falling within the statutory exceptions) must put his or her printed name, signature, and residence address on the carrier envelope to avoid committing a crime." State Letter at 4. But Section 86.006(f) provides no such thing – either explicitly or implicitly. Rather, the statute provides that mailers alone may sign the carrier envelope to cleanse their possession.

Thus, the only change that could alter the basis for the District Court's injunction is a change of the statute itself, not merely a change in the carrier envelope. It is the overly broad criminal prohibition, combined with the State's enforcement history, that has caused an unwarranted chilling effect on constitutional rights. Put simply, regardless whether the carrier envelope informs all consensual possessors to sign it, the statute does not exempt all such individuals

from prosecution. That deficiency is what the District Court's injunction addressed, and that deficiency persists.[3]

II. The State's Proposed Changes To The Carrier Envelope Do Not Take Immediate Or Certain Effect And Thus Provide No Basis For Overturning The District Court's Injunction.

Even if the State's proposed changes to the carrier envelope were relevant to the injunction under review, they would provide no basis for overturning the injunction because the proposed changes do not take immediate or even certain effect. As the State explains at the end of its letter, it does not intend to implement the proposed changes to the carrier envelope for the "upcoming primary season." State Letter at 6.[4] The State asserts that its proposed changes "may be subject" to preclearance requirements under Section 5 of the Voting Rights Act, *id.* – a process that ordinarily takes up to 60 days. *See* 28 C.F.R. Part 51; http://www.usdoj.gov/crt/voting/sec_5/making.htm. The State has not divulged whether it has yet submitted its proposed changes for preclearance.

Because the State's proposed changes have not yet taken effect and will not take effect either imminently or at any time certain, they provide no basis for overturning the District Court's injunction. As noted above, the District Court has scheduled a status conference in this matter for early 2008 and has proposed an aggressive schedule for litigating all issues in this case. The District Court issued its narrow injunctive order based on the factual circumstances that were before it at the time, and those conditions have not changed, even with the changes to the

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[3] The State's own proposed changes continue to reflect the flaws of the underlying statute. Although the State now apparently contemplates that all possessors may sign the carrier envelope to avoid liability, the statute does not exempt such individuals from prosecution unless they also mail the envelope. *See* Tex. Elec. Code § 86.006(f). That reality of the underlying law is reflected in the bold language that the State proposes adding to the instruction form, which demonstrates that the Election Code only authorizes certain individuals – assistors or mailers – to sign the carrier envelope. *See* State Exhibit A (Carrier-Envelope Instructions) ¶ 2. Moreover, as explained above, even assistors who sign the envelope under Tex. Elec. Code § 86.010, have no means of exemption from liability under Section 86.006(f) because they do not all within any of the categories of exemption.

[4] Texas' primary is on March 4, 2008. *See* http://www.sos.state.tx.us/elections/index.shtml.

carrier envelope proposed by the State. In any event, Plaintiffs respectfully submit that the District Court is best positioned to assess whether the State's proposed changes provide any basis for altering the injunction previously entered – when and if those changes to the carrier envelope actually do go into effect.

III. The State's Proposed Changes To The Carrier Envelope Do Not Provide Reasonable Notice Of The Statutory Prohibitions Or A Sufficient Means Of Compliance.

Plaintiffs do not seek to engage in a detailed critique of the State's carrier envelope or the proposed revisions thereto, particularly given that the carrier envelope's redesign does not cure the basis for the District Court's injunction. Plaintiffs respectfully submit that issues concerning the carrier envelope's design should be developed before the trial court before being addressed on appeal. In any event, Plaintiffs note that the State's proposed revisions do not cure the problems with the carrier envelope, for at least two reasons.

First, the carrier envelope does not provide accurate or reasonable notice of the underlying criminal prohibition in Section 86.006(f). Most significantly, neither the envelope nor the instructions state that there is no statutory exemption for prosecution under Section 86.006(f) for individuals who sign the carrier envelope, but who are not mailers. As explained above, and as recognized by the District Court's injunction, the statutory language plainly provides no such exemption. Indeed, the carrier envelope, as revised by the State to suggest that all possessors are required to provide identifying information, will likely mislead some consensual possessors who are not mailers into believing (incorrectly) that they will be exempt from prosecution simply by signing the carrier envelope. The proposed revision to the carrier envelope is also confusing: the new bolded language and the revisions to the signature area suggest that mere possession is enough to require identifying information, whereas the preexisting language on the carrier envelope (which will not be changed) continues to suggest that only assistors or mailers must provide information. Moreover, the envelope as revised continues to block off an area in the lower right that suggests that it is assistors and witnesses who are to sign the envelope. Thus, the State's proposed revisions

neither "improve clarity," State Letter at 2, nor provide accurate notice of the statutory basis for criminal liability.[5]

Second, despite the State's proposed revisions, the carrier envelope does not provide a reasonable means for multiple individuals to provide identifying information. According to the State, all individuals who possess the ballot or envelope (other than the voter) must supply their (1) printed names, (2) signatures, and (3) residence addresses. As Plaintiffs have explained, the current carrier envelope used by the State does not provide room for more than one assistor or mailer to supply identifying information. The only revision proposed by the State relevant to this point is the addition of two hash marks on the name-signature line, and two hash marks on the residence address line. State Letter at 2-3. According to the State, these hash marks "signify separate compartments for up to three different individuals to include their identifying information." *Id.* at 3. Plaintiffs respectfully submit that the State's proposed cure is insufficient: the envelope does not clearly "signify separate compartments" for different individuals, and the already tiny area for providing identifying information has become even smaller for each supposed "compartment." If an assistor, for example, inserts her full first, middle, and last name in the three compartments, or inserts her printed name and signature (both of which are required) in two separate compartments, there would be no space left for the information of a mailer or a witness. The State's proposed fix simply does not reasonably address Plaintiffs' concern that multiple individuals will not be able to provide the required information on the carrier envelope.

Plaintiffs do not seek to nit-pick at the State's attempted revisions. We welcome any effort to make the carrier envelope more user-friendly and do not question the State's motives. But the revisions to the envelope, we submit, make it neither more user-friendly nor clearer. Plaintiffs seek to point out, by way of

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[5] The State's proposed revision to the carrier envelope does not state outright that all possessors must provide identifying information – likely because the applicable Texas Election Code provision does not contain any such requirement. Not only does the State's new language provide uncertain and incorrect statements of the underlying criminal prohibition, but the State has used bolded "warning" language that suggests that there is something dangerous or wrong about providing assistance to voters; such language is thus likely to further deter individuals from providing lawful assistance or other aid to voters.

example, genuine concerns with the hastily redesigned envelope. Plaintiffs respectfully submit that the prudent course, pending a full merits adjudication, is to leave the District Court's injunction in place, thus allowing time for the State to propose a carrier envelope redesign, along with other necessary measures, that respond fully to all of the concerns at issue in this lawsuit.

IV. The State's Purported Supplemental Authority Concerning The Practices Of Other States Is Not Properly Before The Court, And, In Any Event, Does Not Support The State's Arguments.

As the State recognizes, the Court requested that the State file a supplemental letter to advise the Court of any proposed modifications to the carrier envelope, because those modifications were first proposed by the State in its rebuttal at oral argument. State Letter at 1. The Court did not make a more general request for new arguments or authorities in support of the parties' claims. Yet the State inappropriately has attempted to use its letter as a basis for presenting new argument and extensive citations concerning the election laws of states nationwide. *See id.* at 4-6. This presentation has nothing to do with the State's proposed revisions to the carrier envelope, and it is not, as the State claims, a "related point[]." *Id.* at 1. Rather, it is argument that the State could have made in prior briefing but chose not to. Accordingly, the State's new argument and citations should be disregarded by the Court. *See, e.g.*, Fed. R. App. P. 28(j); Fifth Cir. Rule 28.4 (explaining that supplemental authority may be provided by letter at the Court's request, or if related to "intervening decisions or new developments").

In any event, the State's new submission does nothing to undermine the District Court's injunction. It is true and unsurprising that many states have promulgated regulations concerning mail-in balloting, including with respect to who may help the voter receive and return the ballot. *See* State Letter at 4-6 & nn.9-14. However, what is remarkable about Section 86.006(f) is that – unlike nearly every other state statute cited by the State in its letter – Texas has attempted to subject nearly all consensual possession of another's mail-in ballot or carrier envelope to severe criminal penalties. Unlike nearly all of the other state laws cited, Section 86.006(f): (1) applies to possession in all contexts (not just possession that is incidental to the more involved tasks of assisting, mailing, or

personal delivery of a ballot), (2) authorizes substantial criminal liability; (3) is not limited to situations involving fraud, tampering, or otherwise nefarious conduct; and (4) applies to all carrier envelopes and ballots, whether unmarked or marked.

The State claims that, of the 30 States that allegedly "significantly restrict" the possession of mail-in ballots, "many of them make it a criminal offense to unlawfully possess a mail-in ballot and provide penalties for a violation." State Letter at 6. The State's citations, *see id.* at 6 n.15, do not support this bold and inaccurate claim, as explained here by way of example only. Some of the State's citations do not even concern criminal prohibitions. *See, e.g.*, Conn. Gen. Stat. Ann. § 9-140b(d); Ga. Code Ann. § 21-2-385(a). Other statutes cited by the State as supposedly applying to mere possession pertain only to situations involving nefarious activity beyond mere possession, such as ballot tampering. *See, e.g.*, Me. Rev. Stat. Ann. tit. 21-A, § 791; Mass. Gen. Laws ch. 54, § 27; Minn. Stat. § 203B.08. Several of the provisions cited by the State do not broadly outlaw possession, but rather more narrowly regulate certain activities related to mail-in balloting, such as providing actual voting assistance, mailing, or personal delivery. *See, e.g.*, Md. Code Ann., Elec. Law §§ 9-307, 9-308, 9-312; Nev. Rev. Stat. Ann. § 293.330(4); S.C. Code Ann. §§ 7-15-385, 7-25-190; Wash. Rev. Code Ann. §§ 29A.40.080, 29A.84.680. And some of the statutory prohibitions cited by the State apply, at most, to election officials, not individuals helping mail-in voters. *See, e.g.*, Mont. Code Ann. §§ 13-13-214, 13-35-103. In sum, the State's newly provided authority does not rebut the fact that Texas' statutory criminalization of nearly all consensual possession makes Texas one of the most restrictive jurisdictions concerning assistance in mail-in balloting. Although that fact is not dispositive, it weighs heavily in favor of the injunction issued by the District Court. *See* Appellees' Br. at 45-46.[6]

[6] Moreover, and notably, Plaintiffs do not challenge Section 86.006(f) in isolation, but rather in context of all of Texas' statutory prohibitions, combined with Section 86.006(f)'s demonstrated chilling effect on protected activity and the history of discriminatory enforcement against racial minorities and Democrats. Thus, whether Section 86.006(f) is constitutionally problematic – as the District Court correctly held – does not hinge on the practices in the few other states that also have criminalized possession of mail-in ballots in certain limited circumstances.

For the foregoing reasons, and all others apparent to the Court, the preliminary injunction should be affirmed.

Respectfully submitted,

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Counsel for Plaintiffs-Appellees

cc: R. Ted Cruz and Philip A. Lionberger (via overnight delivery)

Exhibit A

To Plaintiffs-Appellees' December 20, 2007 Post-Submission Letter in Case No. 06-41573, *Ray et al. v. Abbott, et al.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILLIE RAY, ET AL.	§	
	§	
V.	§	CIVIL NO. 2:06-CV-385(TJW)
	§	
STATE OF TEXAS, ET AL.	§	

**NOTICE OF SCHEDULING CONFERENCE,
PROPOSED DEADLINES FOR DOCKET CONTROL ORDER
AND DISCOVERY ORDER**

The court, *sua sponte*, issues this Notice of Scheduling Conference, Proposed Deadlines for Docket Control Order and Discovery Order.

Notice of Scheduling Conference

Pursuant to Fed. R. Civ. P. 16 and Local Rule CV-16, the Scheduling Conference in this case is set for **January 8, 2008, at 2:30 p.m. in Marshall, Texas.** The parties are directed to meet and confer in accordance with Fed. R. Civ. P. 26(f) no later than fourteen (14) days before the conference. The parties are excused from the requirement of filing a written proposed discovery plan in this case.

Proposed Deadlines for Docket Control Order

The proposed deadlines for docket control order set forth in the attached Appendix A shall be discussed at the Scheduling Conference. The court will not modify the proposed trial date except for good cause shown.

Discovery Order

After a review of the pleaded claims and defenses in this action and in furtherance of the management of the court's docket under Fed. R. Civ. P. 16, it is ORDERED AS FOLLOWS:

1. **Disclosures.** Except as provided by paragraph 1(j), and, to the extent not already disclosed, within thirty (30) days after the Scheduling Conference, each party shall disclose to every other party the following information:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the disclosing party's claims or defenses (the disclosing party need not marshal all evidence that may be offered at trial);

(d) the name, address, and telephone number of persons having knowledge of relevant facts, a brief statement of each identified person's connection with the case, and a brief, fair summary of the substance of the information known by any such person;

(e) any indemnity and insuring agreements under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment entered in this action or to indemnify or reimburse for payments made to satisfy the judgment;

(f) any settlement agreements relevant to the subject matter of this action;

(g) any statement of any party to the litigation;

(h) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(i) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the disclosing party by virtue of an authorization furnished by the requesting party; and

(j) for any testifying expert, by the date set by the court in the Docket Control Order, each party shall disclose to the other party or parties:

a. the expert's name, address, and telephone number;

b. the subject matter on which the expert will testify;

c. if the witness is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the disclosing party regularly involve giving expert testimony:

(a) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(b) the disclosures required by Fed. R. Civ. P. 26(a)(2)(B) and Local Rule CV-26.

d. for all other experts, the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them or documents reflecting such information; and

e. Upon request, any party shall be excused from furnishing an expert report of treating physicians.

2. **Protective Orders.** Upon the request of any party before or after the Scheduling Conference, the court shall issue the Protective Order in the form attached as Appendix B. Any party may oppose the issuance of or move to modify the terms of the Protective Order for good cause.

3. **Additional Disclosures.** In addition to the disclosures required in Paragraph 1 of this Order, at the Scheduling Conference, the court shall amend this discovery order and require each

party, within forty-five (45) days after the Scheduling Conference and without awaiting a discovery request, to provide, to the extent not already provided, to every other party the following:

(a) a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to the pleaded claims or defenses involved in this action. By written agreement of all parties, alternative forms of disclosure may be provided in lieu of paper copies. For example, the parties may agree to exchange images of documents electronically or by means of computer disk; or the parties may agree to review and copy disclosure materials at the offices of the attorneys representing the parties instead of requiring each side to furnish paper copies of the disclosure materials;

(b) a complete computation of any category of damages claimed by any party to the action, making available for inspection and copying as under Rule 34, the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(c) those documents and authorizations described in Local Rule CV-34;

The court shall order the disclosures set forth in Paragraph 3(a)(b) and (c) in the absence of a showing of good cause by any party objecting to such disclosures.

4. **Discovery Limitations**. At the Scheduling Conference, the court shall also amend this discovery order to limit discovery in this cause to the disclosures described in Paragraphs 1 and 3 together with 25 interrogatories, 25 requests for admissions, the depositions of the parties, depositions on written questions of custodians of business records for third parties, and **depositions of two expert witnesses per side.** "Side" means a party or a group of

parties with a common interest. Any party may move to modify these limitations for good cause.

5. **Privileged Information**. There is no duty to disclose privileged documents or information. However, the parties are directed to meet and confer concerning privileged documents or information after the Scheduling Conference. Within sixty (60) days after the Scheduling Conference, the parties shall exchange privilege logs identifying the documents or information and the basis for any disputed claim of privilege in a manner that, without revealing information itself privileged or protected, with enable the other parties to assess the applicability of the privilege or protection. Any party may move the court for an order compelling the production of any privileged documents or information identified on any other party's privilege log. If such a motion is made, the party asserting privilege shall file with the Court within thirty (30) days of the filing of the motion to compel any proof in the form of declarations or affidavits to support their assertions of privilege, along with the documents over which privilege is asserted for *in camera* inspection. If the parties have no disputes concerning privileged documents or information, then the parties shall inform the court of that fact within sixty (60) days after the Scheduling Conference.

6. **Pre-trial disclosures**. Absent a showing of good cause by any party, the court shall require the following additional disclosures:

Each party shall provide to every other party regarding the evidence that the disclosing party may present at trial as follows:

(a) The name and, if not previously provided, the address and telephone number, of each witness, separately identifying those whom the party expects to present at trial and those whom the party may call if the need arises.

(b) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.

(c) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (1) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (2) any objections, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

7. **Signature.** The disclosures required by this order shall be made in writing and signed by the party or counsel and shall constitute a certification that, to the best of the signer's knowledge, information and belief, such disclosure is complete and correct as of the time it is made. If feasible, counsel shall meet to exchange disclosures required by this order; otherwise, such disclosures shall be served as provided by Fed. R. Civ. P. 5. The parties shall promptly file a notice with the court that the disclosures required under this order have taken place.

8. **Duty to Supplement**. After disclosure is made pursuant to this order, each party is under a duty to supplement or correct its disclosures immediately if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or

incorrect when made, or is no longer complete or true.

9. **Disputes.**

(a) Except in cases involving claims of privilege, any party entitled to receive disclosures may, after the deadline for making disclosures, serve upon a party required to make disclosures a written statement, in letter form or otherwise, of any reason why the party entitled to receive disclosures believes that the disclosures are insufficient. The written statement shall list, by category, the items the party entitled to receive disclosures contends should be produced. The parties shall promptly meet and confer. If the parties are unable to resolve their dispute, then the party required to make disclosures shall, within fourteen (14) days after service of the written statement upon it, serve upon the party entitled to receive disclosures a written statement, in letter form or otherwise, which identifies (1) the requested items that will be disclosed, if any, and (2) the reasons why any requested items will not be disclosed. The party entitled to receive disclosures may thereafter file a motion to compel.

(b) Counsel are directed to contact the chambers of the undersigned for any "hot-line" disputes before contacting the Discovery Hotline provided by Local Rule CV-26(e). If the undersigned is not available, the parties shall proceed in accordance with Local Rule CV-26(e).

10. **No Excuses.** A party is not excused from the requirements of this Discovery Order because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures. Absent court order to the contrary, a party is not excused from disclosure

because there are pending motions to dismiss, to remand or to change venue.

11. **Filings.** Any filings in excess of twenty (20) pages, counsel is directed to provide a courtesy copy to Chambers, simultaneously with the date of filing.

SIGNED this 13th day of December, 2007.

T. John Ward

T. JOHN WARD
UNITED STATES DISTRICT JUDGE

APPENDIX A

PROPOSED DEADLINES FOR DOCKET CONTROL ORDER

PROPOSED DEADLINES TO BE DISCUSSED AT THE SCHEDULING CONFERENCE JANUARY 8, 2008

Monday, August 4, 2008	Jury Selection - 9:00 a.m. in **Marshall, Texas**
July 30, 2008	Pretrial Conference - 9:30 a.m. in **Marshall, Texas**
July 25, 2008	Joint Pretrial Order, Joint Proposed Jury Instructions and Form of the Verdict.
July 25, 2008	**Motions in *Limine* due** The parties are ordered to **meet and confer** on their respective motions *in limine* and **advise the court of any agreements in this regard by 3:00 p.m. the business day before** the pretrial conference. The parties shall limit their motions *in limine* to those issues which, if improperly introduced into the trial of the case would be so prejudicial that the court could not alleviate the prejudice with appropriate instruction(s).
July 7, 2008	**Notice of Request for Daily Transcript or Real Time Reporting of Court Proceedings.** If a daily transcript or real time reporting of court proceedings is requested for trial, the party or parties making said request shall file a notice with the Court and e-mail the Court Reporter, Susan Simmons, at lssimmons@yahoo.com.
July 7, 2008	Pretrial Disclosures due
July 21, 2008	Pretrial Objections due

June 9, 2008	Response to Dispositive Motions (including *Daubert* Motions). **Responses to dispositive motions filed prior to the dispositive motion deadline, including *Daubert* Motions, shall be due in accordance with Local Rule CV-7(e). Motions for Summary Judgment shall comply with Local Rule CV56.**
May 26, 2008	For Filing Dispositive Motions and any other motions that may require a hearing; including *Daubert* motions.
April 21, 2008	Discovery Deadline
May 23, 2008	Defendant to Identify Trial Witnesses
May 9, 2008	Plaintiff to Identify Trial Witnesses
April 25, 2008	Defendant to Answer Amended Pleadings
April 11, 2008	Amend Pleadings **(It is not necessary to file a Motion for Leave to Amend before the deadline to amend pleadings. It is necessary to file a Motion for Leave to Amend after April 11, 2008).**
To be discussed at the Scheduling Conference	Mediation to be completed If the parties agree that mediation is an option, the Court will appoint a mediator or the parties will mutually agree upon a mediator. If the parties choose the mediator, they are to inform the Court by letter the name and address of the mediator. The courtroom deputy will immediately mail out a "mediation packet" to the mediator for the case. The mediator shall be deemed to have agreed to the terms of Court Ordered Mediation Plan of the United States District Court of the Eastern District of Texas by going forth with the mediation. General Order 99-2.
March 14, 2008	Defendant to Designate Expert Witnesses Expert witness report due Refer to Local Rules for required information.

March 7, 2008	Plaintiff to Designate Expert Witnesses Expert witness report due Refer to Local Rules for required information.
March 7, 2008	Privilege Logs to be exchanged by parties (or a letter to the Court stating that there are no disputes as to claims of privileged documents).
February 7, 2008	Join Additional Parties
January 8, 2008	Scheduling Conference (All attorneys are directed to Local Rule CV-16 for scope of the Scheduling Conference).

The parties are directed to Local Rule CV-7(d), which provides in part that "[i]n the event a party fails to oppose a motion in the manner prescribed herein the court will assume that the party has no opposition." Local Rule CV-7(e) provides that a party opposing a motion has **12 days, in addition to any added time permitted under Fed. R. Civ. P. 6(e),** in which to serve and file a response and any supporting documents, after which the court will consider the submitted motion for decision.

OTHER LIMITATIONS

1. All depositions to be read into evidence as part of the parties' case-in-chief shall be **EDITED** so as to exclude all unnecessary, repetitious, and irrelevant testimony; **ONLY** those portions which are relevant to the issues in controversy shall be read into evidence.

2. The Court will refuse to entertain any motion to compel discovery filed after the date of this Order unless the movant advises the Court within the body of the motion that counsel for the parties have first conferred in a good faith attempt to resolve the matter. See Eastern District of Texas Local Rule CV-7(h).

3. The following excuses will not warrant a continuance nor justify a failure to comply with the discovery deadline:

   (a) The fact that there are motions for summary judgment or motions to dismiss pending;

(b) The fact that one or more of the attorneys is set for trial in another court on the same day, unless the other setting was made prior to the date of this order or was made as a special provision for the parties in the other case;

(c) The failure to complete discovery prior to trial, unless the parties can demonstrate that it was impossible to complete discovery despite their good faith effort to do so.

Exhibit B

To Plaintiffs-Appellees' December 20, 2007 Post-Submission Letter in Case No. 06-41573, *Ray et al. v. Abbott, et al.*

ELECTION CODE

CHAPTER 86. CONDUCT OF VOTING BY MAIL

Sec. 86.001. REVIEWING APPLICATION AND PROVIDING BALLOT. (a) The early voting clerk shall review each application for a ballot to be voted by mail.

(b) If the applicant is entitled to vote an early voting ballot by mail, the clerk shall provide an official ballot to the applicant as provided by this chapter.

(c) Except as provided by Section 86.008, if the applicant is not entitled to vote by mail, the clerk shall reject the application, enter on the application "rejected" and the reason for and date of rejection, and deliver written notice of the reason for the rejection to the applicant at both the residence address and mailing address on the application. A ballot may not be provided to an applicant whose application is rejected.

(d) If the application does not include the applicant's correct voter registration number or county election precinct of residence, the clerk shall enter the appropriate information on the application before providing a ballot to the applicant.

(e) If the applicant does not have an effective voter registration for the election, the clerk shall reject the application unless the clerk can determine from the voter registrar that the applicant has submitted a voter registration application and the registration will be effective on election day.

(f) If the clerk receives an application for an election for which the clerk is not serving as early voting clerk, the clerk shall reject the application for that election and notify the applicant of the rejection in accordance with Section 86.008.

(g) If a ballot is provided to the applicant, the clerk shall indicate beside the applicant's name on the list of registered voters that a ballot to be voted by mail was provided to the applicant and the date of providing the ballot unless the form of the list makes it impracticable to do so.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 472, Sec. 26, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1381, Sec. 13, eff. Sept. 1, 1997.

Sec. 86.002. ADDITIONAL BALLOTING MATERIALS. (a) The early voting clerk shall provide an official ballot envelope and carrier envelope with each ballot provided to a voter. If the voter's name appears on the list of registered voters with the notation "S", or a similar notation, or the residence address on the voter's early voting ballot application is not the same as the voter's residence address on the list of registered voters, the clerk shall provide a form for a statement of residence to the voter.

(b) Before providing the balloting materials to the voter, the clerk shall enter on the carrier envelope the identity and date of the election.

(c) The clerk shall enter on a carrier envelope the voter's name in printed form, a notation that a statement of residence is enclosed, if applicable, and any other information the clerk determines necessary for proper processing of the ballot.

(d) The secretary of state shall prescribe instructions to be printed on the balloting materials for the execution and return of a statement of residence. The instructions must include an explanation of the circumstances under which the ballot must be rejected with respect to the statement.

(e) If the clerk determines that the carrier envelope and other balloting materials will weigh more than one ounce when returned by mail to the clerk, the clerk shall include with the balloting materials a notice of the amount of first class postage that will be required for the return by mail of the carrier envelope and enclosed materials.

(f) The clerk shall include with the balloting materials a notice of the clerk's physical address for purposes of return by common or contract carrier.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 54, Sec. 8(b), eff. Sept. 1, 1987; Acts 1987, 70th Leg., ch. 472, Sec. 27, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 916, Sec. 25, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 797, Sec. 41, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 620, Sec. 1, eff. Sept. 1, 2003;

Acts 2003, 78th Leg., ch. 1315, Sec. 43, eff. Jan. 1, 2004.

Sec. 86.003. METHOD OF PROVIDING BALLOT TO VOTER: REQUIRED ADDRESS. (a) The balloting materials for voting by mail shall be provided to the voter by mail. A ballot provided by any other method may not be counted.

(b) Subject to Subsection (c), the balloting materials shall be addressed to the applicable address specified in the voter's application. The election officer providing the ballot may not knowingly mail the materials to an address other than that prescribed by this section.

(c) The address to which the balloting materials must be addressed is the address at which the voter is registered to vote, or the registered mailing address if different, unless the ground for voting by mail is:

(1) absence from the county of residence, in which case the address must be an address outside the voter's county of residence;

(2) confinement in jail, in which case the address must be the address of the jail or of a relative described by Section 84.002(a)(4); or

(3) age or disability and the voter is living at a hospital, nursing home or other long-term care facility, or retirement center, or with a relative described by Section 84.002(a)(3), in which case the address must be the address of that facility or relative.

(d) If the applicable address specified in a voter's application is an address other than that prescribed by Subsection (c), the voter's application shall be rejected in accordance with Section 86.001(c).

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 565, Sec. 4, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1381, Sec. 14, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 1316, Sec. 23, eff. Sept. 1, 2003.

Sec. 86.004. TIME FOR PROVIDING BALLOT TO VOTER. (a) Except as provided by Subsection (b), the balloting materials for voting by mail shall be mailed to a voter entitled to vote by mail not later than the seventh calendar day after the later of the date the clerk accepts the voter's application for a ballot to be voted by mail or the date the ballots become available for mailing, except that if that mailing date is earlier than the 45th day before election day, the balloting materials shall be mailed not later than the 38th day before election day.

(b) For the general election for state and county officers, the balloting materials for a voter who indicates on the application for a ballot to be voted by mail or the federal postcard application that the voter is eligible to vote early by mail as a consequence of the voter's being outside the United States shall be mailed on or before the later of the 45th day before election day or the seventh calendar day after the date the clerk receives the application. However, if it is not possible to mail the ballots by the deadline of the 45th day before election day, the clerk shall notify the secretary of state within 24 hours of knowing that the deadline will not be met. The secretary of state shall monitor the situation and advise the clerk, who shall mail the ballots as soon as possible in accordance with the secretary of state's guidelines.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 2003, 78th Leg., ch. 393, Sec. 12, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 1109, Sec. 1, eff. September 1, 2005.

Sec. 86.005. MARKING AND SEALING BALLOT. (a) A voter must mark a ballot voted by mail in accordance with the instructions on the ballot envelope.

(b) A voter may mark the ballot at any time after receiving it.

(c) After marking the ballot, the voter must 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.

(d) Failure to use the official ballot envelope does not

affect the validity of the ballot.

(e) After the carrier envelope is sealed by the voter, it may not be opened except as provided by Chapter 87.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 2003, 78th Leg., ch. 1315, Sec. 44, eff. Jan. 1, 2004.

Sec. 86.0051. CARRIER ENVELOPE ACTION BY PERSON OTHER THAT VOTER; OFFENSES. (a) A person commits an offense if the person acts as a witness for a voter in signing the certificate on the carrier envelope and knowingly fails to comply with Section 1.011.

(b) A person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier must provide the person's signature, printed name, and residence address on the reverse side of the envelope.

(c) A person commits an offense if the person knowingly violates Subsection (b). It is not a defense to an offense under this subsection that the voter voluntarily gave another person possession of the voter's carrier envelope.

(d) An offense under this section is a Class B misdemeanor, unless the person is convicted of an offense under Section 64.036 for providing unlawful assistance to the same voter in connection with the same ballot, in which event the offense is a state jail felony.

(e) Subsections (a) and (c) do not apply if the person is related to the applicant within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code, or is registered to vote at the same address as the applicant.

Added by Acts 2003, 78th Leg., ch. 393, Sec. 13, eff. Sept. 1, 2003.

Sec. 86.006. METHOD OF RETURNING MARKED BALLOT. (a) A marked ballot voted under this chapter must be returned to the early voting clerk in the official carrier envelope. The carrier envelope may be delivered in another envelope and must be transported and delivered only by mail or by common or contract carrier.

(b) Except as provided by Subsection (c), a carrier envelope may not be returned in an envelope or package containing another carrier envelope.

(c) The carrier envelopes of persons who are registered to vote at the same address may be returned in the same envelope or package.

(d) Each carrier envelope that is delivered by a common or contract carrier must be accompanied by an individual delivery receipt for that particular carrier envelope that indicates the name and residence address of the individual who actually delivered the envelope to the carrier and the date, hour, and address at which the carrier envelope was received by the carrier. A delivery of carrier envelopes is prohibited by a common or contract carrier if the delivery originates from the address of:

(1) an office of a political party or a candidate in the election;

(2) a candidate in the election unless the address is the residence of the early voter;

(3) a specific-purpose or general-purpose political committee involved in the election; or

(4) an entity that requested that the election be held, unless the delivery is a forwarding to the early voting clerk.

(e) Carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk. The secretary of state shall prescribe appropriate procedures to implement this subsection and to provide accountability for the delivery of the carrier envelopes from the voting place to the early voting clerk.

(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, this subsection does not apply to a person who, on the date of the offense, was:

(1) related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter 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.

(h) A ballot returned in violation of this section may not be counted. If the early voting clerk determines that the ballot was returned in violation of this section, the clerk shall make a notation on the carrier envelope and treat it as a ballot not timely returned in accordance with Section 86.011(c). If the ballot is returned before the end of the period for early voting by personal appearance, the early voting clerk shall promptly mail or otherwise deliver to the voter a written notice informing the voter that:

(1) the voter's ballot will not be counted because of a violation of this code; and

(2) the voter may vote if otherwise eligible at an early voting polling place or the election day precinct polling place on presentation of the notice.

(i) In the prosecution of an offense under Subsection (f):

(1) the prosecuting attorney is not required to negate the applicability of the provisions of Subsections (f)(1)-(6) in the accusation charging commission of an offense;

(2) the issue of the applicability of a provision of Subsection (f)(1), (2), (3), (4), (5), or (6) is not submitted to the jury unless evidence of that provision is admitted; and

(3) if the issue of the applicability of a provision of Subsection (f)(1), (2), (3), (4), (5), or (6) is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 431, Sec. 1, eff. Sept. 1, 1987; Acts 1987, 70th Leg., ch. 472, Sec. 28, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, Sec. 1.18; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1381, Sec. 15, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 393, Sec. 14, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 238, Sec. 1, eff. September 1, 2007.

Sec. 86.007. DEADLINE FOR RETURNING MARKED BALLOT. (a) Except as provided by Subsection (d), a marked ballot voted by mail must arrive at the address on the carrier envelope before the time the polls are required to close on election day.

(b) If the early voting clerk cannot determine whether a ballot arrived before the deadline, the ballot is considered to have arrived at the time the place at which the carrier envelopes are deposited was last inspected for removal of returned ballots. The clerk shall check for returned ballots, at least once before the deadline, after the normal delivery time on the last day at the place at which the carrier envelopes are deposited.

(c) A marked ballot that is not timely returned may not be counted.

(d) A marked ballot voted by mail that arrives after the time prescribed by Subsection (a) shall be counted if:

(1) the ballot was cast from an address outside the United States;

(2) the carrier envelope was placed for delivery before the time the ballot is required to arrive under Subsection (a); and

(3) the ballot arrives at the address on the carrier envelope not later than the fifth day after the date of the election, except that if that date falls on a Saturday, Sunday, or legal state or national holiday, then the deadline is extended to the next regular business day.

(e) A delivery under Subsection (d)(2) is timely, except as otherwise provided by this title, if the carrier envelope or, if applicable, the envelope containing the carrier envelope:

(1) is properly addressed with postage or handling charges prepaid;

(2) is sent from an address outside the United States; and

(3) bears a cancellation mark of a recognized postal service or a receipt mark of a common or contract carrier or a courier indicating a time before the deadline.

(f) If the envelope does not bear the cancellation mark or receipt mark as required by Subsection (e)(3), a delivery under Subsection (d)(1) is presumed to be timely if the other requirements under this section are met. Section 1.006 does not apply to Subsection (d)(3).

(g) The secretary of state shall prescribe procedures as necessary to implement Subsection (d).

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 472, Sec. 29, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1349, Sec. 38, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 1316, Sec. 24, eff. Sept. 1, 2003; Acts 2003, 78th Leg., 3rd C.S., ch. 1, Sec. 4, eff. Jan. 11, 2004.

Amended by:

Acts 2005, 79th Leg., Ch. 1062, Sec. 1, eff. September 1, 2005.

Acts 2005, 79th Leg., Ch. 1107, Sec. 1.18, eff. September 1, 2005.

Sec. 86.008. DEFECTIVE APPLICATION. (a) If on reviewing an application for a ballot to be voted by mail that was received on or before the 12th day before election day the early voting clerk determines that the application does not fully comply with the applicable requirements prescribed by this title, the clerk shall mail or otherwise deliver an official application form to the applicant.

(b) The clerk shall include with the application form mailed or delivered to the applicant a written notice containing:

(1) a brief explanation of each defect in the noncomplying application;

(2) a statement informing the voter that the voter is not entitled to vote an early voting ballot unless the application complies with all legal requirements; and

(3) instructions for submitting the second application.

(c) If an application that does not fully comply with the applicable requirements prescribed by this title is received after the 12th day before election day and before the end of the period for early voting by personal appearance, the clerk shall mail or otherwise deliver a notice to the voter containing the information prescribed by Subdivisions (1) and (2) of Subsection (b), including a statement that the application was late, if applicable.

(d) Notwithstanding any other provisions of this code, the clerk may deliver in person to the voter a second application if the defective original application is timely and may receive, before the deadline, the corrected application in person from the voter. If a procedure authorized by this subsection is used, it must be applied uniformly to all applications covered by this subsection. The clerk shall enter a notation on the application indicating any information added by the clerk under this subsection. A poll watcher is entitled to accompany the clerk and observe the procedures under this subsection. The secretary of state may prescribe any other procedures necessary to implement this

subsection including requirements for posting notice of any deliveries.
Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 472, Sec. 30, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 864, Sec. 75, eff. Sept. 1, 1997.

Sec. 86.009. PROVIDING CORRECTED BALLOT TO VOTER. (a) If, after a ballot to be voted by mail is provided to a voter, the official ballot is changed in a way that affects the choices available to the voter in the election or the validity of the ballot provided to the voter if cast, the early voting clerk shall mail a corrected ballot and corresponding balloting materials to the voter unless in the clerk's opinion there is not sufficient time for the voter to timely return the corrected ballot to the clerk.

(b) The clerk shall include with the balloting materials provided to the voter a written notice containing:

(1) a brief explanation of the reason for providing another ballot; and

(2) an instruction to destroy the defective ballot if it has not already been returned to the clerk.

(c) Before mailing the corrected ballot to the voter, the clerk shall place a notation on the carrier envelope indicating that the ballot is a corrected ballot being provided under this section. The clerk shall also indicate on the voter's application that the voter was provided a corrected ballot.

(d) The clerk shall prepare a list containing the name of each voter who is provided a corrected ballot under this section. The clerk shall preserve the list for the period for preserving the precinct election records.

(e) A voter's defective ballot that is timely returned to the clerk as a marked ballot shall be treated as:

(1) a marked ballot not timely returned if the corrected ballot is timely returned as a marked ballot; or

(2) as the voter's ballot for the election if the corrected ballot is not timely returned.
Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 864, Sec. 76, eff. Sept. 1, 1997.

Sec. 86.010. ASSISTING VOTER. (a) A voter casting a ballot by mail who would be eligible under Section 64.031 to receive assistance at a polling place may select a person as provided by Section 64.032(c) to assist the voter in preparing the ballot.

(b) Assistance rendered under this section is limited to that authorized by this code at a polling place.

(c) The person assisting the voter must sign a written oath prescribed by Section 64.034 that is part of the certificate on the official carrier envelope.

(d) If a voter is assisted in violation of Subsection (a) or (b), the voter's ballot may not be counted.

(e) A person who assists a voter to prepare a ballot to be voted by mail shall enter the person's signature, printed name, and residence address on the official carrier envelope of the voter.

(f) A person commits an offense if the person knowingly fails to provide the information on the official carrier envelope as required by Subsection (e).

(g) An offense under this section is a Class A misdemeanor unless the person is convicted of an offense under Section 64.036 for providing unlawful assistance to the same voter, in which event the offense is a state jail felony.

(h) Subsection (f) does not apply if the person is related to the applicant within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code, or is registered to vote at the same address as the applicant.
Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1381, Sec. 16, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 393, Sec. 15, eff. Sept. 1, 2003.

Sec. 86.011. ACTION BY CLERK ON RETURN OF BALLOT. (a) The early voting clerk shall determine whether the return of a voter's official carrier envelope for a ballot voted by mail is timely.

(b) If the return is timely, the clerk shall enclose the

carrier envelope and the voter's early voting ballot application in a jacket envelope.

(c) If the return is not timely, the clerk shall enter the time of receipt on the carrier envelope and retain it for the period for preserving the precinct election records. The clerk shall destroy the unopened envelope and its contents after the preservation period.

(d) Notwithstanding any other provisions of this code, if the clerk receives a timely carrier envelope that does not fully comply with the applicable requirements prescribed by this title, the clerk may deliver the carrier envelope in person or by mail to the voter and may receive, before the deadline, the corrected carrier envelope from the voter, or the clerk may notify the voter of the defect by telephone and advise the voter that the voter may come to the clerk's office in person to correct the defect or cancel the voter's application to vote by mail and vote on election day. If the procedures authorized by this subsection are used, they must be applied uniformly to all carrier envelopes covered by this subsection. A poll watcher is entitled to observe the procedures under this subsection. The secretary of state may prescribe any other procedures necessary to implement this subsection including requirements for posting notice of any deliveries.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 472, Sec. 31, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, Sec. 1.19; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 864, Sec. 77, eff. Sept. 1, 1997.

Sec. 86.012. OFFICIAL BALLOT ENVELOPE. (a) "Ballot Envelope" must be printed on the face of each officially prescribed ballot envelope for a ballot to be voted by mail.

(b) The following textual material, as prescribed by the secretary of state, must be printed on the face of each official ballot envelope and may be continued on the reverse side if necessary:

(1) instructions for marking the ballot and returning the marked ballot to the early voting clerk;

(2) the deadline for returning the marked ballot to the clerk;

(3) limitations on assistance to the voter; and

(4) criminal penalties for unlawful assistance in preparing the ballot.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991.

Sec. 86.013. OFFICIAL CARRIER ENVELOPE. (a) "Carrier Envelope for Early Voting Ballot," the name and official title of the early voting clerk as addressee, and the clerk's official mailing address must be printed on the face of each official carrier envelope for a ballot to be voted by mail.

(b) Spaces must appear on the reverse side of the official carrier envelope for:

(1) indicating the identity and date of the election; and

(2) entering the signature, printed name, and residence address of a person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier.

(c) A certificate in substantially the following form must be printed on the reverse side of the official carrier envelope in a manner that requires the voter to sign across the flap of the envelope:

"I certify that the enclosed ballot expresses my wishes independent of any dictation or undue persuasion by any person.

_____
Signature of voter
By: _____
Signature of person assisting voter, if applicable (see Ballot Envelope for restrictions and penalties)

_____
Printed name of person assisting voter, if applicable

_____
Residence address of person assisting voter, if applicable"

(d) The following textual material, as prescribed by the secretary of state, must be printed on the reverse side of the official carrier envelope or on a separate sheet accompanying the carrier envelope when it is provided:

(1) the prohibition prescribed by Section 86.006(b);

(2) the conditions for delivery by common or contract carrier prescribed by Sections 81.005 and 86.006;

(3) the requirements for the legal execution and delivery of the carrier envelope;

(4) the prohibition prescribed by Section 86.006(e); and

(5) the offenses prescribed by Sections 86.006(f) and 86.010(f).

(e) The following notice must be printed on the reverse side of the official carrier envelope, near the space provided for the voter's signature: "This envelope must be sealed by the voter before it leaves the voter's hands. Do not sign this envelope unless the ballot has been marked by you or at your direction."

(f) The oath of a person assisting a voter must be included on the official carrier envelope as part of the certificate prescribed by Subsection (c).

(g) The secretary of state by rule shall require that a notice informing voters of the telephone number established under Section 31.0055 and the purpose of the telephone number be printed on:

(1) the official carrier envelope; or

(2) an insert enclosed with the balloting materials for voting by mail sent to the voter.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 1.20; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1381, Sec. 17, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 393, Sec. 16, eff. Sept. 1, 2003.

Sec. 86.014. PUBLIC INSPECTION OF EARLY VOTING RECORDS. (a) A copy of an application for a ballot to be voted by mail may be obtained from the early voting clerk:

(1) 72 hours after the time a ballot is mailed to the voter; or

(2) 48 hours after the time a ballot is mailed to the voter if the mailing occurs on the fourth day before election day.

(b) Originals of the applications and carrier envelopes are not available for public inspection until those materials are delivered to the general custodian of election records after the election.

Added by Acts 1987, 70th Leg., ch. 472, Sec. 32, eff. Sept. 1, 1987. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.12; Acts 1991, 72nd Leg., ch. 554, Sec. 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 565, Sec. 5, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1381, Sec. 18, eff. Sept. 1, 1997.