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' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

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

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STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. The underlying case involves several Texas Election Code provisions, the collective purpose of which is to prevent voting fraud relating to early-voting, mail-in ballots. In the District Court, Plaintiffs-Appellees raised multiple claims which alleged that the enactment and enforcement of these provisions violated their rights under the United States Constitution and the Federal Voting Rights Act, and they sought a preliminary injunction of the challenged provisions. The District Court granted Plaintiffs-Appellees a preliminary injunction on two of the challenged provisions, dealing with the possession and return of mail-in ballots and the carrier envelopes that contain them. At the same time, the District Court also denied several of Defendants-Appellants' Rule 12(b) motions to dismiss. Because of the complexity, constitutionality, and manifest public importance of the election issues raised by this case, Defendants-Appellants believe that oral argument will significantly aid the Court in deciding this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

No. 06-41573

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

This case concerns Texas's statutory scheme regarding the privilege of early voting by mail-in ballot and its application and enforcement by the Offices of the Texas Secretary of State and Attorney General. In 2003, the Legislature amended the Election Code to curb abusive practices associated with mail-in ballots, particularly voting fraud being perpetrated against elderly voters by unscrupulous vote harvesters or brokers. Despite the salutary purpose of the recent enactments, the District Court

preliminarily enjoined, on constitutional grounds, the Secretary and Attorney General from enforcing §86.006(f), (h) of the Election Code, which relate to the possession and return of carrier envelopes that contain marked mail-in ballots.

This was error for two main reasons. First, the District Court never should have entertained the request for a preliminary injunction because the case should have been dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction and 12(b)(3) for improper venue. Second, the preliminary injunction was granted in error because §86.006(f), (h) does not unduly burden the voters' privilege of early voting by mail or their ability to receive lawful assistance in exercising that privilege.

This Court should therefore reverse the District Court's preliminary injunction and order the District Court to dismiss the case.

JURISDICTIONAL STATEMENT

The alleged basis for jurisdiction in the District Court was: 28 U.S.C. §§1331, 1343(3)-(4), & 1367(a); and 42 U.S.C. §§1971(d), 1973j(f), & 1983. Appellate jurisdiction is based on 28 U.S.C. §1292(a)(1). The Court has jurisdiction over the District Court's Rule 12(b) rulings under *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940). *First Med. Health Plan, Inc. v. Vega-Ramos*, No. 06-1514, 2007 WL 529907, at *3 (1st Cir. Feb. 22, 2007); *see Libertarian Party of Ind. v.*

Packard, 741 F.2d 981, 990-91 (7th Cir. 1984) (holding that "on appeal from a grant or denial of a preliminary injunction a federal appeals court may order a complaint dismissed if it determines as a matter of law that the complaint states no cause of action"); *Lee v. Ply*Gem Indus., Inc.*, 593 F.2d 1266, 1270 (D.C. Cir. 1979) (holding that, under *Deckert*, district court's rulings on venue and jurisdiction were appealable).

ISSUES PRESENTED

1. Whether the claims of Plaintiffs-Appellees Ray and Johnson should have been dismissed under the doctrine of *Heck v. Humphrey*, and if so, whether the Eastern District of Texas is an improper venue for this case.

2. Whether the Plaintiffs-Appellees lacked standing to assert claims under §2 of the Federal Voting Rights Act, 42 U.S.C. §1971.

3. Whether Texas Election Code §86.006(f) and (h) violate the First and Fourteenth Amendments to the United States Constitution, and whether their application and enforcement by the Secretary and Attorney General should be preliminarily enjoined.

STATEMENT OF THE CASE

In September of 2006, Plaintiffs-Appellees—several persons associated with the Democratic Party and the Texas Democratic Party (collectively, the

Partisans)—sued the State of Texas, Attorney General Abbott, and Secretary of State Williams (collectively, the Officials), challenging several provisions of the Texas Election Code, in particular §§64.036(a)(4), 84.003(b), 84.004, 86.0051, and 86.006, as amended in 2003 (the 2003 Amendments).[1] These provisions establish several requirements relating to early voting by mail. The gist of the Partisans' claims is that the purpose and effect of these provisions, and their application and enforcement by the Officials, unduly burdens the Partisans' voting, free-speech, and associational rights in violation of the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, as well as the Federal Voting Rights Act.[2] Plus, the Partisans assert that the enactment and enforcement of the 2003 Amendments violates their constitutional rights of equal protection and due process of law.[3]

In October of 2006, the Partisans filed a motion for preliminary injunction, seeking to enjoin enforcement of the challenged provisions "in advance of the 2006 election."[4] The Officials filed joint motions under Federal Rule of Civil Procedure

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1. 1.R.9 n.1. In this brief, the following conventions are used to cite to the appellate record: R = Record; Tr. = Transcript; PX = Plaintiffs' exhibit; DX = Defendants' exhibit; RE = Record Excerpt; [volume].R.[page], or [volume].R.[paragraph]@[page]; Tr.[page]; and [tab].RE.[page], or [tab].RE.[paragraph]@[page].

2. 1.R.10-11.

3. *Id*.

4. 1.R.46, 74.

12(b),[5] seeking dismissal for lack of subject-matter jurisdiction, improper venue, and failure to state a claim.[6]

Both the Partisans' motion for preliminary injunction and the Officials' Rule 12(b) motions were set for a hearing on October 30, 2006.[7] At the hearing, the District Court took evidence and heard the parties' arguments regarding the several motions.[8] During the proceedings, the Partisans narrowed the scope of the injunctive relief that they originally sought by asking the Court to enjoin the Officials from enforcing only §86.006 of the Election Code against persons who mail the ballot of another person.[9]

The next day, the District Court issued a preliminary injunction,[10] along with findings of fact and conclusions of law.[11] The injunction is limited to only

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5. 1.R.85-126.

6. 1.R.95, 105-24.

7. 1.R.130.

8. *See* Tr.1-166.

9. *See* Tr.47; *see also id*. at 136-38. *Compare* 1.R.47 & n.2 (motion for P.I. requesting that enforcement of all the challenged Election Code provisions set forth in the Partisans' Original Complaint be forbidden), *with* Tr.138 (counsel stating: "[T]he one thing that we really need is [an injunction against the law] . . . [m]aking it a crime to mail the ballot of another person . . . .").

10. 4.R.843-44; 2.RE.843-44.

11. 4.R.846-59; 3.RE.846-59.

§86.006(f), which makes it a crime for a person to knowingly possess an official ballot or carrier envelope belonging to another person, and §86.006(h), which provides that a ballot returned in violation of the section may not be counted.[12] The Officials were enjoined from enforcing these provisions against "a person, other than the voter, [who] has merely possessed an official ballot or official carrier envelope and such possession is with the actual consent of the voter."[13] The sole basis for the injunction was that the provisions allegedly "unduly burden[]" the Partisans' rights under the First and Fourteenth Amendments "under circumstances in which the voter consents to that possession."[14]

In the findings of fact and conclusions of law accompanying the preliminary injunction, the District Court also ruled on the Officials' 12(b) motions.[15] The Court expressly held that it had subject-matter jurisdiction over the Partisans' constitutional and Voting Rights Act claims, effectively denying the entirety of the Officials' 12(b)(1) motion.[16] The Court also specifically concluded that the doctrine of *Heck*

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12. 4.R.843-44; 2.RE.843-44.

13. 4.R.843-44; 2.RE.843-44.

14. 4.R.¶20@857-58; 3.RE.¶20@857-58.

15. 4.R.¶¶1-5@853; 3.RE.¶¶1-5@853.

16. 4.R.¶2@853; 3.RE.¶2@853.

v. Humphrey,[17] neither barred the claims of Plaintiffs-Appellees Ray and Johnson nor warranted either a dismissal of the entire case for lack of venue or a transfer for improper venue.[18] Lastly, the Court stated that it was "unnecessary to consider [the Officials'] other arguments for dismissal, except as they may be relevant to the [Partisans'] showing on the merits of the motion for preliminary injunction."[19]

The Officials appealed both the preliminary injunction and the findings of fact and conclusions of law.[20] Concomitant with the filing of their notice of appeal, the Officials also filed [1] a motion to stay the District Court's preliminary injunction pending appeal and [2] a request for expedited consideration of their appeal.[21] On November 3, 2006, this Court granted the Officials' motion for stay but denied their request to expedite.[22] Subsequently, the Partisans requested the Supreme Court to vacate this Court's stay order, but on November 4, 2006, the Supreme Court denied

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17. 512 U.S. 477 (1994).

18. 4.R.¶¶3-4@853; 3.RE.¶¶3-4@853.

19. 4.R.¶5@853; 3.RE.¶5@853.

20. 4.R.863; 4.RE.863.

21. *See* 4.R.905.

22. *Id*.

their request.[23] Thus, at this time, the District Court's preliminary injunction remains stayed pending the outcome of this appeal.

STATEMENT OF FACTS

I. TEXAS'S STATUTORY SCHEME FOR EARLY VOTING BY MAIL

This case, at its core, is about Texas's statutes allowing qualified voters to apply for, complete, and cast early-voting, mail-in ballots. In 2003, the Legislature amended several of the provisions relating to early voting by mail. *See* Act of May 28, 2003, 78th Leg., R.S., ch. 393, 2003 Tex. Gen. Laws 1633, 1634-37. Although the District Court's preliminary injunction is directed at only §86.006 of the amended Election Code, an overview of the entire statutory scheme for early voting is necessary to understand the section's purpose and effect and the Partisans' challenge to the section.

A. General Requirements and Eligibility for Early Voting

Title 7 of the Election Code sets forth the statutory scheme for early voting in Texas.[24] Early voting can be accomplished either "by personal appearance at an early

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23. *Ray v. Abbott*, 127 S.Ct. 551, 551 (2006) (mem.).

24. In Texas, the term "early voting" is, generally speaking, synonymous with the term "absentee voting." *See* TEX. ELEC. CODE §81.001(b) ("A reference in a law outside this code to 'absentee voting' means 'early voting.'"). In 1991, the Texas Legislature amended the Election Code "to change the terminology involving 'absentee voting' to [more] appropriate terminology using 'early voting.'" Act of May 24, 1991, 72d Leg., R.S., ch. 554, §51, 1991 Tex. Gen. Laws 1927, 1968.

voting polling place" or "by mail." TEX. ELEC. CODE §81.001(a). The provisions of the Election Code related to voting generally are applicable to early voting, unless the general provisions "are inconsistent with [Title 7] or . . . cannot be feasibly applied to early voting." *Id*. §81.002.

To be eligible for early voting, a person must be a "qualified voter." *See id*. §§82.001-.004. That is, the person must satisfy all of the requirements of §11.002 of the Code. If the general requirements are met, a person is eligible for early voting by mail, provided that he or she meets certain additional criteria. They are: [1] the voter expects to be absent from the county of the voter's residence on election day and during the regular hours for conducting early voting at the main early-voting polling place during the period for early voting by personal appearance, *see id*. §82.001(a); [2] the voter has a disability that prevents him or her from appearing at the polling place on election day, *see id*. §82.002(a); [3] the voter is 65 years-old or older on election day, *see id*. §82.003; or [4] the voter is confined in jail on election day, *see id*. §82.004(a). The Partisans' claims in this case concern voters eligible to early vote by mail because of either disability or age.[25]

25. *See* 1.R.¶7@13, ¶15@15, ¶45@26, ¶53@28.

B. The Application Process for a Mail-in Ballot

To be entitled to early vote by mail, an eligible person "must make an application for an early voting ballot." TEX. ELEC. CODE §84.001(a). The application must be in writing and signed by the applicant. *Id*. §84.001(b). An official application form is not required, but if an application form is used, it must be printed or stamped with the name or office of the early voting clerk. *Id*. §84.001(c)-(d); *see, e.g.*, PX2. The application for an early-voting ballot must be submitted on or after the 60th day before election day and before the seventh day before election day. TEX. ELEC. CODE §84.007(c).

An application may be signed "for the applicant by a witness other than the early voting clerk or a deputy." *Id*. §84.003(a). If it is, the application "must indicate the witness's relationship to the applicant or, if unrelated, indicate that fact." *Id*. It is a misdemeanor for a witness or a person who "otherwise assists an applicant in completing an early voting ballot application" to fail to comply with Election Code §1.011(d) by not "affix[ing]" their signatures to the application and stating their own names and residence addresses. *See id*. §84.003(b)-(d). And it is a misdemeanor for a witness to sign more than one application in the same election, unless the witness is an early voting clerk, deputy early voting clerk, or related to the applicant as a parent, grandparent, spouse, child, or sibling. *See id*. §84.004(a)-(e). The Partisans

claim that the requirements pertaining to witnesses and assistors under §§84.003(b) and 84.004 violate the Partisans' rights under the Federal Constitution and Voting Rights Act.[26]

C. Receipt and Casting of Mail-In Ballot

If an applicant for early voting by mail satisfies the statutory requirements, the early voting clerk will mail that person the "balloting materials." *See* TEX. ELEC. CODE §§86.001(b), .003(a). These materials must be mailed to voters not later than the seventh calendar day after the later of the date on which the clerk accepts the voter's application or the date on which the ballots become available for mailing, but if the mailing date is earlier than the 45th day before election day, the materials will be sent on the 38th day before election day. *Id*. §86.004(a).

After receiving the balloting materials, the voter must mark the ballot "in accordance with the instructions on the ballot envelope." *Id*. §86.005(a). The voter must then place the ballot in the official ballot envelope, seal the envelope, place the ballot envelope in the official carrier envelope, seal the carrier envelope, and sign the certificate on the carrier envelope. *Id*. §86.005(c); *see also, e.g*., PX2.

If the voter needs help in preparing the ballot, he or she may select an authorized person to provide such assistance. TEX. ELEC. CODE §86.010(a). Persons

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26. 1.R.¶¶23-24@17-18, ¶¶50-68@28-32.

authorized by law to assist the voter with their ballot include "any person selected by the voter other than the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs." *Id*. §64.032(c). The assistance that a voter may receive from a person, who is in the presence of the voter's ballot or carrier envelope, includes: [1] reading the ballot to the voter, [2] directing the voter to read the ballot, [3] marking the voter's ballot, or [4] directing the voter to mark the ballot. *Id*. §64.0321. It is a misdemeanor to unlawfully assist a voter [1] who is not eligible for assistance, *id*. §64.036(a)(1), or [2] who has not requested assistance or selected the person to assist them, *id*. §64.036(a)(4). It is likewise unlawful assistance when a person [1] prepares a voter's ballot "in a way other than the way the voter directs," *id*. §64.036(a)(2), or [2] "suggests by word, sign, or gesture how the voter should vote," *id*. §64.036(a)(3).

D. Return of Mail-In Ballot

The deadline for returning the mail-in ballot to the early voting clerk is before the time the polls are required to close on election day. TEX. ELEC. CODE §86.007(a). The early-voting ballot must be returned to the early-voting clerk in the official carrier envelope. *Id*. §86.006(a). The carrier envelope must be transported and

delivered only by mail or by common or contract carrier.[27] *Id*. Carrier envelopes may not be returned in an envelope or package containing another carrier envelope, unless the envelope or package contains the carrier envelopes of persons who are registered to vote at the same address. *Id*. §86.006(b)-(c). A common or contract carrier may not deliver carrier envelopes if the delivery originates from [1] an office of a political party or a candidate in the election, [2] a candidate in the election unless the address is that of the candidate's residence, [3] a political committee involved in the election, or [4] an entity that requested the election be held. *Id*. §86.006(d). Carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk. *Id*. §86.006(e).

It is a crime if a person acts as a witness for a voter in signing the carrier envelope and knowingly fails to sign the carrier envelope and print their name and residence address on the envelope. *Id*. §86.0051(a); *see also id*. §1.011(d). It is also a crime if a person knowingly deposits the carrier envelope in the mail or with a common or contract carrier without providing their signature, printed name, and residence address on the back of the carrier envelope. *Id*. §86.0051(b)-(c). And it is

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27. For purposes of the Election Code, a common or contract carrier must be "a bona fide, for profit carrier, the primary business of which is transporting or delivering property for compensation and the business practices of which are reasonable and prudent according to the usual standards for the business in which it is engaged." TEX. ELEC. CODE §81.005(a)(1).

no defense to a prosecution for violating these requirements that the voter voluntarily gave another person possession of the voter's carrier envelope. *Id*. §86.0051(c).

The Code further provides that it is a crime for a person to knowingly possess an official ballot or carrier envelope that has been provided to a voter. *See id*. §86.006(f)-(g). It is an affirmative defense to prosecution, however, if the person is:

> [1] related to the voter within the second degree by affinity or the third degree of consanguinity;
>
> [2] registered to vote at the same address as the voter;
>
> [3] an early voting clerk or 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 his or her signature, printed name, and residence address on the reverse side of the carrier envelope;
>
> [5] an employee of the U.S. Postal Service; or
>
> [6] a common or contract carrier.

See id. §86.006(f)(1)-(6).[28]

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28. At the present time, the Texas Legislature is considering a bill to amend §86.006(f). *See* Tex. H.B. 1987, 80th Leg., R.S. (2007), http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=HB1987. "H.B. 1987 amends the Election Code to provide that conduct that could currently be used to assert an affirmative defense to criminal prosecution would no longer be within the scope of the criminal provisions of the Election Code that relate to the offense of possessing another person's official ballot or official carrier envelope." House Comm. on Elections, Bill Analysis, Tex. H.B. 1987, 80th Leg., R.S. (2007). The bill eliminates the wording "affirmative defense to prosecution" and, in its place, substitutes the wording "'exception to the application of' this subsection." *See* Tex. H.B. 1987, Engrossed Version, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=

A mail-in ballot that is returned in violation of the Code's provisions may not be counted. *Id*. §86.006(h). But, if a ballot is returned before the end of the period provided for early voting by personal appearance, and the ballot may not be counted because a violation has occurred, the early voting clerk must notify the voter, in writing, [1] that the voter's ballot will not be counted and [2] that the voter may otherwise vote early by personal appearance or on election day by presenting the clerk's notice to election officials at the polling place. *See id*. The District Court's preliminary injunction is directed solely at §86.006(f) and (h).

E. The Legislative History of the 2003 Amendments

To further understand the purpose and intended effect of §86.006, not to mention all of the 2003 Amendments, the legislative history must be examined. The chief architect of the 2003 Amendments was former State Representative Steve Wolens, a Democrat from Dallas.[29] Representative Wolens introduced these changes through H.B. 54, which was entitled "AN ACT relating to certain early voting by mail

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80R&Bill=HB1987. The purpose of the legislation "is to revise the Election Code to provide that conduct that is currently covered by one of the . . . affirmative defenses to prosecution would no longer be subject to criminal prosecution at all." House Comm. on Elections, Bill Analysis, Tex. H.B. 1987, 80th Leg., R.S. (2007).

29. 2.R.245, 325, 501, 505.

procedures and to the prevention of voting fraud generally; providing criminal penalties."[30]

1. Public statements of legislative intent by H.B. 54's authors

According to Representative Wolens, his intention behind the legislation was "to curb 'vote harvesting,' in which the mail-in ballots of elderly or other vulnerable citizens are illegally collected by campaign operatives."[31] Wolens said that "he decided to work to enact the law after vote fraud allegations arose in Dallas elections when his wife [former Democratic Dallas Mayor, Laura Miller] was running for office," and based on "voter fraud claims in previous Dallas elections dating back to the 1980s."[32] Wolens reportedly stated that he and his wife "had both been victimized as political candidates by 'rigged elections with people harvesting votes.'"[33] "My purpose," Wolens has said, "was to eliminate vote fraud in absentee balloting."[34] His intention was neither to "suppress the minority vote '[nor] to squelch completely

30. 2.R.245-64.

31. 2.R.501.

32. 2.R.503.

33. 2.R.505.

34. *Id*.

legitimate, nonfraudulent activities of civic organizations, including political parties.'"[35]

State Representative Mary Denny (R-Aubrey), chair of the House Election Committee and co-author of the legislation, has commented that the bill "was intended to provide a way to prosecute the organizers of vote harvesting."[36] She and Wolens wanted "to make sure [that] the masterminds of such vote fraud rings could be prosecuted, not just the low-level workers who might earn $10 per hour or $10 per vote."[37]

2. Bill analyses of H.B. 54

The bill analysis prepared by the House Committee on Elections is also illuminating. The Committee reported that under the law as it existed prior to H.B. 54, prosecutors were having "difficulty prosecuting those who unduly influence[d] an election"; that "certain individuals [had] unlawfully assisted . . . voters [such as the elderly, infirm, or homebound who are unable to vote at regular polling places on election day] with completing early voting ballot applications and with marking and

35. *Id*.

36. 2.R.502.

37. *Id*.

delivering their ballots"; and that "[s]ome individuals [had] also engaged in the buying and selling of mail ballots to alter election outcomes."[38]

The bill analysis of the House Research Organization similarly notes that H.B. 54's supporters envisioned the bill as "offer[ring] the same protection to homebound voters that voters at the polling place receive."[39] "[T]he law governing absentee voting by mail (homebound voting)," supporters said, "need[ed] to be tightened, and oversight need[ed] to be stricter" because "[b]y its nature, mail-in voting from home is out of the public view and therefore vulnerable to fraud."[40]

Supporters of H.B. 54 were also concerned with clarifying the law:

> The bill would make it easier to punish bad actors by increasing penalties for fraud and by clarifying what constitutes unlawful behavior. This clarification would assist prosecutors as well as people working to increase voter participation. Alleged irregularities are difficult to prosecute because it is hard to identify people who interfere with voters' mail ballots. Currently, it is not against the law to collect and sell voting-by-mail ballots. Bribery statutes do not apply in these circumstances.[41]

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38. 2.R.221.

39. 2.R.230.

40. *Id*.

41. *Id*.

Moreover, the bill was intended to "define clearly what constitutes assisting a voter" and to "create new tracking abilities by requiring people who witness and assist voters to provide their names and addresses."[42]

Supporters of the bill were attempting to eradicate "organized fraud that can occur in nursing homes and assisted living facilities" and to catch "the people who harvest mail-in ballots, sometimes called vote brokers."[43] According to supporters, the problem was "serious."[44] Allegations of such fraud, it was noted, were "common throughout the country" and "an affront to democracy."[45] Indeed, the House Research Organization noted that "vote brokers[] know that sometimes the secret to winning elections is bringing in the homebound vote."[46] The modus operandi of vote brokers typically involves "vist[ing] senior citizens and persuad[ing] them to vote a certain way or to allow someone else to mark their ballots."[47] Vote brokers were rarely caught because "[i]f a voter report[ed] to officials that a campaign worker came into

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42. *Id*.

43. *Id*.

44. *Id*.

45. *Id*.

46. *Id*.

47. 2.R.231.

the home and unduly influenced the voter or took the voter's ballot to be mailed, almost no means exist[ed] to track down the campaign worker."[48]

3. Hearing testimony on H.B. 54

Testimony taken before House and Senate committees also reveals H.B. 54's anti-fraud purpose. During a public hearing before the House Committee on Elections, one supporter of the bill testified of "problems" with mail-in ballots occurring in Dallas County, El Paso County, and Hidalgo County.[49] There was also testimony about "serious voter fraud allegations" in Liberty County,[50] as well as fraud in Bexar County.[51] The legislative record also reflects what one State Senator called "a very severe problem [of voter fraud relating to assisting a voter on mail-in ballots] in East Texas."[52] "Improprieties" were also said to have occurred "in Houston over

48. *Id*.

49. 2.R.460.

50. 2.R.475.

51. 2.R.485-86.

52. 2.R.489.

the years."[53] As one witness testified, "We're very proud of our system here in Texas, but it does have an Achilles heel and the Achilles heel is the mail ballot process."[54]

The testimony identified many forms of alleged fraud. Perhaps the chief complaint concerned persons taking advantage of vulnerable elderly voters.[55] One witness described how "there are entities which . . . will request ballots for elderly people and then will actually steal them out of their mailboxes," and how "there are teams that drive through neighborhoods . . . actually cruise the neighborhoods . . . and . . . go into the mailbox and take the person's ballot out and vote it, mail it."[56] It was also reported that "campaign sources" were ostensibly assisting voters with mail-in ballots but actually "[did not] want voters to sign ballots" because if a voter does not vote for the campaign's candidate, the campaign worker may "forge [the ballot] or just will simply send it in without it being signed, knowing that it won't get counted."[57]

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53. 2.R.331.

54. 2.R.474; *see also id*. at 471 (testimony describing vote fraud involving campaign or political operatives offering "'x' number of dollars per ballot collected" from mail-in voters).

55. 2.R.461-62.

56. 2.R.482.

57. 2.R.486.

Elderly individuals reported that they felt "unlawful influence" concerning their mail-in ballots in that "a voter has that ballot in front of him and that campaign worker is suggesting to them how to mark their ballot."[58] Plus, some elderly voters reportedly "[gave] their ballot[s] away to a campaign worker" because "they felt influence, they felt pressure, to giv[e] that person the ballot."[59]

Wolens echoed these complaints and concerns, stating: "I don't want people to be pushed, that's what I don't want. I don't want pushy people at the door . . . . [H.B. 54] is going to address the larger issue, a very large issue of pushing people around who are sick, who are elderly and don't know how to push back."[60] He also explained that "[t]his is what we want: We want the house to have the same sanctity as the voting booth . . . ."[61] His motivation was to simply "put the same type of protections in place in a mail-in ballot."[62] Even the former State Chair of the Texas Democratic Party recognized that Representative Wolens's concerns were sincere and

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58. 2.R.488.

59. *Id*.; *see also id*. at 411-12 (testimony that "something must be done about fraudulent mail-in ballots" and that "[t]he intimidation of the senior citizens by the ballot brokers has been great . . . and [needs to be] addressed . . . .").

60. 2.R.447, 449.

61. 2.R.358.

62. 2.R.360.

acknowledged that creating "a chilling effect on the ability of some of our senior citizens to vote . . . wasn't the author's intent."[63]

Supporters of H.B. 54 also believed that the bill would help establish "guidelines" that would "tell people in campaigns and tell candidates what you can and can't do" and "lay[] out what is proper procedure."[64] They also believed that the bill would help in the "identification process" if and when an early voter alleges unlawful influence or improper assistance.[65] In other words, the bill's supporters believed that the law as it existed pre-H.B. 54 "lack[ed] a sufficient tracking mechanism" for "what happens to those applications for mail ballots and the mail ballots themselves . . . once they leave the voter [and] get back to the elections department."[66] Another "really important part of th[e] bill" was "to create a definition of assistance," which would "help the State in prosecuting somebody" and provide "a much clearer definition for everybody in writing to know where th[e] line is."[67]

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63. 2.R.398.

64. 2.R.370-71.

65. 2.R.371.

66. 2.R.460.

67. 2.R.462.

4. Official statement of legislative intent

State Representative Norma Chavez (D-El Paso) ensured that the official legislative record contained a statement of legislative intent regarding H.B. 54. Chavez asked Wolens on the record whether "the intent of the bill [was] to prohibit [political-activist groups, volunteers, and organizations] from assisting individuals with homebound ballots."[68] Wolens replied:

> The intent of this bill is to provide a definition for assistance in voting, to make it clear what that assistance is, and to provide penalties for violation of the law. It is also to address tracking, so that we know what the identity is of everybody assisting voters. It is to provide penalties if they don't fill it out correctly, it's to prohibit warehousing of votes, and it's to change the law as to making public who receives—who requests and who receives an absentee ballot.[69]

Chavez further inquired whether "it [was] the intent of [H.B. 54] to serve as a mechanism to promote active intimidation to already vulnerable voting communities, such as first generation immigrants or citizens, first generation immigrant citizens with limited English proficiency, or Spanish speakers."[70] Wolens replied, "No, and no."[71]

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68. 2.R.325.

69. *Id*.

70. 2.R.326.

71. *Id*.

5. Passage of H.B. 54

H.B. 54 passed in the Texas House of Representatives by a vote of 98 to 45, with 15 Democrats voting for passage.[72] The bill passed in the Texas Senate on a vote of 27 to 4, with 8 Democrats voting for the bill, including such prominent Democrats as Rodney Ellis, Juan "Chuy" Hinojosa, Eliot Shapleigh, Leticia Van de Putte, and John Whitmire.[73]

F. Enforcement of the Statutory Scheme

The statutory scheme for preventing fraud in connection with early voting by mail also provides for enforcement mechanisms. The scheme gives the Secretary of State and the Attorney General roles in the prevention of voting fraud and provides mechanisms by which to report, refer, investigate, and prosecute cases involving voting fraud.

1. The Secretary of State's role

The enforcement scheme starts with the Secretary of State. The Secretary is the chief election officer of the State. TEX. ELEC. CODE §31.001. He may perform "any function relating to the administration of elections that is under [his] jurisdiction." *See id*. As part of his duties, the Secretary is required, among other

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72. *Id*.

73. 2.R.328.

things, to "prescribe the design and content . . . of the forms necessary for the administration of the [Election Code]," *id*. §31.002(a), to "obtain and maintain uniformity in the application, operation, and interpretation of th[e] [Election Code] and of the election laws outside [the] [C]ode," *id*. §31.003, to "assist and advise all election authorities," *id*. §31.004(a), "to protect the voting rights of the citizens of this [S]tate from abuse by the authorities administering the [S]tate's electoral processes," *id*. §31.005(a), and to "establish a toll-free telephone number to allow a person to report an existing or potential abuse of voting rights," *id*. §31.0055(a).

In fulfilling these responsibilities, the Elections Division of the Office of Secretary of State "frequently receives reports of possible election irregularities or other potential violations of the Election Code . . . from a variety of sources, including local elections and law enforcement officials, as well as private citizens."[74] If, after receiving a complaint alleging criminal conduct in connection with an election, the Secretary determines that there is reasonable cause to suspect that the alleged criminal conduct occurred, he must refer the complaint to the Attorney General and provide him with all pertinent documents in the Secretary's possession. *Id*. §31.006.

74. DX1.¶3@1.

2. The Attorney General's role

The Secretary of State refers voting fraud complaints to the Criminal Investigations Division (CID) of the Attorney General's Office so long as "the allegation is supported by some evidence that, if true, could be construed as a violation of the Election Code."[75] In making a referral to CID, "the Elections Division does not make any type of recommendation regarding whether or how CID should investigate or otherwise proceed with the matter."[76]

The Attorney General is authorized by law to investigate the allegations of a complaint referred by the Secretary. TEX. ELEC. CODE §273.001(d). "CID has primary responsibility for investigation of potential violations of the Election Code."[77] When CID receives a referral, it "opens an investigative file and does a preliminary analysis of each allegation to determine whether the facts as alleged by the complainant(s) would constitute a violation of law."[78] If further investigation of a complaint is warranted, CID will undertake such investigation and conduct witness

75. DX1.¶4@1.

76. DX1.¶5@1-2.

77. DX2.¶3@1.

78. DX2.¶6@2.

interviews as necessary.[79] If CID believes that a possible violation of law has occurred, then the matter is forwarded to the Attorney General's Criminal Law Enforcement Division (CLED).[80]

The Attorney General is authorized by law to prosecute a criminal offense prescribed by the Election Code. *Id*. §273.021(a). CLED is responsible for such prosecutions.[81] In deciding whether to prosecute an alleged violation of the Election Code, CLED considers the nature of the alleged offense, the weight of the evidence, the credibility of the witnesses, and the likelihood of a conviction.[82] Race, ethnicity, and political-party affiliation of the complainants or the suspects play no part in CLED's consideration whether to prosecute a complaint.[83]

II. THE LAWSUIT

A. The Parties

The Plaintiffs-Appellees are Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Parthenia McDonald, Walter Hinojosa, and the Texas

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79. DX2.¶8@2.

80. DX2.¶10@2.

81. DX3.¶3@1.

82. DX3.¶8@2.

83. *Id*.

Democratic Party.[84] Ray, Johnson, Meeks, and Minneweather all allege that they are African-Americans and political-party activists for the Texas Democratic Party.[85] McDonald alleges that she, too, is African-American but unlike the others she is an elderly, "homebound individual" who is a registered voter that uses a mail-in ballot to vote early.[86] Ray and Johnson are residents of Texarkana, Texas.[87] Meeks, Minneweather, and McDonald all reside in Fort Worth, Texas.[88]

Ray and Johnson were indicted and pleaded guilty to the possession and mailing of ballots for voters in violation of §86.006 of the Election Code.[89] Ray and Johnson received probated sentences for their offenses.[90]

Like Ray, Johnson, Meeks, and Minneweather, Hinojosa alleges that he is a political-party activist for the Democrats.[91] He is Hispanic and resides in Austin,

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84. 1.R.¶¶2-9@11-14.

85. 1.R.¶¶2-6@11-13.

86. 1.R.¶7@13.

87. 1.R.¶¶2-3@11-12.

88. 1.R.¶¶5-7@12-13.

89. 1.R.¶4@12; PX1; PX11.

90. 4.R.¶¶1-4@846, ¶3@853; 3.RE.¶¶1-4@846, ¶3@853; Tr.78-79.

91. 1.R.¶8@13.

Texas.[92] And like the other political-party activists in this case, Hinojosa claims that in the past, he assisted voters in casting their mail-in ballots and that he wishes to continue doing so in the future.[93]

Finally, the Texas Democratic Party is party to this case.[94] It asserts that one way in which it attempts to "maximize voter turnout" is by utilizing its political-party activists such as Ray, Johnson, Meeks, Minneweather, and Hinojosa to help voters who require assistance such as the "homebound," the "physically handicapped," the "elderly," and the "illiterate" to cast mail-in ballots.[95] This assistance, the Partisans allege, typically involves: [1] "prefilling" applications for mail-in ballots and mailing

92. *Id*.

93. *Id*.

94. 1.R.¶9@13-14.

95. 1.R.¶9@13-14, ¶15@15.

them to voters,[96] [2] helping voters "mark their ballots,"[97] and [3] mailing the "carrier envelopes" containing the completed mail-in ballots.[98]

The Partisans sued the State of Texas, Texas Attorney General Greg Abbott, and Texas Secretary of State Roger Williams.[99] The Partisans allege that the Attorney General, the Secretary, and their employees, are the Officials whose application and enforcement of the 2003 Amendments allegedly infringed on the Partisans' constitutional and statutory rights.[100] Both the Attorney General and the Secretary have been sued in their official capacities only.[101]

B. The Partisans' Claims and Relief Sought

The Partisans have asserted that the 2003 Amendments violate their voting, speech, equal-protection, and due-process rights under the First, Fourteenth, and

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96. 1.R.¶16@15. A "prefilled application" is an early-voting, mail-in ballot application that a party volunteer completes for a voter and then sends to the voter for his or her signature. PX15@9. The party volunteer obtains the name of potential voters by mail from lists provided by the local Elections Office, and from these lists, the volunteer can determine who in the past has applied for an early-voting, mail-in ballot and has voted. Tr.81-82; *see also* PX15@9.

97. 1.R.¶16@15.

98. *Id*.

99. 1.R.¶¶10-12@14.

100. 1.R.¶¶30-37@21-23, ¶¶40-41@24-25, ¶¶69-74@32-34, ¶¶75-79@34-36.

101. 1.R.¶¶11-12@14.

Fifteenth Amendments to the United States Constitution, as well as Sections 2 and 208 of the Federal Voting Rights Act, 42 U.S.C. §§1971, 1973, 1973aa-6.[102] Ray, Johnson, Meeks, and Minneweather also brought claims under 42 U.S.C. §1983.[103]

In their complaint, the Partisans broadly assert that "the plain intent and effect" of the 2003 Amendments, and their enforcement by the Officials, "is to suppress voting by disfavored groups" and "to squelch" the assistance provided to voters by activists for the Democratic Party regarding early voting by mail.[104] The Partisans claim that they have been "harm[ed]" by the enactment, application, and enforcement of the 2003 Amendments in several overlapping ways:

- by allegedly violating their right to vote and their rights to political expression and free association guaranteed by the First and Fourteenth Amendments, and §2 of the Voting Rights Act, 42 U.S.C. §§1971, 1973;[105]
- by allegedly infringing on the Democratic Party's right to associate with their party members in their efforts to assist voters who wish to cast an early-voting, mail-in ballot;[106]

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102. 1.R.¶¶42-79@26-36.

103. 1.R.¶¶80-84@36-37.

104. 1.R.10.

105. 1.R.10, ¶¶42-59@26-30, ¶¶66-68@32.

106. 1.R.10, ¶¶50-55@28-29.

- by allegedly infringing on the right of voters, under §208 of the Voting Rights Act, 42 U.S.C. §1973aa-6, to receive assistance in casting an early-voting, mail-in ballot;[107]

- by allegedly discriminating against voters because of their race or ethnicity in violation of 42 U.S.C. §§1971, 1973 and the Fourteenth and Fifteenth Amendments;[108]

- by allegedly selectively targeting minorities for enforcement of the 2003 Amendments by the Officials;[109] and

- by allegedly "failing to provide adequate notice to voters, political-party activists, and political parties" of the 2003 Amendments, by allegedly disseminating "misinformation" and "misleading" advice about the 2003 Amendments.[110]

The Partisans further assert that the 2003 Amendments are unconstitutionally overbroad and vague.[111]

The relief that the Partisans seek is a judgment that [1] declares the 2003 Amendments to be in violation of Constitution and the Federal Voting Rights Act, [2] enjoins the Officials from enforcing or applying the provisions, and [3] awards the Partisans their attorneys' fees and costs.[112]

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107. 1.R.10, ¶¶60-65@30-31.

108. 1.R.10, ¶¶66-74@32-34.

109. 1.R.10, ¶¶69-79@32-36.

110. 1.R.10, ¶¶75-79@34-36.

111. 1.R.10, ¶¶50-59@28-30.

112. 1.R.37-38.

C. The Officials' Rule 12(b) Motions

The Officials moved to dismiss the Partisans' claims under Federal Rule of Civil Procedure 12(b)(1), (3), and (6).[113] As to the Officials' 12(b)(1) motion, they asserted [1] that Ray's and Johnson's claims were barred under the rule announced in *Heck v. Humphrey*, 512 U.S. 477 (1994),[114] and [2] that 42 U.S.C. §1971 did not furnish a basis for the Partisans' claims.[115] The District Court, however, ruled that "*Heck* . . . does not bar the claims of . . . Ray and Johnson" and that "[t]he court has subject matter jurisdiction over the [Partisans'] constitutional and Voting Rights Act claims."[116]

As to the Officials' 12(b)(3) motion to dismiss for improper venue, they argued that because the sole basis for the Partisans' assertion of venue in the Eastern District of Texas was 28 U.S.C. §1391(b)(2), and because the claims of only Ray and Johnson arose in the Eastern District, and because the *Heck* doctrine barred Ray's and Johnson's claims, there was no basis under §1391(b)(2) for maintaining venue in the Eastern District, and the case should be dismissed.[117] In lieu of dismissal, the

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113. 1.R.85-126.

114. 1.R.106-08.

115. 1.R.108-10.

116. 4.R.¶¶2-3@853; 3.RE.¶¶2-3@853.

117. 1.R.110.

Officials alternatively argued that the case should have been transferred, for the same reasons, to either the Northern District of Texas, Fort Worth Division, or the Western District of Texas, Austin Division.[118] Having already rejected the Officials' *Heck* argument, the District Court ruled that venue was proper in the Eastern District.[119]

Lastly, as to the Officials' 12(b)(6) motion, they asserted that the Partisans' complaint failed to state claims entitling them to relief for alleged violations of the First Amendment, the Fourteenth Amendment's Equal Protection and Due Process Clauses, the Fifteenth Amendment, and §§2 and 208 of the Voting Rights Act, as well as the Partisans' overbreadth and vagueness challenges to the 2003 Amendments.[120] The District Court neither granted nor denied the Officials' 12(b)(6) motions; rather, the Court stated that "it [was] unnecessary to consider the [Officials'] other [12(b)(6)] arguments for dismissal, except as they may be relevant to the [Partisans'] showing on the merits of the motion for preliminary injunction."[121]

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118. *Id*.

119. 4.R.¶5@853; 3.RE.¶5@853.

120. 1.R.110-24.

121. 4.R.¶5@853; 3.RE.¶5@853.

D. The Partisans' Motion for Preliminary Injunction

The Partisans moved for a preliminary injunction, asserting that the 2003 Amendments interfered with their ability to assist voters for Democratic candidates in applying for, completing, and dispatching their early-voting, mail-in ballots.[122] The Partisans' chief complaint related to §86.006.[123] At the hearing on their motion for preliminary injunction, the Partisans focused their argument and requested relief on only subsections (f) and (h) of §86.006.[124]

The District Court granted the preliminary injunction as to §86.006[125] and issued findings of fact and conclusions of law in support thereof.[126] The Court determined that:

> [The Partisans had] demonstrated a substantial likelihood of success on the merits of their claim that §86.006's prohibition on the possession of carrier envelopes and ballots provided to others unduly burdens the First and Fourteenth Amendment rights of the [Partisans] under circumstances in which the voter consents to that possession.[127]

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122. 1.R.46-72.

123. *See* 1.R.46-72.

124. Tr.47, 136-38.

125. 4.R.843-44; 2.RE.843-44.

126. 4.R.846-59; 3.RE.846-59.

127. 4.R.¶20@857-58; 3.RE.¶20@857-58.

The Court further concluded that the Partisans had "satisfied their burden to demonstrate they [would] suffer irreparable harm absent an injunction,"[128] that "[t]he balance of hardships favor[ed] the [Partisans],"[129] and that "[t]he public interest [was] not disserved by the injunction."[130]

In arriving at its conclusions, the Court reasoned that the Partisans had no fundamental right to receive and cast an absentee ballot,[131] and therefore, strict-scrutiny analysis did not apply to the Partisans' right-to-vote claims.[132] Instead, the Court applied a more "flexible" approach that weighed "the asserted injury to the [Partisans]" against "the precise interest put forth by the State [Officials] as justification for the burden on the [Partisans'] rights."[133] Using this analytical framework, the Court weighed the Partisans' claim that they and others were "dissuade[d], under the pain of prosecution, from participating in legitimate

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128. 4.R.¶22@858 (citing *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996)); 3.RE.¶22@858.

129. 4.R.¶23@858; 3.RE.¶23@858.

130. 4.R.¶24@858; 3.RE.¶24@858.

131. 4.R.¶11@855 (citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181 (Ill. App. Ct. 2004)); 3.RE.¶11@855.

132. 4.R.¶12@855; 3.RE.¶12@855.

133. 4.R.¶¶9-10@854-55 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983)); 3.RE.¶¶9-10@854-55.

organizational efforts designed to maximize early voter turnout"[134] against the State's "well-recognized and compelling interest" of "curtailing voter fraud."[135]

The Court concluded that §86.006(f) was "particularly burdensome" because "it did not provide for any exception to criminal liability if the person possessing the official ballot or carrier envelope has the consent of the voter."[136] And despite the State's compelling interest in preventing voter fraud, the Court concluded that §86.006(f) and (h) went "too far" in criminalizing "the mere possession of a ballot or carrier envelope" and disqualifying a ballot returned in violation of the section because these provisions "[were] not necessary to achieve the State's interest in curtailing fraud when possession occurs with the voter's consent."[137] "The State's interest in combating voter fraud," the Court found, "[was] sufficiently served by the other provisions of the Election Code."[138]

The injunction therefore ordered the Officials to cease enforcing, pending a trial on the merits, §86.006(f) and (h) only "under circumstances in which a person,

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134. 4.R.¶13@856; 3.RE.¶13@856.

135. 4.R.¶14@856; 3.RE.¶14@856.

136. 4.R.¶18@857; 3.RE.¶18@857.

137. 4.R.¶19@857; 3.RE.¶19@857.

138. 4.R.¶19@857 (citing TEX. ELEC. CODE §§64.012, .036(a)(1)-(3), & 84.0041); 3.RE.¶19@857.

other than the voter, has merely possessed the official ballot or official carrier envelope and such possession is with the actual consent of the voter."[139] The injunction also specified that the Officials were not enjoined "from enforcing TEX. ELEC. CODE §86.0051 under the circumstances in which a person, other than the voter, deposits the carrier envelope in the mail or with a common or contract carrier and does not provide the person's signature, printed name, and residence address on the reverse side of the envelope, even if such person has the actual consent of the voter."[140] And the Court expressly denied any preliminary injunctive relief based on the Partisans' claims regarding overbreadth, void-for-vagueness, and violation of §208 of the Voting Rights Act.[141]

STANDARDS OF REVIEW

I. RULE 12(B) MOTIONS TO DISMISS

A district court's 12(b)(1) determination of its subject-matter jurisdiction is reviewed de novo. *See Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005). Under Rule 12(b)(3), the determination of where a claim arose for purposes of venue under 28 U.S.C. §1391(b) on the basis of undisputed facts is a question of law

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139. 4.R.843; 2.RE.843.

140. 4.R.843-44; 2.RE.843-44.

141. 4.R.¶¶25-26@858-59; 3.RE.¶¶25-26@858-59.

reviewable de novo. *Pierce v. Shorty Small's of Branson Inc.*, 137 F.3d 1190, 1191 (10th Cir. 1998); *Hooker v. United States Dep't of Health & Human Servs.*, 858 F.2d 525, 528 n.2 (9th Cir. 1997).

II. PRELIMINARY INJUNCTION

The grant of a preliminary injunction is reviewed for an abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). But a preliminary injunction that is grounded in erroneous legal principles is reviewed de novo. *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001). And constitutional challenges are reviewed de novo. *Soadjede v. Ashcroft*, 324 F.3d 830, 831 (5th Cir. 2003).

SUMMARY OF ARGUMENT

The District Court's rulings on the Officials' 12(b) motions must be reversed. Ray's and Johnson's claims under 42 U.S.C. §1983 should have been dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction. Neither Ray's nor Johnson's probations were reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. And their §1983 claims in this lawsuit, if successful, would necessarily imply the invalidity of their probations. Under these circumstances, Ray's and Johnson's claims violate the rule from *Heck v. Humphrey* that bars §1983 claims.

Not only that, but because their claims were the sole basis of venue in the Eastern District of Texas, and because they should have been dismissed under *Heck*, the entire case should have been dismissed for improper venue under Rule 12(b)(3).

In addition, the District Court should have dismissed the Partisans' challenge to the 2003 Amendments under 42 U.S.C. §1971 for a lack of standing. Contrary to the requirements of §1971(a)(2)(B), the Partisans have no claim that the Officials have denied them the right to vote because of an error or omission on any record or paper having to do with their registration to vote. In addition, the vast majority of courts hold that §1971 does not permit enforcement by private persons such as the Partisans here, but only by the United States Attorney General.

Lastly, the District Court's preliminary injunction directed at Texas Election Code §86.006(f), (h) must be reversed. The Partisans failed to show a substantial likelihood of success on the merits of their facial challenge to §86.006 under the First and Fourteenth Amendments, because the section is capable of a valid, constitutional application by complying with the simple and easy-to-follow return requirements for mail-in ballots and carrier envelopes. These requirements do not unduly burden the rights of mail-in voters and the persons who lawfully assist them with returning their ballots by mail or by common or contract carrier. Nor did the Partisans carry their burden to prove a substantial threat of irreparable harm, because they made no

showing that the statute actually abridges the right to vote or the rights to freedom of speech, expression, or association. And, finally, the State's compelling interests in preventing voter fraud and avoiding voter confusion far outweighs the Partisans' interests in the mere privilege to cast, to provide assistance with, and to receive assistance with mail-in ballots.

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION OVER CERTAIN CLAIMS OF THE PARTISANS.

A. The Claims of Ray and Johnson Are Barred Under the *Heck* Doctrine.

The doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), barred Ray and Johnson from asserting claims in this case.[142] Ray and Johnson both reside in Texarkana, Texas, are political-party activists for the Texas Democratic Party and their county Democratic party, and they have, in the past, possessed mail-in ballots or carrier envelopes of other voters in violation of §86.006, have pleaded guilty to this offense, and received probated sentences for their offenses.[143] Based on these

142. This Court has held that it has jurisdiction to address a *Heck* claim in an interlocutory appeal. *Wells v. Bonner*, 45 F.3d 90, 92, 94-95 (5th Cir. 1995); *see also Miller v. Riser*, 84 Fed. App'x 417, 419 (5th Cir. 2003).

143. *See supra* notes 84-85, 87, 89-90.

facts, Ray and Johnson brought suit under 42 U.S.C. §1983, asserting that §86.006 is unconstitutional and violates the Federal Voting Rights Act.[144]

But the District Court never should have exercised subject-matter jurisdiction over Ray's and Johnson's §1983 claims in light of the rule in *Heck*. Under *Heck*, a court must dismiss a complaint brought under §1983 when the civil-rights action, if successful, would necessarily imply the invalidity of a plaintiff's conviction or sentence. The *Heck* bar can be avoided only if the plaintiff demonstrates that his or her conviction or sentence has already been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus. *See* 512 U.S. at 486-87.

The *Heck* rule applies regardless whether a §1983 claim is one for monetary, declaratory, or injunctive relief. *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002); *Clarke v. Stalder*, 154 F.3d 186, 189-90 (5th Cir. 1998). And it applies equally to prisoners in custody and to persons not incarcerated. *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995).

Here, Ray's and Johnson's §1983 claims for declaratory and injunctive relief necessarily imply the invalidity of their guilty pleas and sentence. Indeed, their

144. *See supra* notes 102-12.

indictments, guilty pleas, and probations are "intertwined" with their §1983 claims. *See Clarke*, 154 F.3d at 190. Their §1983 claims and probations are so closely connected that a declaration that §86.006 is unconstitutional would entitle them to seek expungement of their guilty pleas and sentences. *See id*. Indeed, Ray's and Johnson's guilty pleas and probations are featured in their complaint[145] and motion for preliminary injunction.[146] Thus, *Heck* jurisdictionally bars Ray's and Johnson's §1983 claims, unless they can show that their probations have already been reversed by a state or federal tribunal.

But they cannot show this. The Partisans' complaint contains no allegation that Ray's and Johnson's probations have been reversed, invalidated, or even called into question by any state-court proceeding or federal habeas proceeding. And it is undisputed that Ray and Johnson never instituted any such proceeding to expunge their probations. Thus, their §1983 claims must be dismissed under Rule 12(b)(1).

Connected to the Officials' 12(b)(1) motion is their 12(b)(3) motion for dismissal for improper venue. The sole basis for the Partisans' assertion of venue in the Eastern District of Texas is 28 U.S.C. §1391(b)(2), which provides: "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may,

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145. 1.R.¶4@12, ¶47@27, ¶82@36.

146. 1.R.55-56.

except as otherwise provided by law, be brought only in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . ." The Partisans' venue allegations arise from the events involving Ray and Johnson, which occurred in Texarkana, Texas. All other events making up the Partisans' allegations involve events occurring in either Fort Worth or Austin, Texas.

But Ray's and Johnson's claims cannot serve as a basis for venue because their claims are a nullity under the *Heck* Doctrine. Because the District Court should have dismissed Ray's and Johnson's claims under *Heck*, the Partisans cannot show that a substantial part of the events giving rise to this action occurred in the Eastern District of Texas. There being no basis under §1391(b)(2) for maintaining venue in the Eastern District, the District Court should have dismissed the Partisans' lawsuit under Rule 12(b)(3). Alternatively, in lieu of dismissal, the District Court should have at least transferred the case to a district in which it could have been brought, *i.e.*, the Northern District of Texas or the Western District of Texas. *See* 28 U.S.C. §1406(a).

B. The Partisans' §1971 Claims Are Barred for Lack of Standing.

The Partisans challenged the 2003 Amendments in part under 42 U.S.C. §1971 and asserted that the section acts as a basis for jurisdiction in the District Court.[147] The section provides:

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147. 1.R.¶1@11, ¶¶66-68@32, ¶74@34.

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote . . . .

42 U.S.C. §1971(a)(2)(B). This section, often referred to as "the materiality provision," *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003), was designed to eliminate practices that could encumber an individual's ability to *register* to vote. *Friedman v. Snipes*, 345 F.Supp.2d 1356, 1370-71 (S.D. Fla. 2004); *McKay v. Altobello*, No. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996); *Good v. Roy*, 459 F.Supp. 403, 404 (D. Kan. 1978). It forbids the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote. *Friedman*, 345 F.Supp.2d at 1371.

For example, one such practice found to be unlawful involved the disqualification of an applicant who failed to list the exact number of months and days in his age. *Condon v. Reno*, 913 F.Supp. 946, 949-50 (D.S.C. 1995). In another case, voter registrants brought suit against the Secretary of State of Georgia, seeking declaratory and injunctive relief on the grounds that Georgia's requirement that prospective voters provide their social security numbers was neither relevant nor material to determining their eligibility to vote under Georgia law and therefore violated §1971(a)(2)(B). *See Schwier*, 340 F.3d at 1285, 1287, 1296. Cases from

other jurisdictions involve similar types of allegations. *See, e.g.*, *Hoyle v. Priest*, 265 F.3d 699, 704 (8th Cir. 2001) (holding that an Arkansas voting initiative procedure which required petition signers to be "qualified electors" was material and outside the scope of §1971(a)(2)(B)); *Howlette v. City of Richmond, Virginia,* 485 F.Supp. 17, 21-22 (E.D.Va. 1978) (holding that a city referendum procedure which required that the signatures of qualified voters on a referendum petition be verified by a notary and subjecting those who take the oath to possible criminal liability for perjury was not "immaterial" and thus did not violate §1971(a)(2)(B)).

The Partisans' claims in this lawsuit have nothing to do with their registration, eligibility, and qualifications to vote. Their only complaint that perhaps even remotely alleges a §1971(a)(2)(B) claim has to do with the Election Code provision that a mail-in ballot will not be counted if it was possessed by someone who omitted their signature, printed name and address on the carrier envelope, in violation of §86.006(f)(4).[148] *See* TEX. ELEC. CODE §86.006(h). But this claim does not give rise to a §1971 claim, because §1971 was not intended to apply to the counting of ballots by individuals already deemed qualified to vote. *Friedman*, 345 F.Supp.2d at 1371. The Partisans, therefore, have no standing to assert a §1971(a)(2)(B) claim, as none of them have been disqualified or declared ineligible to vote under State law.

148. 1.R.¶29@21.

In addition, §1971(c) states that whenever an alleged violation of the section has occurred, "the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order." It makes no mention of enforcement by private persons.

Indeed, a majority of courts addressing claims brought under §1971 have held that the section does not provide a private right of action and is enforceable only by the United States in an action brought by the Attorney General. *Hayden v. Pataki*, No. 00 Civ. 8586 (LMM), 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004); *see McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (stating that "section 1971 is enforceable by the Attorney General, not by private citizens"); *Mixon v. State of Ohio*, 193 F.3d 389, 407 (6th Cir. 1999) (stating that §1971 "is not part of the enforcement provisions of the Voting Rights Act and only the Attorney General can bring a cause of action under this section"); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F.Supp.2d 271, 279 (E.D.N.Y. 2004) (stating that the provisions of section 1971 "are only enforceable by the United States of America in an action brought by the Attorney General and may not be enforced by private citizens"); *Spivey v. Ohio*, 999 F.Supp. 987, 996 (N.D. Ohio 1998) ("The terms of §1971(c) specifically state that the Attorney General may institute a civil action to remedy a violation of the

Voting Rights Act. An individual does not have a private right of action under §1971."); *Altobello*, 1996 WL 635987, at *2 ("The section is intended to prevent racial discrimination at the polls and is enforceable only by the Attorney General, not impliedly, by private persons."); *Cartagena v. Crew*, No. CV-96-3399, 1996 WL 524394, at *3 n.8 (E.D.N.Y. Sept. 5, 1996) ("To the extent that plaintiffs allege a cause of action under 42 U.S.C. §1971 in their memorandum of law, such claim is precluded since a private right of action has not been recognized under this section."); *Willing v. Lake Orion Cmty. Schs. Bd. of Trs.*, 924 F.Supp. 815, 820 (E.D. Mich. 1996) ("Section 1971 is intended to prevent racial discrimination at the polls and is enforceable by the Attorney General, not by private citizens."); *Good*, 459 F.Supp. at 406 (stating that "the unambiguous language of Section 1971 will not permit us to imply a private right of action"). *But see Schwier*, 340 F.3d at 1297 (stating that "the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under §1983").

For either of these reasons, the District Court lacked subject-matter jurisdiction over the Partisans' §1971 claim.

II. THE PARTISANS DID NOT CARRY THEIR BURDEN TO SHOW ENTITLEMENT TO A PRELIMINARY INJUNCTION AS TO TEXAS ELECTION CODE §86.006.

The requirements for a preliminary injunction are: [1] a substantial likelihood of success on the merits; [2] a substantial threat of irreparable harm if the injunction

is not granted; [3] the threatened injury to movant outweighs the injury to non-movant; and [4] granting the injunction does not disserve the public interest. *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003). Because a preliminary injunction is an extraordinary remedy, it should be granted only if the movant has *clearly* carried the burden on all four elements. *Id*. Moreover, in election cases, a court must also consider whether an injunction may result in "voter confusion and consequent incentive to remain away from the polls," and whether there is adequate time to resolve any factual disputes concerning the grant of an injunction. *See Purcell v. Gonzalez*, 127 S.Ct. 5, 7-8 (2006).

A. The Partisans' Did Not Show a Substantial Likelihood of Success on the Merits of Their Claim.

The District Court erred in holding that the Partisans clearly "demonstrated a substantial likelihood of success on the merits of their claim that §86.006's prohibition on the possession of carrier envelopes and ballots provided to others unduly burdens the First and Fourteenth Amendment rights of the [Partisans] under circumstances in which the voter consents to that possession."[149] But, under a facial challenge to the constitutionality of a law such as the one here,[150] a plaintiff must

149. 4.R.¶20@857-58; 3.RE.¶20@857-58.

150. *See* 1.R.¶¶42-49@26-28. It should be noted that the Partisans sought preliminary injunctive relief with regard to only Counts 1-IV of their Complaint. 1.R.47 & n.2. And they further restricted their request for injunctive relief to only §86.006 of the

show that the regulation could never be applied in a valid manner. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984).[151] The Partisans came nowhere near to carrying this burden.

Section 86.006(f) can be applied in a valid manner and, thus, is not facially unconstitutional. All a person who possesses the mail-in ballot of a voter, with the voter's consent, has to do in order to comply with the statute is follow the subsection's simple return provision and the requirements of §86.0051(b), which are incorporated by reference into §86.006(f). These provisions preclude criminal

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Election Code. *See supra* note 124. Count I of the Partisans' Complaint raised a facial challenge to the 2003 Amendments under the First and Fourteenth Amendments. *See* 1.R.47 & n.2. Counts II-IV concerned their claims alleging that the 2003 Amendments are unconstitutionally overbroad and vague and violate §208 of the Voting Rights Act. *Id*. The Partisans did not seek such relief on Counts V-VIII of their Complaint, which concerned alleged "discriminatory enforcement of the [2003 Amendments] against minorities and Democrats" in violation of §2 of the Voting Rights Act, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Fifteenth Amendment. *Id*.; 1.R.¶¶66-84@32-37. The District Court expressly denied the Partisans any injunctive relief as to Counts II-IV of their Complaint, 4.R.843-44; 2.RE.843-44, 4.R.¶¶25-26@858; 3.RE.¶¶25-26@858, thus leaving only Count I subject to the preliminary injunction.

151. Another method of facial attack on a statute occurs when a plaintiff demonstrates that even though the challenged law may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties." *N.Y. State Club Ass'n*, 487 U.S. at 11. This kind of facial challenge concerns allegations that a statute is overbroad. *Id*. For purposes of this appeal, this type of facial challenge does not apply because the District Court concluded that the Partisans did "not satisfy their burden of persuasion to merit preliminary injunctive relief on their claim that the statute is overbroad . . . ." 4.R.¶25@858; 3.RE.¶25@858.

liability from attaching so long as a person who possesses a carrier envelope of a voter in order to deposit it in the mail merely writes his or her name, residence address, and signature on the back of the carrier envelope containing the voter's mail-in ballot. Compliance with the regulations is neither unduly burdensome of a person's First Amendment rights nor does it create an impermissible risk of the suppression of a person's rights to political expression and association. Indeed, even the District Court recognized that §86.0051(b)'s requirements did not unduly burden any First and Fourteenth Amendment rights and helped to curtail fraud.[152]

That conclusion should have ended the discussion. But the Court did not stop there. Instead, the Court found an artificial and unnecessary distinction between persons who "merely possess[] the official ballot or official carrier envelope . . . with the actual consent of the voter,"[153] and persons who possess the voter's ballot or carrier envelope for the purpose of dispatching the envelope by mail or common or contract carrier. According to the Court's orders, the former situation is unconstitutional, whereas the latter is not.

But a person who possesses a voter's carrier envelope, even without depositing it in the mail or with a common or contract carrier, can avoid a violation just as easily

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152. 4.R.¶21@858; 3.RE.¶21@858.

153. 4.R.843; 2.RE.843.

as the person who possesses the carrier envelope and actually dispatches it for delivery by simply following §86.0051(b)'s requirements. The District Court could have avoided any constitutional conflict by construing the statute this way. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [a court is] obligated to construe the statute to avoid such problems.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

This construction is consistent with the Legislature's intent to create an enforcement mechanism by which election officials and prosecutors may track mail-in ballots, carrier envelopes, and the persons handling them in order to combat fraud.[154] It would be an absurd result to allow only the one who dispatches the carrier envelope to avail themselves of §86.0051(b)'s protection but not allow another possessor of the carrier envelope to do likewise. After all, any innocent possessor of the carrier envelope is ultimately just another link or step in the process of dispatching the envelope in the mail or with a common or contract carrier. The District Court's construction of the statute is therefore contrary the legislative history and anti-fraud purpose of the statute.

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154. *See supra* Statement of Facts, Part II(E), at 15-25.

Because as a matter of law, the Partisans cannot show that §86.006(f) could never be applied in a valid manner, they have no substantial likelihood of success on the merits of their claim, and the preliminary injunction must be dissolved.

B. The Partisans Did Not Show a Substantial Threat of Irreparable Harm.

The District Court erred in concluding that the Partisans established a substantial threat of irreparable harm absent an injunction.[155] Other than a single citation to *Ingebretsen v. Jackson Public School District*,[156] the Court did not elaborate on its bare conclusion that the Partisans had sufficiently shown irreparable harm.[157] The Court's citation to *Ingebretsen*, however, apparently signifies that the Court believed that §86.006(f), (h) represented a substantial threat to the Partisans' First Amendment rights, even if only for the minimal period of time that remained for early voting by mail in advance of the November 7th election day. *See* 88 F.3d at 280.

But the record reflects no deprivation of the Partisans' right to vote, to free speech, or to political expression and association under the First and Fourteenth Amendments to the Constitution. Although the Partisans testified that some

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155. 4.R.¶22@858; 3.RE.¶22@858.

156. 88 F.3d 274, 280 (5th Cir. 1996).

157. 4.R.¶22@858; 3.RE.¶22@858.

Democratic Party operatives felt that the 2003 Amendments had a chilling effect on their assistance efforts with mail-in ballots, there was no dispute that if a person wishes to lawfully assist a voter by mailing the voter's ballot with the voter's consent, all that person has to do is write their name, residence address, and signature on the back of the voter's carrier envelope. There was no credible showing that voters are being prohibited from receiving lawful assistance with mail-in ballots, or that persons who wish to properly assist a voter with a mail-in ballot have been unreasonably precluded from providing such assistance.

At worst, the Partisans only demonstrated that some persons may have experienced frustration in assisting qualified voters with their mail-in ballots. But these persons were admittedly ignorant of the legal requirements for assisting with mail-in ballots.[158] Such ignorance was very much the result of the Texas Democratic Party's failure to do an adequate job in educating its workers and volunteers about the legal requirements related to assisting voters with mail-in ballots, in spite of meeting with the Office of the Secretary of State and having readily available informational materials.[159] The Partisans' failure to adequately educate themselves regarding the

158. *See* Tr.65-66, 84; PX14@32.

159. Tr.88, 104-08; *see* PX8.

law is no unconstitutional deprivation of their rights under the First and Fourteenth Amendments.

And even though the Partisans presented some evidence of isolated complaints by voters who cannot get the same level of unregulated assistance with their mail-in ballots by Democratic Party operatives that they received prior to the 2003 Amendments,[160] such complaints do not equate to a denial of the fundamental right to vote. As the Supreme Court has held, although it may be established beyond question that there is a fundamental right to vote, there is no corresponding fundamental right to vote by absentee ballot.[161] *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*). In *Prigmore v. Renfro*, the court followed

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160. Tr.124-26, 128. The testimony of Plaintiff-Appellee McDonald revealed that Plaintiff-Appellee Meeks had assisted McDonald with her mail-in ballot in previous years but that after the 2003 Amendments, McDonald's sister had to help McDonald with her mail-in ballot because Meeks declined to assist McDonald. *Id*. at 125-26. Despite Meeks's reluctance to assist McDonald since the 2003 Amendments, McDonald testified that she was undeterred from voting: "Well, I'm not going to stop. I don't care what they say. If I have to get the ambulance and go, I'm going . . . ." *Id*. at 128.

161. An absentee voter is simply someone who receives his or her ballot prior to election day and votes away from the polling place. *See* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 483 (2003); Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 456 (2005). As noted above, the expression "absentee voting" is generally synonymous with term "early voting" in Texas. *See supra* note 24.

McDonald and upheld the constitutionality of an Alabama election statute concerning absentee balloting:

> Here, no fundamental right is involved. The right to vote is unquestionably basic to a democracy, but the right to an absentee ballot is not. Historically, the absentee ballot has always been viewed as a privilege, not an absolute right . . . . It is a purely remedial measure designed to afford absentee voters the privilege as a matter of convenience, not of right . . . . There is no bar to the right to vote . . . .

356 F.Supp. 427, 432 (N.D. Ala. 1972) (citations omitted).[162] The principle expressed in these cases that absentee voting is not a right but, rather, a privilege "is based on the premise that the constitutional right of suffrage means the right of a qualified

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162. *See also, e.g., Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006) ("The right to receive an absentee ballot is not the same as the right to vote, and will not receive the same constitutional protection . . . . Defendants correctly assert that state regulations or restrictions on absentee voting do not, as a general matter, violate a fundamental constitutional right."); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F.Supp. 1354, 1358 (D. Ariz. 1990) ("In this instance, the court has identified the important fundamental interest in voting, but notes that voting absentee is a privilege and a convenience for those unable to vote in person."); *In re Election Contest as to Reorg. of New Effington Indep. Sch. Dist.*, No. 54-3, 462 N.W.2d 185, 193 (S.D. 1990) ("Absentee voters exercise a privilege not enjoyed by election day voters."); *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983) ("[A]bsentee voting is not a right but rather a mere privilege."); *Wichelmann v. City of Glencoe*, 273 N.W. 638, 640 (Minn. 1937) ("Absentee voting is an exception to the general rule and is in the nature of a special right or privilege which enables the absentee voter to exercise his right to vote in a manner not enjoyed by voters generally."); *Qualkinbush*, 826 N.E.2d at 1192 (stating that the right to vote by absentee ballot does not equate to the fundamental right to vote guaranteed by the United States Constitution); *In re Protest of Election Returns & Absentee Ballots in Nov. 4, 1997 Election for City of Miami*, 707 So.2d 1170, 1173 (Fla. Dist. Ct. App. 1998) ("We first note that unlike the right to vote, which is assured every citizen by the United States Constitution, the ability to vote by absentee ballot is a privilege."); *State of Mo. ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo. Ct. App. 1978) ("To vote by absentee ballot is not a matter of inherent right but rather a special privilege available only under certain conditions . . . .").

elector to cast a ballot in person at a designated polling place on the day of the election." *Erickson*, 670 P.2d at 754. Under this view, "absentee voting legislation grants voters something to which they are not constitutionally entitled." *Id.* "By the very nature of absentee voting, the voter is declaring that he will be unable to participate in the regular voting process at the officially designated polling place on the date of the election. Rather than forsake his opportunity to vote, however, he utilizes the absentee privilege." *Bushmeyer*, 575 S.W.2d at 234.

Thus, as a threshold matter, the absentee-voter cases indicate that the Partisans cannot insist that §86.006 somehow denies voters their fundamental right to vote. Rather, the section merely restricts a voter's exercise of the *privilege* of receiving and casting a mail-in ballot. As *McDonald* and its progeny show, §86.006 does not deny the Partisans the right to vote, because it does not impose an absolute bar to voting and because voters may still vote—and may still receive lawful assistance with voting—prior to election day by personal appearance or on election day at their designated polling places. The Partisans simply have identified no person who has been denied their fundamental right to vote, not to mention someone who has been denied lawful assistance in casting their vote. They have not established a substantial threat of irreparable harm to the right to vote.

Furthermore, it follows that if voting by mail is a mere privilege and not a fundamental right, then the receipt of assistance in casting a mail-in ballot is likewise not a fundamental right. And if a State may regulate early voting by mail without violating the right to vote, it may also regulate the provision of assistance in connection with mail-in ballots without violating the right to vote.

In sum, the Partisans failed to establish irreparable harm because of the alleged denial of the fundamental right to vote or because of an alleged deprivation of First Amendment rights associated with assisting voters with the exercise of the privilege to early vote by mail. The order granting the Partisans a preliminary injunction must reversed.

C. The Partisans Did Not Establish That the Other Factors for Injunctive Relief Weighed in Their Favor.

The third factor required for a preliminary injunction involves balancing the equities. *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994). Closely related to this factor is the fourth factor that considers whether an injunction is in the public interest. *See DSC Commc'ns Corp. v. DGI Techs., Inc*., 81 F.3d 597, 600 (5th Cir. 1996). The District Court concluded that "[t]he balance of hardships favor[ed] the [Partisans],"[163] and that "[t]he public interest [was] not

163. 4.R.¶23@858; 3.RE.¶23@858.

disserved by the injunction."[164] And, in light of the Supreme Court's decision in *Purcell v. Gonzalez*, 127 S.Ct. 5 (2006), the Court further concluded that "[t]he scope of the injunction [would] not result in voter confusion or create any incentive to remain away from the polls."[165] The District Court erred.

In fact, the balancing factors weighed heavily in favor of the State. The Partisans' interests involve casting and assisting others with casting an early-voting, mail-in ballot. The burden on the Partisans' interest in casting a mail-in ballot and in providing assistance in the exercise of that privilege is slight, considering that all a person who possesses a voter's ballot or carrier envelope needs to do in order to avoid violating the law is provide their signature, printed name and address on the back of the voter's carrier envelope. *See* TEX. ELEC. CODE §§86.0051(b), .006(f).

On the other hand, the State's interest in the prevention of voting fraud is "a well-recognized and compelling interest," as the District Court correctly observed.[166] The State will be harmed and the public will be disserved by the inhibition of efforts to prevent voting fraud. Specifically, the record reflects that §86.006, as part of the overall statutory scheme of the 2003 Amendments, aims to prevent the unscrupulous

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164. 4.R.¶24@858; 3.RE.¶24@858.

165. 4.R.¶24@858; 3.RE.¶24@858.

166. 4.R.¶14@856; 3.RE.¶14@856.

activities of vote harvesters or brokers who prey upon vulnerable homebound and elderly voters.[167] Such nefarious persons can exert untoward pressure and undue influence upon these voters in an effort to literally steal or negate votes, thereby corrupting the election system and harming election outcomes.

It is beyond dispute that early-voting, mail-in ballots present increased opportunities for undetected vote tampering. *See In re Election Contest*, 462 N.W.2d at 193 (observing that privilege of absentee voting "opens the door to the risk of fraud"); *Qualkinbush*, 826 N.E.2d at 614 (holding that statutory restriction imposed on returning absentee ballots "substantially contributes to the integrity of the election process" and "is reasonable means of eliminating opportunities for election fraud and uncertainty"). This vulnerability has been described as an "Achilles heel" in our election system.[168] And it is no answer to say that Texas has other Election Code provisions designed to prevent voting fraud,[169] because §86.006, in combination with §86.0051(b), is designed to provide a tracking mechanism that is not otherwise available.[170] The balance of the equities therefore favors the State.

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167. *See supra* note 154.

168. *See supra* note 54.

169. 4.R.¶19@857; 3.RE.¶19@857.

170. *See supra* notes 36, 41-42, 66, 69.

Furthermore, to the extent that a preliminary injunction in this case may be effective against future election contests, it has the potential to cause "voter confusion" and create "an incentive to remain away from the polls." *Purcell*, 127 U.S. at 7. That is, voters casting ballots at their polling place on election day may choose to stay away from the polls if they believe that an injunction of the challenged provisions will permit voting fraud concerning mail-in ballots and that such fraud will dilute their votes.

These factors weigh in favor of the State, and therefore, the preliminary injunction must be dissolved.

CONCLUSION

For these reasons, the Court should reverse the District Court's rulings that [1] refuse to dismiss the claims of Plaintiffs-Appellees Ray and Johnson under the *Heck* Doctrine, the Partisans' claims under 28 U.S.C. §1971, and the case for improper venue, and that [2] grant a preliminary injunction in favor of the Partisans as to Texas Election Code §86.006(f), (h). Judgment should be rendered for the Officials on these rulings of the District Court.

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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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