No. A-_____

In the Supreme Court of the United States

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

v.

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

RESPONSE TO EMERGENCY APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Antonin Scalia, Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

Respondents Greg Abbott, Attorney General of the State of Texas and Roger Williams, Secretary of State for the State of Texas, file this response to the emergency application for a stay filed at 5:00 P.M.on November 3, 2006.

The Fifth Circuit has ordered that the preliminary injunction issued by the district court be stayed pending appeal. By granting this stay, the Fifth Circuit appropriately returned this case to the status quo ante that existed prior to the District Court's injunction. The Fifth Circuit's stay allows the election statute at issue—§86.006(f), (h)—to continue operating and be enforced as it had before the injunction. By issuing the injunction a mere week before the election, and *after early-voting mail-in ballot process had already been well underway*, the district court disrupted the orderly process of the election and injected confusion into that process. The Fifth Circuit's stay was necessary to restore the orderly conduct of the election process.

Applicants now ask the Court to vacate the Fifth Circuit's stay on the ground that the stay order "directly contravenes this Court's recent decision in *Purcell v. Gonzalez*, Nos. 06A375 (06-532) & 06A379 (06-533), [2006 WL 2988365] (U.S. Oct. 20, 2006) (per curiam)." The Fifth Circuit's stay does no such thing. To the

contrary, the stay is appropriate in light of *Purcell*; and it is the Applicants who are misconstruing *Purcell*.

FACTUAL AND PROCEDURAL BACKGROUND

Applicants filed suit in the Eastern District of Texas alleging that certain provisions of the Texas Election Code relating to absentee balloting by mail violated the Constitution and the Voting Rights Act. They alleged that these provisions, including §§86.006(f) & (h) of the Texas Election Code interfered with their ability to assist certain voters for Democratic candidates in completing and dispatching their early-voting, mail-in ballots. They alleged that these provisions violated their fundamental right to vote and their rights to political expression and free association guaranteed by the First and Fourteenth Amendments to the Constitution and the Voting Rights Act.

On September 21, 2006, Applicants filed this lawsuit against the State of Texas,[1] Attorney General Abbott, and Secretary Williams. Twenty-two days *after* filing their lawsuit, Applicants filed a motion for preliminary injunction, seeking an injunction "in advance of the 2006 election." When they filed their motion for preliminary injunction, on October 13, 2006, Applicants requested neither a hearing

[1] The district court has dismissed the State from this lawsuit,"granting in part the motion of the State of Texas to dismiss any constitutional claims brought against it in its sovereign capacity."

nor expedited consideration of their motion, even though early voting had already begun under the challenged election procedures.

Ten days after the filing of Applicants' motion for preliminary injunction, the district court, on its own motion, set an October 30th hearing date for Applicants' motion. The day following the hearing, around 5:00 P.M., the district court issued findings of fact and conclusions of law and a preliminary injunction. The district court's preliminary injunction addressed only §86.006(f) & (h); none of the other challenged provisions is subject to the injunction.[2] The sole basis of the district court's October 31st injunction was that §86.006(f) & (h) allegedly "unduly burden[] the First and Fourteenth Amendment rights of the Applicants." Preliminary Injunction at 1.

The Court's injunction stated that Respondents are ordered to "cease enforcing, pending a trial on the merits" §§86.006(f) and (h) "under circumstances in which a person, other than the voter, has merely possessed the official ballot or official carrier

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[2] Applicants have also alleged violations of equal protection and due process of law in violation of the Fourteenth Amendment, as well as the denial of the right to vote on the basis of race in violation of the Fifteenth Amendment. They also claim that the enactment and enforcement of the challenged provisions discriminates in violation of §§2 and 208 of the federal Voting Rights Act of 1965, 42 U.S.C. §§1971, 1973, 1973aa-6. And Applicants specifically assert that the challenged provisions are unconstitutional under the overbreadth and void-for-vagueness doctrines. Because the district court's preliminary injunction is not on these other claims, but rather is based only on Applicants' claims under the First and Fourteenth Amendments, this appeal will be limited to Applicants' claims addressed by the preliminary injunction.

envelope and such possession is with the actual consent of the voter." Preliminary Injunction at 1. The injunction also states that "[n]othing in this order should be read to enjoin the defendants from enforcing the provisions of Tex. Elec. Code § 86.006(f) or (h) under any other circumstances," *id*., and that "[n]othing in this order should be read to enjoin the defendants 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," *id*. at 1-2.

On November 1, 2006, Respondents filed their Notice of Appeal and a motion to stay the injunction. On November 3, 2006, the Fifth Circuit granted that motion. Applicants then filed this application to stay.

ARGUMENT

As the Court observed recently in *Purcell*, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." 2006 WL 2988365 at *3. The district court granted a preliminary injunction that prevented the enforcement of Texas Election Code provisions designed to prevent voter fraud in early voting by mail. And the court did so *during* the early-voting mail-in ballot period. Altering the election procedures during balloting will cause

voter confusion and result in decreased confidence in the integrity of the 2006 elections. Contrary to Applicants' assertion, such a result is not contemplated by *Purcell*.

I. THE FIFTH CIRCUIT'S STAY PENDING APPEAL WAS APPROPRIATE IN LIGHT OF *PURCELL* AND SHOULD BE AFFIRMED.

On October 31, 2006—more than one month after early voting by mail began in Texas, *see* TEX. ELEC. CODE §§84.007, 86.004—the district court issued an injunction that halted Respondents from enforcing portions of the Texas Election Code aimed at curbing voter fraud.[3] The injunction thus injected uncertainty and voter confusion into the early-voting process by changing the law after that process was well underway.

On November 3, 2006, the Fifth Circuit Court of Appeals issued an order staying that injunction and permitted mail-in balloting to continue under the legal framework that it had been conducted since early voting began. This decision was

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[3] The Texas Election Code prohibits anyone from possessing or mailing another voter's absentee ballot unless that person (1) is a family member, (2) lives at the same address, (3) is an election worker, (4) is a postal worker or common carrier, or (5) most relevant to this appeal, writes his or her name, address, and signature on the outside of the ballot envelope. *See* TEX. ELEC. CODE §86.006. These provisions—passed by the Texas Legislature in 2003 to address longstanding problems of partisan "vote harvesters" collecting absentee ballots and pressuring and manipulating elderly and vulnerable voters—constitute reasonable, easy-to-comply-with disclosure requirements that help protect the integrity of Texas elections.

correct and in keeping with the Court's recent decision in *Purcell*.

A. The Stay Pending Appeal Is Consistent with *Purcell*.

The Fifth Circuit's stay is consistent with *Purcell v. Gonzalez*, which permitted an election *weeks away* to continue under the current election-law procedures. Nos. 06A375 (06-532) & 06A379 (06-533), 2006 WL 2988365, at *3 (U.S. Oct. 20, 2006) (per curiam). Specifically, *Purcell* teaches that prior to granting preliminary injunctions in election cases, courts must weigh "considerations specific to election cases." *Id.*, at *2. Courts should consider whether an order "affecting elections" may result in "voter confusion and consequent incentive to remain away from the polls." *Id*. This consideration is magnified "[a]s an election draws closer." *Id*. In other words, "the imminence of an election" is a further consideration in determining whether to "allow the election to proceed without an injunction suspending [an election regulation]." *Id*. at *3. Also, whether there is "an inadequate time to resolve . . . factual disputes" is another consideration weighing against granting an injunction. *Id*.; *see also id*. (Stevens, J., concurring) ("Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality.").

Contrary to these admonitions, on October 31, 2006—a mere seven days prior to the election and well after the early voting by mail-in ballot process had

begun—the district court here enjoined the enforcement of Texas Election Code provisions relating to returning a voted ballot by mail. *See* Preliminary Injunction at 1-2. Thus, voting by mail was beyond imminent; it was already well underway. It began more than a month ago, *see* TEX. ELEC. CODE §§84.007, 86.004, and will continue through Election Day, *see* TEX. ELEC. CODE §86.007. When an election is *in progress*, the importance of allowing it to continue unimpeded cannot be overstated. The district court's injunction impeded that process.

Had the stay order not been issued, the district court's order altering the procedures of an election already underway would have created confusion for voters who are notified that a federal court has forced State officials to cease enforcing statutes designed to eliminate voter fraud. As the Court recently noted, "[v]oter fraud drives honest citizens out of the democratic process [and v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell*, 2006 WL 2988365, at *3. The Fifth Circuit's emergency stay merely permits the election to continue under the early-voting laws that have been on the books since 2003 and in practice since early voting began more than one month ago. There was no showing of a substantial likelihood that Applicants would prevail on their claim that the law was unconstitutional. As Judge Dennis noted in his concurrence to the stay order, the alleged effects of the statutory requirement were only "speculative."

The district court order impeding the State's efforts to curb voter fraud, had it remained in place, would have effected whether voters chose to exercise their right to cast a ballot and would have served to disenfranchise Texas voters. *See id.*at 4 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.")).

The preliminary injunction also created confusion because it was not clear what actions Respondents would have still been permitted to take to prevent voter fraud. The injunction stated that it applied only to §86.006, and not §86.0051, of the Election Code. *See* Preliminary Injunction at 1-2. But this distinction ignores the fact that those sections work together, as §86.006(f)(4) makes clear. *See* TEX. ELEC. CODE §86.006(f)(4) (setting out as a complete defense to prosecution "a person who possesses the carrier envelope in order to deposit the envelope in the mail or with a common carrier and who provides the information required by Section 86.0051(b) in accordance with that section").

Read and enforced together, §§86.006 and 86.0051 ensure that one who would mail the ballot of another must provide his or her name and residence address to election officials. These directives provide election officials with information that they can use to investigate any question that may arise as to the validity of the ballot

or the purported assister with the ballot.

The district court's injunction, which appeared to permit only enforcement of the provision prohibiting the mailing of another voter's ballot unless your name and address are provided, severely impeded the statute's effectiveness in curbing voter fraud. Preventing the enforcement of §86.006 permits one in possession of other voters' ballots to maintain anonymity until placing the ballots in the mail. But should one then place the ballots in the mail without disclosing his or her name and address, it will be almost impossible for election officials to then determine who submitted the ballots should there be questions as to whether they are fraudulent.

An injunction that introduces such uncertainty into the early-voting process more than one month after that process began would have done nothing but create doubt as to the integrity of the election. The district court's order demonstrated that the court did not appropriately weigh the unique nature of election cases prior to granting the injunction. *See Purcell*, 2006 WL 2988365, at *4.

Applicants are asking the Court to alter Texas voting procedures in a manner that would permit some voters to vote under a different set of laws than those who have already cast their ballots. Just as the Court should not, at 2:00 P.M. on Election Day, alter the manner in which citizens yet to vote will cast their ballots, the Court should not step in and change the mail-in procedures currently in use in Texas.

B. Applicants' Reliance on *Purcell* Is Misplaced.

Applicants claim that the Fifth Circuit's stay of the injunction "directly contravenes" *Purcell* simply because the stay order does not articulate the Fifth Circuit's reasoning behind its grant of a stay. But Applicants' argument misreads *Purcell* by ignoring the factual context in which the Ninth Circuit rendered its decision, which this Court reversed.

It is important to note that in *Purcell*, the Ninth Circuit issued an injunction that altered the procedures under which a pending election was to be held. That injunction was contrary to the decision of the district court to allow the election to proceed under current law. And the Ninth Circuit had little or no basis for its decision.

Here, the opposite is true. The Fifth Circuit—based on a sufficient record—is allowing the election to continue under the procedures that were in place when the early voting began. In this way the Fifth Circuit's approach mirrored the approach taken by the Court in *Purcell*. It was the district court that altered the election process by its injunction and thereby injected confusion and uncertainty in the process.

Moreover, in *Purcell*, the court of appeals issued an injunction based on no findings of fact and conclusions of law. In fact, the district court's findings came after the Ninth Circuit's injunction was issued. Here, however, the district court did

issue the findings and they were reviewed by the Fifth Circuit. The Fifth Circuit therefore was not operating on a blank slate as was the Ninth Circuit. The Fifth Circuit was able to review the district court's conclusions of law under a de novo standard and the findings of fact for clear error. So it is not true that the Fifth Circuit, like the Ninth Circuit in *Purcell*, had no basis for its decision.

Applicants also complain that the Fifth Circuit's stay order contains no explanation for its decision. But that is not true. Judge Dennis issued a concurrence that explicitly mentions that the district court's determination was "somewhat speculative." Accordingly, in keeping with *Purcell*, he noted that it would be appropriate to allow the election to proceed and allow for more time to develop a better record to judge the constitutionality of the challenged statute.

III. THE FACT THAT THIS PROCEEDING IS OCCURRING AT SUCH A LATE DATE IS A DIRECT RESULT OF APPLICANTS' DELAY IN SEEKING RELIEF.

It also bears mention that Applicants' actions in filing and prosecuting this lawsuit are the sole reason for the district court's inability to conduct a trial on the merits prior to Election Day. Applicants filed their complaint on September 21, 2006, but did not seek immediate injunctive relief at that time. Twenty-two days later, on October 13, they filed their motion for preliminary injunction. And even then, they did not request an expedited hearing. In fact, they apparently made no request at all

for a hearing on their motion for preliminary injunction. On its own motion, the district court set the hearing on Applicants' preliminary injunction for October 30. More than five weeks elapsed from the commencement of the suit until the district court enjoined Respondents from enforcing §§86.006(f) and (h) of the Election Code. Applicants' delay and failure to seek a hearing on their motion for preliminary injunction belied their claims of irreparable harm.

Additionally, absent the Fifth Circuit's stay, the district court's injunction would have irreparably altered the elections. Despite the fact that the district court noted that the injunction was "pending a trial on the merits," *see* Preliminary Injunction at 1, there is insufficient time for a trial on the merits to occur prior to Election Day next Tuesday. Therefore, the injunction would have operated through the election and ballot tabulation. And once fraudulent ballots are submitted undetected and counted, there will be no remedy available to ensure an accurate count of the validly-submitted votes. Nor will there be much of a chance that one who submits fraudulent ballots without providing his or her printed name, signature, and residence address, can later be found and held accountable for those acts of election fraud.

The Court should not reward Applicants for their delay with an order altering Texas election procedures during the course of the election.

IV. THE DISTRICT COURT'S INJUNCTION WAS WITHOUT FOUNDATION IN LAW AND IS CONTRARY TO BINDING U.S. SUPREME COURT PRECEDENT.

The district court's injunction constituted a clear abuse of discretion for four separate reasons. *First*, no reasonable construction of §86.006 leads to the conclusion that the provision unduly burdens Applicants alleged constitutional rights under the First and Fourteenth Amendments to the United States Constitution. Compliance with the section's requirements is simple. *All Applicants have to do in order to assist a voter as they wish and to comply with the section is to write their name, residence address, and signature on the back of the carrier envelope containing the voter's mail-in ballot.* Applicants cannot prevail on their facial attack of §86.006 because they never demonstrated that the section "could never be applied in a valid manner." Indeed, the opposite is true—§86.006 can be applied validly by the simple act of providing the required information on the back of the carrier envelope.[4]

Second, there is no constitutional right to vote by absentee ballot, much less to assist another in voting absentee without being subject to any disclosure requirement.

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[4] Indeed, the particular circumstance that is the focus of the district court's injunction—prosecution for the mere possession of another's ballot without having actually placed it in the mail—has *never* been the basis of any prosecution by the Office of the Attorney General. Thus, the district court concluded that Applicants' *facial challenge* to the constitutionality of the voter fraud statute is likely to succeed on the merits, based on a hypothetical circumstance that has never occurred and so could not even support an as applied challenge, much less a facial challenge.

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. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 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 *McDonald* and upheld the constitutionality of an Alabama absentee balloting statute:

> 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).[5] The principle expressed in these cases that absentee voting is not a right but rather is a mere privilege "is based on the premise that the constitutional right of suffrage means the right of a qualified 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

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[5] *See also, e.g., Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F.Supp. 1354, 1358 (D. Ariz. 1990); *In re Election Contest*, 462 N.W.2d at 193; *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983); *Wichelmann v. City of Glencoe*, 273 N.W. 638, 640 (Minn. 1937); *Qualkinbush*, 826 N.E.2d at 1192; *In re Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for City of Miami*, 707 So.2d 1170, 1173 (Fla. Dist. Ct. App. 1998); *State of Mo. ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo. Ct. App. 1978).

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." *Cahill*, 575 S.W.2d at 234.

As *McDonald* and its progeny show, the challenged provisions do not deny Applicants the right to vote, because the provisions do not impose an absolute bar to voting and because voters could still cast a vote—not to mention receive assistance in casting that vote—on election day at their designated polling place.

Third, the preliminary injunction halted presently ongoing and future criminal investigations into referrals concerning alleged violations of voting fraud. But the injunction is inappropriate because Applicants failed to carry their heavy burden to show extraordinary circumstances warranting such anticipatory judicial involvement in criminal investigations. Not only that, but the effect of the injunction was to permit unscrupulous vote brokers, political-party operatives, candidates, and their affiliates to hurry up while the injunction is in place and commit the types of voting fraud that the Texas Legislature was trying to stamp out when it amended the Texas Election Code in 2003.

Fourth, Applicants presented no evidence of irreparable harm. No person is

being denied the privilege of applying for, completing, and dispatching a mail-in ballot. Nor is assistance being denied to voters. If a person wishes to mail a voter's ballot with the voter's consent, all that person needs to do is write their name, residence address and signature on the back of the carrier envelope. Indeed, Applicants' dilatoriness in seeking injunctive relief belies any implication that they have been or will be irreparably harmed by an absence of a preliminary injunction.

For all these reasons, the district court abused its discretion in granting the preliminary injunction enjoining §86.006(f) & (h).

CONCLUSION

For these reasons, the Court should deny the emergency application to vacate the Fifth Circuit's stay.

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