United States District Court
Eastern District of Texas
Marshall Division

WILLIE RAY, JAMILLAH JOHNSON, GLORIA MEEKS, REBECCA MINNEWEATHER, PARTHENIA McDONALD, WALTER HINOJOSA and THE TEXAS DEMOCRATIC PARTY,	§	
Plaintiffs,	§	
v.	§	No. 2:06-CV-385
STATE OF TEXAS, a State of the United States; GREG ABBOTT, Attorney General of the State of Texas; and ROGER WILLIAMS, Secretary of State for the State of Texas,	§	
Defendants.	§	

DEFENDANTS' RULE 12(B) MOTIONS TO DISMISS

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Defendants the State of Texas, Greg Abbott, the Attorney General of Texas, and Roger Williams, Secretary of State for the State of Texas, jointly move to dismiss all of Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction), 12(b)(3) (improper venue), and 12(b)(6) (failure to state a claim upon which relief can be granted).

INTRODUCTION AND SUMMARY OF MOTION

This case has been brought under 42 U.S.C. §1983 and concerns Plaintiffs' purported right to receive and provide assistance in completing and dispatching early-voting mail-in ballots in Texas. There are seven Plaintiffs in this case who may be categorized as one of three types of claimants:

voters, political parties, and political-party activists. Plaintiffs are challenging several provisions of the Texas Election Code, specifically §§64.036(a)(4), 84.003(b), 84.004, 86.0051, and 86.006.

Two of the plaintiffs, Willie Ray and Jamilla Johnson, are self-described political-party activists for the Texas Democratic Party who have both already chosen to plead guilty to criminal possession of mail-in ballots or carrier envelopes of other voters in violation of §86.006 of the Texas Election Code are both currently on probation for that offense. Under black-letter Supreme Court precedent, their attempt to use this civil litigation to collaterally attack their prior criminal convictions is barred, and must be dismissed. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

The remaining plaintiffs (who, absent Ray and Johnson, have no connection to or venue within the Eastern District of Texas) raise broad constitutional challenges to the criminal voter fraud provisions of the Texas Election Code. These claims are without merit. The Legislature has enacted criminal sanctions on election fraud in an effort to protect the integrity of the democratic process and to ensure that each and every voter's right to participate in that process is free of coercion, manipulation, or deception. In particular, the challenged provisions serve to protect elderly and potentially vulnerable voters from being pressured or taken advantage of by party operatives who might attempt to deceive or manipulate those voters. The Secretary of State and the Office of the Attorney General in turn vigorously administer the voter fraud statutes to safeguard the integrity of the electoral process.

Prosecutions by the Office of the Attorney General are initiated only after a referral from the Secretary of State, local officials, or individual citizens. The Office of the Attorney General does not initiate investigations in this area of its own initiative; rather, the investigations and prosecutions flow from the referrals that come in to the office. Thus, the partisan and ethnic composition of those individuals who have been prosecuted to date is a direct consequence of the third-party referrals that

have been received. Each complaint is examined and investigated a neutral and evenhanded manner, and there are currently open investigations concerning members of both major political parties. Nonetheless, because the substantial majority of complaints of voter fraud in partisan elections that have been received by the Office of the Attorney General have concerned alleged misconduct by Democrats (often, with the complaints coming from fellow Democrats), the resultant investigations and prosecutions have reflected those criminal referrals.

The crux of Plaintiffs' allegations is that the overbreadth and vagueness of these provisions—most of which were added to the Code in 2003—render the provisions facially unconstitutional and illegal on two main grounds. First, Plaintiffs contend that the provisions impermissibly discriminate on the basis of race, ethnicity, and political-party affiliation. Second, Plaintiffs contend that the provisions impose a burden on the right to vote, the right to political expression, and the right to associate. Both of these main grounds, Plaintiffs allege, violate the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, as well as §§2 and 208 of the federal Voting Rights Act, 42 U.S.C. §§1971, 1973, 1973aa-6. Plaintiffs also allege that the enforcement and application of the 2003 amendments to the Texas Election Code violated their right of due process of law. For these alleged violations, Plaintiffs seek declaratory and injunctive relief, declaring the provisions unconstitutional and illegal, and enjoining Defendants from enforcing or applying the provisions.

But as detailed below, Plaintiffs' claims, each separately or in their entirety, must be dismissed for any of three independent but nonetheless related grounds:

- ***first***, under Federal Rule of Civil Procedure 12(b)(1), the Court lacks subject-matter jurisdiction over Plaintiffs' claims relating to: (1) the State of Texas because of the State's sovereign immunity as protected by the Eleventh Amendment to the United States Constitution, (2) the §1983 claims of Plaintiffs Ray and Johnson under the *Heck* doctrine, and (3) Plaintiffs'42 U.S.C.

§1971 claim because that section does not imply a private right of action and the section is enforceable only by the U.S. Attorney General;

- ***second***, under Federal Rule of Civil Procedure 12(b)(3), the case should be dismissed for improper venue because the claims of the only two Plaintiffs from Texarkana are jurisdictionally barred under the *Heck* doctrine, thus eliminating those claims from the case and leaving no other basis for venue in the Eastern District of Texas; and

- ***third***, under Federal Rule of Civil Procedure 12(b)(6), Plaintiffs's complaint fails to state viable claims on which relief may be granted under the First, Fourteenth, and Fifteenth Amendments and the federal Voting Rights Act.

RULE 12(B) STANDARDS

Rule 12(b)(1). Under Federal Rule of Civil Procedure Rule 12(b)(1), a party may challenge the subject matter jurisdiction of the district court. *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001). A motion alleging lack of subject-matter jurisdiction may be based on: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Id*. The burden of proof for a motion to dismiss for lack of jurisdiction is on the parties asserting jurisdiction, which in this case are Plaintiffs. *See id*. "'A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.'" *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)).

Rule 12(b)(3). Under Rule 12(b)(3), once a defendant has raised the improper venue issue by motion, the burden of sustaining venue rests with the plaintiff. *McCaskey v. Cont'l Airlines, Inc.,* 133 F.Supp.2d 514, 523 (S.D. Tex. 2001); *Bigham v. Envirocare of Utah, Inc*., 123 F.Supp.2d 1046, 1048 (S.D. Tex. 2000). If there is no evidentiary hearing, courts will allow a plaintiff to carry the burden by establishing facts, taken as true, that establish venue. *Bigham*, 123 F.Supp.2d at 1048; *see also Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). The court accepts undisputed facts in the

plaintiffs' pleadings as true, and resolves any conflicts in the plaintiffs' favor. *McCaskey*, 133 F.Supp.2d at 523. Courts have provided plaintiffs with the benefit of the doubt when determining the governing facts. *See id.*

If improper venue is found, the Court may either dismiss the case or, in the interest of justice, transfer it under 28 U.S.C. §1406(a) to a district where it could have been brought. *Tel-Phonic Servs. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1141 (5th Cir. 1992). The decision to dismiss or transfer is within the Court's discretion. *See Minnette v. Time Warner*, 997 F.2d 1023, 1026 (2d Cir. 1993).

Rule 12(b)(6). In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court accepts "the facts alleged in the complaint as true, [but] if it appears certain that the plaintiff cannot prove any set of facts that would entitle it to the relief it seeks," the motion to dismiss will be granted. *C.C. Port, Ltd. v. Davis-Penn Mortgage Co.*, 61 F.3d 288, 289 (5th Cir. 1995). In other words, the plaintiff must provide factual assertions in the complaint that, if taken as true, could lead to relief. While failure to provide facts to support a claim may lead to dismissal under Rule 12(b)(6), the court must construe the complaint liberally. *Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003).

"[C]onclusory allegations or unwarranted deductions of fact" are not sufficient, however, to avoid dismissal. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (internal quotation marks omitted). Instead, the "plaintiff must plead specific facts." *Id*. (internal quotation marks omitted). In addition, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

Even if the factual allegations are not conclusory, though, dismissal may still be appropriate if "the law simply may not afford relief on the basis of the facts alleged in the complaint." *Walker*

v. S. Cent. Bell Tel. Co., 904 F.2d 275, 277 (5th Cir. 1990). As such, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

STATEMENT OF ALLEGED FACTS TAKEN FROM PLAINTIFFS' COMPLAINT

I. THE PLAINTIFFS

Plaintiffs are Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Parthenia McDonald, Walter Hinojosa, and the Texas Democratic Party.[1] Ray, Johnson, Meeks, and Minneweather all allege that they are African-Americans and political-party activists for the Texas Democratic Party.[2] 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.[3] Ray and Johnson are residents of Texarkana, Texas.[4] Meeks, Minneweather, and McDonald all reside in Fort Worth, Texas.[5]

Like Ray, Johnson, Meeks, and Minneweather, Plaintiff Walter Hinojosa alleges that he is a political-party activist for the Democrats.[6] He is Hispanic and resides in Austin, Texas.[7] 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.[8]

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1. Pltfs. Compl. ¶¶2-9, at 3-5.
2. *Id*. ¶¶2-6, at 3-4.
3. *Id*. ¶7, at 5.
4. *Id*. ¶2, at 3.
5. *Id*. ¶¶5-7, at 4-5.
6. *Id*. ¶8, at 5.
7. *Id*.
8. *Id*.

Finally, the Texas Democratic Party is party to this case.[9] 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 requiring assistance such as the "homebound," the "physically handicapped," the "elderly," and the "illiterate" to cast mail-in ballots.[10] This assistance, Plaintiffs allege, typically may involve: (1) "prefilling" applications for mail-in ballots and mailing them to voters, (2) helping voters "mark their ballots," and (3) mailing the "carrier envelopes" containing the completed mail-in ballots.[11]

II. THE CHALLENGED ELECTION CODE PROVISIONS

Plaintiffs allege that several provisions of the Texas Election Code—most of which were amendments to the Code in 2003—illegally interfere with their ability to assist certain voters for Democratic candidates in completing and dispatching their early-voting, mail-in ballots.[12] These provisions include:

- ***§64.036(a)(4).*** This provision appears in chapter 64 of the Code, which concerns voting procedures generally. The provision itself is concerned with unlawfully assisting a voter in voting. Subsection (a)(4) was added as part of the 2003 amendments to the Code and provides that a person commits the criminal offense of unlawful assistance if he or she knowingly assists a voter who has neither "requested assistance" nor "selected the person to assist the voter." An offense is a Class A misdemeanor.

- ***§84.003(b).*** This provision appears in chapter 84 of the Code, which sets out the procedures for completing an application to cast an early vote by mail-in ballot. This section was amended in 2003 and describes the procedure for the "witnessing" of an application under the chapter. Under subsection (a) of §84.003, a "witness" other than an early voting clerk or a deputy clerk may sign an early-voting ballot application for the applicant if the witness indicates their relationship to the applicant or, if unrelated, indicates that fact. Under subsection (b), the witness is also required to comply with the procedures set forth in §1.011 of the Code, which provides,

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9. *Id*. ¶9, at 5-6.

10. *Id*. ¶¶9, 15-16, at 5-6, 7.

11. *Id.*

12. *See id*. at 1 n.1; *see also id*. ¶¶18-41, at 8-17.

among other things, that the witness must affix their own signature to the document or paper and print the witness's name near their signature, as well as state the witness's residence address if the witness is not an election officer. A witness's knowing failure to comply with §1.011 constitutes an offense under §84.003, which is a Class A misdemeanor. In addition, subsection (b) provides that "[a] person who in the presence of the applicant otherwise assists an applicant in completing an early voting mail-in ballot application commits an offense if the person knowingly fails to comply with Section 1.011(d) in the same manner as a witness." In other words, a person who "otherwise assists" the applicant must comply with §1.011(d)'s requirements by printing the person's name, and providing a signature and residence address just as a witness is required to do.

- ***§84.004.*** This provision makes it an offense to act as a witness for more than one early-voting mail-in ballot applicant in the same election unless the witness is an early-voting clerk or a deputy clerk, or a parent, grandparent, spouse, child, or sibling to the additional applicants. An offense is a Class B misdemeanor.

- ***§86.0051.*** This provision appears in chapter 86 of the Code, which covers the procedures for voting by mail. This specific section was added as part of the 2003 amendments to the Code, and it concerns the handling of carrier envelopes. It requires a witness who signs the carrier envelope's certificate to comply with §1.011 of the Code, and it requires that a person other than the voter who mails the carrier envelope to provide their printed name, signature, and residence address on the reverse side of the envelope, regardless of whether the voter voluntarily gave the person possession of the envelope. An offense is a Class B misdemeanor, unless the person is also convicted of an offense under §64.036, in which case the offense is a state jail felony. The section does not apply to persons related to an applicant within the second degree of affinity or the third degree of consanguinity.

- ***§86.006.*** This section concerns the method of returning a marked mail-in ballot to the early-voting clerk. In particular, Plaintiffs are complaining of subsections (f) and (g), which were added by the 2003 amendments to the Code. Subsection (f) makes it an offense for a person to knowingly possess an official mail-in ballot or carrier envelope. There are several affirmative defenses to subsection (f), unless the person possessing the ballot or envelope intended to defraud the voter or the election authority. It is an affirmative defense if the person on the date of the offense was: (1) related to the voter within the second degree of affinity or the third degree of consanguinity; (2) registered to vote at the same address as the voter; (3) an early-voting clerk or deputy clerk; (4) a person possessing a carrier envelope who provided the information required under §86.0051, namely their printed name, signature, and residence address on the reverse side of the envelope; (5) an employee of the U.S. Postal Service; and (6) a common or contract carrier. Subsection (g) provides the range of punishment—Class A and B misdemeanors and a state jail felony—for violating subsection (f).

III. THE DEFENDANTS

The Defendants are the State of Texas, Texas Attorney General Greg Abbott, and Texas Secretary of State Roger Williams.[13] Plaintiffs' complaint against the State, as the State, apparently involves allegations of impropriety in the enactment of the challenged Texas Election Code provisions, and in the application and enforcement of these provisions by its officials and employees. In particular, Plaintiffs have identified the Attorney General, the Secretary, and their employees as the state officials whose application and enforcement of the provisions at issue have allegedly infringed on the Plaintiffs' constitutional rights protected by the First, Fourteenth, and Fifteenth Amendments to the United States Constitution and statutory rights under the federal Voting Rights Act.

Both the Attorney General and the Secretary have been sued in their official capacities only.[14]

IV. THE PLAINTIFFS' CLAIMS

Plaintiffs' complaint generally presents a facial constitutional challenge to the provisions of the Texas Election Code identified above,[15] as well as claims alleging violations of the federal Voting Rights Act, 42 U.S.C. §§1971, 1973, 1973aa-6.[16] The procedural vehicle used in bringing the complaint is 42 U.S.C. §1983.[17] In the complaint, Plaintiffs broadly assert that "the plain intent and effect" of the Election Code provisions is "to suppress voting by disfavored groups" and "to

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13. Pltfs. Compl. ¶¶10-12, at 6.

14. *Id*. ¶¶11-12, at 6.

15. *See id*. ¶51, at 20 ("Sections 64.036(a)(4), 84.003(b), 84.004, 86.0051, and 86.006 of the Texas Election Code, separately and together, are *facially unconstitutional*. . . ." [emphasis added]), ¶57, at 21 ("Sections 64.036(a)(4), 84.003(b), 84.004, 86.0051, and 86.006 of the Texas Election Code, separately and together, are *unconstitutionally vague on their face*. . . ." [emphasis added]).

16. *See id*. ¶¶60-74, at 22-26.

17. *See id*.¶1, at 3, ¶¶80-84, at 28-29.

squelch" the assistance provided to voters by activists for the Democratic Party regarding early voting by mail-in ballot.[18] Plaintiffs allege that the "harm[s]" arising from the enactment, application, and enforcement of these provisions by Defendants include:

- violating Plaintiffs' fundamental 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. §1973;[19]
- 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;[20]
- 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;[21]
- denying citizens the right to vote on the condition of race in violation of 42 U.S.C. §1971 and the Fifteenth Amendment;[22]
- violating the Equal Protection Clause of the Fourteenth Amendment by allegedly targeting minorities in the State officials' enforcement efforts under the Texas Election Code provisions in question;[23] and
- violating the Due Process Clause of the Fourteenth Amendment by allegedly "failing to provide adequate notice to voters, political-party activists, and political parties" of the 2003 amendments to the Texas Election Code, by allegedly disseminating "misinformation" and "misleading" advice regarding these provisions, and by allegedly engaging in "discriminatory" enforcement practices of the Code.[24]

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18. *See id*. at 2.

19. *See id*.; *see also id*. ¶¶42-59, at 18-22.

20. *See id*. at 2; *see also id*. ¶¶42-59, at 18-22.

21. *See id*. at 2; *see also id*. ¶¶60-65, at 22-23.

22. *See id*. at 2; *see also id*. ¶¶66-74, at 24-26.

23. *See id*.at 2; *see also id*. ¶¶69-74, at 24-26.

24. *See id*.at 2; *see also id*. ¶¶75-79, at 26-28.

As for Plaintiffs' facial constitutional challenge to the Texas Election Code, it attacks the statutory provisions on the basis of their "overbreadth,"[25] "vagueness,"[26] and "discriminatory intent and effect."[27] To show discriminatory purpose for their equal-protection claim, Plaintiffs apparently are relying on the broad allegations they have raised of discriminatory enforcement by the Office of the Attorney General.[28]

As relief for the alleged harms, Plaintiffs seek a judgment (1) declaring that the Texas Election Code provisions mentioned violate the United States Constitution and the federal Voting Rights Act and (2) enjoining Defendants from enforcing or applying the provisions.[29] In addition, they seek attorneys' fees and costs.[30]

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER SEVERAL OF PLAINTIFFS' CLAIMS.

A. Plaintiffs' Claims Against the State Are Barred by the Eleventh Amendment.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment also proscribes suits by citizens against their own State. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). It is well established that the States and their

25. *See id.* ¶52, at 20.

26. *See id.* ¶57, at 21.

27. *See id.* ¶44, at 18.

28. *See id.* ¶¶69-74, at 24-26.

29. *See id.* at 29.

30. *See id*. at 30.

agencies are immune from suit for monetary damages. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Additionally, in *Alabama v. Pugh*, 438 U.S. 781 (1978), the Supreme Court held that actions for injunctive relief against a State or its instrumentalities were not excepted from the eleventh-amendment bar. In fact, the Supreme Court has explained that the Eleventh Amendment prohibits a federal court from exercising jurisdiction over a lawsuit against a State, except where the State has consented to be sued or waived its immunity, or where Congress has overridden the State's immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984); *Quern v. Jordan*, 440 U.S. 332, 341 (1979).

Here, Plaintiffs' complaint makes no assertion that the State of Texas has consented to be sued or waived its immunity. Nor do Plaintiffs assert that Congress has overridden the State's immunity. Accordingly, on the face of Plaintiffs' complaint, the Court lacks authority to hear Plaintiffs' claims against the State. All of Plaintiffs' claims against the State, as the State, are therefore barred by the Eleventh Amendment and must be dismissed. *See* FED. R. CIV. P. 12(b)(1).

B. All of the Claims of Plaintiffs Ray and Johnson Are Jurisdictionally Barred Under the *Heck* Doctrine.

Plaintiffs' complaint asserts that Ray and Johnson both reside in Texarkana, Texas, that they are political-party activists for the Texas Democratic Party and their county Democratic party, that in the past they possessed mail-in ballots or carrier envelopes of other voters in violation of §86.006 of the Texas Election Code, and that in 2005, they pleaded guilty to this offense.[31] It is undisputed that Ray and Johnson are currently on probation for these offenses. Based on these facts, Ray and Johnson have brought claims against Defendants under 42 U.S.C. §1983, challenging §86.006 of the

31. Pltfs. Compl. ¶¶2-4, at 3-4.

Texas Election Code, as well as other Election Code provisions, as being facially unconstitutional and violative of §2 and §208 of the federal Voting Rights Act.

The Court, however, has no subject-matter jurisdiction over Ray and Johnson's §1983 claims because they are barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). 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, unless the plaintiff demonstrates that the 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 under 28 U.S.C. §2254. *Id*. The rule from *Heck* applies regardless of whether the plaintiff's §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); *Osuch v. Gregory*, 303 F.Supp.2d 189, 193 (D. Conn. 2004); *Poor Bear v. Nesbitt*, 300 F.Supp.2d 904, 911 (D. Neb. 2004). The *Heck* rule applies as much to prisoners in custody (a habeas prerequisite) as to persons not incarcerated. *Schilling v. White*, 58 F.3d 1081, 1086 (6th Cir. 1995). And it operates when the fact or duration of parole or probation is called into question. *See Crow v. Penry*, 102 F.3d 1086, 1087 (10th Cir. 1996); *Jackson v. Vannoy*, 49 F.3d 175, 177 (5th Cir. 1995).

Ray and Johnson's complaint contains no allegation that their probation has 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 have not in fact instituted any such proceeding—whether in state or federal court—to expunge their probation.

Moreover, there can be no question that Ray's and Johnson's §1983 claim for declaratory and injunctive relief, if successful, would necessarily imply the invalidity of their guilty pleas and

probation. Indeed, their complaint features their indictments, guilty pleas, and probated sentence, "intertwining" them with their §1983 claims. *See Clarke*, 154 F.3d at 190. Their §1983 claim and their probation are so closely connected that it is beyond doubt that a ruling invalidating as facially unconstitutional §86.006 and the other provisions of the Texas Election Code that Ray and Johnson are challenging would entitle them to seek expungement of their probation. *See id*. For these reasons, *Heck* jurisdictionally bars Ray's and Johnson's §1983 claims, and the Court must dismiss their claims under Federal Rule of Civil Procedure 12(b)(1).

C. Plaintiffs' Claims Under 42 U.S.C. §1971 Are Barred for a Lack of Standing.

Plaintiffs challenge the Texas Election Code provisions in part under 42 U.S.C. §1971. But §1971 does not furnish a jurisdictional basis for Plaintiffs' action.

The section provides:

> 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). The section is an anti-discrimination statute designed to eliminate the discriminatory practices of registrars through arbitrary enforcement of registration requirements. *McKay v. Altobello*, No. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996); *see Good v. Roy*, 459 F.Supp. 403, 404 (D. Kan. 1978) ("The purpose of Section 1971 is to prevent racial discrimination at the polls."); 42 U.S.C. §1971(a)-(b). It forbids the practice of disqualifying potential voters for their failure to provide information irrelevant to determining their eligibility to vote. *Friedman v. Snipes*, 345 F.Supp.2d 1356, 1371 (S.D. Fla. 2004). The provision was intended to address the practice of requiring unnecessary information for voter registration with the intent that

such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters. *See Condon v. Reno*, 913 F.Supp. 946, 949-50 (D.S.C. 1995).

Further, 42 U.S.C. §1971(c) states that whenever an alleged violation of subsection (a) or (b) 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." This subsection makes no mention of enforcement by private persons. Indeed, as the majority of courts addressing civil-rights claims brought under §1971 have held, this section does not provide for 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).[32]

Because Plaintiffs have no private right of action under §1971 and because the section is enforceable by the U.S. Attorney General only, Plaintiffs lack standing to bring this claim. The

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32. *See also McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) ("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) (42 U.S.C. §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) (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 ("the unambiguous language of Section 1971 will not permit us to imply a private right of action"). *But see Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) ("the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under §1983").

Court must therefore dismiss Plaintiffs' §1971 claim for lack of subject-matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1).

II. THE COURT SHOULD DISMISS THIS CASE FOR IMPROPER VENUE, OR ALTERNATIVELY, TRANSFER THE CASE TO A DISTRICT WHERE IT COULD HAVE BEEN BROUGHT.

Plaintiffs' sole basis for venue is 28 U.S.C. §1391(b)(2): "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may, 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 . . . ." Plaintiffs have brought this lawsuit in the Eastern District of Texas, Marshall Division, based on events surrounding the claims of Plaintiffs Ray and Johnson who reside in Texarkana, Texas. None of the other Plaintiffs' claims occurred in this judicial district—their allegations all arise from events occurring in either Fort Worth (Tarrant County) or Austin (Travis County), Texas.

But Ray's and Johnson's claims cannot serve as a basis for venue because their claims are a nullity. Under *Heck*, all of Ray's and Johnson's claims must be dismissed under Rule 12(b)(1), and so Plaintiffs cannot show that a substantial part of the events giving rise to this action occurred in Texarkana. There being no basis under §1391(b)(2) for maintaining venue in this Court, the Court should dismiss Plaintiffs' lawsuit under Rule 12(b)(3).

Alternatively, in lieu of dismissal, the Court may decide, in the interest of justice, to transfer the case to a district in which it could have been brought. *See* 28 U.S.C. §1406(a). Based on Plaintiffs' complaint, an appropriate alternative district in which venue may lie is the Northern District of Texas, Fort Worth Division, or the Western District of Texas, Austin Division. Thus, if the Court chooses to transfer instead of dismiss the case, it should send the case to one of these districts.

III. THE COURT SHOULD DISMISS PLAINTIFFS' ACTION FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED.

The Court may also dismiss Plaintiffs' claims under Rule 12(b)(6) because Plaintiffs' complaint on its face shows that Plaintiffs cannot prove any set of facts that would entitle them to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A. Plaintiffs' Allegations Regarding Their Due-Process Claims Affirmatively Show That They Are Not Entitled to the Relief They Seek.

Plaintiffs' complaint alleges a due-process claim.[33] This claim alleges that Defendants violated Plaintiffs' right to due process of law in two distinct ways. First, Plaintiffs allege that "Defendants made no reasonable or sufficient effort to *notify* voters, political party activists, including Plaintiffs, or political party officials, of the change in the law occasioned by the amendments."[34] Specifically, they criticize Defendants for not providing such notice either on carrier envelopes or in a publication "to political parties or other organizations involved in providing assistance to voters."[35]

Second, Plaintiffs allege that Defendants "misinform[ed]" and "misl[ed]" Plaintiffs regarding the 2003 amendments to the Texas Election Code.[36] Plaintiffs point to a couple of instances where they claim either the Attorney General or the Secretary provided "official guidance that [was] incorrect, confusing, and internally inconsistent."[37] One instance about which Plaintiffs complain allegedly involves "the State's . . . educational materials" that "offer misleading and biased

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33. Pltfs. Compl. ¶¶75-79, at 26-28.

34. *Id*. ¶77, at 26-27 (emphasis added).

35. *Id*. ¶77, at 27.

36. *Id*. ¶78, at 27.

37. *Id*. ¶79, at 27-28.

'advice'"—specifically, the Secretary's website that discusses assistance with the application form for an early-voting, mail-in ballot.[38] Another alleged instance involved investigators from the Attorney General's office who allegedly gave Plaintiff Minneweather and others incorrect information regarding the punishment for a witness's failure to sign the mail-in ballot application—the investigators allegedly advised it was a misdemeanor.[39]

Neither of these claimed violations of due process nor the specific instances of conduct referenced by Plaintiffs assert a viable due-process claim.

1. Plaintiffs' complaint fails to state a due-process claim based on a lack of notice.

For starters, the notice that Plaintiffs assert they should have been given was not required for the enforcement of the amended Texas election laws to comport with due process. In effect, what Plaintiffs are claiming is that because Defendants allegedly provided no notice of the 2003 amendments to the Texas Election Code to Plaintiffs, their ignorance of the change in the laws is excused. This contention has no basis in law.

"Ignorance of a statute is generally no defense even to a criminal prosecution, and it is never a defense in a civil case, no matter how recent, obscure, or opaque the statute." *Torres v. INS*, 144 F.3d 472, 474 (7th Cir. 1998). This rule is "'deeply rooted in the American legal system,'" and "[t]he common law rule that every person is presumed to know the law 'has been applied by the [Supreme] Court in numerous cases construing criminal statutes.'" *United States v. Hancock*, 231 F.3d 557, 561 (9th Cir. 2000) (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991) (citations omitted)). And it is no violation of due process of law if the government fails to notify an individual

38. *Id*. ¶78, at 27; *see also id*. ¶¶40-41, at 16-17.

39. *Id*. ¶78, at 27; *see also id*. ¶41, at 17.

of a change in the law. *Torres*, 144 F.3d at 473-74. Indeed, the government is "not required to inform citizens individually of a change in the law." *Hancock*, 231 F.3d at 565. "To provide constitutionally adequate notice, 'a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.'" *Id*. (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)).

Nothing in Plaintiffs' complaint alters these rules. There is no allegation that the election laws in question were "secret laws" whose existence was "concealed" from them. *See Torres*, 144 F.3d at 474. Nor can there be any legitimate claim that the Texas Legislature failed to publish the laws and afford Plaintiffs a reasonable opportunity to familiarize themselves with the laws' terms and to comply with the laws. *See Hancock*, 231 F.3d at 565. The law therefore presumes that Plaintiffs knew what the election laws law forbade and what those laws required to be done. *See United States v. Buford*, 889 F.2d 1406, 1409 (5th Cir. 1989). And, prospectively, all of the Plaintiffs currently have full awareness of the law, as demonstrated by the fact of this lawsuit. Plaintiffs' due-process allegations regarding a lack of notice fail to state a claim on which relief can be granted and must be dismissed. *See* FED. R. CIV. P. 12(b)(6).

2. Plaintiffs' complaint fails to state a due-process claim based on alleged misinformation provided by Defendants.

Like their due-process claim based on an alleged lack of notice, Plaintiffs' second due-process claim regarding alleged misinformation provided by employees in the Attorney General's office and the Secretary's website likewise fails to state a claim on which relief can be granted. Plaintiffs' claim is that imposing criminal sanctions on them for violating Texas's election laws infringes on their right to due process because Defendants misinformed and misled Plaintiffs about those laws. In effect, Plaintiffs' due-process claim is a form of estoppel defense to their criminal prosecutions or future criminal prosecutions, if any.

But courts are understandably reluctant to apply estoppel to the government based on the acts or representations of its agents because "'[w]hen the Government is unable to enforce the law . . . the interest of the citizenry as a whole in obedience to the rule of law is undermined.'" *United States v. CPS Chem. Co*., 779 F.Supp. 437, 452 (E.D. Ark. 1991) (quoting *Heckler v. Cmty. Health Servs*., 467 U.S. 51, 60 (1984)). As a general rule, "reliance on misinformation provided by a government employee does not provide a basis for estoppel," *Crown v. United States R.R. Ret. Bd*., 811 F.2d 1017, 1021 (7th Cir. 1987),[40] particularly when the information is conveyed verbally. *Heckler*, 467 U.S. at 65. "In dealing with the government, an individual is charged with knowing government statutes and regulations and assumes the risk 'that government agents may exceed their authority and provide misinformation.'" *S&M Inv. Co. v. Tahoe Reg'l Planning Agency*, 911 F.2d 324, 329 (9th Cir. 1990) (quoting *Lavin v. Marsh*, 644 F.2d 1378, 1383 (9th Cir. 1981)).

But if estoppel is applied against the government, the party advancing the estoppel theory must show "affirmative misconduct" on the part of government employees or agents. *See INS v. Miranda*, 459 U.S. 14, 17 (1982) (per curiam). Without affirmative misconduct, the government may not be estopped by any misrepresentations or misinformation given by its employees or agents. *United States v. Manning*, 787 F.2d 431, 436 (8th Cir. 1986). An isolated misstatement—especially an oral one—will ordinarily not constitute affirmative misconduct. *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (per curiam). "'Affirmative misconduct' requires an affirmative misrepresentation

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40. *See also United States v. Browning*, 630 F.2d 694, 703 (10th Cir. 1980) ("[I]ncorrect statements made by a government official may not serve as a basis for holding the government estopped from enforcing its regulations even if the misinformation had led to [the defendants'] subsequent misconduct."); *Reform Party of Ala. v. Bennett*, 18 F.Supp.2d 1342 (M.D. Ala. 1998) (holding that erroneous information given on Alabama Secretary of State's website did not deny the plaintiffs a constitutional right); *accord In re S.A.P.*, 156 S.W.3d 574, 577 (Tex. 2005) (holding that "equitable estoppel generally does not apply to governmental entities"); *S&H Mktg. Group, Inc. v. Sharp*, 951 S.W.2d 265, 266 (Tex. App.—Austin 1997, no writ) (same).

or affirmative concealment of a material fact by the government." *Linkous v. United States*, 142 F.3d 271, 278 (5th Cir. 1998).

Plaintiffs' claim of a due-process violation and estoppel against Defendants must be dismissed because (1) they generally are not entitled to estoppel against the government, and (2) Plaintiffs have not alleged any affirmative misconduct on the part of the Attorney General, the Secretary, or their employees that would overcome the general rule. Based on the averments in Plaintiffs' complaint, the alleged incidents of misinformation, at most, involved isolated misstatements, which, as alleged, may have been negligent, at worst. Thus, Plaintiffs' allegations not only fail to satisfy the requirements of Rule 12(b)(6), but they also fail to satisfy the requirement of Federal Rule of Civil Procedure 9(b): "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Plaintiffs' due-process claim must therefore be dismissed. *See* FED. R. CIV. P. 12(b)(6).

B. Plaintiffs' Allegations Do Not Entitle Them to Any Relief on the Grounds That the Texas Election Code Provisions in Question Are Facially Unconstitutional and Illegal under the First, Fourteenth, or Fifteenth Amendments and the Voting Rights Act for Vagueness and Overbreadth, for Burdening the Right to Vote, or for Discriminating Against a Suspect Class of Voters.

Plaintiffs' complaint alleges that Texas Election Code §§64.036(a)(4), 84.003(b), 84.004, 86.0051, 86.006 impermissibly burden their rights to political expression, to freedom of association, and to vote, and discriminates on the basis of race in violation of the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, as well as §§2 and 208 of the Voting Rights Act.[41] Plaintiffs' complaint regarding these claims, however, fails to state a claim on which relief can be granted.

41. *See* Pltfs. Compl. counts I-VI, ¶¶42-74, at 18-26.

1. Vagueness and overbreadth

Because Plaintiffs challenge the statutory provisions on their face and seek to invalidate the provisions themselves, their complaint alleges a facial challenge rather than an as-applied challenge. *See Jacobs v. Fla. Bar*, 50 F.3d 901, 905-06 (11th Cir. 1995). "Facial invalidation 'is manifestly, strong medicine' that 'has been employed by [courts] sparingly and only as a last resort.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). To prevail on their facial challenge, Plaintiffs face "a heavy burden," *Rust v. Sullivan*, 500 U.S. 173, 183 (1991), and "must demonstrate a *substantial* risk that application of the provision will lead to the suppression of speech," *Nat'l Endowment for the Arts*, 524 U.S. at 580 (emphasis added).

Although not identical, void-for-vagueness and overbreadth challenges under the First Amendment are alternative and often overlapping grounds for the same relief, specifically invalidation of the offending enactment. *Jordan v. Pugh*, 425 F.3d 820, 827 (10th Cir. 2005). The two claims generally involve "the same nucleus of facts, and require similar analysis of the terms and reach of the challenged provisions." *Id*. The Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *see* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 333 (1999) ("Vagueness challenges in the First Amendment Context, like overbreadth challenges, typically produce facial invalidations . . . .").

Facial challenges for vagueness and overbreadth each employ "a common preliminary inquiry about the statute's effect on constitutionally protected activity." *Jordan*, 425 F.3d at 828. To succeed on a facial vagueness challenge, the claimant must show that the potential chilling effect on protected expression is "both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205,

216 (1975). Likewise, a facial overbreadth challenge demands that "the overbreadth of a statute . . . not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. A court that considers a facial challenge to the overbreadth and vagueness of a law must first inquire "whether the enactment reaches a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982). Regardless of whether the claim is overbreadth or void-for-vagueness, a facial challenge is available only if the answer to this inquiry is yes. *Jordan*, 425 F.3d at 828.

Here, Plaintiffs' complaint fails to allege sufficiently that the challenged provisions affect a *substantial* amount of constitutionally protected conduct. Although the Supreme Court has not specified what constitutes a "substantial" infringement on constitutionally protected conduct in terms of the overbreadth and void-for-vagueness doctrines, the Court has said that "there must be a *realistic* danger that the statute itself will *significantly compromise* recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984) (emphasis added). Plaintiffs have come nowhere near adequately alleging this. Their claims amount to no more than a few anecdotes of isolated instances of alleged improper enforcement of the challenged provisions. There is simply no allegation of a realistic threat that the voting rights and the rights of freedom of expression and association of third parties not before the court are being significantly compromised. Plaintiffs' complaint is not sufficient to invalidate the provisions on the grounds of facial vagueness or overbreadth.

2. Equal protection, the Fifteenth Amendment, and the right to vote

The right to vote is a "fundamental political right." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621,

626 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees persons that they will not be denied their fundamental rights—including the right to vote—in an arbitrary or discriminatory manner. *See* U.S. CONST. amend XIV, §1, cl. 4. Similarly, the Fifteenth Amendment protects the right to vote regardless of race against any denial or abridgment by the United States or by any State. U.S. CONST. amend. XV; *United States v. Mississippi*, 380 U.S. 128, 138 (1965).

But as the Supreme Court has noted, "[i]t does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)). States have the power to regulate their own elections and, by necessity, must take "an active role in structuring elections" because "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "States are thus entitled to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

It is therefore erroneous to assume—as Plaintiffs' complaint does[42]—"that a law that imposes any burden upon the right to vote must be subject to strict scrutiny"—it does not. *Id*. Instead, a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to

42. *See* Pltfs. Compl. ¶44, at 18.

which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789; *Tashjian v. Republican Party of Conn*., 479 U.S. 208, 213-14 (1986). A state's important regulatory interests will generally be upheld if a state election law imposes reasonable, non-discriminatory restrictions on voters' First and Fourteenth Amendment rights. *Id*.

Faced with a constitutional challenge to "a neutral state law that produces disproportionate effects along racial lines" under the Fourteenth Amendment or Fifteenth Amendment, a court should hold the enactment unconstitutional only if there is "'[p]roof of racially discriminatory intent or purpose.'" *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 287 (1977)); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) ("Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."); *id*. at 66 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."). The Court has never "embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Washington v. Davis*, 426 U.S. 229, 239 (1976). "Disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id*. at 242.

Here, the challenged Texas Election Code provisions are neutral on their face. The provisions make no mention whatsoever of race or any suspect class. And Plaintiffs' complaint does not allege that the provisions are anything but neutral on their face. Rather, Plaintiffs' allegations regarding their constitutional claims focus on the alleged disproportionate impact that the Election Code provisions have along racial and ethnic lines.

For instance, Plaintiffs' complaint chiefly focuses on §86.006 as a provision that

discriminates and denies them their right to vote—painting the provision's language in the direst of terms. This provision, however, is neutral on its face and simply forbids someone from possessing a voter's official ballot or carrier envelope if that person is not related to the voter, registered to vote at the same address as the voter, an early-voting clerk, an employee of the U.S. Postal Service, a common carrier, or most significantly, someone who provides the information required under §86.0051(b). As to this later exemption, it applies to all voters equally, and all that someone needs to do to obey the law is to simply print their name and address on the carrier envelope and sign the envelope. *See* TEX. ELEC. CODE §86.006(f)(4). This does not pose a substantial burden on a person's right to vote, and it certainly does not purposefully discriminate on the basis of race.

Plaintiffs have not adequately alleged a racially discriminatory purpose or an intent to discriminate against any protected class of voters or burden their right to vote on the part of Defendants or other state officials. The Supreme Court has defined "discriminatory purpose" as being "more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Plaintiffs have made no such allegations (nor can they because it would be patently and recklessly false).

One cannot ignore—and the Court should take judicial notice of the fact—that the Legislature enacted the 2003 amendments to the Texas Election Code through H.B. 54, which was authored by a Democrat, Representative Steven Wolens of Dallas (who is married to another elected Democrat—Dallas Mayor, Laura Miller). *See* Act of May 28, 2004, 78th Leg., R.S., ch. 393, §§5, 7, 8, 12-14, 2003 Tex. Gen. Laws 1633; Texas Legislature Online, http: // www.capitol.state.tx.us / BillLookup / History.aspx?LegSess=78R&Bill=HB54 (last vistited Oct. 13, 2006). H.B. 54 was

intended to "prevent[] . . . voting fraud generally" and to stop the practice of individuals unlawfully assisting elderly, infirm, and homebound voters and "the buying and selling of mail ballots to alter election outcomes." HOUSE COMM. ON ELECTIONS, BILL ANALYSIS, Tex. H.B. 54, 78th Leg., R.S. 1 (2003). The bill passed in the Texas House of Representatives by a vote of 98 to 45, with 15 Democrats voting for passage. H.J. OF TEX., 78th Leg., R.S. 1283 (2003). 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. S.J. OF TEX., 78th Leg., R.S. 2414 (2003). Therefore, it strains credulity for Plaintiffs' Complaint to assert that these Democratic legislators, through the 2003 amendments, intended "to suppress voting by disfavored groups"[43] such as the "poor, the elderly, the infirm, and African-American and other racial and ethnic minorities,"[44] to "severely restrict individuals' First and Fourteenth Amendment rights,"[45] and to "disrupt a political party's right to associate with voters."[46]

Most significantly, the legislative record on H.B. 54 includes an official statement of legislative intent in which Representative Chavez (D-El Paso) asked Representative Wolens point blank whether "the intent of this bill [was] to criminalize volunteers or organizations, such as Young Democrats or the Young Republicans from canvassing neighborhoods or senior centers or public housing buildings, from assisting the elderly or disabled from submitting an application for a homebound ballot," and whether "the intent of this bill [was] to serve as a mechanism to promote

43. Pltfs. Compl. at 2.

44. *Id.* ¶49, at 20.

45. *Id.* ¶44, at 18.

46. *Id.* ¶53, at 21.

active intimidation to already vulnerable voting communities." H.J. OF TEX., 78th Leg., R.S. 1282-83. Representative Wolens denied that was the intent behind the bill. *See id*.

The constitutional claims in Plaintiffs' complaint must therefore be dismissed for failure to state a claim on which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

3. Voting Rights Act

Besides their constitutional claims under the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, Plaintiffs' complaint also alleges that Defendants violated §§2 and 208 of the Voting Rights Act.

Regarding Plaintiffs' §2 claim, the section provides: "[n]o . . . standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 42 U.S.C. §1973(a). A violation of §2 occurs if, "based on the totality of circumstances [minority plaintiffs] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*. §1973(b). To establish the existence of a "denial or abridgement" of the right to vote on account of race:

> [A] plaintiff must prove invidious discrimination in order to establish a violation of [S]ection 2 of the Voting Rights Act. Specifically, the plaintiff may prove *either:* (1) discriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; *or* (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme.

Osburn v. Cox, 369 F.3d 1283, 1289 (11th Cir. 2004) (quoting *Nipper v. Smith,* 39 F.3d 1494, 1524 (11th Cir. 1994)). Moreover, whereas a plaintiff must prove discriminatory intent to succeed on a claim under the Equal Protection Clause or the Fifteenth Amendment, a showing of discriminatory effect may suffice to establish a violation of §2. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471,

482 (1997) ("When Congress amended §2 in 1982, it clearly expressed its desire that §2 *not* have an intent component. . . . Because now the Constitution requires a showing of intent that §2 does not, a violation of §2 is no longer *a fortiori* a violation of the Constitution." [emphasis in original]).

Here, as already shown above, Plaintiffs' complaint does not adequately allege discriminatory purpose under the first method for proving a §2 claim. So Plaintiffs' claim must be dismissed unless they properly allege a §2 claim under the second method—the "results" test to prove a statutory violation. *See Kirksey v. Danks*, 608 F.Supp. 1448, 1451 (S.D. Miss. 1985); *see also Jacksonville Coal. for Voter Prot. v. Hood*, 351 F.Supp.2d 1326, 1333 (M.D. Fla. 2004). Plaintiffs' allegations that the enactment and enforcement of the challenged provisions of the Texas Election Code have had discriminatory effects on voters who are racial and ethnic minorities are conclusory, speculative, insubstantial, and inadequate. The only Plaintiff in this case who has pleaded a claim as a voter is McDonald; the other Plaintiffs are persons or a political party who wish to assist voters, and §2, by its express terms, makes no mention of persons denied the right to *assist* voters on the basis of race. Plaintiff McDonald has made no allegations that she has been denied the right to vote on the basis of her race.[47] Rather, the crux of her allegations is that she benefits from assistance with her mail-in ballot because she is "homebound and physically handicapped," not because of her race.[48] Ergo, any alleged denial of her ability to receive assistance with her mail-in ballot disadvantages her because of her physical disabilities, not because of her race. By its terms, physical disabilities are not covered under §2 of the Voting Rights Act. Plaintiffs' §2 claims therefore must be dismissed for failure to state a claim on which relief can be granted. *See* FED. R. CIV. P. §12(b)(6).

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47. Pltfs. Compl. ¶7, at 5; ¶15, at 7.

48. *Id*. ¶15, at 7.

Regarding Plaintiffs' claim under §208 of the Voting Rights Act, 28 U.S.C. §1973aa-6, that section provides: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." But Plaintiffs' complaint contains no allegation that Defendants have precluded any eligible voter from receiving the assistance guaranteed under §208. At worst, Plaintiffs' complaint merely alleges that persons desiring to provide assistance have been or may be prosecuted for not following the requirements of Texas's Election Code governing early voting by mail-in ballot. There is no allegation whatsoever that anyone who has complied with Texas law relating to mail-in ballots has been either precluded from assisting a voter in casting a mail-in ballot or denied the right to receive such assistance. On the face of Plaintiffs' complaint, Plaintiffs have failed to state a claim on which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

CONCLUSION

For these reasons, Defendants request that their Rule 12(b) motions to dismiss be granted in whole or in part, and that Plaintiffs' action be dismissed in whole or in part. Alternatively, regarding Defendants' Rule 12(b)(3) motion to dismiss for improper venue, if the Court decides not to dismiss, Defendants request that the case be transferred under 28 U.S.C. §1406(a) to either the Northern District of Texas, Fort Worth Division, or the Western District of Texas, Austin Division.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2006, an electronic form of this motion and the proposed order was provided to counsel named below through the Court's electronic filing system, and a courtesy copy has also been sent via e-mail. For those parties not able to receive a copy in electronic form, a copy has been sent via Certified Mail, Return Receipt Requested.

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