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

WILLIE RAY, JAMILLAH JOHNSON, GLORIA MEEKS, REBECCA MINNEWEATHER, PARTHENTIA McDONALD, WALTER HINOJOSA, and THE TEXAS DEMOCRATIC PARTY, Plaintiffs, v. 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.	)	Civil Action No. 2-06CV-385 Judge T. John Ward

EXHIBIT A

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WILLIE RAY, JAMILLAH JOHNSON, GLORIA MEEKS, REBECCA MINNEWEATHER, PARTHENTIA McDONALD, WALTER HINOJOSA, and THE TEXAS DEMOCRATIC PARTY,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2-06CV-385
	)	Judge T. John Ward
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.	)	

MOTION FOR PRELIMINARY INJUNCTION
AND SUPPORTING MEMORANDUM OF LAW

INTRODUCTION

Plaintiffs challenge several unprecedented provisions of the Texas Election Code, largely enacted in 2003, and the enforcement of those provisions in advance of the 2006 election.[1] The challenged provisions authorize a variety of sweeping criminal penalties on individuals and organizations who seek to provide legitimate and necessary aid to voters who vote by mail. For example, under newly enacted Section 86.006(f) of the Texas Election Code, individuals—including Plaintiffs—are now subject to criminal prosecution merely for *possessing* another's completed and sealed mail-in ballot for the sole purpose of depositing that ballot in the mail.

[1] The provisions of the Texas Election Code expressly challenged by Plaintiffs are Sections 64.036(a)(4), 84.003(b), 84.004, 86.0051, and 86.006 (the "challenged provisions").

The challenged provisions, far from accomplishing the legislature's purported goal of preventing voter fraud, are plainly targeted at the longstanding, widespread and legitimate activities of individuals and organizations—and, in particular, political parties—in facilitating voter participation and assisting voters who vote by mail. By deterring individuals and organizations from legitimate get-out-the-vote activity and political association and expression, the challenged provisions and their enforcement are causing irreparable harm both to voters who seek to vote by mail-in ballot, as well as to those who seek to associate with and assist such voters. Notably, the challenged provisions have had an overwhelming and disproportionate ill effect on African-Americans, Hispanics, and Democrats, largely because Defendants' enforcement efforts have been targeted against members of these groups.

Plaintiffs hereby move for a preliminary injunction forbidding enforcement of the challenged provisions in advance of the November 2, 2006 general election, based on those provisions' facial unconstitutionality and unlawfulness. In particular, Plaintiffs seek a preliminary injunction based on Counts I-IV of the Complaint, which allege that the challenged provisions: (1) violate the fundamental right to vote under the First and Fourteenth Amendments (Count I); (2) violate the First Amendment's guarantee of associational and expressive rights (Count II); (3) are unconstitutionally vague (Count III); and (4) violate Section 208 of the Voting Rights Act of 1965 (Count IV). Such an injunction will ensure that voters who seek to vote by mail do not face unreasonable and unnecessary obstacles to having their vote counted.[2]

As detailed below and in the attached materials, Plaintiffs have established the necessary prerequisites for injunctive relief. Not only do Plaintiffs have a substantial likelihood of success on the merits of their claims, but they face immediate and irreparable harm from the squelching

[2] For the sake of expediency, Plaintiffs do not seek preliminary injunctive relief on the remainder of their claims, which largely pertain to the invidious and discriminatory enforcement of the challenged provisions against minorities and Democrats. Plaintiffs will pursue those claims in the ordinary course of this litigation.

of their fundamental voting and associational rights in advance of the November 2006 election. The balance of the harms and the public interest also strongly favor the grant of a preliminary injunction. Accordingly, like other courts recently confronting similarly unwarranted state burdens on the right to vote, this Court should enjoin the challenged provisions. *See, e.g.*, *ACORN v. Cox*, No. 1:06-CV-1891-JTC (N.D. Ga. Sept. 28, 2006) (enjoining voter registration requirements); *Project Vote v. Blackwell*, No. 1:06-cv-1628, 2006 U.S. Dist. LEXIS 64354 (N.D. Ohio Sept. 9, 2006) (enjoining voter registration requirements); *League of Women Voters of Fla. v. Cobb*, No. 06-21265-CIV-Seitz/McAliley, 2006 U.S. Dist. LEXIS 61070 (S.D. Fla. Aug. 28, 2006) (enjoining voter registration requirements); *Common Cause/GA v. Billups*, No. 4:05-CV-0201-HLM, 2006 U.S. Dist. LEXIS 56100 (N.D. Ga. July 14, 2006) (enjoining voter identification requirements); *Gonzalez v. State of Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006) (enjoining, pending appeal, voter registration and identification requirements).

FACTUAL BACKGROUND

A. Legitimate, Longstanding Efforts To Assist Texas Voters With Mail-In Balloting.

Texas law provides a statutory right to cast a mail-in ballot for any qualified voter who is 65 years or older on Election Day, who will be absent from the county of residence on election day, or who is disabled or ill. Tex. Election Code §§ 82.001-82.003. In order to vote by mail, a registered voter "who is eligible for early voting must make an application for an early voting ballot to be voted by mail." *Id.* § 84.001(a). After applying for and receiving a mail-in ballot, a voter must then "mark a ballot voted by mail in accordance with the instructions on the ballot envelope," *id.* § 86.005(a), and then "place it in the official ballot envelope and then seal the ballot envelope, place the ballot envelope in the official carrier envelope and then seal the carrier

envelope, and sign the certificate on the carrier envelope," *id.* § 86.005(c). The marked ballot "must be returned to the early voting clerk in the official carrier envelope." *Id.* § 86.006(a).

Because many voters who vote by mail-in ballot are elderly or otherwise impaired, there is a longstanding practice in Texas—by Plaintiffs and other similarly situated individuals and organizations—of providing assistance to mail-in voters. Hernandez Decl. ¶ 2. Efforts to assist mail-in voters have been conducted by both major political parties and other civic organizations. *Id.* ¶ 8. For example, the Plaintiff Texas Democratic Party has long undertaken efforts to assist mail-in voters in order to maximize voter turnout, particularly among the elderly and disabled, *id.* ¶ 2, and in 2006, the Party expects to spend approximately $100,000 in efforts to assist mail-in voters, *id.* ¶ 3. The Party has also implemented special voter turnout efforts to increase voter turnout in minority communities, including the black and Hispanic communities throughout Texas, because turnout in such communities is typically lower than in Anglo communities, due in large part to the long history of voting discrimination by the State. *Id.* ¶ 9.

Assisting voters with mail-in voting takes many forms. As explained in the attached Declaration of Ruben Hernandez, who is the Executive Director of the Plaintiff Texas Democratic Party, such efforts include: providing assistance to voters in completing an application for a mail-in ballot, including mailing "pre-filled" applications to voters, who then need only sign and return the application; helping voters who have received mail-in ballots with marking their ballots (particularly for voters who are blind or who cannot read or write); and physically placing sealed ballots in the mail or otherwise delivering the ballots to election officials. *Id.* ¶ 2. Some voters need assistance for the entire application and voting process. *Id.* ¶ 4. In all cases, the assistor merely provides whatever help the voter requests. *Id.* ¶ 6. In particular, in situations where the Party member providing assistance is needed to read the ballot

to a voter or to provide instruction in marking the ballot, the voter's decision to vote is made by the voter without influence or pressure from the assistor. *Id.*

In many cases, a Party member assisting a voter with a mail-in ballot is specifically asked to take the voter's completed ballot, which must be sealed in the carrier envelope, and to mail that ballot for the voter. *Id.* ¶¶ 5, 7. Because it is often infeasible or inefficient for an assistor to immediately deposit a completed ballot in the mail or with a common carrier, the Party's practice, prior to the 2003 changes in Texas law, was to allow assistors to accumulate completed ballots (often in a central location) throughout the course of a day. *Id.* ¶ 7. Then, at the end of the day, a Party representative—not necessarily the assistor who interacted with a given voter—would deliver the completed mail-in ballots to the early voting clerk. *Id.* In past years, a significant number of individuals working on behalf of campaigns and the Democratic Party at the county level have been involved in assisting mail-in voters, including mailing voters' ballots.

Mail-in voters regularly inform the Party that they appreciate the assistance provided by the Party. *Id.* ¶ 3. Absent such efforts to assist mail-in voters, such as those long undertaken by the Party and the individual Plaintiffs, many potential mail-in voters would find it difficult or impossible to receive a mail-in ballot or properly complete and cast a ballot. *Id.* ¶ 8. That voters rely on such assistance is exemplified by Plaintiff Parthenia McDonald, who is 78-years old, homebound, and severely physically handicapped, and who requires the assistance of others in order to receive and cast her mail-in ballot. Complaint ¶ 7.

B. The Challenged Provisions.

Texas law—like the law of other states—has long provided for criminal and other penalties to combat voter fraud. In provisions applicable to both in-person and mail-in voting, Texas criminalizes "illegal voting"—*i.e.*, voting by ineligible individuals, multiple voting, and

voting while impersonating another person. Tex. Election Code § 64.012. It is also an offense under Texas law to provide "unlawful assistance" to voters in completing their in-person or mail-in ballots—*i.e.*, by assisting ineligible voters, by acting against the will of the voter, or by suggesting to the voter how to vote. *Id.* §§ 64.036(1)-(3). In addition, Texas criminalizes the provision of false information on an application for a mail-in ballot. *Id.* § 84.0041.

Despite these broad prohibitions already empowering Texas officials to combat actual voter fraud, the Texas Legislature amended the Texas Election Code in 2003 to create a series of novel, vague and broad additional prohibitions related to mail-in voting. *See* House Bill 54, 2003 Tex. Gen Laws 393 (78th Legislature 2003). According to the committee reports pertaining to House Bill 54, the new provisions concerning mail-in ballots were enacted to "clairif[y] procedures for early voting by mail" and to "prevent voting fraud." Senate Research Center Reports on H.B. 54 (May 10, 2003) and C.S.H.B. 54 (May 20, 2003). Specifically, the legislation purported to address those who, "[i]n recent elections," allegedly "unlawfully assisted [mail-in] voters with completing early voting ballot applications and with marking and delivering their ballots," as well as those who "have also engaged in the buying and selling of mail ballots to alter election outcomes." Committee Report on C.S.H.B. 54 (undated).

Many of the provisions enacted in 2003, however, bear no direct relevance to the fraud purportedly targeted by that legislation. Rather, these provisions largely create burdensome and unnecessary restrictions upon mail-in balloting that do not prevent or detect fraud, but instead suppress legitimate and constitutionally protected voting and expressive activity.

Section 64.036(a)(4): Prior to 2003, Texas law already outlawed several types of "unlawful assistance" for both absentee and in-person voting. The 2003 legislation added a new category of "unlawful assistance," providing for criminal penalties if an individual "provides

assistance to a voter who has not requested assistance or selected the person to assist the voter." Tex. Election Code § 64.036(a)(4).

Section 84.003(b): Prior to 2003, Texas law already required that a mail-in ballot application signed by a witness, rather than by the applicant, must indicate the applicant's relationship to the witness and conform to the general rules applicable to the signing of election-related documents by a witness. Tex. Election Code § 84.003(a); *see id.* §1.011(a). Not only did the 2003 legislation create criminal penalties for *witnesses* who fail to follow the applicable rules for signing mail-in ballots, but it also established an additional restriction of unclear and potentially broad scope, establishing penalties for anyone who "in the presence of an applicant otherwise assists an applicant in completing an early voting ballot application" without following the documentation procedure for *witnesses*. *Id.* § 84.003(b). Notably, the term "otherwise assists" in this provision is undefined, because the specific definition of "assisting a voter" provided for by the 2003 legislation does *not* apply to Section 84.003(b). *See id.* § 64.0321.

Section 84.004: Texas law provides for criminal penalties for individuals who witness more than one mail-in ballot *application* in the same election, even if those individuals provide all the information for a witness otherwise required by statute. Tex. Election Code § 84.004.

Section 86.0051: In addition to the several new restrictions on the mail-in ballot application process, the 2003 legislation provided for broad, unprecedented criminal penalties for completely legitimate, non-fraudulent assistance provided to mail-in voters in completing and mailing their ballots. First, the Legislature added Section 86.0051 to the Texas Election Code, establishing criminal penalties related to a "carrier" envelope that holds a mail-in ballot:

> (a) A person commits an offense if the person acts as a witness for a voter in signing the certificate on the carrier envelope and knowingly fails to comply with Section 1.011.

> (b) A person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier must provide the person's signature, printed name, and residence address on the reverse side of the envelope.
>
> (c) A person commits an offense if the person knowingly violates Subsection (b). It is not a defense to an offense under this subsection that the voter voluntarily gave another person possession of the voter's carrier envelope.
>
> (d) An offense under this section is a Class B misdemeanor, unless the person is convicted of an offense under Section 64.036 for providing unlawful assistance to the same voter in connection with the same ballot, in which event the offense is a state jail felony.
>
> (e) Subsections (a) and (c) do not apply if the person is related to the applicant within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code, or is registered to vote at the same address as the applicant.

Tex. Election Code § 86.0051.

Section 86.006: The 2003 legislation also amended Section 86.006 of the Texas Election Code, among other things, to criminalize the mere *possession* of another's mail-in ballot or carrier envelope. This is the provision that has been used to prosecute Plaintiffs Ray and Johnson, and other minorities and Democrats, for non-fraudulent assistance provided to mail-in voters. In particular, Sections 86.006(f) and (g) were added to the Election Code:

> (f) A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, it is an affirmative defense to prosecution under this subsection that 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, as determined under Subsection B, chapter 573, Government Code;
> >
> > (2) registered to vote at the same address as the voter;
> >
> > (3) an early voting clerk or a deputy early voting clerk;
> >
> > (4) a person who possesses the carrier envelope in order to deposit the envelope in the mail or with a common or contract carrier and who

> provides the information required by Section 86.0051(b) in accordance with that section;
>
> (5) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or
>
> (6) a common or contract carrier working in the normal course of the carrier's authorized duties if the official ballot is sealed in an official carrier envelope that is accompanied by an individual delivery receipt for that particular carrier envelope.

(g) An offense under subsection (f) is:

> (1) a Class B misdemeanor if the person possesses at least one but fewer than 10 ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a state jail felony;
>
> (2) a class A misdemeanor if the person possesses at least 10 but fewer than 20 ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a felony of the third degree; or
>
> (3) a state jail felony if the person possesses 20 or more ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a felony of the second degree.

Tex. Election Code §§ 86.006(f), (g).

Section 86.006 was further amended in 2003 to suppress the longstanding, legitimate activities of political parties and other entities that organize assistance to mail-in voters. Prior to the 2003 legislation, Texas law already substantially restricted political parties' ability to return carrier envelopes on behalf of voters, prohibiting the return of such envelopes from a headquarters of a political party or candidate, from a candidate, or from a political committee involved in the election. Tex. Election Code §§ 86.006(d)(1)-(3). Now, Texas law prohibits such return from *any* "office" of a political party. *Id.* § 86.006(d)(1). Voter turnout efforts by political parties are further hampered by the new requirement that "[c]arrier envelopes may not

be collected and stored at another location for subsequent delivery to the early voting clerk." *Id.* § 86.006(e). And now, a carrier envelope may be transported and delivered to election officials *only* by mail or common carrier—as opposed to any other delivery method, *id.* § 86.006(a), including those traditionally used by political parties and other organizations.

Critically, violations of Section 86.006 result in the complete denial of voters' right to vote: "[a] ballot returned in violation of this section ***may not be counted.***" *Id.* § 86.006(h).

C. The Present Lawsuit.

By Complaint filed on September 21, 2006, Plaintiffs challenged these restrictive provisions of Texas law concerning mail-in balloting, which threaten to severely hamper legitimate efforts of Plaintiffs and similarly situated individuals to assist mail-in voters exercise their fundamental right to vote. Plaintiffs are the Texas Democratic Party, which is an organization that has long engaged in legitimate efforts to assist mail-in voters (in particular, disabled and elderly voters) exercise their right to vote, as well as several Party members (Ms. Ray, Ms. Johnson, Ms. Meeks, Ms. Minneweather, and Mr. Hinojosa) who have engaged in such efforts in the past and wish to continue assisting mail-in voters in the future. Complaint ¶¶ 2-6, 8-9. In addition, Plaintiff Parthenia McDonald is a 78-year old, homebound Democratic voter who depends on the assistance of others to apply for and cast her mail-in ballot. *Id.* ¶ 7.

Defendants have enforced the challenged provisions in a discriminatory manner, targeting Democrats and members of minority groups for prosecution. Indeed, through public statements, website postings, and testimony before Legislative oversight committees, the Attorney General has acknowledged that all 13 individuals prosecuted under the 2003 legislation were Democrats. Hernandez Decl. ¶ 14. In addition, it appears that all but one of those prosecuted was African-American or Hispanic. Complaint ¶ 30. In 2005, Plaintiffs Ray and

Johnson, both of whom are African-American, were indicted by State officials for possessing and mailing ballots for voters who required assistance with their mail-in ballots, and they recently plead guilty to violating Tex. Election Code § 86.006(f). *Id.* ¶ 4. Plaintiffs Meeks and Minneweather, both also African-American, have been contacted by officials concerning their involvement in efforts to assist mail-in voters, and they believe that they may be subjects of an investigation by Defendants. *Id.* ¶¶ 5-6. In contrast, the Attorney General's office has refused to properly investigate violations of the election laws allegedly committed by Republicans, such as those involving the improper and illegal handling of ballots. Hernandez Decl. ¶¶ 15-16.[3]

Because the statutory provisions and their discriminatory enforcement by State officials threaten to stifle Plaintiffs' efforts to assist mail-in voters in the November 2006 general election, Plaintiffs move for a preliminary injunction to prevent enforcement of the challenged provisions by State officials. As the Complaint and attached evidentiary materials make clear, the challenged provisions—in particular, Section 86.006(f), which criminalizes the mere possession of another's mail-in ballot—have had a chilling effect on those who seek to assist mail-in voters. For example, the Texas Democratic Party reports that many Party activists are simply unable or unwilling to provide assistance to mail-in voters for fear of investigation or prosecution by State officials, even in the complete absence of any fraudulent activity. Hernandez Decl. ¶¶ 10-11, 13. Accordingly, the Party foresees a substantial decline in such assistance as compared to previous

[3] The Complaint further details the racially discriminatory nature of the 2003 legislation and its enforcement by Defendants. The Legislature knew or should have known that the legitimate practices criminalized by the 2003 legislation were particularly utilized in many minority communities in Texas. Complaint ¶ 21. Moreover, materials prepared by State officials regarding the challenged provisions have made the unfounded suggestion that a correlation exists between membership in a minority group and engaging in voter fraud. *Id.* ¶ 31. For example, a PowerPoint presentation prepared by the office of Attorney General Abbott contains a visual of African-American voters standing in line to vote as an illustration of "Poll Place Violations." *Id.* ¶ 32. That same presentation uses a graphic of the "sickle cell stamp"—a postage stamp used widely by African Americans, whom sickle cell disease particularly affects—to exemplify "unique stamps" associated with voter fraud, despite no legitimate basis for making that connection. *Id.* ¶¶ 32-33. Plaintiffs' motion is not based on the counts of the Complaint alleging racial discrimination, but the discriminatory implementation of the challenged provisions is relevant to show those provisions' breadth, vagueness and consequent susceptibility to abuse.

years. *Id.* ¶¶ 7, 13. Party officials, worried about encouraging members to engage in activities that may lead to investigation or prosecution, have been forced to curtail their ordinary efforts in encouraging members to get out the vote, with some voter turnout programs starting later than planned or not at all. *Id.* ¶¶ 13, 17. Potential volunteers also are confused about the legal requirements for mail-in voting and fear politically-motivated investigation and prosecution by Defendants and other State officials, particularly in light of recent comments of State officials, such as the Texas Solicitor General's false and defamatory statements about the Plaintiffs in this case, *Id.* ¶¶ 13, 17. The Party has attempted to receive clarification from State officials about the scope of the challenged provisions and their enforcement, but has not received adequate clarification, leaving interpretation of the novel and vague requirements in the hands of local election administrators and individuals citizens. *Id.* ¶ 17.

Absent assistance from Plaintiffs and others like them who wish to assist mail-in voters, many elderly and disabled voters will not be able to receive and cast mail-in ballots in the upcoming election, resulting in lost votes that could be outcome determinative. *Id.* ¶¶ 8, 13.

ARGUMENT

THE CHALLENGED PROVISIONS ARE FACIALLY UNCONSTITUTIONAL AND UNLAWFUL AND SHOULD BE PRELIMINARILY ENJOINED.

Plaintiffs are entitled to a preliminary injunction if they establish the following: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from the injunction to the non-movant; and (4) that the injunction will not undermine the public interest." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997); *Canal Authority of Florida v. Callaway*, 489 F.2d 569, 572 (5th Cir. 1974); *Cisco Sys., Inc. v. Huawei Tech., Co.*, 266 F. Supp. 2d 551, 553 (E.D. Tex. 2003).

As this Court has previously explained, "[t]he application of these factors varies with the facts of each case:

> 'Although a showing that plaintiff will be more severely prejudiced by a denial of the injunction than defendant would be by its grant does not remove the need to show some probability of winning on the merits, it does lower the standard that must be met. Conversely, if there is only slight evidence that plaintiff will be injured in the absence of interlocutory relief, the showing that he is likely to prevail on the merits is particularly important.'"

Cisco, 266 F. Supp. 2d at 553 (quoting *Canal Authority*, 489 F.2d at 578).

Entry of a preliminary injunction "rests in the discretion of the district court," *Canal Authority*, 489 F.2d at 572; *Cisco*, 266 F. Supp. 2d at 553, and "must not be disturbed" on appeal "unless grounded upon a clearly erroneous factual determination, an error of law, or an abuse of discretion," *Valley*, 118 F.3d at 1051.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs Are Likely To Show That The Challenged Provisions Burden The Fundamental Right To Vote.

The Supreme Court and Fifth Circuit have long recognized that "[v]oting is of the most fundamental significance in our constitutional system," *Texas Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)), implicating "basic constitutional rights" under the First and Fourteenth Amendments, *Anderson v. Celebrezze*, 460 U.S. 780, 786 & n.7 (1983).[4] To ensure the right to vote is not compromised by burdensome and unnecessary State election regulations and procedures, "[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 against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Kirk*, 84 F.3d at 182 (citing

[4] As the Supreme Court explained in *Anderson*, a constitutional voting rights challenge is based "directly on the First and Fourteenth Amendments" and does not necessarily require "a separate Equal Protection Clause analysis," although Equal Protection Clause caselaw informed the Supreme Court's analysis in *Anderson*. 460 U.S. at 786 n.7.

Burdick, 504 U.S. at 434, and *Anderson*, 460 U.S. at 789). "Only after weighing all these factors is a reviewing court in a position to decide whether the challenged provision is unconstitutional." *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988) (quoting *Anderson*, 460 U.S. at 789). Although "[a] single unreasonable barrier" may violate the Constitution, "[s]everal requirements of an election code may combine" to function unconstitutionally. *Pilcher*, 853 F.2d at 336.

The Supreme Court has cautioned that this balancing analysis "will not be automatic," because "there is 'no substitute for the hard judgments that must be made.'" *Anderson*, 460 U.S. at 789-90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 n.10 (1974)). Nonetheless, both the Supreme Court and Fifth Circuit have described some basic guidelines for the analysis. When First and Fourteenth Amendment rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling interest.'" *Burdick*, 504 U.S. at 434; *accord*, *e.g.*, *Kirk*, 84 F.3d at 182. In contrast, if a challenged "provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434; *accord*, *e.g.*, *Kirk*, 84 F.3d at 182.[5]

In this case, the strictest scrutiny applies because the challenged provisions are "severe" restrictions on Plaintiffs' First and Fourteenth Amendment rights. *See, e.g.*, *Pilcher*, 853 F.2d at 336 (determining that a requirement that minor-party ballot access petitions contain voter registration numbers created a "significant burden" and enjoining the statute). The challenged provisions bear several hallmarks of "severe" burdens. To begin with, the challenged provisions

[5] It is questionable whether the challenged provisions are appropriately analyzed under the *Burdick*/*Anderson* framework rather than automatic strict scrutiny because the challenged provisions deny the vote outright, *see* Tex. Election Code § 86.006(h), whereas *Burdick*, *Anderson*, and their progeny arose in the indirect context of access to the ballot by candidates and political parties, rather than a direct infringement on the right to vote. However, because Plaintiffs demonstrate a likelihood of success on the merits under the *Burdick*/*Anderson* framework, and because courts recently assessing the constitutionality of analogous state restrictions on voting have applied that framework, Plaintiffs present their right to vote arguments under the *Burdick*/*Anderson* framework.

and their criminal penalties have created a substantial burden as an empirical matter, as those provisions have and will continue to curtail longstanding efforts at providing assistance to mail-in voters. *See, e.g.*, *Kirk*, 84 F.3d at 182-83 (discussing the "substantial" burden in *Anderson*, where the challenged law "hampered independent candidates' organizing efforts," such as "volunteer recruiting"). For instance, if every person who "possesses" a given mail-in ballot must sign the envelope and provide information, *see* Tex. Election Code §§ 86.0051, 86.006(f), and if no more than one ballot can be in the same place at the same time, *see id.* § 86.006(e), and if individuals can only serve as a witness for one mail-in ballot application, *see id.* § 84.004, far less assistance will take place and far less voting by qualified mail-in voters will occur. Hernandez Decl. ¶¶ 10-13. Indeed, the challenged provisions create barriers similar to an Ohio law that was recently struck down for (1) requiring "direct return" of voter registration forms by voters, rather than by organizations engaged in voter registration drives, and (2) requiring signatures on a voter registration form for anyone who provided, received, or assisted in filling out the form—requirements that the Court found to impose an "extreme burden." *Project Vote*, 2006 U.S. Dist. LEXIS 64354, at *29-33, 35-36. Unsurprisingly, the Texas Democratic Party reports a substantial decline in its ability to get out the vote among mail-in voters, based on the exacting requirements that State law now imposes on such efforts. Hernandez Decl. ¶¶ 7, 10-13. In cases involving a decline in get-out the vote efforts, courts find a severe burden. *See, e.g.*, *League of Women Voters*, 2006 U.S. Dist. LEXIS 61070, at *55-57 (describing state restrictions on voter registration, which "reduced the quantum of political speech and association" by chilling organizations' voter registration activities); *ACORN v. Cox*, Slip Op. at 14 (same).

Second, heightened scrutiny is warranted because the challenged provisions impose the most severe of burdens by operating to deny the vote outright, rather than simply regulating

matters incidental to voting. For example, ballots submitted in violation of Section 86.006 procedures "***may not be counted***." Tex. Election Code § 86.006(h). Where regulations result in a decline of voting activity by qualified voters, courts find a severe burden. *See, e.g.*, *Common Cause/Georgia*, 2006 U.S. Dist. LEXIS, at *161-62 (concluding that Georgia's photo ID requirement is a severe burden because it "makes the exercise of the fundamental right to vote extremely difficult" and is "likely to prevent Georgia's elderly, poor, and African-American voters from voting").

Third, the challenged provisions are unprecedented. In particular, Plaintiffs are aware of no other jurisdiction that criminalizes mere *possession* of the absentee ballot of another person. Courts recognize that a "severe" burden is more likely to exist when a state election restriction is unique. *See, e.g.*, *Pilcher*, 853 F.2d at 336 (explaining that "no other state requires voter registration numbers on minor party petitions"); *Lee v. Keith*, No. 05-4355, 2006 U.S. App. LEXIS 23686, at *3, 14-15 (7th Cir. Sept. 18, 2006) (striking down Illinois' ballot access law for independent candidates under strict scrutiny, because that law imposed burdens that were "the most restrictive in the nation"); *Project Vote*, 2006 U.S. Dist. LEXIS 64354, at *23 (explaining that the "harshness of these [registration] requirements" was illustrated by defendants' inability "to point to any other state that has enacted anything remotely similar to the burdens Ohio has placed upon compensated voter registration workers").

Fourth, the challenged provisions require heightened scrutiny because they are discriminatorily targeted at organized efforts of political parties—in particular, the Democratic Party. *Burdick*, 504 U.S. at 434 (contemplating heightened scrutiny for discriminatory regulations); *Kirk*, 84 F.3d at 182 (same). For example, the challenged provisions forbid sending mail-in ballots from any political party office, *see* Tex. Election Code § 86.006(d)(1), and

prohibit the accumulation of ballots for delivery to election officials, *id.* § 86.006(e), thereby thwarting longstanding, legitimate logistics used by political parties. Because the challenged provisions both expressly and effectively distinguish between political party activities and those of non-organized individuals, heightened scrutiny is necessary. *See, e.g.*, *League of Women Voters*, 2006 U.S. Dist. LEXIS 61070, at *64-65 (describing the law's discrimination against non-party organizations); *Project Vote*, 2006 U.S. Dist. LEXIS 64354, at *26-27 (discussing the burden created by a law that discriminates against a "selected class" of compensated voter registration workers).

Because the challenged provisions create a "severe burden," they fail constitutional scrutiny absent a compelling state interest and narrowly tailored means of achieving that interest. *See, e.g.*, *Burdick*, 504 U.S. at 434; *Kirk*, 84 F.3d at 182. The State's proffered justification is preventing voter fraud. Although that is an important and legitimate state interest in theory, the challenged provisions do not pertain to any actual fraudulent practices, but instead restrict legitimate efforts to assist voters in obtaining and casting mail-in ballots. Because there is no evidence of fraud related to the conduct covered by the challenged provisions, the State's purported justification is lacking. *See, e.g.*, *League of Women Voters*, 2006 U.S. Dist. LEXIS 61070, at *70-71; *Project Vote*, 2006 U.S. Dist. LEXIS 64354, at *28-29, 32, 36-37; *Common Cause/Georgia*, 2006 U.S. Dist. LEXIS 56100, at *162-64; *ACORN v. Cox*, Slip Op. at 15.

Moreover, the challenged provisions are not narrowly tailored to address any fraud pertaining to mail-in ballots, as they criminalize a wide range of completely unobjectionable and non-fraudulent conduct. For example, Plaintiffs Ray and Johnson pled guilty to possession of another's mail-in ballot, despite no allegation or evidence of actual fraud related to the voting of the ballots at issue. Notably, there are many already existing provisions of the Texas Election

Code that enable the prosecution of actual fraudulent activity related to mail-in voting. *See, e.g.*, Tex. Election Code § 64.012 (illegal voting); §§ 64.036(1)-(3) (unlawful assistance, such as acting against the will of the voter or telling the voter how to vote); § 84.0041 (false information on a mail-in ballot application). Courts regularly find a lack of narrow tailoring when the state's purported interest can be accomplished through existing laws and regulations. *See, e.g.*, *League of Women Voters*, 2006 U.S. Dist. LEXIS 61070, at *72; *Common Cause/Georgia*, 2006 U.S. Dist. LEXIS 56100, at *164; *Project Vote*, 2006 U.S. Dist. LEXIS 64354, at *38-39; *ACORN v. Cox*, Slip Op. at 15-16. Because the regulations at issue are not narrowly tailored to serve any compelling interest, they are unconstitutional.

Even if strict scrutiny does not apply, the challenged provisions are unconstitutional under the *Anderson*/*Burdick* framework because they do not serve "important regulatory interests" of the State, *Burdick*, 504 U.S. at 434; *Kirk*, 84 F.3d at 182, that "make it necessary to burden the plaintiff's rights," *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789. *See, e.g.*, *Cotham v. Garza*, 905 F. Supp. 389, 398 (S.D. Tex. 1995) ("The Supreme Court and the Fifth Circuit have consistently refused to uphold election statutes found to impose even limited burdens on Constitutional rights without a showing of necessity."); *Project Vote*, 2006 U.S. Dist. LEXIS 56100, at *18-19 (striking down "substantial" restrictions on voter registration by analyzing whether "the regulations address a legitimate and important state interest" and whether they "serve that interest in a way that is no greater than necessary in light of the importance of the interest"). For example, in *Cotham v. Garza*, the Southern District of Texas struck down a provision of the Texas Election Code that banned the voter's possession of written communications while marking a ballot, despite the Court's determination that the provision did not "severely" burden voters' rights. 905 F. Supp. at 398, 400-01. As the Court explained,

although preventing fraud is a legitimate state interest in the abstract, the challenged law was not necessary to achieve that interest, particularly because the state's myriad anti-electioneering statutes already protected the integrity of the polling place by prohibiting voters from sharing, exchanging or displaying campaign materials at the polling place. *Id.* at 400. Similarly here, the challenged provisions are not necessary to prosecute fraud related to mail-in balloting, because many pre-existing provisions of Texas law prohibit voters from exercising undue influence on mail-in voters and engaging in other forms of mail-in ballot fraud. *See, e.g.*, Tex. Election Code §§ 64.012, 64.036(1)-(3), 84.0041. Thus, the challenged provisions are unconstitutional regardless of whether heightened scrutiny applies.

B. The Challenged Provisions Are Overbroad And Violate The First Amendment.

Plaintiffs have pleaded a separate First Amendment claim because the challenged provisions unconstitutionally restrict core political speech and association in an overbroad manner. They are likely to succeed on the merits of this claim.

Where, as here, the regulation of core political speech is at issue, strict scrutiny applies. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 & n.12 (1999) (subjecting restrictions on ballot initiative petition circulation to strict scrutiny); *see, e.g.*, *id.* at 207-08 (Thomas, J., concurring) (explaining that "[w]hen a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny," and that "[w]hen core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1995) (explaining that the *Burdick/Anderson* framework does not apply to regulations of pure speech, such as a law prohibiting anonymous campaign

literature); *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (applying strict scrutiny to state law outlawing paid petition circulators).

Several of the challenged prohibitions do not merely regulate the voting process, but outlaw individuals' ability to associate and speak freely with voters. For example, Section 64.036(a)(4) of the Texas Election Code provides for criminal penalties if an individual "provides assistance to a voter who has not requested assistance or selected the person to assist the voter," effectively preventing individuals from seeking out previously unknown voters in order to assist them. Section 84.004 of the Texas Election Code categorically prohibits individuals from witnessing more than one mail-in ballot *application* in the same election, effectively preventing would-be assistors from helping more than one voter each. And Section 84.003(b) of the Election Code requires documentation of anyone who "in the presence of an applicant otherwise assists an applicant in completing an early voting ballot application," but fails to define "otherwise assists," leaving that term open to covering basic association and exchanges of information between voters and would-be assistors. Because the challenged provisions do not merely "control the mechanics of the electoral process," but regulate "pure speech" of would-be assistors, strict scrutiny applies. *McIntyre*, 514 U.S. at 345. And, as detailed above, the challenged provisions cannot survive strict scrutiny because they are not narrowly tailored to serve any compelling state interest. *See supra* Section I.A.

Furthermore, the challenged provisions are facially invalid under the First Amendment because they are substantially overbroad. *See, e.g.*, *Houston v. Hill*, 482 U.S. 451, 458-59 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-16 (1973); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 561 (5th Cir. 1988). As the Supreme Court has explained, overbreadth analysis properly applies where, as here, "rights of association [are] ensnared in

statutes which, by their broad sweep, might result in burdening innocent associations." *Broadrick*, 413 U.S. at 612; *see, e.g., Howard Gault Co.*, 848 F.2d at 561 (striking down statute as unconstitutionally overbroad because the "statute is so broadly written that it cannot help but have a deterrent effect on the exercise of First Amendment rights"). In particular, criminal statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application," *Houston*, 482 U.S. at 459, so long as the overbreadth of the challenged provisions is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *Broadrick*, 413 U.S. at 615. As discussed above, the challenged provisions have *no* constitutional applications, because they are not directed at actual voter fraud, but instead pertain to protected associational and voting activities. But even if the challenged provisions were applicable to some actual fraudulent activity, those applications of the provisions would be miniscule in comparison to the wide range of completely innocent, non-fraudulent conduct covered. Accordingly, the challenged provisions are facially invalid under the First Amendment. *See, e.g., Houston*, 482 U.S. at 466-67 (striking down ordinance as overbroad because it "is susceptible of regular application to protected expression"); *Howard Gault Co.*, 848 F.2d at 561.

C. The Challenged Provisions Are Void For Vagueness.

Under the First and Fourteenth Amendments, the challenged provisions are also facially void for vagueness because they fail to provide fair notice of the conduct covered and thus "may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see, e.g., J&B Ent't v. City of Jackson*, 152 F.3d 362, 367 & n.6 (5th Cir. 1988). "An enactment is void for vagueness if its prohibitions are not clearly defined." *J&B Ent't*, 152 F.3d at 367 (quoting *Grayned*, 408 U.S. at 109). "In determining whether a statute is vague," the

Court "view[s] the law from the standpoint of a person of ordinary intelligence." *J&B Ent't*, 152 F.3d at 367 (citing *Grayned*, 408 U.S. at 109).

The challenged provisions are vague in several critical respects. For instance, Section 64.036(a) forbids the provision of assistance to a voter "who has not requested assistance or selected the person to assist the voter," leaving unclear whether a person who is at first unknown to the voter may ultimately serve as an assistant after speaking to the voter and receiving the voter's consent. Similarly ambiguous is Section 86.006(f)'s broad ban on "possession" of mail-in ballots and carrier envelopes, which does not, among other things, specify whether a ballot or carrier envelope must be *marked* for its possession to be illegal, thus calling into question whether the statute criminalizes the mere possession of another's *unmarked* ballot. Furthermore, the combined requirements of Section 86.0051 and 86.006(f) appear to require *all* individuals witnessing, assisting, and/or possessing a mail-in ballot to provide their signature and identifying information on the carrier envelope, but the carrier envelope has room for only one individual's information, making the responsibilities of multiple assistors completely unclear. Additionally, Section 84.003(b) does not make clear the scope of banned activities related to assisting voters with their mail-in ballot applications, as it merely forbids individuals from "otherwise assist[ing]" voters in an undefined manner not covered by Section 64.0321's specific definition of "assisting a voter." The meaning of Section 86.006(e) is also entirely unclear, barring the "collect[ion]" or "stor[age]" of carrier envelopes at "another location for subsequent delivery"—broad, undefined terms that could be read, for example, to prohibit an individual from collecting mail-in ballots in the course of a day of providing individual assistance to voters.

The harms from such vagueness are patent. First, the challenged provisions' vagueness make them susceptible to arbitrary and discriminatory enforcement which, unsurprisingly, has

already occurred. *See* Hernandez Decl. ¶¶ 13-17; *J&B Ent't*, 152 F.3d at 367 n.6 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application" (quoting *Grayned*, 408 U.S. at 108-09)). The vagueness of the challenged provisions also causes grave harm by chilling completely legitimate, non-fraudulent activity, as individuals and organizations curtail their behavior to avoid violating the uncertain contours of the challenged provisions. *See* Hernandez Decl. ¶¶ 7, 10-13; *J&B Ent't*, 152 F.3d at 367 n.6 ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." (internal quotation marks and citations omitted) (quoting *Grayned*, 408 U.S. at 109)).

D. The Challenged Provisions Violate Section 208 Of The Voting Rights Act of 1965 Entitling Voters To Assistance Of Their Choice.

Section 208 of the Voting Rights Act provides that "[a]ny 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." 42 U.S.C. § 1973aa-6; *see, e.g.*, *United States v. Berks County*, 250 F. Supp. 2d 525, 532-33, 538 (E.D. Pa. 2003) (issuing injunction based in part on a violation of Section 208 by denying non-English speaking voters "the right to bring the assistor of choice into the voting booth"); *American Ass'n of People with Disabilities v. Hood*, 278 F. Supp. 2d 1345, 1356 (M.D. Fla. 2003) (explaining that Section 208 "provides disabled voters who require assistance the right to have a person of their choice assist them").

The challenged provisions violate Section 208 because they unduly burden the right of mail-in voter to receive "assistance by a person of the voter's choice." 42 U.S.C. § 1973aa-6. For example, Section 84.003(b) of the Texas Election Code unjustifiably requires anyone

providing even minimal assistance regarding a voter's mail-in ballot application to comply with the detailed requirements for *witnesses* who actually sign voter applications. Moreover, under Sections 86.0051 and 86.006(f), would-be assistors are subject to criminal penalties for merely mailing or possessing a mail-in ballot at the voters request. And, in stark conflict with the purpose of Section 208—avoiding denial or infringement of disabled voters' right to vote, *Hood*, 178 F. Supp. 2d at 1355—the challenged provisions go so far as to deny the vote to voters who seek or receive assistance that does not comply with Section 86.006, by providing that any ballot returned in violation of Section 86.006 "***may not be counted***." Tex. Election Code § 86.006(h). As one court issuing an injunction based on a violation of Section 208 explained, absent evidence that Section 208 is being used "as a pretext for illegal assistance, the Court has no basis to assume that illegal assistance will take place, and must give deference to the provisions of Section 208." *Berks County*, 250 F. Supp. 2d at 538. Similarly here, absent any evidence of fraud or illegality by those who assist needy voters in obtaining and mailing their mail-in ballots, Section 208 controls and renders the challenged provisions unlawful.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

Irreparable harm to Plaintiffs is presumed in this case because the challenged provisions violate Plaintiffs' constitutional and statutory rights. "Loss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And, as the Fifth Circuit has long held, "where preliminary injunctive relief is expressly authorized by a civil rights statute, irreparable harm is presumed from the very fact that the statute has been violated." *United States v. McMillan*, 946 F. Supp. 1254, 1268 (S.D. Miss. 1995) (citing progeny of *United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969));

see, e.g., *Berks County*, 250 F. Supp. 2d at 540 ("Federal courts have recognized that the holding of an upcoming election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters.").

Here, Plaintiffs have shown a substantial likelihood of success on their constitutional and Voting Rights Act claims. Accordingly, irreparable harm is presumed. In addition, Plaintiffs have established that the challenged statutes have and will continue to chill individuals' and organizations' First Amendment rights and will hamper (or eliminate) many mail-in voters' ability to exercise their fundamental right to vote in the upcoming November election. *See* Hernandez Decl. ¶¶ 8, 13. In light of the impending election, Plaintiffs have plainly established the irreparable harm required for a preliminary injunction. *See, e.g.*, *Project Vote*, 2006 U.S. Dist. LEXIS 64354, at * 38 ("But for the issuance of an injunction, Plaintiffs will continue to be dissuaded from engaging in an important political activity, and will no longer enjoy the freedom they once had to enthusiastically register Ohio citizens to vote, and to encourage participation in the political process."); *League of Women Voters*, 2006 U.S. Dist. LEXIS 61070, at *77 (finding irreparable harm where "Plaintiffs have halted or significantly scaled back their voter registration operations and are losing valuable time to engage in core political speech and association and to add new registrants to Florida's voter rolls" before the deadline for the impending election); *Common Cause/Georgia*, 2006 U.S. Dist. LEXIS 56100, at *188-89 (concluding that irreparable harm exists because Georgia's photo ID requirement "likely will cause a number of Georgia voters to be unable to cast a vote and to have their vote counted" in upcoming elections); *ACORN v. Cox*, Slip Op. at 17 ("[A]n election is a single event incapable of being repeated, and any deprivation of Plaintiffs' rights cannot be remedied after the election is over.").

III. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH HEAVILY IN FAVOR OF A PRELIMINARY INJUNCTION.

As courts recently enjoining burdensome state election laws have recognized, the balance of harms and the public interest both support a preliminary injunction in circumstances such as those presented here. *See, e.g.*, *League of Women Voters*, 2006 U.S. Dist. LEXIS 61070, at *78 ("given that the Defendants have not demonstrated that the Law is necessary to further their asserted interests, and because Plaintiffs have important First Amendment freedoms at stake, the balance of interests clearly favors injunctive relief"); *Project Vote*, 2006 U.S. Dist. LEXIS 64354, at *40-41 ("Because the restrictions on voter registration activities outlined above, viewed separately or in combination, do not promote the exercise of the right to vote but, rather, chill the exercise of that right through an unusual and burdensome maze of laws and penalties . . . the public interest can only be protected through elimination of these barriers."); *Common Cause/Georgia*, 2006 U.S. Dist. LEXIS, at *190-92; *ACORN v. Cox*, Slip Op. at 17 ("Defendants have not demonstrated that the Regulation is necessary to further the State's interest" and "[t]he public's interest is advanced by registering as many eligible voters as possible").

As noted, the harm to Plaintiffs and similarly situated individuals is great, as the challenged provisions will reduce the number of mail-in voters able to cast their ballots and have them counted. In contrast, and as discussed above, any State interest in preventing voter fraud is not advanced by the challenged provisions, particularly given that the State has a wide array of tools at its disposal to prosecute any actual acts of voter fraud or other improper assistance with mail-in ballots. Thus, there is no demonstrable harm to the State from an injunction of these provisions. The public interest is also best served by an injunction, because only an injunction will protect the fundamental First Amendment and voting rights of Plaintiffs and ensure robust participation in the political process. *See, e.g.*, *Common Cause/Georgia*, 2006 U.S. Dist. LEXIS

56100, at *192 ("Because the right to vote is a fundamental right, removing the undue burdens on that right . . . serves the public interest.").

CONCLUSION

For the foregoing reasons, and all others apparent to the Court, Sections 64.036(a)(4), 84.003(b), 84.004, 86.0051, and 86.006 of the Texas Election Code should be preliminarily enjoined and Defendants should be barred (absent further Order from this Court) from any investigation, enforcement, or application of those provisions to deny plaintiffs or any qualified voter in Texas the right to vote by mail, the right to receive lawful assistance in voting, or the right to provide lawful assistance to voters, including the possession or mailing of an application for a mail-in ballot, a mail-in ballot, or a carrier envelope.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

Gerry Hebert discussed this motion with Ed Burbach, Deputy Attorney General, who advised that the defendants are opposed to this motion.

Eric M. Albritton

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 13th day of October, 2006.

Eric M. Albritton

IN THE UNITED STATES DISTRICT COURT
FOR THE 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. 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.	)	Civil Action No. 06CV-385

DECLARATION OF RUBEN HERNANDEZ

Pursuant to 28 U.S.C. §1746, I, Ruben Hernandez, declare that:

1. My name is Ruben Hernandez and I reside in Travis County, Texas. I am a registered voter in Texas and I currently serve as the Executive Director of the Texas Democratic Party.

2. For many years, the Texas Democratic Party has encouraged loyal Democratic voters to engage in lawful efforts to maximize voter turnout, particularly among the elderly and disabled. One well-established and common practice the Texas Democratic Party has engaged in for many years has been to make a concerted effort to encourage eligible voters to vote by mail. This effort of providing mail-in ballot assistance has taken many forms, including:

providing assistance to voters in completing an application for a mail-in ballot, including mailing "pre-filled" applications to voters, who then need only sign and return the application; helping voters who have received mail-in ballots with marking their ballots (particularly for voters who are blind or who cannot read or write); and physically placing sealed ballots in the mail for voters who vote with mail-in ballots.

3. Take, for example, the situation where the Texas Democratic Party helps voters obtain a mail-in ballot. To do this, our Party sends to voters with a history of voting in Democratic primaries a completed application for a mail-in ballot. These completed applications are pre-filled for the voter, so that all the voter has to do is sign the application and mail it. We take this action because many voters in our Party inform us that they appreciate this service because it is a helpful reminder to request their mail-in ballot. Indeed, in 2006, our Party expects to spend approximately $100,350 in carrying out this program.

4. In addition to sending voters pre-filled mail-in ballot applications, party activists often provide voters with in-person assistance in preparing their mail-in ballot applications. Elderly and/or disabled voters frequently contact party activists to request such assistance. In some cases, the voter may have a disability and require physical assistance in filling out the application for a mail-in ballot. In other cases, the voter may need help in physically mailing the application itself. Some voters need assistance for the entire application process.

5. Once voters have completed the mail-in ballot application process and receive a ballot in the mail, such voters often contact a party activist—often a trusted friend who has assisted them with voting in the past—to provide assistance in completing and mailing the mail-in ballot. This is particularly true for elderly and disabled voters.
6. The person providing assistance may read the ballot to a voter, or provide instruction in marking the ballot. In these situations, the voter makes the decision to vote without influence or pressure from the assistor. The assistor merely provides whatever help the voter requests. If the voter needs to have the ballot read to them, due to physical disability (e.g., blindness) or illiteracy, Democratic party activists perform this function for the voters. Receiving such assistance is the only way such voters can cast legal and valid ballots.
7. In many cases in the past, the assistor was asked by the voter to take the voter's completed ballot, which was sealed in the mail-in ballot envelope (known as a carrier envelope), and to mail that completed ballot for the voter or to otherwise deliver it to the elections office. Because it was often infeasible or inefficient for an assistor to immediately deposit an individual's completed ballot in the mail or with a common carrier, our organization's practice prior to the restrictions imposed by Texas Election Code 86.006 in 2003 was to allow assistors to accumulate completed ballots (often in a central location) throughout the course of a day. Then, at the end of the day, a party representative—not necessarily the assistor who had interacted with a given voter—would deliver the completed mail-in ballots to the early voting clerk,

through the mail or otherwise. A substantial number of activists working on behalf of campaigns and the Democratic Party at the county level were involved in the assisting/mailing of mail in ballots. However, the restrictions imposed by Texas Election Code 86.006 have caused a dramatic reduction in the number of volunteers who are willing to continue this service.

8. Democratic Party activists have provided assistance to voters in mailing their mail-in ballots for many years. Absent such assistance, many elderly or disabled voters would not be able to cast their mail-in ballots. It is my understanding and belief that such voter turnout efforts are commonplace throughout Texas and are utilized by, among others, political activists associated with both major political parties in the state.

9. It has been the experience of the Texas Democratic Party that the voter turnout level among the Latino and African American populations is typically lower than in Anglo communities, due in large part to the long history of voting discrimination by the Defendant State of Texas. Thus, the Texas Democratic Party has implemented special voter turnout efforts to increase voter turnout in minority communities, including the black and Hispanic communities throughout the State.

10. The provisions of Texas law enacted in 2003 that make it a crime to possess the mail-in ballot of another (Texas Election Code Section 86.006), and to mail a ballot for a voter without providing certain information on the carrier envelope (Texas Election Code Section 86.0051) have had a chilling effect on the Texas Democratic Party's ability to participate effectively in the political

process through assisting voters with voting by mail-in ballot. Many of our party members routinely performed activities in the past that now appear to be criminalized by the provisions challenged in this lawsuit. Potential assistors fear investigation or prosecution if they fail to comply with the burdensome new requirements, many of which are confusing or unclear. For example, a carrier envelope only contains one blank for providing the name, signature and identifying information of an assistor, calling into question what assistors should do if more than one assistor is involved in delivering the ballot to election officials. Also, for purposes of efficiency and feasibility, assistors traditionally accumulated multiple completed ballots in the course of a day (often at a central location), and assistors do not want to provide assistance if they are required to personally deliver each completed mail-in ballot to the mail before collecting another completed ballot (as the new statutory provisions may be read to require).

11. With the prosecution of more than a dozen Democrats under this law thus far by the Office of the Texas Attorney General in situations involving no actual fraudulent activity, and with no similar prosecutions of Republicans conducting similar activities many Party activists are simply unable or unwilling to provide assistance to voters—even to voters who previously and routinely cast their ballots by mail with assistance from our Party members. These Party activists fear that they, like the Democrats prosecuted so far under the new provisions (such as plaintiffs Ms. Ray and Ms. Johnson), will be

targeted for prosecution because of their affiliation with our Party, despite doing nothing more than mailing a ballot at the request of a voter.

12. The assistance to voters outlawed by the provisions challenged in this lawsuit, including by Texas Election Code Sections 86.0051 and 86.006, has nothing to do with fraudulent activity and everything to do with helping people, particularly the elderly or disabled, exercise their fundamental right to vote. Criminalizing the provision of legitimate and needed assistance to voters who vote by mail-in ballot has hurt the Texas Democratic Party's ability to get out the vote among those who traditionally have cast their ballots by mail, and, in turn, has and will prevent voters from casting their ballots and having their votes counted.

13. Enforcement of the provisions challenged in this lawsuit by the Texas Attorney General and the Secretary of State has hurt the State Party's ability to recruit volunteers who could be used to assist seniors and the homebound in voting. In particular, the Texas Democratic Party faces difficulty recruiting volunteers to provide assistance to mail-in voters in advance of the upcoming November 2006 election. Volunteers tell us they are confused about the new law or, based on media coverage of the prosecutions by the Texas Attorney General, they now fear prosecution if they help a voter in need of having his or her ballot mailed. I estimate, based on my past and present familiarity with the Party's volunteers, that we will have substantially fewer volunteers this year to assist with mail-in voting than in years past and this decline is, in my view, directly attributable to the enforcement of the provisions challenged in

this lawsuit by the Texas Attorney General and the Secretary of State. Several Democratic organizations and County Democratic Party Chairs have expressed deep concern over how the restrictions imposed by Texas Election Code 86.006 will reduce the number of volunteers participating in voter turnout efforts. Because of the difficulty in recruiting volunteers and the uncertainty of future volunteer recruitment, Democratic voter turnout programs will suffer by starting later than planned or not at all. This will directly result in votes lost and put several Democratic candidates at risk of losing their elections.

14. Through public statements, website postings and testimony before Legislative oversight committees, the Attorney General has acknowledged that only Democrats have been prosecuted. Of the 13 prosecutions announced by the Attorney General, all are Democrats and none is a Republican. As a result of this politically selective enforcement, the fear and intimidation caused by the Attorney General's actions accrues only to the Democratic Party and it supporters.

15. The most dramatic publicly known example of selective enforcement by the AG is the failure to prosecute any of the participants in obvious voting irregularities that occurred in Highland Park, Texas during the Constitutional Amendment election on November 8, 2005. Highland Park is a very wealthy and exclusive community within Dallas County that votes overwhelmingly in support of Republican candidates. Bush/Cheney received more than 75

percent support in this community. There are over five hundred homes in this small community with values exceeding $1 million.

16. The Attorney General was provided a memo from the Dallas District Attorney directly implicating the Dallas County Republican County Judge and the Republican Election Judge in the improper and illegal handling of more than 100 ballots at a Highland Park polling place. The investigation of the Dallas District Attorney's office showed that, at the direction of the Republican County Judge and Republican Election Judge, ballots were provided to individuals without proper assurance that the person was a registered voter. Further, there is evidence that some individuals received, and may have marked, more than one ballot. Almost a year after these apparent violations occurred and the Attorney General was notified of the details surrounding the incidents, there have been no public statements, status reports or prosecutions regarding the Highland Park voting irregularities. The Attorney General is sending a clear signal – reports of violations in heavily Democratic neighborhoods will be aggressively investigated and harshly prosecuted, but violations in exclusive heavily Republican areas will be downplayed, avoided and/or ignored.

17. The Party has attempted to receive clarification about the scope of the law from state officials, but has not received sufficient clarification or assurance about the legality of its activities. Essentially, there are no written guidelines for county election administrators, campaigns or Democratic Party activists and State officials have refused to put responses in writing or provide

assurance that current activity is legal. Without clarification, the law will be interpreted differently not only by every county elections administrator but by every activist trying to assist with mail ballots. Because the Party is worried about encouraging its members to engage in activities that may result in their investigation or prosecution, the Party has curtailed its ordinary efforts in encouraging members to get out the vote. In addition, statements made by representatives of the Office of the Texas Attorney General upon the filing of this case have been received by Democratic Party officials and activists as an attempt to bully and intimidate. For example, when this case was filed, Texas Solicitor General, Ted Cruz, made false and in my opinion defamatory statements about the named plaintiffs in this case. Recruiting and training individuals to participate in party activities becomes considerably more difficult when potential volunteers believe that their activities may attract investigation by the Texas Attorney General's office and/or public criticism and ridicule by state officials and others.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 12 day of October, 2006.

Ruben Hernandez