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.	)	Civil Action No. 2-06CV-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,	)	Judge T. John Ward
Defendants.	)	

OPPOSITION TO DEFENDANTS' RULE 12(b) MOTION TO DISMISS

The Complaint presents detailed allegations in support of Plaintiffs' substantial constitutional and statutory challenges to the unprecedented provisions of the Texas Election Code that restrict and criminalize legitimate political and expressive activity related to mail-in balloting. None of Defendants' arguments requires dismissal of Plaintiffs' claims. With respect to Defendants' argument for dismissal pursuant to Rule 12(b)(6) for failure to state a claim, Defendants refuse to confront Plaintiffs' detailed allegations of chilling of activities protected under the First and Fourteenth Amendments, and instead rely heavily – and inappropriately – upon unsubstantiated factual allegations beyond the four corners of the Complaint. Defendants also repeatedly mischaracterize and combine Plaintiffs' asserted causes of action in arguing for Rule 12(b)(6) dismissal. Because the Complaint contains allegations that support each of Plaintiffs' causes of action, the Rule 12(b)(6) Motion should be denied.

Defendants also urge upon the Court several meritless arguments for partial dismissal based on lack of subject-matter jurisdiction, or for dismissal or transfer based on improper venue. Defendants' Rule 12(b)(1) subject-matter jurisdiction arguments lack merit: Defendant Texas cannot claim sovereign immunity with respect to Plaintiffs' Voting Rights Act claims, and Plaintiffs have standing to pursue their claims under 42 U.S.C. § 1971. In any event, neither of these arguments – even if true – require dismissal of any of Plaintiffs' claims. With regard to Defendants' contest of venue in this District under Rule 12(b)(3), Defendants claim that Plaintiffs Ray and Johnson lack standing to sue under *Heck v. Humphrey*, 512 U.S. 477 (1994), improperly characterizing their claims as challenges to their *past* convictions rather than an attempt to immunize their future activities with *prospective* injunctive relief. There is no merit to Defendants' claim that venue in this District is improper, not only because that suggestion hinges completely on Defendants' erroneous *Heck* argument, but also because there are substantial activities that give rise to Plaintiffs' Complaint in this Judicial District to support venue here, regardless whether Ray and Johnson are named Plaintiffs on all causes of action.

Because Plaintiffs' Complaint makes all necessary allegations to sustain the causes of action pleaded, and because all of Defendants' other arguments are contrary to fact and law, this Court should deny Defendants' Motion in its entirety.

ARGUMENT

I. DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE PROPERLY PLEADED ALL CLAIMS.

A. Defendants' Presentation Ignores The Rule 12(b)(6) Standard.

As the Fifth Circuit has noted, "[a] motion to dismiss under rule 12(b)(6) is viewed with disfavor and is rarely granted." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (citations and internal quotation marks omitted). "The court must construe the

complaint liberally in favor of the plaintiff and must take all facts pleaded as true." *Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (2003) (citing *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986)). "Moreover, the court may not dismiss the complaint under rule 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Kane Enters.*, 322 F.3d at 374 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Finally, "[i]n considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto." *Collins*, 224 F.3d at 498 (citing Fed. R. Civ. P. 12(b)(6)).

Defendants simply ignore these constraints, refusing to accept Plaintiffs' allegations as true and making numerous unsupported factual representations throughout their motion that seek to undermine Plaintiffs' factual allegations. While Defendants' factual representations are, as a matter of law, irrelevant to resolving their Rule 12(b)(6) motion, it is worth noting two of these representations that are particularly misleading and unsubstantiated. First, attempting to shirk responsibility for their own improper enforcement of the challenged provisions, Defendants claim that 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 into the office." Mot. 2. What Defendants fail to mention is that the Attorney General has boasted on his website and elsewhere about his Office's involvement in targeting and visiting counties in which local officials are "trained" to investigate voter fraud. *See* Ex. A (explaining that officers from the Attorney General's Special Investigations Unit "work with police departments, sheriffs' offices, and district and county attorneys to identify, investigate and prosecute various types of voter fraud offenses," particularly in "key counties across the state"). Also in direct conflict with Plaintiffs' allegations, *e.g.*, Complaint ¶ 30, is Defendants' claim that "[e]ach complaint is

examined and investigated in a neutral and evenhanded manner, and there are currently open investigations concerning members of both major political parties." This unsubstantiated and likely erroneous factual representation should be ignored.

B. Defendants' Effort To Recharacterize Plaintiffs' Claims Should Be Rejected.

In addition to ignoring the Rule 12(b)(6) standards, Defendants also attempt to recharacterize several of Plaintiffs' claims so as to dispose of those claims without careful analysis. Perhaps most egregiously, Defendants lump together Plaintiffs' fundamental right to vote claim (Count I) with their Fourteenth and Fifteenth Amendment claims and then claim that all of these claims fail for failure to plead *intentional racial discrimination*. Mot. 23-28. But Plaintiffs' right to vote claim is a separate cause of action from Plaintiffs' discrimination claims, and Defendants simply ignore the controlling legal framework for assessing right to vote claims in arguing that proof of intentional racial discrimination is required. Similarly, Defendants blend together Plaintiffs' vagueness and overbreadth causes of action, Mot. 22-23, even though these two separate claims are adjudicated under different legal standards. In addition, Defendants label Plaintiffs' due process claim as "a form of estoppel defense," Mot. 19, which it is not. Defendants' efforts at recharacterization should be seen for what they are – an attempt to avoid Plaintiffs' properly pleaded constitutional and statutory claims.

Defendants have also attempted to paint Plaintiffs' claims uniformly as "facial" challenges to the challenged provisions and thus subject to uniform disposition and an allegedly more exacting standard of proof. Mot. 3. Although it is true that several of Plaintiffs' claims – including those at issue in Plaintiffs' Motion for a Preliminary Injunction – would invalidate the challenged provisions on their face, this is not true of all of Plaintiffs' claims. In particular, Plaintiffs' First Amendment, discrimination, Voting Rights Act, and due process claims are all

susceptible of adjudication on an individual basis. Thus, Defendants cannot dispose of these claims simply by alluding to the standards for "facial" claims or by minimizing as merely "anecdotal" the evidence specific to the named Plaintiffs in this case. Rather, each claim must be viewed separately, and assessed as facial and/or as-applied, as appropriate.

C. Plaintiffs Have Stated Proper Claims For Relief On All Causes of Action.

1. Count I: Fundamental Right to Vote.

Defendants' motion to dismiss Count I is an exercise in obfuscation. Defendants attempt to mix Plaintiffs' Count I right to vote claim with Plaintiffs' separate discrimination claims, so as to argue that Plaintiffs bear the burden of proving *racial discrimination* in order to sustain their right to vote claim. Defendants' argument is contrary to law and to the Complaint, which pleads a detailed and straightforward right to vote claim under the proper legal framework.

Count I involves Plaintiffs' claim that the challenged provisions violate their fundamental right to vote, as guaranteed by the First and Fourteenth Amendments. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under the *Burdick/Anderson* framework, "[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." *Texas Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick*, 504 U.S. at 434, and *Anderson*, 460 U.S. at 789).[1]

[1] As discussed in Plaintiffs' Preliminary Injunction Motion, it is questionable whether the *Burdick/Anderson* framework applies rather than automatic strict scrutiny, because the challenged provisions deny the vote outright, *see* Tex. Election Code § 86.006(b), whereas the *Burdick/Anderson* framework grew out of incidental infringements on the right to vote, such as in the context of ballot access by candidates and political parties. Because Plaintiffs' Complaint survives a motion to dismiss under any level of scrutiny within the *Burdick/Anderson* framework, however, Plaintiffs do not make a detailed argument at this juncture concerning automatic strict scrutiny.

It is established that this balancing analysis "will not be automatic" because "there is 'no substitute for the hard judgments that must be made'" under this framework. *Anderson*, 460 U.S. at 789-90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 n.10 (1974)); *see, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("No bright line separates permissible election-related regulation from unconstitutional infringements."). Accordingly, "[o]nly after weighing all of 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*). Nonetheless, as a guide, both the Supreme Court and Fifth Circuit have described at least two types of scrutiny under *Burdick/Anderson*. When First and Fourteenth Amendment rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance,'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)), whereas 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 (quoting *Anderson*, 460 U.S. at 788). *See, e.g.*, *Kirk*, 84 F.3d at 182.

Under these standards, the Complaint's allegations sustain Plaintiffs' claim that the challenged provisions burden the fundamental right to vote. Plaintiffs have described how the challenged provisions restrict individuals' First and Fourteenth Amendment rights, both by criminalizing the legitimate efforts of willing assistants to help mail-in voters with applying for and casting mail-in ballots, and by depriving mail-in voters with needed assistance. Complaint at 1-3, ¶¶ 42-49. Perhaps most strikingly, a ballot returned in violation of the challenged provisions ***may not be counted***. *Id.* ¶¶ 29, 45 (citing Texas Election Code Section 86.006(h)). Plaintiffs' factual allegations establish, as the Complaint explains, that the challenged provisions create a

"severe" burden under *Burdick/Anderson* – one that is not narrowly drawn to advance a compelling state interest. *Id.* ¶¶ 42-49. Plaintiff also allege how no important or legitimate state regulatory interest is served by the challenged provisions. *Id.* Thus, under any level of scrutiny within the *Burdick/Anderson* framework, Plaintiffs have sufficiently pleaded a fundamental right to vote claim under the First and Fourteenth Amendments.

Defendants have no response to Plaintiffs' straightforward factual and legal allegations. To the contrary, Defendants completely mischaracterize Plaintiffs' claim to argue that it should be dismissed. First, quoting language from *Burdick* that Defendants improperly attribute to the Complaint, Defendants erroneously claim that Plaintiffs "assume" that any right to vote claim is subject to strict scrutiny. Mot. 24. Although strict scrutiny does apply, the Complaint makes no such "assumption," but rather contains allegations sufficient to satisfy any degree of scrutiny under the *Burdick/Anderson* framework. Specifically, Plaintiffs have pleaded that the challenged provisions *both* are not narrowly tailored to serve a compelling interest *and* do not serve any important regulatory interest. Complaint ¶ 44. Thus, Plaintiffs' allegations are sufficient under any level of *Burdick/Anderson* scrutiny. *See Burdick*, 504 U.S. at 434 (absent strict scrutiny, the question is whether a State's "important regulatory interests" justify the restrictions).

Defendants' second mischaracterization is even more outlandish. In essence, Defendants argue that Plaintiffs can plead a right to vote claim only by alleging "[p]roof of racially discriminatory intent or purpose." Mot. 25 (internal quotation marks and citations omitted). But that is the standard for a claim of *racial discrimination*, in voting or otherwise, under the Fourteenth and Fifteenth Amendments. That is *not* the standard for a right to vote claim under the *Anderson/Burdick* framework, which applies to an array of claims involving burdensome state election laws – not just laws that discriminate on the basis of race. For example, *Burdick*

involved a state ban on write-in voting, and *Anderson* and *Kirk* involved states' deadlines and requirements for non-major-party candidates. In those cases, the Court employed an analysis under *Burdick/Anderson* without any suggestion that the Plaintiff was required to establish intentional racial discrimination. What *Burdick/Anderson* requires is a showing that the burden on voting and expressive rights is unjustified by the restrictions imposed by the challenged regulation. *See, e.g., Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789; *Kirk*, 84 U.S. at 182. Because the Complaint plainly contains such allegations, Defendants' arguments about racial discrimination are beside the point and Defendants' motion to dismiss Count I must be rejected.[2]

2. Count II: First Amendment Overbreadth.

In Count II, Plaintiffs allege that the challenged provisions violate the First Amendment because they restrict core political speech and association in an overbroad manner. *See, e.g.*, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 198 & n.12 (1999) (subjecting election-related restrictions on core political speech to strict scrutiny); *Houston v. Hill*, 482 U.S. 451, 458-59 (1973) (setting forth the "substantial overbreadth" standard for evaluating First Amendment overbreadth claims).

Plaintiffs have presented detailed allegations that the challenged provisions regulate core political speech, and that they do so in a manner that restricts a substantial amount of fully protected expression and association. *See* Complaint ¶¶ 51-55. For example, the challenged provisions effectively prevent individuals from seeking out previously unknown voters in order to assist them, *see* Tex. Election Code § 63.036(a)(4), prevent would-be assistors from helping more than one voter apply for a mail-in ballot, *see id.* § 84.004, and criminalize a wide range of innocent association between voters applying for an absentee ballot and would-be assistors, *see*

[2] As discussed below, Plaintiffs have pleaded sufficient allegations of intentional racial discrimination to survive a motion to dismiss on their other, separate constitutional claims. Thus, even assuming Defendants' unsupported gloss on *Burdick/Anderson*, the motion to dismiss Count I must be denied.

id. § 84.003(b). *See* Complaint ¶¶ 51-55. And the various amendments to Section 86.006 chill the entirely innocent expressive activities of political parties and other organizations – such as by criminalizing the mere, non-fraudulent possession of another's mail-in ballot. *Id.* ¶ 55.

Plaintiffs' allegations establish that there are *no* constitutional applications of the challenged provisions consistent with the First Amendment. But, at the very least, Plaintiffs have alleged that the challenged provisions are "so broadly written that [they] cannot help but have a deterrent effect on the exercise of First Amendment rights," *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 561 (5th Cir. 1988), such that they "make unlawful a substantial amount of constitutionally protected conduct," *Houston*, 482 U.S. at 459. Accordingly, Plaintiffs have properly pleaded a First Amendment overbreadth claim.

Defendants' attack on Count II is premised on a mischaracterization of the standards applicable to Plaintiffs' First Amendment overbreadth claim and a failure to accept Plaintiffs' allegations as true. First, Defendants improperly rely on non-First Amendment cases in claiming that Plaintiffs face a "heavy burden" in their overbreadth facial challenge. Mot. 22. But *Rust v. Sullivan*, 500 U.S. 173 (1991), the case relied on by Defendants, is not a First Amendment case, and thus required, for a successful facial challenge, that there be "no set of circumstances . . . under which the Act would be valid." *Id.* at 184 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) (explaining that non-First Amendment facial challenges face a "heavy burden" because the Supreme Court has "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment")). Plaintiffs allege (at Complaint ¶¶ 51-55) a First Amendment claim under the proper standard – whether the overbreadth of the challenged provisions is "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v.*

Oklahoma, 413 U.S. 601, 615 (1973); *see, e.g.*, *Houston*, 482 U.S. at 466-67; *Howard Gault Co.*, 848 F.2d at 561.[3]

Defendants' only other line of defense concerning Plaintiffs' overbreadth claim is the patently erroneous assertion – contrary to the allegations of the Complaint – that Plaintiffs "fail[] to allege sufficiently that the challenged provisions affect a *substantial* amount of constitutionally protected conduct." Mot. 23. But Plaintiffs have expressly alleged that the constitutional applications of the challenged provisions – if any exist – "are substantially outweighed by the provisions' unconstitutional applications and chilling effect." Complaint ¶ 55. As only one example, Plaintiffs allege that Section 86.006 – which criminalizes the mere possession of another's mail-in ballot – hampers a great deal of fully protected expression and association throughout the State, despite no relationship between such expression and fraudulent activity. *Id.* Plaintiffs do not rely on mere "anecdotes," Mot. 23, but have alleged a widespread and significant chilling of fully protected activity. That Defendants simply fail to accept as true Plaintiffs' allegations that a significant amount of constitutionally protected activity is outlawed by the challenged provision provides no proper basis for dismissal under Rule 12(b)(6).

3. Count III: Vagueness.

In Count III, Plaintiffs allege that the challenged provisions are unconstitutionally vague under the First Amendment and the Due Process Clause because they "fail to provide reasonable notice of what conduct is prohibited." Complaint ¶ 57; *see id.* ¶¶ 38, 56-59. Plaintiffs' allegations plainly satisfy the controlling standard for First Amendment vagueness claims: whether the challenged provisions "fail[] to provide 'fair notice to those to whom [they are] directed.'" *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (quoting *Grayned v. City of*

[3] Although the First Amendment *Broadrick* overbreadth standard applies, Plaintiffs' allegations also satisfy *Salerno*, as there are no constitutional applications of the challenged provisions, all of which severely burden protected political and expressive activities without any legally sufficient justification. *See* Complaint ¶¶ 52-55.

Rockford, 408 U.S. 104, 112 (1972)); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"); *J&B Ent't v. City of Jackson*, 152 F.3d 362, 367-69 (5th Cir. 1988) ("An enactment is void for vagueness if its prohibitions are not clearly defined." (quoting *Grayned*, 408 U.S. at 109)).

The Complaint provides several specific examples of the challenged provisions' vagueness. Complaint ¶¶ 38, 56-59. For instance, Section 64.036(a) prohibits assistance to a voter "who has not requested assistance or selected the person to assist the voter," leaving unclear whether a person who is initially unknown to the voter may approach the voter to serve as an assistant. Complaint ¶¶ 38, 58. Section 86.006(f)'s broad ban on "possession" of mail-in ballots and carrier envelopes does not, among other things, specify whether a ballot or carrier envelope must be *marked* for its possession to be illegal. Complaint ¶¶ 38, 58. In addition, the combined requirements of Sections 86.006(f) and 86.0051 may be read 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, rendering the responsibilities of multiple assistors unclear. 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." Complaint ¶¶ 38, 58. The meaning of Section 86.006(e) is also 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. Complaint ¶ 58. Through these detailed allegations, Plaintiffs have pleaded a proper vagueness claim in Count III.

In the face of these detailed vagueness allegations, Defendants conflate the vagueness and overbreadth analyses in an attempt to make the standards for vagueness seem more exacting than they are. Mot. 22-23.[4] Overbreadth and vagueness claims, while "related," are also "distinct." *J&B Ent't*, 152 F.3d at 366. With respect to Plaintiffs' as-applied vagueness claim, there is simply no requirement to show a "real and substantial" chilling effect upon Plaintiffs. *See id.* at 367-68. And, even assuming that there is a threshold requirement of "real and substantial" chilling for Plaintiffs' facial vagueness challenge, the Complaint does allege that challenged provisions "realistically threaten" to "significantly compromise" the voting and expressive rights of the State's citizenry. Mot. 22-23. Plaintiffs have not pleaded, as Defendants claim, merely "a few anecdotes of isolated instances" of chilling of protected activity based on the vagueness of the challenged provisions. *Id.* at 23. To the contrary, the Complaint explains how the challenged provisions and their vagueness will deter "the longstanding, widespread and legitimate activities of Plaintiffs and other individuals, organizations and political parties." Complaint at 2; *see id.* ¶¶ 15, 38, 59. Indeed, those allegations of widespread chilling have already been substantiated in Plaintiffs' Preliminary Injunction filings. *See, e.g.*, PI Mot. at 23 (citing Hernandez Decl. ¶¶ 7, 10-13). Accordingly, there is no basis for dismissal of Count III.

[4] For this argument, Defendants rely heavily on a Tenth Circuit case, *Jordan v. Pugh*, 425 F.3d 820 (10th Cir. 2005), which concluded that "[f]or purposes of Rule 54(b), vagueness and overbreadth are alternative theories underlying a single claim." *Id.* at 829 (concluding that it was error for the district court to enter partial judgment on a plaintiff's facial vagueness claim, but not on the plaintiff's overbreadth and as-applied claims). *Jordan*'s reasoning is not binding on this Court and should not apply outside of the Rule 54(b) partial summary judgment context, not least of which because it conflicts with the precedent of the Supreme Court and Fifth Circuit, both of which recognize vagueness and overbreadth as two distinct – albeit often related – claims. *See, e.g.*, *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002) (noting distinct inquiries to determine whether a statute is "substantially overbroad" or "unconstitutionally vague"); *Hill v. Colorado*, 530 U.S. 703, 730-33 (2000) (separately analyzing Plaintiffs' First Amendment overbreadth and vagueness claims); *J&B Ent't*, 152 F.3d at 367-69.

4. Count IV: Voting Rights Act Section 208.

Count IV properly pleads a violation of Section 208 of the Voting Rights Act, which 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. The challenged provisions, by criminalizing a wide array of legitimate and necessary means of assisting to mail-in voters, violate Section 208 by "burden[ing] individuals' right to provide assistance to voters" and by "burden[ing] and interfer[ing] with voters' receipt of assistance from persons of their choice." Complaint ¶¶ 60-65.

Defendants have no response to the sufficiency of Plaintiffs' actual allegations under Section 208, simply asserting – erroneously – that the Complaint "contains no allegation that Defendants have precluded any eligible voter from receiving the assistance guaranteed under § 208." Mot. 30. But Plaintiffs have made precisely that allegation: that, through their enforcement of the challenged provisions, Defendants have prevented willing assistors from providing assistance and needy voters from receiving such assistance. *See* Complaint ¶¶ 60-65. Plaintiffs and others similarly situated have been chilled and restricted from providing the normal level of assistance that they have provided to voters in need. *See, e.g., id.* ¶¶ 42-65. And, as a specific example, Plaintiff McDonald – a homebound, physically handicapped voter – has been deprived of the assistance of her chosen assistant, Plaintiff Meeks, as a result of Defendants' enforcement of the challenged provisions. *Id.* ¶¶ 7, 15.

Defendants' only other Section 208 argument simply ignores the Supremacy Clause. *See* U.S. Const., Art. VI, ¶ 2. Defendants claim that, in order to state a Section 208 violation, Plaintiffs must allege that someone "*who has complied with Texas law* relating to mail-in

ballots" has been precluded from providing assistance. Mot. 30 (emphasis added). But the entire point of Plaintiffs' Section 208 claim is that the burdensome nature of the challenged provisions – and the enforcement of those provisions by Defendants – deprives Plaintiffs and others of their Section 208 rights. Courts discussing Section 208 have recognized the obvious point that state laws and practices that deprive individuals of their rights under Section 208 violate federal law and must give way. *See, e.g., United States v. Berks County*, 250 F. Supp. 2d 525, 532-33, 538 (E.D. Pa. 2003) (enjoining, in part under Section 208, state practice of 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).

5. Count V: Voting Rights Act Section 2; Fourteenth And Fifteenth Amendments

Count V states a proper claim that the challenged provisions discriminate against Plaintiffs and others similarly situated, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, 42 U.S.C. § 1971, and the Fourteenth and Fifteenth Amendments. *See* Complaint ¶¶ 21, 66-68. Plaintiffs allege that at the time that the challenged provisions were enacted, "Defendants knew, or should have known, that [the outlawed practices were] particularly utilized in many minority communities in Texas, including Texarkana and Fort Worth, to maximize voter turnout." Complaint ¶ 21. As the Complaint explains, "[t]hese techniques were used because in Texarkana and Fort Worth, as in many other communities in Texas, voter turnout among the minority population is typically lower than in Anglo communities, due in large part to the long history of voting discrimination by the Defendant State of Texas." *Id.* Thus, by outlawing legitimate, longstanding practices of assisting mail-in voters that were widely known to be used particularly in minority communities, the challenged provisions discriminate based on race.

Count V pleads racial discrimination in violation of both the Constitution and federal statutes, including Section 2 of the Voting Rights Act. The key difference between Plaintiffs' constitutional and statutory theories is that a showing of intentional discrimination is required to establish a constitutional violation, whereas only a showing of discriminatory impact is required for Plaintiffs' statutory claim. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997) (explaining that "when Congress amended § 2 in 1982, it clearly expressed its desire that § 2 not have an intent component," and thus "now the Constitution requires a showing of intent that § 2 does not"); *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (explaining that "the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives").

Plaintiffs have sufficiently alleged claims under both of these theories of relief. With respect to Plaintiffs' constitutional claims, Plaintiffs have alleged that the obvious *intended* consequence of the enactment of the challenged provision was to disproportionately squelch the voting and expressive rights of members of minority communities in Texas. Complaint ¶ 21, 66-68. Defendants have no response to Plaintiffs' allegations other than to assert that it would be "patently and recklessly false" for Plaintiffs to allege that the enactment of the challenged provisions was racially discriminatory. Mot. 26. But Defendants completely ignore Plaintiffs' allegations that it was well-known to the Legislature that the newly banned practices were concentrated in minority communities, indicating that the enactment of the challenged provisions was indeed discriminatory.[5] With respect to Plaintiffs' statutory claims, their allegations of

[5] Notably, the legislative history cited by Defendants supports Plaintiffs' claims against the challenged provisions, including Plaintiffs' claim of vagueness and discriminatory enforcement. As this legislative history indicates, during the floor debate in 2003, a Democratic Representative received assurance that the amendments to the Election Code would not be used "to criminalize volunteers or organizations . . . from canvassing neighborhoods or

intentional discrimination necessarily are sufficient to plead a violation of Section 2 of the Voting Rights Act. Moreover, Plaintiffs have demonstrated that the consequence of the challenged provisions – unsurprisingly – has been a disproportionate chilling effect upon voting and other protected activities in minority communities. *See* Complaint at 2-3, ¶¶ 21, 30, 66-74. Thus, Plaintiffs allege – as Section 2 requires – that "based on the totality of circumstances," minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Defendants appear to argue that Plaintiffs' discrimination claim is legally insufficient by claiming, without legal support, that Plaintiffs cannot make out a discrimination claim because no Plaintiff has alleged discrimination based on race *as a voter*. Mot. 29. Not only is such an allegation unnecessary as a matter of law, but Plaintiffs have made such allegations. Plaintiff McDonald has claimed that the challenged provisions discriminate against her based on disability and race. Complaint ¶ 7. In any event, as a matter of law, Defendants cite no support for the position that willing assistors – including several of the named Plaintiffs – lack standing to challenge the racially discriminatory enforcement of the challenged provisions, under both the Constitution and Section 2 of the Voting Rights Act. Mot. 29. Regardless whether Section 2 "express[ly] . . . mention[s]" persons "denied the right to *assist* voters on the basis of race," *id.*, the terms of Section 2 plainly encompass a challenge to laws that, like the challenged provisions, have the intended and actual effect of disproportionately impairing minority voters from voting.

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senior centers or public housing buildings, from assisting the elderly or disabled from submitting an application for a homebound ballot," or "to promote active intimidation to already vulnerable voting communities." Mot. 27-28 (citing H.J. of Tex., 78th Leg., R.S. at 1282-83). Yet that is precisely how the challenged provisions have been used, indicating, at the least, those provisions' vagueness and discriminatory enforcement, and, at worst, false assurances provided to skeptical legislators by those promoting the challenged provisions. *See* Exs. B-E (Declarations of Sen. Rodney Ellis, Sen. Leticia Van de Putte, Rep. Garnet Coleman, and Rep. Pete Laney).

Because Plaintiffs' allegations are sufficient to state both constitutional and statutory discrimination claims, Count V is properly before the Court.

6. Count VI: Discriminatory Enforcement.

In Count VI, Plaintiffs allege that Defendants have discriminatorily enforced the challenged provisions, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, 42 U.S.C. § 1971, and the Fourteenth and Fifteenth Amendments. In contrast to Count V, which addresses the intended and actual effect of the challenged provisions on their face, Count VI concerns Plaintiffs' claim that Defendants' *enforcement* efforts have been both intentionally and in effect discriminatory based on race.

Plaintiffs have substantiated their claim of racially discriminatory enforcement with ample allegations. First, as an empirical matter, "those targeted by the enforcement of these provisions so far have been overwhelmingly and disproportionately African-American, Hispanic, and Democratic." Complaint at 2. Specifically, Plaintiffs allege that "[a]ll but one of the eight persons who have been indicted by Defendant Abbott for violating Section 86.006 since 2003 have been African-American or Hispanic," and Defendant Abbott "has prosecuted thirteen persons for violating provisions of the Texas Election Code since 2003 and all but one has been black or Hispanic." Complaint ¶ 30. Moreover, Plaintiffs allege that Defendants' current investigations involving the challenged provisions improperly "focus on minorities and Democrats." *Id.* This statistical evidence alone – which must be accepted as true for present purposes, despite Defendants' allusions to the contrary, Mot. 2-3[6] – both shows a discriminatory

[6] As noted above, *see supra* Section I.A, Defendants refuse to accept Plaintiffs' detailed allegations of discriminatory enforcement as true, both disclaiming that the Attorney General is not responsible for the enforcement patterns of his office, *see* Mot. at 2-3 (claiming that "[t]he Office of the Attorney General does not initiate investigations in this area of its own initiative), and at the same time asserting that "[e]ach complaint is examined and investigated in an evenhanded matter," *id.* at 3. These factual assertions are unsubstantiated, conflict with the Complaint's allegations, and must be disregarded for purposes of Defendants' Rule 12(b)(6) motion.

impact and raises an inference of intentional discrimination. These allegations thus support Plaintiffs' claims of discrimination under both the Constitution and the Voting Rights Act.

But Plaintiffs' statistical allegations are only half the story. Also extremely probative of the intentionally discriminatory nature of Defendants' enforcement efforts are Defendants' egregious race-based training materials, which the Complaint discusses in detail, Complaint ¶¶ 31-35, but which Defendants tellingly ignore completely. For example, as the Complaint explains, materials prepared by Defendant Abbott's office for the purpose of "training" local officials to enforce the challenged provisions "make the unfounded suggestion that a correlation or relationship exists between membership in a minority group and engaging in voter fraud." *Id.* ¶ 31. For example, one slide of a PowerPoint presentation prepared by Defendant Abbott as recently as June 2005 depicts a photograph of African-American voters standing in line to vote as a purported illustration of potential voter fraud at polling places, but contains no similar photographs of non-minority voters, thus communicating the discriminatory and improper message that minority voters should be the focus of election fraud investigations. *Id.* ¶ 32. That same presentation also contains a slide urging investigators to look for "Unique Stamps" as an indication of voter fraud, displaying a prominent picture of a postage stamp known as the "sickle cell stamp," which depicts an African-American woman and her infant. *Id.* ¶ 33. It is widely known that the sickle cell stamp is used extensively by African Americans for their everyday mailing needs, including the infrequent task of mailing election-related documents. *Id.* ¶ 34. The slide thus conveys the unsupported and discriminatory message that the sickle cell stamp is an indication of voter fraud and that investigators should focus their efforts on users of the stamp – *i.e.*, members of the African-American community. *Id.* ¶¶ 33-35. As Plaintiffs allege, these

cues have had their intended discriminatory effect, as the Attorney General's investigators have questioned Plaintiffs about the use of the sickle-cell stamp. *Id.* ¶ 35.

These detailed allegations – which must be accepted as true in evaluating Defendants' Rule 12(b)(6) motion – provide a more than sufficient basis for Plaintiffs' claim of racially discriminatory enforcement. With respect to their constitutional claim, Plaintiffs' allegations concerning Defendants' enforcement efforts targeted at minorities and inappropriate race-based training materials give rise to an inference of intentional discrimination. Complaint ¶¶ 30-35, 69-74. And Plaintiffs' statistical evidence of Defendants' enforcement patterns alone, particularly in light of the additional evidence of Defendants' inappropriate training materials, is sufficient to support a claim under Section 2 of the Voting Rights Act. *Id.* Defendants altogether fail to address Plaintiffs' detailed allegations of discriminatory enforcement, choosing instead to erroneously brand those allegations as "conclusory, speculative, insubstantial, and inadequate." Mot. 29. As the above description of Plaintiffs' allegations indicates, that is hardly the case. Count VI sufficiently pleads a detailed claim of racially discriminatory enforcement.

7. Count VII: Due Process.

In addition to claiming that their due process rights have been violated by the vagueness of the challenged provisions, *see supra* Section I.C.3, Plaintiffs have separately pleaded in Count VII a deprivation of their due process rights based on Defendants' misleading, discriminatory and unfair enforcement of the challenged provisions. Contrary to Defendants' argument, Plaintiffs' claim does not hinge on whether they were "informed" about the changes in law. *Cf.* Mot. 18-19. It is notable, however, that Plaintiffs, other citizens, and even legislators were *not* properly informed about Defendants' aggressive and inappropriate interpretation of the changes in Texas law. For example, no notice whatsoever is provided on the carrier envelopes used for

mailing mail-in ballots that possessing another's mail-in ballot or carrier envelope constitutes a criminal offense – the "violation" of law that Defendants are now aggressively prosecuting. Complaint. ¶¶ 39, 77. Particularly in light of well-known past practices by individuals like Plaintiffs of assisting voters by mailing their mail-in ballots, basic fairness necessitated that Defendants inform Plaintiffs and other similarly situated individuals and organizations of Defendants' interpretation and intended enforcement of the challenged provisions.

In any event, Plaintiffs have properly pleaded both facial and as-applied due process claims based on their allegations that Defendants and their agents have issued erroneous, misleading, and improper guidance concerning the implementation of the challenged provisions. *See, e.g.*, *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (explaining that due process is "flexible and calls for such procedural safeguards as the situation demands"). Defendants' conduct has chilled constitutionally protected voting and expressive activities of Plaintiffs and others. For instance, representatives of the Attorney General's office have erroneously threatened individuals with prosecution for merely filling out a voter's mail-in ballot application. Complaint ¶¶ 40, 78. For his part, the Secretary of State has issued erroneous and misleading guidance designed to chill the completely legitimate assistance provided by representatives of political parties and other civic organizations, improperly warning voters not to accept help from "stranger[s]" who "show up" on voters' "doorstep[s]" to offer assistance. Complaint ¶¶ 40-41, 78. Notably, Defendants (including in their motion) have refused to clarify the erroneous and confusing statements of State officials, which have left entirely unclear whether certain conduct or expression will be deemed to violate the challenged provisions. Particularly in light of Defendants' biased enforcement of the challenged provisions against Democrats and members of minority groups, Plaintiffs' allegations sufficiently state a violation of due process. *See, e.g.*,

Zessar v. Helander, No. 05-C-1917, 2006 U.S. Dist. LEXIS 9830, at *30-31 (N.D. Ill. 2006) (finding that the implementation of a state's absentee ballot regime violated due process).

Defendants incorrectly assert that Plaintiffs' due process claim must be assessed under principles of equitable estoppel. But Plaintiffs are not seeking to defend a criminal proceeding, and, as discussed below, the Plaintiffs who have pleaded guilty to violating Section 86.006 are not challenging their convictions here. *See infra* Section I.B. Thus, Defendants' equitable estoppel analogy is inapposite and a straightforward due process analysis applies. But even if equitable estoppel is the proper analytical framework, Plaintiffs' due process claim should not be dismissed because the Complaint alleges a proper claim under that framework. Specifically, Plaintiffs have alleged the very sort of "affirmative misconduct" that Defendants contend is necessary to support an equitable estoppel claim against the government. Mot. 20-21.[7] Unlike the cases relied upon by Defendants, Plaintiffs' allegations do not rely on inadvertent errors or omissions of low-level government officials. Rather, Plaintiffs have claimed that the Defendant Secretary of State and direct deputies of the Defendant Attorney General have personally issued misleading and improper guidance to voters and assistors, and have done so for the improper purpose of chilling the legitimate activities of political parties and minority groups. Complaint ¶¶ 40-41, 78-79.[8] Thus, even under Defendants' preferred analytical framework, Count VII states a proper claim.

[7] Although Defendants suggest that equitable estoppel is not available against the government, the Supreme Court has repeatedly refused to make any such ruling, but instead has recognized that equitable estoppel is appropriately employed against the government in certain circumstances. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419-23 (1990); *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *see also Andrade v. Gonzales*, 459 F.3d 538, 545 (5th Cir. 2006) (to assert equitable estoppel against the government, "Andrade would have to demonstrate affirmative misconduct – the affirmative misrepresentation or concealment of material fact"); *Linkous v. United States*, 142 F.3d 271, 277-78 (5th Cir. 1998).

[8] Although there is no authority for applying the heightened pleading standard for fraud claims, *see* Fed. R. Civ. P. 9(b), to this cause of action, *cf.* Mot. 21, it is worth noting that Plaintiffs have specifically identified several of Defendants' misleading and erroneous statements underlying their due process claim. Complaint ¶¶ 40-41, 78-79.

II. DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS SHOULD BE DENIED BECAUSE SUBJECT-MATTER JURISDICTION EXISTS.

Defendants seek to dismiss several parties and claims based on an asserted lack of subject-matter jurisdiction. Defendants' arguments fail: the State of Texas is not immune from suit on Plaintiffs' Voting Rights Act claims; Plaintiffs Ray and Johnson are properly before this Court on all claims, including the challenge to Section 86.006 of the Texas Election Code; and Plaintiffs have standing to assert a claim under 42 U.S.C. § 1971 against the challenged provisions. In any event, even assuming that Defendants' subject-matter jurisdiction arguments have merit (which they do not), those challenges have no material effect on this lawsuit because, even under Defendants' arguments: (1) the Defendants other than Texas are properly before this Court, (2) the Plaintiffs other than Ray and Johnson are proper Plaintiffs, and (3) none of Plaintiffs' claims relies solely on Section 1971. Thus, Defendants' Rule 12(b)(1) motion fails.

A. The State Of Texas Is A Proper Defendant And Defendants Do Not Dispute That The Other Defendants Are Properly Named.

Texas is an appropriate Defendant for Plaintiffs' Voting Rights Act and Section 1971 claims because, by passing those statutes, Congress abrogated the States' sovereign immunity. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 519 n.4 (2004) (explaining that "measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States" (internal quotation marks and citation omitted)); *Mixon v. Ohio*, 193 F.3d 389, 399 (6th Cir. 1999) (finding "no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment," and thus assuming "jurisdiction over Plaintiffs' claim under the Voting Rights Act against the State of Ohio"); *Reaves v. United States Dep't of Justice*, 355 F. Supp. 2d 510, 515-16 (D.D.C. 2005) (explaining that the Supreme Court has repeatedly upheld the

application of the Voting Rights Act against the States "as a valid exercise of Congress's power to enforce the guarantees of the Fifteenth Amendment against infringement by the states").

In the face of this compelling authority that Texas has no sovereign immunity from Plaintiffs' Voting Rights Act and Section 1971 claims, Defendants suggest that dismissal is required because the Complaint "makes no assertion that the State has consented to be sued or waived its immunity," and "[n]or do Plaintiffs assert that Congress has overridden the State's immunity." Mot. 12. But Plaintiffs were under no obligation to plead waiver or abrogration of sovereign immunity in the Complaint. Rather, it is Defendants' burden to plead and prove any sovereign immunity defense. *See, e.g.*, *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000) (citing *ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993) ("Like any other [affirmative] defense, that which is promised by the Eleventh Amendment must be proved by the party that asserts it and would benefit from its acceptance.")). Moreover, unlike a Rule 12(b)(6) motion, the Court need not rely on the pleadings to reject Defendants' sovereign immunity argument, but "may base its disposition of a motion to dismiss for lack of subject matter jurisdiction on (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (5th Cir. 2004) (internal quotation marks and citations omitted). Finally, even were Plaintiffs under any pleading obligation, Plaintiffs necessarily pleaded that Texas had no sovereign immunity against those claims by asserting Voting Rights Act and Section 1971 claims against Defendant Texas.

In any event, Texas is not a necessary party to the suit, and thus the State's Rule 12(b)(1) motion has no practical import. Defendants do not dispute that Defendants Abbott and Williams – the State officials primarily charged with enforcement of the challenged provisions – are

properly named Defendants. *See Ex Parte Young*, 209 U.S. 123 (1908). Thus, although Texas is a properly named Defendant, regardless whether Texas is so named, sovereign immunity does not deprive this Court of subject-matter jurisdiction over any of Plaintiffs' causes of action.

B. The *Heck* Doctrine Does Not Bar The Claims Of Plaintiffs Ray And Johnson And Has No Bearing On The Other Plaintiffs' Claims.

Defendant vastly overstates the constraints upon Section 1983 lawsuits erected by the Supreme Court's under *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck* and its progeny present no bar to the claims of Plaintiffs Ray and Johnson, because those Plaintiffs do not use this suit to challenge the lawfulness of their guilty pleas to past violations of Section 86.006. To the contrary, Plaintiffs Ray and Johnson seek prospective injunctive relief so that they can resume providing needed assistance to mail-in voters in the future. At the very least, however, Plaintiffs Ray and Johnson have standing to bring suit against all of the challenged provisions other than Texas Election Code Section 86.006(f) – the only provision underlying their convictions.

As the Supreme Court recently explained, its *Heck* line of cases provides "that a § 1983 suit for damages that would 'necessarily imply' the invalidity of the fact of an inmate's conviction, or 'necessarily imply' the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence." *Nelson v. Campbell*, 541 U.S. 637, 646 (2004). As the Supreme Court has explained, "this 'favorable termination' requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute." *Id.* at 646-47. Thus, *Heck* and its progeny bar an individual seeking damages or declaratory relief based on a past criminal conviction from using 42 U.S.C. § 1983 in order to prevent an end-run around

habeas corpus procedures. *Heck* does not, however, bar a previously convicted individual from challenging the new, *prospective* violation of his or her constitutional rights by the State. To the contrary, the Supreme Court has expressly recognized that its *Heck* jurisprudence permits claims under § 1983 for prospective injunctive relief from violations of federal law. *See, e.g.*, *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (explaining that "ordinarily," a prisoner's "prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983").

Here, Plaintiffs Ray and Johnson do not seek an end-run around habeas rules to invalidate their guilty pleas under § 86.006. Rather, they seek an injunction against future enforcement of that provision so that they can resume their constitutionally protected activities related to mail-in balloting. Were Defendants' argument correct, it would lead to the absurd conclusion that because Plaintiffs Ray and Johnson had previously pleaded guilty to one count of violating Section 86.006(f), they would be forever barred from instituting a suit to challenge the lawfulness of the challenged provisions, and thus could never again engage in their protected activities without fear of criminal prosecution. Because Plaintiffs Ray and Johnson do not bring this case in their capacity as previously convicted individuals, but rather as individuals who seek to engage in prohibited behavior in the future, the *Heck* prohibition simply does not apply.

Moreover, even if *Heck* illogically were to apply to the claims of Plaintiffs Ray and Johnson, Defendants incorrectly describe the effect of such application, claiming that *Heck* bars *all* of the § 1983 claims of Plaintiffs Ray and Johnson. Mot. 13-14. But Plaintiffs Ray and Johnson pleaded guilty only to violating § 86.006(f), whereas Plaintiffs claim that *multiple* provisions of the Texas Election Code (including but not limited to § 86.006(f)) are unlawful. *See* Complaint at 1 n.1 (describing the "challenged provisions" as §§ 64.036(a)(4), 84.003(b),

84.004, 86.0051, and 86.006). Thus, if anything, Defendants' incorrect reading of *Heck* would only bar Plaintiffs Ray and Johnson from challenging § 86.006(f) – not from challenging the other provisions that did not form the basis of their convictions.

Finally, even making the erroneous assumption that Plaintiffs Ray and Johnson lack Section 1983 standing under *Heck*, Defendants do not dispute the challenge of all other individual and organizational Plaintiffs. Accordingly, subject-matter jurisdiction exists over this lawsuit regardless whether Plaintiffs Ray and Johnson remain in this case.[9]

C. Plaintiffs' Section 1971 Claim Is Enforceable Via Section 1983, And, In Any Event, Is Not A Necessary Predicate To Any Of Plaintiffs' Claims.

42 U.S.C. § 1971 creates protection against the denial of voting rights based on errors or omissions by state agents that are immaterial to a voter's qualifications. *See* 42 U.S.C. § 1971(a)(2)(B). As part of their racial discrimination causes of action (Counts V and VI), Plaintiffs have pleaded Section 1971 – in addition to Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments – as a basis for relief from the State's discriminatory and unlawful mail-in ballot regulations and enforcement thereof.

Defendants move to dismiss Plaintiffs' Section 1971 claims, citing several cases holding that Section 1971 is not enforceable by private plaintiffs, but must be enforced by the Attorney General. Mot. 15. But nearly all of the cases relied upon by Defendants contain no extended analysis, and merely assert a lack of enforceability without engaging the Supreme Court's recent private right of action precedent. In contrast, the Eleventh Circuit recently held, in an authoritative opinion, that Section 1971 is privately enforceable via Section 1983. *Schwier v. Cox*, 340 F.3d 1284, 1294-97 (2003). As the Eleventh Circuit explained, the mere fact that Section 1971 provides for enforcement by the Attorney General does not foreclose private

[9] Defendants' *Heck* argument is also the basis for their motion to dismiss for improper venue, but as discussed below, *see infra* Section III, even accepting Defendants' *Heck* argument as true, venue in this District is proper.

enforceability because the Supreme Court has found that analogous sections of the Voting Rights Act "could be enforced by a private right of action, even though those sections also provide for enforcement by the Attorney General." *Id.* at 1294. Moreover, the provision authorizing suit by the Attorney General was not added to Section 1971 until 1957, and thus there is a long history of preexisting enforcement of Section 1971 by private plaintiffs via Section 1983 – including in the Fifth Circuit. *See id.* at 1295 (citing *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946)). After determining that Congress did not intend to foreclose private enforcement of Section 1971, the Eleventh Circuit went on to the next analytical step required by Supreme Court precedent: determining "whether the statute creates rights enforceable by individuals under § 1983." *Id.* at 1296. Discussing the similarity between the rights-creating language in Section 1971 and that recently approved by the Supreme Court in *Gonzaga v. Doe*, 536 U.S. 273, 284 n.3 (2002), and applying the standards approved in *Gonzaga* from *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), the Eleventh Circuit concluded that "the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983." *Schwier*, 340 F.3d at 1297.

The Eleventh Circuit's reasoning, which involves a detailed review of Section 1971's legislative history, the Supreme Court's precedent concerning analogous provisions of the Voting Rights Act, and the Supreme Court's private right of action precedent, is unassailable. Plaintiffs thus have standing to complain that the challenged provisions violate Section 1971. *See Schwier*, 340 F.3d at 1297; *Common Cause/GA v. Billups*, No. 4:05-CV-0201-HLM, 2006 U.S. Dist. LEXIS 56100, at *177-78 (N.D. Ga. July 14, 2006) (recognizing a private claim under Section 1971 against state voter identification requirements).

Regardless whether Section 1971 is privately enforceable, however, this Court has subject-matter jurisdiction over all of Plaintiffs' claims because *none* of those claims relies solely

on Section 1971 as a basis for subject-matter jurisdiction. Indeed, only Counts V and VI of the Complaint reference Section 1971, and both of those Counts also rely upon the Constitution and Section 2 of the Voting Rights Act as a basis for relief. Defendants do not contest Plaintiffs' ability as private citizens to pursue via Section 1983 their Section 2 and constitutional claims. Thus, there is no basis for the dismissal of any of Plaintiffs' causes of action.

III. DEFENDANTS' RULE 12(b)(3) MOTION TO DISMISS SHOULD BE DENIED BECAUSE VENUE IN THIS DISTRICT IS PROPER.

Defendants' claim of improper venue hinges on their argument that Plaintiffs Ray and Johnson are not properly before this Court under *Heck*. Mot. 16. As discussed above, that argument is incorrect – *Heck* does not bar Plaintiffs Ray and Johnson from suing for prospective relief on any of their claims, and most certainly does not bar their claims with respect to any challenged provision other than § 86.006(f). *See supra* Section II.B. Because Defendants' *Heck* argument is the only basis asserted for their Rule 12(b)(3) motion, that motion must be denied.

Even if, contrary to precedent, the claims of Plaintiffs Ray and Johnson were barred in their entirety by *Heck*, venue in this District is proper because "a substantial part of the events or omissions giving rise to the claim occurred" in this District. 28 U.S.C. § 1391(b)(2); *see, e.g.*, *Carty v. Tex. Dep't of Pub. Safety*, No. 06-CV-138, 2006 U.S. Dist. LEXIS 72995, at *4-5 (E.D. Tex. Oct. 6, 2006). Regardless whether Plaintiffs Ray and Johnson are before this Court as Plaintiffs, evidence of the chilling of their protected activities in this Judicial District, and of Defendants' discriminatory investigation and prosecution of them in this District, is relevant to all of the causes of action alleged in the Complaint, many of which include facial challenges to the challenged provisions. Moreover, the Complaint does not rely merely on the activities of Plaintiffs Ray and Johnson in this District, but also discusses how other similarly situated individuals in this District, including many members of the Plaintiff Texas Democratic Party, are

experiencing the ill effects of the challenged provisions and their enforcement. *See, e.g.*, Complaint ¶ 15 (discussing the "common practice" of "individuals, political parties, and other organizations" in "the Texarkana community"); *id.* ¶ 21 (explaining the particular effect of the challenged provisions on "many minority communities in Texas, including Texarkana and Fort Worth"). Thus, venue in this District is proper because Plaintiffs allege "significant acts and omissions" that occurred in this District, regardless whether Plaintiffs Ray and Johnson are formally named in this case. *Carty*, 2006 U.S. Dist. LEXIS, at *5.

Defendants' argument for transfer under 28 U.S.C. § 1406(a) hinges on their erroneous argument that venue in this District is improper. Mot. 16. It should therefore be rejected.[10] Notably, Defendants have presented no claim or argument for transfer under 28 U.S.C. § 1404. Thus, because venue is proper in this District, there is no need for further analysis.

CONCLUSION

For the foregoing reasons, and all others apparent to the Court, Defendant's Rule 12(b) Motion to Dismiss should be denied.

This 27th day of October, 2006.

Respectfully submitted,

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[10] Were the Court to accept Defendants' erroneous venue arguments, it should not simply grant a motion to dismiss, *cf.* Mot. 16, but would instead transfer this lawsuit to another District. Such a transfer is not warranted, however, for the reasons stated above.

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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 27th day of October, 2006.

Eric M. Albritton