

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

WILLIE RAY, ET AL. §
Vs. § CIVIL ACTION NO. 2:06-CV-385
STATE OF TEXAS, ET AL. §

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 30, 2006, the court considered Defendants' Rule 12(b) Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction. Pursuant to Fed. R. Civ. P. 52, the court issues these findings of fact and conclusions of law. Any finding of fact that is actually a conclusion of law should be treated as such. Any conclusion of law that is actually a finding of fact should be treated as such.

1. Plaintiff Willie Ray ("Ray") is an African-American female and is a publicly elected member of the Texarkana City Council. She is affiliated with the Democratic Party.
2. Ray has provided assistance to registered voters in the past with regard to the casting of mail-in ballots, and wishes to provide lawful assistance to voters in the future.
3. Ray was indicted by the State of Texas in 2005 because she allegedly possessed and mailed ballots for voters who needed or requested assistance with their mail-in ballots. She pled guilty to violating Section 86.006 of the Texas Election Code.
4. Plaintiff Gloria Meeks ("Meeks") is an African-American female, registered to vote in Tarrant County, and affiliated with the Democratic Party.

5. Plaintiff Rebecca Minneweather (“Minneweather”) is an African-American female, registered to vote in Tarrant County, and affiliated with the Democratic Party.

6. Meeks and Minneweather are the subjects of investigations by the Defendants for allegedly possessing and mailing ballots of other voters in Tarrant County. They have assisted voters in the past and desire to assist them in the future.

7. Plaintiff Parthenia McDonald (“McDonald”) is an African-American female, a registered voter in Tarrant County, and is affiliated with the Democratic Party.

8. McDonald is a homebound individual who is 78 years old and requires assistance to vote. She is handicapped and uses a wheelchair. The assistance she requires includes the actual mailing of the ballot.

9. Plaintiff Texas Democratic Party is a political party organized and existing under the laws of the State of Texas. The Texas Democratic Party encourages its party activists and local organizers to try to maximize voter turnout, particularly among the elderly and disabled.

10. Defendant Greg Abbott (“General Abbott”) is the Attorney General for the State of Texas. General Abbott is sued in his official capacity.

11. Defendant Roger Williams (“Secretary Williams”) is the Secretary of State for the State of Texas. Secretary Williams is sued in his official capacity.

12. Texas law provides a statutory right to cast a ballot by mail 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. Elec. Code §§ 82.001-82.003.

13. The process of early voting by mail generally requires the completion of an application for a ballot, the review and acceptance of that application by an early voting clerk, the mailing of the

ballot, the official ballot envelope, and an official carrier envelope to the voter, and the marking and return of the ballot, ballot envelope and the carrier envelope to the early voting clerk.

14. Historically, individuals, political parties, and other organizations in certain communities have attempted to maximize voter turnout by assisting voters in casting their mail-in ballots.

15. This assistance has been widely used by both of the major Texas political parties, and it is particularly beneficial to elderly, homebound, disabled, and illiterate voters.

16. The assistance comes in many forms. For example, party activists might provide or mail “pre-filled” early voting applications to voters, who then need only sign and return the application. The assistance also includes helping voters who have received mail-in ballots to mark the ballots (for those who are blind and cannot read or write); and physically placing sealed ballots in the mail for voters using mail-in ballots.

17. In 2003, the Texas Legislature amended the Election Code. The amendments at issue in this case relate to mail-in voting. Steven Wohlens, a Democratic State Representative, was the chief architect of the legislation. The legislation is referred to as House Bill (“H.B.”) 54.

18. Representative Wohlens began work on H.B. 54 after vote fraud allegations arose in Dallas elections when his wife, former Democratic Dallas Mayor, Laura Miller, was running for office. Representative Wohlens has stated that he and his wife had been victimized as political candidates by rigged elections with people harvesting votes. A co-author of the legislation, Republican Representative Mary Denny, has also indicated that the bill was intended to provide a way to prosecute the organizers of vote harvesting. As used by the proponents of H.B. 54, the term “vote harvesting” generally refers to vote fraud in the early voting process.

19. The House Committee on Elections reported that under the law as it existed before the

amendments, it was difficult to prosecute persons who unduly influenced an election. HOUSE COMM. ON ELECTIONS, BILL ANALYSIS, Tex. H.B. 54, 78th Leg., R.S. 1 (2003). Certain individuals had unlawfully assisted voters with completing early voting ballot applications and with marking and delivering their ballots. *Id.* In addition, some persons had engaged in the buying and selling of mail ballots to alter election outcomes. *Id.*

20. The legislative history indicates that the supporters of the bill had determined that the law governing absentee voting by mail needed to be tightened and oversight needed to be stricter because, “[b]y its nature, mail-in voting from home is out of the public view and therefore vulnerable to fraud.” HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 54, 78th Leg., R.S. 6. Supporters of the new law were attempting to combat organized fraud that can occur in nursing homes and assisted living facilities. *Id.* Allegations of such fraud were common throughout the country. *Id.* According to the legislative history, the conduct of vote brokers typically involves “visit[ing] senior citizens and persuad[ing] them to vote a certain way or to allow someone else to mark their ballots.” *Id.* at 7. The legislative history indicates that vote brokers were rarely caught because “[i]f a voter reported to officials that a campaign worker came into the home and unduly influenced the voter or took the voter’s ballot to be mailed, almost no means exist[ed] to track down the campaign worker.” *Id.*

21. In addition to the statements in the bill analyses and the committee hearings, the record contains an official statement of legislative intent regarding H.B. 54:

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

H.J. OF TEX., 78th Leg., R.S., 1282 (2003).

22. H.B. 54 passed with bi-partisan support. H.J. OF TEX., 78th Leg., R.S. 1283 (2003); S.J. OF TEX., 78th Leg., R.S. 2414 (2003).

23. Although the plaintiffs raise challenges to several statutory provisions included in the 2003 amendments, the court will address only one for purposes of preliminary injunctive relief. With respect to the other challenged provisions, the court finds that injunctive relief is improper because even assuming that the plaintiffs' claims are meritorious, the court could not award meaningful relief in the form of a preliminary injunction given the current timetable governing the elections.

24. For purposes of evaluating the motion for preliminary injunction, the court will limit its consideration to Tex. Elec. Code § 86.006. Section 86.006 deals with the return of early mail-in ballots.

25. Section 86.006 provides that:

- (a) A marked ballot voted under this chapter must be returned to the early voting clerk in the official carrier envelope. The carrier envelope may be delivered in another envelope and must be transported and delivered only by mail or by common or contract carrier.
- (b) Except as provided by Subsection (c), a carrier envelope may not be returned in an envelope or package containing another carrier envelope.
- (c) The carrier envelopes of persons who are registered to vote at the same address may be returned in the same envelope or package.
- (d) Each carrier envelope that is delivered by a common or contract carrier must be accompanied by an individual delivery receipt for that particular carrier envelope that indicates the name and residence address of the individual who actually delivered the envelope to the carrier and the date, hour, and address at which the carrier envelope was received by the carrier. A delivery of carrier envelopes is prohibited by a common or contract carrier if the delivery originates from the address of:
 - (1) an office of a political party or a candidate in the election;

- (2) a candidate in the election unless the address is the residence of the early voter;
 - (3) a specific-purpose or general-purpose political committee involved in the election; or
 - (4) an entity that requested that the election be held, unless the delivery is a forwarding to the early voting clerk.
- (e) Carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk. The secretary of state shall prescribe appropriate procedures to implement this subsection and to provide accountability for the delivery of the carrier envelopes from the voting place to the early voting clerk.
- (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 Subchapter 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 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.

(h) A ballot returned in violation of this section may not be counted. If the early voting clerk determines that the ballot was returned in violation of this section, the clerk shall make a notation on the carrier envelope and treat it as a ballot not timely returned in accordance with Section 86.011(c). If the ballot is returned before the end of the period for early voting by personal appearance, the early voting clerk shall promptly mail or otherwise deliver to the voter a written notice informing the voter that:

- (1) the voter's ballot will not be counted because of a violation of this code; and
- (2) the voter may vote if otherwise eligible at an early voting polling place or the election day precinct polling place on presentation of the notice.

26. Tex. Elec. Code § 86.0051(b) provides that “[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.”

27. Plaintiffs contend that § 86.006 prevents them and dissuades others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout. The evidence found to be persuasive indicates that § 86.006 in fact has that effect on organizational efforts.

CONCLUSIONS OF LAW

1. The Court grants in part the motion of the State of Texas to dismiss any constitutional claims brought against it in its sovereign capacity. U.S. Const. amend. XI. The court will, however, decide the constitutional claims pursuant to *Ex parte Young*, 209 U.S. 123 (1908). The State officials are sued in their official capacities and they are the officials responsible for enforcing the challenged provision of the Texas Election Code.
2. The court has subject matter jurisdiction over the plaintiffs' constitutional and Voting Rights Act claims. 28 U.S.C. § 1331.
3. *Heck v. Humphrey*, 512 U.S. 477 (1994) does not bar the claims of Plaintiffs Ray and Johnson. *Heck* and its progeny prohibit a prisoner from challenging the conditions of his confinement through a § 1983 suit instead of proceeding through *habeas corpus*. Ray and Johnson do not challenge their past convictions or sentences for violations of the Election Code. They seek prospective relief in the form of an injunction against enforcement of the same provisions in future elections.
4. The motion to dismiss for lack of venue or to transfer for improper venue is denied, in light of the court's rejection of the defendants' argument that *Heck* precludes the claims of Ray and Johnson. Venue is proper in this district. 28 U.S.C. § 1391.
5. For purposes of assessing the motion for preliminary injunction, it is unnecessary to consider the defendants' other arguments for dismissal, except as they may be relevant to the plaintiffs' showing on the merits of the motion for preliminary injunction.
6. Plaintiffs are entitled to a preliminary injunction if they establish the following: "(1) a substantial likelihood of success of 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).

7. In an election law case, a court considering a preliminary injunction request must also weigh “considerations specific to election cases.” *Purcell v. Gonzalez*, Nos. 06A375 (06-532) & 06A379 (06-533), 2006 WL 2988365, at *2 (U.S. Oct. 20, 2006)(per curiam). The court should consider whether an order affecting elections may result in voter confusion and incentive to remain away from the polls. When an election is near, the court should consider whether to allow the election to proceed without an injunction suspending an election regulation. *Id.*

8. “Voting 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)). Voting implicates basic constitutional rights under the First and Fourteenth Amendments. *Anderson v. Celebrezze*, 460 U.S. 780, 786 & n.7 (1983).

9. Under *Anderson*, the court:

must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

406 U.S. at 788; *see also Kirk*, 84 F.3d at 182; *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988).

10. The *Anderson/Burdick* framework is a flexible one. When First and Fourteenth Amendment rights are subject to “severe” restrictions, the regulation must be narrowly drawn to advance a state interest of compelling interest. *See Burdick*, 504 U.S. at 434. In contrast, if a challenged provision imposes only reasonable, non-discriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions. *Id.*

11. Although there is a fundamental right to vote, the Supreme Court has held there is no corresponding fundamental right to receive and cast an absentee ballot. *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802 (1969); *see also Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1186 (Ill. App. Ct. 2004).

12. In light of *McDonald*, this court holds that strict scrutiny does not apply to the challenged provision. Nevertheless, the challenged statute is applicable only to elections, which, by their nature, involve important First and Fourteenth Amendment rights. It is therefore appropriate to assess the asserted injury to the plaintiffs and to examine the precise interest put forth by the State as justification for the burden on the plaintiffs’ rights. Only then can the court determine whether the challenged provision is constitutional. *See Cotham v. Garza*, 905 F. Supp. 389, 400-401 (S.D. Tex. 1995)(striking provision of Texas Election Code that banned the voter’s possession of written communications in voting booth, despite the court’s conclusion that the provision did not severely burden voter’s rights because the challenged law was not necessary to achieve the State’s interest in preventing fraud). Under the current posture of the case, the court is engaged in this exercise to determine whether the plaintiffs have met their burden of showing a substantial likelihood that they will prevail on the merits of this challenge.

13. The plaintiffs contend that the challenged provision criminalizes the mere possession of an official ballot or carrier envelope provided to another. According to the plaintiffs, the regulation dissuades them and others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout even when these efforts do not involve providing illegal assistance to voters or engaging in voter fraud. In addition, a violation of § 86.006 results in the cancellation of the vote, even under circumstances not amounting to fraud or unlawful voter assistance.

14. The State's asserted interest in the regulation is curtailing voter fraud. *See* Defendants' Response Brief at 22. This is a well-recognized and compelling interest. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process").

15. Texas has an established statutory scheme designed to prevent voting fraud. In provisions applicable both to in-person and mail-in voting, Texas law criminalizes illegal voting, Tex. Elec. Code § 64.012, as well as providing unlawful assistance to a voter. *Id.* §§ 64.036(1)-(3). Texas law also criminalizes the provision of false information on an application for a mail-in ballot. *Id.* § 84.0041.

16. In addition, the Texas Election Code requires persons, other than the voter, who deposit an official carrier envelope in the mail, to provide their name, address, and signature on the carrier envelope. Tex. Elec. Code § 86.0051(b). Subject to certain exceptions, Texas law provides criminal penalties for the failure to comply with this law. Tex. Elec. Code § 86.0051(c)-(e).

17. Section 86.006(f) makes it a criminal offense to possess an official ballot or carrier envelope provided to another. Tex. Elec. Code § 86.006(f). Although the statute provides several affirmative

defenses to prosecution, *see id.*, the defendants' able counsel recognized that the statute provides for an offense for the mere possession of an official ballot or carrier envelope of another. At argument, counsel suggested that no reasonable prosecutor would ever seek an indictment if the elements of an affirmative defense were clearly present. He stopped short, however, of representing that the language of the statute would not allow such a prosecution.

18. For purposes of evaluating the motion for preliminary injunction, the court may assume, *arguendo*, that the affirmative defenses provided under the statute would be construed literally if not practically as exceptions to criminal liability. What makes this statute particularly burdensome is that it does not provide for any exception to criminal liability if the person possessing the official ballot or carrier envelope has the consent of the voter. This is the only fair reading of the statute as a whole, given that the penalties for possession are explicitly enhanced if the person possessing the ballots acts without the consent of the voters. *See* Tex. Elec. Code § 86.006(g).

19. The State's interest in combating voter fraud is sufficiently served by the other provisions of the Election Code. In particular, §§ 64.012, 64.036(1)-(3), and 84.0041 are all aimed at curtailing voter fraud and are applicable to mail-in balloting. The State suggests, however, that a disclosure provision of reasonable scope is necessary to prevent voting fraud occurring in connection with early mail-in voting. On the limited record before it, the court agrees with this position. Section 86.0051's disclosure requirement is thus sufficiently justified by that interest. Section 86.006(f), however, goes too far. Its criminal penalties and disqualification of the vote for the mere possession of a ballot or carrier envelope are not necessary to achieve the State's interest in curtailing fraud when possession occurs with the voter's consent.

20. Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim

that § 86.006's prohibition on the possession of carrier envelopes and ballots provided to others unduly burdens the First and Fourteenth Amendment rights of the plaintiffs under circumstances in which the voter consents to that possession.

21. Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claim that § 86.0051 unduly burdens their First and Fourteenth Amendment rights in light of the State's asserted interest in requiring disclosure to curtail fraud in the early voting by mail process. In light of the testimony at the hearings held on H.B. 54, the State could permissibly require disclosure of the identity of persons other than the voter who deposit the carrier envelope in the mail to aid law enforcement officers in investigating allegations of voting fraud. This is true even if the voter consents to allowing another person to deposit the ballot and carrier envelope in the mail.

22. Plaintiffs have satisfied their burden to demonstrate they will suffer irreparable harm absent an injunction. *See Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996).

23. The balance of hardships favors the plaintiffs.

24. The public interest is not disserved by the injunction. The court has considered the scope of its injunction in light of the proximity of the election and concludes that the injunction will not dissuade voters from participating in the political process because of any fear that their votes will be diluted. The scope of the injunction will not result in voter confusion or create any incentive to remain away from the polls.

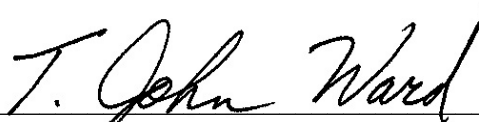
25. The plaintiffs have not satisfied their burden of persuasion to merit preliminary injunctive relief on their claim that the statute is overbroad or void for vagueness.

26. The plaintiffs have not satisfied their burden of persuasion to merit preliminary injunctive relief on their claim that the challenged provision conflicts with Section 208 of the Voting Rights

Act.

27. The court has issued a preliminary injunction in accordance with these findings of fact and conclusions of law.

SIGNED this 31st day of October, 2006.

A handwritten signature in black ink that reads "T. John Ward". The signature is written in a cursive style with a horizontal line underneath it.

T. JOHN WARD
UNITED STATES DISTRICT JUDGE