No. 2-06CV-385

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILLIE RAY; JAMILLAH JOHNSON; GLORIA MEEKS; REBECCA MINNEWEATHER; REUBEN ROBINSON, EDDIE JACKSON; 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 PHIL WILSON, Secretary of State for the State of Texas,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

APPENDIX (Separately filed)

1. CHALLENGED PROVISIONS

2. DECLARATION OF ANN MCGEEHAN
(Ex. A-J)

3. DECLARATION DAVID BOATRIGHT (dated October 30, 2006)
(previously filed)

4. DEPOSITION EXCERPTS OF PLAINTIFF WILLIE RAY

5. DEPOSITION EXCERPTS OF PLAINTIFF JAMILLAH JOHNSON

6. DEPOSITION EXCERPTS OF PLAINTIFF REBECCA MINNEWEATHER

7. VOTING HISTORY OF PLAINTIFF REUBEN ROBINSON

8. DEPOSITION EXCERPTS OF PLAINTIFF REUBEN HERNANDEZ
(Texas Democratic Party)

9. DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

10. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COURT (dated January 9, 2008)

11. DECLARATION OF ANN MCGEEHAN (dated October 27, 2008) (previously filed)

12. DECLARATION OF ADRIENNE MCFARLAND (dated October 27, 2006)
(previously filed)

13. VOTING HISTORY OF GLORIA MEEKS

14. DEPOSITION EXCERPTS OF DOROTHY DEAN

15. DEPOSITION EXCERPTS FOR JOE BAILEY

TABLE OF CASE AUTHORITIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILLIE RAY, JAMILLAH JOHNSON, GLORIA MEEKS, REBECCA MINNEWEATHER, REUBEN ROBINSON, EDDIE JACKSON, 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 PHIL WILSON, Secretary of State for the State of Texas, *Defendants*.	§	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Greg Abbott and Phil Wilson, (hereinafter "Defendants"), move for Summary Judgment against Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Reuben Robinson, Eddie Jackson, and the Texas Democratic Party (hereinafter "Plaintiffs") and in support of their motion would respectfully show unto this Court the following:

I. INTRODUCTION

In this case, Plaintiffs, several persons associated with the Democratic Party, and the Texas Democratic Party (collectively, the Plaintiffs) have sued Texas Attorney General Abbott and Texas Secretary of State Wilson (collectively, the Defendants), challenging several provisions of the Texas Election Code, in particular §§64.036(a)(4), 84.003(b), 84.004, 86.0051, and 86.006, as amended in 2003 (the "Challenged Statutes"). Copies of the

full text of the challenged statutes is included in the accompanying Appendix at Ex. 1.

The Challenged Statutes establish several requirements relating to early voting by mail. The gist of the Plaintiffs' claims is that the purpose and effect of these provisions, and their application and enforcement by the Defendants, unduly burdens the Plaintiffs' voting, free-speech, and associational rights in violation of the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, as well as the Federal Voting Rights Act. Plus, the Plaintiffs assert that the enactment and enforcement of the 2003 Amendments violates their constitutional rights of equal protection and due process of law. By agreement Plaintiffs have severed their claims related to racial discrimination for trial at a later date. As demonstrated below, Defendants are entitled to summary judgment on all of Plaintiffs' remaining, unsevered claims (Counts I, II, III, IV, VII, and VIII) pursuant to Fed. R. Civ. P. 56(b).[1]

II. THE PARTIES

A. The Plaintiffs

Plaintiffs amended their Complaint on February 7, 2008. The current Plaintiffs are Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Reuben Robinson, Eddie Jackson, and The Texas Democratic Party. Former Plaintiffs Parthenia McDonald and Walter Hinojosa have been voluntarily withdrawn from this suit by Plaintiffs. Ray, Johnson, Meeks, Minneweather, and Jackson all allege that they are African-Americans and

[1] Defendants incorporate by reference in this Motion their previously filed Defendants' Rule 12(b) Motions to Dismiss (filed October 16, 2006) and Defendants' Response to Plaintiffs' Motion for Preliminary Injunction (filed October 27, 2006) and supporting exhibits and evidence.

political-party activists for the Texas Democratic Party, who wish to provide lawful assistance to voters casting mail-in ballots. Robinson alleges he is an African-American male who is "severely physically handicapped" and "depends upon a trusted friend" to assist him in voting by mail. Ray, Johnson, and Robinson are residents of Bowie County, Texas. (Amended Complaint ¶¶ 2-8) Meeks and Minneweather reside in Fort Worth, Texas. Jackson alleges he resides in Harrison County, Texas.

In addition to the individual Plaintiffs, the Texas Democratic Party (TDP) is also a party to this case. The TDP asserts that one way in which it attempts to "maximize voter turnout" is by utilizing its political-party activists such as Ray, Johnson, Meeks, Minneweather, and Jackson to help voters requiring assistance such as the "homebound," the "physically handicapped," the "elderly," and the "illiterate" to cast mail-in ballots. (Amended Complaint ¶ 9) This assistance, Plaintiffs allege, typically may involve: (1) "prefilling" applications for mail-in ballots and mailing them to voters, (2) helping voters "mark their ballots," and (3) mailing the "carrier envelopes" containing the completed mail-in ballots."

B. The Defendants

The Defendants are the Texas Attorney General Greg Abbott and Texas Secretary of State Phil Wilson. This Court has previously dismissed the State of Texas as named Defendant. Plaintiffs complain the Attorney General, the Secretary, and their employees are the state officials whose application and enforcement of the Texas Election Code provisions at issue have allegedly infringed on the Plaintiffs' constitutional rights protected by the First, Fourteenth, and Fifteenth Amendments to the United States Constitution and statutory rights

under the federal Voting Rights Act. Both the Attorney General and the Secretary have been sued in their official capacities only.

III. SUMMARY OF THE EARLY VOTING BY MAIL STATUTES

This case, at its core, is about Texas' statutes allowing qualified voters to apply for, complete, and cast early-voting, mail-in ballots. An overview of the entire statutory scheme for early voting is necessary to understand the section's purpose and effect and the Plaintiffs' challenges to the statutes.

A. General Requirements and Eligibility for Early Voting

Title 7 of the Election Code sets forth the statutory scheme for early voting in Texas. Early voting can be accomplished either "by personal appearance at an early voting polling place" or "by mail." TEX. ELEC. CODE §81.001(a). The provisions of the Election Code related to voting generally are applicable to early voting, unless the general provisions "are inconsistent with [Title 7] or . . . cannot be feasibly applied to early voting." *Id*. § 81.002.

To be eligible for early voting, a person must be a "qualified voter." *See id*. §§ 82.001-.004. That is, the person must satisfy all of the requirements of §11.002 of the Code. If the general requirements are met, a person is eligible for early voting by mail, provided that he or she meets certain additional criteria. They are: [1] the voter expects to be absent from the county of the voter's residence on election day and during the regular hours for conducting early voting at the main early-voting polling place during the period for early voting by personal appearance, *see id*. §82.001(a); [2] the voter has a disability that prevents him or her from appearing at the polling place on election day, *see id*. §82.002(a); [3] the

voter is 65 years-old or older on election day, *see id.* §82.003; or [4] the voter is confined in jail on election day, *see id.* §82.004(a). The Plaintiffs' claims in this case concern voters eligible to early vote by mail because of either disability or age.

B. The Application Process for Mail-In Ballot

To be entitled to early vote by mail, an eligible person "must make an application for an early voting ballot." TEX. ELEC. CODE §84.001(a).

An application may be signed "for the applicant by a witness other than the early voting clerk or a deputy." *Id*. §84.003(a). If it is, the application "must indicate the witness's relationship to the applicant or, if unrelated, indicate that fact." *Id*. It is a misdemeanor for a witness or a person who "otherwise assists an applicant in completing an early voting ballot application" to fail to comply with Election Code §1.011(d) by not "affix[ing]" their signatures to the application and stating their own names and residence addresses. *See id*. §84.003(b)-(d). It is a misdemeanor for a witness to sign more than one application in the same election, unless the witness is an early voting clerk, deputy early voting clerk, or related to the applicant as a parent, grandparent, spouse, child, or sibling. *See id*. §84.004(a)-(e). The application form contains a warning to the assistant that "[f]ailure to complete this information if signature was witnessed or applicant was assisted in completing the application is a Class A misdemeanor." (Ex. 2, McGeehan Decl., D)

C. Receipt and Casting of Mail-In Ballot

If an applicant for early voting by mail satisfies the statutory requirements, the early voting clerk will mail that person the "balloting materials." *See* TEX. ELEC. CODE

§§86.001(b), .003(a).

After receiving the balloting materials, the voter must mark the ballot "in accordance with the instructions on the ballot envelope." *Id*. §86.005(a). The voter must then place the ballot in the official ballot envelope, seal the envelope, place the ballot envelope in the official carrier envelope, seal the carrier envelope, and sign the certificate on the carrier envelope. *Id*. §86.005(c).

If the voter needs help in preparing the ballot, he or she may select an authorized person to provide such assistance. TEX. ELEC. CODE §86.010(a). Persons authorized by law to assist the voter with their ballot include "any person selected by the voter other than the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs." *Id*. §64.032(c). The assistance that a voter may receive from a person, who is in the presence of the voter's ballot or carrier envelope, includes: [1] reading the ballot to the voter, [2] directing the voter to read the ballot, [3] marking the voter's ballot, or [4] directing the voter to mark the ballot. *Id*. §64.0321. It is a misdemeanor to unlawfully assist a voter [1] who is not eligible for assistance, *id*. §64.036(a)(1), or [2] who has not requested assistance or selected the person to assist them, *id*. §64.036(a)(4). It is likewise unlawful assistance when a person [1] prepares a voter's ballot "in a way other than the way the voter directs," *id*. §64.036(a)(2), or [2] "suggests by word, sign, or gesture how the voter should vote," *id*. §64.036(a)(3).

The mail-in ballot instructions contain the following warning:

If a person (assistant) helps you in marking your ballot or deposits your carrier

> envelope in the mail or delivers it to a common or contract carrier, that person must sign your carrier envelope and include their printed name and address. Failure of the assistant to provide this information is a crime, and may result in your ballot being rejected.

(Ex. 2, McGeehan Decl. B)

D. Return of Mail-In Ballot

The deadline for returning the mail-in ballot to the early voting clerk is before the time the polls are required to close on election day. Tex. Elec. Code §86.007(a). The early-voting ballot must be returned to the early-voting clerk in the official carrier envelope. *Id*. §86.006(a). The carrier envelope must be transported and delivered only by mail or by common or contract carrier. *Id*. Carrier envelopes may not be returned in an envelope or package containing another carrier envelope, unless the envelope or package contains the carrier envelopes of persons who are registered to vote at the same address. *Id*. §86.006(b)-(c). A common or contract carrier may not deliver carrier envelopes if the delivery originates from [1] an office of a political party or a candidate in the election, [2] a candidate in the election unless the address is that of the candidate 's residence, [3] a political committee involved in the election, or [4] an entity that requested the election be held. *Id*. §86.006(d). Carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk. *Id*. §86.006(e).

As the mail-in ballot instructions warn, it is a misdemeanor if a person acts as a witness for a voter in signing the carrier envelope and knowingly fails to sign the carrier envelope and print his or her name and residence address on the envelope. *Id*. §86.0051(a);

see also id. §1.011(d). It is also a misdemeanor if a person knowingly deposits the carrier envelope in the mail or with a common or contract carrier without providing their signature, printed name, and residence address on the back of the carrier envelope. *Id*. §86.0051(b)-(c). The carrier envelope provides instructions and a space for the person's name, address, and signature. (Ex. 2, McGeehan Decl. A) The offense may be upgraded to a state jail felony if committed in conjunction with unlawful assistance to the same voter in violation of Tex. Elec. Code §64.036. And it is no defense to a prosecution for violating these requirements that the voter voluntarily gave another person possession of the voter's carrier envelope. *Id*. §86.0051(c).

Section 86.006(f) provides it is a criminal offense for a person to knowingly possess an official ballot or carrier envelope that has been provided to a voter, subject to six exceptions. *See id*. §86.006(f)-(g). Prior to September 1, 2007, it was an affirmative defense to prosecution under §86.006(f)(g), if the person was:

[1] related to the voter within the second degree by affinity or the third degree of consanguinity;
[2] registered to vote at the same address as the voter;
[3] an early voting clerk or deputy 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 his or her signature, printed name, and residence address on the reverse side of the carrier envelope;
[5] an employee of the U.S. Postal Service; or
[6] a common or contract carrier.

See id. §86.006(f)(1).

As noted in greater detail below, in 2007, the Texas Legislature amended §86.006

(f)(1)-(6) to eliminate the affirmative defense language and transform the language into exceptions to liability. Persons covered by one of the six exceptions are not subject to criminal prosecution and may not be charged under §86.006(f). In addition, the 2007 amendments provide that if the issue of the applicability of one of the six exceptions to §86.006(f) is submitted to a jury, the trial court must charge the jury that reasonable doubt on the issue requires the defendant be acquitted. Tex. Elec. Code §86.006 (i)(3).

E. The Early Voting Clerk's Handling of Defective Mail-In Ballots and Carrier Envelopes

A carrier envelope returned to the early voting clerk that does not comply with the Code's provisions may be handled by the early voting clerk in a number of ways: (i) the clerk "makes" a notation on the carrier envelope and treats it as a ballot not timely returned in accordance with Section 86.011(c), that is the clerk, retains it for a period for preservation of election records and then destroys the carrier envelope and its contents. If the offending carrier envelope and its contents are 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 written notice informing the voter (a) the voter's ballot will not be counted because of the violation; and (b) the voter may vote at an early voting polling place in person or on election day upon presentation of the clerk's notice. Tex. Elec. Code § 86.006(h).

In the alternative, the early voting clerk may (i) deliver the defective carrier envelope in person or by mail to the voter and may receive, before the deadline, the corrected carrier envelope from the voter, or (ii) the clerk may notify the voter of the defect by telephone and

advise the voter that the voter may come to the clerk's office in person to correct the defect, or (iii) cancel the voter's application to vote by mail and the voter is permitted to vote on election day. Tex. Elec. Code §86.011(d).

Generally, for statewide elections the early voting clerk functions are performed by the county clerk, an elected office, or, for more localized elections, a person appointed by an elected body ordering the election. Tex. Elec. Code §§ 83.001 - 83.007. The early voting clerk delivers the marked mail-in ballots in the sealed carrier envelopes to an early voting ballot board for the county, which is comprised of members representing the prevailing political parties in the county. Tex. Elec. Code §§ 87.002, 87.021. The board members open the carrier envelopes and conduct a review of each mail-in ballot, carrier envelope, and ballot application to determine whether the mail-in vote complies with Texas law. Tex. Elec. Code § 87.041. Accepted mail-in ballots are counted and included on the early voting returns. Tex. Elec. Code §§ 87.042; 87.062. Rejected mail-in ballots are forwarded separately to the custodian of election records for preservation, and within 10 days of the election, written notice must be provided to the voter of the reason for rejection of a mail-in ballot. Tex. Elec. Code §§ 87.043; 87.0431.

F. Enforcement of the Statutory Scheme

The statutory scheme for preventing fraud in connection with early voting by mail also provides for enforcement mechanisms. The scheme gives the Secretary of State and the Attorney General roles in the prevention of voting fraud and provides mechanisms by which to report, refer, investigate, and prosecute cases involving voting fraud.

1. The Secretary of State's Role

The enforcement scheme starts with the Secretary of State. The Secretary is the chief election officer of the State. Tex. Elec. Code §31.001. He may perform "any function relating to the administration of elections that is under [his] jurisdiction." *See id.* As part of his duties, the Secretary is required, among other things, to "prescribe the design and content...of the forms necessary for the administration of the [Election Code]," *id.* §31.002 (a), to "obtain and maintain uniformity in the application, operation, and interpretation of th[e] [Election Code] and of the election laws outside [the] [C]ode," *id.* §31.003, to "assist and advise all election authorities," *id.* §31.004 (a), "to protect the voting rights of the citizens of this [S]tate from abuse by the authorities administering the [S]tate's electoral processes," *id.* §31.005 (a), and to "establish a toll-free telephone number to allow a person to report an existing or potential abuse of voting rights," *id.* §31.0055(a). In fulfilling these responsibilities, the Elections Division of the Office of Secretary of State "frequently receives reports of possible election irregularities or other potential violations of the Election Code...from a variety of sources, including local elections and law enforcement officials, as well as private citizens." (Ex. 11, McGeehan Decl. (October 27, 2006) ¶ 3) If, after receiving a complaint alleging criminal conduct in connection with an election, the Secretary determines that there is reasonable cause to suspect that the alleged criminal conduct occurred, he must refer the complaint to the Attorney General and provide him with all pertinent documents in the Secretary's possession. Tex. Elec. Code . §31.006.

2. The Attorney General's Role.

The Secretary of State refers voting fraud complaints to the Criminal Investigations Division (CID) of the Attorney General's Office so long as "the allegation is supported by some evidence that, if true, could be construed as a violation of the Election." (Ex. 11, McGeehan Decl. (October 27, 2006) ¶ 4) In making a referral to CID, "the Elections Division does not make any type of recommendation regarding whether or how CID should investigate or otherwise proceed with the matter." (*Id*. at ¶ 5) The Attorney General is authorized by law to investigate the allegations of a complaint referred by the Secretary. Tex. Elec. Code §273.001(d). "CID has primary responsibility for investigation of potential violations of the Election Code." (Ex. 3, Boatright Decl. ¶3) When CID receives a referral, it "opens an investigative file and does a preliminary analysis of each allegation to determine whether the facts as alleged by the complainant(s) would constitute a violation of law." (*Id*. at ¶ 6) If further investigation of a complaint is warranted, CID will undertake such investigation and conduct witness interviews as necessary. (*Id*. at ¶ 8) If CID believes that a possible violation of law has occurred, then the matter is forwarded to the Attorney General's Criminal Law Enforcement Division (CLED). (Id. at ¶ 10)

The Attorney General is authorized by law to prosecute a criminal offense proscribed by the Election Code. *Id*. §273.021 (a). The Attorney General does not, however, initiate voter fraud investigations. (Ex. 3, Boatright Decl. ¶ 13) All investigations commence with a third party referral, either from the Secretary of State, local officials, or individual citizens. (*Id*.)

In deciding whether to prosecute an alleged violation of the Election Code, CLED considers the nature of the alleged offense, the weight of the evidence, the credibility of the witnesses, and the likelihood of a conviction. (Ex. 12, McFarland Decl. ¶8) Race, ethnicity, and political-party affiliation of the complaints or the suspects play no part in CLED's consideration whether to prosecute a complaint. (*Id*.)

IV. THE CHALLENGED ELECTION CODE PROVISIONS AND SUMMARY OF PLAINTIFFS' ALLEGATIONS

In this lawsuit, Plaintiffs seek prospective declaratory and injunctive relief relating to five provisions of the Texas Election Code. The crux of Plaintiffs' allegations is that the overbreadth and vagueness of these render the provisions unconstitutional, both facially and as applied to them individually. Plaintiffs have agreed to sever their claims based upon racial discrimination (see below) for trial at a later date. The remaining claims (Counts I-IV, VII and VIII) involve the alleged impermissible burdens these provisions impose upon the Plaintiffs' right to vote, to political expression, and the right to associate. Plaintiffs contend the five provisions in issue violate their constitutionally guaranteed right to vote, the First and Fourteenth Amendments to the United States Constitution, §208 of the Voting Rights Act of 1965, 42 U.S.C. §1973aa-6, and 42 U.S.C. §1983. Plaintiffs also allege enforcement and application of these provisions violate their right of due process of law. For these alleged violations, Plaintiffs seek declaratory and injunctive relief, declaring the provisions unconstitutional and illegal, and enjoining Defendants from enforcing or applying these provisions. The Challenged Statutes (the full text of which are in the accompanying

Appendix) are as follows:

- **Tex. Elec. Code §64.036(a)(4).** Section 64.036(a)(4) was added as part of the 2003 amendments to the Code and provides that a person commits the criminal offense of unlawful assistance if he or she knowingly assists a voter who has neither "requested assistance" nor "selected the person to assist the voter." An offense is a Class A misdemeanor.

> **§ 64.036. Unlawful assistance:** (a) A person commits an offense if the person knowingly: ...(4) provides assistance to a voter who has not requested assistance or selected the person to assist the voter.

- **Tex. Elec. Code §84.003(b).** Section 84.003(b) was amended in 2003 and describes the procedure for the "witnessing" of an application for a mail-in ballot under the chapter. A witness's knowing failure to comply with the requirements constitutes an offense under §84.003, which is a Class A misdemeanor.

> **§84.003. Signing application by witness; assisting applicant.** (b) A person who acts as a witness for an applicant for an early voting ballot application commits an offense if the person knowingly fails to comply with §1.011(d). A person who in the presence of the applicant otherwise assists an applicant in completing an early voting ballot application commits an offense if the person knowingly fails to comply with §1.011(d) in the same manner as a witness.

- **Tex. Elec. Code §84.004.** Section 84.004, which has been in effect since 1985, makes it an offense for a person to act as witness for more than one early-voting mail-in ballot applicant in the same election unless the witness is an early-voting clerk or a deputy clerk, or a parent, grandparent, spouse, child, or sibling to the additional applicants. applicants. An offense is a Class B misdemeanor.

§84.004. Unlawfully witnessing application for more than one applicant.

(a) a person commits an offense if, in the same election, the person signs an early voting ballot application as a witness for more than one applicant.

(b) It is an exception to the application of Subsection (a) that the person signed early voting ballot applications for more than one applicant:

(1) as an early voting clerk or deputy early voting clerk;or

(2) and the person is related to the additional applicants as a parent, grandparent, spouse, child, or sibling.

(c) A violation of this section does not affect the validity of an application involved in the offense.

(d) Each application signed by the witness in violation of this section constitutes a separate offense.

(e) An offense under this section is a Class B misdemeanor.

• **Tex. Elec. Code §86.0051.** Section 86.0051, added as part of the 2003 amendments to the Code, requires that a person other than the voter or relative of the voter who mails carrier envelope containing the ballot to provide his or her printed name, signature, and residence address on the outside of the envelope. An offense is a Class B misdemeanor, unless the person is also convicted of an offense under §64.036, in which case the offense is a state jail felony.

§86.0051. Carrier envelope action by person other than voter; offenses.

> (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 §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 than 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 §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. Elec. Code §86.006.** Section 86.006, added as part of the amendments in 2003 and amended in 2007, governs the return of a marked mail-in ballot to the early-voting clerk.

> **§86.006. Method of returning marked ballot.**
>
> (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, this subsection does not apply to a person who, on the date of the offense, was:
>
> > (1) related to the voter within the second degree by affinity or the third degree by 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 in order to deposit the envelope in the mail or with a common or contract carrier and who provides the information required by §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 on 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 even 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 o n the carrier envelope and treat it as a ballot not timely returned in accordance with § 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.

Plaintiffs contend that the State's investigation and prosecution of the individual Plaintiffs under §86.006(f) has had a chilling effect upon Democratic Party activists who have assisted mail-in voters in the past but have discontinued their assistance because of confusion and fear of future prosecution. According to Plaintiffs, this lack of available assistance has resulted in mass disenfranchisement of elderly and disabled voters.

Plaintiffs Ray and Johnson were investigated and pleaded guilty to violation of §86.006(f), received 6-8 months deferred adjudication, and have completed the terms of the their probated sentences. (Ex. 4, Ray Dep. p. 10, ll. 5-14; Ex. 5, Johnson Dep. p. 10, ll. 10-18) Since completion of their probation, both Ray and Johnson have resumed assisting voters with their mail-in ballots. (Ex. 4, Ray Dep. p. 57, l. 9- p. 59, l.19; Ex. 5, Johnson Dep. pp. 22, ll. 8-19, p. 23, ll. 4-16)

Plaintiff Minneweather was interviewed by an investigator for the Attorney General's Office for unlawfully assisting mail-in voters. (Ex. 6, Minneweather Dep. p. 6, l. 21-p. 8, l. 7.) The investigation was closed and no charges were filed. (Ex. 6, Minneweather Dep. p. 8, 18-22)

Plaintiff Meeks was investigated for assisting mail-in voters. (Amended Complaint ¶5)

The investigation was closed and no charges were filed. Ms. Meeks alleges she has suffered a stroke that has confined her to bed. (Amended Complaint ¶5). According to a voting history provided by Plaintiffs, Ms. Meeks voted by mail-in ballot in the March 2008 Democratic Primary Election. (Ex. 13, Voting history of Gloria Meeks).

Plaintiff Jackson does not claim he has been investigated or prosecuted for any violation. Jackson alleges he is a Democratic party activist who has assisted elderly and disabled voters in the past and he wishes to do so in the future. (Amended Complaint ¶8)

Plaintiff Robinson, who is the sole voter representative among the Plaintiffs, is elderly and disabled and alleges he needs help in voting; nevertheless, he voted in person in the 2008 Democratic Primary election according to a voting history provided by Plaintiffs. (Ex. 7, Voting History of Reuben Robinson)

V. PROCEDURAL SUMMARY

A. Preliminary Injunction, Interlocutory Appeal, and Stay Pending Appeal.

Shortly before the November 2006 election, the Plaintiffs filed this suit and a motion for preliminary injunction, seeking to enjoin enforcement of the challenged provisions. The Defendants filed joint motions under Federal Rule of Civil Procedure 12(b) seeking dismissal for lack of subject-matter jurisdiction, improper venue, and failure to state a claim.

On October 31, 2006, this Court issued a preliminary injunction, along with findings of fact and conclusions of law (Ex. 9, Court's Findings of Fact and Conclusions of Law). The Defendants were preliminarily enjoined from enforcing two Election Code provisions, §

86.006(f) and §86.006(h), "under circumstances in which a person, other than the voter, has merely possessed the official ballot or official carrier envelope and such possession is with the actual consent of the voter."

The Defendants appealed both the preliminary injunction and the findings of fact and conclusions of law. Concomitant with the filing of their notice of appeal, the Defendants also filed [1] a motion to stay the District Court's preliminary injunction pending appeal and [2] a request for expedited consideration of their appeal. On November 3, 2006, this Court granted the Defendants' motion for stay but denied their request to expedite. Subsequently, the Plaintiffs requested the Supreme Court to vacate this Court's stay order, but on November 4, 2006, the Supreme Court denied their request.

B. 2007 Amendments to Texas Election Code §86.006.

During the pendency of the appeal, the Texas legislature passed an amendment to §86.006(f), which eliminated the nomenclature of affirmative defenses. The relevant amended language is reflected below:

> (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 does not apply to a [~~that the~~] person who, on the date of the offense, was:...(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....

In the prosecution of an offense under Subsection (f) the statute now reads:

> if the issue of the applicability of a provision of Subsection (f) (1), (2), (3),(4), (5), or (6) is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.[6]

On May 25, 2007, the governor signed the bill into law and it became effective September 1, 2007.[7] *See id*.

The stated purpose of the legislation "is to revise the Election Code to provide that conduct that is currently covered by one of the ....affirmative defenses to prosecution would no longer be subject to criminal prosecution at all." House Comm. on Elections, Bill Analysis, Tex. H.B. 1987, 80th Leg., R.S. (2007).

No Democrats opposed the bill, and a representative of The Texas Democratic Party even registered in support of the bill.[8] *See id*.

With this amendment, the affirmative-defense language of §86.006(f) was eliminated and replaced with language that transforms the previous affirmative-defense categories into exceptions to the offense. The result is that a person within one of the categories cannot be charged with the offense.

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[6] Tex.1987,80thLeg.,R.S.(2007),="http://www.capitol.state.tx.us/tlodocs/"MACROBUTTONHtmlResAnchorhttp://www.capitol.state.tx.us/tlodocs/ 80r/ billtext/pdf/ hb01987f.pdf

[7] http://www.capitol.state.tx.us/billlookup/history.aspx?legsess=80r&Bill=hb1987.

[8] http://www.capitol.state.tx.us/tlodocs/80r/witlistmtg/html/c2402007032114001.htm.

C. Fifth Circuit Opinion.

During oral argument before the Fifth Circuit, counsel for the Defendants/Appellants proposed modifying the mail-in ballot and carrier envelope to address the notice issues raised by the Plaintiffs. (*See* discussion below and Ex. 2, McGeehan Decl. E-G)

On January 9, 2008, the Fifth Circuit issued its opinion, and mandate was issued on January 31, 2008, vacating the preliminary injunction and remanding the case to the District Court for further proceedings. In its opinion, the Court of Appeals noted that the District Court should be allowed to reconsider its ruling on the injunction in light of "new evidence" not before it when the injunction was entered. The "new evidence" to be considered would be "the recent amendment to §86.006, proposed changes to the forms, the mail-in ballot and carrier envelope forms, assurances by the State that the revised forms cure any constitutional problems, the State's advising it will submit the changes to the ballot materials for preclearance under the VRA [Voting Rights Act] and Plaintiffs contentions to the contrary... ." (A copy of the Fifth Circuit's opinion is included in the Appendix at Ex. 10.)

D. Secretary of State's Modifications To Mail-In Ballot Envelope, Instructions and Carrier Envelope.

As announced in oral argument before the Fifth Circuit, the Elections Division of the Secretary of State's Office has modified the mail-in ballot envelope, the mail-in ballot instructions and the carrier envelope. (McGeehan Decl. ¶15) These modifications have been submitted to the Civil Rights Division of the U.S. Department of Justice for

preclearance approval under the federal Voting Rights Act. (Ex. 2, McGeehan Decl. ¶ 5) Copies of the modified forms are attached as Exhibits E through G to the McGeehan Decl.

While there is no statutory duty to provide such notice, the newly modified carrier envelope (Ex. E to McGeehan Decl.) contains a warning, in bold-faced type, in English and Spanish as follows:

> **Warning: Knowingly possessing another person's ballot or carrier envelope may be a crime unless you provide your signature, printed name and address.** ***Aviso: Intencionalmente en posesion de una boleta o sobre portador de otra persona puede ser un delito si no proporcione su firma, nobre en letra de molde y direcion de domicilio.***

This warning appears on both the front and the back of the carrier envelope. (Ex. 2, McGeehan Decl.E, p.2) The same warning appears in the instructions to the ballot envelope, except that it also contains the prepositional phrase "on the carrier envelope." (Ex. 2, McGeehan Decl. F) This language was added to improve clarity and should provide more clear notice to any person who knowingly possesses someone else's ballot or carrier envelope that the possession of these items is something very serious and may involve criminal penalties. Moreover, the language advises as to what is required to avoid the threat of criminal prosecution.

In addition, on the back of the carrier envelope, in the two blanks for the printed names, signatures, and residence addresses of any witnesses or assistants, there are now two hash marks that divide these lines into six compartments. (Ex. 2, McGeehan Decl. E) These signify separate compartments for up to three different individuals to include their identifying

information. This modification was made to address allegations that the carrier envelope is misleading in seeming to require only one person needed to provide the required information.

Under the printed-name-and-signature line, the text now reads:

> X_____/_____/_____
> Printed names and Signatures of **all** Assistant**s**, Witness**es or Persons handling ballot or carrier envelope**. (Nombres en letra de mode y firmas de todos que ayudaron al voltante, testigos, or personas manejando una boleta o sobre portador.)
>
> _____/_____/_____
> Residence Address**es of persons named above**. (Direccion de domicilio de las personas indicado ariba.)

The inserted mail-in ballot instructions provided to the voter also were modified to include the following for additional clarification:

> **If a person (assistant) helps you in marking your ballot or deposits your carrier envelope in the mail or delivers it to a common or contract carrier, that person must sign your carrier envelope and include their printed name and address.**

(Ex. 2, McGeehan Decl. B)

The modified mail-in ballot instructions continue to carry the same warning they have since 2004 that the failure of an assistant to provide his or her printed name, address and signature "is a crime" and may result in the voter's ballot being rejected. (Ex. 2, McGeehan Decl., *compare* B to F)

The Elections Division of the Secretary of State has requested expedited consideration from the U.S. Department of Justice for pre-clearance. (Ex. 2, McGeehan Decl.¶ 6.) At the time of the filing of this Motion, pre-clearance approval is pending. Upon notice of approval

from the Department of Justice, the Elections Division Office will order printing of the revised forms and will distribute these to the local county election officials throughout the State. (Ex. 2, McGeehan Decl. ¶ 6.)

E. District Court's Agreed Order Severing Certain Claims for Trial.

The District Court set this case for bench trial beginning on May 29, 2008 and then re-set the case for trial on May 28, 2008. The District Court entered an Agreed Order severing the Plaintiffs' claims alleging racial discrimination (Counts V, VI and a portion of Count VII) for discovery and trial at a later date after the November 2008 election. The remaining claims (Counts I, II, III, IV, a portion of VII, and VIII of the Amended Complaint) (not involving allegations of racial discrimination) and associated defenses are currently before the Court and are the subject of this Motion.

VI. The District Court's Findings of Fact and Conclusions of Law.

In the Court's Findings of Fact and Conclusions of Law ("FF/CL") (Ex. 9) in support of the preliminary injunction, the Court found *inter alia* the following:

- The "chief architect" of the 2003 Amendments (referred to as House Bill ("H.B.") 54) was Steve Wohlens, a Democrat. (FF/CL ¶17)
- The intent of House Bill 54 was to "provide a way to prosecute" the organizers of "vote harvesting" which "generally refers to vote fraud in the early voting process." (FF/CL ¶18, p. 3)
- The Bill Analysis prepared by the House Committee on Elections reported that

(i) it was difficult to prosecute persons who unduly influenced an election; (ii) that certain individuals had unlawfully assisted voters with completing early voting ballot applications and with marking and delivering their ballots; (iii) some persons had engaged in the buying and selling of mail ballots to alter election outcomes. (FF/CL ¶19, pp. 3-4)

- The legislative history indicated that the law governing voting by mail "needed to be tightened" and "oversight needed to be stricter", that "[s]upporters of the new law were attempting to combat organized fraud that can occur in nursing homes and assisted living facilities"; that 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'"; that voter brokers were rarely caught because 'almost no means exist[ed] to track down the campaign worker.'" (FF/CL ¶20, p. 4)

- The official statement of legislative intent of H.B. 54 provides :

  > "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." (FF/CL ¶21, pp. 4-5)

- H.B. 54 passed with bi-partisan support. (FF/CL ¶22, p. 5)

In addition, this Court concluded that (i) Texas has a "well-recognized and compelling" interest in preventing voter fraud (FF/CL ¶14, p. 11); (ii) three of the Challenged Statutes (§§ 64.012, 64.036(1)-(3), and 84.0041) are "all aimed at curtailing voter

fraud and are applicable to mail-in balloting" (FF/CL ¶19, p.12); and (iii) the disclosure requirements of §84.0051, the fourth statute, are "sufficiently justified" to prevent voting fraud. (FF/CL ¶19, p. 12) Section 86.006(f), however, this Court held, goes too far because "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". *Id. at p. 12*

VII. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Exhibits A through D, attached to the Declaration of Ann McGeehan , Director of Elections of the Office of Secretary of State, are true and correct copies of the following forms used for mail-in balloting in state elections since 2004.

Carrier Envelope for Early voting Ballot (Ex. A)

Mail-in Ballot Instructions (Ex. B)

Mail-in Ballot Envelope (Ex. C)

Mail-in Ballot Application (Ex. D)

2. Exhibits E through G, attached to the Declaration of Ann McGeehan , Director of Elections of the Office of Secretary of State, are true and correct copies of the revised proposed forms that have been submitted by the Office of Secretary of State to the Acting Chief of the Voting Section of the Civil Rights Division of the U.S. Department of Justice.

Carrier Envelope for Early voting Ballot (Ex. E)

Mail-in Ballot Instructions (Ex. F)

Mail-in Ballot Envelope (Ex. G)

3. There is no evidence of any voters who have been unable to vote due to enactment or enforcement of the Challenged Statutes.

4. There is no evidence any political activist, including Plaintiffs, has discontinued assisting voters with mail-in ballots due to confusion concerning what the Challenged Statutes require.

5. Plaintiffs Ray and Johnson pleaded guilty to violation of §86.006(f) of the Texas Election Code, received deferred adjudication and a sentence of eight months' probation–which they successfully completed in 2007–and resumed their activities in assisting elderly and disabled voters with their mail-in ballots for the 2008 Democratic Primary Election. (Ex. 4, Ray Dep. p. 10, ll. 5-14; pp 57, l. 9-p. 59, l.19; Ex. 5, Johnson Dep. p. 10, ll. 10-18; p. 22, 8-19, p. 23, ll. 4-16)

6. None of the Plaintiffs, including Ray and Johnson, has a criminal record.

7. Plaintiffs Meeks and Minneweather were questioned in 2006 by the Office of Attorney General for potential violations the Election Code in connection with assisting mail-in voters.

8. Plaintiffs Meeks and Minneweather were not arrested and were not charged with an offense under the Texas Election Code. The investigations of Plaintiffs Meeks and Minneweather were closed.

9. Plaintiff Jackson has never been investigated or charged with an offense under the Texas Election Code.

10. Plaintiff Robinson has never been investigated or charged with an offense under the Texas Election Code.

VIII. STATEMENT OF ISSUES TO BE DECIDED BY THE COURT

The following issues are to be decided by the Court in ruling upon this Motion:

1. Whether the State's interest in preserving the integrity of elections justifies the burdens imposed by the Challenged Statutes?

2. Whether there is any evidence that the Challenged Statutes have a chilling effect upon constitutionally protected rights?

3. Whether Tex. Elec. Code §86.006(f) is unconstitutionally overbroad and vague, and whether this challenge is moot in light of the 2007 amendments?

4. Whether Plaintiffs' have stated a viable claim for violation of due process?

5. Whether the Challenged Statutes violate §208 of the federal Voting Rights Act?

7. Whether Plaintiffs Willie Ray and Jamillah Johnson have waived their claims by pleading guilty to violation of Tex. Elec. Code §86.006(f)?

8. Whether Plaintiffs have stated a proper claim under 42 U.S.C. §1983?

IX. ARGUMENT

A. Plaintiffs' Facial Challenge To The Statutes Fails as a Matter of Law.

1. Standard of Review.

Plaintiffs seek to invalidate the Challenged Statutes on the grounds that they allegedly have a "chilling effect" on constitutionally-protected conduct–the right to vote and rights protected under the First and Fourteenth Amendments. (Counts I, II and III).

In two recent cases, the United States Supreme Court confirmed the "heavy burden" challengers such as Plaintiffs face in seeking to invalidate a state election law. *Crawford v. Marion County Elec. Bd.*, 553 U.S. ___, 2008 WL 1848103 (U.S. April 28, 2008); *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, 128 S.Ct. 1184, 1190 (2008). The impact of the *Crawford* decision on these facts is significant. The Supreme Court in *Crawford* held that a voter who fails to show photographic identification at the polls can be disenfranchised–that the state may take away an individual's constitutional right to vote if the voter does not procure and produce not only photographic identification, but identification of a type that is prescribed by the state.

Regarding the burden imposed by the Indiana statute, the Supreme Court stated, "For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 2008 WL 1848103 at 12. The court further found that in instances where the burden of obtaining the required identification document was increased, such as

in the case of elderly voters who may have difficulty obtaining a copy of their birth certificate, which is required to obtain the required photo identification, or in the case of the homeless or people with religious objections to being photographed, the burden was mitigated because these persons were allowed under the statute to cast a provisional ballot and travel to the court clerk's office to file an affidavit. *Crawford*, 2008 WL 1848103 at 12-13. These burdens, imposed by the Indiana legislature on the fundamental right to vote, are not constitutionally infirm.

Crawford teaches several principles important to this case. In *Crawford*, the Court was unwilling to strike down the photo i.d. requirement, despite evidence that the requirement would impose some "special" burdens on the elderly and disabled voters. Here, unlike in *Crawford*, there is no constitutional right to cast a mail-in ballot as this Court has previously found. Thus, the rights in issue here cannot be more deserving of protection than those in *Crawford*. *Crawford* also teaches that even where the burdens involved may affect the elderly and disabled voters, the State's legitimate interests in ensuring orderly administration of elections may prevail. The principle in *Crawford* applies with even greater force here, where the burdens imposed by the Texas legislature to provide a name and address and to witness only one mail-in ballot are far more slight than the burdens in *Crawford*, and they are not imposed on the exercise of a fundamental right, since there is no constitutional right to vote by mail or to assist another in doing so.

Turning to the issue of proper analysis of a challenge to an election statute, the Supreme Court in *Crawford* made it clear that a facial challenge to an election statute

requires a plaintiff to show *actual* burdens on the right to vote that are so severe that they outweigh the State's important interests in regulating and preserving the integrity of their elections. *Id.* The Court noted that the States have important interests in combating voting fraud, maintaining the orderly administration of elections, and safeguarding voter confidence in the integrity of elections, and a plaintiff bears a "heavy burden" in persuading the Court that reasonable, non-discriminatory regulations are not justified. *Crawfor*d, 2008 WL 1848103 at 13. In *Crawford*, the Court, in upholding Indiana's requirement that voters present an official photo identification in order to vote, found that evidence of only a small number of voters who faced a minimal burden of obtaining a photo i.d. was insufficient to invalidate the statute. *Crawford*, 2008 WL 1848103 at 13-14. In *Washington State Grange*, the Court, upholding the state's modified blanket primary system, held that the plaintiffs' evidence amounted to no more than speculation regarding voter confusion and theoretical burdens upon citizens that was insufficient to overturn the statute. *Washington State Grange*, 128 S.Ct. at 1193-94. 128 S.Ct at 1190.

The Court's opinions in *Crawford* and *Washington State Grange* confirm the long-standing rule that when a state identifies an important regulatory interest, those interests are "'generally sufficient to justify reasonable, non-discriminatory restrictions on elections procedures'" and the statute will be upheld. *Washington State Grange,* 128 S.Ct. at 1192 (quoting *Anderson v. Celebreeze*, 460 U.S. 780, 788, 103 S.CT. 1564 (1983)).

To succeed on their facial challenge, Plaintiffs must "'establish that no set of circumstances exists under which the [statute] would be valid', that is, the law is

unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, ____ U.S. ____, 128 S.Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095 (1987)). The Court noted that while some members of the Court may disagree with *Salerno*, "all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Washington State Grange*, 128 S.Ct. at 1190.

This Court has previously rejected strict scrutiny as the standard of review for this case and concluded instead the analytical framework of *Anderson/Burdick*, recently confirmed in *Crawfor*d and *Washington State Grange*, applies. *Burdick v. Takushi*, 504 U.S. 428 (1992). (FF/CL ¶12) *See Anderson v. Celebrezze,* 460 U.S. 780, 786 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Under *Anderson/Burdick*, the court must weigh the "'character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against the 'precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063 (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. at 1570). When the restriction 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*. (quoting *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1569-1570).

2. The State's Dual Interests In Preventing Voter Fraud and Counting All Eligible Votes Outweighs The Limited Burdens Imposed.

Defendants are entitled to summary judgment on Plaintiffs' facial challenge because the State's interests outweigh the limited burdens imposed by the Challenged Statutes. Under the U.S. Constitution, the States may prescribe the "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Art. I, § 4, cl.1. The States retain the power to regulate their own elections. *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850 (1973). "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process. " *Burdick*, 504 U.S. at 434 112 S. Ct. at 2063 (quoting *Storer v. Brown*, 415 U.S. 724, 730 94 S.Ct. 1274, 1279 (1974)). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Burdick*, 504 U.S. at 442, 112 S.Ct. at 2067 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526 (1964)). But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system. *Burdick*, 504 U.S. at 442, 112 S.Ct. at 2067 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569-1570 (1983)).

In *Crawford*, the Supreme Court noted the legitimacy of the States' interest in four areas concerning elections: combating voter fraud, counting eligible votes, orderly administration of elections, and safeguarding voter confidence in the integrity of elections. *Crawford, et al v. Marion County Election Board, et al*, 2008 WL 1848103 at 13-14. (U.S.

Sup. Ct. April 28, 2008). In upholding an Indiana statute requiring voters to present photo identification, the Court stated:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate record keeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id. at 12. The Court noted that voter confidence in elections, while related to the legitimate interest of preventing voter fraud, "has an independent significance [to the States] because it encourages citizen participation in the democratic process." *Id*. at 13. An "'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.'" *Id*. (citation omitted).

In issuing a preliminary injunction in this case, this Court recognized the State's "well-recognized and compelling interest" in voter fraud, but held that Section 86.006(f) of the Election Code "goes too far" because "its criminal penalties and disqualification of the vote for 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." *Id*. The Court rejected the State's position (i) that the penalties provided in §86.006(f) were necessary to ensure establishment of a chain of custody for the mail-in ballot and for tracking campaign workers who assisted mail-in voters; and (ii) the burdens were minimal, in that a person need only provide his or her name, address and signature to avoid criminal liability.

In addition to preventing voter fraud, there is another, equally important State interest

that is served by §86.006(f). As confirmed in *Crawford*, in addition to curtailing fraud, the State has an interest preserving the integrity of the election ***and ensuring that all eligible votes are counted.*** The State has an interest in impressing upon mail-in voters, as well as their assistants, the importance of ensuring that the mail-in ballot is deposited promptly in the mail or with a common carrier with full disclosure establishing a chain of custody and a minimum of handlers. Obviously, the mail-in ballot cannot be counted unless it is, in fact, mailed. Section 86.006 (f) serves that interest by eliminating unidentifiable persons who may assist and thereby minimizing the potential for mail-in ballots to be lost, stolen, misplaced, destroyed, or forgotten during the time between when the voter marks the ballot and the ballot is mailed.

The provisions of the Election Code make it clear that for purposes of mail-in voting, the mail box is synonymous with the ballot box at the polling place. For in-person voting on election day, the Election Code attempts to protect the voter and his or her ballot at the polling place by limiting the assistance a voter may receive (with some narrow exceptions) and providing criminal penalties for unlawfully assisting the voter–even when there is no fraud or undue influence. Tex. Elec. Code §§64.036, 64.032, 64.031. The Code also provides criminal penalties for depositing a ballot that is not one's own ballot in the ballot box–again, even when there is no fraud. Tex. Elec. Code §64.011. In the same way, Chapter 86 of the Election Code attempts as nearly as possible to preserve the sanctity of the mail-in ballot and ensure that it is mailed and counted by requiring either a relative or at least a

responsible person, who discloses his or her identity and address, to deposit the carrier envelope and ballot in the mail.

The voter's "consent" for another to possess the mail-in ballot does not and should not shield the undisclosed "assistant" from criminal liability for failing to provide this disclosure information. Even if the mail-in voter consents to another's possession of the ballot, the State nevertheless has an interest in ensuring that the consent that is given is one that includes prompt mailing of the ballot. The State's interest attaches once the ballot is properly marked by the voter, and that interest includes ensuring that the properly marked ballot is counted. The State must be able to trace the chain of custody of a properly marked ballot to the one who last handled the ballot, not only to investigate and prosecute possible fraud, but also to trace missing, lost or stolen ballots. Thus, to preserve the safeguards for ensuring the mail-in ballot is actually mailed and counted, the State has an interest in requiring an assistant to disclose his or her identity, and to ensure compliance, the State has an interest in providing penalties for failure to do so. The voter's consent to possession has nothing to do with the State's interest in ensuring the ballot is actually mailed.

In contrast to the compelling interests of the State, the burden on the assistant and the voter is minimal–simply to ensure that the assistant's name, address and signature are disclosed on the carrier envelope. When this information is provided on the courier envelope, the exception in subsection (4) of §86.006(f) is fulfilled and the assistant may not be charged with the offense. This Court has already held that disclosure of this information is "sufficiently justified" by the State's interest. (FF/CL ¶19, p. 12)

With respect to invalidating a mail-in vote returned in violation of §86.006, there is no evidence that a mail-in ballot has ever been returned for this reason. Moreover, the statute provides that the vote "may" not be counted and thus is not mandatory. In addition, the statute provides a number of safeguards to ensure that an innocent voter can either correct the carrier envelope and re-submit it to the election clerk or vote in person at an early voting polling place or on election day. Tex. Elec. Code §§86.011(d); 86.006(h).

The disclosure requirement–which makes evident the full chain of custody for early-voting, mail-in ballots–is entirely constitutional and consonant with laws throughout the nation. Approximately 30 other States restrict, in some form or fashion, the possession of mail-in (absentee) ballots.[9] Most of them restrict ballot possession by either having a smaller class of persons eligible to handle the ballots than Texas does,[10] or by requiring the

[9] ARIZ.REV.STAT.ANN. §16-542; ARK. CODE ANN. §7-5-411; CAL. ELEC. CODE §§3011, 3017, 3021, 18403; COLO. REV. STAT. ANN. §§1-8-112, -113; CONN. GEN. STAT. ANN. §9-140b; FLA. STAT. §101.62; GA. CODE ANN. §§21-2-385, -562; 10 ILL. COMP. STAT. 5/19-6, -19-13, /29-20; IND. CODE ANN. §3-14-2-16; IOWA CODE §§39A.4, 53.17, .22; ME. REV. STAT. ANN. TIT. 21-A, §§753-B, 754-A; MD. CODE ANN., ELEC. LAW §§9-307, -308; MASS. GEN LAWS ch. 54, §92; MICH. COMP. LAWS ANN. §§168.764a, .932; MINN. STAT.§§203B.08, .11; MO. ANN. STAT. §115.631, .637; MONT. CODE ANN. §13-13-214; NEB. REV. STAT. §§32-943, -944; NEV. REV. STAT. ANN.§§293.316, .3165, .330, .730; N.H. REV. STAT. ANN. §§657:15, :17; N.J. STAT. ANN. §§19:57-23, 37.1; N.M. STAT. ANN. §1-6-10.1, 1-20-7; N.Y. ELEC. LAW §8.406; N.C. GEN. STAT. §163-226.3; N.D. CENT. CODE §16.1-07-08; OHIO REV. CODE ANN. §§3509.05, 3599.21; S.C. CODE ANN. §7-15-385; S.D. CODIFIED LAWS §§12-19-2.1, -2.2, 7.2; VA. CODE ANN. §24.2-649, -704, -707; WASH. REV. CODE ANN. §29A.40.080; W. VA. CODE ANN. §3-3-5; WIS STAT. ANN. §§6.86, .87.

[10] *See* CAL.ELEC. CODE §§3017, 3021, 18403 (generally allowing only family and members of household to return voted absentee ballots); CONN. GEN. STAT. ANN. §9-140b (allowing only family member or caregiver to return voted absentee ballot); GA. CODE ANN. §21-2-385 (allowing only close family or household member to return voted absentee ballot); 10 ILL. COMP. STAT. 5/19-6, /19-3 (generally allowing only family member to return voted absentee ballot); IND. CODE ANN. §3-14-2-16 (allowing only relative or attorney-in-fact to return voted absentee ballot); IOWA CODE §§ 53.17, .22 (generally allowing only ballot couriers and immediate family to return voted absentee ballot); MASS. GEN. LAWS ch. 54, §92(a) (allowing only family member to return voted absentee ballot); MICH. COMP. LAWS ANN. §§168.764a (allowing only immediate family or household member to return absentee ballot); MO. ANN. STAT. §115.637 (prohibiting anyone from possessing another's absentee ballot); NEV. REV. STAT. ANN. §293.3304(4) (allowing only family to return voted absentee ballots);

absentee voter to designate their agent in writing.[11] Some States also restrict the number of voters for whom one person may serve as agent.[12] South Dakota allows only an authorized messenger to deliver an absentee ballot if the absentee voter is disabled or ill, requires the messenger for more than one voter to disclose to the person in charge of the election all persons for whom he is a messenger, and prohibits authorized messengers from displaying campaign materials or soliciting votes.[13] Of the approximately 30 States that significantly restrict the possession of mail-in ballots, many of them make it a criminal offense to unlawfully possess a mail-in ballot and provide penalties for a violation.[14]

N.M. STAT. ANN. §1-6-10.1 (allowing only caregiver or immediate family to return voted absentee ballot); N.C. GEN. STAT. ANN. §166-226.3(a)(6) (allowing only legal guardian or near relative to possess absentee ballot); OHIO REV. CODE ANN. §3509.05 (a) (allowing only certain relatives to return voted absentee ballot); WASH. REV. CODE ANN. §29A.40.080 (1) (allowing only immediate family to obtain absentee ballot from clerk).

[11] *See* ME. REV. STAT. Tit. 21-A, §753-B (requiring a non-family -third- party agent to be designated in writing); MD. CODE. ANN., ELEC. LAW §9-307 (requiring a voter's agent to be designated in writing); MONT. CODE ANN. §13-13-214 (same); N.Y. ELEC. LAW §8-406 (same); N.D. CENT CODE §16.1-07-08(1) (same); S.C. CODE ANN. §7-15-385 (same) S.D. CODIFIED LAWS §12-19-2.1 (same); WIS. STAT.ANN. § 6.86(3)(a)(1) (same).

[12] ARK. CODE ANN. §7-5-411(a)(2)(B) (restricting a person who hand-delivers absentee ballots to the clerk to deliver no more than two in an election); COLO. REV. STAT. ANN. §1-8-113(1)(a) (restricting a person who hand-delivers ballots to the election official to deliver no more than five in an election); ME. REV. STAT. ANN. tit. 21-A, §753-B(2) (restricting a clerk to give no more than five absentee ballots at a time to a designated agent); MINN. STAT. ANN. §203B.08 (restricting a person who hand-delivers absentee ballots to the clerk to deliver no more than three in an election); MONT. CODE ANN. §13-13-214(1)(b)(iv) (restricting an election administrator to refuse an absentee ballot to a designated agent if the agent has previously picked up ballots for four other electors); N.D. CENT. CODE §16.1-07-08(1) (restricting an agent to serve no more than four absentee voters in an election); W. VA. CODE ANN. §3-3-5(j) (restricting a person who hand-delivers absentee ballots to the clerk to deliver no more than two in an election).

[13] S.D. CODIFIED LAWS §§12-19-2.1-2.2, 7.2.

[14] *See* ARIZ. REV. STAT. ANN. §16-1018(6); CAL. ELEC. CODE §18403; COLO. REV. STAT. ANN. §1-13-803; CONN. GEN. STAT. ANN. §9-140b(d); GA. CODE ANN. §21-2385(a)-(b); 10 ILL. COMP. STAT. 5/29-20(4); ME. REV. STAT. ANN. tit. 21-A, §791; MD. CODE. ANN., ELEC. LAW §9-312; MASS. GEN. LAWS ch 54, §27A; MICH. COMP. LAWS ANN. §§168.931(1)(b)(iv), .932(f); MINN. STAT. §§203B.03,.08; MO. ANN. STAT. §§115.291(2),.304, .631,.637; MONT. CODE ANN. §§13-13-214(1)(b)(iv), -25-103; NEB. REV. STAT. §32-1522(3); NEV. REV. STAT. ANN. §293.330(4); N.H. REV. STAT. ANN. §§657:15, :17, 666:1;

Texas, like these other States, has a broad interest in protecting election integrity, and to that end, restricting the possession of another's mail-in ballot and providing penalties for a violation. The important State interests served by §86.006(f) and the other Challenged Statutes outweigh the minimal burdens imposed upon assistants and voters. Plaintiffs' facial challenge to these statutes therefore fails as a matter of law.

3. There Is No Evidence of A Chill on Constitutionally Protected Activities.

Plaintiffs' facial challenge fails as a matter of law for the additional reason that there is no evidence the Challenged Statutes are chilling any constitutionally protected conduct. (Counts I, II, and III)

A court that considers a facial challenge to the overbreadth and vagueness of a law must first inquire "whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982). To succeed on a facial challenge, the plaintiff must show that the chilling effect on protected conduct is both "real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). The Plaintiffs "bear a heavy burden" to demonstrate a "substantial risk" that application of the challenged provisions will lead to the suppression of protected activities. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998).

N.J. STAT. ANN. §19:57-37; N.M. REV. STAT. ANN. §1-20-7; N.C. GE. STAT. ANN. §163-226.3 (a)(6); N.D. CENT. CODE §16.1-07-14; OHIO REV. CODE ANN. §3599.21(A)(9), (C); S.C. CODE ANN. §§7-15-385, -25-190; VA. CODE ANN. §§24.2-707, -1012; WASH. REV. CODE ANN. §29A.84.680; W. VA. CODE ANN. §§3-3-5(k), -9-19.

To the first question–whether the Challenged Statutes reach constitutionally protected activities–the answer is no because, as this Court has previously held, there is no constitutional right to receive and cast an absentee ballot. (FF/CL ¶ 11, p. 10) *See McDonald v. Bd. of Election Comm'rs of* Chicago, 394 U.S. 802 (1969). It follows logically that if there is no constitutionally protected right to receive and cast an absentee ballot, there can also be no corresponding protected right to assist another in doing so. With respect to First Amendment associational rights, (Counts II and III), Plaintiffs fail to demonstrate how any of the Challenged Statutes, which are facially neutral, adversely affect their right to associate with other members of the Democratic Party or those deemed likely to vote Democratic. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402, - (2000) (The First Amendment protects "the freedom to join together in furtherance of common political beliefs.") The statutes make no party distinctions, places no restrictions on political party functions, and applies equally to all voters who qualify to receive and cast a mail-in ballot and those who assist them. It has long been held that conduct not intended to express an idea is not protected by the First Amendment. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968). *See also Roark v. Hardee LP v. City of Austin,* ____ F. 3d. ___, 2008 WL 819, 509 *11 (Fifth Circuit 2008).

Since assisting another voter is (or is intended to be) content neutral, the State may regulate it without running afoul of the First Amendment.

Even assuming the Challenged Statutes reach protected activity, there is no evidence that there is a substantial chilling effect on protected activity. Discovery in this case reveals,

contrary to Plaintiffs' anecdotal claims, that there is no evidence of disenfranchisement of voters due to their inability to receive assistance with their mail-in ballots. None of the Plaintiffs' witnesses have been able to identify a single voter who has been unable to vote due to lack of assistance. At best, Plaintiffs offer speculation, generalities, and hearsay of mass disenfranchisement of the elderly and disabled, but there is no admissible evidence of voters who have not voted due to lack of assistance with their mail-in votes. The Plaintiffs, including Ms. Meeks and Mr. Robinson, who are disabled, have voted regularly since 2003, including in the 2008 Democratic Primary. (See Exhibits 7 and 13)

Additionally, admissible evidence of activists who have discontinued assisting voters with mail-in ballots is scant. Plaintiffs Willie Ray and Jamillah Johnson testified that they have resumed their activities in assisting voters with their mail-in ballots and that they assisted mail-in voters during the 2008 primary election. (Ex. 4, Ray Dep. pp. 57, l. 9- p. 59, l. 19; Ex. 5, Johnson Dep. p. 22, ll. 8-19, p.23, ll. 4-16) Both Ms. Ray and Ms. Johnson testified that in assisting voters with their mail-in ballots in March 2008 they provided their names, addresses and signatures on the carrier envelopes. *Id.* Ms. Dorothy Dean, a long-time political activist and paid consultant in Dallas, Texas, testified that she also assisted a voter with a mail-in ballot during the 2008 primary election, that she provided the disclosure information, and that in assisting voters in the past she always has included her name, address and telephone number (although not required) on the carrier envelope. (Ex. 14, Dean Dep. pp. 8, l. 3- p. 9, l. 2; p. 14, l 7-8) Plaintiff Minneweather testified that she has discontinued assisting voters with their mail-in ballots but her reasoning was not that she

could not understand what was required by the statute but that she was hurt and upset about being questioned about her activities. (Ex. 6, Minneweather Dep. p. 10, ll 15-21) Even assuming these activities are protected, absent evidence of a substantial chilling effect upon these activities, the Challenged Statutes may not be invalidated, and Defendants are entitled to summary judgment.

4. Plaintiffs' Overbreadth Challenge to §86.006(f) Is Moot.

Plaintiffs' overbreadth and void for vagueness challenges with respect to §86.006(f) (Counts II and III) fail for the additional reason that they are moot. *AT&T Comm. v. City of Austin*, 235 F.3d 241, 243 (5th Cir. 2000). According to Plaintiffs, §86.006(f) is overly broad because a person may be charged with criminal liability for "mere possession" of another's ballot without regard to circumstances. Plaintiffs base their argument on the pre-2007 version of §86.006(f), which provided six affirmative defenses to "knowingly" possessing an official ballot or carrier envelope containing the mail-in ballot of another. Among these six affirmative defenses, a person who possesses the carrier envelope with the intent to deposit it in the mail and who provides his or her name, address, and signature, are excepted from liability. Plaintiffs argue that potential liability attaches separate and apart from the affirmative defenses, and a person may be charged with "mere possession", regardless of whether any affirmative defenses apply. This, Plaintiffs contend, has a chilling effect upon First Amendment associational rights.

The 2007 Amendment clarified §86.006(f), transforming the affirmative defense language into six exceptions to liability under the statute. (*See supra* V. B) In other words, if one of the six exceptions exists, the prosecutor may not charge that person with the offense. If, for example, a person is in knowing possession of another's ballot to deposit in the mail and has provided his or her name, address and signature, subsection (4) of §86.006(f) applies, and an offense has not been committed and that person may not be charged.

Plaintiffs argue that §86.006(f) as amended in 2007 is still overly broad because it does not exempt the innocent intermediary who assists the voter with the marked ballot but does not actually mail it. It is difficult to address Plaintiffs' hypothetical scenario without more facts, such as, whether the intermediary ever took "possession" of the marked ballot. Mere assistance without actual possession would not trigger liability under §86.006(f). If assistance did take the form of "possession", the carrier envelope provides a place for the intermediary to provide his or her name, address and signature, and thereby comply with (f)(4)'s exception. Nothing in (f)(4) prohibits an intermediary from handling a marked ballot as long as the proper disclosures are made. In any event, there is no evidence that the State has ever prosecuted a so-called innocent intermediary under §86.006(f), who possessed but did not actually mail the carrier envelope of another. Plaintiffs' speculation about "imaginary" cases is insufficient to invalidate the statute. *See Washington State Grange v. Washing State Republican Party*, ____ U.S. ____, 128 S.Ct. 1184, 1190 (2008) (In

determining whether a statute is facially invalid, the court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.")

Thus, Plaintiffs' argument that §86.006(f) is unconstitutionally broad because it criminalizes "mere possession" of another's ballot regardless of circumstances has become moot. For this additional reason, Plaintiffs' overbreadth claim with respect to §86.006(f) fails as a matter of law. *See AT&T*, 235 F.3d at 243 (issue became moot upon repeal of city ordinance in dispute). *See also Locke v. Board of Public Instruction*, 499 F.2d 359, 363 (5th Cir. 1974); *Tawwab v. Metz,* 554 F.2d 22 (2d Cir. 1977) (Section 1983 action seeking declaratory or injunctive relief declared moot when practices, procedures, or regulations no longer in use).

B. Plaintiffs' Due Process Claims Fail As A Matter Of Law.

Plaintiffs' due process claims fail as a matter of law. Plaintiffs allege Defendants violated Plaintiffs' right to due process in two distinct ways. First, Plaintiffs contend Defendants failed to notify Plaintiffs of the change in the law occasioned by the 2003 Amendments. Second, Plaintiffs contend Defendants "misinform[ed]" and "mis[led]" them regarding the 2003 Amendments to the Texas Election Code. Both due process claims are legally infirm.

First, as previously briefed by Defendants to this Court, it is no violation of due process of law if the government fails to notify an individual of a change in the law. *Torres* v. *INS*, 144 F.3d 472, 473-74 (7th Cir. 1998). (See pp. 18-21 Defendants' Rule 12(b) Motion to Dismiss). "To provide constitutionally adequate notice, 'a legislature need do nothing

more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.'" *United States v. Hancock*, 231 F.3d 557, 565 (9th Cir. 2000) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)).

Second, the undisputed evidence demonstrates that Plaintiffs had actual notice of what was required of them. The carrier envelope, the ballot envelope, and mail-in ballot instructions in use since the adoption of the 2003 Amendments contain explicit instructions to the voter and those assisting the voter with a mail in ballot as well as a warning that the assistant's failure to provide the required information is a crime. The mail-in ballot instructions state:

> If you cannot sign your name, you must have a person witness your mark. If a person (assistant) helps you in marking your ballot or deposits your carrier envelope in the mail or delivers it to a common or contract carrier, that person must sign your carrier envelope and include their printed name and address. ***Failure of the assistant to provide this information is a crime, and may result in your ballot being rejected***.'

(Emphasis added) (McGeehan Decl. Ex. B, p. 1) The mail-in ballot states: "An assistant must sign the carrier envelope and include the assistant's name and address. ***Failure to provide this information is a crime***." (Emphasis added) The carrier envelope similarly instructs that a person who is "going to deposit the carrier envelope in the mail for the voter or deliver it to a common or contract carrier, ... must provide [his or her] signature, printed name, and address in the space provided." (Ex. 2, McGeehan Decl. A, p. 2) The signature line is provided for the name and signature of the witness or assistant. Plaintiffs wrongly

suggest that these materials contain no notice or warning for those assisting mail-in voters, which is simply incorrect.

The Secretary of State's recent modifications to these materials provide even more explicit clarification for voters and assistants. (Ex. 2, McGeehan Decl. E-G.) Most significantly, the carrier envelope now contains a warning, in bold, on the front and back: **"Knowingly possessing another person's ballot or carrier envelop may be a crime unless you provide your signature, printed name and address.**" (Ex. 2, McGeehan Decl. E, pp. 1-2)

In addition to the notice provided by the statute and the voting materials themselves, the undisputed evidence shows that the Texas Democratic Party also had actual notice of the 2003 Amendments when they were passed by the Texas Legislature in 2003. As this Court has noted, the chief "architect" of H.B. 54 (the 2003 Amendments) was Steve Wohlens, a Democratic State Representative, and the bill was passed with bi-partisan support. (FF/CL ¶ 18, p. 3) The Texas Democratic Party also provided "talking points" to legislators and their staff concerning H.B. 54. (Ex. 8, Hernandez Dep. p. 36, l. 21- p.37, l)

Plaintiffs profess continued confusion regarding the modifications to these materials; however, there is no evidence of any witness who is confused about what information he or she is being asked to provide and where the information should be provided on the carrier envelope. Given Plaintiffs actual notice of the 2003 Amendments at the time they were passed by the Texas legislature (and as evidenced by the Complaint in this lawsuit), the absence of evidence of any particularized confusion, and the explicitness of the current and

proposed instructions and warnings on the mail-in voting materials, any prospective injunctive or declaratory relief related to notice would be unwarranted.

C. Plaintiffs' Claim Under §208 of the Voting Rights Act Fails As A Matter Of Law.

In Count IV, Plaintiffs erroneously contend that the Challenged Statutes violate §208 of the federal Voting Rights Act. 42 U.S.C. § 1973aa-6. Section 208 provides: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of the voter's employer or officer or agent of the voter's union."

In briefing previously provided to this Court, Defendants established that (i) there is no indication that Congress intended to preempt the rights of States in implementing restrictions on absentee voting, and particularly, who may return absentee ballots; (ii) there is no conflict between §208 of the Voting Rights Act and the Challenged Statutes. (*See* Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, pp. 27-29. The Illinois court of appeals opinion in *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1191-97, 357 Ill. App. 3d 594 (Ill. App. Ct. 2004) provides a thorough discussion of the legislative history of §208.

The same analysis employed by the Illinois court in *Qualkinbush* applies here. There is no federal preemption on the right of the State of Texas to impose restrictions on who may assist with an absentee ballot, even if those restrictions exceed those of the Voting Rights Act. *Id* at 1196. Plaintiffs have not identified any conflict between the Challenged Statutes

and §208–because there is none. Under the Texas mail-in voting scheme, the voter may choose any person to assist with the ballot–consistent with §208 of the Voting Rights Act–as long as the assistant provides the required disclosures. The Challenged Statutes are therefore not in conflict and Defendants are entitled to summary judgment on this claim.

D. Plaintiffs' §1983 "As Applied" Challenges Fail As A Matter Of Law.

Plaintiffs generally assert that the challenged provisions of the Texas Election Code have been unconstitutionally applied to them [*see, e.g.,* Pl. 1st Amended Complaint, Count II and Count VIII]. Missing from this broad assertion, though, are both the factual and legal underpinnings to make such a claim.

The Plaintiffs' challenges to the facial constitutionality of various Election Code provisions are addressed, *supra*. However, a claim that a statute is unconstitutional "as applied" to the plaintiff seeks a remedy under 42 U.S.C. §1983 for a deprivation of plaintiff's individual constitutional rights.[15]

Only two of the Plaintiffs have had any of the Election Code provisions at issue "applied" to them via prosecution (Ray and Johnson), both under Texas Elections Code §86.006. Two other Plaintiffs were questioned, but not prosecuted (Meeks and Minneweather) under the same provision. Plaintiffs Robinson, Jackson, and the Texas

[15] *See Longmire v. Guste*, 921 F.2d 620 (5th Cir. 1991)(challenging state statute facially and as applied via §1983); *See also Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006) *cert. denied*, 127 S.Ct. 938 (2007)("the contention that a party cannot challenge a statute as-applied unless the statute has been applied to him is generally correct."); *Virginia v. Hicks*, 539 U.S. 113, 124, 123 S.Ct. 2191, 2199 (2003)("Applications of the RRHA policy that violate the First Amendment can still be remedied through as-applied litigation, but the Virginia Supreme Court should not have used the 'strong medicine' of overbreadth to invalidate the entire RHA trespass policy").

Democratic Party were neither investigated nor prosecuted under the statutes at issue in this suit. None of the plaintiffs have established an actionable violation of their constitutional rights under 42 U.S.C. §1983.

1. Election Code Applied to Ray and Johnson

Willie Ray pleaded guilty to a misdemeanor offense under Texas Elections Code §86.006(f), and received deferred adjudication. She completed the terms of her deferred adjudication and has no criminal record. (Ex. 4, Ray Dep., p.10, ll. 6-21) Jamillah Johnson pleaded guilty, under similar circumstances, to an offense under Texas Elections Code §86.006(f). She also received deferred adjudication, which she completed, and thus has no criminal record. (Ex. 5, Johnson Dep, p. 10, ll. 10-24)

It is a settled matter of law that, so long as a prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in the prosecutor's discretion. *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663 (1978); *see also Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524 (1985)(prosecutor in a better position than court to assess "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the cases's relationship to the Government's overall enforcement plan"). The exercise of prosecutorial discretion is limited by the Equal Protection Clause; however, a court's consideration of an Equal Protection-based claim necessarily begins with a presumption of good faith and constitutional compliance by the prosecutors. *See United States v. Armstrong*, 517 U.S. 456-66, 116 S.Ct.

1480 (1996). Overcoming this presumption requires proof of both discriminatory effect and discriminatory purpose by presenting "clear evidence"– more specifically, a challenger must first present evidence of both discriminatory effect and discriminatory intent. *In re U.S.*, 397 F.3d 274 (5th Cir. 2005), *citing, id*. The record in this case is devoid of evidence (much less "clear evidence") that the Defendants either lacked probable cause under the statute or that they have intentionally discriminated against Plaintiffs, generally, or against Ray or Johnson, in particular.

Plaintiffs first attack the statute "as applied" to them by asserting that the "State has failed to provide adequate guidance, clarity or notice to members of the general public as to the requirements and criminal liabilities . . . added to the Texas Election Code in 2003, including Section 86.006(f)." [Pl. Amended Complaint, ¶ 37; 77]. However, the general rule is axiomatic: "ignorance of the law is no excuse." *United States v. Giles*, 640 F.2d 621, 628 (5th Cir.1981). For instance, a statutory provision proscribing "knowingly"[16] possessing an item does not require that the defendant have actual knowledge that his actions are unlawful, but only that he knows he is engaging in the activity that the legislature has proscribed. *Bryan v. United States*, 524 U.S. 184, 118 S.Ct. 1939, 1945-47 (1998). *Bryan* explained that *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793 (1994), exemplifies this distinction. In *Staples*, the Supreme Court held that conviction for unlawful possession of a machine gun did not require knowledge that machine gun possession was unlawful, but only knowledge

[16] As it relates to the method of returning marked ballots, Texas Election Code §86.006(f) creates a limited prohibition of "knowing]" possession of an ballot or carrier envelope of another.

that the weapon possessed was a machine gun. *Bryan*, 118 S.Ct. at 1946 (under *Staples* "[i]t was not, however, necessary to prove that the defendant knew that his possession was unlawful").

Furthermore, when the legislature passes a law which affects a general class of persons, those persons have all received procedural due process via the legislative process, itself. *See, supra,* at p.46. The large number of people affected by the legislative process ensures that the legislature will act reasonably. *Rogin v. Bensalem Township*, 616 F.2d 680, 693-94 (3d Cir.1980), *cert. denied*, 450 U.S. 1029, 101 S.Ct. 1737 (1981). Indeed, Plaintiffs Ray and Johnson declare in paragraphs 2 and 3 of their Amended Complaint that they are "registered Democrats" and "associated with . . . the Texas Democratic Party." The Texas Democratic Party participated in the legislative hearings on HB 54 in 2003, and did not express opposition to the bill,[17] and could have (and may have) provided them direct notice of the new statutory provisions.

In short, following the 2003 amendments to the Texas Election Code, Ray and Johnson possessed marked ballots of another voter and did not put their own names, addresses, or signature on the carrier envelope. This was clearly contrary to Texas statute, and they were prosecuted for this misdemeanor, and both pleaded guilty. Neither has

[17] Although, during this litigation, the TDP produced an undated report that recites opposition to the bill, Molly Beth Malcom, then Chair of the Texas Democratic Party, testified in 2003 before the House Elections Committee regarding HB 54 that "I didn't testify against it, I didn't testify for it," and also confirmed that "I agree that we want to be sure that every vote that is cast should be cast, and I agree that there are bad people that do some of these things just as there are bad people who intimidate people as well." [Defendants' Response to Pl. P.I., Appx., pp. 183; 180].

presented evidence that there was no probable cause to prosecute this offense. In fact, both pleaded guilty to having done it. Both Ray and Johnson have now incorporated adherence to this provision of the law into their activities, and continue to assist mail-in voters, though they now put their name, address, and signature on the carrier envelope of those they assist. (Ex. 4, Ray Depo, p.57, l. 20- p.59, l. 19; 35, 10-14; Ex. 5, Johnson Depo, p. 21, l. 24-p. 22, p. 17) Johnson admitted that during the time of the deferred adjudication no elections took place. (Ex. 5, Johnson Depo, p.19, ll. 21-25), and neither Ray nor Johnson has presented any admissible evidence that any voter (including themselves) has either been disenfranchised as a result of the change in law or their prosecutions, or that their voluntary voter assistance activities have been meaningfully hindered.[18]

2. Election Code Applied To Meeks And Minneweather[19]

Plaintiffs Meeks and Minneweather each allege that she "believes she has been the subject of an investigation by the Defendants for allegedly possessing and mailing ballots of other voters . . ." [Pl. Amend. Complaint, ¶5-6]. It is agreed that neither was prosecuted, and in deposition, Minneweather described her single, five minute "interview" with OAG

[18]Plaintiffs Ray and Johnson have both testified that they have continued with their same activities in assisting voters mail-in, but now adhere to the process of disclosing their name address and signature. Both testified that they find this process time consuming (Ex. 4, Ray Depo; p.36, ll. 2-6;Ex. 5, Johnson Depo; p.23, ll. 1-3), but neither supplied any testimony that would contradict this Court's finding that the disclosure requirement of §86.051 is sufficiently justified by the State's interest in combating voter fraud. [FF/CL 17, ¶19].

[19]The same arguments would applicable to Plaintiffs Robinson, Jackson, and the Texas Democratic Party, though it is unclear from the pleadings whether these plaintiffs are asserting 42 U.S.C. §1983 challenges to the Election Code statutes as applied to them, individually. Neither Robinson nor Jackson provided particular answers or verifications to Defendants' Interrogatories, and none of these Plaintiffs are mentioned in Count VIII of Plaintiffs' Amended Complaint, titled "The Challenged Provisions Violate 42 U.S.C. §1983."

investigators in 2006, and confirmed her understanding that any investigation was closed. (Ex. 13, Minneweather Depo. p. 8, ll. 3-7, 18-22) Meeks has been reported to Defendants as being incapacitated and not available to be deposed, and has not provided responses or a verification to Defendants' interrogatories.

In their Amended Complaint, Plaintiffs allege that "in threatening to levy criminal enforcement against [Meeks and Minneweather] under Section 86.006 and other challenged provisions, the Defendants are acting under color of state law, and subjecting Plaintiffs Meeks and [Minneweather], or causing them to be subjected, to a deprivation of their rights, privileges, and immunities under the United States Constitution." [Pl. Amend. Complaint, ¶85]. It appears that Plaintiffs' theory is that the mere questioning of these individuals about activities that may have violated a Texas statute, alone, deprived them of a constitutional right.[20] Defendants are at a loss to find any case or other authority that supports this proposition, especially in light of the prosecutorial discretion and presumption of constitutional compliance discussed in the previous section, *supra*.

It may be that Plaintiffs believe that the questioning of anyone, whether an alleged suspect (such as Meeks and Minneweather) or even just a witness (such as Robinson or Jackson) is a mechanism for "chilling" the speech or other constitutionally-protected rights,

[20] In the Rule 30(b)(6) deposition of the Texas Democratic Party, the Party testified that it has no data to suggest that mail-in ballot numbers have declined since the 2003 amendments to the Election Code or any prosecutions of the amendments (Hernandez Depo, p.16, ll. 9-14), nor any data suggesting a "chilling effect" on mail-in voting. (*Id*. at p. 39, l. 16-40, l. 2). Indeed, the Party created and delivered grassroots training on mail-in ballots that it felt confident would adequately explain the statutes to its activists. (Bailey Depo., p.12, l. 1- p. 14, l.18; & Ex. 1).

and can be the basis for an as-applied challenge in this suit. This is simply not the law – for two reasons.

First, a facial, constitutional "void-for-vagueness" challenge can be made when laws have the capacity "to chill constitutionally protected conduct, especially conduct protected by the First Amendment." *Roark & Hardee LP v. City of Austin*, --- F.3d ----, 2008 WL 819509, *8 (5th Cir. 2008)(citation omitted). Constitutionally-protected free speech is "chilled" because of the uncertainty of a speaker as to whether his speech will or will not fall within the scope of the vague area of the regulation and incur governmental sanction. *See, e.g., Gooding v. Wilson,* 405 U.S. 518, 521-22, 92 S.Ct. 1103, 1105 (1972).

However, the Plaintiffs allegations discussed here do not relate to a facial challenge to a statute, but to a challenge to the application of the law to these non-prosecuted individuals. Thus, the question at summary judgment becomes very particular: what individual, constitutional rights of these non-prosecuted plaintiffs were ever deprived? None testified that they were denied the right to vote. Minneweather testified that she stopped doing all political work in 2006 (three years after the statute was amended) (Ex. 6, Minneweather Depo. p.4, 19-21) and that the attention she received after being questioned had a "chilling effect" on her because it was "stressful" and "hurt [her] feelings." (*Id*. at 10, 18-21) But the Election Code is clear about who must perform what actions with respect to mail-in ballots to avoid sanction, and Minneweather claims no particular confusion over what her current statutory duty would be if she did assist mail-in voters. Having hurt feelings over

a mere inquiry as to whether she was complying with a statute simply does not equate with constitutional infirmity.

Second, the focus of "chilled" expression is free speech. Whereas the right to vote involves a number of constitutionally-guaranteed rights, including free speech, this Court has already held that there is no fundamental right to receive and cast an absentee ballot. (FF/CL ¶11, p. 10). But the Plaintiffs in this case are not claiming they were denied either the right to vote or the ability to receive or cast an absentee ballot. Their claims are considerably more attenuated from any protected interest: they claim by this suit that their ability to assist people who may wish to vote by mail has been made somewhat more difficult by the 2003 amendments to the Election Code.

Assisting an individual who votes by mail, however, is not a matter significantly related to the Plaintiffs' individual speech or association rights. Rather, it is a regulation of conduct, not speech. As discussed by the Fifth Circuit in the *Roark* case:

> In *Rumsfeld*,[21] the Supreme Court upheld the Solomon Amendment, a congressional regulation that denies federal funding to institutions of higher education that prohibit military access to and assistance for recruiting services, against a challenge brought by an association of law schools that it unconstitutionally compelled their speech. The Court first explained that "[a]s a general matter, the [statute] regulates conduct, not speech" and that the "[l]aw schools remain free ... to express whatever views they have on" the mandated policy. *Id.* The Court further noted that "[t]he compelled speech to which the law schools point[-sending emails and posting notices

[21] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.(FAIR),* 547 U.S. 47, 60, 126 S.Ct. 1297 (2006)

> on behalf of the military-] is *plainly incidental* to [that] regulation of conduct." . . .
>
> Similarly, we find that Plaintiffs' contention here, that the ordinance unconstitutionally compels their speech, trivializes the freedom protected in *Barnette* and *Wooley*. The ordinance's goal is to prohibit smoking in enclosed public places in order to protect the City's population from the harmful effects of second-hand smoke. To achieve that goal, the ordinance requires Plaintiffs to take the "necessary steps" to stop another person from smoking. Thus, as a general matter, the ordinance regulates Plaintiffs' **conduct**, not speech.

Roark, 2008 WL 819509, *11 (emphasis added)

Clearly, the challenged provisions of the Texas Election Code were enacted to combat voter fraud activities by regulating and requiring certain conduct with ballots – not the speech of those who choose to assist people in obtaining or casting a mail-in ballot. Indeed, numerous Election Code provisions not challenged by this suit would prohibit anyone assisting a mail-in (or polling place) voter from influencing or subjecting a voter to his or her opinions or political speech. Likewise, as held in *Rumsfeld*, laws that regulate conduct without respect to speech are unlikely to implicate association rights. *Rumsfeld*, 547 U.S. at 69-70. This seems inherently logical when applied to the facts of this case, where the laws seek to preserve the integrity of the voter's opinion, as opposed to the individual who chooses to assist, witness, or help to mail the voter's ballot.

X. CONCLUSION

For the foregoing reasons, Defendants are entitled to summary judgment on Plaintiffs' unsevered claims (Counts I, II, III, IV, VII and VIII of the Amended Complaint) and for such further relief to which they are entitled.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing document has been served via Electronic Transmission, on this 7th day of May, 2008, on:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILLIE RAY, JAMILLAH JOHNSON, GLORIA MEEKS, REBECCA MINNEWEATHER, REUBEN ROBINSON, EDDIE JACKSON, 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 PHIL WILSON, Secretary of State for the State of Texas, *Defendants.*	§	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Greg Abbott, Attorney General of the State of Texas, and Phil Wilson, Secretary of State for the State of Texas, filed their Motion for Summary Judgment ("Motion") under Fed. R. Civ. P. 56(b) on all existing, non-severed claims of the Plaintiffs in the above-numbered cause, as remaining in this cause after this Court's Order of February 1, 2008 (Docket Entry No. 37). Upon consideration of the Defendants' Motion, the Plaintiffs' response, and the evidence, briefing, and arguments of counsel, the Court finds that there is no genuine issue of material fact to be tried by the trier of fact in this case and hereby grants Defendants' Motion in its entirety. Defendants are directed to submit to the Court a form of final judgment.