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.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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WILLIE RAY, JAMILLAH JOHNSON, GLORIA MEEKS, REBECCA MINNEWEATHER, REUBEN ROBINSON, EDDIE JACKSON, and THE TEXAS DEMOCRATIC PARTY,	)	
Plaintiffs,	)	
v.	)	Civil Action Number 2:06-CV-385(TJW)
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.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rule 56, Federal Rules of Civil Procedure, Plaintiffs Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Reuben Robinson, Eddie Jackson, and the Texas Democratic Party, by and through undersigned counsel, respectfully move for summary judgment with respect to their challenges to Section 84.004 of the Texas Election Code, as set forth in Counts I, II and IV of Plaintiffs' First Amended Complaint. Because Section 84.004 is unconstitutional and violates Section 208 of the Voting Rights Act of 1965, it should be declared unlawful and permanently enjoined. The grounds for this motion are set forth below.

STATEMENT OF THE ISSUES TO BE DECIDED

The parties' May 28, 2008 Settlement Agreement, announced in open court on that date, stated in pertinent part that Plaintiffs agreed to dismiss certain of their claims with prejudice

"except for Plaintiffs' challenges to Texas Election Code Sec. 84.004 as set forth in the amended complaint[.]" Settlement Agreement ¶ 1. Section 84.004 of the Texas Election Code provides:

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

Texas Election Code § 84.004 (emphasis added).

Consequently, the issues remaining for this Court's decision are whether Section 84.004 of the Texas Election Code, which restricts, under pain of criminal penalty, individuals from witnessing more than one mail-in ballot application per election cycle (other than for family members): (1) violates Section 208 of the Voting Rights Act, 42 U.S.C § 1973aa-6; (2) violates the fundamental right to vote guaranteed by the First and Fourteenth Amendments to the U.S. Constitution; and (3) violates the First Amendment.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Mail-in Voting in Texas

1. Voting by mail is an established tradition and common practice in Texas. Texas law provides a statutory right to cast a ballot by mail for any qualified voter who is 65 years or older on Election Day, who will be absent from the county of residence on Election Day, or who is disabled or ill. Texas Election Code §§ 82.001-82.003.

2. The Secretary of State has recognized that casting a ballot by mail in Texas is synonymous with "exercis[ing] your right to vote." Plaintiffs' Summary Judgment Opposition ("SJ Opp.") Ex. 17; Preliminary Injunction ("PI") PX8.[1]

3. To vote by mail, an eligible registered voter "must make an application for an early voting ballot to be voted by mail." Texas Election Code § 84.001(a).

4. Voting by mail is a part of Texas's established system of "early voting," whereby individuals may cast ballots before Election Day in person or by mail. Texas Election Code § 81.001 *et seq.*

Assistance With Mail-in Voting Takes Many Forms

5. Because mail-in voters include the elderly, disabled and ill, *see* Texas Election Code §§ 82.001-82.003, many mail-in voters require or prefer assistance with the mail-in balloting process in several respects, and there is a well-established and common practice in Texas, particularly in certain communities, to provide assistance to mail-in voters. In fact, some voters need assistance for the entire application and voting process. 1.R.76¶.

6. The assistance provided to mail-in voters has taken many forms, such as: providing assistance to voters in completing an application for a mail-in ballot, including mailing "pre-filled" applications to voters, who then need only sign and return the application; helping voters who have received mail-in ballots with marking their ballots (particularly for voters who are blind or who cannot read or write); and physically placing sealed ballots in the mail on behalf of mail-in voters. Preliminary Injunction Transcript ("PI Tr.") 61-65, 72-76, 86-87; PI PX14 at 10-17; PI PX15 at 8-14; 1.R.75¶2.

[1] "SJ Opp. Ex. __" refers to exhibits submitted with Plaintiffs' summary judgment opposition submitted before the May 28, 2008 partial settlement. "PI PX__" refers to exhibits submitted by Plaintiffs at the 2006 preliminary injunction hearing in this case. "PI Tr. __" refers to the transcript from the 2006 preliminary injunction hearing in this case. "R" refers to the Fifth Circuit record on appeal of this Court's preliminary injunction order. "App. Ex. __" refers to exhibits that Plaintiffs are appending to this motion in a separately filed Appendix.

7. Prior to the 2003 amendments to the Texas Election Code, several of which were previously challenged in this litigation, the Texas Election Code set forth certain regulations of two categories of individuals helping voters. Most relevant here, "witnesses" are individuals who sign a document for voters. *See* Texas Election Code § 1.011 ("When this code requires a person to sign an application, report, or other document or paper, except as otherwise provided by this code, the document or paper may be signed for the person by a witness, as provided by this section, if the person required to sign cannot do so because of a physical disability or illiteracy."). "Assistants" are those who provide certain, specific aid to mail-in and in-person voters other than witnessing, such as reading or marking a voter's ballot. *See id.* §§ 86.010; 64.0321.

Mail-in Voting in Texas Minority Communities and the Texas Democratic Party's Role

8. For many years, it has been common practice by individuals, political parties, and other organizations in certain communities in Texas – including the Texarkana community where Plaintiffs Ray, Johnson, and Robinson reside; in Fort Worth, where Plaintiffs Meeks and Minneweather reside; and in the Marshall area, where plaintiff Jackson resides – to maximize voter turnout by assisting voters in applying for and casting their mail-in ballots. PI Tr. 61-65, 72-76, 86-87; PI PX14 at 10-17; PI PX15 at 8-14; 1.R.75-76¶2.

9. Such assistance has particularly benefited voters who are severely physically handicapped, such as Plaintiffs Meeks, Robinson, and late Plaintiff Parthenia McDonald. This assistance also benefits elderly voters and those who are illiterate.

10. This political and civic activity has been widely used by both of the major political parties in Texas, and also by the political activists within the Plaintiff Texas Democratic

Party, the Bowie County Democratic Party, the Harrison County Democratic Party, and the Tarrant County Democratic Party. PI Tr. 86-87; PI PX14 at 10-17; 1.R.78¶8.

11. For example, Plaintiff Texas Democratic Party has long undertaken efforts to assist mail-in voters in order to maximize voter turnout, particularly among the elderly and disabled. PI Tr. 86-87; 1.R.75-76¶2. Texas Democratic Party representative Ken Bailey has indicated that the "the mail-in ballot program is critical to the Party's get-out-the-vote efforts." Bailey Declaration at 2 (in attached Appendix as Ex. 2). As part of implementing this voter turnout effort, party activists such as Plaintiffs Ray, Johnson, Meeks, and Minneweather have been contacted frequently by friends and acquaintances requesting assistance in applying for and casting mail-in ballots. Such voter turnout efforts are commonplace and well-established throughout Texas. *See* SJ Opp. Exs. 6, 7, 9, 15, 21, 22; PI PX13, 14, 15. In all cases of assistance provided by Plaintiffs, including the Texas Democratic Party, the assistor merely provides whatever help the voter requests. 1.R.77¶6. Where the needed assistance involves reading the ballot to a voter or providing instruction in marking the ballot, the voter's decision is made by the voter without influence or pressure from the assistor. 1.R.77¶6. Mail-in voters regularly inform the Texas Democratic Party that they appreciate the assistance provided by the Party and volunteers. PI Tr. 65; 1.R.76¶3.

12. In 2006, the Texas Democratic Party expected to spend approximately $100,000 in efforts to assist mail-in voters. 1.R.76¶3. In 2008, the Plaintiff Texas Democratic Party again intends to maximize voter turnout and increase political participation by assisting mail-in voters, including with applying for mail-in ballots, with a focus on providing assistance to the elderly and disabled. *See* SJ Opp. Ex. 15.

13. The Texas Democratic Party has implemented efforts to increase voter turnout in minority communities in particular, including black and Hispanic communities in Texas, because turnout there is typically lower than in Anglo communities, due in large part to the long history of voting discrimination by the State. 1.R.78¶9. The Director of Elections at the Secretary of State's Office, Ann McGeehan, testified that she had anecdotal information that it was an important part of the get-out-the-vote effort in black communities in Texas for elderly and disabled voters to be assisted by their neighbors and friends with respect to mail-in voting. SJ Opp. Ex. 3 at 17. In past years, a significant number of individuals in Texas working on behalf of Democratic campaigns and local/county officials of the Democratic Party have been involved in assisting mail-in voters. PI Tr. 61-65, 72-76, 86-87; PI PX14 at 10-17; PI PX15 at 8-14; 1.R.75-76¶2.

14. Absent the efforts of the Texas Democratic Party, Plaintiffs, and individuals like them, many potential mail-in voters would find it difficult or impossible to apply for and receive a mail-in ballot, or to properly complete and cast a ballot. PI Tr. 64, 68, 86-87, 123; PI PX14 at 17; PI PX15 at 12; 1.R.78¶8.

Specific Examples of Mail-In Voters in Need of Assistance

15. Plaintiff Robinson is an African-American male, a registered voter in Bowie County, and a registered Democrat. He was one of dozens of voters questioned by investigators from the office of the Defendant Abbott in 2005 when the Attorney General's office was investigating Plaintiffs Ray and Johnson. App. Ex. 3.

16. Plaintiff Robinson is severely physically handicapped, has suffered a major stroke that has left him partially paralyzed, and uses a wheel chair. SJ Opp. Ex. 4 at 5. Because he cannot use his right hand, Plaintiff Robinson requires the assistance of another person in order to

obtain and cast his mail-in ballot, and he depends on a trusted friend to assist him in applying for a mail-in ballot and in casting that mail-in ballot. SJ Opp. Ex. 4 at 10-12. Plaintiff Robinson voted by mail in the 2004 elections and received assistance in voting. *Id.* The person who assisted Plaintiff Robinson in 2004 was indicted in 2005 by Defendant Abbott for mailing Plaintiff Robinson's ballot. If Plaintiff Ray or Plaintiff Johnson were not willing to help Plaintiff Robinson vote, he probably would not get to vote because he does not know anyone else who could help him. *Id.* at 13, 18.

17. The need for such assistance is exemplified by late Plaintiff Parthenia McDonald, who at the time of her videotaped trial deposition in 2006, was a 78-year old, homebound, and severely physically handicapped woman living in Fort Worth, and who required assistance to receive and cast her mail-in ballot. PI Tr. 119-23.

18. Similarly, two severely disabled voters, Eddie Buchanan and Amanda Hill, of Karnack (Harrison County) and Texarkana (Bowie County), respectively, have testified that they require assistance in voting by mail. SJ Opp. Ex. 5; App. Exs. 4, 5. Mr. Buchanan, a stroke victim, resides with his wife, but if she were no longer able to help him, he would need to call upon Plaintiff Eddie Jackson to help him, because he needs help in applying for the ballot, mailing a ballot, and filling out the ballot. SJ Opp. Ex. 5 at 7-8. Buchanan testified that if he could not receive assistance in mailing his ballot, he would not be able to vote. *Id.* Voter Amanda Hill also cannot prepare outgoing mail because of her disability, and without assistance, she too would not be able to vote. App. Ex. 5 at 9-10.

19. Plaintiff Robinson, voter Buchanan, and voter Hill each wish to receive assistance in the future in applying for mail-in ballots, marking those ballots, and having those ballots

mailed for them by trusted friends with whom they do not reside or with whom they are unrelated. *See* SJ Opp. Exs. 4, 5; App. Exs. 4-6.

Section 84.004 of the Texas Election Code

20. Section 84.004 was enacted in 1985 and became effective on January 1, 1986. It provides that a mail-in ballot application signed for the applicant by a witness, rather than by the applicant, must indicate the applicant's relationship to the witness, *see* Texas Election Code § 84.003(a), subject to the general rules applicable to the signing of election-related documents by a witness, *see id.* § 1.011(a). Section 1.011(d) requires that a witness affix the witness's signature, name and address on the document at issue. Furthermore, Section 84.004 makes it a Class B misdemeanor to serve as a witness for more than one mail-in ballot application in the same election. Thus, for each mail-in ballot application signed by a witness in excess of one per election cycle, the witness faces up to 180 days in jail and up to a $2,000 fine. *See* Texas Penal Code § 12.22 (setting forth penalties for Class B misdemeanors).

21. Plaintiffs challenge Section 84.004 as violating various provisions of federal law by unduly burdening the ability of party activists and others to provide assistance to those who need help obtaining mail-in ballots.

The 2003 Amendments to the Election Code

22. In 2003, despite broad prohibitions already empowering Texas officials to combat actual voter fraud, *see, e.g.*, Texas Election Code §§ 64.012 ('illegal voting"), 64.036 ("unlawful assistance), 84.0041 (false information on a mail-in ballot application), the Texas Legislature amended the Texas Election Code to create a series of additional prohibitions related to mail-in voting. *See* House Bill 54, 2003 Texas Gen. Laws 393 (78th Legislature 2003).

23. Well before passage of the 2003 amendments, Defendants had knowledge, or reasonably should have known, of the widespread, non-fraudulent practice of assisting voters with mail-in balloting, identified above. House Comm. On Elections, Bill Analysis, Tex. H.B. 54, 78th Leg., R.S. (2003). Further, Defendants knew, or should have known, that this practice was particularly utilized in many minority communities in Texas, including Texarkana and Fort Worth, to maximize voter turnout and that this practice was utilized by political parties, including individuals and organizations affiliated with the Democratic Party. *Id*. See also, *e.g.*, SJ Opp. Ex. 3 at 17; SJ Opp. Ex. 16.

24. As the legislative hearings concerning the 2003 amendments indicate, the Texas Legislature received no evidence of fraud concerning individuals and organizations who provided assistance to voters with mail-in ballots, such as Plaintiffs. *See, e.g.*, PI PX21-24¶5, PI PX25-26¶4. Many witnesses simply assumed that such fraud was a problem. For example, Representative Wolens, the bill's sponsor, explained, what motivated him was eliminating any *appearance* of fraud: "I'm not here complaining that there is widespread fraud, I just am saying that there are minimum improprieties that on the face of it look wrong." 3.R.672; *see* 3.R.667 (seeking to "absolutely eliminate the appearance of impropriety"); 3.R.671-72 ("[w]hen I read about it anecdotally in the newspapers, I don't need to go make certain that there is a fraud or not a fraud, it is announced that it just looks bad").

25. Throughout the debate on the 2003 amendments, some legislators questioned whether the provisions were targeted at legitimate get-out-the-vote efforts, particularly those of African-Americans and Hispanics. *See, e.g.*, 3.R.735. Nonetheless, the understanding of legislators (including Democrats) voting for the legislation "was that the amendments would be used to investigate and prosecute actual instances of voter fraud" and would not be used to

prosecute those who simply mailed ballots for other voters or to otherwise deter people from providing assistance to voters in need. PI PX22¶4; PI PX25¶3; PI PX26¶3. In contrast, Democrats opposing the legislation feared that it would "have a chilling effect on [their] constituents' [right] to vote in cases where voter fraud had not and would not be an issue." PI PX24¶5; *see* PI PX21¶4; PI PX23¶4.

26. In 2003, the Texas Legislature established additional criminal penalties for witnesses in the mail-in ballot application process, providing for criminal penalties for witnesses to mail-in ballot applications who do not provide their identifying information as required by Section 1.011 of the Election Code. *See id.* § 84.003(b).

27. The 2003 amendments also created an additional restriction on assistance with respect to mail-in balloting, providing for criminal penalties for anyone who "in the presence of the applicant *otherwise assists* an applicant in completing an early voting ballot application." Texas Election Code § 84.003(b). The definition of "assisting a voter" provided for by the 2003 legislation, *see id.* § 64.0321, does *not* apply to Section 84.003(b). *See id.* Thus, Section 84.003(b) may be read to criminalize a wide range of aid long provided to voters applying for mail-in ballots, including, but not limited to, "assistance" under Section 64.0321.

The Investigations and Prosecutions of Plaintiffs by Defendant Abbott Have Not Involved Voter Fraud

28. Plaintiffs Ray, Johnson, Minneweather, Jackson, and Meeks are political activists associated with both the Texas Democratic Party and their respective local county democratic parties. Each of these Plaintiffs has provided lawful assistance to registered voters in Texas in the past with regard to applying for and casting mail-in ballots. Each of these Plaintiffs wishes to provide lawful assistance to voters in the future. *See generally* SJ Opp. Exs. 7, 9, 22; App. Ex. 7; PI PX13, 15.

29. Plaintiffs Ray and Johnson were indicted by the Defendant State of Texas in 2005 because they allegedly possessed and mailed ballots for voters without providing their names, signatures and addresses on the ballot's carrier envelope. PI PX1.

30. Defendant Abbott widely publicized the indictments of Ray and Johnson, and issued a press release. PI PX9, PI PX11. In his press release announcing these indictments, Defendant Abbott stated: "The integrity of our election process must be protected. I am pleased to announce these indictments and will make certain that anyone who takes advantage of Texas voters is held accountable." PI PX11. The press release also warned the public that the charges facing Ray and Johnson were Class B misdemeanors, which he announced "could result in a $2,000 fine and up to six months in county jail." *Id.*

31. Despite Defendant Abbott's claims that those indicted had "take[n] advantage of Texas voters," the complete criminal investigation file of the Defendant Attorney General does not contain any evidence that either Ray or Jonson took advantage of any voter, disregarded any voter's wishes, or engaged in any fraudulent activity. App. Ex. 8. Rather, Ray and Johnson were indicted simply for possessing and mailing a ballot of a voter and not providing identifying information on the carrier envelope.

32. Both Ray and Johnson pled guilty in 2006 to violating Section 86.006 of the Texas Election Code for the mere possession of ballots of other voters. App. Ex. 9. They were fined and sentenced to terms of probation, which they have completed. Ray and Johnson were never assessed a finding of guilt, but pursuant to a plea bargain, received a deferred adjudication of the alleged violations. App. Exs. 10, 11. Neither Ray nor Johnson were alleged or proven to have committed any actual voter fraud. PI Tr.78-79; PI PX1.

33. Upon entry of the pleas by Ray and Johnson, Defendant Abbott again issued a press release, this time incorrectly suggesting that Plaintiffs Ray and Johnson had pled guilty to voter fraud, instead of mere possession of a voter's mail-in ballot without providing information on the carrier envelope. App. Ex. 12. Defendant Abbott's July 18, 2006 press release announced: "Attorney General Abbott Obtains Guilty Pleas In Bowie County Voter Fraud Case." *Id.* That press release also stated: "These guilty pleas demonstrate precisely why it is so important to uphold the integrity of our election process in this state . . . . We will visit justice upon any who ignore the fact that we have election laws in Texas and they apply to everyone." *Id.*; *see also* App. Ex. 13.

34. Despite Defendant Abbott's statements to the contrary, there is no indication anywhere in the record of the prosecutions of either Ray or Johnson that they "ignore[d]" the law or felt that the law didn't "apply to" them. Both have testified in this proceeding that when they were assisting elderly and infirm voters with voting by mail in the 2004 elections, they simply were not aware that the Texas Legislature had made it a crime to possess the ballot of another without providing identifying information. SJ Opp. Ex. 9 at 7; SJ Opp. Ex. 22 at 9.

35. Defendant Abbott portrayed the prosecutions of those possessing or mailing the ballot of another without providing identifying information (such as plaintiffs Ray and Johnson) as proof of "voter fraud." However, none of the Plaintiffs in this case who has been investigated or prosecuted for assisting voters, or possessing or mailing the ballot of another and failing to sign the carrier envelope (*i.e.*, Plaintiffs Ray, Johnson, Meeks, and Minneweather) has been alleged to have committed any fraudulent act, such as forging a mail-in ballot signature, mismarking a ballot, failing to mail the marked ballot, changing the ballot of a voter without permission, or intimidating or pressuring any voter.

36. Despite the absence of any evidence that Plaintiffs have been in any way involved with any actual voter fraud, when this lawsuit was filed, the Texas Solicitor General R. Ted Cruz – an official in the office of Defendant Abbott – claimed that Plaintiffs are "a combination of political operatives and individual criminals who have already pleaded guilty to voter fraud." App. Ex. 14. Cruz added that the State would vigorously defend the lawsuit "to ensure that admitted criminals like the plaintiffs will not be able to defraud Texas voters and undermine the integrity of elections." *Id.*

37. Other Plaintiffs have also been investigated by defendant Abbott for assisting elderly and disabled voters in casting their ballots by mail. For example, Plaintiff Meeks resides in Fort Worth and is an African-American female, a registered voter in Tarrant County, and a registered Democrat. Plaintiff Meeks is a political activist associated with both the Texas Democratic Party and the Tarrant County Democratic Party. Plaintiff Meeks has lawfully assisted registered voters in Texas (particularly elderly and disabled voters) in casting their mail-in ballots. PI PX15; App. Ex. 7.

38. Plaintiff Meeks was the subject of an investigation by the State in 2006 for allegedly possessing and mailing ballots of other voters in Tarrant County and for providing assistance to voters in casting their ballots. PI PX15, App. Exs. 15, 7. In the course of that investigation, investigators from the Attorney General's office peeped into Ms. Meeks' bathroom window while she was stepping out of the bath. *Id.* Since the filing of this lawsuit, Plaintiff Meeks suffered a stroke that has confined her to bed, and she thus requires the assistance of another person in order to vote. SJ Opp. Ex. 6 at 31.

39. Plaintiff Rebecca Minneweather resides in Fort Worth and is an African-American female, a registered voter in Tarrant County, and a registered Democrat. Plaintiff

Minneweather is a political activist associated with both the Texas Democratic Party and the Tarrant County Democratic Party. Like Plaintiff Meeks, Plaintiff Minneweather was the subject of an investigation by the Defendants for allegedly possessing and mailing ballots of other voters in Tarrant County and for providing assistance to voters in casting their ballots. SJ Opp. Ex. 7; PI PX13.

40. Plaintiff Minneweather has lawfully assisted registered voters in Texas (particularly elderly and disabled voters) in casting their mail-in ballots, and she wishes to provide such lawful assistance to Texas voters in the future. SJ Opp. Ex. 7 at 4, 10. As a direct result of being investigated by Defendant Abbott in 2006, Plaintiff Minneweather has discontinued assisting elderly and disabled voters for fear of being prosecuted. *Id.*

41. Defendant Abbott has produced a chart showing those subjected to prosecution for violations of the Texas Election Code since 2003. *See* SJ Opp. Ex. 8. This chart indicates that individuals other than Plaintiffs similarly have been investigated and prosecuted without a charge or proof of actual voter fraud.

Evidence of Differential Enforcement of the Challenged Provisions

42. The Attorney General has acknowledged that all individuals prosecuted under the 2003 legislation have been Democrats. 1.R.81¶14.

43. In contrast, the Attorney General's office has not investigated or prosecuted violations of the election laws allegedly committed by Republicans, such as those involving the improper and illegal handling of ballots. 1.R.81-82¶¶15-16.

44. It appears that all but one of the individuals prosecuted under the 2003 legislation is African-American or Hispanic. 1.R.21¶30; SJ Ex. 8.[2]

[2] This Court severed Plaintiffs' claims regarding racially discriminatory implementation of the challenged provisions, and those severed claims have been dismissed with prejudice pursuant to the settlement agreement

45. Materials produced by the Defendant Attorney General suggest that a correlation or relationship exists between membership in a minority group and engaging in voter fraud, as well as between being a political party activist and perpetuating voter fraud.

46. For example, sometime after June 3, 2005, the Defendant Attorney General's office prepared a PowerPoint presentation entitled "Investigating Election Code Violations." PI PX10. This PowerPoint presentation was used to train Texas officials in investigating and prosecuting voter fraud. SJ Opp. Ex. 14 at 64.

47. As an introduction to a section of the PowerPoint involving "Poll Place Violations," a slide depicts a photograph of African-American voters apparently standing in line to vote. PI PX10. Notably, the 71-slide presentation contains no similar photographs of white or Anglo voters casting ballots.

48. The presentation does contain a photograph of what appears to be an Anglo Democratic enthusiast in a section describing the "Poll Place Violation" of "Unlawful Operation of a Sound Truck." PI PX10. The accompanying photograph is of a man on a bicycle whose person and bicycle are covered with "Kerry/Edwards" and "Kerry/Vote" signs, as well as an American flag. *Id.* The depicted rider does not appear to be transporting a sound truck or loudspeaker; nor does he appear to be within 1,000 feet of a polling place. Thus, this photograph does not illustrate the "Poll Place Violation" at issue. No similar depictions of Republican activists exist in the 71-slide presentation.

49. Another slide in the same PowerPoint presentation, in a section involving tactics for investigating alleged voter fraud, is entitled "Examine Documents For Fraud." PI PX10.

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announced in open court on May 28, 2008. Nevertheless, the evidence already in the record regarding disparate enforcement (offered at the 2006 preliminary injunction hearing) is also relevant to Plaintiffs' claims at issue in this motion. For instance, this evidence is relevant to whether Section 84.004 is necessary to combat actual voter fraud, whether it burdens the right to vote, and whether the State's enforcement of the mail-in ballot provisions of the Election Code has produced a chilling effect on legitimate political activity.

That slide states that investigators should look for "Unique Stamps" and shows a prominent picture of a postage stamp known as the "sickle cell stamp," which depicts an African-American woman and her infant. This slide communicates the view that the use of the sickle cell stamp is an indication of voter fraud.

50. Sickle cell disease is a group of inherited red blood cell disorders known to particularly affect African-Americans. The disease is inherited at birth by individuals born with sickle cell hemoglobin, and if so, the disease is present for life. The "sickle cell stamp" is used extensively by African-American consumers – largely for mailing everyday items, such as correspondence, bills and cards, but also for the infrequent task of mailing absentee ballots.

51. The PowerPoint presentation suggests to those being trained or otherwise viewing it that there is a correlation or relationship between Democratic or minority affiliation and the potential for violating the challenged provisions. The PowerPoint had the likely effect of cuing state and local officials to focus their investigations and prosecutions under the challenged provisions against minorities and Democrats.

52. The PowerPoint presentation has affected the State's investigators. For example, while investigating Plaintiffs Ray and Johnson, Sergeant Jennifer Bloodworth, an employee of the Defendant Office of the Attorney General, inquired of voters specifically about the use of a sickle cell stamp allegedly found on the ballots of two African-American voters to whom Plaintiffs Ray and Johnson had allegedly provided assistance. App. Ex. 8.

The Chilling Effect Caused by the Challenged Provisions and Defendants' Actions

53. As the early and mail-in voting period neared for the November 6, 2006 election, the chilling effect of the challenged provisions and their enforcement materialized. Texas voters and volunteers – including many affiliated with the Texas Democratic Party – reported being

intimidated and chilled by the State's enforcement of the challenged provisions. PI Tr. 66, 88; PI PX14 at 23-31; PI PX15 at 17-18; 1.R.78-81,82-83¶¶10-14,17.

54. Democratic campaign official Jane Hamilton testified that Defendant Abbott's investigations and prosecutions of African-Americans was having, in her words, "a chilling effect." SJ Opp. Ex. 6 at 31. Ms. Hamilton is no longer willing to assist voters by mail as she has in the past, because she fears prosecution by Defendant Abbott. *Id.* at 38-39.

55. As a result of the Attorney General's investigation of her activities assisting elderly voters with their mail-in ballot applications, Plaintiff Minneweather, who helped between 80 and 100 voters with their mail-in ballots prior to 2006, has stopped assisting voters altogether and has not assisted a single voter since 2006. SJ Opp. Ex. 7 at 4.

56. Plaintiff Willie Ray similarly testified that there was a "chilling effect" in the Texarkana as a result of the Attorney General's office going door to door in the black community and interrogating voters. SJ Opp. Ex. 22 at 14-19. As Ms. Ray put it, the chilling effect produced by the Texas Attorney General's investigations and prosecutions produced "a spirit killing" among the elderly black voters. *Id*. at 17.

57. Democratic voters and volunteers were confused about what activities would trigger investigation and prosecution, despite the Texas Democratic Party's efforts to educate its members about the challenged provisions. PI Tr. 66, 88; PI PX14 at 23-31; PI PX15 at 17-18; 78-71,82-83¶¶10-14,17.

58. This confusion and fear was exacerbated by the fact that all but one of the State's voting prosecutions since 2003 had been of black or Hispanic individuals, and all were Democrats, 1.R.21¶30; 1.R.81¶14, and in light of public comments by State officials, such as the

Texas Solicitor General's false and defamatory statements about the individual Plaintiffs in this case, 1.R.80-83¶¶13,17; App. Ex. 14.

59. Moreover, based on the indictments of Ray, Johnson, and others, individuals feared investigation and prosecution for alleged technical violations of Section 86.006(f) and other provisions, such as Section 84.004, even in the absence of any voter fraud or other illegal or improper conduct.

60. As Early Voting for the 2006 general election got underway, the Texas Democratic Party found that many of its members were unable or unwilling to provide assistance to mail-in voters, for fear of investigation or prosecution by State officials, even in the complete absence of any fraudulent activity. SJ Opp. Exs. 6, 15; PI Tr. 66,88; PI PX14 at 23-24, 26-31; PI PX15 at 17-18; 1.R.78-80¶¶10-11,13. The Party has seen a substantial decline in such assistance as compared to previous years. SJ Opp. Exs. 6, 15; PI Tr. 88; 1.R.77-78,80-81¶¶7,13.

61. Section 84.004's restriction upon witnessing more than one mail-in ballot application per election cycle, under the pain of prosecution, in conjunction with the chilling effect of the State's enforcement efforts, has prevented individuals (including Plaintiffs) from participating in legitimate organizational efforts designed to maximize early voter turnout and political participation.

62. The investigation and prosecution of individuals described in paragraphs 28 through 59, *supra*, involved mail-in ballot provisions. This record of e enforcement by the Defendant Attorney General has chilled all forms of mail-in ballot assistance, including the ability of Plaintiffs and activists within the plaintiff Texas Democratic Party who wish to serve as "witnesses" and "assistors" to voters in applying for a mail-in ballot. As set forth in the sworn

declarations of Plaintiff Willie Ray, for example, the restrictions of Section 84.004 have prevented her from providing needed assistance to voters. See Ex. 1 in Appendix at ¶4.

The Defendants Provided Erroneous and Misleading Information to Voters About the Challenged Provisions and Their Enforcement

63. Section 84.004 and the 2003 amendments to the Texas Election Code criminalize longstanding, legitimate practices in relatively unsophisticated minority communities. Individuals in these communities were unlikely to learn about the changes in State law and the State's enforcement efforts absent some affirmative effort by the State.

64. As the Attorney General's own voting fraud investigator admitted in 2005:

> The actual law about handling ballots, it just went into effect in 2003 and I think the problem is that a lot of people didn't know about it. There's no billboards or anything. There's no way to have known the law changed, and so I think it had been done this way for so long in so many counties that that's why we're having such a problem now, because the law has changed and yet there was nothing advertised about it.

SJ Opp. Ex.16 (2/3/05 J. Bloodworth Interview with P. and R. Houff).

65. Voting materials produced by Defendant Secretary of State – including the mail-in ballot application, the mail-in ballot instructions, and the mail-in ballot envelope – provide confusing and conflicting guidance concerning the responsibilities and potential liabilities of "assistors", "witnesses", "possessors", and "mailers". SJ Opp. Exs. 11-13; McGeehan Decl. & Exs.

66. Each year, the Defendant Secretary of State's office issues a "Dear Voter" letter to those who apply for a mail-in ballot. SJ Opp. Ex. 3 at 11, 45; SJ Opp. Ex. 17. The Secretary of State's Director of Elections testified that these "Dear Voter" letters were intended to be the Secretary of State's "best effort to educate a voter who is voting by mail." SJ Opp. Ex. 3 at 93.

67. In the 2004 version of the "Dear Voter" letter, the Secretary of State's instructions encouraged voters to give their ballot to a trusted friend or family member. SJ Opp. Ex. 17. This advice was in keeping with the longstanding practice of many years identified above, whereby elderly and disabled voters would receive assistance from trusted friends and political party activists. The 2004 Dear Voter letter for the first time instructed the voter (but not those assisting the voter) that the assistor or person mailing the ballot for the voter needed to sign the carrier envelope and provide identifying information. *Id.* The instructions, however, failed to warn voters, among other things: (1) that there was any limit to the number of mail-in ballot applications that could be witnessed; and (2) that it was a crime to witness more than one application (unless you were a family member). Nor were such warnings included in the 2006 and 2008 "Dear Voter" letters. *See* SJ Opp. Ex. 17; *see* SJ Opp. Ex. 3 at 92-95.

68. On numerous occasions, the Secretary of State, Attorney General and their representatives have issued erroneous guidance that has chilled the legitimate efforts of representatives of political parties and other civic organizations. For example, the State Attorney General's office investigators incorrectly informed elderly and/or disabled voters that "everybody has to mail [the ballot] themselves," SJ Opp. Ex. 16, and has improperly warned voters not to accept help from "stranger[s]" who "show up" on voters' "doorstep[s]" to offer assistance, SJ Opp. Ex. 17.

69. In addition, despite a longstanding practice by political parties and other organizations of "pre-filling" applications for mail-in ballots – a practice not expressly outlawed by the 2003 amendments and expressly condoned by the Attorney General, *see* PI PX10 – the Secretary of State's website warns that voters should "ask someone you trust" if "you need help filling out the [application] form," but that "you must write the assistant's name and address" on

the application and that the helper "must also sign the application." *See Texas Secretary of State's Office, Early Voting in Texas,* http://www.sos.state.tx.us/elections/pamphlets/earlyvote.shtml (visited May 28, 2008).

70. The Secretary of State's website also "recommend[s]" that voters decline help if a "stranger" "'show[s] up' on your doorstep offering to help you with your ballot soon after you've received it in the mail." *Id.* However, neither Section 84.004 nor the 2003 amendments bar such assistance.

71. The Attorney General and Secretary of State also have issued conflicting and unclear guidance in PowerPoint presentations to local offices, their websites, and in other materials concerning the challenged provisions. *E.g.*, SJ Opp. Exs. 3, 14; PI PX10; App. Ex. 16. Among other things, the Attorney General and Secretary of State frequently use terms such as "assistor," "witness," "mailer," and "possessor" interchangeably and different from their statutory meanings. Under the Texas Election Code, all of these categories of helpers have different statutory obligations, varying responsibilities, and different potential criminal penalties.

72. In 2006, Texas Democratic Party officials, worried about encouraging activities that could lead to investigation or prosecution, were forced to curtail their ordinary get-out-the-vote efforts, with some voter turnout programs starting later than planned or not at all. PI Tr. 88; 1.R.81-83¶¶13, 17. The Party sought clarification from State officials about the interpretation and enforcement of the challenged provisions, but the State did not respond, leaving such matters to local election administrators and individual citizens. SJ Opp. Ex. 18; Tr. 88; 1.R.82-83¶17.

Voters Are No Longer Voting or Receiving Their Needed and Preferred Assistance

73. Absent assistance from Plaintiffs and others like them who wish to assist mail-in voters, many elderly and disabled voters were not able to apply for, receive, and cast mail-in

ballots in the 2006 election, resulting in lost votes. PI Tr. 68,81; PI PX14 at 23-24, 31; PI PX15 at 25-26; 1.R.78-81¶¶8,13; SJ Opp. Ex. 9 at 15-20; SJ Opp. Ex. 22 at 14; SJ Opp. Ex. 21 at 21; SJ Opp. Ex. 6 at 18-25.

74. The voting histories for some of the Texarkana voters interviewed by the Office of the Attorney General in 2005 during the investigation of Willie Ray and Jamillah Johnson, show that they did not vote after 2004 (e.g., Lillie Briscoe, Opal Walker) and some voted only in the 2006 primary and no other election subsequent to 2004 (*e.g.*, Eugene Grant, Opal Hart, Bernice Junior, Mary Marshall and J.D. Webster). SJ Opp. Ex. 10.

75. Several voters have informed Plaintiff Jamillah Johnson that in light of the prosecutions of Plaintiff Willie Ray and her granddaughter (Ms. Johnson) for mailing the ballots of elderly and disabled voters, they would not vote again. SJ Opp. Ex. 9 at 15. One voter identified by Ms. Johnson was Louise French, who was interviewed by investigators from the office of the Texas Attorney General during the investigation of Plaintiffs Ray and Johnson. *Id*. at 15-20. Ms. Johnson testified that she believes Ms. French is now too scared to ask her for assistance in voting. *Id*. at 20.

76. Even for those mail-in voters who have been able to cast ballots, despite the State's enforcement of the challenged provisions, not all were able to rely on the assistance of the person of their choosing. PI Tr. 125-26; PI PX15 at 17-19. As noted above, see paragraphs 73-75, above, some voters in need of assistance with mail-in voting are no longer voting or receiving any assistance from their preferred assistor, as a result of the chilling effect caused by the restrictions in Section 84.004, and the State's investigation and prosecution of Plaintiffs and others like them. Indeed, Plaintiff Ray "recall[s] several instances where I was contacted by a voter and asked to serve as a witness for the mail-in ballot application, but I was unable to do so

because I had already witnessed one mail-in ballot application for that election cycle. In those cases, I told the voter that I was unable to serve as a witness. I then tried to find another person who could serve as a witness for the voter." App. Ex. 1 at ¶4. Similarly, Texas Democratic Party representative Ken Bailey has stated that the restriction in Section 84.004 to witnessing only one mail-in ballot application is not only harmful to voters, but also hurts those within the Democratic Party who like himself, "have assisted [mail-in ballot applicants] in the past and who wish to do so in the future." App. Ex. 2 at 2.

The State's Recent Changes to Balloting Materials

77. During the course of this litigation, the State has acknowledged the shortcomings of certain of its forms and instructions relating to the mail-in ballot process. For example, at oral argument before the Fifth Circuit on the State's appeal of this Court's preliminary injunction ruling, counsel for the State stated for the first time that the State intended to revise its procedures for those voting by mail. In a post-oral argument submission to the Court of Appeals, the State said that it was acting because "the Court [of Appeals] raised certain concerns regarding Texas's early-voting, mail-in ballot and carrier envelope[.]" The State advised the Court of Appeals that "the Secretary of State intended to modify the ballot envelope instructions and carrier envelope[.]" SJ Opp. Ex. 1. The Defendant Secretary of State has now received preclearance of these changes from the U.S. Department of Justice as required by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

78. None of the State's proposed changes to mail-in voting materials relates to Section 84.004's prohibition against witnessing more than one mail-in ballot application per election.

ARGUMENT

I. SECTION 84.004 OF THE TEXAS ELECTION CODE VIOLATES SECTION 208 OF THE VOTING RIGHTS ACT.

Plaintiffs are entitled to summary judgment with respect to Count IV of their Amended Complaint. Section 84.004 of the Texas Election Code limits individuals, under pain of substantial criminal penalty, to witnessing no more than one mail-in ballot application per election cycle (unless the witness is a family member). The restriction in Section 84.004 applies to witnessing a ballot for a voter – a type of assistance that is a prerequisite to voting for either an illiterate voter or a voter who, due to physical disability, cannot sign his or her name.

Section 208 of the Voting Rights Act provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance *by a person of the voter's choice*, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 42 U.S.C. § 1973aa-6 (emphasis added). Some voters who need a witness in order to execute a mail-in ballot application are unable to obtain such assistance due to the restrictions in Section 84.004. *See* App. Exs. 1, 2. Section 84.004 thus prevents voters who desire to vote by mail from obtaining assistance from "a person of the voter's choice," which violates Section 208 of the Voting Rights Act. Section 84.004 criminalizes completely legitimate assistance to mail-in voters and violates Section 208 by "burden[ing] individuals' right to provide assistance to voters" and by "burden[ing] and interfer[ing] with voters' receipt of assistance from persons of their choice." Amended Complaint ¶¶ 64-65.

The State appears to concede, as it must, that provisions of the Texas Election Code must yield if they conflict with federal law (*i.e.*, Section 208). *See* U.S. Const., Art. VI, ¶ 2.[3] Other courts addressing Section 208 have recognized the obvious point that state laws and practices that deprive individuals of their rights under Section 208 violate federal law and must give way. *See, e.g.*, *United States v. Berks County*, 250 F. Supp. 2d 525, 532-33, 538 (E.D. Pa. 2003) (enjoining, in part under Section 208, state practice of denying non-English speaking voters "the right to bring the assistor of choice into the voting booth"); *American Ass'n of People with Disabilities v. Hood*, 278 F. Supp. 2d 1345, 1356 (M.D. Fla. 2003).

The undisputed facts show that Section 84.004's outright limit on the number of people a person can help, subject to serious criminal penalties, directly contravenes the right of voters under Section 208 to receive necessary assistance, including assistance of their choice. As the sworn Declarations of Willie Ray and Ken Bailey demonstrate (App. Ex. 1, 2), Section 84.004 prevents Ms. Ray, Mr. Bailey, and other political activists from providing needed assistance to voters in the form of witnessing their mail-in ballot applications. Because Ms. Ray, Mr. Bailey, and others like them are unable to witness more than one voter's mail-in ballot application per election cycle, voters are unable to receive needed assistance, request mail-in ballot applications, and exercise their right to vote. *Id.* Section 84.004 thus violates Section 208 by burdening individuals' right to provide assistance to voters and by interfering with voters' receipt of assistance from persons of their choice.

It is not true, as the State has claimed in this litigation, that "[t]he voter may choose any person to assist with the ballot – consistent with § 208 of the Voting Rights Act – as long as the

[3] The Court previously ruled at the preliminary injunction stage that the State of Texas was dismissed on sovereign immunity grounds with respect to Plaintiffs' constitutional claims. *See* PI Findings of Fact and Conclusions of Law at 8 ¶ 1. However, the State of Texas remains a party to this suit because of Plaintiffs' statutory claim, for which Congress has abrogated state's sovereign immunity. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 519 n.4 (2004).

assistant provides the required disclosures." State SJ Mot. at 48-49. Rather, as Plaintiffs have established, Section 84.004 limits outright the number of people a person can assist to one. As Ms. Ray's Declaration makes clear, there have been "several" instances where a voter contacted her to serve as a witness for his or her mail-in ballot application, but she was unable to do so because of the restriction in Section 84.004. Moreover, this restriction on the number of persons who may receive the assistance of a witness, when combined with the State's questionable enforcement history of the provisions challenged in this lawsuit, has created a chilling effect whereby voters are unable or in some cases, unwilling due to fear, to access the assistor of their choice. The chilling effect on the rights of voters and those who wish to assist them by witnessing their signatures on mail-in ballot applications is exacerbated by Section 84.004's provision that criminalizes merely witnessing – with full disclosure of identifying information – a non-family member's mail-in ballot application. Because Section 84.004 deprives voters of "assistance by a person of the voter's choice," 42 U.S.C § 1973aa-6, Plaintiffs are entitled to summary judgment with respect to Section 84.004 on Count IV of the Amended Complaint.

II. SECTION 84.004 BURDENS THE FUNDAMENTAL RIGHT TO VOTE.

Section 84.004 of the Texas Election Code also burdens the fundamental right to vote, in violation of the First and Fourteenth Amendments to the United States Constitution. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 553 U.S. ___, 2008 U.S. LEXIS 3846 (2008); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under the *Burdick-Anderson* framework, which was reaffirmed in *Crawford*, *see* 2008 U.S. LEXIS 3856, at *12-16 & n.8, "[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden

imposed by its rule." *Texas Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) (citing *Burdick*, 504 U.S. at 434, and *Anderson*, 460 U.S. at 789).

It is established that this balancing analysis "will not be automatic" because "there is 'no substitute for the hard judgments that must be made.'" *Anderson*, 460 U.S. at 789-90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 n.10 (1974)); *see, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) ("No bright line separates permissible election-related regulation from unconstitutional infringements."). Thus, "[o]nly after weighing all of these factors is a reviewing court in a position to decide whether the challenged provision is unconstitutional." *Pilcher v. Rains*, 853 F.2d 334, 336 (5th Cir. 1988) (quoting *Anderson*).

As the Supreme Court recently reiterated in *Crawford*, no "litmus test" "neatly separate[s] valid from invalid restrictions." 2008 U.S. LEXIS 3856, at *14-16. Rather, "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* at *14. "However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficient to justify the limitation.'" *Id.* at *16 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Because Section 84.004 applies only to elections, which, by their nature, involve important First and Fourteenth Amendment rights, it is appropriate to assess under the *Burdick-Anderson* framework the asserted injury to Plaintiffs and to examine the precise interest put forth by the State as justification for the burden on Plaintiffs' rights.

Contrary to the State's claims, the fact that Section 84.004 concerns mail-in balloting does not mean that it does not implicate the fundamental right to vote or the *Burdick-Anderson* analysis. Indeed, the Secretary of State has recognized in his official proclamations that casting a ballot by mail in Texas is synonymous with "exercis[ing] your right to vote." PI PX8.

Furthermore, *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), does not support the State's claim that restrictions on mail-in or absentee balloting do not implicate fundamental constitutional rights. In *McDonald*, the Supreme Court held that strict scrutiny did not apply to prisoners' claimed right to vote by absentee ballot where there was no evidence that prisoners could not otherwise exercise the franchise. *See* 394 U.S. at 808.[4] In a series of subsequent cases interpreting *McDonald*, the Supreme Court struck down unreasonable absentee ballot restrictions, despite *McDonald's* holding that strict scrutiny did not apply in that case. For example, in *O'Brien v. Skinner*, 414 U.S. 524 (1974), the Supreme Court explained that *McDonald* merely "rested on a failure of proof," and thus struck down a New York law restricting the use of absentee ballots by prisoners as "unconstitutionally onerous," where the prohibition "denied any alternative means of casting their vote although they are legally qualified to vote." *Id.* at 530. Similarly, in *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court rejected the lower court's use of *McDonald* to sanction absentee ballot restrictions on minority parties, holding that "it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause." *Id.* at 795.

Thus, *McDonald* does not permit the State to impose whatever restrictions it desires on absentee balloting or hold that absentee balloting does not implicate First and Fourteenth Amendment rights. Rather, where, as with respect to Section 84.004, voters are significantly

[4] In its reply brief on summary judgment, the State has mischaracterized Plaintiffs' fundamental right to vote claims in stating that Plaintiffs' "theory" is that "any restrictions on mail-in voting . . . are unconstitutional disenfranchisement because they may deprive voters of the vote." State's Reply Brief at 12. Of course, that is not Plaintiffs' position. Plaintiffs' claim is that Section 84.004 is unconstitutional under the *Burdick-Anderson* framework, which requires weighing all the facts and circumstances at issue in this case. It is the State's "bright line" – that *McDonald* forecloses all constitutional challenges to mail-in balloting restrictions, *id*. at 12 – that is inconsistent with the framework reaffirmed in *Crawford* and that must be rejected.

restricted in their right under State law to receive and cast an absentee ballot, courts must ensure that such restrictions are not arbitrary, unjustified, or unduly onerous.[5]

Unlike cases, such as *Washington Grange* or *Crawford*, where a legal challenge is brought before the law has been enforced by the state, the challenged provisions in this case – including Section 84.004 – have been in effect and enforced for several years. Thus, Plaintiffs have been able to develop evidence showing the burdens created by the State's enforcement efforts. Moreover, unlike *Washington Grange* or *Crawford*, this case involves threatened *criminal penalties* on voters and their helpers. As noted above, if a person violates Section 84.004 by witnessing more than one mail-in ballot application in a given election cycle – regardless whether the helper provides complete identifying information – that person has committed a Class B misdemeanor, with a potential criminal penalty of six months in jail and up to a $2000 fine. This severe criminal penalty is obviously on the extremely severe end of penalties at issue in fundamental right to vote cases. The State's burden to justify such an extreme sanction is correspondingly higher.

[5] The State in this litigation has erroneously claimed that "[t]o succeed on their facial challenge, Plaintiffs must '"establish that no set of circumstances exists under which the [statute] would be valid."'" State's SJ Motion at 32-33 (quoting *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (in turn, quoting *United States v. Salerno*, 481 U.S. 739 (1987))). However, as the Supreme Court acknowledged in *Washington Grange*, the *Salerno* standard has not been held to be controlling in fundamental right to vote cases and thus does not bar invalidation of a statute that has less than a "plainly legitimate sweep" with respect to the fundamental right to vote. *See Washington Grange*, 128 S. Ct. at 1190; *Crawford*, 2008 U.S. LEXIS 3856, at *35 (holding that a facial fundamental right to vote challenge "must fail where the statute has a 'plainly legitimate sweep'"(internal quotes omitted)).

In addition, critical to the Court's assessment of the facial fundamental right to vote challenges in *Crawford* and *Washington Grange* was the pre-enforcement nature of the challenges at issue, and the corresponding evidentiary deficiency that prevented the assessment of the provisions' constitutionality. For example, in *Washington Grange*, the Court followed a path of "judicial restraint" because "[t]he State has had no opportunity to implement" the challenged blanket primary provisions. 128 S. Ct. at 1190-91. Likewise, in *Crawford*, the Court could not facially invalidate the voter ID law at issue "on the basis of the record that ha[d] been made in th[at] litigation," 2008 U.S. LEXIS 3856, at *33, because the record did "not provide any concrete evidence of the burden imposed on voters who currently lack photo identification" and thus made it impossible for the Court to "quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed upon them that is fully justified." *Id*.

Evaluating the undisputed evidence under these controlling standards, it is clear that the burdens created by Section 84.004 and its enforcement do not justify the provision. *See Crawford*, 2008 U.S. LEXIS 3856, at *14 (stating that it is the Court's role, after hearing all relevant evidence at trial, to "make the 'hard judgment' that our adversary system demands").

Since the inception of this lawsuit, the State has recognized that there are constitutional problems with many of the provisions that had been challenged in this suit. First, in 2007, the Texas legislature amended Section 86.006(f) of the Texas Election Code so as to transform what had been narrow affirmative defenses to prosecution into exemptions. Second, the State has recently proposed revising its carrier envelope, mail-in ballot envelope, and related instructions, as described above, to address the novelty and breadth of Sections 86.0051 and 86.006. *See* SJ Opp. Ex. 3.[6]

Despite making these other changes, the State has taken no steps to remedy the severe restrictions in Section 84.004. Indeed, it is difficult to imagine what the State could do to alleviate the burden created by that provision, as it clearly bars individuals – under pain of criminal penalty – from assisting more than one mail-in ballot applicant per election.

While the State has an obvious interest in preventing voter fraud,[7] there is no evidence that the one-application restriction on witnesses in Section 84.004 was supported by any evidence of a link between the activities targeted and actual voter fraud. Indeed, it is strange and

[6] While the State has claimed in this lawsuit that the proposed changes were not legally required, its submission to the United States Department of Justice ("DOJ") repeatedly makes clear that the proposed changes were "necessitated" by Plaintiffs' claims in this litigation. App. Ex. 17..

[7] Contrary to what the State has previously argued in this case, Plaintiffs do not make the broad claim that "the State's interest in curtailing voter fraud does not justify imposing criminal liability for conduct that does not involve actual voting fraud or intimidation." State's Reply Brief on Summary Judgment at 4. Rather, Plaintiffs here argue that based on the specific context of this case – the lack of evidence that Section 84.004 has forwarded the state's asserted interest in preventing voter fraud; the uniquely broad and severe nature of Section 84.004; the preexisting provisions of Texas law addressing voter fraud; and the significant chilling effect created by the enforcement of the 2003 amendments – Section 84.004 unduly infringes on protected constitutional rights. *See* Plaintiffs' Opp. Memorandum To Summary Judgment at 27-33. The fact that Section 84.004 criminalizes legitimate conduct, without requiring a showing of fraud (or any intent), is of course relevant under the *Burdick-Anderson* analysis.

proof of arbitrariness that the State would restrict to one the number of signatures that may be witnessed on a mail-in ballot application, but would not attempt to impose any restrictions on the number of mail-in ballots that may be witnessed, or attempt to limit the number of times a person may serve as a witness for a voter at the polls when the voter appears in person. One would expect that the opportunities for voter fraud, if they exist at all, are more likely to occur at the ballot casting stage than the ballot application stage.

Moreover, the State has offered no evidence that the challenged provisions have been necessary or even useful in investigating or prosecuting actual voting fraud. The State's total lack of evidence to support its asserted interest in preventing voter fraud weighs against the constitutionality of the challenged provisions. *Cf., e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality op.) (explaining that where regulations threaten to impair constitutionally protected rights, the State "must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way" (citation omitted)).

Furthermore, as the undisputed facts show, the existence and enforcement of the provisions challenged in this lawsuit – including Section 84.004 – have had a substantial chilling effect on both mail-in voters and those who wish to assist them. Some individuals have stopped voting or helping altogether. SJ Opp. Ex. 7 at 4 and 10; SJ Opp. Ex. 6 at 23, 39. Others have sharply curtailed their activities due to the provisions' burdens, vagueness and enforcement. SJ. Opp. Ex. 6 at 22-23, 38-39; SJ Opp. Ex. 22 at 15-19; SJ Opp. Ex. 6 at 4; SJ Opp. Ex. 21 at 18. Specifically, Section 84.004's restrictions have prevented individuals from helping persons apply

for mail-in ballots and have deprived voters of the witnesses of their choosing. *See* App. Ex. 1 at ¶s 4-6 and App. Ex. 2 at ¶s 7-10.

The State has conceded that liability under Section 84.004 need not be linked to any actual showing of attempted fraud, coercion or other wrongful conduct. State SJ Mot. at 37. There is also no exception to liability under Section 84.004 for providing all identifying information or acting with the consent and approval of the voter. Although those facts are not themselves dispositive, they indicate a disjunction between the challenged provisions and the primary interest asserted by the State – combating fraud.

It is also relevant to the *Burdick-Anderson* analysis that the great majority, if not all, of the State's recent prosecutions under the mail-in balloting provisions of the Election Code have involved no corresponding allegations or proof of actual voter fraud. Indeed, the May 28, 2008 Settlement Agreement reached in this case includes a revision to the Attorney General's prosecution guidelines that makes clear that cases such as those brought against Plaintiffs Ray and Johnson, and investigations such as those conducted of Plaintiffs Meeks and Minneweather, (all of which involved mere ballot possession), should no longer occur because they did not involve fraud of any kind whatsoever:

> A single complaint of alleged illegal ballot possession…would receive less consideration for investigation and, if warranted, prosecution than a case involving multiple instances of an effort to manipulate or override the free will and exercise of the ballot by voters or a case in which the person acted with intent to defraud the voter or the election authority.

May 28, 2008 Tr. at 6. The State's enforcement history further undercuts the State's claim that the burdens created by Section 84.004 are justified by an interest in combating voter fraud.

Moreover, the individuals who have been investigated and prosecuted under the Election Code's mail-in balloting restrictions have been predominately minorities and Democrats. This is

so, despite the fact that the common activities criminalized by many of the challenged provisions (such as merely possessing another's mail-in ballot or envelope) are not unique to minorities or Democrats. The danger of unfair and arbitrary prosecution is particularly acute, where, as here, Section 84.004 criminalizes legitimate, non-fraudulent activity. The States' racially (and politically) differential enforcement of criminal prohibitions related to mail-in balloting provides evidence that Section 84.004 violates Plaintiffs' fundamental right to vote in multiple respects:

- The selective enforcement has been, in part, responsible for the clear chilling effect on mail-in voting and protected expression and association; and this factor is directly relevant to the *Burdick-Anderson* analysis. *E.g.*, Plaintiffs' Opp. To Summary Judgment at 14-19, 21-22.

- The selective enforcement has occurred largely in cases with no evidence or allegation of actual fraud or coercion, indicating that the challenged provisions do not forward the State's asserted interest in preventing voter fraud; this factor too is relevant to *Burdick-Anderson* and Plaintiffs' other constitutional claims. *E.g.*, *id*. at 15, 29.

The State's interest in combating voter fraud is sufficiently served by provisions of the Texas Election Code and Penal Code other than Section 84.004, which prohibit voters from exercising undue influence on mail-in voters and engaging in mail-in ballot fraud. *See, e.g.*, Texas Election Code §§ 64.012 ("illegal voting"), 64.036(1)-(3) ("unlawful assistance"), 84.0041 (false information on mail-in ballot application). Those provisions have been and can be used to combat wrongdoing related to mail-in ballot applications. *See* SJ Opp. Ex. 8.

As the Southern District of Texas explained in striking down a provision of the Texas Election Code that banned the voter's possession of written communications while marking a ballot (despite the Court's determination that the provision did not "severely" burden voters' rights), although preventing fraud is a legitimate state interest in the abstract, the challenged law was not necessary to achieve that interest, particularly because the state's myriad anti-electioneering statutes already protected the integrity of the polling place by prohibiting voters

from sharing, exchanging or displaying campaign materials at the polling place. *Cotham v. Garza*, 905 F. Supp. 389, 398, 400-01 (S.D. Tex. 1995).

In sum, Section 84.004 of the Texas Election Code imposes an undue burden as to all mail-in voters and helpers. When weighed against the State's asserted interests, Section 84.004 lacks "a plainly legitimate sweep." *Washington Grange, supra*. Accordingly, Plaintiffs are entitled to summary judgment on Count I of the Amended Complaint.

III. SECTION 84.004 VIOLATES THE FIRST AMENDMENT.

Section 84.004 of the Texas Election Code is facially unconstitutional because it prohibits speech and expression fully protected by the First Amendment of the United States Constitution, including the right of political parties and their members to organize and engage in legitimate election-related political activity.

Section 84.004 violates the First Amendment because it impermissibly restricts core political speech and association and because it does so in an overbroad manner. *See, e.g.*, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 198 & n.12 (1999) (subjecting election-related restrictions on core political speech to strict scrutiny); *Houston v. Hill*, 482 U.S. 451, 458-59 (1973) (setting forth the "substantial overbreadth" standard for evaluating First Amendment overbreadth claims).

As the Fifth Circuit has recognized, "[w]ith regard to facial First Amendment challenges, the challenger need only show that a statute or regulation 'might operate unconstitutionally under some conceivable set of circumstances.'" *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

In this litigation, the State erroneously claims that Plaintiffs' First Amendment claim must be adjudicated under the *Burdick-Anderson* standard for facial fundamental right to vote

challenges at issue in *Crawford* and *Washington Grange.* However, unlike the laws at issue in *Crawford* and *Washington Grange*, Section 84.004 burdens both the fundamental right to vote *and* the First Amendment associational and expressive rights of willing helpers (and voters), such as several of the Plaintiffs in this case. Among other things, Section 84.004 threatens to impose *criminal penalties* on those who help voters through their associational and expressive activity. This case is thus unlike *Crawford* and *Washington Grange*, neither of which pertained to the constitutionally protected activities of those who seek to help voters. What is at issue in Plaintiffs' First Amendment claim here are the constitutional rights of Plaintiffs and others like them to associate and express themselves politically.

The Supreme Court has made clear that "[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas," and "[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Plaintiffs here include the Texas Democratic Party and Democratic activists who seek to engage in "functions ordinarily performed by political parties," Reply at 13, such as getting out the vote, associating with like-minded fellow voters and citizens, and assisting party members – such as Plaintiffs Meeks and Robinson – in need of assistance in voting, including mail-in balloting. Texas Democratic Party representative Bailey has underscored that its mail-in ballot program and the assistance that the Party provides to mail-in voters is "vitally important" to the Party. App. Ex. 2 at ¶3. These are the very sort of core expressive and associational activities protected by the First Amendment, which is why the Court must closely scrutinize the challenged provisions.

But even if the less stringent standard for facial challenges articulated in *Crawford* and *Washington Grange* were applicable here, that framework does not require a challenger to show that every application is unconstitutional. Rather, Plaintiffs must show under those cases that the challenged provisions do not have a "plainly legitimate sweep." As explained above, Section 84.004 does not have a plainly legitimate sweep, as it criminalizes a significant amount of legitimate, non-fraudulent and needed assistance to citizens who vote by mail-in ballot.

In addition to claiming that Section 84.004 is facially invalid under the First Amendment, Plaintiffs also allege that Section 84.004 is unconstitutionally overbroad. As *Washington Grange* made clear, an overbreadth challenge is "a second type of facial challenge in the First Amendment context" and is not controlled by the facial challenge standards articulated in *Washington Grange*. 128 S. Ct. at 1191 n.6. The question with respect to the overbreadth aspect of Plaintiffs' First Amendment claim is whether Section 84.004 is "impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, '"judged in relation to the statute's plainly legitimate sweep."'" *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 769-771 (1982) and *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *see, e.g.*, *Broadrick*, 413 U.S. at 601 (the overbreadth must be "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"). Plaintiffs' overbreadth claim requires the Court to determine whether Section 84.004 is "so broadly written that [it] cannot help but have a deterrent effect on the exercise of First Amendment rights," *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 561 (5th Cir. 1988), such that it "makes unlawful a substantial amount of constitutionally protected conduct," *Houston*, 482 U.S. at 459, 466-67.

As explained above, any asserted state interest in combating voter fraud is not served by Section 84.004 so as to justify the burdens that provision creates. In particular, Section 84.004

restricts protected expression and association and, in conjunction with the other mail-in balloting restrictions of the Election Code, has had a substantial chilling effect on political expression and association. *See, e.g.*, App. Exs. 1, 2. The testimony previously found by the Court to be credible evidences that the State's enforcement of criminal prohibitions related to mail-in balloting has had a broad chilling effect on Plaintiffs, Democratic Party activists and voters. That broad chilling effect on legitimate political activity extends to those persons, like Plaintiffs here, who wish to assist voters by witnessing their mail-in ballot applications. Accordingly, Section 84.004's restrictions do not survive scrutiny under the First Amendment.

Moreover, Plaintiffs have established many "instances of arguable overbreadth" of the challenged provisions, *Washington Grange*, 128 S. Ct. at 1191 n.6. – such as their applicability to those who innocently witness an application for more than one of their neighbors or friends, do so with full consent of the voter applicants, and possess no fraudulent or otherwise illegal intent. Indeed, Plaintiffs Ray and Johnson were investigated and prosecuted for technical violations of the mail-in balloting provisions of the Election Code, despite the fact that there was no evidence, allegation, or proof that they illegally influenced, coerced or acted against the will of any voter. Because the overbreadth of the challenged provisions is "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *Broadrick*, 413 U.S. at 615, Plaintiffs are entitled to summary judgment on Count II of the Amended Complaint.

CONCLUSION

WHEREFORE, Plaintiffs respectfully pray that this Court grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiffs' Motion for Summary Judgment was filed electronically in compliance with Local Rule CV-5(a). As such, this Motion was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this 12th day of June, 2008.

/s/ Otis Carroll
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