IN THE UNITED STATES DISTRICT COURT
FOR THE 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 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' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Reuben Robinson, Eddie Jackson, and the Texas Democratic Party, by and through undersigned counsel, respectfully submit this opposition to Defendants' ("the State's") summary judgment motion ("State MSJ").

As set forth in Plaintiffs' motion for summary judgment ("Pl. MSJ") and in Plaintiffs' previously-filed opposition to the State's initial summary judgment motion ("Pl. May 2008 Opp. MSJ"), Section 84.004 of the Texas Election Code violates the Voting Rights Act and is unconstitutional. That provision subjects individuals to substantial criminal penalties for witnessing more than one mail-in ballot application per election cycle, regardless of the voter's

consent, regardless whether there is any evidence of fraud, coercion, or any other wrongful conduct, and regardless whether the witnesses provide all requested identifying information on the mail-in ballot application. As set forth below and in Plaintiffs' summary judgment motion, Section 84.004 is not justified by the interests set forth by the State, and it unduly burdens both voters and willing assistors, including Plaintiffs. Accordingly, summary judgment should be denied to the State and granted to Plaintiffs.

Although Plaintiffs have resolved their claims against other provisions of the Texas Election Code by settlement with the State, it is relevant to the Court's consideration of Plaintiffs' challenges to Section 84.004 that since the enactment of a wide variety of mail-in ballot regulations and criminal prohibitions in 2003—which, together with Section 84.004, constitute the "challenged provisions" in this lawsuit—the State has used these provisions to investigate and prosecute minorities and Democrats for assisting voters with mail-in balloting, absent any evidence of fraud or coercion. The challenged provisions and their enforcement have created a demonstrated chilling effect on mail-in voting, assistance to mail-in voters, and political association. Nearly if not all individuals who have been prosecuted under the challenged provisions—most for the mere consensual possession of another's mail-in ballot—have been Democrats and minorities, including longstanding Democratic political activists and public servants such as Plaintiff Ray. Section 84.004, as one of the many overly burdensome and restrictive mail-in balloting laws in the Texas Election Code, must therefore be scrutinized closely, as the State's enforcement history has made plain that provisions like Section 84.004 can and will been used to unduly restrict mail-in voters' ability to obtain and cast their ballots, and to squelch political association and voter assistance protected by both the Voting Rights Act and the Constitution.

COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS

Plaintiffs dispute two of the State's alleged undisputed material facts, *see* State MSJ at 6, as incorrect or misleading or both.

Plaintiffs dispute proposed fact three because there is evidence of voters who have not been able to vote due to the enactment or enforcement of Section 84.004. As shown by sworn Declarations of Plaintiff Willie Ray and Texas Democratic Party representative Ken Bailey, there are voters who need to have their mail-in ballot applications witnessed, but the restriction set out in Section 84.004 have prevented activists like Ms. Ray and Mr. Bailey from being able to assist such voters. *See* Pl. MSJ Exs.1 and 2.

Plaintiffs dispute proposed fact four because there is evidence that political activists have discontinued assisting voters with mail-in ballot applications due to a variety of mail-in balloting provisions, including Section 84.004. *See* Pl. May 2008 Opp. MSJ Ex. 7 (Rebecca Minneweather Deposition); Pl. May 2008 Opp. MSJ Ex. 6 (Jane Hamilton Deposition). Moreover, this proposed fact is misleading, because some activists have discontinued some but not all of their activities and/or have scaled back their activities without completely discontinuing them, and Plaintiffs' evidence makes clear that activists would witness more voters' mail-in ballot applications but for the criminal penalties set forth in Section 84.004. *See* Pl. MSJ Exs.1 and 2. This chilling effect has been due both to outright restriction on the number of voter applications that may be witnessed and to fear of arbitrary and discriminatory enforcement by the State. *Id.*; *see also* Pl. May 2008 Opp. MSJ Ex. 7 (Rebecca Minneweather Deposition); Pl. May 2008 Opp. MSJ Ex. 6 (Jane Hamilton Deposition).

COUNTERSTATEMENT OF ISSUES TO BE DECIDED

The issues to be decided 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.

ARGUMENT

I. THE STATE IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM UNDER SECTION 208 OF THE VOTING RIGHTS ACT.

The State devotes only a page and half at the end of its motion to Plaintiffs' central claim: that Section 84.004 of the Texas Election Code violates Section 208 of the Voting Rights Act. Section 208 provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 42 U.S.C. § 1973aa-6. The statute refers to "[a]ny voter who requires assistance," *id.* (emphasis added), and nowhere contains any limitation that it only applies to in-person voting or excludes absentee or mail-in voting. Moreover, the term "vote" as defined in the Voting Rights Act clearly encompasses all aspects of the voting process, from voter registration activities to the actual casting of ballots, without any limitations that encompass only in person voting at the polling place:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for

public or party office and propositions for which votes are received in an election. 42 U.S.C. § 1973l(c)(1). As can be seen, this definition is extremely broad and includes numerous other actions that take place outside the voting booth, such as "registration" and "other action required by law prerequisite to voting[.]" *Id.*

The State, without citing a single case, argues that the protections of Section 208 of the Voting Rights Act apply only with regard to assistance at the ballot box and not to voters who receive assistance when voting by mail. This is wrong. If Congress wanted to exclude any step of the voting process from the catch all "assistance in voting"—and thus enable States to hamstring disabled registrants and absentee voters efforts to fully exercise their voting rights—it would have included such an exclusion in the language of Section 208. *See* S. Rep. No. 97-417 at 62. But Congress did no such thing. The plain language of Section 208 contains no such limitation. It guarantees assistance to a voter who needs it by anyone of the voter's choice and has no limiting language regarding the location of the assistance provided.[1]

The Supreme Court's decision in *Bossier Parish v. Reno*, 520 U.S. 471 (1997), rejected an argument similar to the one advanced here by Defendants. In *Bossier Parish*, the U.S. Attorney General argued that the Justice Department could object under Section 5 of the Voting Rights Act to a voting change that violated Section 2 of the Act. The Attorney General relied heavily on language in a 1982 Senate report extending the Voting Rights Act (the same Senate report cited by Defendants here) for this proposition, which expressly authorized the Attorney General to interpose an objection on this basis. The Supreme Court disagreed with the Attorney General, however, relying on the plain language of the Voting Rights Act. The Court said:

[W]e believe Congress has made it sufficiently clear that a violation of § 2 is not

[1] Even if the legislative history were inconsistent with the statute itself, that legislative history would be irrelevant because the statute is unambiguous. *See Davis v. Michigan Dept. Of Treasury*, 489 U.S. 803, 808 n.3 (1989); *see also Public Employees' Retirement System v. Betts*, 492 U.S. 148, 152 (1989).

> grounds in and of itself for denying preclearance under § 5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments, S.Rep. No. 97-417, *supra*, at 12, n. 31, U.S. Code Cong. & Admin. News 1982 pp. 177, 189, does not change our view. With those amendments, Congress, among other things, renewed § 5 but did so without changing its applicable standard. We doubt that Congress would depart from the settled interpretation of § 5 and impose a demonstrably greater burden on the jurisdictions covered by § 5, see *supra*, at 1498, by dropping a footnote in a Senate Report instead of amending the statute itself.

Bossier Parish v. Reno, 520 U.S. at 483-484 (citations omitted).

Defendants cite language from the Senate Report that contains phrases that discuss protections for voters receiving assistance "within the voting booth." State MSJ at 20. According to Defendants, such references prove that Congress viewed assistance to absentee voters and mail-in registrants as beyond Section 208's protections because such voting is a "fertile field for potential fraud and abuse than the regular polling place." *Id*. Contrary to Defendants' theory, it should come as no surprise to this Court that Congress designed Section 208 to guarantee that disabled voters have the assistance of "a person whom the voter trusts" with respect to every step in the voting process. S. Rep. No 97-417 at 62.[2]

Furthermore, it is also not very surprising that the Defendant's underlining of language from the Senate Report, ostensibly for the Court's convenience, stops just before the phrase "a person whom the voter trusts." State MSJ Ex. 22 at 38. A plain reading of the legislative history evidences Congress' prioritization of protecting disabled and illiterate voters with access to a trusted assistant. *See* S. Rep. No. 97-417, 62-64. Defendants' own references to Congress' intention in Section 208 to help disabled voters select "a person of their own choice" to assist them drastically conflict with Defendants' bizarre only-in-the-voting-booth limitation. *Id.*

[2] The Court held early on that Voting Rights Act provisions analogous to Section 208 were designed by Congress to make the right to vote "fully 'meaningful,'" *id.,* and should be given "broad interpretation" in recognition "that voting includes 'all action necessary to make a vote effective.'" *Allen v. State Bd. of Elections.* 393 U.S. 544, 565-566 (1969).

Defendants are forced to draw inferences from the legislative history because the plain language of the statute does not support their position.

The State belittles disabled or illiterate voters who need their applications witnessed with the following statement: "[j]ust as the voter who chooses his or her favorite rock star is not guaranteed that particular person's assistance at the polls or anywhere else, similarly, a mail-in voter is not guaranteed a particular person who is otherwise unable to assist him because he or she has already witnessed an application for someone else." State MSJ at 20. Of course, the whole idea behind Section 208 is that voters are entitled to a person of their choice so that they can vote and use someone they trust. The person assisting, unlike a rock star, is most likely known to the voter, is trusted by the voter, has an interest in the voter filling out the ballot and casting a ballot, and has a genuine desire to help the voter. Obviously, Plaintiffs can not speak for the hypothetical rock stars who wish to witness a ballot, but they can and do speak for themselves. As Willie Ray and Ken Bailey's sworn statements make clear, Pl. MSJ Exs. 1 and 2, they have a genuine desire to serve as a witness for multiple voters who genuinely need their assistance and Section 84.004 prevents them from providing such assistance. Section 208 protects their right to do so.

Section 84.004 restricts a voter's ability to receive assistance in the form of a witness by limiting to one the number of voters whose mail-in ballot applications may be witnessed, subject to substantial criminal penalties. In so doing, the challenged Texas law "burdens individuals' right to provide assistance to voters" and "burdens and interferes with voters' receipt of assistance from persons of their choice." Amended Complaint ¶¶ 64-65.

A. Section 84.004 Does Not Advance the State's Interest In Preventing Voter Fraud

The State claims that the one-witness restriction in Section 84.004 was enacted to prevent voter fraud.[3] The State argues:

> By limiting the signing of a ballot application for another to no more than one per election, the statute reduces the potential for a single person to submit multiple forged ballot applications. It prevents the forger from witnessing many applications without the voters' consent or knowledge and then collecting the official ballots and carrier envelopes from mailboxes of voters (or from nursing home residents) who are not aware a ballot has been sent to them. The statute thus serves as a protection of the ballot and is directed squarely at voter fraud.

State MSJ at 11. However, the one-witness restriction for mail-in ballot applications does no such thing.

First, any person who desires to commit election fraud by submitting multiple forged mail-in ballot applications can continue to do so regardless of Section 84.004. The one-witness restriction in Section 84.004 does not deter such fraud in any way. A person who fills out a mail-in ballot application for another and signs the voter's name to it without their knowledge can continue to do so regardless of the one witness limit. And, of course, a person committing such voter fraud is more likely to do so without the voter ever knowing about it than by committing fraud and signing their own name as a witness on the application. So the one witness rule does not address this type of alleged fraud at all.

Second, the one-witness limit in Section 84.004 also does not "prevent[] the forger from witnessing many applications without the voters' consent or knowledge and then collecting the official ballots and carrier envelopes from mailboxes of voters (or from nursing home residents) who are not aware a ballot has been sent to them." A person who forges another's signature on a

[3] The state's motion for summary judgment states that "[w]hen the state statutes impose 'severe' restrictions [on the right to vote], they must be narrowly drawn to advance a compelling state interest." State MSJ at 7. We agree. Except for an outright ban on witnessing applications, it is hard to imagine a more severe restriction on the right to vote than a one voter limit that is accompanied by criminal penalties for a violation.

mail-in ballot application and then intercepts their ballot in the mail box or at a nursing home is not deterred by the one witness rule at all. The one witness restriction simply does not affect this type of conduct.

Moreover, the voter fraud hypothesized by the State is already adequately addressed by a number of provisions of Texas law already on the books. Thus, the State's interest in preventing fraud by alleged application forgers and ballot stealers is more than adequately protected. The Attorney General's own Policy Statement and Guidelines, *see* Ex. 1, list the following offenses, all of which could apply to the voter fraud conduct asserted by the state in its motion for summary judgment:

> Tex. Elec. Code Ann. § 64.012. **Illegal Voting.** It is a third degree felony to vote in an election where the person ... knowingly impersonates another and votes as the impersonated person.
>
> Tex. Elec. Code Ann. § 86.006. **Method of Returning Marked Ballot.** It is a Class B misdemeanor for a person to knowingly possesses (sic) at least one but fewer than 10 official ballots or carrier envelopes unless possessed without the consent of the voter, in which case it is a state jail felony.
>
> Tex. Elec. Code Ann. § 84.0041. **Providing False Information on Early Voting by Mail Application.** It is a state jail felony for a person, other than the applicant or his relative (in which case it is a Class A misdemeanor), to knowingly provide false information on an application.
>
> Tex. Penal Code Ann. §31.03. **Theft.** It is a state jail felony to steal official ballots or official carrier envelopes for an election.
>
> Tex. Penal Code Ann. §37.10. **Tampering With Governmental Record.** It is a state jail felony to knowingly make a false entry in an official ballot or other election record or to make present or use such a record with knowledge of its falsity.

The State seeks to minimize the burden created by Section 84.004 by claiming that even if a person has already witnessed one mail-in ballot application, they can still "assist" as many mail-in voting applicants as they wish. *See* State MSJ at 4. Of course, witnessing and assisting

are two critically different tasks. *See* Texas Election Code §§ 64.0321 (assistance) and 1.011 and 84.003 (witnessing). Thus, it is cold comfort to a voter who wishes for an individual to serve as a witness that the individual can serve as an assistor. *See* Pl. MSJ Exs. 1 and 2 (Declarations of Willie Ray and Ken Bailey).

The State also proposes the unduly burdensome alternative that a would-be witness barred by Section 84.004 serve as an assistor and recruit another individual to serve as the witness. *See* State MSJ at 12. According to the State, for a "'political activist' who has already witnessed one application, and wishes to assist more than one voter with his or her ballot application, Section 84.004 simply requires that, in the event that a subsequent voter cannot sign due to physical disability or illiteracy, an additional person be brought in to witness and sign. *Id.* Such a suggestion is both unworkable and impractical.

First, given the limited number of party activists who are able to assist voters with mail-in ballots (and this number has decreased because of the State's unfair and discriminatory enforcement of mail-in ballot laws), finding a second volunteer to come to the voter's aid and witness that voter's ballot is impractical. The State's proposal that for some voters to receive assistance, they will have to find two persons (one assistor and one witness) to assist them, imposes a substantial and unnecessary burden on voters and those who assist them. As the sworn testimony of Plaintiff Willie Ray makes clear:

> If you are unable to serve as a witness for a voter's mail-in ballot application because you have already witnessed one such application, it can be difficult to get another person to go to that voter's home and have them serve as a witness because the voter doesn't have the same amount of trust of the new person, who may be someone they don't know.

See Pl. MSJ Ex. 1, ¶6.

Moreover, the State makes no attempt to explain how the restriction of one witness per mail-in ballot application serves any interest in preventing alleged voter fraud when the State has placed no restrictions on the numbers of individuals whom a person may help in other critical portions of the mail-in balloting process: for example, how many voters an assistor may assist (as contrasted with witnessing) in completing their mail-in ballot applications, *see* Texas Election Code § 84.003(b); how many voters' mail-in ballots (as contrasted with applications) a person may witness, *see id.* at § 64.033(b); how many voters may be assisted at the polls with their ballots, *see id.* at § 64.032(c); or how many voters' ballots an individual may mail. *See id*. at § 86.006(f). It is difficult to conceive how the State could be justified in limiting the number of voters whom an individual may help by witnessing their mail-in ballot applications, while imposing no limits whatsoever on how many voters' ballots an individual may witness (either by mail or at the polls). This anomaly undermines significantly the state's claim that the one-witness restriction is needed to combat voter fraud. After all, the application process (which is restricted) is one step removed from the actual casting of a ballot (where there are no numerical restrictions).

Moreover, no conceivable state interest can be served in restricting to one the number of persons whose applications may be witnessed, in light of the State's own claim that merely requiring an assistor, witness, or mailer to place identifying information on the carrier envelope fully serves the State's interest in deterring and investigating voter fraud. Throughout this litigation, the State has repeatedly asserted that a number of the other challenged provisions impose no real burdens on voters, their assistors, or their mailers because all the assistor or mailer has to do is place her or his identifying information and signature on the carrier envelope. For example, the State has argued in this case that Section 86.006 of the Texas Election Code

(which makes it a crime to mail the mail-in ballot of another unless the mailer places his or her name, address and signature on the carrier envelope) is constitutional because "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." State MSJ at 37.

In other words, the State has claimed that its interests in preventing and detecting voter fraud with respect to other aspects of the mail-in ballot process are fully served by the relatively minimal burden of requiring those who help mail-in voters to place their name, address, and signature on the carrier envelope.[4] These other provisions of the Texas Election Code, unlike Section 84.004, impose no numerical limit on the number of voters that may be assisted by mailing their ballot or even having their ballot witnessed, so long as identifying information is provided. Counterintuitively, the State's only numerical restriction applies to witnessing mail-in ballot applications. The State nowhere has explained or can explain what state interest is served in restricting numbers of people helped with applications, especially since the State has admitted that its interests are served in other more critical aspects of the balloting process by simply requiring assistors, witnesses, and mailers to disclose their identity on the ballot envelope.[5]

B. The Legislative History to Section 84.004 Does Not Contain Any Examples of Voter Fraud That Would Be Cured or Eliminated By the One Witness Restriction on Mail-In Ballot Applications

The State references the legislative history of Section 84.004 and claims that "the prohibition on witnessing more than one application was aimed directly at a specific kind

[4] As the State of Texas has noted in this case, "[i]n 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 carrier 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." State MSJ at 37.

[5] Again, the State has asserted in this case: "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." State MSJ at 37.

of voter fraud that was taking place at the time, fraud that took advantage of elderly and disabled voters." State MSJ at 10-11. According to the State, this legislative "intent is clearly delineated in the legislative history." *Id.* at 11. The legislative history offered by the State does not support enactment of the one witness restriction, and the State's claims regarding the legislative history are at best exaggerated.

For example, the State, citing "Ex. 23, pp. 4, 11" to their motion, states that "[w]itnesses also testified before the Committee to complaints of forged ballot applications for absentee ballots." The transcript at page 4 shows testimony from the Duval County Clerk, Alberto Garcia, who complains that many voters living in nursing homes are not mentally fit to vote and asks the Legislature to enact a law that would require doctors to sign an affidavit attesting to a voter competence to vote. Nowhere does he provide any testimony providing any details of forged ballot applications, the scope of the problem, or any quantifiable voter data from the County. While he did testify that there have been "accusations" in Duval County that voters in nursing homes "that are really sick … were voted by other people, that there was fraud committed," he provided no details or context for the statement, and instead devotes the entirety of his testimony to efforts to verify the mental competency of voters. Nowhere in Garcia's testimony is there any statement that limiting the number of mail-in ballot applications that may be witnessed will address any alleged voter fraud.[6] Indeed, when specifically asked about voter fraud in Duval County, Garcia testified as follows:

> REP. SALINAS: Mr. Garcia, since the implication—or implementation of this [Rep.] Glossbrenner law, have you had any new allegations, any new judicial proceedings, of voter fraud in Duval County or contested elections
>
> MR. GARCIA: Not very much. I think we have had pretty good elections.

[6] Garcia himself was the target of allegations that he may be encouraging fraudulent behavior in Duval County. *See* State MSJ Ex. 23 at 18-19 and 23 (Testimony of Carlos Trevino).

State MSJ Ex. 23 at 7.

The other witness whose testimony is cited by the State to support its claim that Section 84.004 was enacted to prevent voter fraud is Mr. Antonio Perez, an election poll worker from Duval County. State MSJ Ex. 23 at 9-11. Not a single word of Mr. Perez's testimony mentioned absentee ballot applications or related in any way to such applications. Mr. Perez testified only that two women, one of whom was employed in county clerk's office, witnessed signatures of over 100 absentee ballots. *Id.* Of course, the Texas Election Code has never imposed any limits on the number of ballots may be witnessed. Moreover, Mr. Perez identified one of the women as working for the County Clerk. *Id*. at 10. Even if the women had witnessed over 100 applications for a mail-in ballot instead of actual ballots, Section 84.004 exempts an early voting clerk or deputy clerk from the one-witness rule. *See* Tex. Elec. Code Ann. § 84.004(b)(1). The remaining pages of Mr. Perez's testimony relate to issues about whether a candidate can simultaneously serve as an election official and the assistance given to a voter at the polls. *See* State MSJ Ex. 23 at 1-5. Upon the chairman of the Committee's statement that is it is "just hard to get a fair election in south Texas", *id.* 23 at 16, Mr. Perez disagreed and stated that the County "just had a fair election awhile ago, about three weeks ago." *Id.* And when the chairman asked Mr. Perez if he thought there had been any "hanky panky" in absentee balloting in that recent election, Mr. Perez responded: "I don't know. I can't say that." *Id*.

Similarly, the State cites to the testimony of three County Judges suggesting that they too registered complaints about forged absentee ballot applications. However the record contains no such testimony. One county judge (Chapa) reported that "people have brought in many voters to assist in voting," State MSJ Ex. 25 at 30; one (Garcia) said he thought the law would ensure voting fraud would not exist but the record is void as to what type of alleged fraud he was

referring to or how the one witness rule would reduce fraud, and he expressed concern on how a one witness limit would be enforced, *id.*; and the third judge (Uresti) only stated that he felt the penalty of a Class C misdemeanor was too mild. *Id.*

Such a legislative record hardly establishes the State's claim that "the prohibition on witnessing more than one application was aimed directly at a specific kind of voter fraud that was taking place at the time, fraud that took advantage of elderly and disabled voters." In fact, not a single witness in any of the state's legislative history exhibits ever even mentioned absentee ballot applications or how a limit on how many could be witnessed would reduce any alleged voter fraud.

C. The State's References to Election Laws In Other States Is Both Inaccurate and Irrelevant

The State has cited to a number of laws from other states in support of its argument that Texas' laws restricting to one the number of times a person may witness an absentee ballot application is not particularly restrictive. First, none of the states cited by Texas has engaged in questionable enforcement activities targeting Democrats and minority voters and activists as Texas has done. This backdrop is relevant to Plaintiffs' Voting Rights Act and constitutional claims, due to the chilling effect that the State has created through its enforcement of mail-in balloting criminal prohibitions. Moreover, even if it were true that other states imposed restrictions on the absentee ballot process that were stricter than those in Texas, it does not necessarily mean that those laws are constitutional.

In any event, the State's descriptions of some of the laws in other states, *see* State MSJ at 14-16, are either flatly wrong or overstated. The State claims, for example, that "Colorado limits any assistance to mail-in voters (other than authorized election officials and close relatives) to no more than one voter per election." State MSJ at 14. But the State's gloss ignores that Colorado

is nowhere as restrictive as Texas. Colorado law states that a voter can give his mail-in ballot "to any person of the elector's own choice or to any duly authorized agent of the designated election official for mailing or personal delivery to the designated election official." COLO. REV. STAT. ANN. § 1-8-113(1a). Moreover, if an assistor is "a duly authorized agent of the designated election official" such a person may receive more than five mail-in ballots in any election for mailing or delivery to the designated election official. *Id.* And Colorado law expressly provides for political parties to appoint a representative who can become an agent of a duly designated election official and assist more than five voters with regard to delivering mail-in ballots. *See* COLO. REV. STAT. ANN. § 1-8-112.[7] So Colorado is not only less restrictive than Texas when it comes to mail-in ballot assistance, it provides for political party activists to assist potentially vast numbers of mail-in voters. Section 84.004 of the Texas Election Code, of course, does not exempt political party representatives from the one witness per mail-in ballot application restriction.[8]

The State also misleadingly claims that "North Carolina precludes *anyone* other than the voter or the voter's near relative or legal guardian (or election officials) from signing an application for an absentee ballot for the voter." State MSJ at 15 (emphasis in original). What the State fails to note is that North Carolina law imposes no restrictions on those who need assistance in applying for an absentee ballot due to physical disability or illiteracy: "If a

[7] This provision reads in part: "When more than five mail-in ballots are to be sent to the same group residential facility within a county, which includes, but is not limited to, nursing homes and senior citizen housing facilities, a committee consisting of one employee of the county clerk and recorder and, where available, a representative appointed by each of the major political parties shall deliver the mail-in ballots and return those ballots to the office of the county clerk and recorder." COLO. REV. STAT. ANN. § 1-8-112.

[8] In three of the seven states whose laws were cited by the Defendants as more burdensome than 84.004, in order for criminal penalties to apply a person must "knowingly violate[]" or "willfully violate[]" provisions of the Election law. MONT. CODE ANN. §13-35-103 ("A person who knowingly violates a provision of the election laws of this state for which no other penalty is specified is guilty of a misdemeanor."); VA. CODE ANN. § 24.2-704 ("Any person who willfully violates the provisions of this section or § 24.2-649 in providing assistance to a person who is voting absentee shall be guilty of a Class 5 felony."). *Cf.* Texas Election Code § 84.004 ("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.").

requester, due to disability or illiteracy, is unable to complete a written request [for an absentee ballot], that requester may receive assistance in writing that request from an individual of that requester's choice." *See* N.C. GEN. STAT. § 163.230.2. This North Carolina statute does not apply to witnessing signatures at all, but rather sets forth a right to receive assistance during the application process for a disabled or illiterate voter. It contains no restrictions on how many voters may be assisted.

Similarly, the State claims that "Kentucky law precludes anyone other than the voter or close relatives from applying for an absentee ballot." State MSJ at 15. In Kentucky, a request for an absentee ballot can be made by telephone, facsimile machine, by mail, or in person. KY. REV. STAT. ANN. § 117.085. So any person in Kentucky (such as a political party activist) can go to a voter's home, request that the voter sign a letter requesting an absentee ballot (or urge the voter to call the election's office), and mail or fax that letter of request for them without any restrictions whatsoever. Moreover, Kentucky places no limits on the numbers of voters who may be so assisted, and thus does not support Texas's outlier restriction at issue here.

The State also mischaracterizes Nevada law. Defendants cite Nevada as a state that "require[s] pre-approval by election officials for those who wish to assist or sign for another's absentee ballot application." State MSJ at 15. The Nevada law does no such thing. Nevada law simply requires a voter seeking assistance to include the assistor's name in a letter or other written statement requesting a ballot and include the assistor's name, address and signature on the letter or statement.[9] *See* NEV. REV. STAT. 293.3165 (2008). No "pre-approval by election officials" is needed, as the State contends. The letter from the voter is, in essence, the application for a mail-in ballot. Importantly, Nevada provides no limits on how many voters

[9] Nevada law also requires any voter seeking to vote absentee due to physical disability include in their letter "a statement from a physician licensed in this state certifying that the registered voter is a person with a physical disability[.]" NEV. REV. STAT. 293.3165 (2008).

may be assisted, and expressly authorizes an assistor to "mark and sign an absentee ballot issued to the registered voter" without restriction or limit.

Finally, according to the State, "Virginia law requires that persons who wish to assist disabled voters or those who cannot read or write must obtain pre-approval from election officials" and that failure to do so "constitutes a Class C felony." State MSJ at 16. Defendants' statement is wrong. Virginia law contains no pre-approval process. In Virginia, a person who needs assistance in applying for an absentee ballot must check the assistance box on the application, *see* Ex. 2 at Part B (Va. Absentee Ballot Application), and the person assisting the voter must provide their name, address and signature on the application. *See* Ex. 2 at Part E. If the person who needs assistance in voting but does not need assistance in filling out the application, then the assistor need not sign the application. Once the application is sent in, the voter is then sent a ballot and an assistance form. An executed assistance form signed by the assistor must accompany the ballot. *See* VA. CODE ANN. § 24.2-704 (Michie 2008). A voter may designate any person of their choosing as an assistor, *see* VA. CODE ANN. § 24.2-649 (Michie 2008), and there are no limits in Virginia as to how many voters one person may assist with regard to the application for a mail-in ballot or in casting it. The State is simply wrong to claim that there is any pre-approval process for assistors in Virginia or that Virginia law is more stringent than Texas Election Code Section 84.004.

II. PLAINTIFFS' FUNDAMENTAL RIGHT TO VOTE CLAIM.

Seeking to avoid the searching analysis of Plaintiffs' fundamental right to vote claim (Count I) required under the *Burdick-Anderson* framework, as recently reaffirmed by the Supreme Court in *Crawford v. Marion County Elec. Bd.*, 128 S. Ct. 1610 (2008), the State caricatures Plaintiffs as proposing a bright-line rule that the State may not enforce any statute

regulating elections without first "demonstrat[ing] fraudulent activity" if it might "punish conduct not involving actual voting fraud." State MSJ at13-14 (claiming that "the crux of Plaintiffs' legal theory" is "that the Constitution precludes the State from imposing criminal liability for 'innocent' activities such as possession of another's ballot witnessing a ballot application").

That is not Plaintiffs' position. With respect to their fundamental right to vote claim, what Plaintiffs have argued for, and what precedent requires, is that the Court apply the *Burdick-Anderson* framework, which requires the Court to "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." Pl. May 2008 Opp. MSJ at 23-24 (quoting and citing Supreme Court and Fifth Circuit precedent). As the Supreme Court recently reiterated, there is no "litmus test" that "neatly separate[s] valid from invalid restrictions." *Crawford*, 128 S. Ct. at 1616. Rather, "[h]owever slight [a] burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficient to justify the limitation.'" *Id.* (citation omitted).

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 MSJ at 12. Rather, they argue, that based on the specific context of this case—the lack of evidence that the challenged provisions have forwarded the state's asserted interest in preventing voter fraud; the uniquely broad and severe nature of the new prohibitions; the preexisting provisions of Texas law addressing voter fraud; and the significant chilling effect created by the challenged provision—the challenged provision unduly infringes on protected constitutional rights. Pl. May 2008 Opp. MSJ. at 27-33. The fact that the challenged provision

criminalizes well-established conduct that was long considered lawful, without requiring a showing of fraudulent intent (or of any intent), is of course relevant to the *Burdick-Anderson* analysis. But, contrary to the State's claims, that is not the only factor at issue.

The State continues to cite *Burson v. Freeman*, 504 U.S. 191 (1992), as support for its argument that no nexus between fraud and a voting restriction is necessary for such a restriction to survive constitutional scrutiny. State MSJ at 13. However, what is noteworthy about the law challenged in *Burson* is that there was a "widespread and time-tested consensus" among all 50 states supporting a "restricted zone around the voting compartments" at in-person voting booths. *Burson*, 504 U.S. at 206. In contrast, at most a handful of other states impose restrictions on mail-in balloting even approaching the severity of the challenged provisions. Pl. May 2008 Opp. MSJ at 31-33; State MSJ at 14-16.

In sum, Plaintiffs' fundamental right to vote argument (like their other constitutional arguments) is not that a state may never criminalize activity short of actual fraud. *Cf.* State MSJ at 13-14. Rather, the question presented in this case—under the *Burdick-Anderson* framework, the First Amendment, and the other sources of law at issue in this case—is whether the challenged provision's burdens are justified by the State's asserted interest. *See, e.g.*, *Crawford*, *Crawford*, 128 S. Ct. at 1613-16. The breadth of the protected activities criminalized by the challenged provision must be weighed against the risk and actuality of the chilling of protected activities, such as mail-in voting and political expression and association, as well as whether the challenged provision actually advances the State's interests. *Id.*[10]

[10] Plaintiffs recognize that preventing voter fraud is obviously important in the abstract. *See id.* (citing Pl. May 2008 Opp. MSJ at 27). But that is not the end of the analysis. Rather, the question is whether, on the facts of this case, the State has done more than "'posit the existence of the disease sought to be cured,'" and has "demonstrate[d] 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." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality op.); *see, e.g.*, *Crawford*, 128 S. Ct. at 1614-16.

III. HEIGHTENED SCRUTINY APPLIES TO PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT CLAIMS BECAUSE OF THE CONSTITUTIONALLY PROTECTED ACTIVITIES AT STAKE.

With respect to Plaintiffs' fundamental right to vote claim, the State implies that Plaintiffs rigidly demand "strict scrutiny." State MSJ at 8 n.2. However, as Plaintiffs made clear in their Motion for Summary Judgment, they do not argue for "strict scrutiny," but for application of the *Burdick-Anderson* framework. *See* Plaintiffs' MSJ at 26-27. As noted, that framework is a "flexible" one that requires the Court to weigh all the circumstances. *E.g.*, *Crawford*, 128 S. Ct. at 1616 n.8. *Crawford* expressly rejected a rigidly-tiered analysis. *See id.* Thus, although the mail-in ballot context is appropriately considered in this case, *see* Pl. May 2008 Opp. MSJ at 24-25 & n.17, it is not dispositive of Plaintiffs' claims, as the State incorrectly suggests, *see* State MSJ at 9-12.

Plaintiffs' claim is that the challenged provisions at issue in this case are 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, State MSJ at 9—that is inconsistent with the framework reaffirmed in *Crawford* and that must be rejected.

The State erroneously suggests that this case does not implicate the fundamental right to vote because it involves mail-in balloting. State MSJ at 9. Plaintiffs respectfully submit that this argument is incorrect.[11] To begin with, 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." PX8 to PI Hearing. The State rests its argument on *McDonald v. Board of Election*

[11] Plaintiffs recognize the Court's ruling at the preliminary injunction stage concerning *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), *see* Findings ¶¶ 11-12, but respectfully submit that *McDonald*'s application of less than strict scrutiny to absentee balloting restrictions does not mean that such restrictions do not implicate the fundamental right to vote.

Commissioners of Chicago, 394 U.S. 802 (1969). However, *McDonald* does not support the State's claim that burdensome restrictions on mail-in or absentee balloting do not implicate a fundamental right. 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.

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, it is simply untrue that *McDonald* permits the State to impose whatever restrictions it desires on absentee balloting or that absentee balloting does not implicate First and Fourteenth Amendment rights. Rather, where, as here, voters are significantly restricted in their right under State law to apply for and cast an absentee ballot, courts must ensure that such restrictions are not arbitrary, unjustified, or unduly onerous.

Moreover, critical to the Court's assessment of the facial fundamental right to vote challenges in *Crawford* and *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008) ("*Washington Grange*"), was the pre-enforcement nature of the challenges at issue in those cases, 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," 128 S. Ct. at 1623, 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*. In stark contrast to both of these cases, here the challenged provision has been in effect for several decades, and Plaintiffs have thus been able to develop evidence showing the burdens created by the provision.

Moreover, unlike *Washington Grange* or *Crawford*, this case involves threatened criminal penalties on voters and their helpers—an obviously different and more severe sanction than in the ordinary fundamental right to vote case.

The State is simply incorrect that Plaintiffs' have failed to cite any proof or authority supporting the contention that limiting witnessing infringes on First Amendment rights. State MSJ at 16-17. The Plaintiffs have submitted precisely this type of evidence in the undisputed sworn Declarations of Willie Ray and Ken Bailey, Pl. MSJ Exs. 1 and 2. Moreover, as the Supreme Court has made clear, "[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," Pl. MSJ 35, 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. 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.

The State erroneously claims that Plaintiffs' First Amendment claim must be adjudicated under the *Burdick/Anderson* standard for facial fundamental right to vote challenges which were at issue in *Crawford* and *Washington Grange. See* State MSJ at 30, 337. That is incorrect. Unlike the laws at issue in *Crawford* and *Washington Grange*, here the challenged provision 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, the challenged provision threatens to impose criminal penalties on those who help voters through their associational and expressive activity. This case is thus completely unlike *Crawford* and *Washington Grange*, neither of which pertained to the constitutionally protected activities of those who seek to help voters. It is the First Amendment rights of Plaintiffs and others like them to associate and express themselves politically that is infringed by Section 84.004's restriction on witnessing applications.

Accordingly, Plaintiffs need not show that the challenged provisions violate the First

Amendment in every application to succeed on First Amendment grounds. Rather, 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)). Moreover, even if the *Crawford* and *Washington Grange* facial challenge framework were applicable here, that framework does not require a challenger to show that every application is unconstitutional, as explained above. Rather, all that Plaintiffs must show under those cases is that the challenged provisions do not have a "plainly legitimate sweep." *See, e.g., Crawford*, 128 S. Ct. at 1623.

The State here ignores the fact that its interest in combating voter fraud is sufficiently served by other provisions of the Texas Election Code that can be used to combat any actual cases of voter fraud. Neither the Attorney General nor the Secretary of State has been able to identify one case of actual voter fraud that could not have been prosecuted but for the existence of the challenged provision. By analogy, in *Cotham v. Garza*, the Southern District of Texas struck down a provision of the Texas Election Code that banned the voter's possession of written communications while marking a ballot, despite the Court's determination that the provision did not "severely" burden voters' rights. 905 F. Supp. 289, 398, 400-01 (S.D. Tex. 1995). As *Cotham* explained, although preventing fraud is a legitimate state interest in the abstract, the challenged law was not necessary to achieve that interest, particularly because the state's myriad anti-electioneering statutes already protected the integrity of the polling place by prohibiting voters from sharing, exchanging or displaying campaign materials at the polling place. 905 F. Supp. at 400.

Similarly here, the outright restriction on witnessing applications is not necessary to

prosecute fraud related to mail-in balloting, because many pre-existing provisions of Texas law already prohibit persons from engaging in the type of mail-in ballot fraud that the State claims is the basis for Section 84.002. *See supra*, at 8-9. Moreover, as Plaintiffs' evidence establishes, the challenged provision has deterred individuals from voting and assisting others in the exercise of the franchise. In contrast to this hard evidence that the challenged provisions actually impede the State's proffered interest in counting all votes, the State offers no evidence that the challenged provisions have been necessary or even useful in investigating or prosecuting actual voting fraud. The State's dearth of evidence to support this assertion does not support its theoretical interest in ensuring that all votes are counted. State MSJ at 11; *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)).

CONCLUSION

For the foregoing reasons, as well as those contained in Plaintiffs' Motion for Summary Judgment and Plaintiffs' May 2008 Opposition to Motion for Summary Judgment (all of which are incorporated herein by reference), and all others apparent to the Court, the State's summary judgment motion should be denied.

Dated: June 19, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiffs' Opposition to Defendants' Motion for Summary Judgment with two Exhibits 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 19th day of June, 2008.

/s/ Otis Carroll
Otis Carroll