

No. 2-06CV-385

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILLIE RAY; JAMILLAH JOHNSON; GLORIA MEEKS; REBECCA MINNEWEATHER;
REUBEN ROBINSON, EDDIE JACKSON; and THE TEXAS DEMOCRATIC PARTY,
Plaintiffs,

v.

STATE OF TEXAS, a State of the United States;
GREG ABBOTT, Attorney General of the State of Texas;
and PHIL WILSON, Secretary of State for the State of Texas,
Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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| WILLIE RAY, JAMILLAH JOHNSON, | § | |
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| REUBEN ROBINSON, EDDIE JACKSON, | § | |
| and THE TEXAS DEMOCRATIC PARTY, | § | |
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| | § | |
| v. | § | Civil Action No. 2-06CV-385 |
| | § | |
| STATE OF TEXAS, a State of the United States; | § | |
| GREG ABBOTT, Attorney General of the State | § | |
| of Texas; and PHIL WILSON, Secretary of | § | |
| State for the State of Texas, | § | |
| <i>Defendants.</i> | § | |

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
CROSS-MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE T. JOHN WARD

Defendants, the State of Texas, Greg Abbott, Attorney General of Texas, and Phil Wilson, Secretary of State for the State of Texas, substituting for former Secretary of State Roger Williams, file this their Response to Plaintiffs' cross Motion for Summary Judgment ("Plaintiffs' Cross-Motion") with respect to TEX. ELEC. CODE §84.004.

Contemporaneously with this Response, Defendants file their Objections to Plaintiffs' Summary Judgment evidence, which is attached as Exhibit A to the Supplemental Appendix.

**I.
INTRODUCTION**

On the first day of trial, May 28, 2008, Plaintiffs announced in open court that they would dismiss with prejudice Cause No. 2:08-CV-76 and "dismiss with prejudice Cause No. 2:06-CV-385, except for the Plaintiffs' challenges to ... Section 84.004 as set forth in the amended complaint, which will be submitted to the Court on cross motions for summary judgment...." (Transcript of

5/28/08, pp. 3-4) Plaintiffs' Cross-Motion expressly states that Plaintiffs are moving for summary judgment with respect to three of the remaining six unsevered counts of the Amended Complaint in Cause No. 2"06-CV-385: "Counts I, II and IV." (Plaintiffs' Cross-Motion p. 1). Count I alleges §84.004 of the Texas Election Code violates the right to vote, and Count II alleges §84.004 violates the right to associate for political purposes as guaranteed by the First Amendment to the United States Constitution. Count IV alleges §84.004 violates §208 of the federal Voting Rights Act. Plaintiffs' Statement of Issues to be decided by the Court confirms that these three claims alone—Counts I, II, and IV—are the subject of their Motion. (Plaintiffs' Cross-Motion p. 2) Plaintiffs' Cross-Motion is silent, however, with respect to the remaining three unsevered Counts of the Amended Complaint: Count III (unconstitutionally void for vagueness), Count VII (violation of due process), and Count VIII (violation of 42 U.S.C. §1983). As Plaintiffs evidently have decided not to move for summary judgment on Counts III, VII, and VIII, these claims have been waived by Plaintiffs pursuant to the terms of their agreement on May 28, 2008 to submit all remaining claims to the Court on summary judgment motion.

With respect to Counts I, II, and IV, which are the subject of Plaintiffs' Cross-Motion, Plaintiffs have not met their heavy burden that §84.004 is unconstitutional or violates §208 of the Voting Rights Act as a matter of law. Plaintiffs' Cross-Motion should be denied, and Defendants' Cross-Motion (timely filed on June 12, 2008) should be in all respects granted.¹

¹The foregoing Introduction constitutes Defendants' response to Plaintiffs' Statement of Issues. Local Rule CV-7(a)(1).

Defendants incorporate by reference their previously filed Defendants' Motion for Summary Judgment (with respect to Tex. Elec. Code §84.004) (filed June 12, 2008)("Defendants' Cross-Motion") and contemporaneously filed Appendix ("Def. App.") and exhibits (Docket No. 67), Defendants' previously filed Motion for Summary Judgment filed on May 12, 2008("First Motion")(Docket No. 48), Reply Brief in Support of Motion for Summary Judgment ("Defendants' Reply") (Docket No. 58), and the appendices and exhibits in support (Docket Nos. 49, 58, and 59). In addition, Defendants incorporate their previously filed briefing in the District Court: Defendants' Motion to Dismiss (Docket No. 7), Defendants' Response to Plaintiffs' Motion for Preliminary Injunction (Docket No. 11), and the briefing

II. SUMMARY OF ARGUMENT

Plaintiffs fail to carry the heavy burden the law imposes on those who would seek to override the legislature and strike down an election statute, in this case, one that has been on the books for almost 30 years. As the Plaintiffs' requested relief is summary judgment, that burden is further heightened by Rule 56's requirement that Plaintiffs must establish *all* of the essential elements of their claims as a matter of law. Plaintiffs' Motion falls well short of this standard and should be denied.

Despite the extensive briefing in the trial court and at the appellate court levels, Plaintiffs have never satisfied the threshold issue of their constitutional challenges (Counts I and II) that any of the Challenged Statutes, including §84.004, infringes upon a fundamental constitutional right. Plaintiffs' Cross-Motion sheds no new light on this issue and cites no supporting authority for Plaintiffs' proposition that witnessing a mail-in ballot application, the *sole* activity restricted by §84.004, constitutes constitutionally protected conduct.

Even assuming §84.004 infringes upon constitutionally protected conduct, Plaintiffs' Motion fails to satisfy the *Anderson/Burdick/Crawford* requirement of *evidence* that the burdens imposed by §84.004 outweigh the State's undisputable interest in combating voting fraud.² Despite its length, Plaintiffs' Cross-Motion is glaringly devoid of any evidence of the supposed burdens on voters and activists caused by §84.004. There is no evidence of any voter being disenfranchised or

filed by Defendants in the Fifth Circuit.

² Defendants have previously briefed the Court on the test as set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1982) and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 245 (1992), which the Supreme Court recently confirmed in *Crawford v. Marion County Election Bd.*, ___ U.S. ___, 128 S.Ct. 1610 (2008). (See Defendants' (First) Motion, pp. 30-35; Defendants' Cross-Motion, pp. 7-9). Defendants' respectfully refer the Court to this previous briefing, which is incorporated by reference.

an activist being prevented from assisting a voter due to §84.004. The only evidence directed to §84.004 at all are the declarations of Ms. Ray and Mr. Bailey, which offer nothing more than unsupported statements of unspecified difficulties. Plaintiffs' largely irrelevant, 20-plus page long "Statement of Undisputed Facts" (which Defendants dispute) cannot obscure this lack of evidence on a key element of Plaintiffs' case.

Moreover, the evidence that does exist leads to the opposite conclusion—that §84.004 is not burdensome at all. As demonstrated below, §84.004 was enacted in 1979, and Plaintiffs testified that they have assisted hundreds and even "thousands" of mail-in voters with their ballot applications since then. The unspecified difficulties Plaintiffs claim now obviously have not prevented them from assisting voters with their mail-in ballot applications for over two decades. With respect to voters, Plaintiffs present no evidence of even a single voter who has been prevented from voting due to the enactment of §84.004. At most, Plaintiffs' offer speculation, hearsay, and generalized rumors of a "chill" in the community, none of which is substantiated by admissible evidence and therefore must be rejected as insufficient for summary judgment purposes.

As to the misdemeanor penalty for violation of §84.004, the State is well within constitutional parameters in this regard, as confirmed by the Supreme Court more than 15 years ago in *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (1992). (*See* Defendants' Reply Brief, pp. 4-10). As Defendants have previously briefed to this Court, *Burson* teaches that in the interest of preventing voting fraud, the states may regulate protected political activities—and impose criminal penalties for enforcement—without running afoul of the First Amendment and without having to prove fraud has occurred. *Id.* at 1855. Consistent with *Burson*, many states, as demonstrated by Defendants, impose criminal penalties for election code violations—even though the violations do

not involve any fraudulent activity. (Defendants’ Reply Brief, pp. 8-9; Defendants’ Cross-Motion pp. 14-16) In short, as the weight of authority confirms, given the State’s interest in combating voting fraud, the State is well within constitutional boundaries in penalizing “innocent” conduct such as witnessing a ballot application. Tellingly, Plaintiffs offer no response and no counter authority to *Burson*, or the other authorities cited by Defendant.

Plaintiffs’ Voting Rights Act claim (Count IV) is equally infirm. As demonstrated by Defendants in their Motion, §208 applies to voting assistance *on election day at the polls, not to absentee voting*. (See Defendants’ Cross-Motion (Docket No. 67), pp. 19-20, Def. App. Ex. 22) The legislative history of §208 confirms Congress intended to preclude the states from restricting disabled or illiterate voters from bringing a trusted friend into the voting booth on election day, but nothing in §208 or its legislative history suggests it applies to prevent states from imposing restrictions on assisting the disabled absentee voter—where the safeguards of the polling place are not present and where there are greater opportunities for undue influence and fraud.

III. ARGUMENTS AND AUTHORITIES

A. Section 84.004 Has Not Chilled Plaintiffs From Assisting Voters Since 1979.

Plaintiffs’ Cross-Motion erroneously attempts to expand §84.004 beyond its actual scope by contending that it prevents them from assisting mail-in voters. (Plaintiffs’ Cross-Motion pp. 4-8) In fact, the sole activity that §84.004 actually limits is “signing” as a witness for more than one ballot application per election. Assistance other than signing the application is not limited or addressed in §84.004:

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

- (a) A person commits an offense if, in the same election, *the person signs an*

early voting ballot application as a witness for more than one applicant.

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

- (1) as an early voting clerk or deputy early voting clerk; or
- (2) the person is related to the additional applicants as a parent, grandparent, spouse, child, or sibling.

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

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

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

(emphasis added) There is simply nothing in §84.004 that precludes the Plaintiffs from assisting as many voters as they wish. To the extent an activist such as Ms. Ray has already witnessed a ballot application during an election and wishes to assist more than one disabled voter, nothing in §84.004 or elsewhere in the Code prevents her or the voter from bringing in a relative of the voter, an election official, or a neighbor or friend to witness the ballot application. While Ms. Ray testifies “it can be difficult” to obtain another person to witness the voter’s mark, she does not specify, and Plaintiffs do not otherwise specify, what those alleged difficulties are—as is their burden. (Plaintiffs’ Ex. 1, Ray Decl. ¶6)

In any event, the unnamed burdens of §84.004 are clearly not so onerous as to prevent Plaintiffs from rendering assistance to disabled voters for the past almost three decades. Contrary to Plaintiffs’ claims, the substantive provisions of §84.004 were enacted in 1979 and have remained unchanged since then, *including* the criminal provisions. (See Plaintiffs’ Cross-Motion ¶ 20) (Def. App. Ex. 24, 28)

Section 84.004 (formerly art. 5.05, subd. 2, para. (e)(f) of the Texas Election Code)) was codified along with the rest of the Texas Election Code in 1985, but the substance remained the same. The *only* change to §84.004 by the 2003 Amendments was to add 3 clarifying words to the caption title, but the text was not changed, including the misdemeanor provisions which have been in effect since 1979.

The bulk of Plaintiffs' case (prior to May 28, 2008) has been directed to the 2003 Amendments, and chiefly, the Defendants' enforcement of §86.006. Section 84.004, the sole remaining statute in issue, obviously differs from the provisions enacted in 2003, since its requirements, including the misdemeanor provisions, have been in effect for almost 30 years.

The significance here is that, according to Plaintiffs' own testimony, the Plaintiffs have known about and complied with §84.004's provisions for years before this lawsuit. As Ms. Ray testified in her declaration, she has known about the requirements of §84.004 and has complied with them since the "1990's." (Plaintiffs' App. Ex. 1 ¶2)

Ms. Ray testified at the preliminary injunction hearing before this Court that over the last 30 years she had assisted "thousands" of voters with their mail-in ballots and applications:

Q. How many years would you say, Ms. Ray, that you assisted voters with mail-in ballot applications or the mail-in ballots themselves? About how many years have you been providing this assistance, roughly?

A. About 30-plus.

Q. And over those 30 years, if you had to give a ballpark figure to the Court here about how many people you have helped, either applied for a ballot or actually cast a ballot, how many would you say?

A. Oh, thousands.

(Supp. App. Ex. B Transcript, Preliminary Injunction, p. 75 (line 25); p. 76 (lines 1-9).

Other Plaintiff activists—Ms. Meeks and Minneweather—also testified that before this lawsuit they assisted many voters in elections over the years with their ballots and ballot applications. Ms. Minneweather testified before 2003 she assisted “about 80” to 100 people with their mail-in ballot applications per election:

Q. [W]hen you started up until, you know, 2003, 2004, about how many people were you helping with voting, mail-in voting?

A. Well, started out in the community, kind of exceeded my neighborhood and just around in the surrounding areas, about 80, and then I moved up to about a hundred.

...

Q. And would you help generally those same 80 to a hundred people each—each election cycle?

A. Yes, unless one of them were, you know, deceased; and then that would – you know, somebody else would tell me of someone in the neighborhood that needed assistance, and I would, you know go by and see them as well.

Q. Okay. What would you do to help these people?

A. Mainly I take their applications to them so that they could, you know, get them filled out and – sign them so that I could mail them for them if there was something that was needed or if they could mail them themselves, they would; but most of the time I would, you know, go and mail them for them.

(Supp. App. Ex. C Minneweather Dep. (10/27/06), p.11 (lines 14-21, 24-25), p. 12 (lines 1-15).

Ms. Meeks testified that she estimated she had helped approximately 50 people per election with their mail-in ballots and applications beginning in 1982:

Q. Okay. Since 1982 up till 2003, did you continue to do work targeting the elderly and disabled in assisting them with voting by mail?

A. Yes.

...

Q. Okay. Did you ever help people by providing them prefilled applications?

A. Yes.

...

Q. In addition to your assistance with applications, did you during this time frame help voters actual mail their completed ballots?

A. Yes, I did.

Q. Did you also help voters read their ballots?

A. Yes. I did.

...

Q. So during that time period about how many people were you helping in any given election year?

A. Oh, well let's estimate maybe around 50 or so.

(Supp. App. Ex. D Meeks Dep. (10/27/06) p. 8 (lines 16-20); p. 9 (lines 8-10, 19-25); p. 10 (lines 1, 6-10).

The point is that during the past approximately three decades while §84.004 has been in effect, the Plaintiffs themselves have assisted many voters with their mail-in ballot applications. Obviously, the “burdens” imposed by §84.004 have not prevented the Plaintiffs from providing this assistance to mail-in voters as they now claim.

In light of their own testimony to the contrary, Plaintiffs’ argument that this decades old statute suddenly has created impermissible burdens upon their First Amendment rights is highly suspect and should be rejected.

B. Plaintiffs’ Attempt To Obscure Their Lack Of Evidence Should Be Rejected.

Plaintiffs’ lengthy and largely irrelevant “Statement of Undisputed Facts” cannot obscure the weaknesses of Plaintiffs’ case. (*See* Plaintiffs’ Cross-Motion, pp. 2-23)

Plaintiffs' detailed description of voters who need their assistance with voting (Plaintiffs' Cross-Motion, pp. 4-8 ¶¶ 8-19) is entirely beside the point here since §84.004 does not preclude Plaintiffs from assisting voters. Moreover, as the evidence shows, §84.004 has not prevented Plaintiffs from assisting voters for almost three decades. That some voters may need assistance with their ballot applications is not in dispute (although Plaintiffs have not put any such evidence in the record), but it is also beyond dispute that the §84.004 does not preclude Plaintiffs from assisting as many of these voters as they wish.

Plaintiffs' extensive recycling of the legislative history of the 2003 Amendments (pp. 8-10 ¶¶ 22-27) is as puzzling as it is irrelevant. As noted, §84.004 was enacted in 1979. (*See* discussion of legislative history of §84.004 at Defendants' Motion, pp.10-11; Def. App. Ex. 24-30) The purpose of House Bill 2025, now §84.004, was to prevent elderly and disabled persons from becoming unwitting victims of voting fraud. (Def. App. Ex. 24, 25) House Bill 2025 was voted out of committee by vote of 6 Democrats. (Def. App. Ex. 25, 26, 30) Since 1979, the text of §84.004 has remained unchanged. Thus, the 2003 legislative history is wholly irrelevant to §84.004. Moreover, to the extent Plaintiffs include this discussion of the 2003 legislative history to raise questions about the legitimacy of the State's interest in combating voting fraud, that issue recently has been put to rest in the State's favor by the Supreme Court in *Crawford*: "While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." 128 S.Ct. at 1619.

Equally puzzling is the Plaintiffs' exhaustive rehashing of the investigations and prosecutions under §86.006(f) of the Election Code, which was one of the statutes subject to Plaintiffs' dismissal with prejudice. (*See* Plaintiffs' Cross-Motion, pp. 10-14 ¶¶ 28-41) This is obviously irrelevant to Plaintiffs' challenge to §84.004 and should not be allowed to deflect attention away from the fact that

(i) none of the Plaintiffs has ever been charged with or even questioned concerning §84.004, (ii) there is no evidence of any past or ongoing investigations or prosecutions of §84.004; (iii) the Plaintiffs' only evidence regarding §84.004 is from Ms. Ray, who testifies that she has been aware of and complied with its requirements since the "1990's." (Plaintiffs' App. Ex. 1 (Ray Decl.) ¶2)

Plaintiffs' repeat of allegations of racially motivated enforcement of the Election Code is wholly improper. (Plaintiffs' Cross-Motion pp. 14-16 ¶¶ 42-52) As noted, on May 28, 2008, Plaintiffs agreed to dismiss with prejudice Cause No. 2:08-CV-76 (*see* Transcript 5/28/08 p. 3), which includes all of their severed claims relating to "racial discrimination" by Defendants. (*See* Docket No. 37). Plaintiffs' attempt to re-inject racial allegations after voluntarily dismissing these claims should be rejected.

Plaintiffs' allegations about the alleged "chilling" effect of the Challenged Statutes including §84.004 (Plaintiffs' Cross-Motion pp. 16-19 ¶¶ 53-62) has been exposed as contrary to the evidence from the Plaintiffs themselves that §84.004 has had no effect upon their assistance activities in the almost three decades since it was enacted. (*Supra* pp.9-11) Notably absent from the "undisputed" facts is any evidence of a single voter who has been disenfranchised due to §84.004, or an activist who has been precluded from assisting a voter due to §84.004. Plaintiffs' bare allegation of a "chill" does not make it so. (*See* Plaintiffs' Cross-Motion ¶ 61).

Plaintiffs' allegations about misleading information provided by Defendants (Plaintiffs' Cross-Motion, pp. 19-21 ¶¶ 63-72) is irrelevant since Plaintiffs have declined to pursue their due process claims in their Cross-Motion. Moreover, none of these allegations of misinformation or confusion is directed to the provisions of §84.004. With respect to notice of the statute, it is difficult to conceive that Plaintiffs seriously contend that Plaintiffs were unable to learn about §84.004 in the almost thirty years since its enactment. (*See* Plaintiffs' Cross-Motion ¶63) Moreover, Ms. Ray's declaration belies

the Plaintiffs' contention of the public's inability to understand and comply with the law. (*See* Plaintiffs' Ex. 1, Ray Decl. ¶2)

Plaintiffs' contention that "voters are no longer voting or receiving their needed and preferred assistance" as a result of §84.004 is unsupported by any admissible evidence and grossly misleading. (Plaintiffs' Cross-Motion, pp. 21-23 ¶¶ 73-76) Plaintiffs state that "[a]bsent 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." (Plaintiffs' Cross-Motion ¶73) The long string cite that follows erroneously suggests there is evidence in record which shows mass disenfranchisement. What these cites actually reveal are the same generalized hearsay statements and rumors that Plaintiffs have previously offered in this case, but, as before, there is no admissible evidence of even a single voter who has been disenfranchised due to §84.004 or any other of the Challenged Statutes.³

Plaintiffs' statement that voters interviewed by the Attorney General in 2005 regarding Plaintiffs Ray and Johnson did not vote after 2004 or only in the 2006 primary election is also misleading and in some material respects simply wrong. (Plaintiffs' Cross-Motion ¶74) The most recent voting histories provided by Plaintiffs (*see* Def. Supp. App. 17) indicate that, contrary to Plaintiffs' statement, *all* (except Ms. Briscoe) voted after 2005 in 2006 and/or in the 2008 Democratic Primary: Opal Walker (Ex. 17-23 (2008)); Opal Hart (Ex. 17-22 (2006 and 2008)); Bernice Junior (Ex. 17-3 (2006 and 2008)); Eugene Grant (Ex. 17-9 (2006)); (Mary Marshall (Ex. 17-20 (2006)); and

³ For example, Plaintiffs' "evidence" of mass disenfranchisement consists of Ms. Meeks's hearsay testimony that she has "been told" by unidentified persons that "if it wasn't for me that a lot of people wouldn't vote" and Ms. Ray's hearsay testimony that she has been told by unidentified voters that "we are not going to vote this time." (Preliminary Injunction Transcript pp. 68, 81)

J.D.Webster (Ex. 17-4 (2006 and 2008)). Equally misleading, Plaintiffs omit the voting histories of the rest of the approximately 30 elderly and disabled voters in the Texarkana area (as identified by Plaintiffs) who have voted since 2005. (*See* Def. App. Ex. 17-1 - 17-29). (*See also* Ex. E, Plaintiffs' Disclosures, pp.8-9) Moreover, the implication that voters have discontinued voting because they were questioned by officials is pure speculation. Again, there is no evidence of even a single voter who has not voted as a result of §84.004.

C. Plaintiffs' Constitutional Challenges To §84.004 Fail As A Matter of Law. (Counts I and II)

Plaintiffs' constitutional challenges (Count I (violation of the right to vote) and Count II (violation of the right to associate for political purposes)) fail as a matter of law.

With respect to Count I, the right to vote is not even implicated by §84.004. The *only* activity being restricted is the ability of another person *other than the voter* to witness the voter's mark on a ballot application more than once per election. The restriction and associated penalty are upon the witness, not the voter. Even if the witness violates §84.004, the voter remains unaffected since a violation of §84.004 "does not affect the validity" of the ballot application. Tex. Elec. Code §84.004(c).

Moreover, Plaintiffs' contention that §84.004 impermissibly infringes the right to vote is wholly inconsistent with the Supreme Court authority of *McDonald v. Bd. of Comm'rs of Chicago*, 394 U.S. 802, 808 (1969), as adopted by this Court in its previous findings. (FF/CL p. 10, ¶¶ 11, 12)

In *McDonald*, inmates in the Cook County jail awaiting trial challenged the Illinois absentee ballot statute, which did not allow inmates to apply for an absentee ballot. The *McDonald* Court found there was no disenfranchisement, holding "the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny

appellants the exercise of the franchise....” 394 U.S. at 807-08; 89 S.Ct. at 1408. The Court noted there was no evidence the prisoners could not otherwise exercise their right to vote. *Id.*

McDonald teaches that when absentee ballot restrictions do not foreclose other avenues for exercising one’s right to vote, including personal appearance at the polls—no matter how “difficult” or “practically impossible” it may be—there is no unconstitutional disenfranchisement. *Id.* at 394 U.S. at 810, 89 S.Ct. at 1409.

Other courts have held, consistent with *McDonald*, that absentee ballot restrictions do not deprive citizens of the fundamental right to vote. *See Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004); *Friedman v. Snipes*, 345 F.Supp.2d 1356, 1370 (S.D. Fla. 2004) (“[T]here is no fundamental right to vote by absentee ballot.”); *Price v. New York State Board of Elections*, 2007 WL 3104327 at 6 (N.D.N.Y. 2007) (“[A]bsent special circumstances not present here, a restriction on absentee balloting does not constitute a burden on the fundamental right to vote.”); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1192 (Ill. Ct. 2005).

According to Plaintiffs, the constitutionally impermissible burden imposed by §84.004 on voters is that it *may* deprive them of their “preferred” choice for witnessing their mail-in ballot application. (Plaintiffs’ Cross-Motion p. 22 ¶ 76) This is not disenfranchisement under *McDonald* since the voter has many alternatives for exercising his or her right to vote. Either a relative, an election official, or another qualified person may witness the ballot. Or the voter may opt to vote in-person at the polls. Obviously, having to forego one’s “preferred choice” for witnessing one’s mail-in ballot application is a far cry from the obstacles facing the Cook County inmates in exercising their right to vote in *McDonald*. If one follows Plaintiffs’ theory to conclusion, any restrictions on mail-in voting—such as deadlines for applying and returning ballots, the oath and signature, or even the qualifications themselves are unconstitutional disenfranchisement because they *may* deprive voters

of their vote. *McDonald* recognized that this path would be endless and established the bright line that unless the statute forecloses other means for exercising one's right to vote, there is no impermissible disenfranchisement.

Plaintiffs fail to distinguish *McDonald* in any meaningful way or cite any counter authority. (Plaintiffs' Cross-Motion p. 28 n. 4)

With respect to Count II, despite extensive briefing in this case, Plaintiffs have never cited any authority to support their contention that the Challenged Statutes infringe upon First Amendment associational rights. As previously demonstrated by Defendants, the assistance to be provided to a mail in voter is required to be content neutral; therefore, any protected political speech or activity is only incidental. Section 84.004 is even less likely to involve protected political speech or activity. The activity being regulated by 84.004 is the signing of an application *by a witness*, who may or may not be affiliated with a political party. Plaintiffs fail to demonstrate how limiting this activity infringes upon their right to associate with other Democrats for political purposes.

Even assuming §84.004 involves First and Fourteenth Amendment rights, Defendants are nevertheless entitled to summary judgment in their favor on Counts I and II because, as demonstrated, the State's compelling interests in preventing voting fraud and the orderly administration of elections easily outweigh the minimal burdens imposed. (*See* Defendants' Cross-Motion pp. 7-18) As the legislative history evidence indicates, the intent of §84.004 is to prevent voting fraud upon elderly voters by those who would forge their ballot applications and collect their ballots from nursing homes or mailboxes unbeknownst them. (*See id.* at 9-11; Def. App. Ex. 23-30) Contrary to Plaintiffs' claims, the State does not have the burden to prove that the statute has been successful in preventing voting fraud—which would be virtually impossible—but only that the State's underlying interest is “real” and not conjectural. Testimony of the witnesses before the Elections Committee in 1979

concerning voting fraud complaints amply supports the State's interest in enacting §84.004. (*See* Def. App. Ex. 23).

D. Plaintiffs' Voting Right Act Claim Fails As A Matter Of Law (Count IV).

Plaintiffs' Voting Rights Act claim fails as a matter of law as well. (Count IV).

§208 of the Voting Rights Act provides:

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of the voter's employer or officer or agent of the voter's union.

42 U.S.C. §1973aa-6. Plaintiffs' interpretation of the phrase "voter's choice" as meaning the mail-in voter is guaranteed his or her choice of a particular person to witness his mark is too narrow. Although Section 208 allows the voter his or her "choice", it does not follow that if one particular person is chosen but not qualified the statute is violated. Common sense would dictate the voter simply chooses another. The statute is intended to prevent the State or anyone else from forcing an unwanted assistant upon the voter, not to guarantee the voter the assistance of a particular person who may or may not be qualified. (Def. App. Ex. 22, pp. 62-64)

Plaintiffs' argument fails for the additional reason that §208 does not apply to mail-in balloting assistance. As demonstrated by Defendants in their Cross-Motion (pp. 19-20), the legislative history indicates Congress intended §208 to apply to assistance *on election day at the polls*, not to absentee balloting. The Senate Judiciary Committee expressed its concern that the blind, the disabled, and those who are unable to read or write are susceptible to undue influence and manipulation "at the polls" and may be unable to exercise their right without "aid within the voting booth." (Def. App. Ex. 22 (S. Rep. No. 97-417 at 62-64). The Committee concluded that the "only kind of assistance that will make fully 'meaningful' their vote" is to "permit them to bring *into the*

voting booth a person whom the voter trusts and who cannot intimidate” the voter. (Emphasis added)
Id. Nothing in the legislative history suggests that this choice extends to the absentee voting realm, where the safeguards of the polling place are not present and the opportunities for fraud and improper influence are much greater

Both cases cited by Plaintiffs involve voting assistance *at the polling place*, not absentee voting. *See American Ass’n of People with Disabilities v. Hood*, 278 F. Supp. 1345 (M.D. Fla. 2003) (concerning whether election official wrong rejected available voting equipment that would have allowed disabled voters to vote at the polls without assistance); *United States v. Berks County*, 250 F. Supp. 2d 532-33, 538 (E.D.Pa. 2003)(concerning the right of Spanish speakers to bring an assistor into the voting booth).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs’ Cross-Motion should be denied, and Defendants’ Cross-Motion should be granted in its entirety.

Respectfully submitted,

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