

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.¹

INTRODUCTION

The State’s motion for summary judgment should be denied because it seeks judgment based upon disputed material facts and because the State is not entitled to prevail on Plaintiffs’ claims as a matter of law. Plaintiffs are entitled to a trial on their claims that several provisions of the Texas Election Code largely enacted in 2003 (the “challenged provisions”), separately and in conjunction, violate Plaintiffs’ federal constitutional and statutory rights.² As the State’s motion all but concedes, Plaintiffs’ serious challenges in this lawsuit already have led the State to revise the design of the carrier envelope that is used for returning mail-in ballots, and to revise the instructions sent to voters for casting such ballots.³ Prior to the State’s proposed redesign, the carrier envelope, along with other materials propagated by the State, provided inadequate and misleading notice of the challenged provisions. In particular, voters and potential assistants would not reasonably have known that Texas Election Code Section 86.006(f) criminalizes the mere consensual *possession* of another’s ballot or carrier envelope, subject to only a few narrow exemptions, or that all who come into contact with the ballot must provide identifying information, even if they do no more than possess the ballot to mail it. Plaintiffs appreciate the State’s efforts to remedy the statutory failings, but respectfully submit that the proposed changes

¹ The State incorrectly claims that Defendant the State of Texas has been dismissed from this case. *See* Defendants’ Motion at 3. At the preliminary injunction stage, the Court dismissed the State only with respect to Plaintiffs’ constitutional claims. *See* Findings of Fact and Conclusions of Law at 8 ¶ 1. Plaintiffs’ statutory claims against the State are proper because Congress has abrogated states’ sovereign immunity. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 519 n.4 (2004) (explaining that “measures protecting voting rights are within Congress’ power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States” (citation omitted)).

² Specifically, Plaintiffs challenge Sections 64.036(a)(4), 84.003(b), 84.0004, 86.0051 and 86.006 of the Texas Election Code.

³ The State’s proposed redesign of the carrier envelope was conceived and announced in the middle of oral argument before the Fifth Circuit in December 2007, on appeal of the preliminary injunction issued by the Court in 2006.

alone do not cure the serious defects in the Election Code identified by Plaintiffs.

As discovery has uncovered, the two state officials primarily responsible for enforcing the Election Code – the Secretary of State and the Attorney General – have indicated their conflicting interpretations of the statutory provisions at issue, which are so broad and vague that they have allowed the arbitrary and unfair enforcement that has existed to date. Indeed, it is undisputed that African-Americans, Latinos and Democrats comprise the great majority if not the entirety of those criminally prosecuted by the State under the challenged provisions since 2003. Moreover, the great majority of those prosecutions were for mere consensual possession under Texas Election Code Section 86.006(f) and involved *no* allegation, proof, or conviction of any actual fraud. In contrast, the State has failed to investigate or prosecute other non-minority, non-Democrats who also have “technically” violated Section 86.006. For example, as discovery has shown, the “Escapees” – a vast organization of recreational vehicle (“RV”) users, whose membership is predominantly non-minority and non-Democrat – use mail distribution and collection procedures for mail-in balloting that violate the plain terms of Section 86.006, but their efforts have been actively *supported* by the State. The vague and overbroad statutory provisions that make such unfair enforcement possible cannot withstand scrutiny.

Discovery also has made clear the vast chilling effect of the challenged provisions on political and expressive activity – of voters, of willing helpers, and of party activists. Plaintiffs have alleged this chilling effect since the inception of this lawsuit; it was confirmed with testimony and other evidence at the preliminary injunction stage of this case; and it has been confirmed further in the discovery that has taken place in the last several months. As Plaintiffs will show at trial, there has been a massive chilling effect on individuals’ longstanding efforts – particularly in Democratic and minority communities – to associate politically and get out the

vote by helping voters with mail-in balloting. The combination of the vagueness and breadth of the challenged provisions and the State's unfair pattern of enforcement has created this demonstrable chilling effect. The State's motion simply ignores the record evidence to the contrary, which creates a material factual issue precluding summary judgment.

STATEMENT OF THE CASE

Plaintiffs filed their initial complaint in this case on September 21, 2006, challenging several unduly restrictive provisions of Texas law concerning mail-in balloting. Following an evidentiary hearing, this Court, on October 31, 2006, issued a narrow preliminary injunction against enforcement of Sections 86.006(f) and (h) of the Texas Election Code in certain and limited circumstances.⁴ The Court concluded that Section 86.006 “prevents [Plaintiffs] and dissuades others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout.” The Court thus enjoined the State from enforcing Sections 86.006(f) and (h) “in circumstances in which a person, other than the voter, has merely possessed the official ballot or official carrier envelope and such possession is with the actual consent of the voter.” The Court preserved the State's ability to require identifying information from those *mailing* ballots for voters, stating that the State was not prevented “from enforcing Tex. Elec. Code § 86.0051 under the circumstances in which a person, other than the voter, deposits the carrier envelope in the mail or with a common or contract carrier and does not provide the person's signature, printed name, and residence address on the reverse side of the envelope.” In other words, this Court's injunction barred the prosecution of a person who

⁴ This Court made clear that its preliminary injunction ruling pertained solely to Plaintiffs' challenge to Section 86.006, because “even assuming that [Plaintiffs' other] claims are meritorious, the court could not award meaningful relief in the form of a preliminary injunction given the current timetable governing the election.”

consensually possessed the mail-in ballot or carrier envelope of another but did not actually mail the ballot for the voter.⁵

The State immediately moved for a stay of the injunction in the Fifth Circuit Court of Appeals. The State claimed that the “district court’s injunction has the *immediate* effect of enjoining [the State] from preventing voter fraud,” incorrectly describing the injunction as having “enjoined any enforcement of §§ 86.006(f) & (h) of the Texas Election Code.” Stay Mot. at 3, 15 (filed Nov. 1, 2006). Plaintiffs opposed the stay motion on November 2, 2006.

On November 3, 2006, a panel of the Fifth Circuit granted the State’s motion to stay, but denied the State’s motion to expedite the appeal. Judge Dennis concurred, but found it “difficult . . . to say that the district court abused its discretion in its carefully drawn preliminary injunction of what appears to be the state’s overly broad criminalization of conduct intended to assist disabled voters and its resulting disqualification of disabled voters’ mail-in ballots.” Plaintiffs thereafter sought emergency relief from the Supreme Court, which denied review, over the dissent of Justice Souter.

Following a full briefing on the merits of the State’s appeal of this Court’s limited 2006 injunction, oral argument in the Fifth Circuit was held on December 4, 2007. At oral argument, counsel for the State Defendants for the first time suggested 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

⁵ In addition to granting Plaintiffs’ motion for a preliminary injunction in part, this Court ruled on aspects of the State’s motion to dismiss necessary to the disposition of the Court’s injunctive order. The Court granted in part the State’s motion to dismiss the State as a Defendant, determining it was immune from suit only on the constitutional claims. The Court also stated that it had subject matter jurisdiction over Plaintiffs’ constitutional and Voting Rights Act claims, although it relied only on the constitutional right to vote claim as a basis for granting the injunction. Finally, the Court rejected the State’s motion to dismiss or transfer for lack of venue based on *Heck v. Humphrey*, 512 U.S. 477 (1994), concluding that *Heck* did not bar the claims of Plaintiffs Ray and Johnson or warrant transfer.

court of appeals that “the Secretary of State intended to modify the ballot envelope instructions and carrier envelope[.]” App. Ex. 1 (State’s 12/13/07 letter to the Fifth Circuit).⁶ The State’s proposed changes to the carrier envelope (the envelope used for sending mail-in ballots to election officials) were two-fold. A warning would be placed on the carrier envelope stating that “knowingly possessing another person’s ballot or carrier envelope may be a crime unless you provide your signature, printed name, and address.” *Id.* at 2.⁷ Second, on the back of the carrier envelope, where the envelope contains a place for the signatures of witnesses or assistants, there would be placed two hash marks to provide those mailing a ballot for another with a place to sign the envelope. The language underneath the signature line on the carrier envelope would be changed from “Printed names and Signatures of Assistants, Witnesses” to “Printed names and Signatures of all Assistants, Witnesses or Persons handling ballot or carrier envelope.”

The Plaintiffs submitted a response to the Fifth Circuit Court of Appeals concerning the State’s proposed changes. *See* App. Ex. 2. While the Plaintiffs welcomed the State’s effort to attempt to begin to rectify the failings of the Texas election law, Plaintiffs noted that the proposed changes not only failed to resolve Plaintiffs’ objections, but also did not address the basis for this Court’s narrow injunction of Section 86.006(f) of the Texas Election Code. For example, the Texas Election Code imposes criminal liability for mere possession of another’s mail-in ballot and does not exempt from liability persons who handled the ballot and who signed the ballot envelope. Thus, for example, a person who signs the ballot envelope as an assistor is not exempt from the criminal sanctions of the Texas Election Code, § 86.006(f); there are six

⁶ “App. Ex. ___” refers to those exhibits included in the appendices being filed simultaneously with this Motion. Plaintiffs also cite exhibits received into evidence at the 2006 hearing on plaintiffs’ motion for preliminary injunction, and those exhibits are cited herein as “PX___”. Under Fed R. Civ. P. 65(a)(2), evidence introduced at the preliminary injunction hearing is part of the record for trial and need not be reintroduced. *See John v. State of La. Bd. of Trustees for State Colleges and Universities, et. al.*, 757 F.2d 698, 705 (5th Cir. 1985)

⁷ The state also intended to include the warning in the instructions sent to each voter mailed a carrier envelope.

exemptions under 86.006(f) and signing as an assistor is not one of the six exemptions. Similarly, a person who incidentally handles the mail-in ballot of another with their permission, such as a prison guard or a nursing home attendant, but who does not actually mail the ballot, is criminally liable under the statute. So while the changes to the carrier envelope and the revised instructions proposed by the State provide some notice (albeit not entirely clear or accurate) to those mailing the ballot of another that they need to sign the carrier envelope and if they do so they will exempt themselves from prosecution, the changes made to the envelope (with the proposed warnings) do not alter the underlying problem with the statute: the criminalization of legitimate handling and possession of a ballot without any fraudulent activity whatsoever. Moreover, even the State's proposed warnings to voters are inadequate, because certain possession of another's ballot can never be cured by signing the carrier envelope (such as a nursing home attendant, or any person who consensually may handle another person's mail but does not actually mail the ballot for the voter).

The Fifth Circuit decided the appeal on January 9, 2008, and did not address the State's proposed changes to the carrier envelope or the revised instructions. Rather, in light of the changes to Texas election law that have occurred since the time of the 2006 injunction, the State's proposed changes to the carrier envelope and the Plaintiffs' opposition thereto, the Court of Appeals remanded the case to this Court for resolution of all issues in the first instance. Accordingly, the Court of Appeals vacated the injunction and remanded the case to this Court noting that "[i]n the light of the November 2008 elections, we are confident this action will be resolved well in advance of them."

On remand, an agreed-upon order was entered on February 1, 2008, which severed two of the claims in that complaint, Counts V and VI, which contained allegations of racial

discrimination by defendants. Those claims will be subject to further proceedings with discovery not commencing until after December 1, 2008. Trial of all remaining non-severed claims in the complaint is scheduled for May 29-30, 2008.

STATEMENT OF FACTS

A. Plaintiffs And Others Have A History Of Legitimate Efforts To Assist Texas Voters With Mail-In Balloting.

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. Tex. Elec. Code § 81.001 *et seq.* Texas law provides a statutory right to cast a mail-in ballot 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. *Id.* §§ 82.001-82.003. As the Secretary of State has recognized, casting a ballot by mail in Texas is synonymous with "exercis[ing] your right to vote." PX8. To vote by mail, an eligible registered voter "must make an application for an early voting ballot to be voted by mail." *Id.* § 84.001(a). After receiving a mail-in ballot, a voter must "mark a ballot voted by mail in accordance with the instructions on the ballot envelope," *id.* § 86.005(a), and then "place it in the official ballot envelope and then seal the ballot envelope, place the ballot envelope in the official carrier envelope and then seal the carrier envelope, and sign the certificate on the carrier envelope," *id.* § 86.005(c). The marked ballot "must be returned to the early voting clerk in the official carrier envelope." *Id.* § 86.006(a).

Because many voters who vote by mail-in ballot are elderly or physically impaired, there is a longstanding practice in Texas – by Plaintiffs and others similarly situated – of providing assistance to mail-in voters. Tr. 61-65,72-76,86- 87⁸; PX14 at 10-17; PX15 at 8-14; 1.R.75-76¶2. The Director of Elections at the Secretary of State's office, Ann McGeehan, testified that she had

⁸ "Tr. __" references the transcript from the October 30, 2006 hearing on plaintiffs' motion for preliminary injunction. "R." references the Record on Appeal.

anecdotal information that it was an important part of the get-out-the-vote effort in the black community in Texas for elderly and disabled voters to be assisted by their neighbors and friends. App. Ex. 3 at 17. Efforts to assist mail-in voters have been conducted by both major political parties and other civic organizations. Tr. 86-87; PX14 at 10-17; 1.R.78¶8. 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. Tr.86-87; 1.R.75-76¶2. In 2006, the Party expected to spend approximately \$100,000 in efforts to assist mail-in voters. 1.R.76¶3. The Party has also implemented efforts to increase voter turnout in minority communities, 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. Assisting voters with mail-in voting takes many forms. For example, the efforts of Plaintiff Texas Democratic Party have included: providing assistance to voters in completing applications for mail-in ballots, 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 voters who are blind or cannot read or write); and physically placing sealed ballots in the mail or otherwise delivering the ballots to election officials. Tr.61-65,72-76, 86-87; PX14 at 10-17; PX15 at 8-14; 1.R.75¶2.

Some voters need assistance for the entire application and voting process. 1.R.76¶4. In all cases, the assistor merely provides whatever help the voter requests. 1.R.77¶6. Where the assistance needed 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. In many cases, an assistor is specifically asked to take the voter’s completed ballot, which must be sealed in the carrier envelope, and mail that ballot for the voter. Tr.63-64,75,86-

87,122-23; PX14 at 13-17; PX15¶¶11-12; 1.R.77-78¶¶5,7. Because it was often infeasible or inefficient to immediately deposit a completed ballot in the mail or with a common carrier, the Party's practice before 2003 was to allow assistants to accumulate completed ballots during the day, and, at the end of the day, a Party representative – not necessarily the assistant who interacted with the voter – would deliver the ballots to the clerk. Tr.86-87; 1.R.77-78¶7. In past years, a significant number of individuals working on behalf of campaigns and the Democratic Party at the county level have been involved in assisting mail-in voters, including mailing voters' ballots. Tr.61-65,72-76,86-87; PX14 at 10-17; PX15 at 8-14; 1.R.75-76¶2. Mail-in voters regularly inform the Party that they appreciate this assistance. Tr.65; 1.R.76¶3. Absent such efforts by the Party and the individual Plaintiffs to assist mail-in voters, many potential mailing voters would find it difficult or impossible to receive a mail-in ballot or properly complete and cast a ballot. Tr.64,68,86-87,123; PX14 at 17; PX15 at 12; 1.R.78¶8.

The need for such assistance is exemplified by late Plaintiff Parthenia McDonald, who at the time of her videotaped deposition in 2006, was a 78-years old, homebound, and severely physically handicapped woman living in Fort Worth, and who required assistance to receive and cast her mail-in ballot. Tr.119-23. Plaintiff Reuben Robison is another severely handicapped voter who requires assistance to cast his ballot. Mr. Robison, a paralyzed veteran who resides in Texarkana, is wheel-chair bound and has suffered several strokes. App. Ex 4 at 5. Because he cannot use his right hand, he needs assistance in placing a ballot in the carrier envelope (*id.* at pp. 10-11), and it is "hard" for him to mail his ballot. *Id.* at 12. If Plaintiff Willie Ray or her granddaughter (Plaintiff Jamillah Johnson) were not willing to help him vote, he probably would not get to vote because he does not know anyone else who could help him. *Id.*, at 13, 18. Eddie Buchanan, another stroke victim who is severely disabled and lives in Karnack, also requires

assistance. He 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 mailing a ballot, filling out the ballot, and applying for the ballot. App. Ex. 5 at 15. Buchanan testified that if he could not receive assistance in mailing his ballot, he would not be able to vote. *Id.* at 8.

B. Texas Voter Fraud Law And The Challenged Provisions.

Texas law – like the law of other states – has long provided for criminal and other penalties to combat voter fraud. In provisions applicable to both in-person and mail-in voting, Texas criminalizes “illegal voting” – *i.e.*, voting by ineligible individuals, multiple voting, and voting while impersonating another person. Tex. Elec. Code § 64.012. Texas law also makes it an offense to provide “unlawful assistance” to voters in completing their in-person or mail-in ballots – *i.e.*, by assisting ineligible voters, by acting against the will of the voter, or by suggesting to the voter how to vote. *Id.* §§ 64.036(a) (1)-(3). Texas also criminalizes the provision of false information on an application for a mail-in ballot. *Id.* § 84.0041.

Despite these broad provisions empowering Texas officials to combat actual voter fraud, the Texas Legislature amended the Texas Election Code in 2003 to create a series of novel, vague and broad additional prohibitions related to mail-in voting. *See* House Bill 54, 2003 Tex. Gen. Laws 393 (78th Legislature 2003). At the time that the Legislature considered House Bill 54, it was in the midst of one of the fiercest battles in Texas legislative history – the mid-decade redistricting of the Texas congressional districts. PX25-26¶2. Accordingly, the Bill proceeded through the Legislature quickly and without extensive debate. PX25-26¶2. As several legislators explain, “the hasty process and the vague wording of some of the provisions of House Bill 54 may have left it unclear how those provisions would be applied in practice.” PX25-26¶3.

As the legislative hearings concerning these provisions 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.*, PX21-24¶5, PX25-26¶4. Many witnesses simply assumed that such fraud was a problem. For example, Representative Wolens, the Bill’s sponsor, indicated that he was acting on unproven suspicions that fraud had occurred in elections involving him and his wife and newspaper accounts alleging voter fraud. 3.R.660-61. As he 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”). Ultimately, Representative Wolens sought to stop what he described as “pushy” people, R.3.777, not “vote harvesters,” proof of which did not exist.⁹

Throughout the proceedings, 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. PX22¶4; PX25¶3; PX26¶3. In contrast, Democrats opposing the Bill feared that its provisions, including Texas Election Code §86.006, would “have a chilling effect on [their]

⁹ “Vote harvesting” is not a recognized term under Texas law, but, according to a news article quoting Representative Wolens, “vote harvesting” occurs when “the mail-in ballots of elderly or other vulnerable citizens are illegally collected by campaign operatives.” 2.R.501.

constituents' [right] to vote in cases where voter fraud had not and would not be an issue.”

PX24¶5; *see* PX21¶4; PX23¶4.

The 2003 legislation added several restrictions whose primary effect is to deter legitimate and constitutionally protected voting and expressive activity:

Section 64.036(a)(4): The 2003 legislation added a new, broad category of “unlawful assistance,” providing for criminal penalties if an individual “provides assistance to a voter who has not requested assistance or selected the person to assist the voter.” Tex. Elec. Code §64.036(a)(4).

Section 84.003(b): The 2003 legislation created a restriction of unclear and potentially broad scope, establishing penalties for anyone who “in the presence of an applicant *otherwise assists* an applicant in completing an early voting ballot application” without following the documentation procedure for witnesses. Tex. Elec. Code § 84.003(b) (emphasis added). The term “otherwise assists” in this provision is undefined, and to make matters even more confusing for voters and assistors, the specific definition of “assisting a voter” set forth in the 2003 legislation does *not* apply to Section 84.003(b). *See id.* § 64.0321.

Section 84.004: The 2003 legislation altered the title of this provision, which criminalized witnessing more than one mail- in ballot application in the same election, even if all the required information for a witness is provided. Tex. Elec. Code § 84.004.

Section 86.0051: Section 86.0051 establishes criminal penalties for legitimate assistance provided to voters related to the “carrier envelope” that holds a mail-in ballot. Relevant here, Section 86.0051 provides that it is a criminal offense if “[a] person other than the voter . . . deposits the carrier envelope in the mail or with a common or contract carrier” without “provid[ing] the person’s signature, printed name, and residence address on the reverse side of the envelope.” Tex. Elec. Code §§ 86.0051(b), (c). It is no defense “that the voter voluntarily gave another person possession of the voter’s carrier envelope.” *Id.* § 86.0051(c), although there is a narrow exception for immediate family members and individuals registered to vote at the same address, *id.* § 86.0051(e).

Section 86.006: The 2003 legislation added Sections 86.006(f) and (g) to the Texas Election Code, criminalizing the mere *possession* of another’s mail-in ballot or carrier envelope:

(f) A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, this subsection does not apply to a person who, on the

date of the offense, was:

(1) related to the voter within the second degree of affinity or the third degree of consanguinity, as determined under Subsection B, chapter 573, Government Code;

(2) registered to vote at the same address as the voter;

(3) an early voting clerk or a deputy early voting clerk;

(4) a person who possesses the carrier envelope in order to deposit the envelope in the mail or with a common or contract carrier and who provides the information required by Section 86.0051(b) in accordance with that section;

(5) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or

(6) a common or contract carrier working in the normal course of the carrier's authorized duties if the official ballot is sealed in an official carrier envelope that is accompanied by an individual delivery receipt for that particular carrier envelope.¹⁰

(g) An offense under subsection (f) is:

(1) a Class B misdemeanor if the person possesses at least one but fewer than 10 ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a state jail felony;

(2) a class A misdemeanor if the person possesses at least 10 but fewer than 20 ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a felony of the third degree; or

(3) a state jail felony if the person possesses 20 or more ballots or carrier envelopes unless the person possesses the ballots or carrier envelopes without the consent of the voters, in which event the offense is a felony of the second degree.

Tex. Elec. Code §§ 86.006(f), (g).

¹⁰ In 2007, the Texas Legislature amended Section 86.006(f) of Texas Election Code to provide for these exemptions. Prior to 2007, these six categories merely provided a person with an affirmative defense to prosecution. Although that is a positive step, such amendment would leave Section 86.006(f) constitutionally defective, because the statute contains no exception for one who merely possesses the ballot of another voter with that voter's consent and does not mail the ballot.

Thus, Section 86.006(f) and (g) provide that it is a class B misdemeanor—subject to up to 180 days in jail and up to a \$2,000 fine, *see* Tex. Penal Code § 12.22—to possess even just one mail-in ballot of another voter. A person possessing such a ballot may escape liability only if he or she falls within one of the six narrow exemptions provided by Section 86.006(f). Moreover, by its plain terms, Section 86.006(f) applies and provides no potential exemption from liability for individuals who, for example: (1) provide lawful assistance to voters, provide identifying information on the carrier envelopes, but do not mail the voters’ ballots, and (2) incidentally or consensually possess but do not mail another’s ballot.

Violations of Section 86.006 result in the complete denial of voters’ right to vote:

“[a] ballot returned in violation of this section may not be counted.” *Id.* § 86.006(h).¹¹

C. The Challenged Provisions Have Been Used To Target Legitimate Activities Of Disfavored Groups, Creating A Chilling Effect On Protected Expression And Association.

Defendants have enforced the challenged provisions – particularly Section 86.006(f) – in a discriminatory manner, targeting Democrats and members of minority groups for prosecution. Indeed, through public statements, website postings, and testimony before legislative oversight committees, the Attorney General has acknowledged that all individuals prosecuted under the 2003 legislation were Democrats. 1.R.81¶14. In addition, it appears that all but one of those prosecuted was African-American or Hispanic. 1.R.21¶30. In contrast, the Attorney General’s office has refused to properly investigate 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.

This selective enforcement of the challenged provisions is unsurprising, given that the State’s own training materials for local election officials encourage targeting enforcement on a racially discriminatory basis by making the unfounded suggestion that a correlation exists

¹¹ Newly amended Section 86.006 also restricts political parties’ ability to return carrier envelopes for voters, prohibiting return from any “office” of a political party, *id.* § 86.006(d)(1), and requiring that “[c]arrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk.” *Id.* § 86.006(e). Section 86.006 also now provides that a carrier envelope may be delivered to officials only by mail or common carrier, and not methods (e.g., hand-delivery) traditionally used by political parties. *Id.* § 86.006(a).

between membership in a minority group and engaging in voter fraud. For example, a PowerPoint presentation prepared by the office of Attorney General Abbott contains a photograph of African-American voters standing in line to vote to emphasize that “all laws apply” to early voting. PX10 at 25. That same presentation uses a graphic of the “sickle cell stamp” – a postage stamp used widely by African Americans, whom sickle cell disease particularly affects – to exemplify “unique stamps” associated with voter fraud, despite no legitimate basis for making that connection. PX10 at 61.5.

In early 2006, Plaintiffs Ray and Johnson, both of whom are African-American, were indicted by State officials for possessing and mailing ballots for voters who required assistance with their mail-in ballots, and they pleaded guilty to violating Tex. Elec. Code § 86.006(f). PX1. There was no allegation or proof of any actual voter fraud. Tr.78-79; PX1. The Attorney General widely publicized these indictments in 2006. PX9, PX11. These two Plaintiffs were never assessed a finding of guilt, but pursuant to a plea bargain, received a deferred adjudication of the alleged violations. Plaintiffs Meeks and Minneweather, both also African-American, were contacted by state officials concerning their involvement in efforts to assist mail-in voters, leading them to believe that they may be subjects of an investigation. Tr.65-66; PX15 at 16-18.

As the early and mail-in voting period neared for the November 6, 2006 election, the chilling effect of the challenged provisions materialized acutely, as 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. Tr.66,88; PX14 at 23-31; PX15 at 17-18; 1.R.78-81,82-83¶¶10-14,17. Democratic campaign official Jane Hamilton testified about how Defendant Abbott’s investigations and prosecutions of African-Americans was having, in her words, “a chilling effect”:

[T]he elderly who need help [with voting] are hearing the rumors, the phoners [in the phone banks] are hearing the rumors. This is all—these are all the same people who are all hearing that people are going to jail, hearing that there was a private investigator that peeked into someone’s window. Next thing you know, she has a stroke. Next thing you know she is in a nursing home. Next thing you know she is not the same person that she was years ago. We all hear about these things, and everyone has been affected by it.

* * *

It’s a chilling effect. I mean, that’s what it is. That’s the best way to describe it.

App. Ex. 6 at 31.

Similarly, Plaintiff Rebecca Minneweather also testified about “a very chilling effect for me[.]” App. Ex. 7 at 10. 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. *Id.* at 4. Ms. Minneweather’s testimony underscores the personal intimidating effect that the State’s enforcement efforts have had on her:

At that time when they did the investigation or interrogation or however you want to put it, because it was very intimidat[ing], it was a very chilling effect for the mere fact that it was very stressful. I didn’t appreciate them calling me a criminal in the newspaper and judge me because you [the Texas Attorney General’s office] didn’t know me, and I didn’t appreciate that. And that really hurt my character.

....And it really upset me that I didn’t get a chance to spend any more time with my senior citizens because, again, I render a service to the public, and that’s what it’s all about. And for you to come in and suggest the things that have been suggested that really hurt my feelings as an individual, and I feel like you need to know that.

And you also interrogated a lot of the senior citizens to the point they don’t want to have anything to do with anybody else because they are afraid because of how y’all handled the situation.

App. Ex.7 at 10. 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. App. 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.

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. Tr.66,88; PX14 at 23-31; PX15 at 17-18; 78-71,82-83¶¶10-14,17. This confusion and fear was exacerbated by the fact that all but one of the State’s voting prosecutions since 2003 had been targeted at black or Hispanic individuals,¹³ and all were Democrats, 1.R.21¶30; 1.R.81¶14,¹⁴ 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. In particular, Section 86.006(f), which criminalizes the mere possession of another’s mail-in ballot, had a chilling effect on those who sought to assist mail-in voters. Although the Section provided for several affirmative defenses (now exemptions) to prosecution, including for an individual who deposits the envelope in the mail and provides

¹³ This Court has severed out the Plaintiffs’ claims regarding racially discriminatory implementation and enforcement of the challenged provisions. Nevertheless, the evidence already in the record regarding this claim (offered at the 2006 preliminary injunction hearing) is relevant to show that the challenged provisions are unnecessary to combat actual voter fraud, as well as vague and substantially overbroad, so as to provide an extremely broad basis to arbitrary and unfairly enforce the provisions against disfavored groups.

¹⁴ An updated chart prepared by the Texas Attorney General of those being subjected to prosecution for violations of the Texas Election Code can be found at App. Ex. 8. Because this document has been marked confidential by Defendants, this exhibit will be filed under seal pursuant to Local Rule CV-5.

¹⁶ Notably, the carrier envelope presently used by the State does not contain language indicating that anyone who possesses the envelope – regardless whether they deposit it in the mail – must provide their identifying information. PX2. The envelope also contains no separate signature area for individuals *mailing* ballots for voters – as opposed to individuals *assisting* voters in completing or marking the ballot. PX2. In official correspondence to mail-in voters, the Defendant Secretary of State similarly failed to advise voters that possession of another’s ballot is a crime and that identifying information must be provided to avoid prosecution, not only by those who assist but also by those simply mailing ballots. PX8.

identifying information, there was no defense for an individual who merely possessed another's carrier envelope with the voter's consent. Tex. Elec. Code § 86.006(f).¹⁶

Thus, 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. Tr.66,88; PX14 at 23-24,26-31; PX15 at 17-18; 1.R.78-80¶¶10-11,13. Accordingly, the Party foresaw a substantial decline in such assistance as compared to previous years. Tr.88; 1.R.77-78,80-81¶¶7,13. 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. 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 adequately respond, leaving such matters to local election administrators and individual citizens. Tr.88; 1.R.82-83¶¶17. App. Ex. 18.

Absent assistance from Plaintiffs and others like them who wish to assist mail-in voters, many elderly and disabled voters were not able to receive and cast mail-in ballots in the 2006 election, resulting in lost votes. Tr.68,81; PX14 at 23-24,31; PX15 at 25-26; 1.R.78-81¶¶8,13. 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. App. 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. Even for those mail-in voters able to cast ballots, not all were able to rely on the assistance of the person of their choosing. Tr.125-26; PX15 at 17-19.

D. This Court's 2006 Injunction Order

This Court's October 31, 2006 injunction was based, in part, on testimony from several witnesses describing the chilling effect created by Section 86.006(f) on voting and voter assistance. This Court also received substantial documentary evidence, including confusing materials from State officials concerning Section 86.006(f). PX8-10. Ruben Hernandez, the Executive Director of the Plaintiff Texas Democratic Party, testified about the devastating effect that Section 86.006's broad prohibition was having on get-out-the-vote efforts. Tr.87-89; 1.R.78-83¶¶10-14,17. Several of the Plaintiffs testified live (Ray) or via videotaped deposition (Minneweather, Meeks and McDonald) to explain how Section 86.006 restricted the provision of needed assistance to consenting voters. Tr.65-70,81,122-26; PX15 at 17-20. Campaign manager and Democratic Party activist Jane Hamilton further explained by videotaped deposition the chilling effect created by Section 86.006. PX14at24-25. Based upon this evidence, this Court made the considered factual finding that "§ 86.006 prevents [Plaintiffs] and dissuades others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout." 4.R.852¶27; 3.R.E.852¶27. This finding has been further confirmed by the additional evidence developed in discovery, which is cited throughout this brief and included in the attached exhibits.

Based on its findings, this Court issued a narrow preliminary injunction against certain enforcement of Sections 86.006(f) and (h). The Court ruled that, pursuant to the First and Fourteenth Amendments, which protect the fundamental right to vote, the State is barred from

enforcing Sections 86.006(f) and (h) “in circumstances in which a person, other than the voter, has merely possessed the official ballot or official carrier envelope and such possession is with the actual consent of the voter.” 4.R.843; 2.R.E.843. It is important to note that the statute provides no exception or affirmative defense in such a situation. 4.R.856-57¶¶17-20; 3.R.E.856-57¶¶17- 20. However, this Court also stated: “Nothing in this order should be read to enjoin the defendants from enforcing the provisions of Tex. Elec. Code § 86.006(f) or (h) under any other circumstances.” 4.R.843; 2.R.E.843. In particular, the State was not prevented “from enforcing Tex. Elec. Code § 86.0051 under the circumstances in which a person, other than the voter, deposits the carrier envelope in the mail or with a common or contract carrier and does not provide the person’s signature, printed name, and residence address on the reverse side of the envelope.” 4.R.843-44; 2.R.E.843-44.

As a result of the Court’s injunction, Counsel for Plaintiffs prepared a “Memorandum to Interested Parties,” which was widely distributed on November 1, 2006 to over 500 leaders in the state Democratic Party, including Democratic county chairs and candidates, and which accurately summarized the injunction. *See* Ex. 3 to Plaintiffs’ Opp. to 5th Cir. Stay Mot. (filed Nov. 2, 2006).

E. The Parties.

Plaintiffs in this action include the Texas Democratic Party, an organization that has long engaged in legitimate efforts to assist mail-in voters (particularly disabled and elderly voters) exercise their right to vote, as well as several voters (Plaintiffs Ray, Johnson, Meeks, and Minneweather) who assisted disabled and elderly voters in the past and wish to continue assisting them in the future. Plaintiff Reuben Robinson is a disabled veteran who is a homebound

voter; Plaintiff Robinson depends upon the assistance of others to apply for and cast his mail-in ballot.

Defendants are the State of Texas, the Texas Attorney General, Greg Abbott, and the Texas Secretary of State, Phil Wilson.

COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS

Plaintiffs dispute several of the State's alleged undisputed material facts (at Defendants' Motion for Summary Judgment at 27-29) as either incorrect, incomplete, misleading, irrelevant or a combination thereof.

Plaintiffs dispute proposed fact three because there is evidence of voters who have not voted due to the enactment or enforcement of the challenged provisions. *See, e.g.*, App. Ex. 9 at 15-20 (Jamillah Johnson Deposition), App. Ex. 22 at 14 (Willie Ray Deposition); App. Ex. 21 at 21 (Dorothy Dean Deposition), and App. Ex. 6 at 18-25 (Jane Hamilton Deposition). Moreover, 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). App. Ex.10.

Plaintiffs dispute proposed fact four because there is evidence that political activists have discontinued assisting voters with mail-in ballots due to confusion about the challenged provisions. 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. This chilling effect has been due both to confusion about the challenged provision and fear of arbitrary and discriminatory enforcement by the State. *See, e.g.*,

App. Ex. 7 (Rebecca Minneweather Deposition); App. Ex. 6 (Jane Hamilton Deposition)

Plaintiffs dispute proposed fact five because Plaintiffs Ray and Johnson have not fully resumed the political and associational activities that they undertook prior to being investigated and prosecuted by the State for the mere act of consensually possessing another's mail-in ballot. Moreover, witnesses have testified that the challenged provisions and the State's enforcement thereof have curtailed their ability to help voters in need and organize other helpers. *See* App. Ex. 6 at 38-39 (Jane Hamilton Deposition), App. Ex. 22 at 15-19 (Deposition of Willie Ray) and App. Ex. 21 at 18 (Dorothy Dean Deposition). Furthermore, the Texas Democratic Party's Political Director, Ken Bailey, identified a number of Party activists who discontinued providing assistance to voters who wished to vote by mail because they were intimidated and confused by the 2003 amendments to the law and the Attorney General's prosecutions. App. Ex. 15 at 17-18, 29-30 (Ken Bailey Deposition).

Plaintiffs dispute proposed fact six because Plaintiffs Ray and Johnson do have a criminal record; they were prosecuted, pleaded guilty, paid fines, and served sentences of probation. Indeed, the State has argued throughout this proceeding (including in its summary judgment motion) that because of their criminal records, Plaintiffs Ray and Johnson are barred from bringing suit under *Heck v. Humphrey*, 512 U.S. 477 (1994). Thus, not only is this proposed fact incorrect, but the State should be estopped from taking this factual position, which is contrary to its argument that Plaintiffs Ray and Johnson are convicted criminals who have no right to bring this suit.

Plaintiffs dispute proposed fact seven because it is misleading. Plaintiffs Meeks and Minneweather were not merely questioned by investigators from the Attorney General's Office – they were interrogated, harassed, and intimidated.

Plaintiffs dispute proposed fact eight because it is not clear that the investigations of Plaintiffs Meeks and Minneweather were closed. Neither has received notice to that effect.

Plaintiffs dispute proposed fact ten because Plaintiff Reuben Robinson has been interrogated by investigators from the Attorney General's Office and has thus been part of the State's investigative efforts related to the challenged provisions.

COUNTERSTATEMENT OF ISSUES TO BE DECIDED

There are five substantive causes of action (fundamental right to vote, First Amendment, vagueness, due process and Section 208) and five challenged provisions. The Court must assess all of the challenged provisions (separately and together) under all of the substantive causes of action, both on a facial and as-applied basis, in order to grant summary judgment to the State.

Plaintiffs' vagueness and overbreadth challenge is not only to 86.006(f), but to all of the challenged provisions.

ARGUMENT

I. THE STATE IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FUNDAMENTAL RIGHT TO VOTE CLAIM.

A. The State Does Not Accurately Describe Plaintiffs' Fundamental Right To Vote Claim Or The Controlling Standard Of Review.

Count I of the Complaint alleges that the challenged provisions are unconstitutional because they violate the fundamental right to vote guaranteed by the First and Fourteenth Amendments. *See, e.g., Crawford v. Marion County Elec. 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)).

The State erroneously suggests that this case does not implicate the fundamental right to vote because it involves mail-in balloting. *E.g.*, Defendants’ Motion at 41. Plaintiffs respectfully submit that this argument is incorrect.¹⁷ To begin with, the Secretary of State has recognized in his official proclamations that casting a ballot by mail in Texas is synonymous

¹⁷ 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.

with “exercis[ing] your right to vote.” PX8. The State rests its argument on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), *see* Defendants’ Motion at 41. 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 cast an absentee ballot, courts must ensure that such restrictions are not arbitrary, unjustified, or unduly onerous.

The State also erroneously claims that “[t]o succeed on their facial challenge, Plaintiffs

must ““establish that no set of circumstances exists under which the [statute] would be valid.”” Defendants’ 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)).

Moreover, 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.* In stark contrast to both of these cases, here, the challenged provisions have been in effect and enforced for several years, and Plaintiffs have thus been able to develop evidence showing the burdens created by the provisions, their vagueness, and the State’s enforcement. 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.

B. The Material Factual Disputes Concerning Plaintiffs’ Fundamental Right To Vote Claim, As Well As The *Burdick-Anderson* Balancing, Must Be Resolved By The Court At Trial.

The State is not entitled to summary judgment on Plaintiffs’ fundamental right to vote claim, evaluated under these controlling standards. Plaintiffs have developed evidence supporting their allegations in the Complaint and demonstrating that the burdens created by the challenged provisions and their enforcement do not justify those provisions, despite the State’s obviously important interest in preventing voting fraud. It is the Court’s role, after hearing all relevant evidence at trial, to “make the ‘hard judgment’ that our adversary system demands.” *Crawford*, 2008 U.S. LEXIS 3856, at *14.

Notably, since the inception of this lawsuit, the State has recognized that there are constitutional problems with the challenged provisions. 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, and even more significantly, the State has recently proposed revising its carrier envelope, mail-in ballot envelope, and related instructions, in order to provide what the State attempts to clarify as “more clear” guidance to voters and helpers about the scope of the challenged provisions. Defendants’ Motion at 23. Although the State now argues that the proposed changes were not legally required, its submission to the United States Department of Justice repeatedly makes clear that the proposed changes were “necessitated” by Plaintiffs’ claims in this litigation. App. Ex. 11 at 1 (Secretary

of State's Submission to U.S. Department of Justice, March 27, 2008).¹⁸ Although the State's proposed revisions do not cure the constitutional problems with Texas Election Code Sections 86.0051 and 86.006, they do indicate that there are significant factual issues at stake concerning both liability and remedies. These issues will need to be carefully weighed by the Court based on all the evidence at trial.¹⁹

In arguing for summary judgment, the State misrepresents the existing evidence regarding the burdens on voters and helpers, making the erroneous and unsupported claim that “[t]here is no evidence of a chill on constitutionally protected activities.” Defendants’ Motion at 40; *see id.* at 41-43. Plaintiffs’ evidence establishes burdens on both voters and helpers. Some individuals have stopped voting or helping altogether. App. Ex. 7 at 4 and 10 (Rebecca Minneweather Deposition); App. Ex. 6 at 23, 39 (Jane Hamilton Deposition). Others have sharply curtailed their activities due to the provisions’ burdens, vagueness and enforcement. *See* App. Ex. 6 at 22-23, 38-39 (Jane Hamilton Deposition), App. Ex. 22 at 15-19 (Deposition of Willie Ray Deposition); App. Ex. 6 at 4 (Rebecca Minneweather Deposition), and App. Ex. 21 at 18 (Dorothy Dean Deposition). And it certainly should not be held against Plaintiffs that the severely disabled Gloria Meeks and Reuben Robinson, each of whom has suffered strokes, have been able to cast their votes in recent elections, despite that the challenged provisions unduly and unfairly burden the assistance that they may receive, and despite that those provisions threaten to prevent them and other elderly and disabled voters from receiving needed assistance altogether in the future.

¹⁸ The State’s submission to DOJ also noted that the proposed changes were made “as a result of [this] litigation” (App. Ex. 11 at 3). On April 3 and 18, 2008, the State supplemented its submission to DOJ, noting in both instances that the proposed changes to the carrier envelope and the instructions to voters were “necessitated” by this litigation.

¹⁹ For example, regardless whether the carrier envelope notifies all consensual possessors to provide identifying information (and the State’s proposed revisions still do not provide that notification), the statute does not exempt all such individuals from prosecution. Rather, the statute only exempts such individuals from prosecution if they also mail the envelope. *See* Tex. Elec. Code § 86.006(f). That deficiency can only be remedied by enjoining the vastly overbroad statute, just as the Court did at the preliminary injunction phase of the case.

With respect to Section 86.006(f) in particular, the State misrepresents the scope of the provision, erroneously suggesting that any person who knowingly but consensually possesses another's mail-in ballot may avoid liability by providing identifying information on the carrier envelope. Defendants' Motion at 37, 44. To the contrary, Section 86.006(f) provides *no basis* for exempting from liability any and all consensual possessors who provide identifying information. Rather, under the plain terms of the statute, an individual must fall within one of the six exemption categories in order to be authorized to provide identifying information. *See* Tex. Elec. Code § 86.006(f). Plaintiffs contend that Section 86.006(f) imposes an undue burden as to all mail-in voters and helpers, but Section 86.006(f) provides a particularly severe burden on consensual possessors who do not "possess[] the carrier envelope *in order to deposit the envelope in the mail,*" Tex. Elec. Code § 86.006(f) (emphasis added), because such possessors have *no* statutory avenue for exempting themselves from criminal liability. Such individuals include nursing home personnel whose testimony Plaintiffs will present at trial. *See also* App. Ex. 6 at 24 (Jane Hamilton Deposition).

It is noteworthy that the State concedes that liability under Section 86.006(f) need not be linked to any actual showing of attempted fraud, coercion or other wrongful conduct. Defendants' Motion at 37. Accordingly, the State no longer justifies this provision as simply a tool for fighting fraud, but now also contends that the provision is needed to ensure "prompt mailing of the ballot" and "to trace missing, lost or stolen ballots." *Id.* Of course, there is no evidence whatsoever to support the State's present suggestion that there was any problem prior to the 2003 Amendments with delays in mailing or with missing, lost or stolen ballots. Rather, as the Court has previously found, the asserted state interest supporting the 2003 amendments was *combating actual voting fraud*. Conclusions of Law ¶ 14. It is thus highly relevant that the

great majority, if not all, of the State's prosecutions under Section 86.006(f) to date have involved no corresponding allegations or proof of actual voter fraud.

The State's premature *Burdick-Anderson* balancing also ignores that other provisions of the Texas Election Code 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 provisions. 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 broad terms of the challenged provisions are not necessary to prosecute fraud related to mail-in balloting, because many pre-existing provisions of Texas law prohibit voters from exercising undue influence on mail-in voters and engaging in other forms of mail-in ballot fraud. *See, e.g.*, Tex. Elec. Code §§ 64.012, 64.036(1)-(3), 84.0041.

Although the proper time for the Court to weigh the burdens and State interests is after the evidence has been submitted at trial, Plaintiffs note that the State's proffered interest in "ensuring that all eligible votes are counted," Defendants' Motion at 36, does not support the State's position, and, if anything, cuts against it. A ballot returned in violation of the challenged

provisions *may not be counted*. Tex. Elec. Code § 86.006(h).²⁰ Moreover, as Plaintiffs' evidence establishes, the challenged provisions and their enforcement have 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. Rather, the State offers mere speculation that Section 86.006(f) and the other challenged provisions are necessary to ensure that mail-in ballots are not "lost, stolen, misplaced, destroyed, or forgotten during the time between when the voter marks the ballot and the ballot is mailed." Defendants' Motion at 36. The State's dearth of evidence to support this assertion does not support its theoretical interest in ensuring that all votes are counted. *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)).

Finally, the Court should reject the State's erroneous claim that it is entitled to summary judgment because the challenged provisions are allegedly "consonant with laws throughout the nation." Defendants' Motion at 38-40. It is true and unsurprising that many states have promulgated regulations concerning mail-in balloting, including with respect to who may help voters receive and return ballots. What is remarkable about Section 86.006(f) in particular is that

²⁰ The State now appears to make the strained argument that the "may" language in this provision is not mandatory and thus somehow authorizes election officials to count mail-in ballots regardless whether they are returned in violation of Section 86.006(f). Defendants' Motion at 38. Section 86.006(h) makes clear that election officials are not to count ballots returned in violation of 86.006 and sets forth a procedure for processing such ballots. There is simply no basis for the State's erroneous suggestion that election officials are not complying with the mandate of Section 86.006(h) to not count ballots returned in violation of Section 86.006.

– unlike nearly every other state statute cited by the State in its brief – Texas has attempted to subject nearly *all* consensual possession of another’s mail-in ballot or carrier envelope to severe criminal penalties. Unlike nearly all of the other state laws cited, Section 86.006(f): (1) applies to possession in all contexts (not just possession that is incidental to the more involved tasks of assisting, mailing, or personal delivery of a ballot), (2) provides for substantial criminal liability; (3) is not limited to situations involving fraud, tampering, or otherwise nefarious conduct; and (4) applies to all carrier envelopes and ballots, whether unmarked or marked. The State claims that, of the 30 states that allegedly “significantly restrict” the possession of mail-in ballots, “many of them make it a criminal offense to unlawfully possess a mail-in ballot and provide penalties for a violation.” Defendants’ Motion at 39. The State’s citations, *see id.* at 39-40 n.14, do not support this bold and inaccurate claim, as explained here by way of example only. Some of the State’s citations do not even concern criminal prohibitions. *See, e.g.*, Conn. Gen. Stat. Ann. § 9-140b(d); Ga. Code Ann. § 21-2-385(a). Other statutes cited by the State as supposedly applying to mere possession pertain only to situations involving nefarious activity beyond mere possession, such as ballot tampering. *See, e.g.*, Me. Rev. Stat. Ann. tit. 21-A, § 791; Mass. Gen. Laws ch. 54, § 27; Minn. Stat. § 203B.08. Several of the provisions cited by the State do not broadly outlaw possession, but rather more narrowly regulate certain activities related to mail-in balloting, such as providing actual voting assistance, mailing, or personal delivery. *See, e.g.*, Md. Code Ann., Elec. Law §§ 9-307, 9-308, 9-312; Nev. Rev. Stat. Ann. § 293.330(4); S.C. Code Ann. §§ 7-15-385, 7-25-190; Wash. Rev. Code Ann. §§ 29A.40.080, 29A.84.680. And some of the statutory prohibitions cited by the State apply, at most, to election officials, not individuals helping mail-in voters. *See, e.g.*, Mont. Code Ann. §§ 13-13-214, 13-35-103.

In sum, contrary to the erroneous impression that the State seeks to create, Texas’

statutory criminalization of nearly all consensual possession makes Texas one of the most restrictive jurisdictions concerning assistance in mail-in balloting. That fact weighs heavily in favor of Plaintiffs' fundamental right to vote challenge to Section 86.006(f), both by itself and in conjunction with all of the other unduly restrictive challenged provisions.

II. THE STATE IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FIRST AMENDMENT CLAIM.

A. Plaintiffs' First Amendment Claim Is Not Controlled By The Fundamental Right To Vote Claim Standards In *Crawford*.

In Count II, Plaintiffs allege that the challenged provisions violate the First Amendment because they impermissibly restrict core political speech and association and because they do 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).

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*. *See* Defendants' Motion at 30, 33. That is incorrect. Unlike the laws at issue in *Crawford* and *Washington Grange*, here the challenged provisions burden 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 provisions threaten 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 at issue in Count II.²¹

Accordingly, Plaintiffs need not show that the challenged provisions violate the First Amendment in every application to succeed on Count II. 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 supra*.

In addition to arguing that the challenged provisions are facially invalid under the First Amendment, Plaintiffs also allege that the challenged provisions are 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. Rather, the question with respect to the overbreadth aspect of Plaintiffs’ First Amendment claim in Count II is whether the challenged provisions are “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”); *Houston*, 482

²¹ Elsewhere, the State appears to recognize the proper standard for assessing Count II of the Complaint. Defendants’ Motion at 40.

U.S. at 466-67; *Howard Gault Co.*, 848 F.2d at 561. As Plaintiffs will show at trial, the many “instances of arguable overbreadth” of the challenged provisions, *Washington Grange*, 128 S. Ct. at 1191 n.6. – such as their application to innocent and incidental possessors of ballots, as well as to individuals with no fraudulent or otherwise illegal intent – require those provisions’ invalidation under the First Amendment.²²

B. Material Disputes Of Fact Preclude Summary Judgment On Count II.

There is a material question of fact precluding summary judgment as to whether the challenged provisions are “so broadly written that [they] 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 they “make unlawful a substantial amount of constitutionally protected conduct,” *Houston*, 482 U.S. at 459. Accordingly, summary judgment should be denied on Count II. Even assuming the more stringent standards argued for by the State are applicable to Plaintiffs’ First Amendment claim (which they are not), there is still a material dispute of fact as to whether the challenged provisions have a “plainly legitimate sweep” and whether they are unconstitutional in every application: Plaintiffs and the State do not agree on how much protected expression is chilled by the challenged provisions and whether that chilling effect is justified by any demonstrable state interest that is actually served by the challenged provisions.

The State simply ignores the record evidence in claiming that Plaintiffs have failed to show that the challenged provisions “adversely affect their right to associate with other members of the Democratic Party or those deemed likely to vote Democratic.” Defendants’ Motion at 41; *see id.* at 42-43. The testimony of Plaintiffs Rebecca Minneweather and Jamillah Johnson, as

²² Although the First Amendment standards described in the text apply to Count II, Plaintiffs also satisfy *Salerno*, as there are no constitutional applications of the challenged provisions, all of which severely burden protected political and expressive activities without any legally sufficient justification.

well as of Jane Hamilton, provide examples of the chilling effect that the enforcement of the challenged provisions has had on Plaintiffs and activists within the Democratic Party. *See supra* pp. 15 to 17.

Faced with the plain factual dispute between the parties concerning the challenged provisions' chilling effect on constitutionally protected activities, the State goes so far as to assert that the activities regulated by the challenged provisions are "conduct not intended to express an idea," inaptly analogizing to a case that rejected a vagueness challenge to a smoking ban, including the challengers' strained argument that the ban amounted to compelled speech. Defendants' Motion at 41 (citing *Roark v. Hardee LP v. City of Austin*, 2008 U.S. App. LEXIS 6484 (5th Cir. 2008)). Plainly, the core political expressive and associational activities that are criminalized and chilled by the challenged provisions are at the heart of what the First Amendment protects.

Plaintiffs are entitled a trial on their claim that 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.

C. Plaintiffs' Overbreadth Claim Concerning Section 86.006(f) Is Not Moot.

The State argues that the 2007 amendments to Section 86.006(f) – which transformed the six narrow affirmative defenses into exemptions from prosecution – have mooted Plaintiffs' overbreadth claim. That is incorrect. Plaintiffs' overbreadth claim was not based solely, or primarily, on the affirmative defenses. Rather, Plaintiffs' claim is that Section 86.006(f)'s criminalization of consensual possession is overbroad because it is not limited to individuals who have any reasonable or conceivable relationship to actual voter fraud. Moreover, as the State recognizes, Plaintiffs claim that the provision is particularly unjustified with respect to

individuals who possess the ballot but do not mail it, Defendants' Motion at 44, and thus are unable to avail themselves of any of the statutory exemptions – even if they provide identifying information. The State's position that *all* consensual possessors may avail themselves of the statutory exemption by providing identifying information is contrary to the plain language of the statute.

III. THE STATE IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' VAGUENESS CLAIM.

In Count III, Plaintiffs claim that the challenged provisions are unconstitutionally vague under the First Amendment and the Due Process Clause because they “fail to provide reasonable notice of what conduct is prohibited.” First Amended Complaint ¶ 57. As the State appears to concede, Plaintiffs' facial vagueness challenge does not require Plaintiffs to show that the challenged provisions are unconstitutionally vague in every application. *See* Defendants' Motion at 55 (citing *Roark*). Rather, as the Fifth Circuit recently recognized, “[m]any times void-for-vagueness challenges are successfully made when laws have the capacity ‘to chill constitutionally protected conduct, especially conduct protected by the First Amendment.’” *Roark*, 2008 U.S. App. LEXIS 6484 at *29 (citation omitted); *see, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1996). The standard for First Amendment vagueness claims is whether the challenged provisions “fail[] to provide ‘fair notice to those to whom [they are] directed.’” *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement”); *J&B Ent't v. City of*

Jackson, 152 F.3d 362, 367-69 (5th Cir. 1988) (“An enactment is void for vagueness if its prohibitions are not clearly defined.”) (quoting *Grayned*, 408 U.S. at 109).

The State does not separately analyze Plaintiffs’ facial vagueness claim, but attempts to lump that claim in with Plaintiffs’ fundamental right to vote and overbreadth facial challenges. *See* Defendants’ Motion at 30-45. However, Count III presents a constitutional claim that is governed not by *Burdick-Anderson*, but by the separate vagueness standards just described. Where, as here, an allegedly vague statute imposes criminal penalties that implicate expressive and associational rights under the First Amendment, the analysis does not begin and end with *Burdick-Anderson*, as the State erroneously appears to suggest. Moreover, the State only purports to address Plaintiffs’ vagueness challenge to Section 86.006(f), and ignores Plaintiffs’ challenges to the remainder of Section 86.006, as well as the other challenged provisions. Because the State has not addressed Plaintiffs’ vagueness claims, let alone under the proper legal standard, summary judgment should be denied.

As the Complaint details, the challenged provisions are unconstitutionally vague in several respects. What is more, discovery has confirmed that state officials have no standard understanding of many of the challenged provisions, and, in fact, have conflicting understandings of what constitutes a violation of several of the provisions at issue. For example, a representative of the Office of the Attorney General testified that Texas Election Code Section 86.006 applies to “official ballots,” App. Ex. 14 at 32-33 (Eric Nichols Deposition), and a representative of the Office of the Secretary of State testified that Section 86.006 applies to “marked ballots”. App. Ex. 3 at 59-61 (McGeehan Deposition). Moreover, even though Section 86.006 provides that “carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk,” the Director of Elections at the Office of the

Secretary of State testified that it would *not* be a violation of for a person to collect carrier envelopes containing marked ballots of voters voting by mail and to store them in their trunk while they go and eat lunch. App. Ex.3 at 48-49.

Section 64.036(a) prohibits assistance to a voter “who has not requested assistance or selected the person to assist the voter,” leaving unclear whether a person who is initially unknown to the voter may approach the voter to serve as an assistant. Complaint ¶¶ 57-59.

Section 86.006(f)’s broad ban on “possession” of mail-in ballots and carrier envelopes does not, among other things, specify whether a ballot or carrier envelope must be *marked* for its possession to be illegal. Complaint ¶¶ 38, 58. Although the title of the provision suggests that only marked ballots are covered, the plain text of the statute is not limited to marked ballots, as the Attorney General agrees, see App. Ex. 15 at 32-33 (Nichols Deposition). *See also* pp. 38, *supra*, for a contradictory interpretation of Section 80.006 by Defendants.

In addition, the combined requirements of Sections 86.006(f) and 86.0051 may be read to require *all* individuals witnessing, assisting, and/or possessing a mail-in ballot for the purpose of mailing the ballot to provide their signature and identifying information on the carrier envelope, but the carrier envelope has room for only one individual’s information, rendering the responsibilities of multiple assistors unclear.²³

Section 84.003(b) does not make clear the scope of banned activities related to assisting voters with their mail-in ballot applications, as it merely forbids individuals from “otherwise assist[ing]” voters in an undefined manner not covered by Section 64.0321’s specific definition of “assisting a voter.” Complaint ¶¶ 38 and 58.

²³ The State’s newly proposed carrier envelope has the same sized space for assistors, witnesses and possessors to sign and provide identifying information, but has merely added hash marks in an apparent effort to indicate that more than one individual can provide information. It is doubtful that this proposed revision of the carrier envelope will alleviate any of the confusion, particularly given the other conflicting terms and instructions on the envelope.

The meaning of Section 86.006(e) is also unclear, barring the “collect[ion]” or “stor[age]” of carrier envelopes at “another location for subsequent delivery”—broad, undefined terms that could be read, for example, to prohibit an individual from collecting mail-in ballots in the course of a day of providing individual assistance to voters. Complaint ¶ 28. *See also* App. Ex. at 3 48-49.

Plaintiffs will present evidence at trial that the vagueness of the challenged provisions has had a chilling effect on the activities of would-be voters and helpers. Although such evidence is not required to prevail on Plaintiffs’ vagueness claims, it underscores that – as a matter of practice – the challenged provisions have failed to provide adequate notice. Indeed, as Plaintiffs evidence at trial will show, the challenged provisions’ breadth and vagueness have resulted in the very sort of “arbitrary and discriminatory enforcement” that the First Amendment forbids. *J&B Ent’t*, 152 F.3d at 367-69. Accordingly, summary judgment should be denied.²⁴

IV. THE STATE IS NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’ DUE PROCESS CLAIM.

In addition to the due process aspect of Plaintiffs’ vagueness claim, *see supra*, Plaintiffs have separately pleaded in Count VII that the challenged provisions violate due process based on the inaccurate and misleading information provided by the State concerning the meaning and enforcement of the challenged provisions. *See, e.g., Zessar v. Helander*, No. 05-C-1917, 2006 U.S. Dist. LEXIS 9830, at *30-31 (N.D. Ill. 2006) (finding that the implementation of a state’s absentee ballot regime violated due process). The State’s argument for summary judgment on this claim hinges on the erroneous premises “that Plaintiffs had actual notice of what was required of them,” Defendants’ Motion at 46, and that “recent modifications” to voting materials “provide even more explicit clarification for voters and assistants,” *id.* at 47. The record

²⁴ For the reasons discussed above with respect to Plaintiffs’ overbreadth claim, Plaintiffs’ vagueness challenge to Section 86.006(f) is not moot.

evidence belies these assertions; disputed questions of fact preclude summary judgment on the due process claim.

Although Plaintiffs' due process challenge is not based only on the State's failure adequately to inform its citizenry of the important amendments to the Election Code in 2003, Defendants' Motion at 45, the State's failure in that regard is relevant to the due process analysis. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (explaining that due process is "flexible and calls for such procedural safeguards as the situation demands"). That is particularly so where, as here, the 2003 amendments criminalized longstanding, legitimate practices in relatively unsophisticated minority communities, which were unlikely to learn about the changes in State law and the State's enforcement efforts absent some affirmative effort by the State. 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.

App. Ex.16 (2/3/05 J. Bloodworth Interview with P. and R. Houff). Among other things, no notice whatsoever is provided on the mail-in ballot envelope and carrier envelopes that the State has used since 2004 that merely possessing another's mail-in ballot or carrier envelope constitutes a criminal offense. *See* App. Ex.13.²⁵ Similarly, no notice is provided concerning the other challenged provisions. Not only is such notice required by fundamental fairness – on the carrier envelope and otherwise – but it is expressly required by the Election Code. *See* Tex. Elec. Code §§ 86.012, 86.013.

²⁵ Nor is notice provided that a person who consensually possesses the ballot or ballot envelope other than to mail the ballot may not avail himself of the exemptions by providing identifying information.

In any event, Plaintiffs' due process claim does not rest solely or even primarily on the State's failure to notify. To the contrary, Plaintiffs also allege and will show at trial that Defendants and their agents have issued erroneous, misleading, and improper guidance concerning the implementation of the challenged provisions, and have even lulled voters and helpers into believing that their activities were permissible even though they would eventually be prosecuted. Defendants' conduct has chilled constitutionally protected voting and expressive activities of Plaintiffs and others.

For instance, the Secretary of State's annual letters to voters arbitrarily change their guidance from year to year concerning whether those who possess mail-in ballots for the purpose of mailing them must provide identifying information. App. Ex. 17. On numerous occasions, the Secretary of State, Attorney General and their representatives have issued erroneous guidance to chill the legitimate assistance provided by representatives of political parties and other civic organizations, such as by incorrectly claiming that "everybody has to mail it themselves," (App. Ex. 16) (2/3/05 J. Bloodworth Interview), and by improperly warning voters not to accept help from "stranger[s]" who "show up" on voters' "doorstep[s]" to offer assistance. App. Ex. 17. The Attorney General and Secretary of State have issued conflicting and unclear guidance in PowerPoint presentations to local offices, their websites, and in other materials concerning the challenged provisions. See, for example, App. Ex. 17, where the Secretary of State in 2004 encouraged voters to give their ballot to "a trusted friend" and warned the voters that the trusted friend must sign the carrier envelope to avoid violating the Election Code, but then in 2006 encouraged the use of a trusted friend to mail a ballot but failed to notify voters that if the trusted friend mailed the ballot and failed to sign the carrier envelope, they would be criminally liable under the Election Code. And the voting materials themselves – including the

mail-in ballot application, the mail-in ballot instructions, the mail-in ballot envelope, and the carrier envelope – provide confusing and conflicting guidance concerning the responsibilities and potential liabilities of assistors, witnesses, possessors, mailers. See App. Ex. 13. Under the Texas Election Code, all of these categories of helpers have different statutory obligations, responsibilities, and potential criminal penalties, but the voting materials – as well as State officials – frequently misuse these terms or incorrectly use them interchangeably, further confusing matters.

Ultimately, the State’s argument comes down to a disputed factual issue – whether Plaintiffs had notice of the challenged provisions and their intended enforcement, and whether the State’s recent modifications to the voting materials have cured their previous failings. These are factual questions that must be resolved at trial.

The State’s claim that all Plaintiffs were made aware of the changes in the law and knew the scope and intended enforcement of the challenged provisions is false. Several Plaintiffs have testified to the contrary. See App. Ex. 9 at 29-30. See also the Testimony of Plaintiffs Ray, Minneweather and Meeks introduced at the 2006 preliminary injunction hearing). With respect to the Texas Democratic Party, although it attempted to discern the meaning and scope of the challenged provisions to the best of its ability, even it was unable to receive clear guidance from State officials prior to this lawsuit. Among other things, the Secretary of State refused to answer a letter sent by the party in 2006, seeking clarification in advance of the 2006 elections, and in light of the State’s stepped up investigative and prosecutorial efforts with respect to the challenged provisions. App. Ex. 18. A letter from the Republican Party of Texas seeking guidance from the Secretary of State in 2003 regarding mail-in ballot procedures did receive a response. See App. Ex. 19.

Finally, the eleventh hour changes to the carrier envelope and voter instructions formulated and announced by the State during the Fifth Circuit oral argument are plainly inadequate to cure the confusion caused by the challenged provisions and the State's prior guidance regarding those provisions. To begin with, the carrier envelope does not provide accurate or reasonable notice of the underlying criminal prohibition in Section 86.006(f). Most significantly, neither the envelope nor the instructions state that there is no statutory exemption for prosecution under Section 86.006(f) for individuals who sign the carrier envelope, but who are not mailers. As explained above, statutory language plainly provides no such exemption. Indeed, the carrier envelope, as revised by the State to suggest that all possessors are required to provide identifying information, will likely mislead some consensual possessors who are not mailers into believing (incorrectly) that they will be exempt from prosecution simply by signing the carrier envelope. The proposed revision to the carrier envelope is also confusing: the new bolded language and the revisions to the signature area suggest that mere possession is enough to require identifying information, whereas the preexisting language on the carrier envelope (which will not be changed) continues to suggest that only assistors or mailers must provide information. Moreover, the envelope as revised continues to block off an area in the lower right that suggests that it is assistors and witnesses who are to sign the envelope. Thus, the State's proposed revisions neither improve clarity, nor provide accurate notice of the statutory basis for criminal liability.²⁶

Furthermore, despite the State's proposed revisions, the carrier envelope does not provide

²⁶ The State's proposed revision to the carrier envelope does not state outright that all possessors must provide identifying information – likely because the applicable Texas Election Code provision does not contain any such requirement. Not only does the State's new language provide uncertain and incorrect statements of the underlying criminal prohibition, but the State has used bolded “warning” language that suggests that there is something dangerous or wrong about providing assistance to voters; such language is thus likely to further deter individuals from providing lawful assistance or other aid to voters.

a reasonable means for multiple individuals to provide identifying information. According to the State, all individuals who possess the ballot or envelope (other than the voter) must supply their (1) printed names, (2) signatures, and (3) residence addresses. As Plaintiffs have explained, the current carrier envelope used by the State does not provide room for more than one assistor or mailer to supply identifying information. The only revision proposed by the State relevant to this point is the addition of two hash marks on the name-signature line, and two hash marks on the residence address line. According to the State, these hash marks signify separate compartments for up to three different individuals to include their identifying information. Plaintiffs respectfully submit that the State's proposed cure is insufficient: the envelope does not clearly signify separate compartments for different individuals, and the already tiny area for providing identifying information has become even smaller for each supposed compartment. If an assistor, for example, inserts her full first, middle, and last name in the three compartments, or inserts her printed name and signature (both of which are required) in two separate compartments, there would be no space left for the information of a mailer or a witness. The State's proposed fix simply does not reasonably address Plaintiffs' concern that multiple individuals will not be able to provide the required information on the carrier envelope.

Plaintiffs welcome any effort to make the mail-in voting materials more user-friendly. But the State's proposed revisions do not dispose of Plaintiffs' due process claim. The complete and proper remedy for the State's due process violations should be determined at trial.

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

Plaintiffs are entitled to trial on Count IV of the Complaint, which states a claim under 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 challenged provisions criminalize a wide array of legitimate assistance to mail-in voters and violate 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 Section 208. *See* U.S. Const., Art. VI, ¶ 2.²⁷ The State's argument for summary judgment on Plaintiffs' Section 208 claim thus rests on the erroneous and fact-based assertion that "Plaintiffs have not identified any conflict between the Challenged Statutes and § 208" because "[t]he voter may choose any person to assist with the ballot – consistent with § 208 of the Voting Rights Act – as long as the assistant provides the required disclosures." Defendants' Motion at 48-49. To the contrary, Plaintiffs have established such a conflict, in several respects: some challenged provisions limit outright the number of people a person can help, *see* Tex. Elec. Code § 84.004; other provisions impose unnecessary and vague burdens that serve as a deterrent to would-be helpers as well as voters, *see, e.g.*, Tex. Elec. Code §§ 64.036(a)(4), 84.003(b), 86.006; and the threatened enforcement of all of these provisions has created a chilling effect whereby voters are unable to access the assistors of their choice. *See* pp. 15 to 17, *supra*. This evidence plainly presents a question for trial.

²⁷ Courts discussing 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).

VI. PLAINTIFFS ALSO PRESENT PROPER AS-APPLIED CHALLENGES TO ALL OF THE CHALLENGED PROVISIONS.

Plaintiffs' as-applied challenges require a trial as well. The State's opposition to Plaintiffs' as-applied challenges rests on the fundamental misconception that Plaintiffs' claims must be based upon a past "application" of the challenged provisions to their conduct by the State. Defendants' Motion at 49. Although Plaintiffs can demonstrate past applications by the State supporting their standing to bring as-applied claims, those as-applied challenges do not hinge on past conduct. Rather, because all Plaintiffs wish to engage in activities barred or chilled by the challenged provisions, but fear investigation or prosecution by the State if they do so, they have standing to bring their as-applied challenges for declaratory and injunctive relief. *See, e.g., Roark*, 2008 U.S. App. LEXIS 6485, at *14-21.

Although Plaintiffs' intended future conduct provides a clear basis for their as-applied challenges, a couple of the State's claims about Plaintiffs' past conduct merit response.

First, and notably, the State appears to have abandoned its argument that Plaintiffs Ray and Johnson lack standing under *Heck v. Humphrey*, 512 U.S. 477 (1994). Instead, the State now claims that Ray and Johnson cannot object to the State's past enforcement of the challenged provisions against them because they had clear notice of the challenged provisions and they were not discriminatorily targeted. Defendants' Motion at 50-53. To the extent such showings are relevant to Plaintiffs' claims, they are the subject of a material dispute of fact and thus require a trial. As explained above, the State has issued conflicting and misleading guidance regarding the scope of the challenged provisions and, in particular, whether violations of Section 86.006(f) would be investigated and prosecuted in the absence of fraudulent conduct. Among other things, the State's own voting fraud investigator stated in 2005 that "[t]here's no way to have known the law changed." App. Ex. 16 (2/3/05 Bloodworth Interview). There is also a material dispute of

fact as to whether the State's investigation and prosecution of Ray and Johnson was improperly discriminatory: Ray and Johnson are both African-American Democrats; there was no allegation or proof of any actual voting fraud in their cases; and yet they were investigated and prosecuted for technical violations of Section 86.006(f), whereas scores of Anglo Republicans who technically violate those provisions every election were never investigated or prosecuted by the State. *See* App. Ex. 20 (Deposition of Escapees RV Club Representative).²⁸ Thus, although Plaintiff contends that the State's proposed inquiries are irrelevant, they are certainly not susceptible to resolution on summary judgment.

Second, the Court should reject the State's attempt to minimize the other Plaintiffs' as-applied challenges as being based on "[h]aving hurt feelings" over the State's investigative and prosecutorial efforts with respect to the challenged provisions. *See* Defendants' Motion at 54-55. As Plaintiffs have alleged and will show at trial, they are all barred and chilled from engaging in constitutionally protected activities due to the overbreadth and vagueness of the challenged provisions and those provisions' discriminatory and unfair enforcement by the State, particularly in situations where there is no charge or evidence of actual voting fraud. In particular, Plaintiffs Meeks and Minneweather have been and continue to be significantly impaired by the challenged provisions and the State's unduly aggressive enforcement efforts, which included state investigators peeping in Meeks' bathroom window while she was stepping out of the bath and intimidating Minneweather into ceasing her efforts to help mail-in voters. Contrary to the State's new assertions, the challenged provisions "significantly relate[] to" core political, expressive and

²⁸ The Escapees are thousands of persons who claim to reside on Rainbow Drive in Polk County, Texas. They usually live and travel in RVs and are out of state for much if not all of the year. They apply for mail-in ballots and have their mail-in ballots sent to a P.O. Box in Shephard, Texas (in San Jacinto County), where an Escapees employee picks up the ballots, brings them back to the Escapees office in Polk County, and then mails them to the voters. Thus, the employee possesses literally thousands of official ballots and carrier envelopes and has not been prosecuted. The Office of the Attorney General in 2000 went to court to protect the rights of Escapees to vote by mail, so the Defendants are fully aware of these procedures and the handling of official ballots by Escapees' employees.

associational conduct, including Plaintiffs' ability to engage in political expression with whom they choose. Defendants' Motion at 56. Finally, it is particularly disingenuous for the State to claim that Plaintiffs can address their individual concerns through facial challenges – rather than through as-applied challenges – when the State's position is that facial challenges are no longer appropriate under *Crawford* and *Washington Grange*. All Plaintiffs are entitled to a trial on their as-applied challenges.

CONCLUSION

For the foregoing reasons, those contained in Plaintiffs' prior briefing, and all others apparent to the Court, the State's summary judgment motion should be denied in full.

Dated: May 14, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiffs' Opposition to Defendants' 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 14th day of May, 2008.

/s/ J. Gerald Hebert
J. Gerald Hebert