

No. 2-06CV-385

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

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

v.

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

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**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

	PAGE
I. BACKGROUND.....	1
II. PLAINTIFFS’ ALLEGATIONS WITH RESPECT TO TEX. ELEC. CODE §84.004 .....	2
1. Chapter 84 of the Texas Election Code Governs Applications For Mail-In Ballots. ....	2
2. Plaintiffs’ Allegations.....	5
III STATEMENT OF UNDISPUTED MATERIAL FACTS.....	6
IV. STATEMENT OF ISSUES TO BE DECIDED BY THE COURT.....	6
V. ARGUMENT AND AUTHORITIES. ....	7
A. Section 84.004 Is Constitutional.....	7
1. Standard of Review. ....	7
2. The State’s Interest in Reducing Voting Fraud And Preserving the Integrity of Elections is Compelling. ....	9
3. The Minimal Burdens Imposed By §84.004 Are Justified. ....	11
4. Texas Law Is Less Restrictive Than Similar Laws Of Other States.....	14
5. There Is No Evidence Of A Chill On Constitutionally Protected Activity. ....	16
B. Section 84.004 Does Not Violate Section 208 of the Voting Rights Act.....	19
C. Plaintiffs’ Due Process Claims Fail As A Matter of Law.....	20

VI. CONCLUSION ..... 22

## APPENDIX

1. Declaration of Ann McGeehan, Director of Elections, Texas Secretary of State, dated May 7, 2008 (previously filed) and Exhibit D thereto
2. Colorado election statutes
3. North Carolina election statutes
4. Kentucky election statutes
5. Montana election statutes
6. Nevada election statutes
7. Virginia election statutes
8. Indiana election statutes
9. - 14. Plaintiffs' voting histories
15. Voting history of Eddie Buchanan
16. Voting history of Amanda Hill
17. Elderly and disabled voters' voting histories (17-1 through 17-29)
18. Deposition excerpts of Plaintiff Willie Ray
19. Deposition excerpts of Plaintiff Jamillah Johnson
20. Deposition excerpts of Plaintiff Reuben Hernandez
21. Deposition excerpts of Plaintiff Rebecca Minneweather
22. Senate Judiciary Committee Report on §208 of the federal Voting Rights Act
23. Elections Committee Subcommittee on Funding and Voting Systems, Testimony of Alberto Garcia, Antonio Perez, Jr., and Carlos S. Trevino
24. C. S. H. B 2025 Bill Analysis

25. HB 2025 House Study Group Bill Analysis
26. Committee Report, April 25, 1979
27. Bill History Report, July 16, 1979
28. HB 2025 as enacted
29. Committee on Elections, April 4, 1979
30. Excerpt from *Texas Almanac and State Industrial Guide*

## TABLE OF CASE AUTHORITIES

<i>Anderson v. Celebrezze</i> , 460 U.S. 780, 103 S.Ct. 1564 (1982). . . . .	7,8
<i>Burdick v. Takashi</i> , 504 U.S. 428, 112 S.Ct. 245 (1992).. . . . .	7,8
<i>Burson v. Freeman</i> , 504 U.S. 191, 112 S.Ct. 1846 (1992). . . . .	13
<i>Crawford v. Marion County Election Board</i> , ___ U. S. ___, 128 S. Ct. 1610 (2008). . . . .	8, 9, 12
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1972). . . . .	17
<i>McDonald v. Bd. of Election Comm'rs of Chicago</i> , 394 U.S. 802, 89 S. Ct. 1404 (1969) . . . . .	9
<i>Qualkinbush v. Skubisz</i> , 826 N.E.2d 1181, 357 Ill. App. 3d 594 (Ill. App. Ct. 2004).. . . . .	20
<i>Texas Independent Party v. Kirk</i> , 84 F.3d 178 (5 <sup>th</sup> Cir. 1996). . . . .	8
<i>Torres v. INS</i> , 144 F.3d 472 (7 <sup>th</sup> Cir. 1998).. . . . .	21
<i>United States Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers</i> , 413 U.S. 548 (1973). . . . .	21
<i>United States v. Engler</i> , 806 F.2d 425 (3d Cir. 1986). . . . .	14
<i>United States v. Hancock</i> , 231 F.3d 557 (9 <sup>th</sup> Cir. 2000). . . . .	21
<i>United States v. Johnson &amp; Towers, Inc.</i> , 741 F.2d 662 (3d Cir. 1984). . . . .	14
<i>Washington State Grange v. Washington State Republican Party</i> , ___ U.S. ___, 128 S.Ct. 1184 (2008). . . . .	9, 16

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**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE T. JOHN WARD

Defendants, the State of Texas, Greg Abbott, Attorney General of Texas, and Phil Wilson, Secretary of State for the state of Texas, substituting for former Secretary of State Roger Williams, file this their Motion for Summary Judgment with respect to TEX. ELEC. CODE §84.004 and show respectfully as follows:

**I.  
BACKGROUND**

This case originally included constitutional and statutory attacks on §§64.036(a)(4), 84.003(b), 84.004, 86.006, and 86.0051 of the Texas Election Code (“Challenged Statutes”). Trial was set for May 27-28, 2008. Prior to commencement of the trial, Plaintiffs agreed to dismiss with prejudice all claims<sup>1</sup> except for Plaintiffs’ challenges to TEX. ELEC. CODE §84.004, which prohibits a person from signing the ballot application as a witness on behalf of more than one voter (with

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<sup>1</sup>Plaintiffs also agreed to dismiss with prejudice severed Cause No. 2:2008 cv 00076.

certain exceptions) during an election cycle. The parties agreed that Plaintiffs' claims under §84.004 would be submitted to the Court by cross-motions for summary judgment. Defendants timely file their Cross Motion for Summary Judgment. Defendants incorporate by reference the Appendix and exhibits contemporaneously filed with this Motion, their previously filed Motion for Summary Judgment (“(First) Motion”) (Docket No. 48), Reply Brief in Support of Motion for Summary Judgment (“Reply”) (Docket No. 58), and the appendices and exhibits thereto (Docket Nos. 49, 58, and 59). As demonstrated below, Plaintiffs' remaining claims with respect to TEX. ELEC. CODE §84.004 fail as a matter of law. Defendants are entitled to summary judgment.

## **II.**

### **PLAINTIFFS' ALLEGATIONS WITH RESPECT TO TEX. ELEC. CODE § 84.004.**

#### ***1. Chapter 84 of the Texas Election Code Governs Applications For Mail-In Ballots.***

Chapter 84 of the Texas Election Code establishes the procedures for application for a mail-in ballot. As set forth in this Chapter, the mail-in voter first of all must qualify to vote by mail-in ballot, and secondly, must apply for a mail-in ballot which is directed to the early voting clerk. Tex. Elec. Code §84.001. Upon receipt of a properly filled-in application, the early voting clerk mails an early voting ballot to the mail-in voter. Tex. Elec. Code §86.001(b). In the event a mail-in voter is unable to sign the application due to physical disability or illiteracy, the applicant is required to make his or her “mark.” Tex. Elec. Code §1.011. The “mark” must be “attested” and signed by a witness. Tex. Elec. Code §§1.011; 84.003. In addition, the witness must indicate the witness's relationship to the applicant, or if unrelated, indicate that fact. Tex. Elec. Code §84.003.

The next section, §84.004 of the Election Code, the sole remaining statute in issue in this lawsuit, prohibits a person from signing as a witness for more than one ballot application per election

(except election officials or close relatives of the applicant) and provides a misdemeanor penalty for violation:

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

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

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

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

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

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

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

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

(emphasis added)

Section 84.004 (formerly art. 5.05 subd. 2, para. (e) (f) of the Texas Election Code) was enacted by passage of House Bill 2025 in 1979. (Ex. 28) The purpose of H.B. 2025 was to “prevent voting fraud.” (Ex. 24) Since 1979, the substance of §84.004 has remained unchanged. The only change to §84.004 implemented by the 2003 Amendments was the addition of clarifying language to the title caption.

Plaintiffs erroneously contend that §84.004 precludes them from “assisting” more than one mail-in voter per election and thereby unduly restricts legitimate get-out-the-vote efforts. This is plainly not the meaning of §84.004. The sole activity that the statute limits is “signing” as a witness

for more than one ballot application per election. Assistance other than signing the application is not limited or addressed by §84.004. Moreover, there are no other provisions of the Texas Election Code that limit the number of voters that a person may otherwise assist with their mail-in ballots. Any alleged confusion regarding §84.004—that it precludes assistance with more than one mail-in ballot per election—can be remedied by a plain reading of the statute.

Thus, in the scenario in which an activist who has *witnessed* one application *and* wishes to *assist* other voters with their ballot applications, he or she may do so, but in the event a voter is physically disabled or illiterate and unable to sign, another person—a relative, a friend, a neighbor of the voter—must be present to witness and sign the application on behalf of the voter.

The ballot application comes with instructions on how to comply with §84.004 and a warning that a person may not “sign” a ballot application as a witness for more than one applicant per election:

**5. SIGN YOUR APPLICATION.**

If you cannot sign, you must have a person witness your mark. If a person helped you fill out this application, he/she must give their name and address in the box for witness and/or assistant.

In any single election, it is a Class B misdemeanor for any person to sign a ballot application as a witness for more than one applicant. A person may sign more than one application as a witness if the second and subsequent applications are related to the witness as a parent, spouse, child, sibling, or grandparent.

(McGeehan Decl. Ex. D)

The ballot application form itself cautions that all information and instructions should be read “very carefully” and provides additional clarifying instructions for witnesses and assistants:

**For Witness and/or Assistant:**

Applicant, if unable to sign, shall make mark in presence of witness, if applicant is unable to make mark, the witness shall check here  Failure to complete this information if signature was witnessed or applicant was assisted in completing the application is a Class A misdemeanor.

\_\_\_\_\_  
Signature of Witness/Assistant

\_\_\_\_\_  
Print Full name of Witness/Assistant

\_\_\_\_\_  
Residence Address of Witness/Assistant or Title of Witness/Assistant if an Election Official

*See Instructions for Clarification*

\_\_\_\_\_  
Relationship to Applicant of Witness/Assistant (Check one  parent,  grandparent,  spouse,  child,  sibling,  other,  other,  reside at same address as applicant)

(McGeehan Decl. Ex. D)

**2. *Plaintiffs' Allegations.***

In their Amended Complaint, Plaintiffs contend §84.004 impermissibly burdens their voting, free speech, and associational rights in violation of the First and Fourteenth Amendments to the United States Constitution (Counts I, II, III, and VIII) and violates §208 of the federal Voting Rights Act (Count IV) and due process guarantees (Count VII). (Plaintiffs have previously dismissed severed Counts V and VI (*see* fn. 1 *supra*).

The key issue before this Court, which resolves most of the Plaintiffs' claims in this lawsuit, is simply whether the burdens imposed by §84.004 are justified by the legitimate interests of the State in preventing voter fraud and administering elections. As demonstrated by Defendants, the answer is yes, with the resulting impact on Plaintiffs' claims as follows: (i) §84.004 stands as

written; (ii) any future investigations and prosecutions of violations of §84.004 are within constitutional boundaries and therefore not actionable under 42 U.S.C. §1983; (iii) the Plaintiffs’ constitutional challenges (Counts I, II, III, and VIII) fail as a matter of law; and (iv) Plaintiffs’ demand for declaratory and injunctive relief regarding prospective enforcement of §84.004 must be denied. Any alleged “chill” created by §84.004, even assuming it exists, becomes irrelevant and non-actionable. The two remaining issues—due process and violation of the federal Voting Rights Act—fail as a matter of law for other reasons as demonstrated below. (Counts IV and VII)

As demonstrated below, Plaintiffs’ remaining claims under §84.004 are legally and factually insufficient to withstand summary judgment, and Defendants’ Motion should be granted in its entirety.

**III.  
STATEMENT OF UNDISPUTED MATERIAL FACTS**

The following material facts are undisputed:

1. Exhibit D to the Declaration of Ann McGeehan, Director of Elections, is a true and correct copy of the mail-in ballot application and instructions form used in state elections.
2. None of the Plaintiffs has been questioned, investigated, charged or prosecuted under Tex. Elec. Code §84.004.
3. There is no evidence that any voters have been unable to vote due to Tex. Elec. Code §84.004.
4. There is no evidence that any political activists, including Plaintiffs, have discontinued assisting voters with mail-in ballot applications due to Tex. Elec. Code §84.004.

**IV.  
STATEMENT OF ISSUES TO BE DECIDED BY THE COURT**

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

1. Whether the State’s interest in reducing voting fraud and preserving the integrity of elections justifies the burdens imposed by Tex. Elec. Code §84.004?
2. Whether Tex. Elec. Code §84.004 infringes on any constitutionally protected activity?
3. Whether Tex. Elec. Code §84.004 is unconstitutionally overbroad or vague?
4. Whether Tex. Elec. Code §84.004 violates §208 of the federal Voting Rights Act?
5. Whether Plaintiffs have stated a viable claim for violation of due process?
6. Whether Plaintiffs have stated a viable claim under 42 U.S.C. §1983?

**V.  
ARGUMENT AND AUTHORITIES**

**A. Section 84.004 of the Texas Election Code Is Constitutional.**

***1. Standard of Review.***

As this Court has previously found, the proper analytical framework for Plaintiffs’ challenge to the ballot access provisions in this case is the test announced in *Anderson v. Celebrezze*, 460 U.S. 780 (1982) and *Burdick v. Takushi*, 504 U.S. 428 (1992). (See FF/CL p. 10 (Docket No. 17)) In *Anderson*, the Supreme Court required that lower courts analyzing a ballot access case must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments. Then the courts must identify and evaluate the precise interests put forth by the state as justifications for the voting regulation. In making this evaluation, the court determines the legitimacy and strength of each of these interests and considers the extent to which these interests burden constitutionally protected rights. *Anderson*, 460 U.S. at 789.

When state statutes impose “severe” restrictions, they must be narrowly drawn to advance a compelling state interest. However, when a state law imposes only “reasonable, nondiscriminatory

restrictions” on those rights, the state’s important regulatory interests are generally sufficient to uphold the statute.<sup>2</sup> *Burdick*, 504 U.S. at 434; *see also Texas Independent Party v. Kirk*, 84 F.3d 178, 182 (5<sup>th</sup> Cir. 1996). Under the *Anderson-Burdick* analysis, a challenged provision is first examined to determine whether it burdens First and Fourteenth Amendment rights, and if it does, the extent of that burden.

Recently, the Supreme Court re-affirmed the *Anderson-Burdick* test in *Crawford v. Marion County Election Board*, \_\_\_ U. S. \_\_\_, 128 S. Ct. 1610, 1616 n. 8 (2008). By a plurality opinion, the Court upheld an Indiana statute requiring voters to present state issued photographic identification at the polling place in order to be allowed to vote. Significant to this case for several reasons, *Crawford* confirmed what this Court has previously recognized—that the States have important interests in combating voting fraud, maintaining the orderly administration of elections and safeguarding voter confidence in the integrity of elections. 128 S.Ct. at 1617-1619. The Court stated:

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

(emphasis added) 128 S.Ct. at 1619.

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<sup>2</sup> In *Burdick*, the Supreme Court explicitly rejected a standard under which every voting case would be subject to strict scrutiny:

to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of the states seeking to assure that elections are operated equitably and efficiently.

*Burdick v. Takushi* at 433, 112 S.Ct. at 2063.

*Crawford* reiterated that the burden of persuasion in a challenge to an election regulation is a “heavy” one. *Id.* at 1621. The Court noted that to succeed on a facial challenge of an election regulation, plaintiffs must “‘establish that no set of circumstances exists under which the [statute] would be valid’, that is, the law is unconstitutional in all of its applications.” *Washington State Grange v. Washington State Republican Party*, \_\_\_\_ U.S. \_\_\_\_, 128 S.Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 107 S.Ct. 2095, 2101 (1987)). The Court noted that while some members of the Court may disagree with *Salerno*, “all agree that a facial challenge must fail where the statute has a ‘plainly legitimate sweep.’” *Washington State Grange*, 128 S.Ct. at 1190.

As this Court has previously held, the Plaintiffs here have no fundamental right to receive and cast an absentee ballot. (FF/CL p. 10, ¶¶ 11, 12) *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 808 (1969). Thus, there is no burden on First and Fourteenth Amendment rights. Even assuming *arguendo* that there is any burden, as demonstrated below, that burden is slight or only incidental. In such cases, the State’s regulatory interests are sufficient to uphold the statute. In this instance, the State’s interests are “compelling,” as this Court has previously found, and thus easily outweigh the minimal burdens imposed.

**2. *The State’s Interest In Reducing Voting Fraud And Preserving The Integrity of Elections Is Compelling.***

Consistent with the Supreme Court’s recent decision in *Crawford*, this Court has previously found that Texas has a “well-recognized and compelling” interest in preventing voter fraud. (Docket No. 17, FF/CL §14 p. 11) This Court has also found that §84.004 is among the Texas Election Code statutes that is “aimed at curtailing voter fraud.” (FF/CL §19, p. 12)

The Court's findings are consistent with the legislative history of §84.004. The restriction on witnessing applications for absentee ballots was first passed in 1979 as HB 2025. (Ex. 28) The legislative history shows that witnesses testified to the House Committee on Elections that people had fraudulently obtained absentee ballots for nursing home residents without their knowledge. (Ex. 25 (House Study Group)). Witnesses also testified before the Committee to complaints of forged ballot applications for absentee ballots. (Ex. 23, pp. 4, 11) Witnesses for the bill were County Judges from three South Texas counties: Blas Chapa from Starr County, Joe B. Garcia from Brooks County, and Gilberto Uresti from Duval County. (Ex. 25, House Study Group Bill Analysis, May 3, 1979.) In addition, a written statement from the League of Women Voters in favor of the bill was entered into the record. (Ex.29.) There were no witnesses against the bill. (Ex.25, House Study Group Bill Analysis, May 3, 1979.)

This bill was specifically designed to stop the problem of elderly and disabled persons in nursing homes becoming the unwitting victims of vote fraud. (Ex. 24, 25) HB 2025 was voted out of committee by a 6-0 vote with 5 absentees and no one present but not voting. (Ex. 25, 26) The six votes for the bill were Susan G. McBee, Joseph T. Gibson, Bill Haley, Tom C. Massey, G. Don Rains, and Clay Smothers. All six were Democrats. (Ex.30, excerpted from *Texas Almanac and State Industrial Guide*, (Fred Press, ed.,50th 2d.) 1980-1981). The bill passed the House of Representatives on a non-record vote on May 4, 1979, and passed the Senate 31-0 on May 24, 1979. It was signed by the Governor on June 11, 1979 and became effective 90 days later, on August 27, 1979. (Ex. 27 Bill History Report; Ex. 28, 66<sup>th</sup> Legislature—Regular Session, pp. 1169-1170).

The prohibition on witnessing more than one application was aimed directly at a specific kind of voter fraud that was taking place at the time, fraud that took advantage of elderly and disabled

voters. This intent is clearly delineated in the legislative history.

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

Second, §84.004 reduces the opportunity for fraud. In the scenario of a political activist who wishes to assist more than one voter per election, he or she must enlist the help of another person—the voter's relative, friend, neighbor, etc.—to sign the application. The presence of this additional person as a witness of the voter's mark also reduces the opportunity for fraud or undue influence on the disabled or illiterate voter. And third, by limiting the signing of a ballot application by a non-family member to no more than one per election, the statute allows the early voting clerk to identify potential fraud. Receipt of multiple ballot applications all signed by the same “witness” would surely give the early voting clerk grounds to inquire about the source and circumstances of the ballot application.

Applying *Anderson-Burdick* here, §84.004 must be upheld because it is narrowly tailored to serve the State's compelling interests in combating voting fraud and preserving the integrity of state elections, and, as described below, those interests justify the minimal burdens imposed.

**3. *The Minimal Burdens Imposed By §84.004 Are Justified.***

Given the important State interests in regulating elections and preventing voting fraud, the “burdens” imposed by §84.004 are more than justified. For the voter who cannot sign the application

because of physical disability or illiteracy, §84.004 requires nothing more than the voter enlist the help of a family member—or a neighbor, friend, or other person who has not signed a ballot application for another during the same election—to witness and sign for them. For the “political activist” who has already witnessed one application, and who wishes to assist more than one voter with his or her ballot application, §84.004 simply requires that, in the event that a subsequent voter cannot sign due to physical disability or illiteracy, an additional person be brought in to witness and sign. The statute does not, as Plaintiffs contend, preclude the activist from assisting more than one voter with his or her ballot application. For the witness, the statute simply requires his or her signature, name and address. §§84.004; 1.011.

Plaintiffs complain that §84.004 disproportionately affects the elderly and disabled voters. In this regard, *Crawford* illustrates a number of principles important to this case. 128 S.Ct. at 1616-1619. In *Crawford*, the Court was unwilling to strike down the photo identification requirement, despite evidence that the requirement would impose some “special” burdens on the elderly and disabled voters. Here, unlike *Crawford*, there is no constitutional right to cast a mail-in ballot, as this Court has previously found. Thus, the rights here cannot be more deserving of protection than those in *Crawford*. Moreover, *Crawford* also teaches that even where the burdens involved may affect elderly and disabled voters, the State’s legitimate interests in ensuring orderly administration of elections may prevail. This principle applies with even greater force here where the burdens imposed by §84.004 are far more slight than in *Crawford*.

With respect to the criminal penalty for violation of §84.004, Plaintiffs argue that the State’s interest in curtailing voting fraud does not justify imposing criminal liability for conduct that does not involve actual voting fraud or intimidation. (Opposition to Defendants’ Motion for Summary

Judgment p.6 (Docket No. 50)) According to Plaintiffs, the statute is overbroad because it potentially punishes “innocent” conduct. As demonstrated by Defendants (Reply Brief, pp. 4-10 (Docket No. 58)), the Plaintiffs’ premise is directly contrary to Supreme Court authority in *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (1992). In *Burson*, the Court upheld a state statute providing that it was a misdemeanor to display campaign materials within 100 feet of the entrance to a polling place on election day. 504 U.S. at 195-95, 112 S.Ct. at 1848-49.

The *Burson* Court reasoned that the statute advanced the state’s compelling interests in preventing voter intimidation and election fraud. *Id.* The statute was silent, however, with respect to a showing of actual voter intimidation or interference. The Court rejected the plaintiffs’ argument that the statute was over-inclusive because it impermissibly punished innocent behavior, not involving voter intimidation, which was punishable under other statutes. *Id.* at 207, 112 S.Ct. at 1855. The Court reasoned that unlike the other statutes the 100-foot restriction on campaign materials captured less blatant, more subtle instances of voter intimidation.

*Burson* teaches two principles important to this case: (i) in the interest of curtailing voting fraud, the states may regulate protected political speech—and enforce such regulations with criminal penalties—without running afoul of the First Amendment; (ii) a statute is not overbroad simply because it may punish conduct not involving actual voting fraud. Both principles apply with even greater force here where the conduct being regulated—assistance with a mail-in ballot application—does not involve protected political speech. Accordingly, applying *Burson* to this case, (i) the State of Texas is within constitutional boundaries in enacting §84.004; and (ii) the statute is not overly broad because it may reach conduct which does not include any fraudulent activity.

*Burson* breaks no new ground in this regard but simply recognizes the well-settled principle

found in other contexts that where important regulatory interests are involved, the State may impose criminal liability without showing any criminal intent:

The Supreme Court ... has long recognized that a different standard [than *mens rea*] applies to those federal criminal statutes that are essentially regulatory, that are designed to protect the public welfare, and that do not have their origins in the common law. With respect to these offenses, ‘whatever the intent of the violator, the injury is the same.... [L]egislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element.’”

*United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986) (quoting *Morissette v. United States*, 342 U.S. 246, 252, 72 S.Ct. 240, 244 (1952)). As another court noted:

[T]hough the result may appear harsh, it is well established that criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose.

*United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 (3d Cir. 1984).

In short, the crux of the Plaintiffs’ legal theory—that the Constitution precludes the State from imposing criminal liability for “innocent” activities such as witnessing a ballot application—is simply wrong. Where important State regulatory interests are involved, such as preventing voting fraud and the orderly administration of elections, the State may impose criminal liability without showing any criminal intent.

#### **4. Texas Law Is Less Restrictive Than Similar Laws of Other States.**

Texas is not alone among the states in implementing restrictions on mail-in ballot applications and in imposing criminal penalties for violations. Indeed, a number of states impose more onerous restrictions and penalties than the Texas statutory scheme. (Copies of the relevant statutes are attached as Ex. 2 through 8.)

Colorado limits *any* assistance to mail-in voters (other than authorized election officials and close relatives) to no more than one voter per election. This is more restrictive than the Texas scheme,

which limits only the signing of an application ballot to one per election. COLO. REV. STAT. ANN. §1-8-114(3) (West 2008) (Ex. 2). A knowing violation of the Colorado law is punishable by a “fine of not more than five thousand dollars or by imprisonment in the county jail for not more than eighteen months, or by both such fine and imprisonment.” COLO. REV. STAT. ANN. §1-13-803 (West 2008).

At least two states restrict assistance with an application for absentee ballot solely to family members or legal guardians. For example, North Carolina precludes *anyone* other than the voter or the voter’s “near relative” or legal guardian (or election officials) from signing an application for an absentee ballot for the voter. N.C. GEN. STAT. §163.230.1(a)(b) (2008); §163-230.2 (2008) (Ex. 3). If the voter is a patient in a hospital or nursing home, violation of this provision is a Class I felony. N.C. GEN. STAT. §163.226.3(a)(4) (2008) (Ex. 3). Kentucky also precludes anyone other than the voter or close relatives from applying for an absentee ballot. KY. REV. STAT. ANN. §117.085(1) (Banks-Baldwin 2008) (Ex. 4). Violation of this provision is a Class D felony. KY. REV. STAT. ANN. §117.995(5) (Banks-Baldwin 2008) (Ex. 4).

Other states require pre-approval by election officials for those who wish to assist or sign for another’s absentee ballot application. Montana requires that a voter who is unable to provide a signature must have his or her signature verified by the election clerk or apply to election officials for approval of an agent to sign for the voter. MONT. CODE ANN. §13-1-116(4) (2008) (Ex. 5). Failure to comply is a misdemeanor. MONT. CODE ANN. §13-35-103 (2008) (Ex. 5). Nevada requires that a disabled voter submit a written statement from a physician certifying the voter is physically unable to mark or sign and designate a person who will assist the voter, including name, address and signature of the assistant. NEV. REV. STAT. §293.3165 (2008) (Ex. 6). Failure to comply is an “E

felony” and may subject the assistant to a civil penalty of up to \$20,000. NEV. REV. STAT. §§293.800 (2008); 293.840 (2008) (Ex. 6). Virginia requires that persons who wish to assist disabled voters or those who cannot read or write must obtain pre-approval from election officials. Failure to do so is a Class 5 felony. VA. CODE ANN. §24.2-704 (Michie 2008) (Ex. 7).

Indiana requires persons (other than election officials or family members) who sign a ballot application for a disabled voter to provide a power of attorney to the application. IND. CODE ANN. §3-11-4-2 (b) (West 2008) (Ex. 8). Indiana also restricts the information that may be “pre-filled” in on a ballot application. IND. CODE ANN. § 3-11-4-2 (d) (West 2008) (Ex. 8). Violation of these provisions is a Class D felony. IND. CODE ANN. §3-14-2-16 (West 2008) (Ex. 8).

Consistent with these other states, Texas is well within constitutional boundaries by restricting the ballot application process and imposing criminal penalties for violations.

**5. *There Is No Evidence Of A Chill On Constitutionally Protected Activity.***

As noted, the State’s interests in curtailing voting fraud and preserving the integrity of elections amply justifies the burdens imposed by §84.004. Plaintiffs cannot demonstrate that limiting a person to witnessing one ballot application per election cycle is unconstitutional in all of its applications. *Washington State Grange*, 128 S. Ct. at 1190. Indeed, they cannot demonstrate that it is unconstitutional in any application since there is no constitutional right to cast a vote by mail, much less a constitutional right to apply for a mail-in ballot and have a particular person of one’s choice witness the application.

Plaintiffs have never satisfied their burden of demonstrating that any of the Challenged Statutes infringes upon a constitutionally protected activity. Specifically with respect to §84.004, Plaintiffs cite no authority that supports their allegation that a statute which limits the number of mail-

in ballot applications that may be witnessed in a single election infringes upon First Amendment rights. (*See* discussion and authorities at Defendants’ (First) Motion, p.41; Reply p. 13) As this Court has previously held, absentee voting is not a fundamental right protected by the Constitution. (FF/CL p. 10 ¶¶ 11, 12) Certainly, the more attenuated activity—witnessing an absentee ballot application—is even less deserving of constitutional protection. Moreover, the activity being regulated by §84.004 is required to be content neutral, and therefore by definition does not constitute the kind of expressive activity that is protected by the First Amendment. In the absence of being deprived of a fundamental right under the United States Constitution, the Plaintiffs representing the interests of political activists have no cognizable claim under 42 U.S.C. §1983.

Even assuming §84.004 reaches protected activity, Plaintiffs’ claims nevertheless fail because there is no evidence of a “real and substantial” chill on that activity. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1972).

As noted in Defendants’ Motion, Plaintiffs have not identified a single voter by name who has been unable to vote due to §84.004 or any of the Challenged Statutes. None of the Plaintiffs themselves have been disenfranchised. (Ex. 9 through 14)<sup>3</sup> All of the Plaintiffs have voted since the inception of this lawsuit, most recently in the 2008 Democratic primary, even Mr. Robinson who is physically disabled, and Ms. Meeks, who has suffered a stroke and voted by mail. (Ex. 11 and Ex. 13) Two additional voter witnesses, Mr. Buchanan and Ms. Hill, also are physically disabled or elderly, and they have voted in the recent 2008 primary as well. (Ex. 15 and Ex. 16) Of the approximately 30 persons listed by Plaintiffs in their initial disclosures as being disabled or elderly, all but 2 of these people have voted since 2004—either by mail-in ballot or in person. (Ex. 17) The

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<sup>3</sup>Voting histories of Plaintiffs and others have been produced by Plaintiffs in this lawsuit.

only two voters identified by Plaintiffs whose voting histories indicate they have not voted recently are Ms. Louise French and Ms. Lillie Briscoe. There is no evidence before the Court as to *why* these two voters have not voted or that their reasons for not voting have anything to do with §84.004. Mr. Hernandez of the Texas Democratic Party testified the Party has no data to support its claims that mail-in voting is down due to the Challenged Statutes. (Ex. 20, p. 16, lines 9-14)

At most, Plaintiffs' witnesses testify of a generalized "chill" in the "community" or that a particular voter (not a witness) *said* he or she would be unable to vote without assistance. (Opposition pp. 15-17, 28) Vague and inadmissible hearsay is insufficient to raise a genuine issue of fact to defeat summary judgment. Fed.R.Civ.P. 56(c).

With respect to "chilling" the activities of assistants, there is no evidence §84.004 has had any impact at all. As noted, it is undisputed that none of the Plaintiffs has ever been investigated, charged, or even questioned with respect to §84.004. As noted, since they pled guilty to violating another section of the Election Code, two of the Plaintiffs, Ms. Ray and Ms. Johnson, have resumed their activities in assisting voters, including assistance with mail-in ballot applications, and are complying with the law. (Ex. 18 pp. 57-59 and Ex. 19 pp.19 and 22) Any "chill" they may have felt in 2006 at the inception of this lawsuit has obviously been resolved. Ms. Meeks has suffered a stroke and therefore Defendants have been unable to depose her and determine if she has resumed her activities in assisting mail-in voters. Mr. Hernandez, of the Texas Democratic Party, testified that the Party trains volunteers in assisting mail-in voters, and provides a handbook with instructions on assisting voters. He testified that the Party has no data that any of the Challenged Statutes has had a "chilling effect" upon activists who wish to assist voters. (Ex. 20, p. 39, lines 22-23) Ms. Minneweather testified that she had discontinued assisting voters, not due to any confusion, but due

to being “hurt” about being investigated. (Ex. 21, p. 10)

Plaintiffs have not pled that any one of them has been unable to apply for an absentee ballot due to the fact that the only witnesses they could locate had already witnessed the applications of other voters and were therefore disqualified from witnessing other applications. Furthermore, while Plaintiffs have identified disabled and elderly voters who need assistance in voting, none of these individuals has been described as needing a witness to his or her signature, nor has any been described as ever having had difficulty in locating an individual who can sign on their behalf.

**B. Section 84.004 Does Not Violate Section 208 of the Voting Rights Act**

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

Section 208 of the federal Voting Rights Act provides:

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

42 U. S. C. § 1973aa-6. Plaintiffs erroneously contend that §84.004 illegally interferes with the mail-in voter’s right under §208 to obtain assistance from a person of the “voter’s choice.”

Plaintiffs’ claim is flawed in a number of respects. First, §208 applies only to assistance on election day *at the polls*—not with absentee ballots and not with ballot applications. The legislative history of §208 confirms the congressional intent was to prohibit the states from interfering with voters who need assistance *in the voting booth at the polls*. See Ex. 22 (S. Rep. No. 97-417 at 62-64). The Senate Judiciary Committee expressed its concern that the blind, the disabled, and those who are unable to read and write are susceptible to undue influence and manipulation “at the polls” and may be unable to exercise their right to vote without “aid within the voting booth.” *Id.* at 62. The Committee concluded that the “only kind of assistance that will make fully ‘meaningful’ their vote”

is to “permit them to bring *into the voting booth* a person whom the voter trusts and who cannot intimidate” the voter. *Id.* Nothing in the language of §208 or its legislative history suggests Plaintiffs’ expanded reading that it precludes states from imposing restrictions on assistance with absentee ballots or applications, which, as established, provide a vastly more fertile field for potential fraud and abuse than the regular polling place.

Contrary to Plaintiffs’ argument, the Voting Rights Act does not hamstring the States from imposing restrictions on those providing assistance with absentee balloting or applications. In briefing previously provided to this Court, Defendants established the Voting Rights Act does not preempt state restrictions regarding the absentee ballots of disabled voters, and states may impose restrictions “above and beyond those set forth in the Voting Rights Act.” *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1196, 357 Ill. App. 3d 594, 610 (Ill. App. Ct. 2004). (*See* Defendants’ Response to Plaintiffs’ Motion for Preliminary Injunction pp. 27-29)

To the extent Plaintiffs argue by the term “choice” the Voting Rights Act somehow requires States to guarantee voters their choice of a particular person to assist them, common sense dictates rejection of this interpretation of §208. Just as the voter who chooses his or her favorite rock star is not guaranteed that particular person’s assistance at the polls or anywhere else, similarly, a mail-in voter is not guaranteed a particular person who is otherwise unable to assist him because he or she has already witnessed an application for someone else.

Even assuming the interpretation Plaintiffs give to §208, their claims still fail as a matter of law because there is no evidence any of the Plaintiffs or any other voter has been denied the right to have a person of his or her own choosing assist them with a mail-in ballot application due to §84.004.



**C. Plaintiffs' Due Process Claims Fail As A Matter of Law.**

Plaintiffs' due process allegations (Count VII) focus almost exclusively on the statutes enacted by 2003 Amendments to the Election Code, which have been previously dismissed from this lawsuit. As noted, §84.004 was enacted in 1979. In the past 29 years, none of the Plaintiffs has ever been investigated, charged or even questioned with respect to §84.004.

The Amended Complaint contains no specific allegations about voters or witnesses being misled or confused about the requirements of §84.004. Nor is there any admissible evidence of confusion about the requirements. As noted, the plain language of the statute is clear, which is all that is required. Moreover, the application instructions as well as the application form itself provide ample warnings and clear instructions. (McGeehan Decl. Ex. D) Vague allegations of confusion in the community are insufficient to strike down the statute. As the Supreme Court noted in upholding a similar challenge:

There might be quibbles about the meaning of [certain terms] ... but there are limitations in the English language ... and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with ....

*United States Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973).

With respect to notice of §84.004, it is difficult to conceive that Plaintiffs seriously contend that they have not been given fair notice of a statute enacted 29 years ago. Moreover, as previously briefed by Defendants to this Court, enactment of the statute by itself is constitutionally adequate notice. *Torres v. INS*, 144 F.3d 472, 473-74 (7thCir. 1998) (See pp. 18-21, Defendants' Rule 12(b) Motion to Dismiss). "A legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *United States*

*v. Hancock*, 231 F.3d 557, 565 (9<sup>th</sup> Cir. 2000) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)).

Given the actual notice Plaintiffs have of the requirements of §84.004—as evidenced by their allegations in this lawsuit, the absence of any admissible evidence of confusion about this statute, and the explicitness of the law and the instructions and warnings on the Secretary of State’s forms, any prospective injunctive or declaratory relief with respect to §84.004 would be unwarranted.

### **CONCLUSION**

Defendants have shown that they are entitled to summary judgment under the law. Neither the Constitution nor the Voting Rights Act prohibits a state from allowing a person to witness only one application for a mail-in ballot per election cycle. Defendants therefore request that the court grant them summary judgment and all other relief to which they are justly entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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