

No. 2-06CV-385

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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

v.

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

**REPLY BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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

**REPLY BRIEF IN SUPPORT OF
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

Defendants Greg Abbott, Attorney General of the State of Texas, and Phil Wilson, Secretary of State for the State of Texas, file this Reply Brief in response to Plaintiffs’ Opposition (“Opposition”) to Defendants’ Motion for Summary Judgment.

Defendants file their Objections to Plaintiffs’ Summary Judgment Evidence, which we attached as Exhibit A to the Supplemental Appendix.

I. INTRODUCTION

As the non-movants, Plaintiffs understandably wish to create the appearance of an exceedingly complex set of issues and facts—all of which Plaintiffs contend must be resolved before the Court can grant summary judgment. (Opposition p. 23) But in fact, the

key issue that resolves most of the Plaintiffs' claims in this lawsuit is simply whether the burdens imposed on Texans by the Challenged Statutes, as written, are justified by the legitimate interests of the State in preventing voter fraud and administering elections. As demonstrated by Defendants, the answer to this question is yes. As a result, (i) the Challenged Statutes stand as written; (ii) any future investigations and prosecutions of violations are within constitutional boundaries and therefore not actionable under 42 U.S.C. §1983; (iii) the Plaintiffs' constitutional challenges under the First and Fourteenth Amendments (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 the Challenged Statutes must be denied. Any alleged "chill" created by the Challenged Statutes, even assuming it exists, becomes irrelevant and non-actionable. The two remaining issues are (i) Plaintiffs' due process claims, based on alleged lack of notice and misinformation (Count VII), and (ii) Plaintiffs' Voting Rights Act claims under § 208 (Count IV), which as demonstrated, fail as a matter of law for other reasons.

With respect to Count V, for alleged violation of §2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments, and Count VI for selective enforcement against minorities in violation of the Equal Protection Clause of the Fourteenth Amendment and Fifteenth Amendment, Plaintiffs agreed to sever these two Counts which "contain allegations of racial discrimination by defendants" (as well as a portion of Count VII related to alleged selective discriminatory enforcement of the Challenged Statutes) pursuant to an agreed Order, signed by this Court on February 1, 2008. (See Docket No. 37) Notwithstanding the

severance of these claims from this lawsuit, Plaintiffs argue and present evidence in support of these claims in their opposition papers. (Opposition, pp. 14-18) The Plaintiffs' racial discrimination claims are not before the Court, and Defendants object to Plaintiffs' evidence offered in support of these claims as irrelevant to this proceeding. Should the Court determine that Plaintiffs' selective enforcement claims are relevant to other Counts not severed, as demonstrated below, these claims fail as a matter of law.

Plaintiffs' multiple, and unsupported, assurances throughout their Opposition brief that they will present evidence at trial that will resolve all fact questions (pp. 27, 28, 30, 40, 42, 43) are insufficient to defeat summary judgment. Fed. R. Civ. P. 56(c) The summary judgment evidence that Plaintiffs have submitted—much of which is irrelevant, out-dated, or hearsay—does not demonstrate there is a genuine issue of triable fact. Defendants are therefore entitled to summary judgment on all claims.

II. ARGUMENT

A. The State's Interest In Curtailing Voting Fraud Justifies Criminal Penalties For Unlawful Possession Of Another's Ballot—Even Though No Actual Fraud Is Alleged Or Shown.

The focus of Plaintiffs' case continues to be almost exclusively on Tex. Elec. Code §86.006(f). Plaintiffs' chief complaint is that §86.006(f) "criminalize[es] ...legitimate handling and possession of a ballot without any fraudulent activity whatsoever." (Opposition p. 6) Plaintiffs ignore the fact that the statute exempts from liability those who provide their name, address and signature. According to Plaintiffs, notwithstanding this exemption, to

pass constitutional muster, the State must demonstrate fraudulent activity is involved in order to enforce a statute designed to curtail voting fraud.

Plaintiffs' premise—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—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 194-95, 112 S.Ct. at 1848-49. The 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 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 of such regulations with criminal penalties—without running afoul of the First Amendment; (ii) the 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—does not involve protected political speech.

Accordingly, applying *Burson* to this case, (i) the State of Texas is within constitutional boundaries in enacting the regulatory scheme found in §86.006(f), which prohibits unauthorized possession of another's mail-in ballot and imposes criminal penalties for violations; and (ii) the statute is not overly broad because it may reach conduct which does not include any fraudulent activity.

Directly on point with the facts of this case, in *People v. Deganutti*, 810 N.E.2d 191 (Ill. Ct. App. 2004), the court rejected the argument that the state must allege and prove actual fraud or voter intimidation in order to convict for unlawful assistance with an absentee ballot. In *Deganutti*, the defendant was convicted of unlawful observation of voting and mailing another's absentee ballot. *Id.* at 193. The statute, the court noted, was enacted “to safeguard the integrity of the election process by depriving unauthorized persons of the opportunity to tamper with ballots after they have been completed.” (citation omitted) *Id.* Thus, the court continued, “the relevant inquiry is not whether a ballot has actually been tampered with, but whether *the opportunity* for such tampering by unauthorized persons was present.” (emphasis added). *Id.* at 197. “The act of knowingly observing another individual cast his or her ballot, and the act of an unauthorized person knowingly taking an absentee ballot in order to mail the ballot, are in themselves so potentially damaging to the integrity of the election process” that criminal intent is not required to impose criminal liability. *Id.* at 198. Thus, the statute, requiring only a “knowing” mental state, rather than criminal intent, was upheld.

Also on point is *People v. Hays*, 492 N.E.2d 213 (Ill. Ct. App. 1986). In *Hays*, the defendants were convicted for an election code violation for possessing the absentee ballots of voters in disregard of the statutory requirement that ballots be mailed or delivered personally by the voter to the election authority. The court upheld the constitutionality of the statute and remanded for trial, noting that the state was not required to allege or prove fraud or tampering:

That no fraud or tampering is alleged or proved cannot justify departure from the mandatory ballot return provisions of [the statute]. Consistent with the prophylactic nature of these provisions, the relevant inquiry is not whether a ballot has actually been tampered with, but whether the opportunity for such tampering by unauthorized persons was present.

492 N.E.2d at 215.

Burson, *Deganutti*, and *Hays* are consistent with 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).

Contrary to Plaintiffs' arguments, it is well-settled that the states may impose criminal liability for "mere" possession of an item illegally, *regardless of the defendant's intent*. *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990); *United States v. Garrett*, 984 F.2d 1402, 1411 (5th Cir. 1993); *Engler*, 806 F.2d at 432. In *Nguyen*, the defendant was convicted of possessing and importing a threatened species of sea turtle in violation of the Endangered Species Act. The Fifth Circuit held that it was "sufficient that the [defendant] knew he was in possession of a turtle. The government was not required to prove that [the defendant] knew that this turtle is a threatened species or that it is illegal to transport or import it." *Nguyen*, 984 F.2d at 1411. In *Garrett*, the court declined to find that the government was required to prove the defendant knew that she was carrying a concealed weapon aboard an aircraft and that her conduct was illegal. 984 F.2d at 1412. In *Engler*, the Third Circuit upheld the conviction of the defendant for selling protected bird parts in violation of the Migratory Bird Treaty Act, and found that the absence of a scienter requirement from the statute did not violate due process. 806 F.2d at 436.

In short, the crux of the Plaintiffs' legal theory—that the Constitution precludes the State from imposing criminal liability for "innocent" activities such as possession of another's ballot—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 for “mere” possession without showing any criminal intent.

Texas is not alone in imposing criminal penalties for unlawful possession of absentee ballots, contrary to Plaintiffs’ suggestion. (See Opposition, pp. 31-32) Similar to Texas, at least eleven other states—North Carolina, New Mexico, Michigan, Arizona, California, Missouri, Nevada, Ohio, Connecticut, Illinois, and Arkansas—restrict possession of another’s absentee ballot and provide criminal penalties for unlawful possession—regardless of whether the possession is fraudulent. (*See* Supp. App. Ex. 1-11) All eleven states impose restrictions that are equally or more onerous and penalties that are more harsh than the Texas statute. For example, North Carolina provides that it shall be a Class I felony “[f]or any person to take into that person’s possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter, provided, however, that this prohibition shall not apply to a voter’s near relative or the voter’s verifiable legal guardian....” N.C.G.A. §163-226.3. New Mexico provides that it is a fourth class felony for unlawful possession of an absentee ballot and defines unlawful possession as consisting of “possession at any time of absentee ballot materials when not authorized by the Election Code to be in possession of such materials.” N.M.S.A. §1-20-7. Connecticut provides that it is a class D felony for “possession [of] any official absentee ballot or ballot envelope ... except” election officials, postal workers, and “any other person authorized.” Conn. Gen. Stat. Ch. 145, §9-140b(d), Ch. 151, §9-359(5). Illinois makes it a Class A misdemeanor for unauthorized possession of an absentee ballot of another. Ill. Stat. Ch. 10, Act 5, art. 19, 5/19-6; Ch. 10, Act 5, art. 29, 5/29-12. Arkansas provides that it is a Class A misdemeanor for a “designated bearer”

or “authorized agent” to “have more than two (2) absentee ballots in his or her possession.” Ark. Elec. Code Tit. 7, Ch. 5, Subchapter 4, § 7-5-419(a)(b); Tit. 7, Ch. 1 §7-1-103(c).

Michigan also makes it a felony for any person other than a member of the immediate family, a person living in the household, mail servicepeople, or clerks to “possess an absent voter ballot mailed or delivered to another person, regardless of whether the ballot has been voted.” Mich. Comp. Laws Ann. § 168.932(f)(i). Further, Nevada provides that it is a class E felony for the unlawful possession of an absentee ballot by anyone “other than the voter who requested the ballot [or] who is a member of the family of the voter who requested the absent ballot.” Nev. Rev. Stat. Ann. § 293.330(4). Missouri makes it a class one election (felony) offense for “any person assisting a voter who is not entitled to such assistance...” to have possession of the voter’s absentee ballot. Mo. Ann. Stat. § 115.291(1). Ohio also provides that election falsification by way of third-party absentee ballot possession is a felony. Ohio Rev. Code Ann. § 3509.05, 3599.36.

Additionally, Arizona makes it a class 2 misdemeanor for a person to “knowingly [receive] an official ballot from a person other than the election official having charge of the ballots.” Ariz. Rev. Stat. Ann. § 16-1018(6). California also provides that any third party who delivers another voter’s absentee ballot is a person “who willfully interfere[d] with the prompt delivery of a completed vote... [and] is guilty of a misdemeanor.” Cal. Elec. Code § 3017(3), 18576.

Like Texas, none of the foregoing state statutes requires a showing of voter fraud or intimidation. Knowing but unauthorized possession, by itself, is sufficient to charge a person with the crime. As noted, the Illinois statute has been challenged on the same constitutional grounds Plaintiffs argue here and has been upheld. *Deganutti*, 810 N.E.2d at 197-98. Plaintiffs’ suggestion that the Texas statutory scheme is “novel” (Opposition, p. 10), and Texas is a rogue state, testing the outer limits of absentee ballot restrictions, is simply unfounded.¹

B. Strict Scrutiny Does Not Apply Because The Challenged Statutes Do Not Infringe On Any Fundamental Constitutional Right.

Plaintiffs argue that the “strict scrutiny” standard of review applies because the Challenged Statutes infringe on the fundamental right to vote. (Opposition p. 23) As noted, this Court has already held that the fundamental right to vote is not in issue in this case, that strict scrutiny does not apply, and that instead the more flexible framework of *Anderson/Burdick* should be applied. (See FF/CL, p. 10, ¶¶ 11, 12 (“Although there is a fundamental right to vote, the Supreme Court has held there is no corresponding fundamental right to receive and cast an absentee ballot. (citations omitted). In light of *McDonald*, this court holds that strict scrutiny does not apply to the challenged provision.”)) Nothing in the Plaintiffs’ Summary Judgment response alters this Court’s previous conclusion regarding *Anderson/Burdick*.

1

Plaintiffs’ contention that the State’s portrayal of other state statutes is “inaccurate” (Opposition p. 32) erroneously fails to take into account that for several states the criminal penalties are located in other sections of the state’s statutes (*e.g.*, Illinois, Connecticut, and Michigan).

Plaintiffs struggle and ultimately fail to distinguish *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 302, 309, 89 S.Ct. 1404, 1408 (1969), which holds that the rights conferred by state statute to vote by absentee ballot are not fundamental rights guaranteed by the Constitution. (Opposition p. 24) In *McDonald*, inmates in the Cook County jail awaiting trial challenged the Illinois absentee ballot statute, which did not allow inmates to apply for an absentee ballot. The *McDonald* Court found there was no disenfranchisement, holding “the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise....” 394 U.S. at 807-08; 89 S.Ct. at 1408. The Court noted there was no evidence the prisoners could not otherwise exercise their right to vote. *Id.*

The same reasoning applies here—the Challenged Statutes are part of the overall statutory scheme in Texas designed to make voting more available to some groups who cannot easily get to the polls. Regulating mail-in ballot procedures to safeguard the process does not deny voters their right to vote. Plaintiffs argue because *McDonald’s* ruling is based on “no evidence” it does not apply here. (Opposition p. 24). Plaintiffs’ argument misses the point, however. *McDonald* teaches that when the absentee ballot restrictions do not foreclose other avenues for exercising one’s right to vote, including personal appearance at the polls—no matter how “difficult” or “practically impossible” it may be—there is no unconstitutional disenfranchisement. *Id.* at 394 U.S. at 810, 89 S.Ct. at 1409. The

requirement here that a mail-in voter simply follow the ballot instructions and have an assistant identify himself is obviously far less of an obstacle than the Cook County inmates faced in attempting to exercise their right to vote.²

According to Plaintiffs' theory, *any* restrictions on mail-in voting—such as deadlines for applying and returning ballots, the oath and signature, or even the qualifications themselves for voting by mail-in ballot—are unconstitutional disenfranchisement because they may deprive voters of their vote. *McDonald* recognized that this path would be endless and established the bright line that unless the statute forecloses other means for exercising one's right to vote, there is no impermissible disenfranchisement.

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

² Plaintiffs' reliance on *O'Brien v. Skinner*, 414 U.S. 524 (1974), also involving absentee voting by inmates, is similarly distinguishable. (Opposition, p. 25) The practical limitations of voting on persons who are incarcerated in *O'Brien* has no application to the regulatory safeguards imposed by the Challenged Statutes here. In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Court's rejection of restrictions on minority parties also has no application to the Challenged Statutes here which are facially neutral.

Strict scrutiny also does not come into play with respect to Plaintiffs' alleged First Amendment associational rights to assist voters with their mail-in ballots. Plaintiffs cite no authority that supports their claim that the assistance provided to a mail-in voter—which the law requires be content neutral—constitutes expressive activity that is protected by the First Amendment. Plaintiffs have not identified or presented evidence of any impediments upon the Plaintiffs' ability to perform any functions ordinarily performed by political parties. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364 (1997). In the absence of being deprived any rights under the United States Constitution, the Plaintiffs representing the interests of activists have no cognizable claim under §1983. *Baker v. McCollan*, 443 U.S. 137, 140-41, 99 S.Ct. 2689, 2692 (1979).

Plaintiffs' brief presents a confused picture of their position on the State's interest. On the one hand, Plaintiffs concede the State has an "obviously important interest in preventing voting fraud." (Opposition p. 27) A few pages earlier, however, Plaintiffs argue that in legislative hearings on H.B. 54 there was no evidence of voting fraud and it was simply "assumed" such fraud was a problem, citing the sworn declarations of three Texas Democratic legislators. (Opposition pp. 10-11) The testimony concerning H.B. 54 of legislators who either did not read the bill or were not paying attention at the time of its enactment is simply not relevant to the intent of the Texas legislature or the meaning of the statutes. *Forman v. Dallas County*, 193 F.3d 314, 322 (5th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (citing *Bread Political Action Comm. v Federal Elec. Comm'n*, 455 U.S. 577

(1982)). Moreover, to the extent Plaintiffs are arguing that these Democratic legislators were somehow hoodwinked into voting for H.B. 54, their testimony is particularly disingenuous since the Democrats have not attempted to repeal or amend any portion of the Challenged Statutes in the two legislative sessions since 2003. In any event, there is no doubt, as the Supreme Court has recently confirmed, that the states have a compelling interest in preventing voting fraud. *Crawford v. Marion County Elec. Bd.*, 2008 WL 1848103 at 13 (U.S. 2008) (“While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.”) Related to that interest is the orderly administration elections. *Id.*

C. Section 86.006(h) Provides Safeguards For Ensuring All Eligible Votes Are Counted.

Plaintiffs argue §86.006(h) is invalid because it authorizes the early voting clerk not to count a mail-in ballot if the carrier envelope does not comply with §86.006. (Opposition p. 31 fn. 20). Plaintiffs suggest, erroneously, any irregularity means automatic disenfranchisement of the voter. This is incorrect. Plaintiffs fail to consider the multiple safeguards provided for ensuring that in the event of an irregularity with respect to the carrier envelope the voter is informed promptly by the early voting clerk so that the voter may either correct the defect before the deadline and re-submit the mail-in vote, or vote in person at an early polling place or at the regular polling place on election day. §§86.011(d), 86.006(h). (See discussion generally pp. 9-10 of Motion). Notifying the voter promptly is part of the

statutory duties of the early voting clerk, who is bound by oath to “faithfully perform [his or her] duty as an officer of the election and guard the purity of the election.” Tex. Elec. Code §§ 83.001, 62.003. After the election, written notice must be provided by the clerk to the voter of the reason for rejection of the mail-in ballot. Tex. Elec. Code §§87.043; 87.0431.

Invalidating the mail-in ballot due to a violation of §86.006 is no different than invalidating for any other reason, such as mailing after the deadline, or failing to register. It is axiomatic that any regulation of voting procedures may result in some voters being unable to vote or their votes being disqualified. Here, since 2004, the mail-in ballot instructions warn voters that if they receive assistance with their ballot or depositing their ballot in the mail the assistant’s name, address, and signature must be provided and failure to include this information “may” result in the voter’s ballot “being rejected.” (Ex. 2, McGeehan Decl. Ex. B).

Texas is not alone among the states in providing that an absentee or mail-in ballot may be invalidated due to unauthorized handling of the ballot—even where there is no fraudulent activity. (*See* Ex. 21-23). Like Texas, at least three other states - Arizona, California, and Illinois - require that the unlawfully possessed absentee ballots be invalidated. (*Id.*) Arizona provides that if a third-party possessor delivered another voter’s absentee ballot there was “more than mere technical irregularity and invalidated balloting even absent showing of fraud.” Ariz. Rev. Stat. Ann. § 16-542(6). (*Id.*) California requires that if absentee ballots are returned by a third party, even at that voter’s request, cannot be counted. Cal. Elec. Code

§ 3017(3). (*Id.*) Illinois provides that “where absentee ballots were not returned by mail or personally to clerk’s office, such ballots were properly invalidated, despite the fact that there was no evidence of fraud or tampering with such ballots.” 10 Ill. Comp. Stat. Ann. 5/19-6(4). (*Id.*)

Plaintiffs’ suggestion that there has been mass disenfranchisement due to 86.006(h) is belied by the fact that there is no evidence of even a single vote being disqualified under this provision. Indeed, from a purely practical standpoint, there is no way for an early voting clerk to know of an omission from the carrier envelope by an assistant. Section 86.006(h) is directed to other scenarios covered in §86.006. Although not specifically excluded, it has no practical application to an omission under §86.006(f).

The only time a ballot would not be counted due to a violation of §86.006(f) is in the course of an election contest in which the court obtained facts to show that a ballot was delivered by a person who did not provide the required information.

D. Plaintiffs’ Post-2007 Amendment Overbreadth Arguments Fail As A Matter of Law.

Despite the amendment to §86.006(f) in 2007, exempting assistants who provide their name, address and signature, Plaintiffs persist in arguing that its overbreadth claims are not moot because §86.006(f) criminalizes the innocent person who forwards or picks up a mail-in ballot but does not actually deposit the carrier envelope in the mail. Plaintiffs’ argument is based on a hypertechnical reading of §86.006(f)(4). The statute does not require, as Plaintiffs

contend, that the person in possession of another’s mail-in ballot must personally deposit the envelope in the mailbox to fall within the exception in (f)(4), only that the person who possesses the carrier envelope does so “to deposit” it in the mail. The statute does not specify, and the actual depositing may be done directly or indirectly. As demonstrated by Defendants, there is no evidence of the State ever prosecuting anyone under §86.006(f) if that person provided the required disclosure information on the envelope—regardless of whether that person mailed the envelope personally.

Plaintiffs conjure as an example of overbreadth the hypothetical scenario of a mailroom worker in a nursing home who provides the required disclosure information on the carrier envelope but does not actually deposit the envelope in the mailbox. Plaintiffs argue that he or she would not fulfill the exception under §86.006(f)(4) and would be subject to prosecution because the worker did not actually deposit the carrier envelope in the mailbox. As demonstrated by Defendants, there is no evidence of the State ever prosecuting a person working in a mailroom who incidentally handles a mail-in ballot of another but does not actually deposit it in the mailbox. Plaintiffs’ hypothetical is precisely the kind of argument the Supreme Court has recently held will not be heard to invalidate a statute. *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190 (2008) (In determining whether a statute is facially invalid, the court “must

be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.") None of the Plaintiffs before the Court in this case is a nursing home mailroom worker or purports to represent the interests of mailroom workers. As such, the named Plaintiffs lack standing to assert the interests of hypothetical mailroom workers, not before this Court. *Lujan v. Defenders of Wildlife*, 504 U.S.555, 563, 119 S.Ct. 2130, 2137 (1992). Even if Plaintiffs were to add a mailroom worker, it is difficult to imagine how working in a mailroom handling mail constitutes constitutionally protected activity under the First Amendment.

E. Plaintiffs' Summary Judgment Evidence Does Not Raise A Genuine Issue Of Fact.

As noted, if the Challenged Statutes are valid as Defendants contend, evidence of any chilling effect on constitutionally protected activity becomes irrelevant. Even if the Court were to find the Challenged Statutes are vague or overly broad, Defendants are nevertheless entitled to summary judgment because Plaintiffs have presented no admissible evidence of any "chill" on protected activities.

As noted in Defendants' Motion, Plaintiffs have not identified a single voter by name who has been unable to vote since 2003 due to the Challenged Statutes. None of the Plaintiffs themselves have been disenfranchised. (Supp. App. Ex. 12-17) *All* of the

Plaintiffs have voted since the inception of this lawsuit, most recently in the 2008 primary, even Mr. Robinson who is physically disabled, and Ms. Meeks, who has suffered a stroke and voted by mail. (Supp. App. Ex. 14 and 16) 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. (Supp. App. Ex. 18) Of the 30-plus persons listed by Plaintiffs in their initial disclosures as being disabled or elderly, all but 2 of these people voted have voted since 2004—either by mail-in ballot or in person. (Supp. Ex. 18) The only two voters identified by Plaintiffs whose voting histories indicate they have not voted recently are Ms. Louise French and Ms. Lillie Briscoe. (Supp. App. Ex. 18-18; 18-19) There is no evidence before the Court as to *why* these voters have not voted and they are not listed as trial witnesses by the Plaintiffs. The potential reasons for their not voting, of course, are endless: they moved away, they have been too busy, they have not been interested in the recent elections. At best, Plaintiffs can only speculate as to their reasons.

The only evidence Plaintiffs present of a “chill” on voters is vague and inadmissible hearsay. 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, as noted, Plaintiffs fail to cite any authority supporting the notion that providing assistance with a mail-in ballot is constitutionally protected activity. Assuming for purposes of argument that it is, the Plaintiffs’ evidence of “chill” on this activity is insufficient to defeat summary judgment. As noted, two of the Plaintiffs, Ms. Ray and Ms. Johnson, have resumed their activities in assisting voters and are complying with the law. 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 he did not know of anyone who has refused to assist mail-in voters due to the Challenged Statutes. (Ex.24 Supp. App. p. 10) Ms. Minneweather testified that she had discontinued assisting voters, not due to any confusion about what the statute requires, but due to being

“hurt” about being investigated.³ As demonstrated by Defendants, this evidence falls well short of the “substantial” chill required to overturn a statute. *Washington State Grange*, 128 S.Ct. At 1191.

F. Plaintiffs’ Selective Enforcement Claims Fail As A Matter of Law.

In their Opposition, Plaintiffs continue to urge that Defendants have violated the Equal Protection Clause by selectively enforcing the Challenged Statutes against three groups—African Americans, Hispanics, and Democrats. (Opposition p. 14) Putting aside the racial discrimination claims which have been severed (see Order, dated February 1, 2008), Plaintiffs’ “selective enforcement” claims as to Democrats fail as a matter of law because (i) Plaintiffs have not identified any similarly situated individuals who have been treated differently, and (ii) it is undisputed that the Defendants have prosecuted only those who were reported as having violated (or potentially violated) the law. *Wayte v. United States*, 470 U.S. 598,609, 105 S.Ct. 1524, 1532 (1985).

As the summary judgment evidence establishes, Defendants do not initiate voter fraud investigations. (See Motion, p. 12) The Secretary of State receives complaints, determines if there is reasonable cause, and refers the complaint to the Attorney General for investigation, as required by statute. (Motion, pp. 11-12) Plaintiffs do not dispute this evidence.

³ Plaintiff Minneweather is mistaken in attributing any publicity about her to the Attorney General. There is no evidence of any public statements issued by the Attorney General concerning Ms. Minneweather.

To state a claim under equal protection, the plaintiff must show (i) that similarly situated individuals were treated differently, and (ii) that this disparate treatment was deliberately based upon unjustifiable standards such as race, religion or other arbitrary classification, including the exercise of protected statutory and constitutional rights. *Summers v. City of Raymond*, 105 F. Supp. 2d 549, 551 (S.D. Miss. 2000) (citing *United States v. Lawrence*, 179 F.3d 343 (5th Cir. 1999)). Here, Plaintiffs cannot establish either prong. Plaintiffs have not identified any similarly situated individuals who have been treated differently related to enforcement of the Challenged Statutes. The recreational vehicle club in Livingston, Texas, to which Plaintiffs refers on page 48 of its Opposition, is not similarly situated because it is undisputed that the club does not provide voter assistance to its members nor does it handle marked ballots or carrier envelopes containing marked ballots on behalf of its members, and thus there is no potential violation of §86.006(f). (Carr Dep. p. 30) (Supp. App. Ex. 20). Moreover, there is no evidence of any complaints against the club for handling marked mail-in ballots or carrier envelopes. In contrast, the Defendants' investigations and prosecutions of Plaintiffs were initiated as a result of complaints filed and concern only the possession and handling of marked ballots in violation of §86.006(f).

Second, Plaintiffs cannot establish any discriminatory intent on the part of the Defendants. Discriminatory intent requires a showing that the decision maker selected a target for prosecution *because of* the target's membership in an identifiable group. *Wayte*,

470 U.S. at 609, 105 S.Ct. at 1532. In *Wayte*, the plaintiff contended that the United States government selectively prosecuted him and others in violation of the Equal Protection Clause for failing to register for the draft because he exercised his First Amendment rights. The Supreme Court rejected this claim, holding that there was no selective enforcement where the government's policy was to prosecute only those who self-reported or were reported by others to the government for failure to register. In effect, selection for prosecution was wholly "passive" on the part of the government and therefore there could be no discriminatory intent. *Id.*

The same analysis in *Wayte* applies here. To the extent the number of investigations and prosecutions under the Challenged Statutes impact more Democrats than Republicans, it cannot be a matter of intent on the part of Defendants since Defendants do not initiate any investigations and only prosecute those who are the subject of complaints by the public.⁴ Absent any evidence of discriminatory intent, Plaintiffs' equal protection claims fail as a matter of law. *Esmail v. Macrane*, 53 F.3d 176, 178-79 (7th Cir. 1995).

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Plaintiffs' contention that a picture of a "sickle cell" stamp in the power point presentation is evidence of discriminatory intent on the part of Defendants against African Americans is not only speculative but grossly unfair given the deposition testimony of Eric Nichols, Deputy Attorney General for Criminal Justice. When asked about the purpose of the stamp in the power point, Mr. Nichols explained that the stamp was actually taken from the investigation file of the Plaintiff Willie Ray in this case. (Supp. App. Ex. 19, Nichols Dep. pp. 70-71). Mr. Nichols explained that the point of the slide was to demonstrate that the unique stamp was used to trace back mail-in ballots to a common source. (*Id.*)

CONCLUSION

Defendants respectfully request that summary judgment be entered in their favor on all claims.

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
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