

No. 06-_____

**In the
United States Court of Appeals
for the Fifth Circuit**

WILLIE RAY, JAMILLAH JOHNSON, GLORIA MEEKS, REBECCA MINNEWEATHER,
PARTHENIA McDONALD, WALTER HINOJOSA, THE TEXAS DEMOCRATIC PARTY,
Plaintiffs-Appellees,

v.

STATE OF TEXAS,
Defendant,

GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS;
ROGER WILLIAMS, SECRETARY OF STATE FOR THE STATE OF TEXAS,
Defendants-Appellants.

On Appeal from the United States District Court
Eastern District of Texas, Marshall Division

**APPELLANTS' MOTION FOR EMERGENCY STAY OF PRELIMINARY INJUNCTION
PENDING APPEAL AND MOTION TO EXPEDITE APPEAL**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees:

- Willie Ray
- Jamillah Johnson
- Gloria Meeks
- Rebecca Minneweather
- Parthenia McDonald
- Walter Hinojosa
- The Texas Democratic Party

Counsel for Plaintiffs-Appellees:

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Defendants-Appellants:

- Greg Abbott, Attorney General of the State of Texas
- Roger Williams, Secretary of State for the State of Texas

Counsel for Defendants-Appellants:

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- Kathlyn C. Wilson
- Philip A. Lionberger
- Adam W. Aston

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Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Appellants Greg Abbott, Attorney General of the State of Texas, and Roger Williams, Secretary of State for the State of Texas, file this motion for an emergency stay of the preliminary injunction entered in this case yesterday, on October 31, 2006. The preliminary injunction has the immediate effect of preventing the enforcement of portions of the

Texas voter fraud statutes and will predictably result in injecting uncertainty and voter confusion into the upcoming election six days hence, on November 7, 2006.

The Texas Election Code prohibits anyone from possessing or mailing another voter's absentee ballot unless that person (1) is a family member, (2) lives at the same address, (3) is an election worker, (4) is a postal worker or common carrier, or (5) most relevant to this appeal, writes his or her name, address, and signature on the outside of the ballot envelope. *See* TEX. ELEC. CODE §86.006. These provisions—passed by the Texas Legislature in 2003 to address longstanding problems of partisan “vote harvesters” collecting absentee ballots and pressuring and manipulating elderly and vulnerable voters—constitute reasonable, easy-to-comply-with disclosure requirements that help protect the integrity of Texas elections.

Indeed, the challenged provisions are nearly identical to (and in fact more lenient than) one of the key recommendations of the bipartisan Commission on Federal Election Reform co-chaired by President Jimmy Carter and Former Secretary of State James A. Baker, III.¹ In order to “improve ballot integrity,” the Commission recommended that:

¹ Other members of the bipartisan Commission included former Democratic Majority Leader Senator Tom Daschle, former Democratic Representative Lee Hamilton, former Texas Chief Justice Tom Phillips, and former National Council of La Raza President Raul Yzaguirre. *See* List of Members of Commission on Federal Election Reform, *available at* <http://www.american.edu/ia/cfer/members.htm>.

State and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. *The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.*

Recommendation 5.2.1 (emphasis added), Commission of Federal Election Reform available at http://www.american.edu/ia/cfer/report/CFER_section5.pdf.

The Texas Legislature chose to be even more lenient than the Commission recommendation, and to still allow party workers to pick up absentee ballots, but only if they comply with the disclosure requirement that they write their name, address, and signature on the outside of the ballot envelope. Nevertheless, Plaintiffs challenged the provision, and the district court yesterday enjoined any enforcement of §§86.006(f) & (h) of the Texas Election Code because it determined that “Plaintiffs have demonstrated a substantial likelihood of success on their merits of their claim” that those statutes are facially unconstitutional because they “unduly burden[] the First and Fourteenth Amendment rights of the plaintiffs.” Exhibit B at 12-13.

Neither Plaintiffs nor the district court cited any authority whatsoever for the proposition that requiring the disclosure of the identity of individuals who possess or mail the absentee ballot of another is facially unconstitutional, and the state defendants are unaware of any other court, state or federal, that has ever so held. And, the applicable U.S. Supreme Court precedent is directly to the contrary. *See*

McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802 (1969) (holding that absentee voting is a privilege, not a right, and so the State may impose reasonable restrictions upon it or even eliminate it altogether); *see also O'Brien v. Skinner*, 414 U.S. 524, 529-30 (1974) (reaffirming *McDonald*).

As a result of the district court's injunction, substantial voter confusion is likely. Indeed, unscrupulous individuals reading newspaper headlines such as "Federal Court Enjoins Enforcement of Voter Fraud Statute" may well be encouraged to engage in all sorts of egregious conduct, to the detriment of all the voters. As the Supreme Court explained less than two weeks ago—in *unanimously* reversing another federal court injunction against a different voter fraud statute, also issued on the eve of the election—courts must weigh additional "considerations specific to [these types of] cases." *Purcell v. Gonzalez*, Nos. 06A375 (06-532) & 06A379 (06-533), 2006 WL 2988365, at *2 (U.S. Oct. 20, 2006) (per curiam). In particular, courts must consider whether an order "affecting elections" may result in "voter confusion and consequent incentive to remain away from the polls." *Id.* This consideration is magnified "[a]s an election draws closer." *Id.* In other words, "the imminence of an election" is a further consideration in determining whether to "allow the election to proceed without an injunction suspending [an election regulation]." *Id.* at *3. Also, whether there is "an inadequate time to resolve . . . factual disputes" is another

consideration weighing against granting an injunction. *Id.*; *see also id.* (Stevens, J., concurring) (“Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality.”). As the Court emphasized, “[v]oter fraud drives honest citizens out of the democratic process [and v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Id.*

This election is six days away. Absentee ballots are being filled out and mailed every day from now until early next week. Because voter fraud undermines the integrity of the entire democratic process, and because voter confusion in the wake of this injunction is highly likely, an emergency stay is warranted to permit Appellants to continue to combat voter fraud during the final week of voting by mail. *See* TEX. ELEC. CODE §86.007 (balloting by mail concludes on Election Day, which is November 7, 2006). Moving for a stay in the district court first would be impracticable, *see* FED. R. APP. P. 8(a)(2)(A)(i), because of the immediate effect the injunction has on efforts to prevent voter fraud in the ongoing absentee voting by mail and the lack of an available remedy for fraud that occurs while a motion is pending before the district court.

Pursuant to Fifth Circuit Local Rule 27.5, Appellants also move to expedite their appeal in this cause. The ongoing nature of balloting by mail—which will

conclude six days from now on Election Day, November 7, 2006—is good cause for the Court to decide this case on an expedited basis. Indeed, resolution of the case on a non-expedited basis may render moot any relief the Court may grant.²

FACTUAL AND PROCEDURAL BACKGROUND

I. THE PLAINTIFFS - APPELLEES

Appellees filed suit in the Eastern District of Texas alleging that certain provisions of the Texas Election Code relating to absentee balloting by mail violated the Constitution and the Voting Rights Act. *See* Exhibit B (Findings of Fact and Conclusions of Law) at 5. Appellees Willie Ray, Jamillah Johnson, Gloria Meeks, and Rebecca Minneweather alleged that they are African-American political-party activists for the Texas Democratic Party. *See* Exhibit B at 1-2. Appellee Parthenia McDonald, an African-American, alleged that she is an elderly, homebound registered voter who uses a mail-in ballot to vote early, and requires assistance to do so. *See* Exhibit B at 2. Appellee Walter Hinojosa alleged that he is a Hispanic political-party activist for the Democratic Party. Finally, Appellee the Texas Democratic Party asserted that one way in which it attempts to maximize voter turnout is by utilizing its political-party activists such as Appellees Ray, Johnson, Meeks, Minneweather, and Hinojosa to help voters requiring assistance—such as the

² If the Court does stay the injunction, the need for an expedited appeal is substantially diminished.

homebound, the physically handicapped, the elderly, and the illiterate—to cast mail-in ballots. *See* Exhibit B at 2-3.

Notably, two of the plaintiffs, Willie Ray and Jamilla Johnson, have both already chosen to plead guilty to criminal possession of mail-in ballots or carrier envelopes of other voters in violation of §86.006 of the Texas Election Code and are both currently on probation for that offense.³

II. THE CHALLENGED ELECTION CODE PROVISIONS

Appellees alleged that several provisions of the Texas Election Code—most of which were amendments to the Code in 2003—illegally interfere with their ability to assist certain voters for Democratic candidates in completing and dispatching their early-voting, mail-in ballots. *See* Exhibit B at 5, 7. These provisions included:

- **§86.0051.** This section was added as part of the 2003 amendments to the Code, and it concerns the handling of carrier envelopes. It requires a witness who signs the carrier envelope’s certificate to comply with §1.011 of the Code, and it requires that a person other than the voter who mails the carrier envelope to provide their printed name, signature, and residence address on the reverse side of the envelope, regardless of whether the voter voluntarily gave the person possession of the envelope. The section does not apply to persons related to an applicant within the second degree of affinity or the third degree

³ Under black-letter Supreme Court precedent, their attempt to use this civil litigation to collaterally attack their prior criminal convictions is barred, and must be dismissed. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). The only basis for the Plaintiffs filing this case in Marshall, Texas was that Plaintiffs Ray and Johnson reside in the Eastern District of Texas. Thus, under Federal Rule of Civil Procedure 12(b)(3), the case should have been dismissed for improper venue because the claims of the only two Plaintiffs from Texarkana are jurisdictionally barred under the *Heck* doctrine, and without those claims there is no other basis for venue in the Eastern District.

of consanguinity. *See* TEX. ELEC. CODE §86.0051.

- **§86.006.** This section concerns the method of returning a marked mail-in ballot to the early-voting clerk. In particular, Plaintiffs complained of subsections (f) and (g), which were added by the 2003 amendments to the Code. Subsection (f) makes it an offense for a person to knowingly possess an official mail-in ballot or carrier envelope. There are several affirmative defenses to subsection (f) that may apply unless the person possessing the ballot or envelope intended to defraud the voter or the election authority. It is an affirmative defense if the person on the date of the offense was: (1) related to the voter within the second degree of affinity or the third degree of consanguinity; (2) registered to vote at the same address as the voter; (3) an early-voting clerk or deputy clerk; (4) a person possessing a carrier envelope who provided the information required under §86.0051, namely their printed name, signature, and residence address on the reverse side of the envelope; (5) an employee of the U.S. Postal Service; and (6) a common or contract carrier. Subsection (g) provides the range of punishment—Class A and B misdemeanors and a state jail felony—for violating subsection (f). *See* TEX. ELEC. CODE §86.006.

Appellees also asserted challenges to §§ 64.036(a)(4), 84.003(b), and 84.004 of the Election Code.

Appellees asserted that the plain intent and effect of these Election Code provisions was to suppress voting by disfavored groups and to prevent Democratic-Party activists from providing assistance to persons voting early by mail. Appellees alleged that these provisions violated Plaintiffs' fundamental right to vote and their rights to political expression and free association guaranteed by the First and Fourteenth Amendments to the Constitution and §2 of the Voting Rights Act.

III. THE DISTRICT COURT'S PRELIMINARY INJUNCTION

On September 21, 2006, Plaintiffs filed this lawsuit against the State of Texas,⁴ Attorney General Abbott, and Secretary Williams. Twenty-two days *after* filing their lawsuit, Plaintiffs filed a motion for preliminary injunction, seeking an injunction “in advance of the 2006 election.” When they filed their motion for preliminary injunction, on October 13, 2006, Plaintiffs requested neither a hearing nor expedited consideration of their motion, even though election day was only 35 days away.

Ten days after the filing of Plaintiffs’ motion for preliminary injunction, the district court, on its own motion, set an October 30th hearing date for Plaintiffs’ motion. The day following the hearing, around 5:00 P.M., the district court issued findings of fact and conclusions of law and a preliminary injunction. The district court’s preliminary injunction addresses only §86.006(f) & (h); none of the other challenged provisions is subject to the injunction.⁵ The sole basis of the district

⁴ The district court has dismissed the State from this lawsuit, “granting in part the motion of the State of Texas to dismiss any constitutional claims brought against it in its sovereign capacity.” Exhibit B at 8.

⁵ Plaintiffs have also alleged violations of equal protection and due process of law in violation of the Fourteenth Amendment, as well as the denial of the right to vote on the basis of race in violation of the Fifteenth Amendment. They also claim that the enactment and enforcement of the challenged provisions discriminates in violation of §§2 and 208 of the federal Voting Rights Act of 1965, 42 U.S.C. §§1971, 1973, 1973aa-6. And Plaintiffs specifically assert that the challenged provisions are unconstitutional under the overbreadth and void-for-vagueness doctrines. Because the district court’s preliminary injunction is not on these other claims, but rather is based only on Plaintiffs’ claims under the First and Fourteenth Amendments, this appeal will be limited to Plaintiffs’ claims addressed by the preliminary injunction.

court's October 31st injunction is that §86.006(f) & (h) allegedly "unduly burden[] the First and Fourteenth Amendment rights of the plaintiffs."

The Court's injunction states that Appellants are ordered to "cease enforcing, pending a trial on the merits" §§86.006(f) and (h) "under 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." Exhibit A at 1. The injunction also states that "[n]othing 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," *id.*, and that "[n]othing in this order should be read to enjoin the defendants 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, even if such person has the actual consent of the voter," *id.* at 1-2. On November 1, 2006, Appellants filed their Notice of Appeal and this Motion for Emergency Stay of Preliminary Injunction Pending Appeal and Motion to Expedite Appeal.

ARGUMENT

As the Supreme Court observed recently in *Purcell v. Gonzalez*, Nos. 06A375 (06-532) & 06A379 (06-533), 2006 WL 2988365 (U.S. Oct. 20, 2006) (per curiam),

“[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Id.* at *3. The district court granted a preliminary injunction that prevents the enforcement of Texas Election Code provisions designed to prevent voter fraud in early voting by mail. This order will result in decreased confidence in the integrity of the 2006 elections. That the injunction was granted while the early-voting process was ongoing, and a mere seven days prior to Election Day, compounds the district court’s error and necessitates an emergency stay of the injunction and an expedited appeal.

I. THE PRELIMINARY INJUNCTION CREATES CONFUSION AND WILL PERMIT ELECTION FRAUD.

The Supreme Court recently noted in *Purcell* that before issuing an order “affecting elections,” a court must consider whether such an order will create confusion and disincentive to voting. *Purcell*, 2006 WL 2988365, at *2 In light of the fact that voting by mail is currently in progress, the district court’s order—which has the effect of preventing Appellants from obtaining a trial on the merits in time to obtain meaningful relief—cannot be justified under *Purcell*’s high standard. The resulting potential for voter fraud further demonstrates that the district court’s issuance of an injunction prior to resolving all issues on the merits was error.

A. The District Court Did Not Give Sufficient Weight to the Need to Allow an Ongoing Election to Continue

Undisturbed.

Prior to granting preliminary injunctions in election cases, courts must weigh “considerations specific to election cases.” *Purcell*, 2006 WL 2988365, at *2. Courts should consider whether an order “affecting elections” may result in “voter confusion and consequent incentive to remain away from the polls.” *Id.* This consideration is magnified “[a]s an election draws closer.” *Id.* In other words, “the imminence of an election” is a further consideration in determining whether to “allow the election to proceed without an injunction suspending [an election regulation].” *Id.* at *3.

On October 31, 2006, the district court enjoined the enforcement of Texas Election Code provisions relating to returning a voted ballot by mail. *See* Exhibit A at 1-2. Voting by mail is beyond imminent; it is underway. It began more than a month ago, *see* TEX. ELEC. CODE §§84.007, 86.004, and will continue through Election Day, *see* TEX. ELEC. CODE §86.007. Because a trial on the merits cannot resolve the factual disputes in this case until after the election, the district court erred in granting the preliminary injunction, the result of which will be confusion and an increased likelihood of voter fraud.

B. The Preliminary Injunction Creates Confusion for Voters.

The district court’s order will create confusion for voters who are notified that a federal court has forced Appellants to cease enforcing statutes designed to eliminate

voter fraud. As the Supreme Court recently noted, “[v]oter fraud drives honest citizens out of the democratic process [and v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell*, 2006 WL 2988365, at *3. Unless this Court grants an emergency stay and permits an expedited appeal, the district court order impeding the State’s efforts to curb voter fraud will be in effect as voters choose whether to exercise their right to cast a ballot. That order will serve to disenfranchise Texas voters. *See id.* at 4 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”))).

C. The Preliminary Injunction Creates Confusion and Will Undermine the Integrity of the Election.

The preliminary injunction also creates confusion because it is not clear what actions they are still permitted to take to prevent voter fraud. The injunction states that it applies only to §86.006, and not §86.0051, of the Election Code. *See* Exhibit A at 1-2. But this distinction ignores the fact that those sections work together, as §86.006(f)(4) makes clear. *See* TEX. ELEC. CODE §86.006(f)(4) (setting out as a complete defense to prosecution “a person who possesses the carrier envelope in order to deposit the envelope in the mail or with a common carrier and who provides

the information required by Section 86.0051(b) in accordance with that section”).

Read and enforced together, §§86.006 and 86.0051 ensure that one who would mail the ballot of another must provide his or her name and residence address to election officials. These directives provide election officials with information that they can use to investigate any question that may arise as to the validity of the ballot or the purported assister with the ballot.

The district court’s injunction, which appears to permit only enforcement of the provision prohibiting the mailing of another voter’s ballot unless your name and address are provided, severely impedes the statute’s effectiveness in curbing voter fraud. Preventing the enforcement of §86.006 permits one in possession of other voters’ ballots to maintain anonymity until placing the ballots in the mail. But should one then place the ballots in the mail without disclosing his or her name and address, it will be almost impossible for election officials to then determine who submitted the ballots should there be questions as to whether they are fraudulent.

An injunction that introduces such uncertainty into the early-voting process in the week prior to Election Day will do nothing but create apprehension as to the integrity of the election. The district court’s order demonstrates that the court did not appropriately weigh the unique nature of election cases prior to granting the injunction. *See Purcell*, 2006 WL 2988365, at *4.

II. AN EMERGENCY STAY OF THE PRELIMINARY INJUNCTION PENDING APPEAL IS NECESSARY TO MAINTAIN THE INTEGRITY OF THE ONGOING EARLY-VOTING PROCESS AND THE GENERAL ELECTION.

The district court's injunction has the *immediate* effect of enjoining Appellants from preventing voter fraud because mail-in balloting is ongoing through Election Day. As a result, each day that the injunction is in effect increases the potential for voter fraud to occur. Because the fraud at issue involves submitting ballots by mail on behalf of others purportedly registered to vote, once the ballots are fraudulently deposited in the mail, detection of those responsible for the fraud becomes exceedingly difficult. An emergency stay is therefore necessary to permit Appellants to continue to combat voter fraud during the final week of voting by mail.

Additionally, absent the Court's swift intervention, the district court's injunction will irreparably alter the elections. Despite the fact that the district court noted that the injunction is "pending a trial on the merits," *see* Exhibit A at 1, there is insufficient time for a trial on the merits to occur prior to Election Day next Tuesday. Therefore, the injunction will operate through the election and ballot tabulation. And once fraudulent ballots are submitted undetected and counted, there will be no remedy available to ensure an accurate count of the validly-submitted votes. Nor will there be much of a chance that one who submits fraudulent ballots without providing his or her printed name, signature, and residence address, can later

be found and held accountable for those acts of election fraud.

III. EXPEDITED APPEAL OF THE PRELIMINARY INJUNCTION IS NECESSARY TO MAINTAIN THE INTEGRITY OF THE ONGOING EARLY-VOTING PROCESS AND THE GENERAL ELECTION.

Expedited appeal is necessary for the same reasons that the emergency stay is necessary: absent appellate review on an expedited basis, review of the district court's injunction will be insufficient to remedy the harm caused by the injunction. *See supra* Part II. Only an expedited appeal affords Appellants an opportunity to achieve any meaningful relief. This practical concern, in addition to the fact that the mail-in balloting is currently taking place, is good cause for the Court to decide this case on an expedited basis. 5TH CIR. R. 27.5; *see also* 5TH CIR. R. 34.5.

IV. THE DISTRICT COURT'S INJUNCTION IS WITHOUT FOUNDATION IN LAW AND CONTRARY TO BINDING U.S. SUPREME COURT PRECEDENT.

The district court's injunction constituted a clear abuse of discretion for four separate reasons. *First*, no reasonable construction of §86.006 leads to the conclusion that the provision unduly burdens Plaintiffs' alleged constitutional rights under the First and Fourteenth Amendments to the United States Constitution. Compliance with the section's requirements is simple. *All Plaintiffs have to do in order to assist a voter as they wish and to comply with the section is to write their name, residence address, and signature on the back of the carrier envelope containing the voter's*

mail-in ballot. Plaintiffs cannot prevail on their facial attack of §86.006 because they never demonstrated that the section “could never be applied in a valid manner.” Indeed, the opposite is true—§86.006 can be applied validly by the simple act of providing the required information on the back of the carrier envelope.⁶

Second, there is no constitutional right to vote by absentee ballot, much less to assist another in voting absentee without being subject to any disclosure requirement. As the Supreme Court has held, although it may be established beyond question that there is a fundamental right to vote, there is no corresponding fundamental right to vote by absentee ballot. *See McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802 (1969); *see also O’Brien v. Skinner*, 414 U.S. 524, 529-30 (1974) (reaffirming *McDonald*). In *Prigmore v. Renfro*, the court followed *McDonald* and upheld the constitutionality of an Alabama absentee balloting statute:

Here, no fundamental right is involved. The right to vote is unquestionably basic to a democracy, but the right to an absentee ballot is not. Historically, the absentee ballot has always been viewed as a privilege, not an absolute right It is a purely remedial measure designed to afford absentee voters the privilege as a matter of convenience, not of right There is no bar to the right to vote

⁶ Indeed, the particular circumstance that is the focus of the district court’s injunction—prosecution for the mere possession of another’s ballot without having actually placed it in the mail—has *never* been the basis of any prosecution by the Office of the Attorney General. Thus, the district court concluded that Plaintiffs’ *facial challenge* to the constitutionality of the voter fraud statute is likely to succeed on the merits, based on a hypothetical circumstance that has never occurred and so could not even support an as applied challenge, much less a facial challenge.

356 F.Supp. 427, 432 (N.D. Ala. 1972) (citations omitted).⁷ The principle expressed in these cases that absentee voting is not a right but rather is a mere privilege “is based on the premise that the constitutional right of suffrage means the right of a qualified elector to cast a ballot in person at a designated polling place on the day of the election.” *Erickson*, 670 P.2d at 754. Under this view, “absentee voting legislation grants voters something to which they are not constitutionally entitled.” *Id.* “By the very nature of absentee voting, the voter is declaring that he will be unable to participate in the regular voting process at the officially designated polling place on the date of the election. Rather than forsake his opportunity to vote, however, he utilizes the absentee privilege.” *Cahill*, 575 S.W.2d at 234.

As *McDonald* and its progeny show, the challenged provisions do not deny Plaintiffs the right to vote, because the provisions do not impose an absolute bar to voting and because voters could still cast a vote—not to mention receive assistance in casting that vote—on election day at their designated polling place.

Third, the preliminary injunction has halted presently ongoing and future

⁷ See also, e.g., *Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006); *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F.Supp. 1354, 1358 (D. Ariz. 1990); *In re Election Contest*, 462 N.W.2d at 193; *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983); *Wichelmann v. City of Glencoe*, 273 N.W. 638, 640 (Minn. 1937); *Qualkinbush*, 826 N.E.2d at 1192; *In re Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for City of Miami*, 707 So.2d 1170, 1173 (Fla. Dist. Ct. App. 1998); *State of Mo. ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo. Ct. App. 1978).

criminal investigations into referrals concerning alleged violations of voting fraud. But the injunction is inappropriate because Plaintiffs failed to carry their heavy burden to show extraordinary circumstances warranting such anticipatory judicial involvement in criminal investigations. Not only that, but the effect of the injunction is that now unscrupulous vote brokers, political-party operatives, candidates, and their affiliates may hurry up while the injunction is in place and commit the types of voting fraud that the Texas Legislature was trying to stamp out when it amended the Texas Election Code in 2003.

Fourth, Plaintiffs presented no evidence of irreparable harm. No person is being denied the privilege of applying for, completing, and dispatching a mail-in ballot. Nor is assistance being denied to voters. If a person wishes to mail a voter's ballot with the voter's consent, all that person needs to do is write their name, residence address and signature on the back of the carrier envelope. Indeed, Plaintiffs' dilatoriness in seeking injunctive relief belies any implication that they have been or will be irreparably harmed by an absence of a preliminary injunction.

For all these reasons, the district court abused its discretion in granting the preliminary injunction enjoining §86.006(f) & (h).

V. THE FACT THAT A TRIAL ON THE MERITS CANNOT, AT THIS LATE DATE, OCCUR PRIOR TO ELECTION DAY IS THE DIRECT RESULT OF APPELLEES' DELAY IN SEEKING RELIEF.

It also bears mention that Appellees' actions in filing and prosecuting this lawsuit are the sole reason for the district court's inability to conduct a trial on the merits prior to Election Day. Appellees filed their complaint on September 21, 2006, but did not seek immediate injunctive relief at that time. Twenty-two days later, on October 13, they filed their motion for preliminary injunction. And even then, they did not request an expedited hearing. In fact, they apparently made no request at all for a hearing on their motion for preliminary injunction. On its own motion, the Court set the hearing on Plaintiffs' preliminary injunction for October 30. More than five weeks elapsed from the commencement of the suit until the district court enjoined Appellants from enforcing §§86.006(f) and (h) of the Election Code. Appellees' delay and failure to seek a hearing on their motion for preliminary injunction belied their claims of irreparable harm. Appellees should not be rewarded for their delay with an injunction from which no meaningful relief may be obtained.

CONCLUSION

For these reasons, the Court should grant Appellants' Motion for Emergency Stay of Preliminary Injunction Pending Appeal. Likewise, the Court should grant Appellants' Motion to Expedite Appeal.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that Appellants conferred with opposing counsel for Willie Ray, Jamillah Johnson, Gloria Meeks, Rebecca Minneweather, Parthenia McDonald, Walter Hinojosa, and the Texas Democratic Party, and they **OPPOSE** these motions.

Adam W. Aston

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via facsimile and third-party commercial carrier, overnight mail, on November 1, 2006, to:

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