

No. 06-41573

In the United States Court of Appeals  
For the Fifth Circuit

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WILLIE RAY; JAMILLAH JOHNSON; GLORIA MEEKS;  
REBECCA MINNEWEATHER;  
PARTHENIA MCDONALD; WALTER HINOJOSA;  
TEXAS DEMOCRATIC PARTY,

*Plaintiffs-Appellees,*

v.

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

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS, MARSHALL DIVISION

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**BRIEF *AMICI CURIAE* OF AARP AND LEAGUE OF WOMEN  
VOTERS OF TEXAS IN SUPPORT OF PLAINTIFFS-APPELLEES**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following persons and parties have an interest in the outcome of this case. These representations are made in order 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, Texas Democratic Party

*Counsel for Plaintiffs-Appellees:* Eric M. Albritton, Otis W. Carroll, J. Gerald Hebert, Bruce V. Spiva, Kathleen R. Hartnett, Art Brender

*Defendants-Appellants:* Greg Abbott, Attorney General of the State of Texas; Roger Williams, Secretary of State for the State of Texas; State of Texas

*Counsel for Defendants-Appellants:* Edward R. Burbach, R. Ted Cruz, Robert B. O’Keefe, Kathlyn C. Wilson, Philip A. Lionberger, Adam W. Aston

*Amici Curiae:* i) AARP – legal entities related to AARP are the AARP Foundation; AARP Services, Inc.; Legal Counsel for the Elderly; AARP Financial; AARP Global Network; Focalyst

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax.

AARP is also organized and operated as a non-profit corporation pursuant to the provisions of Title 29 of chapter 6 of the District of Columbia Code 1951.

ii) League of Women Voters of Texas (LWV- TX) – entities related to LWV - TX are local Leagues throughout the State of Texas and the League of Women Voters of the United States

LWV-TX, a nonpartisan political organization, encourages the informed and active participation of citizens in government and influences public policy through active education and advocacy. Membership in the LWV-TX is comprised of 2700

members from local Leagues and members at large throughout the State of Texas. LWV-TX does not have a parent corporation, nor has it issued shares or securities.

*Amici Curiae* represent that neither they, nor their related entities “are financially interested in the outcome of the litigation” in this case.

Respectfully submitted,

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Daniel B. Kohrman

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## INTERESTS OF THE *AMICI*

This case concerns the validity of Sections 86.006(f) and (h) of the Texas Election Code, which *amici* assert, as the district court held, create unjustified restrictions on persons assisting voters in exercising the franchise, and thus, unduly limit the rights of Texas voters – especially older and disabled voters – across the political spectrum. The parties’ briefs acknowledge that the lion’s share of persons affected by these 2003 election law amendments are older voters.<sup>1</sup> Moreover, the district court found that in Texas “assist[ance] to voters in casting their mail-in ballots” has been widespread on the part of “individuals,” both “major Texas political parties” and “other organizations,” and “is particularly beneficial to elderly, homebound, disabled, and illiterate voters.”<sup>2</sup> Texas law itself recognizes the difficulty many older or disabled individuals have voting in person, by guaranteeing that persons over age 65 or with a disability preventing their appearing at the polls may vote by mail, *see* Tex. Elec. Code §§ 82.002(a), 82.003.

*Amici* are organizations whose mission includes advocating public policies that make it easier for Americans to vote, and policies that assist voters, including

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<sup>1</sup> *See* Appellants’ Brief (“State Br.”) 1-2 (identifying the focus of Sections 86.006 (f) & (h) as “elderly voters”; Appellees’ Brief (“App. Br.”) 9-10 (explaining the focus of voter assistance, and thus of the 2003 amendments, is “the many voters who vote by mail-in ballot [who] are elderly or physically impaired.”

<sup>2</sup> *Ray v. Texas*, No. 2:06-CV-385 (E.D. Tex. Oct. 31, 2006) at 3 (Findings of Fact and Conclusions of Law, hereafter “DCT Dec.”) (Findings of Fact 14-15).

older and disabled voters, to participate in the political process. *Amicus* AARP is a nonprofit, nonpartisan membership organization of more than 38 million people age 50+ that is dedicated to assuring that older Americans have independence, choice and control in ways that are beneficial to them and to society as a whole. AARP has offices in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. AARP's objectives include supporting "procedures that encourage and promote maximum participation in the electoral process," and a voting process that "is not burdensome, nor hampers access" to the franchise. AARP's electoral reform advocacy reflects concern for voters of all ages, but focuses especially on needs of older voters, regardless of party affiliation. Addressing the interests of voters with disabilities is important to AARP because older persons have a higher incidence of disabilities than other age groups.<sup>3</sup> To these ends, AARP has participated in electoral reform legal cases in various federal and state courts.

*Amicus* League of Women Voters of Texas (LWV-TX), along with the League of Women Voters of the United States (LWVUS), has a historic interest in

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<sup>3</sup> AARP has taken no prior position on the specific statutory provisions on appeal. AARP offered limited support for Texas House Bill 54, which included many terms on mail-in voting. (AARP "registered" for the bill generally, without providing testimony.) AARP took no further action on HB 54 as it moved through the legislature and became law in 2003. Based on implementation of §§ 86.006(f) and (h) and the record in this case, AARP concluded, as the district court held, that these provisions contain unduly harsh sanctions, unfairly sacrifice older and disabled voters' rights, and are not needed to deter and prevent mail-in vote fraud.

voter rights and the electoral process. The right of every citizen to vote has been a basic League principle since its origin. For many years LWV-TX has undertaken numerous activities to educate voters, including older voters and voters with disabilities, about public issues. In addition, LWV-TX has a long history of actively monitoring the electoral system in Texas and from time to time, advocating reforms in the system.

*Amici* believe, as the district court held, that Sections 86.006(f) and (h) – by threatening criminal sanctions for merely possessing the ballot of a voter, even with that voter’s consent, and by denying a defense to such charges (except in limited circumstances) for friends, neighbors and other non-relatives who frequently assist older and disabled voters not living in the same household – “unduly burdens” aid to many older and disabled voters, in that it “prevents ... and dissuades ... under the pain of prosecution,” persons inclined to assist older and disabled voters from doing so. DCT Dec. 7 (Findings of Fact ¶27), 13 (Conclusions of Law ¶21). In Sections 86.006(f) and (h), *amici* submit, Texas has established policies at odds with laudable efforts by groups like *amici* to actively encourage political participation, especially by older voters and voters with

disabilities. The challenged provisions of state law thus undermine Texas' own interest in facilitating broader engagement by its citizens in the electoral process.<sup>4</sup>

## INTRODUCTION AND SUMMARY OF ARGUMENT

The district court properly evaluated Section 86.006 under legal standards articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The same standards likewise govern this Court's review. The *Anderson* Court explained:

[a reviewing court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged position is constitutional.

460 U.S. at 788; DCT Dec. at 9 (Conclusion of Law 9) (*quoting* same). *Accord* *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In assessing these factors, the

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<sup>4</sup> This brief addresses *only* the validity of the district court's ruling that "[Section] 86.006's prohibition on the possession of carrier envelopes and ballots provided to others unduly burdens the First and Fourteenth Amendment rights of the plaintiffs under circumstances in which the voter consents to that possession." DCT Dec. at 12-13 (Conclusion of Law 20). *Amici* do not address and express no view of the parties' arguments in regard to Appellants' assertions that the district court should have dismissed Appellees' claims under 42 U.S.C. § 1983 for lack of subject matter jurisdiction and under 42 U.S.C. § 1971 for lack of standing. *Amici* also take no position on the impact of Section 86.006 on any political party.

district court applied a balancing test, having determined “that strict scrutiny does not apply” in light of its further conclusion that “[a]lthough there is a fundamental right to vote ... there is no corresponding fundamental right to receive and cast an absentee ballot.” *Id.* at 10 (Conclusions of Law 11-12 (relying on *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802 (1969))).

Moreover, the district court ruled “that the affirmative defenses provided under [Section 86.006] would be construed ... as exceptions to criminal liability.” *Id.* at 12 (Conclusion of Law 18). In other words, the district court accepted as established the State’s assertion that Texas would not prosecute absentee voter assistants who might benefit from an affirmative defense set forth in Section 86.006(f).<sup>5</sup> In the main, these defenses apply to relatives of a voter and to other registered voters residing at the same address, as well as to any person who handles a voter’s ballot, in order to mail it, and who also provides lawfully required identifying information on the outside of the ballot.<sup>6</sup>

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<sup>5</sup> *Id.* at 11-12 (Conclusions of Law 17-18).

<sup>6</sup> *Id.* at 6 (reproducing Sections 86.006(f)(1), (2) and (4), as well as (3), (5) and (6); the latter three address early voting clerks (3), postal services employees (5), and UPS or similar “common or contract carrier” employees (6). Subsection (4) covers any “person who possesses the carrier envelope to [mail it] and who provides the information required by Section 86.0051(b)”). Section 86.0051(b) requires a “person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier [to] provide the person’s signature, printed name, and residence address on the reverse die of the envelope.” *Id.* at 17 (Finding of Fact 27).

Employing the standards embraced by the district court – *i.e.*, not exploring if more exacting scrutiny of the challenged provisions is proper (and treating Section 86.006(f) defenses as exceptions<sup>7</sup>), *amici* contend that each of the *Anderson* factors supports affirmance in this case. First, the principally affected populations, older and disabled voters, will endure serious injury to their voting rights if “mere possession of [their] ballot or carrier envelope” by another may result in “criminal penalties” to the person assisting them and also “disqualification of the[ir] vote.” *Id.* at 12 (Conclusion of Law 19). Moreover, publicly available information regarding practices throughout the United States reinforces the district court’s conclusion.

Second, the district court correctly ruled that it “goes too far” to premise “criminal penalties and disqualification of the vote” on the State’s interest in “curtailing voter fraud.” *Id.* at 12 (Conclusion of Law 19).<sup>8</sup> Although the district court did not explain this portion of its ruling in detail, that judgment is fully

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<sup>7</sup> The district court’s judgment seems wise, given recent steps by the Texas Legislature to achieve this very result. *See* Texas House Bill 1987 (2007), available at [www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB1987](http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB1987).

<sup>8</sup> This is so, the district court recognized, despite the fact that the State’s anti-fraud concerns are “well-recognized and compelling,” and further, suffice to justify Section 86.0051(b)’s “disclosure requirement” (*i.e.*, the mandate that assistors who mail in a voter’s ballot identify themselves in writing on the ballot envelope). *Id.* at 11-2 (Conclusions of Law 14, 19)

consistent with *Anderson*. That is, the State failed to identify any sort of “precise” linkage between its interest in “curtailing voter fraud,” in the form of so-called “vote harvesting,” and the means to do so set out in Section 86.006 (f) and (h). For instance, the State’s chief argument on this point – that the district court should have read §§ 86.006(f) and 86.0051(b) to require *all* persons possessing a voter’s ballot (not just the one putting it in the mail) to provide identifying data, and thereby avoid fear of prosecution, State Br. 52-54 – would require this Court to rewrite the law. This falls far short of showing the law serves the State’s asserted interest with “precision.”

Third, the State is unable to demonstrate that the sanctions imposed by §§ 86.006(f) and (h) are “necessary” to serve its interest in curtailing voter fraud. The district court correctly identified other provisions of Texas election law serving that interest “sufficiently.” In addition, Texas failed to consider or adopt a variety of alternative effective approaches less harmful to older and disabled voters’ rights. The enormous potential harm to voting rights threatened by §§ 86.006(f) and (h), the current lack of aid to older and disabled voters, and the rapid growth of this share of the electorate all further undermine the State’s necessity argument.

## ARGUMENT

### **I. SECTION 86.006, WHICH CRIMINALIZES MERE POSSESSION OF A VOTER’S MAIL-IN BALLOT, EVEN WITH THAT VOTER’S CONSENT, CANNOT SATISFY THE CRITERIA BY WHICH SUCH BURDENS ON THE RIGHT TO VOTE ARE ASSESSED.**

The district court weighed the correct factors, and properly supported its conclusion that the sanction scheme in Sections 86.006(f) and (h) punishing “mere possession of a ballot or carrier envelope ... when possession occurs with the voter’s consent” was unconstitutional. DCT Dec. at 12 (Conclusion of Law 19). The district court’s sound judgment is supported by other record evidence as well as information in the public domain of which this Court should take note.

#### **A. The Character And Magnitude Of Potential Injury To Mail-In Voters, Especially Older And Disabled Voters, Is Enormous.**

While the district court stressed potential injury to those who assist absentee voters in Texas, *amici* urge this Court to look with equal vigor to evidence of harm likely to voters themselves, such as that provided by plaintiff Parthenia McDonald. To be sure, the district court used broad language to identify the injury in question, DCT Dec. at 13 (holding Section 86.006 “unduly burdens the First and Fourteenth Amendment rights of the plaintiffs”). Yet in characterizing those rights, the trial court naturally focused on the law’s effect in “dissuad[ing]” campaign workers “from participating in legitimate organizational efforts ... even when these efforts



do not involve providing illegal assistance to voters or engaging in voter fraud.” *Id.* at 11 (Conclusion of Law 13). *Amici*, organizations involved in non-partisan voter education activity, appreciate the damage caused to fundamental rights when government impedes grassroots political activity; however, denying to *actual voters* assistance *they* may need to cast their ballots also warrants emphasis as proof of serious injury threatened by implementation of Sections 86.006(f) and (h).

**1. Given The Size And Growth Of The Older And Disabled Voting Population, And Lack Of Attention To Their Voting Access Needs, Section 86.006 Threatens Serious Harm.**

The sheer force of demographic trends indicates that mail-in voting will become a bigger phenomenon in Texas elections in coming years. By now it is past disputing that the older population of the U.S. “is about to face its single largest sustained growth in history.”<sup>9</sup> Due to the “Baby Boom” generation, the size of the age 65+ cohort – on which Texas already has bestowed the right to vote absentee – is expected to double by 2030 (by comparison with the year 2005).<sup>10</sup> Moreover, if current patterns persist, older persons will continue to be the group

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<sup>9</sup> Jessica A. Fay, “Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters,” 13 ELDER L. J. 453, 461 (2005).

<sup>10</sup> *Id.* If “older voters” are denied as voters age 50+ (as AARP does), the size of the cohort and its influence on national, state and local politics is and will become all the greater.

with the highest percentage of registered voters and the highest percentage of registered voters who vote, not to mention “the most informed electors” (whether because of their accumulated experience or because those forced or able to retire have more time to absorb information about candidates).<sup>11</sup> To the extent Section 86.006 “goes too far” in impeding assistance to mail-in voters, that harm is likely to grow with the expansion of the nation’s and Texas’ older population.

A burgeoning older electorate also portends an increase in the number of individuals who will be entitled – and need – to vote by mail in Texas by virtue of the fact that they will have a qualifying disability – *i.e.*, a disability preventing them from appearing in person at the polls. Tex. Elec. Code § 82.003. In addition to national data showing a greater incidence of disabilities is associated with advancing age,<sup>12</sup> the best available empirical study of polling places, by the U.S. General Accounting Office,<sup>13</sup> indicates that progress remains limited in making in-person voting accessible to people with disabilities. For instance, in the November

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<sup>11</sup> *Id.* at 460.

<sup>12</sup> *See, e.g.*, AARP Public Policy Institute “Beyond 50 2003, A Report to the Nation on Independent Living and Disability” 34-42 (2003) (despite improving overall health among persons age 50+ disability rates continue to climb for age subgroups of this cohort, and are greater for each successively older age subgroup).

<sup>13</sup> U.S. Gen. Accounting Office, VOTERS WITH DISABILITIES – ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS (Oct. 2001)(GAO Study), *available at* <http://www.gao.gov/new.items/d02127.pdf>.

2000 elections, 84% of polling places had at least one impediment that could deter persons with disabilities from voting. And even assuming a polling place is physically accessible, it remains off limits to voters with disabilities not accommodated by available voting equipment; thus, in November 2000 none of the polling places surveyed by GAO had machines permitting blind persons to vote, and the agency also observed that various forms of voting equipment continue to “pose challenges for people with mobility, vision, or dexterity impairments.”<sup>14</sup>

Analysts of federal legislation intended to improve accessibility of polling places are consistent in observing that a great deal remains to be done. Thus, despite a variety of laws enacted by Congress, “voting participation rates [for people with disabilities] have remained low and accessibility inadequate.”<sup>15</sup>

Another academic commentator concludes: “... the cumulative effect of these problems is decreased voting levels for people with disabilities.”<sup>16</sup>

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<sup>14</sup> GAO Study at 7, 32.

<sup>15</sup> Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE LAW REVIEW \_\_ (forthcoming) (Draft at 24).

<sup>16</sup> Michael E. Waterstone, “Lane, Fundamental Rights, and Voting,” 56 ALA. L. REV. 793, 827 (2005). *See* Michael E. Waterstone, “Constitutional and Statutory Voting Rights for People with Disabilities,” 14 STAN. L. & POL’Y REV. 353, 362 (2003) (“Various commentators have noted that existing federal law does not protect the ability to vote secretly and independently, and does not require absolute access to polling places. Some have lamented these statutes’ ineffectiveness in creating social change with regard to the right to vote”)(footnotes omitted).

Whether the problem is inadequate technology, bureaucratic inertia, or the severity of impairments affecting persons still capable of voting, it appears the option of voting by mail is, and will likely continue to be, at least for the foreseeable future, critical to making the right to vote a reality for people with disabilities. That is, “[o]ne might ask ... how a disabled person unable to arrive at a polling place on election day, for example due to hospitalization or inability to travel, could participate in the voting process without absentee provisions. ... [A]bsentee voting provisions must be implemented in order to ensure access to all disabled electors.” Fay, *supra*, 13 ELDER L. J. at 469. Daniel Tokaji and Ruth Colker agree, that “there is strong evidence that people with disabilities rely heavily on mail-in absentee ballots. In fact one study found that people with disabilities were ‘the only group that are less likely to vote in person but are more likely to vote absentee as compared with other groups.’”<sup>17</sup>

Unimpeded access to a mail-in voting option, under Texas law, is all the more important in light of the absence of affirmative protection, under federal statutes or the U.S. Constitution, of such access for older or disabled voters. For

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<sup>17</sup> 38 MCGEORGE LAW REVIEW\_\_\_\_ (forthcoming) (Draft at 13 n.41) (*quoting* Jeffrey A. Karp & Susan A. Banducci, “Going Postal: How All-Mail Elections Influence Turnout,” 22 POL. BEHAVIOR 223, 234 (2000) (discussing Oregon’s all-mail voting system)). Tokaji is an Associate Professor of Law, and Colker is Heck Faust Memorial Professor of Constitutional Law, both at the Moritz College of Law, Ohio State University.

example, existing precedent recognizes neither a federal constitutional right to vote absentee, *Whalen v. Heimann*, 373 F. Supp. 353, 357 (D. Conn. 1974), nor such a right to vote in person if a right to vote absentee exists, *Selph v. Council of L.A.*, 390 F. Supp. 58, 61 (C.D. Cal. 1975). Also, the Voting Accessibility for Elderly and Handicapped Act of 1984, 42 U.S.C. § 1973ee, requires that polling places and registration facilities used in federal elections be accessible, but has no impact on absentee voting. Likewise, the Help America Vote Act of 2002, 42 U.S.C. §§ 15301, *et seq.*, which addresses voting “access and participation” for people with disabilities, principally requires accessible technology to be introduced into polling places. *See* 42 USC § 15481(a)(3).<sup>18</sup>

Nor can there be a serious question whether many mail-in voters – especially older and disabled persons voting absentee – require personal assistance in casting a ballot, other than the sort of assistance presumptively exempted from the strictures of Section 86.006(f) by the district court’s ruling. No less than twenty-three states (not including Texas) have laws affording voting assistance to persons in nursing homes and “other similar health care facilities for older persons and

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<sup>18</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2002), and Title II of the Americans with Disabilities Act of 1990 42 USC §§ 12131- 12134 (2002), both generally prohibit disability-based discrimination in public programs, but do not specifically address voting and never have been applied, to the knowledge of *amici*, to state or local mail-in voting “programs.”

persons with disabilities,” including (in most of the states) assisted living facilities, senior citizen housing, mental health facilities, U.S. Veteran’s Administration facilities and hospitals.<sup>19</sup> Policies for assisting voters in facilities in a majority of these twenty-three states also include provision “for assisting the residents with voting,” and are triggered by a resident’s absentee ballot request or “a threshold number of absentee ballot applications.” Notwithstanding the praise they reserve for the near-majority of states that place a priority on affording some form of aid to older and disabled voters, the authors of this nationwide study of state voting policies deem such affirmative efforts inadequate in assuring access to the franchise. They note that states generally “reli[ed] on residents to initiate the process” and often employed “cumbersome” procedures.<sup>20</sup> In states such as Texas, where robust public policies do not exist to facilitate voting by older and

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<sup>19</sup> Amy Smith and Charles P. Sabatino, “Voting by Residents of Nursing Homes and Assisted Living Facilities,” 26 BIFOCAL (Bar Associations in Focus on Aging and the Law, publication of the American Bar Association Commission on Law and Aging) No.1, 1-2, 8 (Fall 2004).

<sup>20</sup> *Id.* at 4, 8. U.S. Census data indicate about 1.6 million persons age 65 and older live in nursing homes “on any given day.” Meanwhile, the Centers for Medicare and Medicaid Services estimate the nursing home population at approximately 3 million persons of whom nearly 90 percent are age 65 or older. *Id.* at 1. Meanwhile, another one million or so persons nationwide reside in assisted living facilities. Nina A. Kohn, “Preserving Rights in Long-Term Care Institutions, Facilitating Resident Voting While Maintaining Election Integrity,” 38 MCGEORGE LAW REVIEW \_\_\_ n.2 (forthcoming) (Draft at 3) (reviewing various data sources). Kohn is an Assistant Professor of Law at Syracuse University College of Law.

disabled voters in nursing homes and other health care-related facilities, it is all the more important for the state to avoid restrictions such as those created by §§ 86.006(f) and (h) in order to permit mail-in voters meaningful access to informal aid – *e.g.*, from friends or the staff of institutions in which they reside – in casting a ballot.<sup>21</sup>

Just three states in the U.S. provide “ballot assistance ... to all voters or all absentee voters.”<sup>22</sup> In all others, including Texas, voters such as plaintiff Parthenia McDonald, who lives in her own home, “requires the assistance of another person to vote, and depends on trusted friends to assist her in ... casting her ballot,” would be grievously injured by legal requirements such as those set forth in Sections 86.006(f) and (h), which would deny them the assistance they need, in the form they choose – in good faith – to secure it. *See* 42 U.S.C. 1973aa-6 (Voting Rights Act of 1965, as amended in 1982, guaranteeing any voter with a disability the right to “assistance [in voting] by a person of the voter’s choice”).

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<sup>21</sup> *See* Kohn, *supra*, 38 MCGEORGE LAW REVIEW \_\_\_\_ (forthcoming) (Draft at 43) (“Where state officials are not readily available, ..., facility staff should be available to assist residents who specifically request assistance with ballot completion .... To decline assistance in such situations would be to effectively condition residents’ ability to vote on their physical condition”).

<sup>22</sup> *Id.* at 8.

**2. The Sanction Of Vote Disqualification Imposed By Section 86.006(h) Is Draconian And Imposes A Heavy Burden Of Justification On The State.**

The vote disqualification sanction contained in Section 86.006(h) is a harsh penalty imposed directly against the voter. Nowhere in its brief, however does the State acknowledge this fact.

In discussing the impact of Section 86.006 on plaintiff McDonald and other actual voters, the State maintains a chorus characterizing this case as purely the exploit of “Partisans.” But the State does not seriously address the plight of older and disabled voters of all parties forced to seek alternative means of assistance in light of the *in terrorem* effect of the 2003 amendments on persons who previously assisted such voters. Rather, Appellants seek to take advantage of plaintiff McDonald’s sheer determination to find a way, some way, to exercise her right to vote, *see* State Br. 56 n.160 (quoting *McDonald* as bravely declaring “I don’t care what they say. If I have to get the ambulance and go, I’m going [to vote]”), to suggest no serious practical injury exists, even if, as a matter of law, the State is correct that there is no fundamental constitutional right to vote absentee, much less via mail with adequate assistance.

In the end, the State’s position on the issue of harm attributable to Section 86.006 amounts to little more than a patronizing reminder that any voter – no



matter how seriously disabled or infirm – can vote “prior to election day by personal appearance or on election day at their designated polling place.” State Br. 58. This is essentially an admission that the “character and magnitude of the asserted injury” to the rights of such voters, *see Anderson supra*, as a result of §§ 86.006(f) and (h) is absolute. Whether the State acknowledges it or not, this grave potential injury to voters needing to vote by mail creates a heavy burden of justification.

**B. The State Has Failed to Identify a “Precise” Interest in Sections 86.006 (f) and (h) as Means to Deter and Prevent Vote Fraud.**

The State’s explanation of its interest in the specific remedies established by the challenged statutory provisions is highly superficial. For instance, the State’s account of the legislative history of Section 86.006 is remarkable for its lack of direct evidence of vote fraud and the absence of linkage between the goal of deterring and preventing fraud and the means employed – sanctioning mere possession of a voter’s ballot with consent, and disqualification of that ballot if such possession occurs.

The State cites several speeches by legislators employing the term “vote-harvesting” and including ominous references to “vote fraud rings” and mail-in ballots “illegally collected by campaign operatives.” *See, e.g.*, State Br. 16-17, 19. But none of these terms is self-explanatory and none are placed in context,

quantified, corroborated or otherwise illuminated. Such statements may well reflect the good faith beliefs of elected state representatives, but they hardly qualify as an explication of the “precise interests” of the State in wielding the powerful tools established in Sections 86.006(f) and (h).

Likewise, the “bill analysis” reported by the State is strikingly conclusory. Rather than a systematic accounting of evidence of a problem and its solution, or a more nuanced defense of the new legislative scheme, the State highlights rather vague assertions (the law “needed to be tightened ... to be stricter”) and circular reasoning (oversight under state election law had to be enhanced because “[b]y its nature, mail-in voting from home is out of the public view”). State Br. 18. Similarly, the State cites concern about “fraud that *can* occur in nursing homes and assisted living facilities,” State Br. 19 (emphasis supplied), not reports of actual fraud that *has* occurred.

As if to excuse the serious and specific harms asserted by plaintiffs, the State also advances testimony from the legislative record that the challenged law was not intended to have “a chilling effect on the ability of some of our senior citizens to vote,” but rather, was intended to provide clarity by adopting a strict “definition for assistance in voting.” *Id.* 23-24. Once again, *amici* do not, and indeed need not, contest the good faith underlying the various assertions in the legislative record

supporting what became Section 86.006. But *amici* submit that this retelling of the genesis of the challenged law offers no material support for the proposition that the State has carried its burden to articulate with “precision” the interests pursued and served by the provisions of Section 86.006 that i) criminalize mere possession of a voter’s ballot by a person other than the voter, even with the voter’s consent, and ii) disqualify any vote so possessed.

**C. Since Various Means Exist to Secure Both Ballot Integrity and Access for Older and Disabled Voters, the State’s Crude Anti-Fraud Approach in Section 86.006 Is Far from Necessary.**

In states that afford assistance to older voters and/or voters with disabilities, a variety of means are employed to make voting easier without sacrificing ballot security. This belies the State’s assertion that the onerous sanctions in §§ 806.006(f) and (h) are needed to deter and prevent vote fraud.

For instance, Amy Smith and Charles Sabatino report that “[a] significant number of the state procedures [for assisting voting by residents of nursing homes and other healthcare facilities] require, or suggest, that ballots be delivered by bipartisan teams of election officials.” They conclude that this approach seems “a fairly simple practice that goes a long way in avoiding the appearance of abuse by a political group, as well as in discouraging fraud.” 26 BIFOCAL No. 1, 8. Further, “[o]f the 23 states that address nursing home voting, eight ... include in their

provisions rules or guidance for assisting residents with voting [while] [m]ost of the other states ... have ballot assistance rules ... applicable to all voters or to all absentee voters.” Meanwhile, in three of the twenty-three states, voters in nursing homes and other covered facilities “may receive assistance by election officials only” and “[e]ight states provide for election officials or a person of the voter’s choice.” “[E]leven states simply permit voters to be assisted by any persons the voter selects.” *Id.* 4. Although some of these forms of assistance would appear not to be permitted by Section 86.006 (*i.e.*, assistance by “any persons the voter selects”), in the context of state efforts to “bring the ballot to the voters,” such assistance would seem to be consistent with Texas’ asserted concerns about ballot security.<sup>23</sup>

Another popular approach, adopted in about one-third of the states (sixteen, as of 2006), is “permanent absentee ballot registration.” A principal attraction of this method is an individualized certification process that limits the likelihood of

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<sup>23</sup> *See id.* 6-7 (chart describing procedures in twenty three states affording assistance to voters in nursing homes and other facilities, including Minnesota, where a “Ballot must be delivered by two election judges, each affiliated with different political parties, who must be present when the voter completes the ballot,” and Nebraska, where “Absentee ballots shall be administered by registered voters who are not affiliated with the same political party”); Fay, *supra*, 13 ELDER L. J. at 482 (“Many states allow family members or a person of the voter’s choice to provide assistance, while in some states only the visiting election official may provide assistance”). *See also* GAO Study 84-85 (describing special voting procedures at nursing homes and other facilities).

fraud. Jessica Fay recommends limiting eligibility to “individuals who are elderly or permanently disabled”:

electors who wish to apply for permanent absentee voter status should submit a doctor’s certification of their disability or need for permanent status with their initial [voter] registration form. That single, simple step would then ensure many homebound electors would be able to cast a ballot in each and every election. By instituting such a limitation, the risk of absentee ballot fraud is decreased, as fewer people are permitted to register as absentee voters while simultaneously limiting the risk of voter fraud among the elderly.

13 ELDER L.J. at 484 (citation omitted). *Amici* do not presume to say that this device or any other is right for Texas. Rather, they simply urge this Court to consider the myriad options available yet untried in that state. Doing so leads to the conclusion the district court was correct in concluding the draconian sanctions set out in §§ 86.006(f) and (h) were *not* necessary to achieve the State’s interest in preventing mail-in ballot fraud.

**II. SECTION 86.006 CLASHES WITH AN EMERGING CONSENSUS THAT IMPEDIMENTS TO VOTING FOR PEOPLE WITH DISABILITIES ARE SERIOUS AND WIDESPREAD, AND THUS, THAT CONCERN FOR BALLOT ACCESS MUST BALANCE CONCERN FOR BALLOT INTEGRITY.**

In March 2007 the American Bar Association's Commission on Law and Aging<sup>24</sup> convened a Conference on voting, aging and disability.<sup>25</sup> The Conference addressed a variety of issues including at least two directly related to the subject matter of this case: "issues in absentee balloting" and "voting in long term care settings." The Conference resulted in a report and a recommended resolution that have been submitted by the Commission on Law and Aging to the ABA for action at its annual meeting in August 2007. While no definitive actions have been taken as yet based on the participants' efforts, the key findings and recommendations are highly relevant to this case.

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<sup>24</sup> The Commission's mission is "to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training." Further: "The Commission consists of a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates." See "American Bar Association Commission on Law and Aging," <http://www.abanet.org/aging>.

<sup>25</sup> Entitled "Facilitating Voting as People Age: Implications of Cognitive Impairment," and jointly convened with the Borchard Foundation Center on Law and Aging and the Capital Government Center on Law and Policy of the McGeorge Law School, Sacramento, CA, the symposium gathered experts in "law and aging, medicine, long term care, voting technology, and elections administration." See American Bar Association Commission on Law and Aging, RECOMMENDATION, REPORT and APPENDIX (Exhibit A hereto) Report 1-3 (2007).

The Conference recommendations represent the consensus position of a majority of some of the foremost national experts on the following related questions posed by the parties: protecting voting rights of people with disabilities; providing necessary assistance in voting for such persons; and doing so while protecting the integrity of the voting process. Specifically, three sub-parts of the resolution recommended by the Commission on Law and Aging to the ABA<sup>26</sup> include the following actions:

- “That the [ABA] urges federal, state [and] local ... governments to permit citizens to opt freely for absentee (“vote at home”) balloting ....
- “That the [ABA] urges state [and] local ... governments to improve access to voting by residents of long-term care facilities ... includ[ing] (1) Mobile polling; (2) Where mobile polling is not provided, the provision of teams of election officials at the local level to conduct absentee voting in long-term care facilities; and (3) Training of residents, staff, and others involved in the care of residents about the rights of persons with disabilities in relation to voting and the community resources available to provide assistance.”
- “That the [ABA] urges federal, state [and] local ... governments to recruit and train election workers to address the needs of voters with disabilities, including physical, sensory, cognitive, intellectual, or mental disabilities.”

*Amici* submit that each of these recommendations demonstrates an emerging consensus that many older and disabled voters need reliable assistance in casting a

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<sup>26</sup> *Id.* (Exhibit A hereto) RECOMMENDATION 1-2.

ballot, and further, that potential assistors, public and private, require training in order to undertake effectively and responsibly such interactions with these voters. This approach, balancing ballot integrity and ballot access, is consistent with the analysis of the district court in this case, yet inconsistent with the State's determination to pursue a narrow understanding of ballot integrity regardless of adverse consequences for the voting rights of older and disabled Texans.

### CONCLUSION

For the reasons set forth above, the district court's order should be affirmed.

Dated: May 25, 2007

Respectfully submitted,

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**EXHIBIT A**

to Brief of *Amici Curiae*

AARP and League of Women Voters of Texas

*Ray v. Abbott*, No. 06-41573 (5th Cir.)

Dated: May 25, 2007

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) (7)(C) and 5th Cir. R. 32, I hereby certify that the brief of *Amici Curiae* AARP, *et al.*, in *Willie Ray, et al. v. Greg Abbott, et al.*, Case No. 06-41573, was prepared in a proportionally spaced, New Times Roman typeface using Corel WordPerfect 12 and a font size of 14 points (13 points for footnotes).

I further certify that exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 5th Cir. R. 32.2 the above referenced brief contains 5016 words.

I understand that a material misrepresentation in completing this Certificate of Compliance, or circumvention of the type-volume limits in Federal Rule of Appellate Procedure 32(a)(7) and 5th Cir. R. 32.2 may result in the Court's striking the brief and imposing sanctions against the undersigned.

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**CERTIFICATE OF FILING AND SERVICE**

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