

No. 12- 40914

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

VOTING FOR AMERICA, PROJECT VOTE INC., BRAD RICHEY,
and PENELOPE MCFADDEN,
Plaintiffs-Appellees,

v.

HOPE ANDRADE, Texas Secretary of State, in her official capacity,
Defendant-Appellants.

On Appeal from the United States District Court for the
Southern District of Texas, Galveston Division
Case No. 3:12-cv-44

**APPELLEES' OPPOSITION TO APPELLANT'S MOTION FOR
EMERGENCY STAY OF PRELIMINARY INJUNCTION PENDING
APPEAL AND MOTION TO EXPEDITE APPEAL**

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CERTIFICATE OF INTERESTED PERSONS

Voting For America, et al. v. Andrade

No. 12-40914

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

- **Voting for America**, Plaintiff;
- **Project Vote, Inc.**, Plaintiff;
- **Brad Richey**, Plaintiff;
- **Penelope McFadden**, Plaintiff;
- **Brian Mellor**, Project Vote, Inc., Counsel for Plaintiff Voting for America ;
- **Michelle Kanter Cohen**, Project Vote, Inc., Counsel for Plaintiffs Voting for America and Project Vote, Inc.;
- **Ryan M. Malone, Julia Lewis, David C. Peet**, Ropes & Gray LLP, Counsel for Plaintiffs Voting for America and Project Vote, Inc.;
- **Chad W. Dunn**, Brazil & Dunn, L.L.P., Counsel for Plaintiffs;
- **Richard Alan Grigg**, Spivey & Grigg, L.L.P., Counsel for Plaintiffs;
- **Hope Andrade**, Defendant;
- **Cheryl Johnson**, Defendant;
- **Donald S. Glywasky**, Galveston County, Counsel for Defendant Cheryl Johnson;
- **Jonathan F. Mitchell**, Office of the Attorney General, Counsel for Defendant Hope Andrade;
- **State of Texas**, Defendant-Intervenor; and
- **Tax Assessors-Collectors and Election Administrators for all 254 Texas Counties**.

/s/ Chad W. Dunn
Chad W. Dunn
Attorney for Plaintiffs-Appellees

INTRODUCTION

Government of the people was born from men who gathered to enshrine basic principles of liberty and democracy in an innovative Constitution. But recognizing that democracy cannot flourish without open discussion, the First Congress amended the Constitution with the Bill of Rights and secured in its first clause the right of the people to assemble and speak for or against the government. *See Citizens United v. FEC*, 130 S. Ct 876, 898 (2010) (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”). This case is about protecting the fundamental right to peaceably assemble and engage in political speech.¹

¹ The state attempts to distract from the clear record in this case and disparage Project Vote by citing matters never presented to the District Court, including involvement with ACORN. These aspersions include unsubstantiated allegations of voter registration fraud with no evidence, or even argument, as to how the contested provisions would have addressed the alleged ACORN fraud. The state casts The state’s argument here is in direct opposition to the evidence presented by the Texas Secretary of State’s Director of Elections in an exchange concerning the Compensation Provision:

THE COURT:	So does it depends how high the number is?
MR. INGRAM:	Well, that's not the way the statute is worded. The statute says “any quota.”
THE COURT:	Right.
MR. INGRAM:	But I think that the reason for that language is to prevent that sort of high quota. <i>They're not all responsible organizations like Voting for America.</i> You understand what I'm saying?

Att. 2, Preliminary Injunction Tr. vol. 2, 215, June 12, 2012 (emphasis added).

Since its founding, this nation has struggled to define “we the people” who have a say in this government. In Texas, like so many other states, too few engage their right to participate in our democracy through voting: The record in this case demonstrates that Texas contains millions of unregistered, yet eligible potential voters. Though these unregistered citizens bear responsibility for their inactivity, so too does the people when they fail to encourage participation. Plaintiff-Appellees Voting for America and Project Vote² are private associations — in the words of the state's election director “responsible organizations” — that exercise their rights to encourage citizens to participate in democracy. Using the tools provided to them by the First Amendment and the National Voter Registration Act (“NVRA”), which was enacted to rid the country of “discriminatory and unfair registration laws and procedures” that “have a direct and damaging effect on voter participation in elections,” they engage citizens and help them register to vote, the required first step to participate in the electoral process. *See* 42 U.S.C. § 1973gg(a). The State of Texas has, through legislation and legal reinterpretation, obstructed, intimidated, and quashed this protected activity.

As a result, on August 2, 2012, the District Court for the Southern District of Texas issued an order preliminarily enjoining five of such provisions that regulate

² Project Vote is an independent 501(c)(3) organization that has no corporate affiliation with Association of Community Organizations for Reform Now, also known as ACORN. In the past, Project Vote worked with ACORN to plan and execute voter registration programs. That business relationship ended in 2008. Today, Project Vote continues its work, but with a number of other organizations.

individuals and organizations involved in voter registration drives: the Photocopying Prohibition (Tex. Elec. Code § 13.038), the Personal Delivery Requirement (Tex. Elec. Code § 13.042), the In-State Restriction (Tex. Elec. Code § 13.031(d)(3)), the County Limitation (Tex. Elec. Code § 13.038), and, in part, the Compensation Prohibition (Tex. Elec. Code § 13.008(a)(2), (3)). *See Voting for Am. v. Andrade*, No. 3:12-00044, 2012 WL 3155566, at *35-36 (S.D. Tex. Aug. 2, 2012). On August 3, 2012, Defendant Andrade moved to stay the injunction. Def. Andrade's Mot. for Stay at 1 (ECF No. 66). The court denied that motion on August 14, 2012, after finding that Defendant Andrade's arguments did "not meet the high burden for a stay." *See Voting for Am. v. Andrade*, No. 3:12-cv-00044, slip op. at 2 (S.D. Tex. Aug. 14, 2012). On August 16, 2012, Andrade filed this emergency appeal again seeking a stay of the injunction. As the record below demonstrates, the District Court was not only correct to enjoin these oppressive laws but it was well within the established and emerging judicial law in this area and this Court should deny the emergency stay requested.

ARGUMENT

Stay pending appeal is an "extraordinary remedy." *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968) (denying stay pending appeal). To prevail on her motion, Andrade must show: (1) a likelihood of success on the merits; (2) that she will suffer irreparable injury absent a stay; (3) that Plaintiffs

will not be substantially harmed; and (4) that the stay will serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987); *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992) (same). As the district court noted, this standard places a heavy burden on the moving party, such that “more commonly stay requests will not meet this standard and will be denied. Examples of cases . . . in which stays have been denied [are those] involving . . . First Amendment violations.” *Voting for Am. v. Andrade*, slip op. at 2 (S.D. Tex. Aug. 14, 2012) (quoting 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2904 (2d ed. 1995)); *see also Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).

I. Andrade Is Unlikely To Succeed on the Merits

Andrade still cannot meet her burden under this standard, as each of the four prongs weighs heavily against a stay. In his opinion granting the preliminary injunction, Judge Costa resolved the question of likelihood of success on the merits in favor of Plaintiffs after an exhaustive analysis of the relevant law. *See Voting for Am. v. Andrade*, 2012 WL 3155566, at *14-32. The court held that two of the enjoined provisions “directly conflict” with the provisions of the NVRA, while the other three violate the Constitution by imposing a “substantial burden” on First Amendment rights without “substantially advanc[ing] a legitimate state interest.” *Id.* Defendants have offered no compelling arguments to either this Court or the

district court demonstrating that they are likely to prevail on the merits of the claims at issue in this case.

A. The NVRA Requires That Texas Accept Voter Registration Applications By Mail And Allow Photocopying of Completed Voter Registration Applications

As the district court rightly found, the plain language of the NVRA and federal precedent leave little doubt that Plaintiffs will prevail on the merits of their statutory claims. Contrary to Defendant Andrade's claim, the two year "maintenance" requirement in the Public Disclosure Provision of the NVRA is separate from, and not a limitation upon, the public disclosure and photocopying requirements that also appear in that provision. *See* 42 U.S.C. § 1973gg-6(i) ("Each State shall maintain for at least 2 years and shall make available for public inspection, and where available, photocopying at a reasonable cost, all records . . ."). In a case involving virtually identical arguments to those presented by Defendant Andrade at the district level, the Fourth Circuit held that the Public Disclosure Provision of the NVRA unquestionably provides for the public disclosure and photocopying of completed voter registration applications. *See Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012); 42 U.S.C. § 1973gg-6(i). The district court ruled that the logic set forth by the Fourth Circuit applies to all completed applications, regardless of whether such applications are in the custody of a VDR or the county registrar. *Voting for Am. v. Andrade*, 2012

WL 3155566, at *17. Not only is a “completed application in the hands of a VDR . . . in the government’s constructive possession,” but the “NVRA requires states to make available even those applications that are not in their actual custody.” *Id.* at *17-18 (“States have the power to ‘make available’ for photocopying even those applications they do not possess simply by granting VDRs the legal authority to make photocopies.”).

The NVRA also mandates that states must accept voter registration applications delivered by mail, without making “any distinction between applications submitted directly by a voter and those submitted by a third party like a VDR.” *Voting for Am. v. Andrade*, 2012 WL 3155566, at *19. See generally 42 U.S.C. 1973gg-2(a), gg-4, gg-6(a)(1)(B). Defendant Andrade contends, nonetheless, that Texas may impose criminal penalties on individuals who mail registration applications on another’s behalf without running afoul of the NVRA. The Eleventh Circuit completely rejected such an argument in *Charles H. Wesley Educ. Found., Inc. v. Cox* when it noted that voter registration drives are, in fact, a “method by which private parties may facilitate the use of the mode of registration by mail.” 408 F.3d 1349, (11th Cir. 2005). As the district court held, “by requiring the states to accept mail-in forms, the [NVRA] does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates,”

such as Texas’s Personal Delivery Requirement. *Voting for Am. v. Andrade*, 2012 WL 3155566, at *18 (quoting *Cox*, 408 F.3d at 1354).

B. Texas Law Violates The First And Fourteenth Amendments

The district court also correctly concluded that the In-State Restriction, the County Limitation, and the challenged provisions of the Compensation Prohibition³ violate the First and Fourteenth Amendments of the Constitution. Speech about voter registration is “closely linked to the promotion of a free and robust political process because what they are encouraging is the exercise of another right—the right to vote, which is ‘a fundamental political right, because preservative of all rights.’” *Id.* at *20.

Andrade asks the court to find that the First Amendment is not implicated by voter registration advocacy. But the district court correctly rejected this argument by reasoning that “the Supreme Court has applied the Speech Clause to various types of expressive conduct that do not involve pure speech but nonetheless convey a particularized message.” *Id.* at *21 (citing *Texas v. Johnson*, 491 U.S. 397, 303-306 (1989)). Indeed, this case falls well within a well-established line of Supreme Court precedent on laws regulating canvassers who collect signatures for

³ Andrade also argues that the district court should have afforded Texas state courts an opportunity to interpret the Compensation Prohibition before declaring it unconstitutional. But this argument was never raised in the court below, and should not be considered by this court, particularly in this motion for an emergency stay. *See* 5th Cir. R. 8.1.2 (“If the appellant raises an issue that was not raised before the district court . . . , the applicant must give the reasons why prior action was not taken and why a stay should be granted.”).

ballot initiatives. *See Buckley v. Am. Constitutional Law Found. Inc.*, 525 U.S. 182 (1999); *Meyer v. Grant*, 486 U.S. 414 (1988). Although those cases involved laws that did not directly regulate speech, the Court nevertheless held that the laws at issue regulated conduct that was tied to speech, and therefore had the effect of reducing the number of voices that were available to convey a particular message. *Voting for Am. v. Andrade*, 2012 WL 3155566, at *21, (“The First Amendment likewise applies to the Texas laws at issue in this case because they limit[] the number of voices who will convey [Plaintiffs’] message.”) (internal quotation marks and citations omitted).

Though noting that there was some basis for applying strict scrutiny, the district court nevertheless applied the Anderson-Burdick test to the challenged Texas provisions. *Voting for Am. v. Andrade*, 2012 WL 3155566, at *23. Under this test, the court must balance the injury to First and Fourteenth Amendment interests against the “precise interests put forward by the State as justifications for the burden imposed by the rule.” *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983). Because the Plaintiffs created an extensive record of the injury to their Constitutional interests, and because Andrade could not articulate a reason why this substantial burden was justified, the district court correctly concluded that the In-State Restriction, the County Limitation, and the challenged provisions of the

Compensation Prohibition were invalid. *Voting for Am. v. Andrade*, 2012 WL 3155566, at *24-32.

II. The State Will Not Suffer Irreparable Injury Absent A Stay

Although the failure to show a substantial likelihood of success is reason enough to deny Andrade's motion, she has also failed to demonstrate irreparable harm absent a stay. Instead, Andrade asserts that the injunction will permit widespread voter fraud in Texas, without even attempting to explain how the individually enjoined provisions are likely to cause voter fraud. There is simply no evidence in the record for a finding of irreparable harm on this basis. Indeed, by failing to present even a single witness or document at the evidentiary hearing, Defendant Andrade has failed to make any factual showing beyond bare speculation. *See id.* at *34 ("Defendants, by contrast, presented no evidence that would allow this Court to find that an injunction would do substantial harm to their interests or the interests of the people of Texas.").

Even though Andrade seeks a stay of all five enjoined provisions, the harm asserted by Andrade stems primarily from two: the County Limitation and the Personal Delivery Requirement. But, contrary to Andrade's assertions, these two modifications do not substantially alter the county-based system of voter registration in Texas. *See Voting for Am. v. Andrade*, No. 3:12-cv-00044, slip op. at 3 (S.D. Tex. Aug. 14, 2012). Texas county registrars are still the officials who

must receive and process the completed voter registration applications for residents of their counties. Tex. Elec. Code § 13.002. The county registrar is still responsible for determining eligibility to vote of applicants in their counties. *Id.* § 13.071. But now, VDRs who are registered in one county may accept and submit applications in other counties and from residents of other counties, and they may use the mail to do so. *See Voting for Am.*, 2012 WL 3155566, at *35-36. So far as Plaintiffs and the court have been able to identify, no other states with county-based voter systems impose similar restrictions on submitting registration applications by mail, and there is no evidence that there is greater disorder or voter fraud in those states. *See Voting for Am. v. Andrade*, No. 3:12-CV-00044, slip op. at 4 (S.D. Tex. Aug. 14, 2012).

These two provisions have only the most remote effect on eliminating voter fraud. Andrade claims that the face-to-face interaction required by the Personal Delivery Requirement allows for identification of VDRs who submit incomplete or fraudulent applications, and that county registrars are most likely to recognize VDRs from their own counties. But VDRs are required to provide a signed receipt to the voter upon accepting a voter registration application. *See* Tex. Elec. Code § 13.040(a). A copy of this receipt must also be provided to the county registrar together with the registration application. *Id.* § 13.040(d). This requirement still remains in force after the Court's preliminary injunction, and therefore VDRs

submitting applications by mail must also submit the receipt to the county registrar. *See Voting for Am. v. Andrade*, No. 3:12-CV-00044, slip op. at 5 (S.D. Tex. Aug. 14, 2012). This receipt provides a far more reliable and accurate way of tracking and terminating rogue VDRs than facial recognition, particularly given the hustle and bustle of a county registrar's office.

Andrade has also argued that because county registrars must now accept applications from VDRs in multiple counties, it will be difficult to terminate misbehaving VDRs. If an out-of-county VDR submits problematic applications, Andrade argues that the county registrar must send notice to the county who deputized the VDR to ask that he or she be terminated. In response to this argument, Judge Costa modified his preliminary injunction order to require that VDRs indicate their county of appointment on the application receipt if they submit applications to other counties. *See Voting for Am. v. Andrade*, No. 3:12-CV-00044, slip op. at 8-9 (S.D. Tex. Aug. 14, 2012). This requirement allows county registrars to take action against problematic VDRs even more easily than was possible prior to the injunction: before, the county registrar may have become aware of a problematic VDR only in his own county, and there was no easy way to detect what other counties the VDR had been deputized in.

Andrade did not assert in her motion for stay before the district court any particular harm that would be caused from enjoining the Photocopying Prohibition,

the In-State Restriction, or the Compensation Prohibition. Nor does she offer any reason why she could not have raised these arguments before the district court.

It strains credulity to suggest that this injunction will lead, as Andrade has previously asserted, to disenfranchisement of voters. If a voter registration application is incomplete, the county registrar must notify the applicant that their application is incomplete and provide an opportunity to submit a corrected application. Tex. Elec. Code §§ 13.073 (notice of rejection), 13.075 (notice of challenge). Thus, even if a VDR accidentally submits an incomplete registration application, a mechanism still exists to ensure the voter is registered. The VDR must still provide a receipt to the applicant, allowing the applicant to check on his or her registration status and notify the appropriate authorities of any improper activity. Tex. Elec. Code § 13.040. If a VDR attempts to register voters that do not exist, are deceased, or are fictional characters, no voter is disenfranchised by this fraudulent conduct, and the receipt requirement still provides the best means for the official to identify such individuals and take appropriate action.

To the extent that a VDR may try to improperly enforce her political predilections by picking and choosing between what applications to submit—and there is no evidence in the record that this has actually occurred—the world is no different now than it was before. The Personal Delivery requirement supposedly removed the excuse that the registration was lost in the mail; but that was not likely

to be a convincing excuse in the first place. And given that it is so unlikely that people who take the time and energy to register prospective voters would wish to commit voter fraud, it is unsurprising that Andrade cannot produce any evidence that this kind of voter fraud has ever occurred or is likely to occur if the preliminary injunction remains in place.

III. Voting For America and Project Vote Will Be Irreparably Injured By A Stay

Even if the State had properly presented evidence to substantiate its arguments, an emergency stay would still be improper due to the significant injuries that the voting restrictions inflict on Plaintiffs' ability to engage in voter registration activities. As the district court recognized in its order granting the preliminary injunction, the Plaintiffs have presented substantial evidence of irreparable harm through their inability to engage in voter registration activities protected by the First Amendment and the NVRA. *See Voting for Am. v. Andrade*, No. 3:12-cv-00044, 2012 WL 3155566, at * 33-36. Violations of such rights unquestionably rise to the level of injury that demands imposition of the district court's injunction, because "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1340 (S.D. Fla. 2006) ("Plaintiffs have suffered and will continue to suffer irreparable harm unless the Court enjoins the challenged statute. The

undisputed evidence demonstrates that Plaintiffs have halted or significantly scaled back their voter registration operations and are losing valuable time to engage in core political speech”). Thus, the severity of Plaintiffs’ harm also counsels in favor of denying the stay request.

IV. A Stay Would Disserve the Public Interest

Finally, granting a stay of the preliminary injunction will harm the public interest. The Supreme Court has “often reiterated that voting is of the most fundamental significance under our constitutional structure.” *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). The web of regulations and restrictions that impede voter registration activities do not protect the right to vote, and instead chill it by making effectively impossible to conduct voter registration drives, shutting off this critical means of engaging citizens in the political process. The injunction ensures “[t]he vindication of constitutional rights and the enforcement of a federal statute” which would “serve the public interest almost by definition.” *League of Women Voters of Fla. v. Browning*, 2012 WL 1957793, at *11 (N.D. Fla. May 31, 2012); *see also Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)) (“[I]t is always in the public interest to protect constitutional rights.”).

CONCLUSION

Because Defendant Andrade makes no compelling argument for why the

district court was incorrect on its assessment of the merits, and because the balance of the equities weighs strongly in favor of allowing the injunction to proceed, the Court should deny Appellant's Motion for Emergency Stay of Preliminary Injunction Pending Appeal and Motion to Expedite Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17 of August, 2012, a copy of this Opposition to Motion to Stay Preliminary Injunction Pending Appeal was served via the CM/ECF system to all counsel of record.

/s/ Chad W. Dunn

Chad W. Dunn

Attorney for Plaintiffs-Appellees

ATTACHMENTS

1. Transcript of Preliminary Injunction Hearing, Vol. I.
(June 11, 2012)
2. Transcript of Preliminary Injunction Hearing, Vol. II.
(June 12, 2012)