

No. 12-40914

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

VOTING FOR AMERICA, INC., BRAD RICHEY, and
PENELOPE McFADDEN,
Plaintiffs-Appellees,

v.

HOPE ANDRADE, in her Official Capacity as Texas Secretary of State
Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Texas, Galveston Division
Case No. 3:12-CV-00044

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

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1820
Fax: (512) 469-3180

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

ARTHUR C. D'ANDREA
Assistant Solicitor General

J. REED CLAY, JR.
Senior Counsel to the Attorney General

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF INTERESTED PERSONS
Andrade v. Vote for America, Inc., et al.,

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, Inc.** —Plaintiff;
- **Brad Richey** —Plaintiff;
- **Penelope McFadden** —Plaintiff;
- **Brian Mellor and Michelle Rupp**, Project Vote, Inc.—counsel for Plaintiff Voting for America, Inc.;
- **Michelle Cantor Cohen**, Project Vote, Inc.—counsel for Plaintiffs Voting for America, Inc. and Project Vote, Inc.;
- **David C. Peet, Julia Lewis, Ryan Moreland Malone**, Ropes & Gray, L.L.P.—counsel for Plaintiff Voting for America, Inc.;
- **Chad W. Dunn**, Brazil & Dunn— counsel for Plaintiffs;
- **Donald S. Glywasky**, Galveston County
- **Jonathan F. Mitchell**, OFFICE OF THE ATTORNEY GENERAL—counsel for Defendant Hope Andrade.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Attorney for Defendant-Appellant

REQUEST FOR EMERGENCY CONSIDERATION

Appellant Hope Andrade (“the State”) respectfully moves for a stay pending appeal of the district court’s order of August 2, 2012, which preliminarily enjoins the State from enforcing many provisions of Texas’s election-integrity laws. *See* Order and Prelim. Inj., August 2, 2012, ECF No. 65 (Attach. 4). Some of these laws were passed in direct response to a national voter-registration scandal involving Project Vote, Inc., and its founder ACORN. *See* Comm. Rep. HB 239, 82d Leg. (Tex. 2011) (“In many of the scandals, the convicted individuals specifically cited compensation or performance quotas as the incentive to fraudulently complete voter registration forms.”); *see also* STAFF OF THE HOUSE COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 111TH CONG. (July 23, 2009) (“Nearly 70 ACORN employees have been convicted in 12 states for voter registration fraud.”); *id.* (Feb. 18, 2010) (“Project Vote employee was convicted and sentenced to 30 days of community service in 1998 for submitting more than 400 fake voter registration applications. Project Vote paid its employees \$1.00 for each voter registration application it received.”). On August 3, 2012, the State moved for a stay pending appeal in the district court, which was denied on August 14, 2012. *See* Order Den. Mot. for Stay, August 14, 2012, ECF No. 71 (Attach. 8).

The State now respectfully seeks a stay pending appeal from this Court. The State is likely to succeed on the merits of its appeal, and the State will be irreparably injured if the district court’s order remains in effect between now and the upcoming

November elections. The laws that the district court enjoined are designed to prevent negligent and fraudulent practices associated with third-party voter registration—practices that threaten the voting rights of individual Texans and the integrity of the electoral process. Merely expediting the appeal, without staying the district court’s order, will require the State and its citizens to assume the risk of any fraud or mistakes arising from third-party voter-registration activity during the appeal, with state and national elections less than three months away. Such an outcome should be avoided, especially when the district court’s preliminary-injunction order is unlikely to survive appellate review in this Court and a stay would impose only minor burdens on the ability of the parties in this case to conduct voter-registration drives.

ARGUMENT AND AUTHORITIES

A preliminary injunction is “an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation and internal quotation marks omitted). The plaintiffs in this case have not made this “clear showing” on any of the factors relevant to a preliminary injunction. Whether this Court should stay the district court’s preliminary injunction pending appeal turns on four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*,

481 U.S. 770, 776 (1987). All four factors favor a stay. Indeed, the movant need not even show even a “probability” of success on the merits. *See Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 1981) (per curiam) (“If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed.”) It is enough for the movant to “present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.” *Id.*; *see also id.* (“The stay procedure . . . affords interim relief where relative harm and the uncertainty of final disposition justify it.”).

I. THE STATE WILL LIKELY PREVAIL ON THE MERITS.

The State of Texas permits any private individual or organization to distribute voter-registration forms and encourage their fellow citizens to register—activities that are undoubtedly protected by current First Amendment doctrine. *See, e.g., Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999) (holding that the Speech Clause extends to the activity of gathering signatures for a ballot-initiative petition); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980) (holding that Speech Clause protects charitable solicitation). Anyone in Texas is permitted to gather blank voter-registration forms, distribute them, and urge others to register. They may even help other voters fill out their registration application so long as they do not act as an unauthorized “agent” by completing and signing the form on the applicant’s

behalf. *See* TEX. ELEC. CODE §§ 13.003, .006. Texas election law does not require persons engaging in these activities to be licensed, deputized, or appointed by the State or county officials.

The State also permits a limited class of private individuals to *collect* completed voter-registration applications and *deliver* them to the county registrar. These activities—which do not involve speech or expressive conduct of any sort—are regulated by the State because they present opportunities for fraud and abuse, and create the risk that other citizens’ right to vote could be abridged on account of the carelessness or misdeeds of someone purporting to help. Many voter-registration drives are conducted by individuals or organizations that seek to advance the electoral prospects of a specific candidate or political party. Given that partisan organizations often organize voter-registration drives, and given the opportunities for abuse when private individuals are empowered by county officials to receive voter-registration applications from prospective voters, the State must take steps to ensure that completed voter-registration applications are properly submitted to local election officials and that the voter-registration process remains free from corruption and partisan misconduct. *See Project Vote v. Kelly*, 805 F. Supp. 2d 152, 186 (W.D. Pa. 2011). The State must further ensure that the individuals entrusted to handle completed applications are honest and competent, and that they will be held accountable for both inadvertent mistakes and intentional misconduct that arise during the process of collecting and delivering the applications.

Texas law therefore requires anyone who *receives* a voter-registration application from a prospective voter to be appointed as a volunteer deputy registrar (“VDR”). TEX. ELEC. CODE §§ 13.031, .038. Because voter registration is conducted at the county level in Texas, VDRs must be appointed by the local county registrar. *See* §§ 12.001, 13.032. VDRs must be Texas residents, and they serve terms that last no longer than two years. *See id.* §§ 13.031, .036. VDRs must undergo training to ensure that they understand their duties and responsibilities. VDRs must hold appointments from each county in which they desire to collect completed voter-registration applications both because county election officials lack the authority to deputize individuals to act on behalf of another county and because county election officials must have the ability to hold accountable anyone acting on their behalf. *See id.* § 13.031. But nothing prohibits an individual from being deputized in all counties. And although VDRs are allowed to receive compensation from private organizations, their compensation cannot depend on a fixed number of voter-registration applications that they “facilitate.” *Id.* § 13.008. Finally, Texas law regulates the manner in which VDRs handle the applications that they receive from prospective voters. Because registration applications contain sensitive personally identifying information, VDRs are prohibited from photocopying registration applications. And VDRs must deliver the applications to the county registrar in person, or through another VDR, within five days of receipt. *See id.* § 13.042(a)-(b).

The district court enjoined the Secretary of State from enforcing most of these provisions that regulate and inject accountability into the VDR system. It concluded that the Texas-residency requirement, the requirement that VDRs secure appointments from each county on whose behalf they collect voter-registration forms, and the regulations of the compensation that VDRs (and others) receive from private organizations violate the Speech Clause of the First Amendment. *See* Order and Prelim. Inj. 50. The court further held that the photocopying restrictions and personal-delivery requirement were in “direct conflict” with the National Voter Registration Act (“NVRA”), 42 U.S.C. §§ 1973gg et seq.

Although the State respects the district court, its analysis of the constitutional issues is likely to be reversed on appeal because the acts of *collecting* completed voter-registration applications from prospective voters and *delivering* them to county officials do not qualify as “speech” or “expressive conduct” of any sort. As a result, the State’s regulations of VDRs simply do not implicate the First Amendment. Although some discrete components of voter-registration activities are protected by the Speech Clause, such as encouraging others to register, none of those speech-related activities are regulated or limited by the statutory provisions that the district court disapproved. The district court committed a fundamental error by declaring the abstract category of “voter-registration activity” to be protected by the Speech Clause, without recognizing that only certain components of voter-registration activity qualify as speech or expressive conduct protected by the First Amendment. *See, e.g.,* Order and Prelim. Inj. 57

(“[T]he *voter registration activity* in which the Organizational Plaintiffs engage is protected First Amendment conduct.” (emphasis added)). *See generally Washington v. Glucksburg*, 521 U.S. 702, 721 (1997) (requiring federal courts to employ a “careful description” of conduct or behavior that a litigant alleges to be protected by the Constitution, and forbidding resort to generalizations or abstractions).

The district court’s treatment of the alleged NVRA violations is also likely to be reversed. First, the district court concluded that the provisions of Texas law that forbid VDRs to photocopy completed voter-registration applications “directly conflict” with 42 U.S.C. § 1973gg-6(i). *See* Order and Prelim. Inj. 41-46. But the district court misunderstood the scope of the duty imposed by section 1973gg-6(i), which provides that “[e]ach 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 concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.” 42 U.S.C. § 1973gg-6(i) (emphasis added). The use of the word “maintain” means that this statutory obligation extends only to records that the State is capable of “maintain[ing]”—*i.e.*, those records within the State’s possession and control. Section 1973gg-6(i) cannot apply to voter-registration applications held by VDRs who have not yet submitted them, as it is impossible for a State to “maintain” or “make available for public inspection” documents that have not been delivered to any state or county official.

The district court also held that the State’s personal-delivery requirement “directly conflicts with” 42 U.S.C. § 1973gg-4, Order and Prelim. Inj. 48, which requires States to “accept and use” a federal mail-in application form. Yet Texas accepts *every* voter-registration form that arrives through the mail—including those that VDRs improperly mail to county registrars in violation of state law. *See* TEX. ELEC. CODE §§ 13.071-.072; *see also* Order and Prelim. Inj. 49 (acknowledging that “improperly mailed forms will still be accepted”). And any eligible voter (including a VDR) may mail his own voter registration application; the law prohibits only VDRs from mailing *someone else’s* completed voter-registration application that has been entrusted to their care. The State’s approach is an eminently sensible accountability device. If the State permitted VDRs to transmit completed voter-registration forms through the mail, it would allow careless or unethical VDRs to blame the Post Office for any applications that got “lost” in the delivery process. And there is no provision in the NVRA that requires States to allow third parties to use the mail when delivering voter-registration applications on behalf of someone else.

A. The Act of Collecting and Delivering Another Person’s Completed Voter-Registration Application Is Neither “Speech” Nor “Expressive Conduct” Protected by the First Amendment.

Texas law permits *anyone* participating in a voter-registration drive to distribute forms, encourage others to register, and assist them in filling out their applications. None of these communicative acts requires a VDR appointment, and no one participating in these speech-related activities becomes subject to the regulations governing

VDRs. The VDR regulations govern only those who *collect* another person's completed voter-registration application on behalf of the county registrar. That is not "speech" of any sort and does not implicate the First Amendment.

Taking custody of another person's completed voter-registration application and transmitting it to the authorities on his behalf is conduct, not speech; it is not an utterance of a written or spoken word. And although the Supreme Court has interpreted the Speech Clause to protect "expressive conduct" such as flag burning, the act of possessing another person's voter-registration application is not a display meant to communicate a message to onlookers. *Texas v. Johnson*, 491 U.S. 397 (1989), holds that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Id.* at 404 (citation omitted). Neither of these factors is present here. A VDR does not seek to make a public spectacle of the voter-registration applications he collects, nor does he use the completed applications in his custody to communicate a message to others. Collecting and delivering voter-registration applications is not conduct that is "inherently expressive." See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("[W]e have extended First Amendment protection only to conduct that is inherently expressive.").

The district court went off track by asking whether the plaintiffs’ “voter registration activities” in the abstract qualified as protected First Amendment activity, rather than asking whether the specific act of accepting a completed voter-registration application on behalf of county officials could qualify as “speech” or “expressive conduct.” In doing this, the district court lumped the undeniably protected speech activity of urging one’s fellow citizens to register to vote in with the non-speech activities regulated by the State’s VDR regime. *See, e.g.*, Order and Prelim. Inj. 50, (“The Organizational Plaintiffs contend that *their voter registration activities* are a constitutionally protected form of speech and associational activity.” (emphasis added)); *id.* at 51 (“The Organizational Plaintiffs’ *registration drives* seek political change at the most elemental level. They encourage citizens to engage in the political process by registering to vote.” (emphasis added)); *id.* at 54 (“[T]*hird-party voter registration activity* implicates not just freedom of speech, but also freedom of association.” (emphasis added)); *id.* at 54-55 (“*Voter registration drives*, in which citizens engage with one another to increase participation in the political process, are paradigmatic associational activity.” (emphasis added)); *id.* at 57 (“[T]he *voter registration activity* in which the Organizational Plaintiffs engage is protected First Amendment conduct.” (emphasis added)). It bears repeating that Texas does not regulate the speech-activity components of voter-registration drives; anyone in Texas is free to obtain blank voter-registration form, distribute them to passers-by, and encourage others to register to vote.

To its credit, the district court acknowledged and understood the State’s argument on this point. *See id.* at 52. But its opinion does not adequately rebut it. The district court’s observation that the Texas Election Code *might* be construed to prohibit non-VDRs from *distributing* voter-registration application forms has no bearing on this case because the Secretary of State (the State’s chief election official) has repeatedly and emphatically declared that she will not interpret the Election Code in that manner. *See id.* at 11-12; Def. Andrade’s Mot. to Dismiss 29, ECF No. 13-2; Prelim. Inj. Hr’g Tr. 110–11, June 11, 2012; Pls.’ Ex. 6, Texas Volunteer Deputy Registrar Guide. *See generally Poe v. Ullman*, 367 U.S. 497 (1961) (no Article III standing to challenge a criminal statute that will never be enforced against the litigant).

The district court also noted that the State’s rules governing compensation for voter-registration activity extend beyond VDRs; any “person” who accepts compensation that depends on the number of voter registrations that he “facilitates” is guilty of a misdemeanor. *See* TEX. ELEC. CODE § 13.008(a)(3). This *at most* could show that the challenged compensation rules implicate the First Amendment; it provides no help to the plaintiff’s Speech Clause challenges to the Texas-residency and county-appointment requirements, which apply only to VDRs. In addition, the verb “facilitates” is ambiguous and is reasonably susceptible of a construction that extends only to non-speech activity (such as collecting the completed applications from prospective voters). Instead of interpreting this language in section 13.008(a) expansively and then enjoining it for violating the First Amendment, the district court should have fol-

lowed the numerous Supreme Court decisions that require federal courts to interpret state laws to *avoid* constitutional conflicts. *See Akron v. Ohio Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (“Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.” (citation and internal quotation marks omitted)); *Frisby v. Shultz*, 487 U.S. 474, 483 (1988) (holding that federal courts must construe state statutes, no less than federal statutes, to “avoid constitutional difficulties”). And if the district court is unwilling to impose a saving construction on the meaning of “facilitates” in section 13.008(a), then the proper response is to abstain and allow the state courts an opportunity to interpret the statute. *See Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976) (“As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.” (citations and internal quotation marks omitted)).

Finally, the district court claimed that the State’s argument “takes too narrow a view of the First Amendment” because the Supreme Court has extended the Speech Clause to “expressive conduct.” *See* Order and Prelim. Inj. 53-54. But the district court never explained how the act of collecting and delivering another voter’s registration form could qualify as “expressive conduct.” All the district court had to say on this score was that “[f]ederal courts have recognized that the expressive conduct of actually registering voters, to the extent such conduct can be separated from the

speech involved in persuading voters to register, is protected expressive conduct. *See, e.g., Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1200 (D.N.M. 2010); *Blackwell*, 455 F. Supp. 2d at 700.” *Id.*

Yet the first of the two cases that the district court cites holds exactly the opposite; the *Herrera* court concluded that “[t]he United States Constitution does not compel the State to provide for third-party registration” and that “New Mexico would not violate the Constitution if it prohibited third-party registration entirely and instead required all citizens to register only with government officials.” *See Herrera*, 690 F. Supp. 2d at 1218. The district court’s pincite of *Herrera* directs the reader to page 1200, but that page contains only abstract discussion of the Supreme Court’s expressive-conduct jurisprudence without ever asserting or even implying that the act of collecting completed voter-registration applications is protected by the First Amendment. The district court miscites *Herrera*.

As for *Project Vote v. Blackwell*, the court in that case asserted only that “*participation in voter registration* implicates a number of both expressive and associational rights which are protected by the First Amendment.” *See* 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006) (emphasis added). Its discussion considered only voter-registration activities in the abstract and did not analyze whether the discrete acts at issue in this case—the acts of collecting completed voter-registration applications on behalf of the State—are protected by the Speech Clause.

Finally, if gathering and transmitting completed voter-registration applications truly qualify as “speech” protected by the First Amendment, then it is hard to see how Texas could limit these activities to VDRs licensed by the State. The core of the First Amendment is its prohibition on prior restraints, and the Justices have described this ban on prior restraints in near-absolutist terms. *See New York Times v. United States*, 403 U.S. 713 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”). Although the district court analogized the collection and delivery of third-party voter-registration applications to flag burning and wearing black armbands, *see* Order and Prelim. Inj. at 53, the Supreme Court would never tolerate a regime that required flag burners or armband wearers to receive advance permission from state or county officials. The district court never questioned the State’s prerogative to restrict these collection-and-delivery activities to VDRs appointed in advance by county officials, but acknowledging the State’s prerogative to limit these activities to VDRs compels the conclusion that these activities fall outside the scope of the Speech Clause.

B. Even If This Case Implicates the First Amendment, the State’s Interests in Deterring and Preventing Fraud Are Sufficient to Sustain the VDR Regulations Under *Anderson v. Celebrezze*, *Burdick v. Takushi*, and *Crawford v. Marion County*.

In the event that this Court disagrees with the State and concludes that the Speech Clause applies to the State’s regulation of VDRs, the State remains likely to prevail on appeal under the standards used in *Anderson v. Celebrezze*, 460 U.S. 780

(1983), *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Crawford v. Marion County Election Board*, 553 U.S. 181, 190-91 (2008). The district court's application of these standards was insufficiently deferential to the State's interests in deterring and preventing fraud, as the court repeatedly faulted the State for failing to produce evidence of past fraud committed by VDRs. *See* Order and Prelim. Inj. 64, 83. This approach is irreconcilable with *Crawford*, which upheld Indiana's photo-identification law as a legitimate fraud-prevention device under *Anderson* and *Burdick*—even though Indiana was unable to produce *any* evidence of in-person voter impersonation. 553 U.S. at 194, 204. States do not need evidence of past fraud to justify election-fraud prevention measures under *Anderson* or *Burdick*, especially when the fraud that they seek to counter is difficult to detect. It is enough for a State to show that fraud *might* occur and that its election laws are a rational means of deterring or preventing it, even if those laws impose a mild burden on speech or voting. Each of the state laws that the district court disapproved easily satisfies this test.

The rationale behind the Texas-residency requirement is straightforward: Texas residents will be more easily deterred from committing fraud because they are less likely to flee the State and will therefore be easier to investigate and apprehend. Out-of-state residents who act as VDRs are less easily deterred from breaking the law because they are more likely to abscond and remove themselves from the jurisdiction of state investigators and prosecutors. The State is not required to prove that out-of-state VDRs have committed more fraud than Texans who serve as VDRs, and in crit-

icizing the State for its failure to produce evidence on this score the district court never cited *Cranford* nor considered how the Supreme Court's treatment of Indiana's law should inform the analysis here. Voter-registration fraud, like in-person voter impersonation, is difficult for state officials to detect, so the State is hardly to be faulted for the absence of evidence, and in all events *Cranford* holds that States need not produce evidence of past fraud to justify their election-fraud prevention laws. The county-appointment requirement serves a similar accountability function by enabling county officials to revoke the appointments of VDRs who carelessly or fraudulently submit applications to that county. *See* TEX. ELEC. CODE § 13.033 (b)(6) (an appointment as VDR "may terminate on the registrar's determination that the person failed to adequately review a registration application."). These interests are more than sufficient to sustain the VDR regulations under *Anderson*, *Burdick*, and *Cranford*. *See also Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 465 (1945) ("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part.").

C. The District Court Erred by Failing to Defer to the Secretary of State's Interpretation of Section 13.008, Failing to Impose a Saving Construction on Section 13.008, and Failing to Afford the State Courts an Opportunity to Interpret Section 13.008 Before Declaring It Unconstitutional.

The district court's treatment of the compensation regulations is also likely to be vacated on appeal. The district court adopted an unreasonable construction of section 13.008 by concluding that it forbids voter-registration organizations to terminate

canvassers for lack of diligence—even though the Secretary of State expressly rejected this interpretation and insisted that the statute prohibits only two practices: (1) paying canvassers on a per-application basis and (2) conditioning payment or employment solely on the submission of a high preset number of applications. *See* Order and Prelim. Inj. 72. The district court refused to defer to the Secretary’s construction of the statute—even though this construction would have saved the statute from unconstitutionality—and imposed his own interpretation on section 13.008 that caused it to violate the Speech Clause. *See id.* at 75-76. This was error.

Federal courts must defer to a state official’s interpretation of state law—even when that interpretation is announced in litigation. *See, e.g., Frisby*, 487 U.S. at 483 (construing a town ordinance “more narrowly” in part because “[t]his narrow reading is supported by the representation of counsel for the town at oral argument”); *Bellotti*, 428 U.S. at 143 (“The interpretation placed on the statute by appellants in this Court is of some importance and merits attention, for they are the officials charged with enforcement of the statute.”). On top of that, federal courts must interpret state laws to avoid constitutional conflicts. *See Akron Ctr. for Reprod. Health*, 497 U.S. at 514 (“[W]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.” (citation and internal quotation marks omitted)). The district court’s treatment of section 13.008 contravenes each of these cardinal principles of constitutional adjudication. The district court also should have afforded the state courts an opportunity to interpret section 13.008(a) before declaring it unconstitutional. Alt-

though federal district courts cannot certify questions to Texas state courts, the section 13.008(a) issue presents a paradigmatic case for abstention. *Bellotti*, 428 U.S. at 146-47 (“As we have held on numerous occasions, abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.”) (internal quotation marks omitted). *See also Arizona v. United States*, 132 S. Ct. 2492, 2509-2510 (2012) (forbidding federal courts to enjoin the enforcement of a state law that “could be read” by the state courts to avoid constitutional or preemption concerns).

II. THE STATE WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

Refusing to stay the district court’s injunction will prevent the State from enforcing a duly enacted statute that was designed to protect the integrity of the State’s electoral process. Enjoining the enforcement of democratically enacted legislation harms the State by preventing it from implementing the will of its people. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (“[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.”). And the State will suffer additional irreparable injury because the enjoined statutory provisions enable the State to deter and detect fraud as well as inadvertent mistakes committed

by VDRs. This oversight is essential in protecting the rights of individual voters as well as the integrity of the state's electoral system.

III. ISSUING A STAY WILL NOT SUBSTANTIALLY INJURE OTHER PARTIES INTERESTED IN THE LITIGATION.

Voting for America has not clearly shown that enforcement of the law pending appeal will cause it irreparable injury. They remain able to conduct nearly every aspect of a voter-registration drive throughout the State of Texas, including aiding potential voters in completing their voter-registration applications, and there is an ample number of appointed VDRs available to collect and deliver those applications.

IV. A STAY PENDING APPEAL IS BY DEFINITION IN THE PUBLIC INTEREST.

A stay of the preliminary injunction would allow Defendants to carry out the statutory policy of the Legislature, which “is in itself a declaration of the public interest and policy which should be persuasive.” *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937); *see also Ill. Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) (“When the opposing party is the representative of the political branches of a government the court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.”).

CONCLUSION

The district court's preliminary injunction should be stayed pending appeal.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Solicitor General
State Bar No. 24075463

ARTHUR C. D'ANDREA
Assistant Solicitor General

J. REED CLAY, JR.
Senior Counsel to the Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1820
Fax: (512) 469-3180

CERTIFICATE OF EMERGENCY

I certify that the facts supporting emergency consideration of this motion are true and complete.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Solicitor General
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed with the Clerk of the Court and served by ECF on this the 16th day of August, 2012, to:

Chad W. Dunn
K. Scott Brazil
Brazil & Dunn, L.L.P.
4201 Cypress Creek Parkway, Suite 530
Houston, Texas 77068
Facsimile: (281) 580-6362

Michelle Cantor Cohen
Brian Mellor
Michelle Rupp
Project Vote
1350 I Street NW
Washington, D.C. 20005
Facsimile: (202) 629-3754

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
Facsimile: (512) 474-8035

David C. Peet
Julia Lewis
Ryan Malone
Ropes & Gray, L.L.P.
700 12th St. NW Suite 900
Washington, D.C. 20005
Facsimile: (202) 383-8322

Donald S. Glywasky
Galveston County Legal Department
722 Mood, 5th Floor
Galveston, Texas 77550
Facsimile: (409) 770-5562

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Solicitor General

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on August 16, 2012, this Emergency Motion was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov/>.

Counsel further certifies that: (1) required privacy redactions have been made, 5TH CIR. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5TH CIR. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Defendant-Appellant

CERTIFICATE OF CONFERENCE

On August 15, 2012, we conferred with counsel for plaintiffs and they oppose this motion and intend to file an opposition.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Defendant-Appellant

ATTACHMENTS

1. Plaintiffs' Motion for Preliminary Injunction
(May 10, 2012)
2. Defendants' Response to Motion for Preliminary Injunction
(May 24, 2012)
3. Plaintiffs' Reply ISO Motion for Preliminary Injunction
(June 4, 2012)
4. Opinion and Order Granting in Part and Denying in Part Plaintiff's
Motion for a Preliminary Injunction
(August 2, 2012)
5. Defendants' Motion to Stay Preliminary Injunction
(August 3, 2012)
6. Plaintiffs' Response to Motion to Stay Preliminary Injunction
(August 7, 2012)
7. Defendants' Reply ISO Motion to Stay Preliminary Injunction
(August 8, 2012)
8. Order Modifying Preliminary Injunction and Denying Motion for Stay
(August 14, 2012)
9. Modified Preliminary Injunction
(August 14, 2012)

1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

**VOTING FOR AMERICA,
PROJECT VOTE INC.,
BRAD RICHEY, and
PENELOPE MCFADDEN**

Plaintiffs,

V.

HOPE ANDRADE,

In Her Official Capacity as Texas Secretary of State, and

CHERYL E. JOHNSON

*In Her Official Capacity as Galveston County
Assessor and Collector of Taxes and Voter
Registrar*

Defendants.

[illegible]

CIVIL ACTION NO. 3:12-cv-00044

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND ACCOMPANYING MEMORANDUM OF LAW

TABLE OF CONTENTS

INTRODUCTION	1
NATURE AND STAGE OF THE PROCEEDING.....	2
STATEMENT OF ISSUES	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Plaintiffs’ Claims Have a Substantial Likelihood of Success on the Merits	4
A. The Texas Election Code Directly Conflicts with the Mandates of the NVRA	5
B. The Texas Election Code Restricts the Organizational Plaintiffs’ Core Political Speech in Violation of the First Amendment	6
C. Enforcement of the Compensation Requirement and the Completeness Requirement is Prohibited Because They Are Unconstitutionally Vague and Overbroad	8
II. Plaintiffs Will Suffer Irreparable Injury If This Court Does Not Grant a Preliminary Injunction	10
A. Limitations on Canvassers and VDRs Have the Effect of Injuring the Organizational Plaintiffs’ Ability to Engage in Protected Speech.....	10
B. Texas Restrictions on Canvassers and VDRs Deprive Plaintiffs of Their Ability to Assist Voters to Register Consistent with the NVRA	14
III. The Deprivation of Plaintiffs’ Rights Under the First Amendment and the NVRA Outweigh Any Purported Harm to the State	16
A. The First Amendment violations at issue in this case outweigh any harm the state is alleged to have suffered	16
B. The NVRA violations at issue in this case also outweigh any harm the state is alleged to have suffered	17
C. Defendants’ concerns over potential election fraud are baseless and pale in comparison to the Organizational Plaintiffs’ extensive injuries	17
D. The state’s costs of compliance with the injunction do not outweigh the Organizational Plaintiffs’ right to engage in political speech or assist voters to register consistent with the NVRA	18

IV.	A Preliminary Injunction Against Enforcement of the Texas Voting Restrictions Furthers the Public Interest in Protecting the Organizational Plaintiffs' Constitutional Rights and the Constitutional and Statutory Rights of Eligible Citizens to Register to Vote.....	19
	CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>American Ass’n of People with Disabilities v. Herrera</i> , 690 F. Supp. 2d 1183, 1214-17 (D.N.M. 2010).....	7
<i>Ass’n of Comm. Orgs. for Reform Now v. Scott</i> , No. 08-cv-4084-NKL, 2008 WL 2787931 (W.D. Mo. July 15, 2008).....	17
<i>Baker Hughes Inc. v. Nalco Co.</i> , 676 F. Supp. 2d 547 (S.D. Tex. 2009)	4
<i>Bond Pharm., Inc. v. Anazaohealth Corp.</i> , 815 F. Supp. 2d 966 (S.D. Miss. 2011).....	16, 17
<i>Byrum v. Landreth</i> , 566 F.3d 442 (5th Cir. 2009)	4
<i>Canal Auth. of Fla. v. Callaway</i> , 489 F.2d 567 (5th Cir. 1974)	3
<i>Charles H. Wesley Educ. Found., Inc. v. Cox</i> , 324 F. Supp. 2d 1358 (N.D. Ga. 2004).....	17, 19
<i>Charles H. Wesley Educ. Found., Inc. v. Cox</i> , 408 F.3d 1349 (11th Cir. 2005)	5, 6, 15
<i>Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley</i> , 454 U.S. 290 (1981).....	16
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010).....	7
<i>City of Chicago v. Morales</i> , 527 U.S. 41 (1999).....	10
<i>Concerned Democrats of Florida v. Reno</i> , 458 F. Supp. 60 (S.D. Fla. 1978)	14
<i>Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.</i> , 600 F.2d 1184 (5th Cir. 1979)	3
<i>Finlan v. City of Dallas</i> , 888 F. Supp. 779 (N.D. Tex. 1995)	4

<i>Free Mkt. Found. v. Reisman</i> , 540 F. Supp. 2d 751 (W.D. Tex. 2008).....	11, 18, 20
<i>Freelance Entm’t, LLC v. Sanders</i> , 280 F. Supp. 2d 533 (N.D. Miss. 2003).....	19
<i>Gonzalez v. Arizona</i> , No. 08-17115, 2012 WL 1293149 (9th Cir. Apr. 17, 2012).....	5
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	9
<i>Henry v. First Nat’l Bank</i> , 595 F.2d 291 (5th Cir. 1979)	19
<i>Humana Ins. Co. v. Leblanc</i> , 524 F. Supp. 2d 764 (M.D. La. 2007).....	17
<i>Ingebreetsen v. Jackson Pub. Sch. Dist.</i> , 88 F.3d 274 (5th Cir. 1996)	10
<i>Int’l Women’s Day March Planning Comm. v. City of San Antonio</i> , No. SA-07-CA-971-XR, 2008 WL 501286 (W.D. Tex. Feb. 21, 2008)	18
<i>Janvey v. Alguire</i> , 647 F.3d 585 (5th Cir. 2011)	2, 4
<i>League of Women Voters of Florida v. Cobb</i> , 447 F. Supp. 2d 1314 (S.D. Fla. 2006).....	6
<i>MD II Entm’t, Inc. v. City of Dallas</i> , 28 F.3d 492 (5th Cir. 1994)	6
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988).....	16
<i>Millennium Rests. Grp., Inc. v. City of Dallas</i> , 181 F. Supp. 2d 659 (N.D. Tex. 2001)	10
<i>Mississippi Power & Light Co. v. United Gas Pipe Line Co.</i> , 760 F.2d 618 (5th Cir. 1985).....	17
<i>Mississippi Women’s Med. Clinic v. McMillan</i> , 866 F.2d 788 (5th Cir. 1989)	19
<i>Netherland v. City of Zachary</i> , 527 F. Supp. 2d 507 (M.D. La. 2007).....	19

<i>Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.</i> , 579 F.3d 502 (5th Cir. 2009)	10
<i>Phelps-Roper v. Nixon</i> , 545 F.3d 685 (8th Cir. 2008)	18
<i>Productos Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.</i> , 621 F.2d 683 (5th Cir. 1980)	3
<i>Project Vote v. Blackwell</i> , 455 F. Supp. 2d 694, 702 (N.D. Ohio 2006).....	7, 8
<i>Rios v. Bexar Metro. Water Dist.</i> , No. SA-96-CA-335, 2006 WL 2711819 (W.D. Tex. Sept. 21, 2006)	18
<i>Smith v. Matthews</i> , No. G-09-152, 2010 WL 519781 (S.D. Tex. Jan. 20, 2010).....	19
<i>Texas v. Seatrain Int’l, S.A.</i> , 518 F.2d 175 (5th Cir. 1975)	3
<i>United States v. Emerson</i> , 270 F.3d 203 (5th Cir. 2001)	10
<i>United States v. Williams</i> , 553 U.S. 285 (2008).....	9
<i>Valley v. Rapides Parish School Bd.</i> , 118 F.3d 1047 (5th Cir. 1997)	4
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982).....	9
<i>Villas at Parkside Partners v. City of Farmers Branch</i> , 496 F. Supp. 2d 757 (N.D. Tex. 2007)	19
<i>Watchguard Techs., Inc. v. Valentine</i> , 433 F. Supp. 2d 792 (N.D. Tex. 2006)	10
STATUTES	
42 U.S.C. § 1973gg-2(a), gg-6(a)(1)(B)	15
42 U.S.C. § 1973gg-5(a)(4)(A)(iii),(d)(1)	5
Tex. Bus. & Com. Code § 521.001 <i>et seq.</i>	18
Tex. Elec. Code § 11.002(a)(5).....	8

Tex. Elec. Code § 13.007.....	8
Tex. Elec. Code § 13.008.....	7, 9, 20
Tex. Elec. Code § 13.008(b).....	14
Tex. Elec. Code § 13.031.....	20
Tex. Elec. Code § 13.031(d)(3)	8
Tex. Elec. Code § 13.033.....	7, 20
Tex. Elec. Code § 13.036.....	9, 20
Tex. Elec. Code § 13.038.....	7, 20
Tex. Elec. Code § 13.039.....	5, 9, 16, 20
Tex. Elec. Code § 13.040.....	18
Tex. Elec. Code § 13.042.....	15, 20
Tex. Elec. Code § 13.042(b).....	16
Tex. Elec. Code § 13.043.....	14
Tex. Elec. Code § 13.047.....	8

OTHER AUTHORITIES

Letter from Keith Ingram, Director of Elections, Election Advisory No. 2012-04 (Mar. 12, 2012), http://www.sos.state.tx.us/elections/laws/advisory2012-04.shtml (last visited Apr. 27, 2012)	11
Volunteer Deputy Voter Registrar Requirements and Training Schedule, Harris County Tax Office, http://www.hctax.net/Voter/Deputy/acknowledge.aspx (last visited May 3, 2012)	11

Plaintiffs Voting for America and Project Vote, Inc. respectfully move for a preliminary injunction, and in support thereof, file this memorandum.

INTRODUCTION

Plaintiffs request that this Court grant a preliminary injunction enjoining Defendants' enforcement of various provisions of the Texas Election Code. These state laws threaten not only the rights of individual voters, but also the ability of voter registration organizations like Plaintiffs Voting for America and Project Vote, Inc. (together, the "Organizational Plaintiffs") to assist citizens in registering to vote. To preserve their ability to conduct current and future voter registration activities, such as voter registration drives, across Texas, the Organizational Plaintiffs challenge Defendants' enforcement of this statutory scheme. Therefore, the Court's decision will not only impact the organizations themselves, but also the underrepresented communities that the Organizational Plaintiffs seek to empower.

In Texas, employees that undertake the responsibility of facilitating voter registration ("canvassers") are essential to the success of the Organizational Plaintiffs' outreach efforts. Texas requires these canvassers to be deputized as volunteer deputy registrars ("VDRs"). Burdensome requirements on VDRs harm the Organizational Plaintiffs by limiting these organizations' available supply of eligible VDRs, and by denying those eligible VDRs the right to engage in protected political speech.

With this in mind, the necessity of injunctive relief at this stage of the litigation cannot be overstated. A preliminary injunction is necessary to ensure that the Plaintiffs' Constitutional and statutory rights are not violated by state law. With the deadline to register to vote in the 2012 federal election only five months away, Texans deserve the opportunity to participate in free and fair elections. Essential to achieving this goal is the Organizational Plaintiffs' ability to conduct voter registration drives in accordance with federal law without unauthorized and unlawful

intrusions on their right to engage prospective voters.

NATURE AND STAGE OF THE PROCEEDING

This proceeding is a request for a preliminary injunction enjoining Defendants' enforcement of the Texas laws governing the appointment of VDRs. Each Defendant filed a motion seeking to dismiss Plaintiffs' claims under Rule 12(b)(1) and (6). The Plaintiffs filed an opposition to these motions on April 30, 2012. The Court has scheduled a hearing to decide both Defendants' aforementioned motions, as well as this motion for a preliminary injunction, on June 11, 2012.

STATEMENT OF ISSUES

This Court is tasked with the duty to consider whether the Plaintiffs are entitled to a preliminary injunction enjoining the enforcement of Texas election laws designed to limit the voter registration activities of individuals and organizations seeking to assist citizens to register to vote. When considering a motion for a preliminary injunction, courts in this circuit must consider whether (1) the movant has shown a substantial likelihood of success on the merits; (2) there is a substantial threat that the movant will suffer irreparable injury absent the injunction; (3) the threatened injury outweighs any harm that would result from the injunction; and (4) entry of such relief would serve the public interest. *See, e.g., Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

SUMMARY OF ARGUMENT

The Organizational Plaintiffs are likely to succeed on the merits of their claims. The NVRA prohibits Texas's attempts at regulating the method of delivery of voter registration applications, and the Constitution does not permit any of Texas's attempts to curb the core political speech of canvassers, VDRs, or the voter registration organizations that rely on them.

The state's restrictions on canvassers, VDRs, and voter registration organizations inflict

irreparable harm on the Organizational Plaintiffs' rights under the NVRA and the Constitution, and these harms cannot be counterbalanced by Defendants' speculative concerns of voter fraud. Texas law uses both pre-appointment and post-appointment barriers in order to chill canvassers' and VDRs' ability to engage in protected political speech, thereby silencing the Organizational Plaintiffs' opportunity to connect with voters in anticipation of the 2012 federal election. These Plaintiffs also suffer irreparable harm through their inability to deliver registration applications as guaranteed by the NVRA, resulting in the deprivation of the right to vote for otherwise eligible applicants.

The public interest prohibits the state's unlawful interference with the Organizational Plaintiffs' exercise of fundamental rights. Moreover, there is a strong interest in furthering the participation in the voting process of underrepresented communities that Project Vote and Voting for America aim to serve.

ARGUMENT

The Fifth Circuit has previously directed lower courts to place special emphasis on a plaintiff's potential for success on the merits, noting that "[a] preliminary injunction may issue . . . despite the existence of a plausible defense, as long as the movant demonstrates a substantial likelihood of success." *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979). However, "[t]he importance of this requirement varies with the relative balance of threatened hardships facing each of the parties." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). In addition, this factor does not require the moving party to conclusively prove victory on the merits, but rather that there are grounds for prevailing "to some degree." See *Productos Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980); *Texas v. Seatrains Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975).

(“Nor is there need to weigh the relative hardships which a preliminary injunction or the lack of one might cause the parties unless the movant can show *some likelihood of ultimate success.*”) (emphasis added).

Here, each factor weighs in favor of the Organizational Plaintiffs. The Organizational Plaintiffs are entitled to relief on the merits, and, without judicial intervention, will continue to suffer irreparable harm through the enforcement of the Texas Election Code.¹ As reflected by the strong public interest in protecting political speech and association rights, the state’s harm does not justify or excuse the ongoing restrictions placed on the Organizational Plaintiffs. For these reasons, this Court should grant the Plaintiffs’ Motion for Preliminary Injunction.

I. Plaintiffs’ Claims Have a Substantial Likelihood of Success on the Merits

“To assess the likelihood of success on the merits,” in the context of a motion for a preliminary injunction, a court “look[s] to ‘standards provided by the substantive law.’” *Janvey*, 647 F.3d at 596 (quoting *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990)) accord *Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). The moving party “is not required to prove its entitlement to summary judgment.” *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009); see also *Baker Hughes Inc. v. Nalco Co.*, 676 F. Supp. 2d 547, 552 (S.D. Tex. 2009). Rather, the movant must only present issues demonstrating a “fair ground for litigation and thus for more deliberate investigation.” *Finlan v. City of Dallas*, 888 F. Supp. 779, 791 (N.D. Tex. 1995). Based on the substantive law of the Fifth Circuit, Plaintiffs have demonstrated a substantial likelihood of success on each of their claims under the United States Constitution and federal and state laws.

¹ This motion adopts and incorporates the definitions of each problematic provision of the Texas Election Code as described in the Plaintiffs’ First Amended Complaint. See Am. Compl. ¶¶ 22-39.

A. The Texas Election Code Directly Conflicts with the Mandates of the NVRA

“The goal of the NVRA was to streamline the registration process for all applicants” *Gonzalez v. Arizona*, No. 08-17115, 2012 WL 1293149, at *11 (9th Cir. Apr. 17, 2012) (en banc). By imposing onerous burdens on VDRs, Texas law contravenes not only federal law’s purpose, but also its regulation over the “final content and method of delivery” of voter registration applications. *See Charles H. Wesley Educ. Found., Inc. v. Cox* (“*Cox II*”), 408 F.3d 1349, 1353 (11th Cir. 2005). Texas’s restrictions on canvassers’ and VDRs’ eligibility to serve prospective voters and their means of delivering voter registration applications directly conflict with the NVRA and therefore are subordinate to the federal law.

First, the Elections Clause prohibits Texas’s enforcement of the Completeness Requirement. *See Gonzalez*, 2012 WL 1293149, at *3-4; Pls.’ Opp’n to Defs.’ Mots. to Dismiss 26-27.² The Completeness Requirement requires VDRs in Texas to ensure that prospective voters include “all the required information and the required signature” on an application. *See Tex. Elec. Code* § 13.039. By contrast, while the federal statute does provide for the submission of “completed” application forms, *see* 42 U.S.C. § 1973gg-5(a)(4)(A)(iii),(d)(1), an application is still sufficient under the NVRA even if it is only partially complete as long as it has been “completed” by the individual applicant. Thus, Texas law requires that a VDR reject a partially completed application while the federal law would not levy the same punishment.

Next, Texas law attempts to circumvent the NVRA’s requirement that states permit the delivery of completed voter registration applications by mail. *See Pls.’ Opp’n to Defs.’ Mots. to Dismiss* 27-28. The NVRA’s explicit regulation of the method of delivery protects VDRs from enforcement of the Personal Delivery Requirement and requires that states make the mail system

² For the Court’s convenience, Plaintiffs have cited to portions of their Opposition to Defendants’ Motions to Dismiss rather than repeat their arguments in full here. The cited portions of the Plaintiffs’ brief are incorporated herein.

an available means of delivering voter registration applications. *See Cox II*, 408 F.3d at 1354.

The Organizational Plaintiffs are likely to succeed in challenging the Training Requirement and the County Limitation because of the effect these regulations have on the organizations' core functions. *See id.* at 1353-54 (finding that voter registration organizations have standing to enforce the NVRA where state law affects their ability to perform core functions such as conduct registration drives and submit voter registration forms by mail); Pls.' Opp'n to Defs.' Mots. to Dismiss 29-32. These regulations hamstring the mission of the Organizational Plaintiffs; fortunately, the NVRA recognizes this harm. *See Cox II*, 408 F.3d at 1354. For these reasons, Plaintiffs are likely to succeed on their challenges under the NVRA.³

B. The Texas Election Code Restricts the Organizational Plaintiffs' Core Political Speech in Violation of the First Amendment

The challenged provisions should also be enjoined because they violate the Organizational Plaintiffs' First Amendment rights, necessitating a preliminary injunction. As content-based restrictions on protected speech relating to voter registration, the problematic provisions of the Texas Election Code are presumptively invalid, subject to strict scrutiny, and unconstitutional unless the state uses the least restrictive means to advance a compelling state interest. *See MD II Entm't, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994). The Texas laws impose restrictions on the Organizational Plaintiffs' ability to conduct registration advocacy and to facilitate the registration process for prospective voters.

Various federal courts have concluded that state limitations on voter registration drives significantly affect speech and association rights. In *League of Women Voters of Florida v. Cobb*, the Southern District of Florida granted a preliminary injunction prohibiting the

³ The Plaintiffs have purposefully omitted their request for disclosure of the requested voter registration applications under the NVRA's Public Disclosure Provision as part of this Motion for Preliminary Injunction. Plaintiffs recognize that, due to the nature of the relief requested, a permanent injunction is the more appropriate form of relief. Plaintiffs also reserve other claims not referenced herein for determination later in the proceedings.

enforcement of criminal laws that imposed strict liability on third parties who failed to promptly return completed applications promptly. 447 F. Supp. 2d 1314, 1333 (S.D. Fla. 2006). In *Project Vote v. Blackwell*, the Northern District of Ohio rejected a series of state laws imposing registration, training, and special delivery requirements on individuals assisting prospective voters at registration drives. 455 F. Supp. 2d 694, 702 (N.D. Ohio 2006). Finally, in *American Ass'n of People with Disabilities v. Herrera*, the District of New Mexico found that voter registration was itself expressive conduct, that speech is intertwined with voter registration, and that voter registration implicates expressive association. 690 F. Supp. 2d 1183, 1214-17 (D.N.M. 2010). As a result, the court denied the defendant's motion to dismiss on the grounds that the burden imposed by voter registration laws and the justifications supporting the law are questions of fact not suitable for disposition on a 12(b)(6) motion. *Id.* at 1220.

In addition to the content-based nature of the problematic Texas laws, strict scrutiny also applies because the statutes are viewpoint discriminatory and severely burden core political speech. *See* Pls.' Opp'n to Defs.' Mots. to Dismiss 38-39. For example, VDRs may only serve on a county-by-county basis, and VDR status in one county does not transfer to neighboring counties. *See* Tex. Elec. Code § 13.038. As a result, an organization running a statewide campaign must register its canvassers in all 254 counties in Texas in order to be able to deliver applications to every registrar in the state. Texas law also compels such canvassers to disclose their certificates of appointment for each county upon request. *See* Tex. Elec. Code § 13.033. In addition, the Organizational Plaintiffs are prohibited from providing compensation based on effective political speech and association. *See id.* § 13.008. In so doing, Texas law "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Citizens United v. FEC*, 130 S. Ct. 876, 898

(2010) (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)); *see also* Pls.’ Opp’n to Defs.’ Mots. to Dismiss 43-44 (discussing the burdens of requiring VDRs to carry a certificate of appointment for each county in which she is registered).

Texas law also limits speech through restrictive eligibility and pre-registration requirements. First, the law prohibits non-residents from serving as VDRs, which eliminates out-of-state individuals experienced in voter registration drives and non-resident volunteer college students from participating in voter registration drives. Tex. Elec. Code § 11.002(a)(5); 13.031(d)(3). The Training Requirement further burdens the Organizational Plaintiffs’ speech and associational rights by mandating that VDRs complete a course of training without providing any guidance on the scope, duration, or contents required. *See id.* § 13.047. The Organizational Plaintiffs face a litany of restrictions both directly and by way of the VDRs they utilize as part of voter registration drives.

Finally, the Defendants’ interest in protecting against voter fraud does not justify this litany of burdens in and of itself. The mere assertion that Defendants “might generally assume” the existence of voter fraud activity “is insufficient as a matter of law to justify legislation that imposes substantial burdens on the First Amendment rights” of paid canvassers and the entities with whom they are affiliated. *See Project Vote*, 455 F. Supp. 2d at 704-05. As such, the Court should grant Plaintiffs’ Motion for Preliminary Injunction with respect to its claims under the First Amendment.

C. Enforcement of the Compensation Requirement and the Completeness Requirement is Prohibited Because They Are Unconstitutionally Vague and Overbroad

The Compensation Requirement is unconstitutionally overbroad because it criminalizes the payment of VDRs based on their engagement in protect speech activities. The statute prohibits compensation based on the number of citizens persuaded to register, even where the

canvasser uses speech alone to accomplish this result, never touching an application. *See* Tex. Elec. Code § 13.008. Likewise, tying compensation to the number of registration applications distributed could run afoul of this prohibition. *See id.* That Defendant Andrade herself concedes that the statute attempts to regulate protected speech only further supports the prohibition on enforcement. *Compare* Def. Andrade’s Mot. to Dismiss 29 (acknowledging the Organizational Plaintiffs’ right to encourage unregistered voters’ participation in voting drives) *with id.* at 45-46 (construing the Compensation Requirement to include a prohibition on payment where a VDR’s “assistance has resulted in a successful registration”).

The Compensation Requirement is also unconstitutionally vague because it fails to “provide a person of ordinary intelligence fair notice of what is prohibited.” *See United States v. Williams*, 553 U.S. 285, 304 (2008). This statute does not clearly establish whether the Organizational Plaintiffs may pay canvassers different hourly rates based on productivity or increase hourly wages for canvassers who perform more difficult work. *See* Tex. Elec. Code § 13.008; Pls.’ Opp’n to Defs.’ Mot. to Dismiss 47. Given that a more stringent standard of clarity applies to provisions like the Compensation Requirement that jeopardize constitutional rights and provide for criminal penalties, *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982), the state law must fail on vagueness grounds. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

Like the Compensation Requirement, the Completeness Requirement is also unconstitutionally vague. The Texas Election Code allows registrars to terminate VDRs for their failure “to adequately review” a voter registration application for “completeness.” *See* Tex. Elec. Code §§ 13.036, 13.039. The text of these ambiguous provisions indicates that, absent definitions of these key phrases, any one of the county’s 254 registrars may terminate a VDR for

a single incomplete application. *See City of Chicago v. Morales*, 527 U.S. 41, 56-64 (1999) (examining the text of a statute to conclude that it is unconstitutionally vague).

II. Plaintiffs Will Suffer Irreparable Injury If This Court Does Not Grant a Preliminary Injunction

In order to demonstrate the existence of irreparable injury, courts require that a movant show a “presently existing actual threat” of harm rather than a merely remote or speculative injury. *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) (quoting 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995)). Injury rises to the level of “irreparable” harm when monetary relief is incapable of remedying the alleged wrong. *See Watchguard Techs., Inc. v. Valentine*, 433 F. Supp. 2d 792, 794 (N.D. Tex. 2006). Enforcement of the Texas Election Code presents a substantial threat of injury by imposing a multitude of restrictions designed to limit civic engagement in the voting process. As a result, the state endangers the rights of the Plaintiffs as well as similarly situated prospective voters, VDRs, and voter registration organizations with the country only six months from the next federal election.

A. Limitations on Canvassers and VDRs Have the Effect of Injuring the Organizational Plaintiffs’ Ability to Engage in Protected Speech

Texas courts recognize the unique nature of restrictions on speech in the preliminary injunction calculus. “[T]here is a strong presumption of irreparable injury . . . when a case involves infringement on First Amendment rights.” *Millennium Rests. Grp., Inc. v. City of Dallas*, 181 F. Supp. 2d 659, 667 (N.D. Tex. 2001) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The “loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.” *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) (citing *Elrod*, 347 U.S. at 373); *see also Ingebreetsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (holding that a state statute permitting prayer on public school property presented a substantial threat to First

Amendment rights and an irreparable injury under *Elrod*); *Free Mkt. Found. v. Reisman*, 540 F. Supp. 2d 751, 755 (W.D. Tex. 2008) (finding irreparable injury due to infringement on First Amendment rights of Texas campaign finance laws restricting contributions for election of state congressional office). The Texas Election Code causes irreparable harm by placing restrictions on speech and expressive conduct. These laws inhibit the ability of the Organizational Plaintiffs to engage in pro-registration speech by restricting both the organizations that sponsor voter registration drives and the canvassers that interact with potential voters. Absent a preliminary injunction, this array of restrictions will continue and the Organizational Plaintiffs will continue to be deprived of their ability to engage in protected First Amendment speech.

One way in which the Texas Election Code has limited the ability of voter registration organizations is through erecting barriers to appointment of VDRs. The Organizational Plaintiffs utilize canvassers as the principal point of contact in distributing and receiving voter registration applications. Decl. of Michael Slater ¶¶ 15-19. Devoting significant time to satisfy these pre-appointment obligations severely detracts from the time canvassers may devote to civic engagement and the collection of voter registration applications. *See id.* ¶ 35.

For example, Defendant Andrade's regulations allow county registrars to satisfy the Training Requirement by holding only one training session per month for new VDRs. *See* Section 3.1, Letter from Keith Ingram, Director of Elections, Election Advisory No. 2012-04 (Mar. 12, 2012), <http://www.sos.state.tx.us/elections/laws/advisory2012-04.shtml> (last visited Apr. 27, 2012). This has led even densely populated areas like Harris County to adopt trainings occurring weeks apart and during normal working hours. *See* Volunteer Deputy Voter Registrar Requirements and Training Schedule, Harris County Tax Office, <http://www.hctax.net/Voter/Deputy/acknowledge.aspx> (last visited May 3, 2012). In addition,

requiring canvassers to carry certificates may discourage their enlistment as VDRs. Decl. of Michael Slater ¶¶ 70-71.

The needs of the Organizational Plaintiffs only aggravate the effect of the Texas laws. Larger voter drives that employ twenty to thirty canvassers require a steady stream of new volunteers to combat the reality of regular turnover and continue to operate consistently. *Id.* ¶ 31. Daily training is the only means by which groups like the Organizational Plaintiffs can appropriately manage their volunteer staffing numbers, and Texas law severely impedes their ability to do so. *Id.* ¶¶ 32-35. These constraints on appointment cripple the ability of the Organizational Plaintiffs to conduct registration drives. Without a reliable supply of available canvassers to ensure that interested citizens receive proper assistance with voter registration applications, voter organizations cannot conduct effective registration campaigns in Texas.

Even upon gaining appointment as VDRs, canvassers face continuing limitations that chill speech related to voter registration. For example, canvassers deputized as VDRs face onerous geographic restrictions that limit a canvasser's potential audience. When conducting voter registration drives at transportation hubs, regional events near county lines, or large public gatherings like shopping malls, the Organizational Plaintiffs are likely to encounter residents from different counties. *See id.* ¶¶ 47-48. Yet Texas law requires VDRs to narrow the audience with whom they may engage and provide assistance, thereby defeating the entire purpose for engaging the community at such gatherings. By requiring VDRs to actively avoid connecting with citizens from different counties, Texas law clearly chills the Organizational Plaintiffs' First Amendment speech rights.

Aside from limitations placed on canvassers, Texas law also places restrictions directly on the organizations sponsoring registration drives. The Compensation Prohibition severely

burdens speech by restricting the Organizational Plaintiffs' ability to manage their own respective teams and engage in common business practices such as performance evaluation and performance-based pay. Canvassers for the Organizational Plaintiffs are periodically reviewed based on the number of applications collected. *Id.* ¶ 55. Because the organizations have an interest in ensuring that these paid canvassers effectively execute their duties, a canvasser's failure to meet specific targets for completed applications can result in additional training or discharge. *Id.* ¶¶ 56-57. Disallowing the Organizational Plaintiffs from using a canvasser's success in the field as a means of evaluating performance leaves the organizations without recourse to deal with incompetent and ineffective employees. Just as any public or private employer would want the ability to remove employees that do not further the employer's stated goals, the Organizational Plaintiffs seek to appropriately deal with their employees who fail to engage potential voters.

Additionally, this prohibition requires voter organizations to rely on less effective instruments of civic engagement. Volunteer canvassers are proven to be significantly less productive in the field, averaging submission of only approximately one application per hour. *Id.* ¶ 61. Paid canvassers, on the other hand, average between three and four applications per hour. *Id.* The Compensation Prohibition forces the Organizational Plaintiffs to rely on a less effective means of voter registration, thereby limiting their ability to engage target communities to the fullest extent possible.

Texas's prohibition on collection of applications by out-of-state canvassers also impedes the Organizational Plaintiffs by restricting their ability to provide effective training. Project Vote and Voting for America routinely train managers of local registration drives by bringing permanent employees from other states to demonstrate the proper methods of engaging and

assisting registrants. *Id.* ¶ 69. By prohibiting local volunteers from observing these national employees and gaining valuable training, the Organizational Plaintiffs’ canvassers will be less successful when approaching individuals in the field. *Id.* Like the limitations placed on canvassers, Texas law has inflicted and—absent an injunction—will continue to inflict severe impairments on the core political speech of the Organizational Plaintiffs.

Finally, Texas law subjects canvassers and voter registration organizations to potential criminal penalties for violations of the Personal Delivery Requirement or the Compensation Prohibition. *See* Tex. Elec. Code § 13.008(b); *id.* § 13.043. Faced with the threat of criminal penalties, the state would have the Organizational Plaintiffs pay a significant price for the right to engage in protected political speech. The Organizational Plaintiffs have specifically avoided directly funding local organizations in Texas due to the risk of criminal liability that organizations and employees face. *See* Decl. of Michael Slater ¶¶ 8, 12. This court should prevent canvassers from having to make that choice as part of the upcoming federal election by finding that the Organizational Plaintiffs have suffered and will continue to suffer irreparable harm. In *Concerned Democrats of Florida v. Reno*, a federal court enjoined enforcement of a Florida statute prohibiting a political organization’s endorsement of candidates for the state judiciary. 458 F. Supp. 60, 61-62 (S.D. Fla. 1978). The court noted that the law, under which the group faced the threat of criminal prosecution, would cause irreparable harm by requiring the plaintiffs to choose between constitutional rights and freedom from criminal penalties. *Id.* at 65. The Organizational Plaintiffs should not be made to face this same conundrum. *See id.* (“If they act, they face criminal sanctions . . . If they wait, the elections will have come and gone.”).

B. Texas Restrictions on Canvassers and VDRs Deprive Plaintiffs of Their Ability to Assist Voters to Register Consistent with the NVRA

The Organizational Plaintiffs’ mission is “to empower, educate, and mobilize low-

income, minority, youth, and other marginalized and underrepresented voters.” Decl. of Michael Slater ¶ 9. They further this mission by organizing and funding civic engagement opportunities, such as voter registration drives. *Id.* ¶¶ 4, 9. The Organizational Plaintiffs cannot fulfill this mission as long as the challenged provisions of the Texas Election Code continue to violate the NVRA.

For example, the Organizational Plaintiffs suffer irreparable harm through the enforcement of the Completeness Requirement because this law would require a VDR to reject applications that are otherwise permissible under federal law. Canvassers often face difficulty in ensuring that all necessary information appears in the completed application. *Id.* ¶ 39. Applicants omit such information both on purpose and accidentally, and canvassers may not finish reviewing an application before an applicant has decided to leave the drive. *Id.* The unlawful denial of applications deprives the Organizational Plaintiffs of their ability to take custody of and deliver an otherwise satisfactory application. The NVRA protects their ability to do so, and state law must conform to this right. *See Cox II*, 408 F.3d at 1353.

In addition, Texas’s Personal Delivery Requirement undercuts the right of VDRs and voter registration organizations to use the mail system as a proper means of delivering completed voter registration applications under the NVRA. *See* 42 U.S.C. § 1973gg-2(a), gg-6(a)(1)(B); Tex. Elec. Code § 13.042. Precluding the use of the mail system detracts from the canvasser’s ability to participate in an organization’s registration drive and the organization’s ability to review the work of its canvassers. The Organizational Plaintiffs also rely on a rigorous quality control system in order to verify that each canvasser’s received applications comply with state law. Decl. of Michael Slater ¶ 20-21. This process can take up to five days. *Id.* at 20. Because the Personal Delivery Requirement mandates that VDRs submit completed applications to

county registrars no later than five days after receipt from the registrant, *see* Tex. Elec. Code § 13.042(b), the Texas law forces the Organizational Plaintiffs to curtail their quality control processes for fear of missing the state’s deadline for submission. Rushing this important system of internal review only increases the risk that VDRs will submit improper applications in violation of the Completeness Requirement. *See* Tex. Elec. Code § 13.039; Decl. of Michael Slater ¶ 43. Put simply, the burdens of different Texas laws place the Organizational Plaintiffs squarely in the crosshairs by rendering it difficult to effectuate full compliance. In these ways, the Organizational Plaintiffs face irreparable harm through their inability to assist the public and transmit applications pursuant to the NVRA.

III. The Deprivation of Plaintiffs’ Rights Under the First Amendment and the NVRA Outweigh Any Purported Harm to the State

A. The First Amendment violations at issue in this case outweigh any harm the state is alleged to have suffered

The threat of injury to the Plaintiffs clearly outweighs any harm that an injunction may cause Defendants. “This country values above perhaps all others the guarantee of an unfettered interchange of ideas.” *Bond Pharm., Inc. v. Anazaohealth Corp.*, 815 F. Supp. 2d 966, 976 (S.D. Miss. 2011) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). In the absence of injunctive relief, Plaintiffs will continue to lose their federally and constitutionally protected rights as Texas’s voter registration laws continue to chill and restrict speech about voter registration. These laws have “the inevitable effect of reducing the total quantum of speech,” limiting “the number of voices who will convey [Plaintiffs’] message and the hours they can speak and, therefore, limit[ing] the size of the audience they can reach.” *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988). By contrast, Texas has no legitimate interest in enforcing unconstitutional statutes. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981) (“there is no significant state or public interest in curtailing” freedom

of expression); *Humana Ins. Co. v. Leblanc*, 524 F. Supp. 2d 764, 777 (M.D. La. 2007) (“the State has no interest in enforcing an unconstitutional statute”).

B. The NVRA violations at issue in this case also outweigh any harm the state is alleged to have suffered

In harming the Organizational Plaintiffs’ statutory rights under the NVRA as well as the interests of voters otherwise unable to receive registration assistance, the state’s policies cause irreparable harm. Courts have found irreparable injury in cases involving the denial of the ability to register to vote due to a defendant’s violations of the NVRA. *See Charles H. Wesley Educ. Found., Inc. v. Cox* (“*Cox I*”), 324 F. Supp. 2d 1358, 1368 (N.D. Ga. 2004) (“[N]o monetary award can remedy the fact that [plaintiff] will not be permitted to vote in the precinct of her new residence”), *aff’d*, 408 F.3d 1349 (11th Cir. 2005) *accord Ass’n of Comm. Orgs. for Reform Now v. Scott*, No. 08-cv-4084-NKL, 2008 WL 2787931, at *7 (W.D. Mo. July 15, 2008).

C. Defendants’ concerns over potential election fraud are baseless and pale in comparison to the Organizational Plaintiffs’ extensive injuries

Defendants’ expressed fears are entirely speculative and therefore insufficient to forestall a preliminary injunction. Defendant Andrade is suspicious that “[u]nscrupulous campaign workers can collect voter registration forms and then deliver only those forms of voters who have articulated a preference for the campaign worker’s candidate.” Def. Andrade’s Mot. to Dismiss 24. But Defendants have no evidence that this supposed fraud has ever occurred, or is likely to. Courts in the Fifth Circuit have frowned upon speculative arguments like these. *See Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 626 (5th Cir. 1985); *Bond Pharm.*, 815 F. Supp. 2d at 975 (refusing to accept the non-moving party’s speculative assertions of harm while evaluating the balance of harms on each party).⁴ As such, the state

⁴ Even if defendants had substantiated their claim of voter fraud, other state laws already effectively address Defendants’ concerns over voter fraud. First, the state imposes criminal penalties for knowingly falsifying a voter

cannot excuse its ongoing violation of the Organizational Plaintiffs' Constitutional rights, or its frustration of the organizations' attempts to fulfill the purposes of the NVRA.

D. The state's costs of compliance with the injunction do not outweigh the Organizational Plaintiffs' right to engage in political speech or assist voters to register consistent with the NVRA

Similarly, the state cannot claim that a preliminary injunction would impose financial obligations so unreasonable as to outweigh the harms visited upon the Organizational Plaintiffs. First Amendment rights are of such importance that they outweigh any claimed pecuniary harm. *See Int'l Women's Day March Planning Comm. v. City of San Antonio*, No. SA-07-CA-971-XR, 2008 WL 501286, at *15 (W.D. Tex. Feb. 21, 2008) (holding that restrictions on speech under the First Amendment outweighed the city's potential costs in complying with the preliminary injunction). Statutory rights similarly outweigh Defendants' costs. *See Rios v. Bexar Metro. Water Dist.*, No. SA-96-CA-335, 2006 WL 2711819, at *1 (W.D. Tex. Sept. 21, 2006) (granting injunction in Plaintiff's favor where concerns including costs relating to ordering a changed election were "outweighed by the necessity for an election that comports with the U.S. Constitution and the Voting Rights Act"). Thus, the Organizational Plaintiffs' harms outweigh any economic burdens that Defendants face through compliance with a preliminary injunction.

registration application. *See* Tex. Elec. Code § 13.007. Second, the state requires VDRs to provide copies of signed receipts to the applicant and the county registrar when accepting voter registration applications. *See* Tex. Elec. Code § 13.040. Finally, the Texas Identify Theft Enforcement and Protection Act, which targets unauthorized use of non-public identifying information, assuages Defendants' concern. *See* Tex. Bus. & Com. Code § 521.001 *et seq.* Where other enactments adequately protect the state's purported interest, the balance of equities tips in the Organizational Plaintiffs' favor where they "will irrevocably lose their opportunity for political debate." *See Free Mkt. Found.*, 540 F. Supp. 2d at 758-59 (granting motion for preliminary injunction enjoining enforcement of campaign finance laws that limited political organizations' participation during election of Speaker of the Texas House of Representatives).

IV. A Preliminary Injunction Against Enforcement of the Texas Voting Restrictions Furthers the Public Interest in Protecting the Organizational Plaintiffs' Constitutional Rights and the Constitutional and Statutory Rights of Eligible Citizens to Register to Vote

“[I]t is always in the public interest to protect constitutional rights.” *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)). As the Northern District of Texas has noted, “the public interest does not extend so far as to allow actions that interfere with the exercise of fundamental rights.” *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007); see *Netherland v. City of Zachary*, 527 F. Supp. 2d 507, 521-22 (M.D. La. 2007).

When considering motions for preliminary injunction, courts in the Fifth Circuit have consistently recognized the significant public interest in preserving First Amendment freedoms. See *Henry v. First Nat'l Bank*, 595 F.2d 291, 305 (5th Cir. 1979) (“[T]he public has a vital interest in the vigorous and free discussion of public issues”); *Mississippi Women's Med. Clinic v. McMillan*, 866 F.2d 788, 797 (5th Cir. 1989) (“The First Amendment retains a primacy in our jurisprudence because it represents the foundation of democracy”); *Smith v. Matthews*, No. G-09-152, 2010 WL 519781, at *3 (S.D. Tex. Jan. 20, 2010) (“[T]he public certainly has an interest in the unfettered public discussion of issues of public concern”); *Freelance Entm't, LLC v. Sanders*, 280 F. Supp. 2d 533, 547 (N.D. Miss. 2003) (finding that the “public’s interest to protect rights guaranteed under the Constitution” favored preliminary injunctive relief).

The public interest of citizens in exercising their constitutional and statutory rights to register to vote and vote further weighs in favor of an injunction. See, e.g., *Cox I*, 324 F. Supp. 2d at 1369 (ordering preliminary injunction requiring Secretary of State to accept mailed-in ballots from voter registration organization where “[t]he public has an interest in seeing that the State of Georgia complies with federal law, especially in the important area of voter

registration”). A preliminary injunction will serve the public’s interest in participatory democracy and the interests of eligible citizens to vote, because additional eligible citizens will be added to the voter rolls through the assistance of the Organizational Plaintiffs and other organizations that hold or fund voter registration drives. However, if an injunction is not granted, voters in underrepresented populations and communities who otherwise would have been added to the rolls through the assistance of Organizational Plaintiffs will not have their voices heard in the upcoming presidential election. If those voters are not registered to vote before Texas’s deadline of October 9, 2012, this harm is irreparable because their voices will not be heard in the presidential election. Their disenfranchisement in the upcoming election would be irreversible if injunction is not granted now but the Plaintiffs later prevail.⁵

The public’s interest weighs heavily in favor of a preliminary injunction where, as here, state laws restrict the ability to exercise fundamental rights. With the national election looming this fall, the public interest in injunctive relief is “especially immediate.” *See Free Mkt. Found.*, 540 F. Supp. 2d at 759. It is thus critical that the Texas statutes be enjoined.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court enter a preliminary injunction enjoining Defendants from enforcing Tex. Elec. Code §§ 13.008, 13.031, 13.033, 13.036, 13.038, 13.039, 13.042, and from refusing to permit access to any requesting party for copy and/or inspection of voter registration applications and related records, as sought by the Organizational Plaintiffs in this matter.

This 10th day of May, 2012.

⁵ Even in the event the Plaintiffs did not ultimately prevail, there would be no harm to the public interest in having granted a preliminary injunction, since election officials must still assess the applications of registrants assisted by Plaintiffs to determine whether they meet the varied eligibility requirements under state and federal law.

Respectfully submitted,

By: /s/ Chad W. Dunn

Chad W. Dunn

State Bar No. 24036507

Southern District of Texas No. 33467

K. Scott Brazil

State Bar No. 02934050

Brazil & Dunn, L.L.P.

4201 Cypress Creek Parkway, Suite 530

Houston, Texas 77068

Telephone: (281) 580-6310

Facsimile: (281) 580-6362

Dicky Grigg

State Bar No. 08487500

Southern District of Texas No.

Spivey & Grigg, L.L.P.

48 East Avenue

Austin, Texas 78701

Telephone: (512) 474-6061

Facsimile: (512) 474-8035

*Attorneys for Plaintiffs Voting For America,
Project Vote, Inc., Brad Richey and
Penelope McFadden*

Ryan M. Malone
D.C. Bar No. 483172
Southern District of Texas No. 598906
Ropes & Gray LLP
700 12th St. NW Suite 900
Washington, D.C. 200005
Telephone: (202) 508-4669
Facsimile: (202) 383-8322

Brian Mellor
MA Bar. No. 43072
(admitted pro hac vice)
Michelle Rupp
VA Bar. No. 82591
(admitted pro hac vice)
Project Vote, Inc.
1350 Eye Street NW
Washington, D.C. 20005
Telephone: (202) 546-4173
Facsimile: (202) 629-3754

*Attorneys for Voting for America and
Project Vote, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/ Chad W. Dunn
Chad W. Dunn

2

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

VOTING FOR AMERICA, INC., §
BRAD RICHEY, and §
PENELOPE McFADDEN, §
Plaintiffs, §

V. §

CIVIL ACTION NO. 3:12-CV-00044

HOPE ANDRADE, in her Official §
Capacity as Texas Secretary of State, and §
CHERYL E. JOHNSON, in her Official §
Capacity as Galveston County Assessor §
And Collector of Taxes and Voter §
Registrar, §
Defendants. §

DEFENDANT HOPE ANDRADE'S RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

ROBERT O'KEEFE
General Litigation, Division Chief

KATHLYN C. WILSON
Texas Bar No. 21702630
Southern District ID No. 10763
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
(512) 320-0667 FAX

Attorneys for Defendant Hope Andrade

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
I. NATURE AND STAGE OF THE PROCEEDINGS.....	1
II. ISSUES TO BE RULED UPON WITH STANDARD OF REVIEW.....	1
III. SUMMARY OF THE ARGUMENT.....	2
IV. RESPONSE.	3
A. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.	5
B. IRREPARABLE INJURY.....	14
C. HARM TO PLAINTIFFS DOES NOT OUTWEIGH HARM TO DEFENDANTS.....	19
D. A PRELIMINARY INJUNCTION WOULD DISSERVE THE PUBLIC INTEREST...	21
CONCLUSION.	25
CERTIFICATE OF SERVICE.	26

TABLE OF AUTHORITIES

CASES

<i>Affiliated Professional Home Health Care Agency v. Shalala</i> , 164 F.3d 282 (5th Cir. 1999).	1
<i>American Ass’n of People with Disabilities v. Herrera</i> , 690 F.Supp.2d 1183 (D.N.M. 2010).	10
<i>American Ass’n of People with Disabilities v. Herrera</i> , 580 F.Supp.2d 1195 (D.N.M. 2008).	10
<i>Anderson v. Celebrezze</i> , 460 U.S. 780, 103 S.Ct. 1564 (1983).	2, 9, 17
<i>Burdick v. Takushi</i> , 504 U.S. 428, 112 S.Ct. 2059 (1992).	2, 17
<i>Charles H. Wesley Educ. Found., Inc., v. Cox</i> , 408 F.3d 1349 (11 th Cir. 2005).	5
<i>Citizens United v. Federal Election Com’n.</i> , ___ U.S. ___, 130 S.Ct. 876 (2010).	7
<i>Concerned Democrats of Florida v. Reno</i> , 458 F.Supp. 60 (S.D. Fla. 1978).	17
<i>Concerned Women for America, Inc. v. Lafayette County</i> , 883 F.2d 32 (5th Cir.1989).	2
<i>Gonzalez v. Arizona</i> , No. 08-17115, 2012 WL 1293149 (9 th Cir. Apr. 17, 2012).	5
<i>Hill v. Colorado</i> , 530 U.S. 703, 732, 120 S.Ct. 2480 (2000).	11
<i>League of Women Voters v. Cobb</i> , 447 F.Supp.2d 1314 (S.D. Fla. 2006).	9
<i>Meyer v. Grant</i> , 486 U.S. 414, 108 S.Ct. 1886 (1988).	7, 8
<i>New Motor Vehicle Bd. of California v. Orrin W. Fox Co.</i> , 434 U.S. 1345, 98 S.Ct. 359 (1977).	21
<i>Project Vote v. Blackwell</i> , 455 F. Supp.2d 694 (N.D.Ohio 2006).	6
<i>Project Vote v. Kelly</i> , 805 F.Supp.2d 152 (W.D.Pa. 2011).	12
<i>Project Vote v. Long</i> , 752 F.Supp.2d 697 (E.D.Va. 2010).	5
<i>United States v. Emerson</i> , 270 F.3d 203 (5 th Cir. 2001).	14
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781, 794, 109 S.Ct. 2746 (1989).	11

STATUTES

TEX. ELEC. CODE § 13.003(b).	23
TEX. ELEC. CODE § 13.008.	4, 10, 22
TEX. ELEC. CODE § 13.031.	3, 23
TEX. ELEC. CODE § 13.031(d)(3).	8
TEX. ELEC. CODE § 13.033.	3, 7, 22
TEX. ELEC. CODE § 13.036.	4, 8, 12, 22
TEX. ELEC. CODE § 13.038.	4, 22
TEX. ELEC. CODE § 13.039.	4, 10, 22
TEX. ELEC. CODE § 13.039(b).	13
TEX. ELEC. CODE § 13.042.	3, 22

OTHER AUTHORITIES

11A Wright, Miller, and Kane, <i>Federal Practice and Procedure</i> § 2948.1 (2d ed. 1995).	14
---	----

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant Texas Secretary of State Hope Andrade and files this her Response to Plaintiffs' Motion for Preliminary Injunction in the above-referenced cause of action. In support thereof, Defendant would respectfully show the Court the following:

**I.
NATURE AND STAGE OF THE PROCEEDINGS**

This suit challenges various Texas statutes governing volunteer deputy registrars (VDRs), who are appointed by voter registrars to accept and deliver completed voter registration applications in order that the applicant may be successfully added to the voter rolls. Both Defendants have filed Motions to Dismiss, and both of those motions cite jurisdictional grounds for dismissal. Plaintiffs are seeking a preliminary injunction in order to prevent the operation of these laws during the current election season. The Court has set a hearing on the Motions to Dismiss and the Motion for Preliminary Injunction on June 11, 2012.

**II.
ISSUES TO BE RULED UPON WITH STANDARD OF REVIEW**

The issue to be ruled upon is whether the Plaintiffs have met the requirements for a preliminary injunction. Those requirements are: 1) a substantial likelihood of a success on the merits; 2) that he will suffer irreparable harm were the relief not granted; 3) that the harm to him outweighs the harm to the defendants; and 4) the granting of the restraining order will not render a disservice to the public interest. *Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 285 (5th Cir. 1999).

The standard of review on appeal is "whether the issuance of the injunction, in the light of the applicable standard, constitutes an abuse of discretion." *Id.*, 164 F.3d 284-285 quoting

Concerned Women for America, Inc. v. Lafayette County, 883 F.2d 32, 34 (5th Cir.1989). In performing that review, findings of fact that support the district court's decision are examined for clear error, whereas conclusions of law are reviewed de novo. *Id.*

III. SUMMARY OF THE ARGUMENT

Plaintiffs have met none of the four requirements for a preliminary injunction. First, they have not shown that they are likely to succeed on the merits. They have cited no authority in which any of the provisions about which they complain have been overturned. Furthermore, they have not shown a severe burden on any constitutional right. See *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983); *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059 (1992). Moreover, even if there were a severe burden, the statutes narrowly draw a line at the point where a Texas eligible voter loses possession of his application, and they serve a compelling government interest of protecting the fundamental voting rights of Texas citizens who wish to register in order to exercise that right.

Plaintiffs have likewise failed to show that they will suffer irreparable harm. They are not being deprived of a constitutional right because the statutes they are attacking regulate the governmental business of registering qualified citizens to vote. Furthermore, while they discuss administrative difficulties associated with following Texas law, they do not show that those burdens are severe.

With respect to whether the harm to Plaintiffs outweigh the harm to the state, Plaintiffs claim that there is no cost to the state. The standard however, is not cost, but harm. If the Court grants the injunctions requested by Plaintiffs, Texas will lose the ability to protect the voting applications of its citizens; indeed, it will lose the ability even to request the names of the persons who are gathering

those applications, and will lose any opportunity to hold those persons accountable for any voting rights that may be lost. The harm to Plaintiffs is that they will not be able to operate as efficiently as they could without the regulations, and they claim that this loss of efficiency will cause them to refrain from operating voting drives in the state. That, however, is their choice. With the statutes in place, they remain able to advocate for and register voters in Texas if they choose to do so, as evidenced by the fact that they co-managed a voting drive in Houston in 2008. Plaintiffs' Motion for Preliminary Injunction, Appendix A, Statement of Michael Slater, p. 3, ¶ 7.

Finally, Plaintiffs have not shown that an injunction will not disserve the public interest. Granting the injunctions requested will deprive the state and its voter registrars from protecting voter registration applications when they leave the applicants' hands, from training volunteers to make certain the applications are properly filled out so that the applicants are included on the voter rolls, and from holding third parties accountable when they take responsibility for the constitutional rights of others.

Having met none of the four requirements for preliminary injunctions, Plaintiffs should be denied their request. In addition, the specific relief that Plaintiffs request is problematic in that it does not give them what they are asking for. An order from the court granting all of Plaintiffs' requested relief will not accomplish the result they desire.

IV. RESPONSE

Plaintiffs seek to enjoin the following Texas election statutes: Section 13.031, providing for appointment and training of VDRs and requiring VDRs to be eligible to vote in Texas; Section 13.042, requiring that a VDR personally deliver the applications he gathers; Section 13.033,

providing that a VDR must show his certificate of appointment upon request when accepting a completed application for delivery; Section 13.039, requiring a VDR to review an application to make sure it is complete before accepting it for delivery; Section 13.036, providing that a VDR who does not adequately review applications may lose the right to accept those incomplete applications for delivery; and Section 13.008, prohibiting compensation of VDRs per voter registered or by means of a quota system, and Section 13.038, limiting the authority of a VDR to the county in which he is appointed.

Plaintiffs have also asked that the Court issue an order enjoining Defendants “from refusing to permit access to any requesting party for copy and/or inspection of voter registration applications and related records, as sought by the Organizational Plaintiffs in this matter.” Plaintiffs’ Motion for Preliminary Injunction, p. 20. At the same time, Plaintiffs have included on page 6 a footnote indicating that they have purposefully omitted this request for voter registration applications from the request for preliminary injunction because a permanent injunction is the more appropriate form of relief for this request. Plaintiffs’ Motion for Preliminary Injunction, p. 6, n. 3. Regardless of their request for an injunction covering the issue of photocopying, Plaintiffs have not included their claim that the inability to photocopy applications meets any of the requirements for a preliminary injunction, and for this reason, their request for an injunction covering this issue should be denied.

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

None of the cases that Plaintiffs cite in support of their argument that they are likely to succeed on the merits involves a situation in which a statute that is substantially similar to those at issue here was struck down.¹

Plaintiffs cite *Charles H. Wesley Educ. Found., Inc., v. Cox*, 408 F.3d 1349 (11th Cir. 2005) (*Cox II*) as authority for striking down Texas' personal delivery requirement. *Cox II*, however, did not deal with personal delivery; it dealt with the issue of mailing applications in a bundle as opposed to mailing applications individually. *Id.*, 408 F.3d at 1351. The court in *Cox II* enjoined Georgia officials from rejecting applications that had been bundled into one package. *Id.*

Regarding the requirement that VDRs must review an application for completeness, Plaintiffs cite to *Gonzalez v. Arizona* as authority for the proposition that analysis of the NVRA under the Elections Clause leads to the conclusion that Congress meant to prohibit states from ensuring that all required information is included on an application. See *Gonzalez v. Arizona*, No. 08-17115, 2012 WL 1293149, 3-4 (9th Cir. Apr. 17, 2012). Plaintiffs' Motion for Preliminary Injunction, p. 5. *Gonzalez*, however, dealt with requiring proof of citizenship to register and requiring identification at the polls in order to vote. *Id.* 2012 WL 1293149 at 1. It is simply not authority for the proposition that the NVRA prohibits states from rejecting partial applications, and it did not strike down a requirement that submitted applications be complete.²

¹ The photocopying issue, which Plaintiffs state they purposefully omit from their motion, is the lone exception. It was enjoined in *Project Vote v. Long*, 752 F.Supp.2d 697 (E.DVa. 2010). That case is currently on appeal to the Fourth Circuit.

² Plaintiffs have not clarified exactly the extent to which the state is obligated to accept a partially completed application, and at this point, where they ask for an injunction, they should at least be required to inform the court how much information is sufficient. Under the injunction they envision, is it sufficient for an applicant

Concerning the Texas requirements for training of VDRs and the limitation of the VDRs' authority to the county where appointed, Plaintiffs again cite to *Cox II*. Neither of these issues was present in *Cox II*. Furthermore, the practice enjoined in *Cox II*—rejecting applications that were bundled for mailing—has to do only with the delivery of mail applications. The holding of *Cox II* is not applicable to statutes having to do with training on how to fill out an application and limiting the authority of a VDR to the county in which the registrar who made the appointment has power. Nothing in *Cox II*'s interpretation of the NVRA's mailing requirement goes this far.

It is true that *Project Vote v. Blackwell* struck down Ohio statutes requiring compensated third parties who register others to vote to pre-register with the Secretary of State, to personally deliver completed applications, to undergo online training, and to affirm that training when submitting applications. *Project Vote v. Blackwell*, 455 F. Supp.2d 694, 702-703 (N.D. Ohio 2006). The statute there, however, placed these requirements only upon *compensated* voter registration workers; uncompensated workers were not covered by the law. The district court in Ohio was concerned that laws applying only to “a *selected class* of persons” violated the spirit of the NVRA. *Id.* 455 F. Supp.2d at 703 (emphasis in original). The court was also concerned that the requirements that applied only to a selected class posed constitutional problems; specifically, the court pointed out that there was no rational basis for the difference. *Id.* 455 F. Supp.2d at 704. The injunction in *Project Vote v. Blackwell*, while it struck down pre-registration, training, and

to give only his name and address? If he leaves out his address, how is a county registrar to know whether the voter even lives in Texas, or what precinct the voter must be registered in? Plaintiffs claim in the statement of Michael Slater that they need the ability to fire canvassers who turn in a higher than normal percentage of incomplete applications. Plaintiffs' Motion for Preliminary Injunction, Appendix A, p.11, ¶ 39. This means that Plaintiffs want the ability to review applications for completeness, but they believe that the government, which is in charge of actually placing the applicant on the voter rolls, is prohibited from by the NVRA from reviewing applications for completeness.

affirmation requirements, did so on the basis that those laws applied only to compensated persons. The Ohio court did not strike down requirements that, like these in Texas, applied to all who take possession of the voter registration application of another person.

With respect to Texas' prohibition of compensation of workers on a per voter or a quota basis, Plaintiffs cite to *Citizens United v. FEC* for the proposition that this statute reduces the quantity of their expression. *Citizens United v. Federal Election Com'n.*, ___ U.S. ___, ___, 130 S.Ct. 876, 898 (2010). *Citizens United*, however, did not strike down a statute prohibiting certain means of compensation for those who carry an organization's message. It struck down a complete ban on corporate expenditures. Furthermore, there was no issue of the necessity of the government to carry out a purely governmental function, like registering voters. Neither the result or the reasoning of *Citizens United* is authority for Plaintiffs' claims concerning the compensation issue. It likewise lends no support to their argument that they are likely to succeed on the merits.

Plaintiffs also rely on *Meyer v. Grant*, a case in which the Supreme Court struck down Colorado's prohibition against paying canvassers to collect petition signatures. *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886 (1988). The differences between collecting petition signatures and accepting voter applications for delivery are obvious, and the most significant one is that petition canvassers do not accept into their possession a piece of paper that represents the citizen's right to vote. Again, neither the result nor the reasoning of this case supports Plaintiffs' claims, and it does not contribute to their attempt to show that they will succeed on the merits.

Plaintiffs also cite *Meyer v. Grant* as authority for striking down the Texas statute requiring a VDR to produce his appointment certificate when accepting an application for delivery, if the voter requests it. TEX. ELEC. CODE § 13.033. In *Meyer*, the court struck down a statute requiring petition

circulators to wear name badges, thus identifying themselves to everyone who saw them, in addition to the people with whom they personally engaged. There were two ways that the provision restricted political speech: it limited the number of people circulating the petition, and, the court said, “it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.” *Id.* at 423, 108 S.Ct at 1893.

Here, the second consideration is not at issue, and, significantly, this Texas statute only requires identification at the point that its citizen’s voter registration application is placed in possession of the VDR. Even then, identification is only required when requested. The provisions that were found unconstitutional in *Meyer* are not present in this Texas statute, and the reasoning behind the validity of the *Meyer* injunction are not operative with respect to the Texas statute.

Plaintiffs have likewise failed to cite any cases which struck down either a state statute allowing dismissal of a VDR who has demonstrated an inability adequately to review a completed application or a state’s requirement that people who collect the registrations of others for delivery to the county registrar must be an eligible voter in the state. See TEX. ELEC. CODE § 13.036; 13.031(d)(3).

In addition to failing to cite to any case where the provisions of these statutes have been struck down, Plaintiffs have also failed to show that they are entitled to strict scrutiny, under which Plaintiffs assume these laws would be unconstitutional. Plaintiffs argue that because these statutes are content based restrictions on free speech, they are presumptively invalid. Plaintiffs’ Motion for Preliminary Injunction, p. 6. For authority on the imposition of strict scrutiny on these third party registration laws, they point to several cases, none of which supports this theory.

For instance, Plaintiffs cite to *League of Women Voters v. Cobb*, 447 F.Supp.2d 1314 (S.D. Fla. 2006), as authority for holding that these statutes significantly affect First Amendment rights. *Id.* There, a District Court in Florida concluded that the act of registering voters was intertwined with speech. *Cobb*, 447 F.Supp.2d at 1333-34. The court did not, however, apply strict scrutiny as a result of this conclusion. Instead, the court applied *Anderson v. Celebrezze* framework. *Id.*, 447 F.Supp.2d at 1332. The Florida statutes at issue imposed additional penalties on voter registration organizations for failure to deliver voter applications promptly. *Id.*, 447 F.Supp.2d at 1322. Those additional penalties were \$250 for each application delivered more than 10 days after it was collected, \$500 for each application collected before the election books closed (29 days before the election), and delivered afterward, and \$5,000 for each application not delivered. *Id.* 447 F.Supp.2d at 1322-23.

The organizations were strictly liable for the fines along with the worker who collected the application, the registered agent, and those running the day to day operations of the voter registration organization. No exceptions to the laws were allowed. In examining the character and magnitude of the laws on First Amendment rights, the court considered not only the fines themselves, but the fact that they were imposed only on voter registration organizations, and not on political parties. *Id.* 447 F.Supp.2d at 1334. After balancing the interests impacted by the statutes and the interest of the state, the court enjoined the state from imposing the fines and from excluding political parties from the definition of voter registration organization. *Id.* 447 F.Supp.2d at 1341.

At play in this decision was not only the extreme nature of the penalties, which weighed in the court's consideration of the character and magnitude of the harm, but also the fact that the law excluded political parties, and thus discriminated on its face on the basis of political association. The

statutes and issues in *Cobb* were very different from the ones before this court, where the statutes apply equally to all, and which do not add penalties only for specific organizations.

Plaintiffs also cite to a district court decision in New Mexico, *American Ass'n of People with Disabilities v. Herrera*, in which the court found that voter registration is intertwined with expressive conduct. *American Ass'n of People with Disabilities v. Herrera*, 690 F.Supp.2d 1183, 1214-1217 (D.N.M. 2010). This is true, but that finding alone does not lead to the necessity of applying strict scrutiny, and in fact, the court in *Herrera* did not do so.

Plaintiffs cite to the court's denial of the defendants' motion to dismiss for the proposition that registering voters is protected speech. It is the order on preliminary injunction, however, that is more pertinent to the issue before this Court. In that order the New Mexico district court, in spite of finding that registering voters is intertwined with protected speech, did not apply strict scrutiny. *American Ass'n of People with Disabilities v. Herrera*, 580 F.Supp.2d 1195, 1228 (D.N.M. 2008). The court denied the preliminary injunction.³ *Id.*, 580 F.Supp.2d at 1247. Thus, while these Plaintiffs attempt to rely on *Herrera* for the proposition that they have engaged in protected speech, the Plaintiffs cannot rely on *Herrera* for the proposition that their protected speech must result in the application of strict scrutiny.

Plaintiffs also present an overbreadth challenge to Section 13.008 (compensation) and a vagueness challenge to Section 13.008 (compensation) and 13.039 (completeness). Contrary to Plaintiffs' claim, the Secretary of State did not concede that the compensation statute attempts to regulate successful speech. Plaintiffs claim that the Secretary's acknowledgment of Plaintiffs' right

³ The statutes at issue in *Herrera* included pre-registration requirements, limits on the number of voter registration certificates, and a forty-eight hour delivery requirement for completed applications. *Id.* 580 F.Supp.2d at 1203-1206.

to encourage unregistered voters' participation in voting drives and her construction of Section 13.008 to include prohibiting payment where a VDR's assistance has resulted in a successful registration means that she agrees that the regulation covers protected speech. Plaintiffs' Motion for Preliminary Injunction. The Secretary's statements about compensation is consistent with her argument that assisting registration is engaging in conduct that is a governmental function.

Plaintiffs claim that the statute prohibits compensation per voter when a canvasser has persuaded a voter by speech alone to register, never touching the application. Persuasion and facilitating the application are two different things. The Secretary has argued in terms of facilitating and its meaning of giving assistance. Furthermore, a review of the statement of Michael Slater gives the solid impression that Plaintiffs only review and evaluate their workers based on the number of registrations actually collected. Thus, the statute does not prohibit payment for speech alone, and the Plaintiffs do not seek to pay their workers for speech alone.

As for vagueness, neither the compensation statute nor the statute requiring that applications be reviewed for completeness is unconstitutionally vague. Criminal statutes are vague if they fail "to provide a person of ordinary intelligence fair notice of what is prohibited...." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480 (2000). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746 (1989).

Plaintiffs claim that the compensation statute does not "clearly establish whether the Organizational Plaintiffs may pay canvassers different hourly rates based on productivity or increase hourly wages for canvassers who perform more difficult work." Plaintiffs' Motion for Preliminary Injunction, p. 9. Project Vote made a similar attack on a Pennsylvania statute that prohibited

compensation “based upon the number of registrations obtained.” *Project Vote v. Kelly*, 805 F.Supp.2d 152, 158 (W.D.Pa. 2011). There, Project Vote claimed that the language of the statute was vague and sufficiently ambiguous as to include prohibitions against commission payments and productivity goals. *Id.*, 805 F.Supp.2d at 168-169.

The court easily rejected Project Vote’s argument, finding “no basis in law, reason, or common sense,” to read the Pennsylvania statute to prohibit terminating canvassers for failing to secure a set number of registrations during one shift or over the course of several shifts. *Id.* 805 F.Supp.2d at 170. Here, it is clear that the statute does not criminalize performance evaluations or increasing payment for increased productivity. Plaintiffs are only prohibited from offering workers a fixed amount for each voter registration they facilitate or from refusing to pay their workers unless they reach a certain quota. Only these two practices are criminalized.

Project Vote failed to convince the court in Pennsylvania that it was unable to understand how it was allowed to pay its workers under a statute prohibiting per voter payment. It has attempted to do the same here under a similar Texas statute prohibiting either per voter or quota payments. These Plaintiffs have not shown that they are likely to succeed on the merits of this claim.

Plaintiffs’ vagueness challenge to the requirement that applications be reviewed for completeness seems to be that the text of the statute does not define either “to adequately review” or “completeness.” The lack of these definitions, according to Plaintiffs, may lead to a VDR being terminated from his position for a single incomplete application.

Again, the Plaintiffs complain that they cannot tell what it means to adequately review a completed application or what completeness means. Yet Section 13.039, referenced in Section 13.036 (the statute Plaintiffs claim is vague) provides a definition of completeness. “If the application

does not contain all the required information and the required signature, the volunteer deputy shall return the application to the applicant for completion and resubmission.” TEX. ELEC. CODE § 13.039(b). Both adequate review and completeness are explained here. Complete means the required information and required signature is provided, and adequate review means the VDR successfully checks for the required information. Since optional information is labeled “optional” on the form, this review is not difficult. In addition, the state has obviously provided training, but Plaintiffs have demonstrated that they do not want to be subjected to a training requirement.

Both of the terms about which Plaintiffs complain are fully explained in the statute. The plain language contained therein is sufficient to put these Plaintiffs and others on notice that if they submit a registration on behalf of another and have allowed a mistake in a required field that will result in the applicant’s not being able to vote, the person who submitted the application may lose the right to assist others., and he may lose that right after submitted one incomplete application because that application represents a constitutional right. This only makes sense. If a VDR proves to the state that he cannot successfully assist voters, his assistance serves no purpose, and may cause Texas citizens to be disenfranchised.

Despite this danger, Plaintiffs do not want their workers’ VDR rights to be subject to termination by the state, regardless of how well or poorly their workers perform in getting prospective voters on the voter rolls. The statute about which they complain, however, is clear, and they have not shown that they are substantially likely to have this statute struck down for being unconstitutionally vague.

Plaintiffs have not demonstrated that they are likely to succeed on the merits. They have not cited to one case where an injunction issued against a statute substantially similar to the ones they

challenge. Even the cases they rely upon for support of their claim that registering voters is protected conduct do not conclude, as Plaintiffs do, that the statutes are subject to strict scrutiny. Plaintiffs have also failed to show that these statutes are not narrowly drawn to advance a compelling government interest. The burdens of these statutes is not severe, and cannot be shown to be unconstitutionally infirm. Plaintiffs' motion can be denied on this basis alone.

B. IRREPARABLE INJURY

Plaintiffs claim that they are irreparably harmed in their ability to engage in free speech and in their ability to assist voters consistent with the NVRA. Plaintiffs' Motion for Preliminary Injunction, pp. 10, 14. While the Texas statutes may add administrative requirements, those requirements are hardly insurmountable.

Plaintiffs complain that the barriers to appointment "severely detracts" from the time that canvassers can devote to their jobs. Plaintiffs' Motion for Preliminary Injunction, p. 11. In support of this claim, Plaintiffs point to paragraph 35 of the statement of Michael Slater. There, Slater projects the possibilities of harm on a voter registration drive if a county holds training only once per month. His conjectures of possible harm do not show irreparable injury, which must, as Plaintiffs admit, be a "presently existing actual threat" rather than a remote or speculative injury. *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) quoting 11A Wright, Miller, and Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995). Plaintiffs' Motion for Preliminary Injunction, p. 10.

Plaintiffs also complain that they must have daily training to maintain a steady stream of workers, and that they cannot conduct an effective campaign without them. *Id.* Again, this is a conclusion based on conjecture concerning the availability of training. Plaintiffs have accepted as final that training will be available only once per month because presently, that is the schedule posted

online by Harris County. Plaintiffs' Motion for Preliminary Injunction, p. 11. They have not considered other counties, nor have they mentioned that training in one county must be accepted by another. Plaintiffs' Appendix C, Letter from Keith Ingram, Election Advisory No. 2012-04, p. 2, Section 3.3. There is no indication that Plaintiffs have attempted to contact the Harris County Clerk to see if there will be additional sessions added or to discuss their needs to see if they can be worked out. Instead, they have attacked the statute requiring them to be trained in filling out the Texas voter application so they might better help the people they want to register, claiming that this training causes them irreparable harm.

According to Plaintiffs, when their workers are at large public gatherings, the limitation of acting as a VDR only where deputized narrows their audience because the law requires VDRs "to actively avoid connecting with citizens from different counties." Plaintiffs' Motion for Preliminary Injunction, p. 12. Nothing in this statute—or any of the statutes—requires this. Workers for Plaintiffs may engage anyone they want. They are only prevented from taking possession of a completed application.

Irreparable harm is also alleged to arise from the law prohibiting paying compensation per voter or by quota limits. This statute is alleged to harm Plaintiffs' management because they cannot use success in the field to evaluate performance. Nothing in the statute prohibits, this, however. Hourly wages and performance standards are not prohibited, nor are discipline and termination. Despite the fact that the statute does not prohibit other kinds of payment, Plaintiffs conclude that the statute forces them to rely only on volunteers, which reduces the number of people they can register. This is not a valid conclusion, and it is certainly not a valid assumption concerning the operation of this statute. Plaintiffs are conjecturing that they can only rely on volunteers, yet the statute allows

them to pay their workers. This is not a showing of harm, much less harm that is so irreparable that the Court must enjoin a statute passed by the people of Texas.

With respect to limiting VDRs to eligible Texas voters, Plaintiffs claim that irreparable harm is caused by the fact that their experienced out of state trainers cannot demonstrate proper methods of engaging and assisting prospective voters. They claim that the statute prohibits them from observing these employees and learning from them. It does not. Plaintiffs' trainers are able to instruct workers and demonstrate how to engage voters, impart their experience to workers in meeting voters' questions and concerns, and generally teach them how to advocate for voter registration. Plaintiffs are not deprived of the wisdom and experience of out-of-state canvassers. The statute says nothing that prohibits them from imparting their knowledge.

Plaintiffs also point to criminal penalties associated with Texas' prohibition against compensation per voter or by quota, and with the state's requirement of personal delivery. Avoiding these penalties, however, is not difficult. Paying workers by the hour and thus eliminating the incentive for newly hired workers to fill out and turn in bogus applications avoids liability under the statute. With respect to being required to deliver the application of a qualified voter, Plaintiffs apparently are arguing that the state has no right to hold them responsible with serious consequences if the applications are not delivered. Those applications, however, represent Texas citizens' right to vote, and if that right is taken by the negligence or intentional act of anyone, there should be consequences, and they should be serious.

It is not just Plaintiffs who sponsor registration drives. Political parties and individual campaigns also go into the community to register voters. All of them should be held responsible for the delivery of the applications they collect, and criminal penalties both underline the seriousness of

the state in protecting that right to vote and gives the state a way to punish those who violate it and deter others from doing so. These Plaintiffs, however, state that the presence of criminal penalties makes them unwilling to directly fund local organizations, and that they are thus irreparably harmed by the presence of those penalties. Their choice not to expose themselves to reasonable regulations designed to protect the right to vote of Texas citizens and to prevent attempts to register people whose names are simply taken from the phone book is not irreparable harm caused by the state.

In support of this claim of irreparable harm, Plaintiffs cite to *Concerned Democrats of Florida v. Reno*, where a Florida district court enjoined enforcement of a statute prohibiting political parties from endorsing judicial candidates. *Concerned Democrats of Florida v. Reno*, 458 F.Supp. 60 (S.D. Fla. 1978). This case, being prior to *Anderson* and *Burdick*, was analyzed under First Amendment law and strict scrutiny was applied. *Id.*, 458 F.Supp. at 64. The court found that the state had a compelling interest in maintaining non-partisan judicial elections, but also found that the statute was not narrowly drawn—that criminal penalties were not the least restrictive means of promoting a non-partisan judiciary. With respect to the application for preliminary injunction, the court found irreparable harm because the plaintiffs there were faced with the choice speaking up and facing criminal prosecution or waiting for the court’s determination on a full record and losing their right to voice their opinion in the upcoming election, which was less than a month away. *Id.* 458 F.Supp. at 65.

Plaintiffs do not face this choice. The statutes they challenge do not prohibit their speech. The reasoning and legal analysis of this pre-*Anderson/Burdick* case from a Florida district court is not precedent in this court. Neither the facts nor the law of *Concerned Democrats of Florida v. Reno* is applicable here.

Under the NVRA, Plaintiffs claim irreparable harm from enforcement of the statutes requiring that applications be complete and that they be personally delivered. They claim that canvassers face difficulties in ensuring that all the necessary information is included on an application because prospective voters leave blanks, both accidentally and on purpose. This causes them irreparable harm, they claim, because it results in their inability to possess and deliver an application that is otherwise satisfactory under the NVRA.

Plaintiffs have never explained what information they believe the NVRA prohibits Texas from requiring on its state voter registration applications. They assume that the state is unlawfully denying applications that satisfy the NVRA. This is not a valid assumption. Plaintiffs have never specified what information would make a partially complete state application satisfactory under the NVRA. Without some clarification on why they believe partial applications that are acceptable under the NVRA are being rejected, Plaintiffs have not shown any harm at all, much less harm that is irreparable.

Plaintiffs further claim that they are irreparably harmed by being required to personally deliver completed applications entrusted to their care, and to deliver them within 5 days. The harm to Plaintiffs is alleged to stem from the fact that they are precluded from using the mail system, which is their right under the NVRA. They claim that having to personally deliver the applications “detracts from the canvasser’s ability to participate in an organizations’ registration drive and the organization’s ability to review the work of its canvassers.” Plaintiffs’ Motion for Preliminary Injunction, p. 15. Presumably, the workers are detracted from participation because they have to use a portion of their time to deliver applications.

The organization's harm is in its inability to engage in its own internal review process, which can take up to five days, although the statement submitted by Plaintiffs asserts that the process can be completed in as little as two. Appendix A, Statement of Michael Slater, ¶ 20. They claim that having to rush their review process increases the risk of the submission of improper applications. They give no instances of this happening.

Plaintiffs have not established that the NVRA in effect repealed the Texas statute governing VDRs and their delivery of completed voter registration applications. Furthermore, the requirement that applications be delivered within 5 days is reasonable, particularly given the importance of the completed applications and the risk of loss from negligence or otherwise by delay in delivery. Plaintiffs have simply not shown harm that is irreparable. They have not shown why they have a process of review that takes 5 days, they have not shown why those 5 days are necessary before submitting the applications, and they have not shown that their review cannot be accomplished more promptly. Given the value of the documents they are retaining for 5 days and the importance of delivering them to the county registrar to make certain the applicants are actually placed on the voting rolls and do not lose their right to vote, they should be required to show why their delay is so vital to their free speech.

There is no showing of harm to Plaintiffs that is irreparable. They therefore cannot show themselves entitled to a preliminary injunction.

C. HARM TO PLAINTIFFS DOES NOT OUTWEIGH HARM TO DEFENDANTS

The harm to Defendants is that they will lose the ability to track completed voter applications that have been entrusted to strangers. Those strangers will have no obligation to identify themselves either to the voter or to local voting officials, even though their ultimate purpose involves taking

responsibility for the completed applications of prospective voters. If those strangers abuse the laws by submitting names out of the phone book, the state of Texas will have no recourse against the organizations who hired these workers. The Texas citizens whose names have been fraudulently submitted may see their voter registration changed, particularly if the worker used an older phone book.

In short, the state of Texas will be unable to hold accountable employers or their workers who accept voter registration applications and fail or refuse to see that they are properly delivered. While Plaintiffs may argue that they have an evaluation process that will hold their workers accountable, all the Plaintiffs can do is terminate someone's temporary employment. They cannot prevent them from taking another job with another voter registration drive, and they cannot deter the same behavior by punishing it with criminal sanctions.

The harm to Plaintiffs is that more of their resources will go toward administrative costs, which vary depending upon the regulations of the state in which the organization is currently operating. Those administrative costs in Pennsylvania, for example, included pre-registration, limits on the number of applications, and a forty-eight hour delivery requirement. Other states will naturally have various statutes to which Plaintiffs will have to conform. For a national organization engaging in multiple states, administrative costs of complying with local election laws are to be expected.

Plaintiffs claim that the Secretary of State's concerns about potential election fraud are merely speculative. Specifically, they point to the Secretary's concern that workers for individual political campaigns might only mail the voter applications for those citizens who expressed a preference for the worker's candidate. Plaintiffs call these speculative fears that are insufficient to forestall a preliminary injunction, and claim that because there is no evidence that this has ever happened, there

must be no harm. The provision at issue here, however, has been the law in Texas since at least 1985. It is intended to prevent a specific kind of voter fraud that is easy to commit. The state does not have to go through a period of allowing this kind of fraud in order to justify stopping it.

Plaintiffs have not shown that they are losing a well-recognized constitutional right. At most, the constitutional nature of their speech rests on the fact that registering voters is intertwined with recognized political speech. Balanced against the indisputable constitutional right of Texas citizens to vote for their own government, the weight of the harm in this case is in favor of the state's decision to protect voter registration applications.

Injunctions are an extraordinary remedy, and no more so than when the target of the injunction is a state statute, duly passed by its representatives. “[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 363 (1977) (Rehnquist, Circuit Justice). These Plaintiffs have not demonstrated that the harm to themselves outweighs the harm to the Defendants.

D. A PRELIMINARY INJUNCTION WOULD DISSERVE THE PUBLIC INTEREST

In support of their claim that an injunction furthers the public interest, Plaintiffs cite numerous cases that discuss the importance of protecting constitutional rights. It is not just the claimed constitutional rights of the Plaintiffs that are at issue here. It is the right of Texas citizens to vote. It is their right to ask the identity of the person who is taking application from them, and it is their right to require that person to actually do what he promises when he takes the application for delivery. Plaintiffs argue as though their ability to participate in registering voters is the only right at issue and the only one that this court is entitled to protect.

Plaintiffs claim that the public interest will be served by the additional citizens added to the voting rolls, and that is a benefit, but it cannot come at the expense of the risk of disenfranchising the very voters the Plaintiffs seek to enroll. These Texas statutes allow for voter registration drives while protecting its citizens' right to vote. These statutes serve the public interest. They should not be enjoined.

E. THE RELIEF PLAINTIFFS REQUEST DOES NOT GIVE THEM THE RELIEF THEY SEEK

Plaintiffs' request for relief is problematic. What they want is for their workers and volunteers to be able to accept completed applications, process them through their own evaluation system, mail them when their evaluation is done, and pay their workers per voter or by quota as they choose, based on the number of applications each worker collects. They want to do this without any oversight by Texas election officials, and without exposure to any penalties should they fail in their duties to ensure that eligible Texas citizens become registered voters.

In order to gain this relief, they specifically ask that the court enjoin the following provisions of the Texas Election Code: Section 13.008 (compensation); Section 13.031, (appointment, training, and authorizing only eligible Texas voters as VDRs); Section 13.033 (identification); Section 13.036 (failure to adequately review); Section 13.038 (county limitation); Section 13.039 (completeness), and Section 13.042 (personal delivery). If the court enters an order that enjoins the enforcement of these statutes, with nothing more, then the state of the law in Texas is that no one other than a parent, child, or spouse of an eligible voter may act as an agent for mailing a completed voter application.

This result is due to the operation of Texas Election Code Section 13.003(b), which reads: "To be eligible for appointment as an agent [of an applicant], a person must: (1) be the applicant's

spouse, parent, or child; and (2) be a qualified voter of the county or have submitted a registration application and be otherwise eligible to vote.” TEX. ELEC. CODE § 13.003(b). This issue was raised in Secretary Andrade’s Motion to Dismiss discussing the issue of redressability. Defendant Hope Andrade’s Motion to Dismiss, p. 33. Plaintiffs, however, have not presented a basis for this statute’s being enjoined, and have not asked that it be included in an injunction order.

If the court issues an order prohibiting the enforcement of the statutes Plaintiffs have listed, the Secretary of State will, to the best of her ability, publish and explain that order to the county registrars in Texas who administer these statutes. Secretary Andrade will be obliged to point out that the court did not enjoin Section 13.003(b), that it is still operative, and the effect of the court’s order on Texas law is that no one except a spouse, child, or parent can mail the application of another, and even then, the spouse, child, or parent must be a qualified voter in the county or have submitted his or her own application, and be otherwise eligible. The result is that none of Plaintiffs’ workers could lawfully take possession of and mail completed applications.

If that happens Plaintiffs presumably would, believing they had won the ability to conduct their voter registration drive as they please, most likely file a motion accusing the Secretary of contempt of the court’s order. The Secretary, however, would have correctly explained its effect.

In addition, Plaintiffs have asked that Section 13.031, regarding appointment, be enjoined in its entirety, yet they have never argued that appointment of VDRs is itself unlawful. It is therefore unclear exactly the extent to which they believe the provisions of this statute need to be made the subject of an injunction order.

Secretary Andrade firmly believes that Plaintiffs are not entitled to a preliminary injunction; however, if one does issue, she intends to comply with it to the best of her abilities. (See Secretary

Andrade's Motion to Dismiss, Section 5, Case or Controversy, pp. 9-13.) In order to do that, she needs for the order to be explicit and well crafted, taking into account the effect of other currently operative Texas laws.

There is likewise a problem with Plaintiffs' request that the court enjoin the Defendants "from refusing to permit access to any requesting party for copy and/or inspection of voter registration applications and related records, as sought by the Organizational Plaintiffs in this matter." Plaintiffs' Motion for Preliminary Injunction, p. 20. In addition to the fact that Plaintiffs in footnote 3 said that they are not seeking disclosure of the requested records in their preliminary injunction, the other problem with this request is that, once more, it fails to give the Plaintiffs what they want.

What Plaintiffs want with respect to the voter registration applications is to be able to photocopy them *before* they deliver them. Their request for injunction asks that the documents must be disclosed by Defendants, which necessarily requires that they must have been received by Defendants. Plaintiffs are therefore seeking an injunction that the documents be disclosed *after* Plaintiffs deliver them. The order would not result in the relief Plaintiffs actually seek. Additionally, the documents that Plaintiffs are seeking are the voting records withheld by Harris County, which is not a party to this suit.

If this Court determines that Plaintiffs are entitled to relief, any order issuing from the court should be crafted in such a way that both Defendants can comply with both the letter and the spirit of the order.

CONCLUSION

Defendants respectfully request that this court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

ROBERT O'KEEFE
General Litigation, Division Chief

/s/ Kathlyn C. Wilson
KATHLYN C. WILSON
Texas Bar No. 21702630
Southern District ID No. 10763
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
(512) 320-0667 FAX

Attorneys for Defendant Hope Andrade

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed with the Clerk of the Court and served using the CM/ECF system on this the 24th day of May 2012, to:

Chad W. Dunn
K. Scott Brazil
Brazil & Dunn, L.L.P.
4201 Cypress Creek Parkway, Suite 530
Houston, Texas 77068
Facsimile: (281) 580-6362

Ryan Malone
Ropes & Gray, L.L.P.
700 12th St. NW Suite 900
Washington, DC 20005
Facsimile: (202) 383-8322

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
Facsimile: (512) 474-8035

Brian Mellor
Michelle Rupp
Project Vote
1350 Eye Street NW
Washington, DC 20005
Facsimile: (202) 629-3754

/s/ Kathlyn C. Wilson
Kathlyn C. Wilson
Assistant Attorney General

3

INTRODUCTION

Plaintiffs Voting for America and Project Vote, Inc. (the “Organizational Plaintiffs”) respectfully submit this reply in support of their motion for a preliminary injunction. A preliminary injunction is necessary to vindicate the Organizational Plaintiffs’ constitutional and statutory rights. With the national election looming, the necessity of injunctive relief at this stage of the litigation cannot be overstated. The Texas laws not only impose severe administrative burdens, but also criminal penalties that cause speakers not to speak and violate private conduct in a fundamental way. The Organizational Plaintiffs also anticipate that the upcoming evidentiary hearing on June 11 will allow the Court to hear first-hand the significant hardships that they and others are experiencing as a result of these laws.

ARGUMENT

I. The Organizational Plaintiffs’ Claims Have a Substantial Likelihood of Success on the Merits

A. The Texas Voting Restrictions Are Unconstitutional Whether Under a Strict Scrutiny Analysis or the *Anderson v. Celebrezze* Framework

The content-based and viewpoint-discriminatory Texas laws at issue in this case should be subjected to a strict scrutiny analysis. By restricting advocacy and the facilitation of the registration process, the Texas laws impose severe burdens. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (finding that election regulations that impose "severe" burdens to speech or association are subject to strict scrutiny). Even if a balancing test is utilized, however, the Texas laws are unconstitutional.

If the election regulations are found not to be severe, the court will undergo the “balancing approach” articulated in *Anderson v. Celebrezze*. Under this fact-intensive standard, the “character and magnitude” of the injury to speech and association is compared against the “precise interests” put forward by the state in attempting to justify the law. *Anderson v.*

Celebrezze, 460 U.S. 780, 789 (1983).

The Defendants claim that they will be unable to hold accountable employers or their workers who commit voter fraud. But the Defendants have no evidence that this supposed fraud has ever occurred, or is likely to. Even if Defendants' speculative fears had any basis, other state laws already address concerns over voter fraud by imposing criminal penalties.

The Defendants mischaracterize the harm to the Organizational Plaintiffs as simply administrative burdens. However, the Defendants fail to realize that the very act of assisting people to register to vote is expressive conduct protected by the First Amendment and that furthers the purposes of the NVRA:

The assertion that the challenged provisions implicate no constitutional rights is plainly wrong. The plaintiffs wish to speak, encouraging others to register to vote, and some of the challenged provisions...regulate pure speech. This is core First Amendment activity. Further, the plaintiffs wish to speak and act collectively with others, implicating the First Amendment right of association. More importantly, the plaintiffs wish to assist others with the process of registering and thus, in due course, voting. Voting is a right protected by several constitutional provisions; state election codes thus are subject to constitutional scrutiny. Together speech and voting are constitutional rights of special significance; they are the rights most protective of all others, joined in this respect by the ability to vindicate one's rights in a federal court.

League of Women Voters of Fla. v. Browning, No. 04:11-cv-00628-RH-CAS, slip op. at *4 (N.D. Fla. May 31, 2012) (rejecting restrictions on voter registration drives including a restriction that made use of mail to return applications practicably impossible).

During the upcoming hearing, Project Vote will present witnesses who will testify not only to severe administrative burdens, but also to criminal penalties that are preventing citizens from engaging in speech that they would otherwise engage in.

B. The Texas Election Code Restrictions Are Superseded by the NVRA

The Texas provisions in question frustrate the NVRA's goal of "streamlin[ing] the registration process for all applicants..." *Gonzalez v. Arizona*, No. 08-17115, 2012 WL

1293149, at *11 (9th Cir. Apr. 17, 2012) (en banc). Unlike a Supremacy Clause analysis, where courts deciding whether a state law is preempted must strive to maintain the delicate balance between the state and federal governments, under the Elections Clause courts generally construe Congress’s authority expansively. *Id.* at *3. Thus, the Supremacy Clause “presumption against preemption” and “plain statement rule” does not apply here, in the Elections Clause context. *Id.* at *4. Thus, here the court does not “strain to reconcile a state’s federal elections regulations with those of Congress, but consider[s] whether the state and federal procedures operate harmoniously when read together naturally.” *Id.* at *8.

The Texas laws conflict with the goals and purposes of the NVRA. For example, requiring personal delivery of completed voter registration applications stands in stark contrast to the NVRA’s requirement that states make the mail system an available means of delivery. *Charles H Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). (The NVRA “simply requires that valid registration forms delivered by mail and postmarked in time to be processed.”). Indeed, a federal district court in Florida just last week struck down a 48-hour delivery requirement that effectively precluded use of the mail:

The state has no legitimate interest, and claims none, in prohibiting a voter-registration organization from using the mails to send in voter-registration applications. The state’s election officials routinely rely on the mails....[T]he burden that this statute and rule impose on a voter-registration organization’s use of the mails, coupled with the absence of any legitimate state interest on the other side of the balance, probably renders these provisions unconstitutional.

League of Women Voters of Fla., No. 04:11-cv-00628-RH-CAS, slip op. at *12. In addition to finding that the requirement was probably unconstitutional, the court found that it violated the NVRA:

The NVRA encourages voter-registration drives; the NVRA requires a state to accept voter- registration applications collected at such a drive and mailed in to a voter-registration office; the NVRA gives a voter-registration organization like each of the

plaintiffs here a “legally protected interest” in seeing that this is done; and when a state adopts measures that have the practical effect of preventing an organization from conducting a drive, collecting applications, and mailing them in, the state violates the NVRA.

League of Women Voters of Fla., No. 04:11-cv-00628-RH-CAS, slip op. at *14 (citing *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005)).

Similarly, by hamstringing the core functions and mission of the Organizational Plaintiffs, the Training Requirement and the County Limitation are in conflict with the purpose of the NVRA. *See Cox*, 408 F.3d at 1354. Moreover, the Completeness Requirement, which imposes additional restrictions on the content and delivery of registration applications, directly conflicts with the NVRA’s regulation of the “final content and method of delivery” of voter registration applications. *See Id.* at 1353; 42 U.S.C. § 1973gg-4, -6(a)(1).

Finally, regarding the Photocopying Prohibition, Defendants are correct that at this stage of the proceedings, see Pls.’ Mot. for Prelim. Inj. at 6 n.3, Plaintiffs are not seeking records withheld by Harris County, as such a request is not consistent with preliminary relief. However, Plaintiffs are currently seeking that the Photocopying Prohibition, reflecting the States’ interpretation of Tex. Elec. Code. 13.038 to prohibit copying of applications before they are submitted, be preliminarily enjoined as part of the burdensome scheme for at least the reasons stated in Pls.’ Opp. to Defs’. Mot. to Dismiss at 12-26, Pls.’ Mot. for Prelim. Inj. at 12, 16-20, as well as in the Declaration of Michael Slater ¶¶ 27-29, Exhibit A to Pls.’ Mot. for Prelim. Inj. (discussing, among other things, harm to efforts to get out the vote among new registrants if Plaintiffs and organizations cannot photocopy applications before submission). To the extent that Plaintiffs inadvertently included a request with respect to copies of records in Harris County’s possession in their motion for preliminary injunction, see Pls.’ Mot. for Prelim. Inj. at 24, Plaintiffs clarify their request not to seek those records at this time.

C. The Organizational Plaintiffs Are Not Engaging in Any Governmental Function When They Simply Collect Applications and Turn Them Over to the State

The Defendants repeatedly mischaracterize the role that Project Vote and other entities play in voter registration. The Organizational Plaintiffs attempt only to assist potential voters. This function, however, is private. They are not registering voters or processing applications. Rather, the Organizational Plaintiffs are simply *collecting* applications and turning them into the state. Thus, they are not performing a governmental function. The court in *Cox II* dismissed a similar argument by stating that “[t]he Act does not dictate that only state actors may perform the simple function of assisting citizens with voter registration forms, and plaintiffs do not claim authority to receive such forms on behalf of the state.” *Id.* at 1355. Indeed, “a private registration drive is not a mode of registration at all” but instead is a “method by which private parties may facilitate the use of the mode of registration...” *Id.* at 1353. Similarly, Defendants’ assertion that if the court enjoins the statutes at issue, then only an “agent” of a voter may mail a completed application is incorrect. Defendants incorrectly assume a default system that may have existed prior to the NVRA, in which Texas prescribes all potential avenues for voter registration. But the NVRA changed the national default, with which Texas law must be harmonious: “And under the National Voting Rights Act, an organization has a federal right to conduct a voter-registration drive, collect voter-registration applications, and mail in the applications to a state voter-registration office.” *League of Women Voters of Fla.*, No. 04:11-cv-00628-RH-CAS, slip op. at *2. Individuals and organizations in Texas do not need a Texas law such as the Appointment provision to specifically allow them to assist individuals to register to vote; the Constitution and the NVRA provide that right.¹

¹ As further demonstration of the scheme’s vagueness, Texas’s statute is not even clear on its face that a member of the public who is not a VDR cannot assist applicants with

Texas has imposed a uniquely burdensome system that sets the state's laws apart from any registration requirements that have been permitted by courts. The statutory schemes in Pennsylvania and Ohio were not as onerous as in Texas. Defendant Andrade claims that Section 13.039 does not shift the burden of a government function, but instead provides a means for a volunteer to perform a governmental function. Def. Andrade's Mot. To Dismiss at 22. But by conscripting the Organizational Plaintiffs into a VDR scheme when they are simply *assisting* and not *registering* voters, the Defendants violate both the NVRA and the Organizational Plaintiffs' fundamental speech rights and association.

D. Enforcement of the Compensation Requirement and the Completeness Requirement is Prohibited Because They Are Unconstitutionally Vague and Overbroad

The Compensation Requirement is unconstitutionally overbroad because it criminalizes the payment of VDRs based on their engagement in protected speech activities. This requirement also is vague because it fails to "provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008).

Defendant Andrade has conceded that "[p]laintiffs are only prohibited from offering workers a fixed amount for each voter registration they facilitate or from refusing to pay workers unless they reach a certain quota." Def. Andrade's Resp. to Pls.' Mot. for Prelim. Inj. at 12. In an attempt to resolve this issue, the Organizational Plaintiffs have proposed a stipulation to the Defendants in which the parties would agree that § 13.008 does not criminalize or prohibit the use of performance evaluations by voter registration organizations, their employees or their

applications and collect them, as long as that person does not "purport to act as a volunteer deputy registrar" when he is not one and does not want to act as one. See Tex. Elec. Code § 13.044. However, Texas has clearly interpreted the statute to require VDR appointment. See Pls. Hearing Exhibit 1; Def. Andrade's Mot. to Dismiss at 32.

agents, including terminations or wage decreases for poor productivity, or increased payment, incentives, or promotions for increased productivity. The Defendants are currently considering whether to agree to the stipulation.

Contrary to Defendants’ assertions, the Completeness Requirement in §§ 13.036 and 13.039 of the Texas Election Code is unconstitutionally vague. Under these provisions, registrars “may terminate” the appointment of a VDR because she “failed to adequately review” a voter registration for “completeness.” The Organizational Plaintiffs firmly believe that the state must accept all applications, even if they cannot take any positive actions based on the applications. Federal law—not state law—governs the terms of acceptance of voter registration forms. *See Cox*, 408 F.3d at 1353 (The NVRA regulates the “final content and method of delivery” of voter registration). The NVRA “only requires that valid registration forms delivered by mail and postmarked in time be processed.” *Id.* at 1354. As an example of the statute’s vagueness, Texas requires an applicant to provide a Drivers’ License, State ID, or Social Security number if the voter has been assigned one, but according to the Texas VDR Guide, a VDR cannot require a voter to provide it. *Compare* Texas Voter Registration Form for Travis County, available at www.traviscountytax.org/pdfs/VOTERREGAPP.pdf (“Texas VR Form”) with Texas Volunteer Deputy Registrar Guide at 4, (Pls.’ Hearing Exhibit 6). Contrary to Defendants’ claims, this requested information is not marked “optional” on Texas’s voter registration form and it is therefore unclear whether the application is “complete,” even when a VDR follows Texas’s own guide. *Compare* Texas VR Form with Def. Andrade’s Resp. to Pls.’ Mot. for Prelim. Inj. at 13.

Surely, the Organizational Plaintiffs agree that applications should be complete because submitting incomplete applications that are not processed wastes valuable resources and could

harm the applicant. However, they do object to the state being able to unilaterally prevent a private citizen from accepting voter registration applications on the basis of an indeterminate number of completed applications, possibly one, especially when the term “complete” is ambiguous. As stated above, the Organizational Plaintiffs are not seeking to perform any governmental function such as registering voters or processing applications. They are simply assisting voters by collecting applications and turning them over to the state. *Id.* at 1355 (The NVRA “does not dictate that only state actors may perform the simple function of assisting citizens with voter registration forms...”). As the statute currently stands, any one of Texas’s 254 registrars may engage in arbitrary and discriminatory enforcement that burdens expressive conduct and the inextricably intertwined advocacy that accompanies voter registration.

II. The Organizational Plaintiffs Will Suffer Irreparable Injury Under Texas’s Burdensome Scheme if This Court Does Not Grant a Preliminary Injunction

The Organizational Plaintiffs have adequately shown that they will suffer irreparable injury. However, Defendant Andrade misses the point when she claims that the harms of the Texas statutes are “hardly insurmountable.” Def. Andrade’s Resp. to Pls.’ Mot. for Prelim. Inj. at 14. Indeed, “there is a strong presumption of irreparable injury . . . when a case involves infringement on First Amendment rights.” *Millennium Rests. Grp., Inc. v. City of Dall.*, 181 F. Supp. 2d 659, 667 (N.D. Tex. 2001) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Furthermore, the “loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.” *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) (citing *Elrod*, 347 U.S. at 373). Further, as noted by the court in *League of Women Voters v. Browning*, “denial of a right of this magnitude under circumstances like these almost always inflicts irreparable harm...because when a plaintiff loses an opportunity to register a voter, the opportunity is gone

forever.” No. 04:11-cv-00628-RH-CAS, slip op. at *24.

Without an injunction, the barriers imposed by Defendants will continue to chill the Organizational Plaintiffs’ First Amendment speech rights, violate their rights under the NVRA, and frustrate its purpose.

III. The Deprivation of the Organizational Plaintiffs’ Rights Under the First Amendment and the NVRA Outweigh Any Purported Harm to the State

The harm to the Organizational Plaintiffs clearly outweighs any harm that an injunction may cause Defendants. In the absence of injunctive relief, the Organizational Plaintiffs will continue to lose their federally and constitutionally protected rights as Texas’s voter registration laws continue to chill and restrict speech about voter registration. By contrast, Texas has no legitimate interest in enforcing unconstitutional statutes. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981) (“there is no significant state or public interest in curtailing” freedom of expression); *Humana Ins. Co. v. Leblanc*, 524 F. Supp. 2d 764, 777 (M.D. La. 2007) (“the State has no interest in enforcing an unconstitutional statute”). Interestingly, the Defendants are only able to express fears that are entirely speculative and already addressed by other Texas laws. As such, the ongoing violation of the Organizational Plaintiffs’ constitutional rights, or the frustration of the organizations’ attempts to fulfill the purposes of the NVRA, clearly outweigh the Defendants’ speculative harms.

IV. A Preliminary Injunction Furthers the Public Interest in Protecting the Organizational Plaintiffs’ Constitutional Rights and the Constitutional and Statutory Rights of Eligible Citizens to Register to Vote

The Organizational Plaintiffs have shown that an injunction is in the public’s interest. But the Defendants continue to express unfounded and unlikely fears that the Organizational Plaintiffs will disenfranchise the very voters that they seek to enroll. It is the desire of the

Organizational Plaintiffs not only to protect their constitutional rights, but also the constitutional rights of eligible citizens to vote. “The vindication of constitutional rights and the enforcement of a federal statute serve the public interest almost by definition. And allowing responsible organizations to conduct voter-registration drives—thus making it easier for citizens to register and vote—promotes democracy.” *League of Women Voters of Fla.*, No. 04:11-cv-00628-RH-CAS, slip op. at *24; *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.”).

V. Defendant Johnson is a Proper Party to Enjoin in this Case

Defendant Johnson’s claims that she is not a proper party to enjoin in this case are without merit. Due to Defendant Johnson’s independent enforcement authority at the local level, she has discretion to enforce the voting regulations. As the local registrar, Defendant Johnson performs numerous functions related to registration and voting. Indeed, she has been the official in Galveston County who has been interacting with voters and enforcing the regulations at issue.² Thus, it is proper to enjoin the conduct of Defendant Johnson.

CONCLUSION

For the foregoing reasons, and the reasons stated in their Motion for Preliminary Injunction, as well as in their Opposition to Defendants’ Motion to Dismiss, Organizational Plaintiffs request that this Court enter a preliminary injunction enjoining Defendants from enforcing Tex. Elec. Code §§ 13.008, 13.031, 13.033, 13.036, 13.038, 13.039, and 13.042.

DATED this 4th day of June, 2012.

² The very fact that Defendant Johnson—whose official title is the Galveston County Tax Assessor—is at all responsible for voter registration is a vestige of the time when Texas charged a poll tax. *See* Acts 1951, 52nd Leg., p. 1114-1118, ch. 492, § 41-50 (charging the County Assessor and Collector of Taxes with administration of the poll tax).

Respectfully Submitted,

/s/ Chad W. Dunn

Chad W. Dunn

State Bar No. 24036507

Southern District of Texas No. 33467

K. Scott Brazil

State Bar No. 02934050

Brazil & Dunn, L.L.P.

4201 Cypress Creek Parkway, Suite 530

Houston, Texas 77068

Telephone: (281) 580-6310

Facsimile: (281) 580-6362

Richard Alan Grigg

State Bar No. 08487500

Southern District of Texas No. 08487500

Spivey & Grigg, L.L.P.

48 East Avenue

Austin, Texas 78701

Telephone: (512) 474-6061

Facsimile: (512) 474-8035

*Attorneys for Plaintiffs Voting For America,
Project Vote, Inc., Brad Richey and
Penelope McFadden*

Ryan M. Malone

D.C. Bar No. 483172

Southern District of Texas No. 598906

Julia M. Lewis

D.C. Bar No. 995759

(admitted *pro hac vice*)

Ropes & Gray LLP

700 12th St. NW Suite 900

Washington, D.C. 20005

Telephone: (202) 508-4669

Facsimile: (202) 383-8322

Brian Mellor
MA Bar. No. 43072
(admitted *pro hac vice*)
Project Vote, Inc.
1350 Eye Street NW
Washington, D.C. 20005
Telephone: (202) 546-4173
Facsimile: (202) 629-3754
*Attorneys for Voting for America and
Project Vote, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/ Chad W. Dunn

Chad W. Dunn

4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

VOTING FOR AMERICA, INC., <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. G-12-44
	§	
HOPE ANDRADE, <i>et al</i> ,	§	
	§	
Defendants.	§	

**OPINION AND ORDER GRANTING IN PART AND DENYING IN
PART PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Broad-based participation in the political process is crucial to governmental legitimacy and the proper functioning of our constitutional system. *See* THE FEDERALIST NO. 10 (James Madison); *see also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (“Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”). The most elementary form of political participation is voting; thus, the right to vote is “a fundamental matter in a free and democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). But, in order to vote, one must first be registered, and many citizens are not registered.

This problem has been tackled on many fronts; governmental actors and private citizens alike have spent much time and treasure attempting to increase the number of Americans who are registered to vote. One of the primary means by which individuals have been able to help their fellow Americans register is what is commonly known as the voter registration drive. Voter registration drives have played a vital role in increasing participation in the political process. This is especially true in minority communities with historically lower rates of voter registration. Census figures indicate that a significant percentage of African-Americans and Hispanics voting in the last presidential election registered through voter registration drives and other third-party voter registration activities.¹

This case concerns Texas's heavy regulation of third-party voter registration activity. For more than two decades, Texas has required those

¹ See *Voting and Registration in the Election of November 2008 – Detailed Tables: Table 14. Method of Registration by Selected Characteristics: November 2008*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html> (last visited July 24, 2012). These figures do not indicate specifically how many voters are registered during voter registration drives, but they do show the number of voters registered at a “registration booth” or at a “school, hospital, [or] campus.” *Id.* These two categories are not perfect proxies for voter registration drives, but they are broadly indicative of the effect of third-party voter registration activities such as registration drives. During the 2008 General Election, 20.4% of African-American voters and 18.9% of Hispanic voters were registered at a booth or a school, hospital, or campus. For White non-Hispanic voters, the figure was 10.7%. *Id.* For those voters registered at a booth, a category which is likely the best single proxy for the effect of third-party voter registration activity, the numbers are even more stark: 11.1% of African-American voters and 9.6% of Hispanic voters were registered at a booth, compared to only 5.0% of White non-Hispanic voters. *Id.*

seeking to receive applications from prospective voters to be appointed volunteer deputy registrars (“VDRs”). During the 2011 legislative session, the Governor signed two bills that imposed a number of additional requirements. The new laws restricted non-Texans from becoming VDRs, required VDRs to undergo training, and banned certain forms of compensation for voter registration activities. The result is that Texas now imposes more burdensome regulations on those engaging in third-party voter registration than the vast majority of, if not all, other states.

Two organizations involved in national voter registration efforts filed this lawsuit and now seek a preliminary injunction barring enforcement of a number of the Texas laws regulating voter registration drives. They contend that the federal National Voter Registration Act (“NVRA”) preempts some of the laws. Others, they maintain, violate the First Amendment guarantees of freedom of speech and association and the Fourteenth Amendment guarantee of due process.

In reviewing these challenges, the Court first holds that Plaintiffs have standing to bring the eight claims on which they requested preliminary relief against both named defendants—the Texas Secretary of State and the Galveston County Registrar. Then, having reviewed the applicable statutes and case law, as well as the briefing and the evidence presented at a lengthy

injunction hearing, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion for Preliminary Injunction. Plaintiffs have met the demanding standards for a preliminary injunction on five of the eight challenges on which they seek preliminary relief. They are entitled to a preliminary injunction on two of their preemption challenges, those brought against the Photocopying Prohibition and the Personal Delivery Requirement, and on three of their First Amendment challenges, those brought against the In-State Restriction, the County Limitation, and part of the Compensation Prohibition.

I. BACKGROUND

A. Procedural History

Plaintiffs are the nonprofit organization Project Vote, its affiliate, Voting for America (together, the "Organizational Plaintiffs"), and Galveston County residents Brad Richey and Penelope McFadden. In May 2011, after the enactment of the new laws regulating voter registration drives, the Organizational Plaintiffs sent a letter requesting the Secretary of State to clarify Texas's interpretation of both the new laws and the pre-existing scheme. After receiving a response, Plaintiffs filed suit in February 2012 challenging (1) the constitutionality and enforceability of ten regulations that the Texas Election Code imposes on the third-party voter

registration process; (2) Galveston County's alleged unlawful enforcement of Texas's photo identification requirement for voters prior to the proper preclearance of that law under the Voting Rights Act; and (3) Galveston County's alleged failure to follow state law requiring notice to voters before suspending their registration. Defendants are Hope Andrade, sued in her official capacity as the Texas Secretary of State (the "Secretary"), and Cheryl Johnson, sued in her official capacity as the Galveston County Tax Assessor and Voter Registrar.

The Organizational Plaintiffs filed a motion for a preliminary injunction seeking to immediately bar enforcement of most, but not all, of the Texas voter registration laws they contend are either unconstitutional or preempted. They did not seek preliminary relief on the claims in their complaint that are specific to Galveston County enforcement practices. In addition to disputing the merits of the case, both Andrade and Johnson contend that the Organizational Plaintiffs lack standing to sue them.

B. The Organizational Plaintiffs

The Organizational Plaintiffs are national nonpartisan organizations dedicated to helping citizens become registered to vote and to encouraging eligible voters to vote. The Organizational Plaintiffs work to accomplish their mission through nonpartisan political advocacy, educational outreach,

and, most notably, voter registration drives. The drives are primarily aimed at registering voters from demographic groups—particularly the African-American and Latino communities—with a history of underrepresentation in the political process.

While the Organizational Plaintiffs sometimes conduct drives by themselves, more often they provide funding, instruction, and training to “partner” organizations, typically local nonprofit or civic groups selected from the geographic area or demographic group targeted for a drive. The same basic methods are followed in each drive. The Organizational Plaintiffs will provide funding to a local partner organization. Then, using that funding, the partner organization will hire temporary employees from the target community to serve as canvassers. These canvassers are paid a flat or hourly wage to go to high traffic locations, such as grocery stores and public transit stations, and attempt to register other citizens to vote. The canvassers encourage passersby to register, assist those who agree to register in filling out their applications, and collect the applications for delivery. Once the applications are collected, the canvassers return them to their supervisors. The supervisors then perform quality analysis and control checks by reviewing the applications for completeness and signs of fraud. Afterwards, they photocopy or scan all nonconfidential parts of the

applications for tracking purposes and mail the applications to the appropriate state or county registrar.

After submitting the applications, the partner organizations coordinate with the Organizational Plaintiffs to inspect the relevant voter rolls and registration records. They do this by examining the rolls to determine whether the applicants were actually registered as new voters. Once this information is gathered, it is used in two ways. First, the applicants who were added to the rolls are contacted and encouraged to actually vote. Second, for those applicants who were not added to the rolls, the Organizational Plaintiffs and their partners seek to determine if the applications were rejected for a legitimate reason, such as a correct determination that an applicant was not eligible to register under state law or that an applicant provided incorrect information. Rejected applicants may be contacted to re-register if it is determined that they are eligible. If the Organizational Plaintiffs determine that the government has rejected an application for an improper reason, they may seek to remedy the situation through demand requests, public pressure, or legal action.

Although the Organizational Plaintiffs rarely canvass potential voters themselves, they have primary control over each registration drive. As the executive director of Project Vote testified, the Organizational Plaintiffs'

employees often train the managers and supervisors of their partner organizations by helping them assist applicants in the field, a process that requires the employees to directly handle voter registration applications. *See* Preliminary Inj. Hr’g Tr. 23–24, June 11, 2012, ECF No. 62. The Organizational Plaintiffs’ employees identify areas to send canvassers, provide remedial training to canvassers who collect inadequate numbers of applications or who collect incomplete applications, review completed applications for signs of fraud, and handle phone calls from members of the public or local law enforcement. *See id.* at 23–26, 130–32. In addition, the Organizational Plaintiffs’ employees make hiring and termination decisions. *See id.* at 144–45. The Organizational Plaintiffs condition their grants of funding on retaining control over all staffing decisions. *Id.*

C. The Texas Volunteer Deputy Registrar Regime

1. The Appointment Requirement

The Organizational Plaintiffs contend that the Texas Election Code’s comprehensive regulation of third-party registration activities prevents them from conducting effective drives in the state. Most of the challenged statutes regulate the activities of VDRs, whom county registrars are required to appoint if certain qualifications are met. *See* Tex. Elec. Code Ann. §§

13.031(a), 13.032. The provision governing the appointment of VDRs reads as follows:

§ 13.031(a). Appointment; Term

- (a) To encourage voter registration, the registrar shall appoint as deputy registrars persons who volunteer to serve.
- (b) In this code, “volunteer deputy registrar” means a deputy registrar appointed under this section.
- (c) Volunteer deputy registrars serve for terms expiring December 31 of even-numbered years.
- (d) To be eligible for appointment as a volunteer deputy registrar, a person must:
 - (1) be 18 years of age or older;
 - (2) not have been finally convicted of a felony or, if so convicted, must have:
 - (A) fully discharged the person’s sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court; or
 - (B) been pardoned or otherwise released from the resulting disability to vote; and
 - (3) meet the requirements to be a qualified voter under Section 11.002 except that the person is not required to be a registered voter.
 - (3) not have been finally convicted of an offense under Section 32.51, Penal Code.²

² The Texas Legislature amended § 13.031 twice during 2011. Because each bill added a different subsection (d)(3) to the statute, the statute now contains two subsection (d)(3)s.

- (e) A volunteer deputy registrar appointed under this section may not receive another person's registration application until the deputy registrar has completed training developed under Section 13.047. At the time of appointment, the voter registrar shall provide information about the times and places at which training is offered.

Tex. Elec. Code Ann. § 13.031.

The linchpin of the Texas regime, which the parties refer to as the “Appointment Requirement,” is that only those who have been appointed VDRs may accept or deliver a third party's voter registration application. Given that most of the challenges in this case are premised on this understanding that a person who has not been appointed a VDR is prohibited from handling third-party applications, it is noteworthy that the Election Code does not contain such an express prohibition. Instead, the Secretary interprets the prohibition to arise by implication.

The Secretary argues that this implied prohibition arises from the VDR appointment scheme itself. What would be the purpose of the appointment process, as well as the numerous regulations that flow from the appointment scheme, if anybody could accept and deliver applications? Another argument derives from the text of the Election Code, which grants the power to handle applications to two specific types of third parties: VDRs

When this Court cites subsection (d)(3), it is referring to the subsection (d)(3) that requires VDRs to “meet the requirements to be a qualified voter under Section 11.002.”

and “agents.” Although applicants must generally submit their applications to the appropriate county registrar “by personal delivery or by mail,”³ they are also allowed to submit their applications to a VDR or agent for third-party delivery to the county registrar. *Id.* §§ 13.002(a), 13.003(a), 13.038. In the Secretary’s view, this is an exclusive grant of power. Only an applicant’s spouse, parent, or child may be their agent; thus, third parties who are not related to a particular applicant may only handle applications if appointed a VDR. *Id.* § 13.003(b). Moreover, it is a crime for a person to “purport to act” as a VDR if the person lacks an effective VDR appointment. *Id.* § 13.044.

There is one other wrinkle, however. Although the Secretary reads section 13.038 as an exclusive grant of power to VDRs to handle completed applications, she nonetheless contends that any person may distribute blank applications to potential applicants. *See* Def. Andrade’s Mot. to Dismiss 29, ECF No. 13-2; Preliminary Inj. Hr’g Tr. 110–11, June 11, 2012; Pls.’ Ex. 6, Texas Volunteer Deputy Registrar Guide. As the Organizational Plaintiffs point out, this flies in the face of the plain text of section 13.038, which states that a VDR “may distribute voter registration application forms

³ An explicit exception to the mode of delivery requirement is made for applicants participating in Texas’s address confidentiality program. Tex. Elec. Code Ann. § 13.002(a).

throughout the county and receive registration applications submitted to the deputy in person.” Tex. Elec. Code Ann. § 13.038; Preliminary Inj. Hr’g Tr. 428–29, June 12, 2012, ECF No. 63. If the section is to be read as an exclusive grant of power to VDRs, consistency would seem to require reading it as an exclusive grant on both the distribution and collection elements.

No Texas court has interpreted these provisions. Because this Court “lack[s] competence to rule definitively on the meaning of state legislation,” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997), it must accept any “narrowing construction or practice to which the law is fairly susceptible.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 770 n.11 (1988) (citations omitted); *cf. Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (stating that when the constitutionality of a federal law is challenged, a court must “first ascertain whether a construction of the statute is fairly possible by which the question may be avoided”) (citation omitted).⁴

⁴ The Supreme Court has noted that “[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State’s law, for the federal tribunal risks friction generating error when it endeavors to construe a novel state Act not yet reviewed by the State’s highest court.” *Arizona*, 520 U.S. at 79. Were it possible, this Court would consider whether certification to the Texas Supreme Court would be an appropriate manner of resolving the proper interpretation of the Election Code provisions at issue. However, because

The narrowing construction that has been offered is the Secretary's argument that section 13.038 exclusively grants VDRs the power to accept, handle, and deliver filled-out applications, but allows any person to distribute blank applications. Bearing in mind that Plaintiffs do not request preliminary relief from the Appointment Requirement itself,⁵ this Court will assume at this stage of the litigation that the Election Code only forbids third parties from accepting, handling, or delivering a prospective voter's application without first being appointed VDRs.

2. The VDR Scheme

Once individuals become VDRs, a comprehensive set of regulations governs their activity. Some of these regulations have been in place since 1987, but the 2011 letter that the Secretary sent the Organizational Plaintiffs clarified how stringently the state interprets these provisions. First, VDRs must carry signed certificates of appointment that contain their full names and residential addresses, and they must present these certificates as identification to any applicants who request to see them. Tex. Elec. Code Ann. § 13.033. Second, when VDRs accept applications, they must review them for completeness while the applicants are present and return them to

Texas does not allow federal district courts to certify questions, that avenue is unavailable to this Court. *See* Tex. R. App. Proc. § 58.1.

⁵ As discussed below, Plaintiffs do challenge the Appointment Requirement in their Complaint and seek a permanent injunction against it.

the applicants if they are unsigned or lack required information. *Id.* § 13.039. If a county registrar determines that a VDR has “failed to adequately review” an application for completeness, that county registrar may terminate the VDR’s appointment. *Id.* § 13.036(b). Third, as made clear by the 2011 letter the Secretary sent to the Organizational Plaintiffs, VDRs may only accept applications from residents of the county in which they were appointed. *See id.* § 13.038; Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah 4 (May 13, 2011). Fourth, VDRs must personally deliver to the county registrar all applications submitted to them within five days of receipt. Tex. Elec. Code Ann. § 13.042(a)–(b). VDRs may not mail applications to the county registrar. *Id.*; Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah 5. Any VDR who fails to personally deliver an application within five days is subject to a criminal penalty. Tex. Elec. Code Ann. § 13.043(a). Fifth, VDRs may not photocopy applications that they have collected, even if the copies redact all confidential information. *See id.* § 13.038; Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah 6.

Bills enacted during the 2011 legislative session imposed additional requirements on VDRs. Now, only Texas residents are allowed to be VDRs. *See* Tex. Elec. Code Ann. §§ 11.002(a)(5), 13.031(d)(3). And, once

appointed, VDRs may not accept or deliver applications without first completing a training program approved by the Secretary and implemented by the county registrar who appointed them. *See id.* §§ 13.031(e), 13.047.

The new 2011 law additionally included another provision that affects VDRs but also applies more broadly to others involved in voter registration activities even if they are not accepting or delivering applications. That provision prohibits “compensat[ing] another person based on the number of voter registrations that the other person successfully facilitates”; “present[ing] another person with a quota of voter registrations to facilitate as a condition of payment or employment”; and “engag[ing] in another practice that causes another person’s compensation from or employment status with the person to be dependent on the number of voter registrations that the other person facilitates.” *Id.* § 13.008(a)(1)–(3). Accepting compensation for any of the above activities is also illegal. *Id.* § 13.008(a)(4). Any violation of the provision is a Class A misdemeanor. *Id.* § 13.008(b). Moreover, if the person who violates the provision is an entity, the entity’s officers, directors, and agents can be punished for the offense. *Id.* § 13.008(c).

All told, the Texas regime is restrictive—and uniquely so. This is true in multiple ways. Only one other state of which either the parties or this

Court are aware—Wisconsin, which is a very different animal because it allows same-day registration and thus is exempt from the mandates of the NVRA⁶—requires individual canvassers to be appointed or registered with the government at the local level as Texas does. *See* Pls.’ Comparative Statement Regarding State Voter Registration Laws 2–3, ECF No. 58; Def. Andrade’s Postsubmission Br. 6–8, ECF No. 60. Most other states do not even have an appointment process at a statewide level. A number of states allow but do not require canvassers to be appointed or registered as deputy registrars. *See, e.g.,* Ariz. Rev. Stat. Ann. § 16-131 (allowing county recorders both to appoint deputy registrars and to distribute blank applications to “groups and individuals that request forms for conducting voter registration drives”). And a smattering of states require the person or entity overseeing a registration drive to register. *See, e.g.,* Cal. Elec. Code § 2159.5 (requiring any person or entity that pays others to conduct third-party voter registration activities to maintain a list of all employees and to make that list available to the California Secretary of State on demand); Colo. Rev. Stat. Ann. § 1-2-701(1) (requiring voter registration drive organizers to file a statement of intent and designate the drive’s agent); Del.

⁶ *See* 42 U.S.C. § 1973gg-2(b)(2); Wis. Stat. § 6.15 (allowing same-day registration); Wis. Stat. § 6.26 (requiring canvassers to be appointed special registration deputies on a municipality-by-municipality basis).

Code Ann. tit. 15, § 2060 (requiring entities conducting organized voter registration drives to register with the state and provide the name and contact information of a responsible person). One requires paid canvassers meeting a certain threshold of applications to register with the state. *See* Mo. Rev. Stat. § 115.205 (requiring registration with the Missouri Secretary of State of any person paid for soliciting more than ten voter registration applications).

Moreover, canvasser appointment and registration requirements aside, many states do not place any restrictions on how registration drives may be run or how canvassers may work. Some states' laws do contain prohibitions on voter registration activities that are similar to—albeit less expansive than—the prohibitions in the Texas Election Code. *See, e.g.,* Colo. Rev. Stat. Ann. § 1-2-703(4) (banning the payment of compensation “based on the number of voter registration applications . . . distribute[d] or collect[ed]” but not restricting the use of voter registration quotas or other types of performance-based pay and employment actions); Del. Code Ann. tit. 15, § 2061 (requiring training for individuals participating in voter registration drives, but doing so on a statewide rather than county-by-county basis). And other states' laws previously contained strict prohibitions that federal courts have since struck down. *See, e.g.,* Fla. Stat. § 97.0575(3)(a) (2011), *invalidated by League of Women Voters of Fla. v. Browning*, 4:11cv628-

RH/WCS, 2012 WL 1957793 (N.D. Fla. May 31, 2012) (requiring voter registration organizations, on penalty of fine, to deliver all applications collected within 48 hours of the moment of receipt); Ohio Rev. Code Ann. §§ 3503.19, 3599.11 (2006), *invalidated by Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006) (requiring any person who registered another person to vote to deliver that person's application directly to the appropriate state office, without the application going through the hands of any intermediates).

Yet, especially when viewed against the background of unrestricted third-party voter registration activity that prevails in most states, the Texas Election Code's requirements stand out. While other states may restrict an activity here or prescribe a regulation there, no other state of which this Court is aware has gone as far as Texas in creating a regulatory web that controls so many aspects of third-party voter registration activity.

D. The Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs allege that these pervasive requirements, alone and in combination, render their voter registration practices illegal. Claiming that the provisions are preempted by federal law, run afoul of the First or

Fourteenth Amendments, or both, Plaintiffs seek preliminary relief from the following parts of the Election Code:⁷

- *The Photocopying Prohibition.* Section 13.038, as interpreted by the Secretary, prohibits VDRs from photocopying applications they receive and submit, even for tracking purposes.
- *The Personal Delivery Requirement.* Section 13.042 requires that VDRs deliver applications to the appropriate county registrars in person. It forbids VDRs from mailing these applications.
- *The In-State Restriction.* Sections 13.031(d)(3) and 11.002(a)(5) together have the effect of prohibiting non-Texas residents from serving as VDRs.
- *The County Limitation.* Defendants interpret Section 13.038 to prohibit VDRs from accepting applications from residents of counties other than the county in which the VDRs are appointed.
- *The Compensation Prohibition.* Section 13.008 criminalizes a number of compensation practices, including “compensat[ing] another person based on the number of voter registrations that the other person successfully facilitates,” “present[ing] another person with a quota of voter registrations to facilitate as a condition of payment or employment,” and “engag[ing] in another practice that causes another person’s compensation from or employment status with the person to be dependent on the number of voter registrations that the other person facilitates.”
- *The Completeness Requirement.* Section 13.039(a) requires VDRs to examine applications for completeness in the presence of the applicant, and section 13.036(b) allows for the termination of the appointment of any VDR who fails to “adequately review” an

⁷ Plaintiffs do not ask for preliminary relief on the validity of the “Law Enforcement Exception” or the “Appointment Requirement” identified in their complaint, and they do not ask for preliminary relief on the validity of Galveston County’s alleged unlawful enforcement of a photo ID requirement or its alleged failure to follow Texas law requiring notice to voters placed on a suspension list.

application. Moreover, section 13.039(b) requires VDRs to return incomplete applications to applicants for completion.

- *The Training Requirement.* Section 13.031(e) requires VDRs to undergo training approved by the state and administered by the county registrars pursuant to section 13.047.
- *The Identification Requirement.* Section 13.033 requires VDRs to carry with them a certificate of appointment that contains their full name and residential address, and to produce the certificate for inspection to any applicant who requests to view it.

E. The Evidentiary Hearing

On May 24, 2012, before evidence was taken or argument heard on Plaintiffs' motion, this case was reassigned to this Court. The Court discussed outstanding motions with counsel in a telephone conference on June 5, 2012. The next week, during a day-and-a-half hearing, the Court took extensive evidence and heard argument on the preliminary injunction claims as well as on Defendants' separate motions to dismiss for lack of standing.

Plaintiffs presented the testimony of five witnesses: Mr. Michael Slater, the executive director of Project Vote; Dr. Denise Rousseau, an expert in behavioral and organizational psychology from Carnegie Mellon University; Ms. Esthelle Holmes and Ms. May Mitchell, two VDRs from Galveston County; and former Governor Mark White, who signed the Election Code into law in 1985 and who, during his tenure in the 1970s as

Secretary of State, was responsible for enforcing Texas's election laws. Plaintiffs also presented thirty-two exhibits and the declarations of two other witnesses. The Secretary presented no witnesses or exhibits. Johnson presented the testimony of herself and Dominique Allen, the senior Voter Registration Specialist in the Galveston County Registrar's office. Johnson also introduced two exhibits.

II. STANDING

Defendants filed motions to dismiss under Rule 12(b)(1), arguing as a matter of standing law that they are not proper parties to this suit. These motions challenge this Court's jurisdiction and therefore must be addressed before considering the Organizational Plaintiffs' motion for a preliminary injunction. This Court finds that, with respect to the eight claims on which they have requested preliminary relief, the Organizational Plaintiffs have standing to sue both Defendants. Defendants' motions to dismiss under Rule 12(b)(1) are therefore denied with respect to those claims.⁸

Plaintiffs must show that they satisfy the trifecta of standing: injury in fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984). As to

⁸ Defendants' 12(b)(1) motions against Plaintiffs' other claims will be addressed in a later order at the appropriate stage of the litigation along with their remaining 12(b)(6) motions to dismiss for failure to state a claim. *See infra* note 13.

the first requirement, that of injury in fact, the Organizational Plaintiffs allege that the Election Code makes it impossible for them to conduct voter registration drives and achieve their desired level of voter registration activity because it dramatically increases the administrative costs of conducting registration drives and bans them from using many common compensation and employment practices with their paid canvassers. Pls.’ First Am. Compl. ¶¶ 58, 59, ECF No. 8. The Organizational Plaintiffs also allege that Defendants’ refusal to disclose voter registration records and the ban on photocopying voter registration applications “frustrates and hampers” their ability to register voters. *Id.* at ¶ 68. Defendants do not seriously dispute that the Organizational Plaintiffs have established the existence of a judicially cognizable injury in fact. *See* Def. Andrade’s Mot. to Dismiss 9; Def. Johnson’s Am. Mot. to Dismiss 9, ECF No. 22. This Court agrees that, with respect to each claim on which they request preliminary relief, the Organizational Plaintiffs have fulfilled their duty on this first prong of the standing analysis.⁹

⁹ Other courts have held that injuries similar to those alleged by Plaintiffs satisfy the requirement of injury in fact. *See, e.g., Fla. State Conference of the N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (holding that an organization that wished to conduct voter registration drives had alleged a sufficient injury in fact by stating that the challenged statute would require it to divert time and personnel from registering voters to complying with the statute); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353–54 (11th Cir. 2005) (holding that “it is clear that [an organization’s] right to conduct voter registration drives is a legally protected interest);

Defendants do, however, strongly dispute that Plaintiffs have met the causation and redressability requirements. Under *Lujan*, causation is present only if the Plaintiffs can show that their injuries are “fairly traceable” to Defendants and not “the result of the independent action of some third party.” *Lujan*, 504 U.S. at 560 (citation and internal punctuation omitted). Redressability is only satisfied if it is “likely” that Plaintiffs’ injuries will be “redressed by a favorable decision” against Defendants. *Id.* at 561 (citation omitted).

Unlike the common standing challenge in which a defendant argues that litigation cannot vindicate the plaintiff’s interests as a general matter, *see, e.g., Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40–46 (1976), neither Defendant claims that the federal courts are unable to provide adequate relief in this type of case. Instead, each claims that she is not the proper party and instead points the finger at the other: the Secretary argues that Plaintiffs only have standing to sue Johnson and other county registrars, while Johnson argues that Plaintiffs only have standing to sue the Secretary. *See, e.g.,* Def. Johnson’s Am. Mot. to Dismiss 11; Preliminary Inj. Hr’g Tr.

Project Vote/Voting for Am., Inc. v. Long, 752 F. Supp. 2d 697, 703–04 (E.D. Va. 2010) (holding that organizations engaged in voter registration activity had a right under the NVRA to obtain voter registration records).

390, June 12, 2012. The Court therefore analyzes Plaintiffs' standing against each Defendant in turn.

A. Secretary of State Andrade

The Secretary argues that she is not the cause of Plaintiffs' alleged injuries because the Election Code delegates enforcement power to county registrars like Johnson. *See* Def. Andrade's Mot. to Dismiss 9–13. She also argues that enjoining her would not redress Plaintiffs' injuries because she has no direct authority to control the actions of the county registrars. *See id.* Although the Secretary acknowledges that she is the official who interprets the Election Code and provides guidance on enforcement to the registrars of all 254 Texas counties, she contends that her authority is only persuasive, and that she is powerless to stop county registrars from disobeying her. Preliminary Inj. Hr'g Tr. 390–92, June 12, 2012. The Secretary thus argues that only Johnson—and the 253 other Texas county registrars, who were not named as parties—are proper defendants in this type of suit. *Id.* at 390.

The Secretary's argument is at odds with numerous cases in which plaintiffs have sued secretaries of state when challenging voter registration laws even though states commonly delegate voter registration

responsibilities to county officials.¹⁰ In most of these cases, the secretaries did not even raise the argument that only county officials could be sued. In the two courts of appeals cases in which secretaries of state did raise the argument, the courts rejected it. *See Harkless*, 545 F.3d at 451–55 (finding standing to sue the Ohio Secretary of State); *see also United States v. Missouri*, 535 F.3d 844, 846 n.1 (8th Cir. 2008) (finding that the Missouri Secretary of State was the proper party to be sued under the NVRA even though enforcement power was delegated to local officials). The Sixth and Eighth Circuits relied primarily on Ohio’s and Missouri’s designations of their secretaries of state as the officials charged with administering the NVRA even though state law delegated enforcement powers to local county authorities. *See Harkless*, 545 F.3d at 452 (citing 42 U.S.C. § 1973gg-8); *Missouri*, 535 F.3d at 846 n.1 (same). Texas has likewise designated the Secretary as the state official responsible for administering the NVRA. Tex. Elec. Code Ann. § 31.001(a).

¹⁰ *See, e.g., Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008); *Fla. State Conference of the N.A.A.C.P.*, 522 F.3d 1153; *Charles H. Wesley Educ. Found., Inc.*, 408 F.3d 1349; Order Granting a Preliminary Inj., *League of Women Voters of Fla. v. Browning*, 4:11cv628-RH/WCS, 2012 WL 1957793 (N.D. Fla. May 31, 2012); *Project Vote/Voting for Am., Inc.*, 752 F. Supp. 2d 697; *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183 (D.N.M. 2010); *Blackwell*, 455 F. Supp. 2d 694. The only case this Court is aware of in which every local county registrar was named as a party is *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), in which the State of Arizona itself was also named as a defendant.

The *Harkless* Court's analysis of the standing issue is compelling with respect to the claimed violations of the NVRA, but this case also involves constitutional challenges divorced from the Secretary's status as the NVRA designee. Recent Fifth Circuit cases on causation and redressability provide the standards for analyzing that issue. The first is *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc), in which a group of doctors filed suit against the Louisiana Governor and Attorney General to challenge Louisiana's creation of a private cause of action against persons who perform abortions. *Id.* at 409. The Secretary relies heavily on *Okpalobi*, which found no standing because the Louisiana Governor and Attorney General had absolutely no power to prevent a private plaintiff from filing suit under the Louisiana statute. *Id.* at 426–27 (opinion of Jolly, J.); *id.* at 429 (Higginbotham, J., concurring); *id.* at 432–33 (Benavides, J., concurring).

But a subsequent Fifth Circuit decision involving the same Louisiana statute provides a closer analogy to this case. *See K.P. v. LeBlanc*, 627 F.3d 115 (5th Cir. 2010). In *LeBlanc*, a former patient filed an administrative claim for damages with the Louisiana Patients' Compensation Fund Oversight Board against the physicians who had performed her abortion. *Id.* at 119–20. Under Louisiana law, physicians could enroll in the

Compensation Fund in order to have their medical malpractice liability capped. *Id.* at 119. Patients seeking malpractice damages could file administrative claims with the Board, which had the power to either refuse the claims or convene a medical review panel to consider their merit. *Id.* In *LeBlanc*, the Board refused the patient's claim on the ground that the Louisiana statute barred doctors from capping their liability for claims arising from abortion procedures. *Id.* at 120. The former patient then sued the doctors asserting the cause of action created by the statute challenged in *Okpalobi*. *Id.* The doctors responded by suing the Board to enjoin the statute on its face and as it had been applied to forbid them from participating in the Compensation Fund. *Id.* The district court dismissed the suit for lack of standing, citing *Okpalobi* for the proposition that the Board lacked enforcement power with respect to the private cause of action. *Id.*

The Fifth Circuit reversed. *Id.* at 119. In doing so, it recognized that the Board had no power to enforce the Louisiana statute creating the private cause of action. *Id.* at 123. However, it distinguished *Okpalobi* by noting that, unlike the Louisiana Governor or Attorney General, the Board could take *some* action that affected the statute's application. *See id.* at 123–24. The Board, the Fifth Circuit noted, could still refuse administrative claims for payment or convene medical review panels to consider claims, even

though it could not stop patients from bringing tort actions in state court. *Id.* The Fifth Circuit “acknowledge[d] that the Board is far from the sole participant in the application of the challenged statute” but nonetheless held that the statute “impact[ed] the Board’s actions sufficiently to confer standing on the[] Plaintiffs.” *Id.* at 123. The Fifth Circuit noted that a “plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.” *Id.* (emphasis in original) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). Because the Board could “unilaterally preclude the Plaintiffs from claiming the benefits of limited liability” and “ha[d] definite responsibilities relating to the application of [the Louisiana statute],” the physicians had standing to sue. *Id.* at 123–24.

Another post-*Okpalobi* case’s summary of redressability law indicates an even lower threshold. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007). In *Abbott*, the Fifth Circuit endorsed Justice O’Connor’s opinion in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), as establishing the rule that redressability is satisfied when nonparty actors can be expected to amend their conduct in response to a court declaration against a party. *Abbott*, 495 F.3d at 159–60 n.19. The plaintiffs in *Franklin* had challenged

the system by which the federal government allocated, for voter registration purposes, the home states of federal employees serving overseas. *Franklin*, 505 U.S. at 790–91. They filed suit against the President, the Secretary of Commerce, the Clerk of the U.S. House of Representatives, and Census Bureau officials. *Id.* at 790. Justice O’Connor’s plurality opinion held that the plaintiffs’ alleged injuries would be redressable solely by a declaration against the Secretary of Commerce even though the Secretary of Commerce could not directly enforce a court order and had no authority to order the other officials to enforce the law. *Id.* at 803. In so holding, Justice O’Connor stated:

The Secretary certainly has an interest in defending her policy determinations . . . ; even though she cannot herself [enforce the law by] chang[ing] the reapportionment, she has an interest in litigating its accuracy. . . . [W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the . . . statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Id.

Thus, under *Okpalobi*, causation and redressability will not exist if a governmental defendant has no “duty or ability to do *anything*” about the enforcement of the challenged law. *Okpalobi*, 244 F.3d at 427 (emphasis in original). But *LeBlanc* makes clear that causation and redressability will

exist when a defendant has “definite responsibilities relating to the application of” the challenged law. *LeBlanc*, 627 F.3d at 124; *see also* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.6 (3d ed. 2008) (“The Court has said that standing does not require a plaintiff to show that a decree can remedy his every injury. Some measure of relief suffices.”). And *Abbott*, applying *Franklin*, clarifies that redressability will exist if a declaration against a governmental defendant without enforcement power is reasonably likely to cause nonparties with enforcement power to obey the court’s order. *Abbott*, 495 F.3d at 159–60 & n.19; *see also Bennett v. Spear*, 520 U.S. 154, 169–71 (1997) (finding that redressability was satisfied where the plaintiffs sought to have a Fish and Wildlife Service advisory opinion set aside because such advisory opinions were often followed by the agencies that directly caused plaintiffs’ injuries).

With these rules in hand, the standing analysis requires the Court to determine what powers of enforcement the Secretary possesses. The Secretary’s powers under Texas law are certainly not exhaustive, but they are nonetheless expansive—indeed, they are far more expansive than those of the Board in *LeBlanc* or the Commerce Secretary in *Franklin*. The Secretary is given the authority and mandate to “obtain and maintain uniformity in the application, operation, and interpretation” of election laws

in Texas, and pursuant to that authority she promulgates binding regulations and nonbinding election law opinions.¹¹ Tex. Elec. Code Ann. § 31.003. She must “assist and advise all election authorities with regard to the application, operation, and interpretation” of the election laws, and “may take appropriate action to protect the voting rights of the citizens of [Texas] from abuse by the authorities administering the state’s electoral processes.” *Id.* §§ 31.004(a), 31.005(a). Where she “determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner that impedes the free exercise of a citizen’s voting rights,” she “may order the person to correct the offending conduct.” *Id.* § 31.005(b). And although she may not be able to directly order a county voting registrar to follow state law in other instances, the Secretary admitted in this Court that—through the Texas Attorney General—she can still bring a suit in her name to obtain a writ of mandamus against any county official who refuses to follow her interpretations of the voting laws. Preliminary Inj. Hr’g Tr. 395–96, June 12, 2012; *see also* Def. Andrade’s Mot. to Dismiss 10. Finally, the Secretary can withhold certain state funds from county registrars

¹¹ Indeed, the Secretary responded promptly to the Organizational Plaintiffs’ letter asking for clarification on the proper interpretation of the Election Code. Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah.

who refuse to follow the regulations that she has promulgated in the Texas Administrative Code, one of which requires VDRs to personally deliver certain voter registration applications in compliance with the deadlines in section 13.042 of the Election Code. *See* 1 Tex. Admin. Code § 81.4 (2002).¹² The Secretary's authority more than satisfies *LeBlanc*'s requirement that she have "definite responsibilities relating to the application of" the Election Code. *LeBlanc*, 627 F.3d at 124. She is therefore a proper party to this suit.

Even if the Secretary's powers were limited to interpretation, *Franklin*—viewed in light of the Secretary's admissions and the evidence presented to this Court—would also require this conclusion. If the Secretary were to be enjoined, most—if not all—Texas county registrars are likely to amend their conduct in response to the injunction. Defendant Johnson testified that the Secretary was "absolutely essential" to the operation of

¹² The Secretary and Johnson disagree about whether the Secretary can withhold these "Chapter 19 funds" as an enforcement mechanism. Johnson claims that the funds can be withheld whenever a county registrar refuses to follow Texas law, while the Secretary claims they can never be withheld. *See* Def. Andrade's Postsubmission Br. 2, ECF No. 60; Preliminary Inj. Hr'g Tr. 403–05, June 12, 2012. There are no Texas cases on point to guide this court, but it is apparent that there are relevant situations in which the Secretary could withhold Chapter 19 funding as an enforcement mechanism. Under Texas law, county registrars are granted certain state funds to defray the costs of voter registration. *See* Tex. Elec. Code Ann. §§ 19.001–19.006. However, the Secretary may withhold funds from a county registrar not in substantial compliance with "rules implementing the registration service program," *id.* § 19.002(d), and may refuse to grant funds to county registrars who fail to adhere to the rules the Secretary promulgates in chapter 81 of the Texas Administrative Code. 1 Tex. Admin. Code § 81.29 (2007).

voter registration procedures in her office, and that she had no choice but to obey the Secretary's "restrictions." Preliminary Inj. Hr'g Tr. 352, June 12, 2012. Governor White testified that, during his tenure as Secretary of State in the 1970s, he was able to use the persuasive power of his office to convince several recalcitrant county registrars to follow the law. *Id.* at 304–07. And during the hearing, the Secretary admitted that at least some county registrars follow the progress of lawsuits against the Secretary and seek updates from her about how the rulings in those suits affect their conduct. *Id.* at 399–400. *Lujan's* requirements that the Organizational Plaintiffs' alleged injuries be "fairly traceable" to the Secretary and "likely" to be redressed by an injunction against her are satisfied. *Lujan*, 504 U.S. at 560. The Organizational Plaintiffs have standing in their suit against the Secretary.

B. County Registrar Johnson

The analysis of the Organizational Plaintiffs' standing to sue Johnson is straightforward. Johnson argues that she is not the cause of Plaintiffs' injuries because she is required to enforce the laws enacted by the Texas Legislature and the interpretations and regulations promulgated by the Secretary, whatever those may be. *See* Def. Johnson's Am. Mot. to Dismiss 11–12; Preliminary Inj. Hr'g Tr. 352, June 12, 2012. Johnson further argues

that Plaintiffs' injuries will not be redressed by enjoining her because an injunction would not affect the Election Code's statewide enforcement. Thus, Johnson's view, which she has repeated throughout this litigation, is that her role is ministerial and that she is an unwitting and powerless spectator to the Organizational Plaintiffs' real dispute against the state. *See* Def. Johnson's Am. Mot. to Dismiss 11; Preliminary Inj. Hr'g Tr. 458–59, June 12, 2012.

While it is true that Johnson had nothing to do with enacting the Election Code, is not involved in the promulgation of statewide regulations interpreting it, and cannot enforce it outside Galveston County, Texas law designates her as the governmental official who is directly responsible for Galveston County's enforcement of many of the provisions challenged in this suit. As quick reference to well-known Supreme Court cases illustrates, constitutional challenges are often brought against local entities or officials enforcing statewide laws they played no role in creating. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (challenging a state law criminalizing abortion by bringing suit against the district attorney of Dallas County, Texas); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963) (challenging a state law requiring the reading of Bible verses in public schools by bringing suit against the school district of Abington Township, Pennsylvania).

Texas law designates county tax assessors like Johnson as the voter registrars for their counties. Tex. Elec. Code Ann. § 12.001. As the voter registrar, she is directly responsible for the appointment and training of VDRs and the enforcement of all the VDR regulations. *See* Tex. Elec. Code Ann. §§ 13.031, 13.036, 13.047. And county tax assessors like Johnson are also directly involved in the decision of whether to release county voter registration records pursuant to demands made under the NVRA. *See* Pls.’ Ex. 3, Letter from Vince Ryan, Harris Cnty. Att’y, to the Hon. Greg Abbott (Dec. 7, 2010). Because Johnson enforces the laws that the Organizational Plaintiffs contend cause them injury, an injunction against her would directly redress that alleged injury. *See City of Herriman v. Bell*, 590 F.3d 1176, 1182 (10th Cir. 2010) (holding, in response to a nearly identical standing argument from a local elections clerk with similarly ministerial duties, that standing was satisfied because the defendant was “the official responsible for running the local . . . election, and may yet be subject to future federal court restrictions”).

Both the Secretary and Johnson have a designated role to play in the interpretation and enforcement of the Election Code, and both are proper parties to any suit seeking to challenge its validity and enjoin its

enforcement. Plaintiffs have amply demonstrated their standing to sue both Defendants. Defendants' motions to dismiss for lack of standing are denied.

III. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

With the jurisdictional question settled, the Court now turns to Plaintiffs' motion for a preliminary injunction. To prevail at this early stage of the litigation, Plaintiffs must show "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (citation omitted).¹³

A. First Factor—Substantial Likelihood of Success

1. Preemption Challenges

a. Preemption Under the Elections Clause

Of the eight regulations at issue in the preliminary injunction stage, Plaintiffs argue that the federal NVRA preempts the following five: (i) the Photocopying Prohibition; (ii) the Personal Delivery Requirement; (iii) the

¹³ Defendants' motions to dismiss for failure to state a claim pursuant to Rule 12(b)(6) are partially addressed herein. For the challenges discussed below on which the Court concludes that Plaintiffs are substantially likely to succeed, that analysis necessarily denies the 12(b)(6) motions. For the claims that the Court found did not meet the "substantial likelihood" standard, or those that the Organizational Plaintiffs did not include in their request for preliminary relief, the Court will address the 12(b)(6) motions in a future order.

County Limitation; (iv) the Training Requirement; and (v) the Completeness Requirement. This Court finds that Plaintiffs have demonstrated that they are substantially likely to succeed in their preemption challenges to the Photocopying Prohibition and the Personal Delivery Requirement.

Preemption challenges usually derive from the Supremacy Clause. But when preemption challenges are brought against state election laws, the Elections Clause of the Constitution governs. *See Foster v. Love*, 522 U.S. 67, 69 (1997); *see also, e.g., Gonzalez v. Arizona*, 677 F.3d 383, 390–92 (9th Cir. 2012) (en banc); *Harkless*, 545 F.3d at 454; *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793–94 (7th Cir. 1995). The Elections Clause states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, § 4, cl. 1. It “invests the States with responsibility for the mechanics of congressional elections . . . but only so far as Congress declines to preempt state legislative choices.” *Foster*, 522 U.S. at 69. When Congress acts to regulate federal elections, its “regulations . . . are paramount to those made by the State legislature[s]; and if they conflict

therewith, the latter, so far as the conflict extends, ceases to be operative.”

Ex parte Siebold, 100 U.S. 371, 384 (1879).

Although it is clear that the Elections Clause grants Congress the power to override state election laws regulating federal elections, case law says little about the proper standard to apply when analyzing Elections Clause preemption. The Fifth Circuit’s guidance on this matter is limited to a brief statement that state and federal law must “directly conflict” in order for Elections Clause preemption to occur. *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000).¹⁴ Neither the Supreme Court nor the Fifth Circuit have ruled whether Elections Clause preemption law contains the Supremacy Clause’s “presumption against preemption,” *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), its “plain statement” rule, *see Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), or its requirement that a reviewing court attempt to reconcile conflicting federal and state law before preempting, *see Altria Grp., Inc. v. Good*, 555 U.S. 70, 76–77 (2008). However, the Sixth and Ninth Circuits have spoken convincingly on these matters.

¹⁴ This requirement does not limit this Court’s scrutiny of the challenged regulations. In *Bomer*, the Fifth Circuit endorsed a far-ranging Elections Clause analysis. The *Bomer* court went beyond the plain text of the federal law at issue to examine a wide variety of sources—including a law review article and the Congressional Record—in determining that no conflict existed in that case. *See Bomer*, 199 F.3d at 776–77.

In the recently decided *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), the en banc Ninth Circuit discussed the standard for Election Clause preemption in the context of a challenge to Arizona's Proposition 200. That proposition required voter registration applicants to present proof of U.S. citizenship when registering to vote. *Id.* at 387. The plaintiffs in that suit claimed that the proof-of-citizenship requirement conflicted with the NVRA's requirement that states accept applications submitted using the "federal form," the content of which the NVRA prescribes and limits. *Id.* at 390; *see* 42 U.S.C. §§ 1973gg-2(a)(2), 1973gg-4, 1973gg-7. The Ninth Circuit agreed and held that Proposition 200's proof-of-citizenship requirement was preempted as applied to the federal form. *Gonzalez*, 677 F.3d at 403.

Judge Ikuta's opinion rejected Arizona's argument that the Supremacy Clause's presumption against preemption and plain statement rule should apply.¹⁵ It noted that, when analyzing preemption under the Supremacy Clause, courts must act with great hesitation before preempting in order to preserve the "delicate balance" between the states and the federal

¹⁵ Eight of the ten judges in *Gonzalez* agreed on this point. Six joined Judge Ikuta's majority opinion in full on this issue, while Chief Judge Kozinski, writing separately to concur, agreed that the presumption against preemption and plain statement rule could not be applied because "the Supreme Court has never articulated any doctrine giving deference to the states under the Elections Clause." *Gonzalez v. Arizona*, 677 F.3d 383, 400 (9th Cir. 2012) (en banc) (Kozinski, C.J., concurring).

government. *See id.* at 392 (quoting *Gregory*, 501 U.S. at 460). This, it said, was because the Supremacy Clause addressed preemption “in areas within the states’ historic police powers.” *See id.*; *see also Gregory*, 501 U.S. at 461 (“[The Supremacy Clause’s] plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”). Judge Ikuta contrasted the domain of the Supremacy Clause with that of the Elections Clause, which expressly “committed” federal election procedures “to the exclusive control of Congress.” *Gonzalez*, 677 F.3d at 391 (quoting *Colegrove v. Green*, 328 U.S. 549, 554 (1946)). Because the Elections Clause governs “only an area in which the states have no inherent or reserved power: the regulation of federal elections,” the presumption against preemption and plain statement rule did not apply. *Id.* at 392 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995)); *accord Harkless*, 545 F.3d at 454 (holding that the presumption against preemption and the plain statement rule are inapplicable in the Elections Clause analysis).

Thus, the Elections Clause requires a more searching preemption analysis than that allowed under the Supremacy Clause. The Court notes, however, that the full extent of the distinction between Elections Clause

preemption and Supremacy Clause preemption need not be resolved at this time. The challenged provisions “directly conflict” with the mandates of the NVRA; for now, that is all that is required to determine that Plaintiffs are substantially likely to succeed on the merits of the two claims which the Court now addresses. *Bomer*, 199 F.3d at 775.

b. The Photocopying Prohibition

The Texas Election Code states that “[a] volunteer deputy registrar may distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person.” Tex. Elec. Code Ann. § 13.038. The Secretary contends that section 13.038 is an exclusive grant of power to VDRs, and that, because VDRs are limited to distributing and collecting applications for delivery, they may not make copies of the applications they collect, particularly given the confidentiality requirements of section 13.004. *See* Tex. Elec. Code Ann. §§ 13.004, 13.038; Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah 6. The Organizational Plaintiffs contend that the following NVRA provision, titled “Public disclosure of voter registration activities,” preempts the prohibition on photocopying:

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 concerning the implementation of programs and activities conducted for the

purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

42 U.S.C. § 1973gg-6(i).

The Secretary defends the Photocopying Prohibition on the grounds that (1) voter registration applications are not “records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters” subject to public disclosure under the NVRA; and (2) even if voter registration applications are subject to public disclosure, privacy interests counsel against letting Plaintiffs photocopy the applications. *See* Def. Andrade’s Mot. to Dismiss 14–20; Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah 6.

A recent appellate decision demonstrates that the Organizational Plaintiffs have a substantial likelihood of prevailing on this challenge. Three days after the conclusion of the preliminary injunction hearing, the Fourth Circuit found in favor of the same Organizational Plaintiffs in a similar challenge. *See Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012). In *Long*, the Organizational Plaintiffs challenged the Virginia State Board of Elections’s contention that rejected voter registration

applications in the custody of a local registrar did not need to be released under the NVRA's public disclosure provision. *See id.* at 333–34. The Board made arguments that were essentially identical to the Secretary's two defenses. *See id.* at 335–40.

The *Long* court held that completed voter registration applications are records within the meaning of the NVRA's public disclosure provision, and that these records could not be withheld in order to protect voter privacy. *Id.* at 340. Judge Wilkinson's opinion first noted the purposes of the NVRA: to “increase the number of eligible citizens who register to vote”; to “enhance[] the participation of eligible citizens as voters”; to “protect the integrity of the electoral process”; and to “ensure that accurate and current voter registration rolls are maintained.” *Id.* at 334 (quoting 42 U.S.C. § 1973gg(b)). In support of these goals, the *Long* court recognized that the NVRA's public disclosure requirement “embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies.” *Id.* at 334–35.

Turning to the statute itself, the *Long* court conducted a thorough textual analysis and concluded that the NVRA's public disclosure requirement “unmistakably encompasses completed voter registration

applications.” *Id.* at 335–36. Then, the court rejected the Board’s privacy arguments, noting that the Organizational Plaintiffs had only requested nonconfidential information (i.e., copies of applications with Social Security numbers redacted). *Id.* at 338–40. In doing so, the court stated that “[i]t is not the province of this court . . . to strike the proper balance between transparency and voter privacy. . . . Congress has already answered the question by enacting [section 1973gg-6(i)], which plainly requires disclosure of completed voter registration applications.”¹⁶ *Id.* at 339.

This Court agrees with the statutory analysis in Judge Wilkinson’s opinion and adopts it in full. But *Long* dealt with voter registration applications already in the custody of the appropriate registrar. In this case, the Organizational Plaintiffs do ask for access to such records in their complaint, though they have not asked for preliminary relief on that issue. But their instant challenge, on which they have requested preliminary relief, is to the prohibition on copying applications that have not yet been submitted to governmental custody. Is the outcome any different for applications that are in the custody of a VDR but have not yet been submitted to the county registrar?

¹⁶ It is worth noting that the Organizational Plaintiffs have not requested any information that is not already available to political campaigns or anyone else who requests voter registration information from the Secretary’s statewide computerized voter registration list pursuant to section 18.066 of the Election Code. *See* Tex. Elec. Code Ann. § 18.066; Preliminary Inj. Hr’g Tr. 343–44, June 12, 2012.

For a number of reasons, the answer is no. First, the entire premise of the Texas VDR scheme is that a completed application in the hands of a VDR is in the government's constructive possession. VDRs are deputized as government agents when they collect applications. *See* Tex. Elec. Code Ann. § 13.031; Def. Andrade's Mot. to Dismiss 29 (“[R]eceiving and processing the application is a governmental obligation.”). Moreover, VDRs' behavior is heavily regulated. They must turn a submitted application in to the county registrar within five days, on pain of criminal prosecution. *See* Tex. Elec. Code Ann. §§ 13.042–13.043. As the Secretary has said, “Texas law assumes that the state has the ability to protect that application by regulating how it is handled until it is in the hands of the local registrar.” Def. Andrade's Briefing on First Amendment 2, ECF No. 55.

In any event, the NVRA requires states to make available even those applications that are not in their actual custody. Congress did not require states to “release” or “turn over” records. Those words would have indicated that public disclosure was limited to records in the state's physical possession. But the words chosen, “make available,” are more open-ended. 42 U.S.C. § 1973gg-6(i). 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.

And it would be an absurd result to forbid private parties from copying applications before finally submitting them. Regardless of who physically holds a completed application, it is still a “record” because it contains vital information and is a critical piece in the puzzle of determining whether the voter registration rolls are correct. *See* 42 U.S.C. § 1973gg-6(i). It makes no sense to forbid someone who has collected a voter registration application from copying that application while it is in their possession but to then allow them to make a copy once the government has received it. That would be to succumb to exactly the “administrative chicanery, oversights, [and] inefficiencies” that the NVRA’s public disclosure provision was meant to eliminate. *Long*, 682 F.3d at 335.

Because the NVRA’s Public Disclosure provision directly conflicts with the Secretary’s interpretation of Tex. Elec. Code Ann. § 13.038 as a ban on photocopying applications, the Organizational Plaintiffs have shown they are substantially likely to succeed in their preemption challenge to the Photocopying Prohibition.

c. The Personal Delivery Requirement

The Election Code states that “[a] volunteer deputy registrar shall deliver in person, or by personal delivery through another designated volunteer deputy, to the registrar each completed voter registration

application submitted to the deputy” Tex. Elec. Code Ann. § 13.042(a). By using the mandatory language “shall,” this provision forbids VDRs from using U.S. mail to deliver the applications they have collected to the appropriate county registrar. *See* Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah 5. Any VDR who violates this ban may be criminally prosecuted. Tex. Elec. Code Ann. § 13.043. Plaintiffs contend that several NVRA provisions preempt this Personal Delivery Requirement.

The first of these federal provisions, section 1973gg-4(a)(1), states that “[e]ach State shall accept and use the mail voter registration application form prescribed . . . pursuant to section 1973gg-7(a)(2)” 42 U.S.C. § 1973gg-4. This provision demonstrates Congress’s determination that the states allow applicants to use the federal form to register by mail. The second of these provisions, 42 U.S.C. § 1973gg-2(a)(2), states that “notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in Elections for Federal office . . . by mail application pursuant to section 1973gg-4.” 42 U.S.C. § 1973gg-2(a)(2). By using this exclusive language, this provision sets a floor: while states can create new forms of registering and means of delivering registrations to the appropriate county registrar, the federal mail-in application form must be

allowed in all circumstances. *See Charles H. Wesley Educ. Found. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). The third provision, 42 U.S.C. § 1973gg-6(a)(1), requires each state to “ensure that any eligible applicant is registered to vote in an election . . . in the case of registration by mail under section 1973gg-4 . . . if the valid voter registration form . . . is postmarked not later than . . . 30 days . . . before the date of the election.” 42 U.S.C. § 1973gg-6(a)(1). This provision ensures that any valid application submitted by mail will be accepted and result in a properly registered voter even if state law would otherwise forbid that result. Thus, as the Eleventh Circuit held in *Cox*, “[b]y 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.” *Cox*, 408 F.3d at 1354.

Texas’s Personal Delivery Requirement, which forbids VDRs from mailing the applications they have collected, directly conflicts with the NVRA’s requirement that states “accept and use” the federal mail-in application form. 42 U.S.C. § 1973gg-4; *see also Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 702 n.6 (N.D. Ohio 2006) (“As drafted and passed, it is arguable that [the Ohio direct return requirement] required personal delivery of voter registration forms. Such a requirement would clearly run afoul of

the NVRA.”).¹⁷ The Election Code, by requiring the personal delivery of applications by VDRs, makes it a crime for a VDR to follow federal law and mail an application, notwithstanding the fact that improperly mailed forms will still be accepted. *See* Tex. Elec. Code Ann. §§ 13.071–13.072; Preliminary Inj. Hr’g Tr. 344, 441–42, June 12, 2012. The NVRA makes no distinction between applications submitted directly by a voter and those submitted by a third party like a VDR. The Personal Delivery Requirement forbids VDRs from mailing in applications, while the NVRA requires the state to allow them to do so. Plaintiffs have shown that they have a substantial likelihood of succeeding on the merits of their preemption challenge to the Personal Delivery Requirement.¹⁸

¹⁷ In *Blackwell*, the Ohio Secretary of State mooted the plaintiffs’ preemption challenge to the Ohio direct return requirement by agreeing that the statute allowed applications to be delivered by mail. *Blackwell*, 455 F. Supp. 2d at 702 & n.6. Nonetheless, the *Blackwell* court ultimately enjoined Ohio’s direct return requirement on First Amendment grounds. *Id.* at 706.

¹⁸ Because Plaintiffs have a substantial likelihood of succeeding on their preemption challenge to the Personal Delivery Requirement, this Court will not address their First Amendment challenge given the principle of avoiding constitutional issues when alternative resolutions are available. Thus, the Secretary’s arguments that the Personal Delivery Requirement imposes only a slight burden on Plaintiffs and is narrowly tailored to further a compelling state interest, arguments that have no bearing on the preemption question, need not be resolved. *See* Def. Andrade’s Mot. to Dismiss. 35–37; Preliminary Inj. Hr’g Tr. 447, 455–56.

2. Plaintiffs' Constitutional Challenges

a. Plaintiffs' Protected Activity and the Standard of Review

The Court next turns to the constitutional challenges. Of the six Election Code regulations at issue in the preliminary injunction stage that this Court has not already addressed, Plaintiffs argue that five violate the First Amendment: (i) the In-State Restriction; (ii) the County Limitation; (iii) the Compensation Prohibition; (iv) the Training Requirement; and (v) the Identification Requirement. This Court finds that Plaintiffs have demonstrated that they are substantially likely to succeed in their First Amendment challenges to the In-State Restriction, the County Limitation, and the Compensation Prohibition.

The Organizational Plaintiffs contend that their voter registration activities are a constitutionally protected form of speech and associational activity. As is well-known, “interactive communication concerning political change” stands at the “zenith” of conduct entitled to First Amendment protection. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)); *see also Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010). “The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the

people.”” *Meyer*, 486 U.S. at 421 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The Organizational Plaintiffs’ registration drives seek political change at the most elemental level. They encourage citizens to engage in the political process by registering to vote. Indeed, few messages strike closer to the underlying rationale for First Amendment protection that Justice Brandeis famously articulated:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The Organizational Plaintiffs’ communications are 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.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356,

370 (1886)); *cf. Citizens United*, 130 S. Ct. at 898 (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. 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.”) (internal citations omitted). First Amendment scrutiny of laws that regulate political advocacy also guards against the concern that those in power will enact rules of the political game that make it more likely they will retain their power. *See McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 307–08 (2003) (Kennedy, J., concurring in part and dissenting in part) (arguing that a campaign finance regulation was unconstitutional because it functioned in practice as “an incumbency protection plan”).

The Secretary acknowledges that the act of encouraging another citizen to register is a form of protected speech. Def. Andrade’s Mot. to Dismiss 29; Def. Andrade’s Briefing on First Amendment 2–3. But, she contends, the challenged regulations do not implicate that right because they only regulate the stage of the voter registration process at which a VDR receives an application and submits it to the elected registrar. This distinction rests on a couple of erroneous premises. First, as already noted, the statute that the Secretary reads as an exclusive grant of power to VDRs

to accept and handle applications may very well also be an exclusive grant to “distribute voter registration application forms.” Tex. Elec. Code Ann. § 13.038. Second, the Compensation Prohibition is not tied to VDRs but instead imposes criminal sanctions on any person who makes or receives the prohibited forms of payment in exchange for “facilitat[ing]” voter registrations. *Id.* § 13.008. The challenged provisions thus do more than just regulate the application receipt and submission functions that VDRs perform.

But the Secretary’s attempt to carve even that conduct outside the scope of the First Amendment fails for a more fundamental reason. She takes far too narrow a view of the First Amendment in arguing that it does not apply to laws regulating only the receipt and submission of applications by VDRs who are participating in registration drives. For one thing, 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. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404–06 (1989) (flag burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (arm bands to protest the Vietnam War); *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966) (sit-ins to protest segregation). The messages in those cases are typically political ones, but they are not always

so; the Supreme Court has held that the “outer perimeters” of the First Amendment provide protection even to such expressive conduct as nude dancing. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991). Federal courts have recognized that the expressive conduct of actually registering voters, to the extent such conduct can be separated from the speech involved in persuading voters to register, is protected expressive conduct. *See, e.g., Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1200 (D.N.M. 2010); *Blackwell*, 455 F. Supp. 2d at 700.

Even more problematic for the Secretary’s attempt to avoid the First Amendment is the fact that third-party voter registration activity implicates not just freedom of speech, but also freedom of association. The “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *see also Kasper v. Pontikes*, 414 U.S. 51, 56–57 (1973) (“There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments.”) (citation omitted). Voter registration drives, in which citizens engage with one another to increase participation in the

political process, are paradigmatic associational activity. *See Herrera*, 690 F. Supp. 2d at 1202; *Blackwell*, 455 F. Supp. 2d at 700, 706 (“The interactive nature of voter registration drives is obvious: they convey the message that participation in the political process through voting is important to a democratic society.”).

Supreme Court cases applying First Amendment protection to laws regulating those who collect signatures for ballot initiative petitions also reject the Secretary’s purported distinction. *See Buckley*, 525 U.S. at 197, 200 (striking down Colorado’s requirement that those collecting petition signatures wear a badge and be registered voters); *Meyer v. Grant*, 486 U.S. 414 (1988) (striking down Colorado’s ban on paying petition circulators). In those cases, it could be said—just as the Secretary argues here—that the invalidated regulations did not prevent anyone from actually speaking to another citizen in an attempt to persuade her to sign a petition; rather, the regulations just governed the act of collecting the signatures. But Justice Thomas explained why such regulations, those the Secretary says govern only “governmental” conduct, are entitled to First Amendment protection:

Although Colorado’s registration requirement . . . does not *directly* regulate speech, it operates in the same fashion that Colorado’s prohibition on paid circulators did in *Meyer*—the requirement reduces the voices available to convey political messages. We unanimously concluded in *Meyer* that initiative petition circulation was core political speech. Colorado’s law

making it a felony to pay petition circulators burdened that political expression, we said, because it reduced the number of potential speakers.

Buckley, 525 U.S. at 210 (Thomas, J., concurring) (emphasis in original) (citations omitted). The same reasoning underlies the Supreme Court's determination that donations to political campaigns are entitled to First Amendment protection. *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

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." *Meyer*, 486 U.S. at 422; *see also League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1332–33 (S.D. Fla. 2006) ("Here, as in *Meyer*, the Third–Party Voter Registration Law has reduced the total quantum of speech."). The In-State Requirement excludes millions of Americans from serving as VDRs in Texas. The County Limitation substantially restricts the number of potential voters a VDR can help register. And the Compensation Prohibition reduces the number of people willing to hire VDRs or to work as VDRs because it criminalizes

performance-based pay. Indeed, as the Secretary concedes, *see* Def. Andrade’s Briefing on First Amendment 3–4, every federal court considering the question has rejected her argument and ruled that the voter registration activity in which the Organizational Plaintiffs engage is protected First Amendment conduct. *See League of Women Voters of Fla. v. Browning*, 4:11cv628-RH/WCS, 2012 WL 1957793, at *2 (N.D. Fla. May 31, 2012) (“The assertion that the challenged provisions implicate no constitutional rights is plainly wrong This is core First Amendment activity.”); *Herrera*, 690 F. Supp. 2d at 1216 (“In short, to participate in voter registration is to take a position and express a point of view in the ongoing debate whether to engage or to disengage from the political process. The Court concludes that the act of voter registration is expressive conduct worthy of First–Amendment protection.”); *Blackwell*, 455 F. Supp. 2d at 700 (“[T]he Court is satisfied that participation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment. These rights belong to—and may be invoked by—not just the voters seeking to register, but by third parties who encourage participation in the political process through increasing voter registration rolls.”); *Cobb*, 447 F. Supp. 2d at 1334 (“Because the collection and submission of voter registration drives is intertwined with speech and

association, the question is not whether Plaintiffs' conduct comes within the protections of the First Amendment, but whether Defendants have regulated such conduct in a permissible way."); *see also Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008) ("The parties do not dispute that voter registration is speech protected by the First Amendment.").

But while the State's interest in overseeing the receipt and submission of voter registration applications does not eliminate First Amendment protection, the Supreme Court has recognized that the interest does play a role in the ultimate determination of constitutionality. There "must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Even within the nebulous world of constitutional balancing tests, however, the test the Supreme Court has developed for analyzing election regulations that infringe on First Amendment interests stands out for its indeterminacy:

[A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must 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 also must 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 provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is no substitute for the hard judgments that must be made.

Anderson v. Celebrezze, 460 U.S. 780, 789–90 (1983) (citations and quotations omitted).

The Supreme Court later held that this balancing is not necessary when election laws impose severe burdens, in which case strict scrutiny applies and the restrictions on First Amendment activity must be “narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); *see also Buckley*, 525 U.S. at 192 (applying strict scrutiny); *Meyer*, 486 U.S. at 420 (same). But when an election law imposes lesser First Amendment burdens, the balancing of interests quoted above, now known as the *Anderson–Burdick* test, applies. *See Burdick*, 504 U.S. at 434 (stating that “reasonable, nondiscriminatory restrictions” will generally withstand scrutiny) (citation omitted); *see also League of Women Voters of Fla. v. Browning*, 2012 WL 1957793, at *2–*3; (applying the lesser balancing test to regulations of third-party voter registration activities); *Herrera*, 690 F. Supp. 2d at 1214 (same); *Blackwell*, 455 F. Supp. 2d at 701–02 (same); *Cobb*, 447 F. Supp. 2d at 1331–32 (same).

Two of the recently enacted laws being challenged on First Amendment grounds in this case—the In-State Restriction and the Compensation Prohibition—are arguably subject to strict scrutiny. The In-State Restriction is inherently discriminatory. *See Anderson*, 460 U.S. at 792–93 (“[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.”) (citation omitted). And the Compensation Prohibition is “an outright ban” on speech “backed by criminal sanctions” that has “the inevitable effect of reducing the total quantum of speech.” *Citizens United*, 130 S. Ct. at 897; *Meyer*, 486 U.S. at 423.¹⁹ However, for purposes of ruling on Plaintiffs’ motion for a preliminary injunction, this Court uses the *Anderson–Burdick* balancing test because the challenged sections of those two provisions do not survive even under that less exacting scrutiny. It is to that pure balancing test that the Court now turns.

¹⁹ Strict scrutiny has been applied in a number of cases where plaintiffs brought First Amendment challenges to compensation bans. *See infra* note 28.

b. The In-State Requirement

One of the 2011 amendments to the Election Code provides that only a Texas resident may be appointed a VDR. *See* Tex. Elec. Code Ann. §§ 13.031(d)(3), 11.002(a)(5). Because only VDRs can receive, handle, and submit registration applications, this essentially makes it a crime for a nonresident to “touch” a third party’s application. *See id.* § 13.044 (criminalizing “purport[ing] to act” as a VDR without an effective appointment). This In-State Restriction, believed to be the only one of its kind in the nation, is unlikely to withstand First Amendment scrutiny.

Although the Organizational Plaintiffs generally believe it is more effective to employ local residents as canvassers, the In-State Restriction’s ban on employing non-Texas residents as VDRs impedes the Organizational Plaintiffs’ ability to effectively staff voter registration drives in Texas. *See* Pls.’ First Am. Compl. ¶ 101, ECF No. 8; Preliminary Inj. Hr’g Tr. 22–23, June 11, 2012. As the executive director of Project Vote testified, the restriction prevents their employees, who are able to develop expertise from working full-time and around the country in the voter registration field, from supervising the managers and canvassers of their local partner organizations. *See* Preliminary Inj. Hr’g Tr. 24, 61–62, June 11, 2012 (“[W]hat [the In-State Restriction] essentially says is our national managers can’t have a

hands-on role in the voter registration process or the management of this work. And that is their best value, is the fact that they can do hands-on work. So it really prohibits our assistance in troubleshooting or identifying problems [The In-State Restriction] reduces our ability to be hands-on and look for problems.”).

History demonstrates the importance of allowing Americans the freedom to promote voter registration throughout the nation. The Mississippi Freedom Summer of 1964, one of the most famous voter registration drives in this country’s history, involved hundreds of out-of-state residents working with local African-Americans to end that state’s history of pervasive racial discrimination in voting. *See* JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 215–71 (1994). The astounding transformation of African-American political participation in Mississippi that the Freedom Summer helped launch—by 2002, Mississippi had the most elected African-Americans of any state²⁰—demonstrates the power of voter registration drives and in particular of one that relied heavily on out-of-state participants.

²⁰ *See Table 413: Black Elected Officials by Office and State, 1970 to 2002, and State, 2002*, UNITED STATES CENSUS BUREAU: THE 2011 STATISTICAL ABSTRACT, *available at* <http://www.census.gov/compendia/statab/2011/tables/11s0413.pdf> (listing 950 elected African-American officials in Mississippi with Alabama at second place with 757 elected African-American officials) (last visited July 26, 2012).

The State has not specified any interest in this criminal prohibition that would have rendered Freedom Summer illegal, let alone a weighty one. Defendant Andrade asserts conclusory claims that “regulatory interests” justify the In-State Restriction and that the Election Code generally “protect[s] the right to vote.” Def. Andrade’s Mot. to Dismiss 37; Def. Andrade’s Briefing on First Amendment 5. In fact, the only state interest either Defendant has articulated as a justification for the In-State Restriction came in response to the Court’s direct questioning during the preliminary injunction hearing:

THE COURT: What’s the state interest with the instate restrictions? Is it one of the new statutes?

[THE SECRETARY]: I think there the Legislature is assuming that people in Texas are going to—are going to take better care of their—of their fellow citizens’ registration forms than people from out of state. And given the sort of well publicized problems with other voter registration organizations coming in from out of state, I’m not—that’s a perfectly reasonable conclusion.

Preliminary Inj. Hr’g Tr. 457, June 12, 2012.

But any state interest in restricting nonresidents from acting as VDRs is not a strong one. First, it may be more logical to surmise—and surmising is all the state has done in asserting an interest behind the In-State Restriction—that in-state residents are more prone to commit fraud because they are more likely to be passionate about certain local candidates and

causes. Moreover, the training requirement eliminates any concern that out-of-state residents will be unfamiliar with Texas law. And the state has not produced evidence showing that rampant fraud by out-of-state VDRs existed in pre-2011 Texas elections or continues to exist in those states that permit all Americans to engage in the voter registration activities protected by the First Amendment.

Of course, only Texas residents may actually register and vote in Texas elections. But there is a host of other activities aimed at influencing the political process—making speeches, donating money to campaigns, or drafting and distributing campaign literature, to name just a few—that non-Texans are allowed to perform. The state has not justified its singling out of third-party voter registration activity as the one area of campaign activity off-limits to Americans from other states. And the draconian nature of this unique, complete ban on non-Texans becoming VDRs is certainly not a narrowly tailored attempt at curtailing fraud that out-of-state canvassers may commit.

Plaintiffs have shown that the In-State Restriction imposes a substantial burden on their First Amendment rights, and Defendants have not been able to explain how it substantially advances a legitimate state interest.

Plaintiffs therefore have demonstrated a substantial likelihood of establishing that the In-State Restriction violates the First Amendment.

c. The County Limitation

Tex. Elec. Code Ann. § 13.038 states that “[a] volunteer deputy registrar may distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person.” The Secretary argues that this grant of power is exclusive, such that it impliedly bans any person from accepting or handling applications from residents of counties other than the county in which the person is appointed as a VDR. *See* Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah 4. Under this interpretation, which the Court accepts at this stage of the proceeding, a VDR must be appointed in every county in which any applicant who submits an application to her resides. And because the training requirement appears to be tied to the appointment process with a particular county’s registrar, *see* Tex. Elec. Code § 13.031(e), this also means that a VDR must complete training in every county in which she is appointed.

Under the *Anderson–Burdick* balancing analysis, Plaintiffs have demonstrated that the County Limitation imposes heavy administrative burdens on organizations that conduct voter registration drives. *See* Pls.’

First Am. Compl. ¶¶ 103–104. It does so by forcing organizations engaged in large-scale registration efforts to have their canvassers and managerial staff appointed and trained as VDRs in multiple counties. *See id.* ¶ 103. As Plaintiffs have pointed out, a VDR active only in the City of Dallas would need to be appointed in Dallas, Denton, Collin, Rockwall, and Kaufman Counties in order to legally accept applications from residents of all parts of the city. Pls.’ Opp. To Defs.’ Mots. to Dismiss and Supporting Memo. of Law 31, ECF No. 25. The fact that VDRs working in certain areas, such as downtown business districts populated by commuters, are very likely to receive applications from applicants domiciled in other counties compounds this problem. Preliminary Inj. Hr’g Tr. 45–46, June 11, 2012. For example, a VDR engaged in voter registration activities in downtown Houston is likely to receive applications not just from Harris County residents, but also from residents of Montgomery, Fort Bend, Galveston, and other surrounding counties.

The fact that Texas has 254 counties, by far the most of any state and a large number even taking account of the state’s vastness,²¹ magnifies the burden the County Limitation imposes. A registration drive seeking to

²¹ Texas has nearly 100 more counties than the state with the next highest number, Georgia, which has 159 counties. Other large states have far fewer counties than does Texas. Alaska and Montana have 18 “boroughs” and 56 counties, respectively, while California has 58 counties. *See Find a County*, NAT’L ASS’N OF CNTYS. (2012), <http://www.naco.org/Counties/Pages/FindACounty.aspx> (last visited July 26, 2012).

significantly increase statewide voter registration—the goal of the Organizational Plaintiffs—would thus likely need to have canvassers and supervisors appointed in scores of counties. Drives associated with statewide and congressional campaigns would also require VDR appointments in a large number of counties. During the most recent congressional elections (2010), the Fourteenth Congressional District encompassed territory in ten counties, including the four that make up this Court’s division.²² Another district, the Panhandle’s Thirteenth, contained all or part of forty-four counties.²³ The county limitation, by requiring both registration and training in any county in which a potential VDR wishes to submit applications, thus imposes severe time burdens and administrative expenses on voter registration activity.

With respect to the County Limitation, the state cannot put much weight on its side of the *Anderson–Burdick* seesaw. State, not county, law governs voter registration, so there are not county specific issues involved in

²² The counties in the Fourteenth Congressional District were Aransas, Brazoria, Calhoun, Chambers, Fort Bend, Galveston, Jackson, Matagorda, Wharton, and Victoria Counties. *See Census 2010*, TEXAS REDISTRICTING, http://www.tlc.state.tx.us/redist/current_census_2010.html (last visited July 12, 2012).

²³ These were Archer, Armstrong, Baylor, Briscoe, Carson, Childress, Clay, Collingsworth, Cooke, Cottle, Crosby, Dallam, Dickens, Donley, Foard, Gray, Hall, Hansford, Hardeman, Hartley, Haskell, Hemphill, Hutchinson, Jack, Jones, King, Knox, Montague, Moore, Motley, Lipscomb, Ochiltree, Oldham, Palo Pinto, Potter, Randall, Roberts, Sherman, Stonewall, Swisher, Throckmorton, Wheeler, Wichita, and Wilbarger Counties. *See id.*

either VDR appointment or training. Indeed, the statute requires the Secretary of State to issue statewide training standards for county registrars to follow. *See* Tex. Elec. Code Ann. § 13.047. A VDR required to undergo appointment and training in multiple counties would thus simply be repeating the same routine.

The Secretary argues that the County Limitation helps prevent fraud by making local county registrars more aware of the VDRs active in their counties. But with or without the County Limitation, county registrars are only likely to be able to tie particular VDRs to the applications the VDR personally submitted.²⁴ Even when a VDR appointed in County X submits applications via mail or hand delivery to the registrar in County Y, the County Y registrar will still know the identity of the person making the submission. Mandatory county-by-county appointment and training therefore has only a tenuous connection to increasing the ability of registrars to track applications. Moreover, the Secretary was unable to identify any other state having a similar county-by-county appointment or training requirement. Because there is no evidence or reason to believe that the practices of all the other states, which do not require appointment of

²⁴ The Identification Requirement, which this order does not enjoin, is the mechanism available for individuals to report any suspicious presubmission VDR activity to county registrars. *See* Tex. Elec. Code Ann. § 13.033.

individual registrars let alone on a county-by-county basis, have a higher incidence of voter registration fraud than Texas, Defendants are unable to show that the County Limitation plays a meaningful role in combating fraud.

Given the substantial burden the County Limitation imposes on large-scale voter registration activity and the negligible connection the provision has to the state interest in fraud prevention, the Organizational Plaintiffs are substantially likely to prevail on this First Amendment challenge.

d. The Compensation Prohibition

i. Overview and Scope of the Challenged Provisions

The Organizational Plaintiffs seek to enjoin part of the recently enacted Compensation Prohibition. The provision, titled “Performance-based Compensation for Registering Voters Prohibited,” criminalizes many employment actions by persons who pay others to conduct voter registration activities. Tex. Elec. Code Ann. § 13.008. Unlike the other statutes challenged in this case, the Compensation Prohibition is not limited to those seeking to receive and submit third-party applications (i.e., those who must become VDRs under the Secretary’s interpretation of Texas law); it applies to anyone involved in voter registration activity who pays or receives the prohibited forms of compensation.

The Compensation Prohibition has the following three subparts:

- A ban on “compensat[ing] another person based on the number of voter registrations that the other person successfully facilitates.” Tex. Elec. Code Ann. § 13.008(a)(1);
- A ban on “present[ing] another person with a quota of voter registrations to facilitate as a condition of payment or employment.” *Id.* § 13.008(a)(2); and
- A ban on “engag[ing] in another practice that causes another person’s compensation from or employment status with the person to be dependent on the number of voter registrations that the other person facilitates.” *Id.* § 13.008(a)(3).

The statute’s fourth subsection bans any person from accepting compensation for an activity described in the first three subsections. *Id.* § 13.008(a)(4). A violation of any of these four subsections is a Class A misdemeanor punishable by up to a \$4,000 fine, a year’s imprisonment, or both. *Id.* § 13.008(b); Tex. Penal Code Ann. § 12.21. If the person committing an offense is an entity, the entity’s officers, directors, or other agents can be held strictly liable for the offense. Tex. Elec. Code Ann. § 13.008(c).

The Organizational Plaintiffs do not challenge the prohibition on paying canvassers per application collected, because that is not a practice they employ. Preliminary Inj. Hr’g Tr. 103–04, June 11, 2012. And courts of appeals, in the context of petition drives, have upheld similar bans on per-signature payments as narrowly tailored at eliminating a financial incentive for fraud. *See, e.g., Person v. N.Y. State Bd. of Elections*, 467 F.3d 141, 143

(2d Cir. 2006); *Prete v. Bradbury*, 438 F.3d 949, 969–71 (9th Cir. 2006).

But the Organizational Plaintiffs contend that the rest of the Compensation Prohibition severely burdens their ability to conduct registration drives by preventing them from rewarding or punishing employees based on performance as most effective businesses are able to do. *See* Pls.’ Am. Compl. ¶¶ 96–98, 106–113; Preliminary Inj. Hr’g Tr. 209, June 12, 2012.

Because the Organizational Plaintiffs typically engage in large-scale registration drives aimed at substantially increasing the voter rolls in targeted communities, they rely on paid canvassers. Preliminary Inj. Hr’g Tr. 69–70, June 11, 2012. The Organizational Plaintiffs pay their canvassers hourly wages. They do not pay canvassers per application or set predetermined target numbers of applications that their canvassers must collect as a condition of payment. *Id.* at 58, 103–04. But the Organizational Plaintiffs argue that the Compensation Prohibition nevertheless makes it effectively impossible for them to conduct large-scale voter registration drives in Texas. *Id.* at 69–70. They argue that it exposes them to criminal prosecution if they terminate or otherwise discipline a canvasser who, through lack of either effort or skill, performs poorly by collecting an inadequate number of applications. *Id.* at 57–58. For example, the Organizational Plaintiffs contend the Compensation Prohibition makes it a

crime to fire an employee who, after a full month of canvassing, has only registered a handful of voters despite working more than a hundred hours. This would be a serious burden on the Organizational Plaintiffs because “some canvassers simply cannot meet any sort of standards” and, without the ability to discipline or terminate canvassers for poor performance, the Organizational Plaintiffs would “go broke if [they] kept them on staff.” *Id.* at 59. Conversely, the Compensation Prohibition prevents the Organizational Plaintiffs from promoting or increasing the pay of a canvasser who is especially hardworking or competent.

It is first necessary to determine whether the statute actually criminalizes such performance-based employment decisions. The Secretary argues that the Compensation Prohibition only criminalizes two practices: (1) paying canvassers on a per-application basis and (2) conditioning payment or employment solely on the submission of a preset number of applications. *See* Preliminary Inj. Hr’g Tr. 211–12, 451–52, June 12, 2012; Def. Andrade’s Postsubmission Br. 3, ECF No. 60. She argues that the statute does not ban terminations or adverse employment actions based on a retrospective, generalized review of a canvasser’s performance. *See* Preliminary Inj. Hr’g Tr. 211–12, 451–52, June 12, 2012.

The Court is mindful that no Texas court has interpreted section 13.008, and thus this Court must accept “any narrowing construction or practice to which the law is fairly susceptible.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 770 n.11 (1988). However, the Secretary’s construction would render subsection (a)(3) superfluous. *See United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (“To read [the challenged statute] as the Government desires requires rewriting, not just reinterpretation.”). Subsection (a)(3), the broader of the two challenged subsections, unambiguously applies to commonplace performance-based employment decisions: any person who terminates a canvasser for collecting an inadequate number of applications, or promotes a canvasser to a managerial role for successfully bringing in an extraordinary number of applications, would violate the prohibition on “engag[ing] in another practice that causes another person’s . . . employment status with the person to be dependent on the number of voter registrations that the other person facilitates.” Tex. Elec. Code Ann. § 13.008(a)(3). At the preliminary injunction hearing, the Secretary struggled to explain how this provision could be read any other way. *See Preliminary Inj. Hr’g Tr.* 211–16, 451–56, June 12, 2012. If read in the narrow manner the Secretary proposes—i.e., limited to preventing payment per application and adverse employment

actions based solely on the failure to meet predetermined “quotas”—subsection (a)(3) would not add anything to the two preceding subparts.

Subsection (a)(2), which bans “present[ing] another person with a quota of voter registrations to facilitate as a condition of payment or employment,” is not as expansive as subsection (a)(3), but it still prohibits the Organizational Plaintiffs from disciplining canvassers for poor performance based on low productivity. Tex. Elec. Code Ann. § 13.008(a)(2). The Court agrees with the Secretary that (a)(2)—unlike subsection (a)(3)—may fairly be read as applying only to preset, prospective performance goals. “Condition” is commonly defined as a condition precedent that contemplates future performance. *See Condition*, MERRIAM-WEBSTER, www.merriam-webster.com/definition/condition (defining “condition” as both “a premise upon which the fulfillment of an agreement depends” and “something essential to the appearance or occurrence of something else”) (last visited Aug. 1, 2012). And the word “presenting,” as opposed to a broader term like “using” or “applying,” can be read as limited to quotas announced prior to performance. Thus, subsection (a)(2) can be fairly read as applying to informing canvassers that their (i) pay or (ii) employment is dependent on the number of applications received in the future.

The Secretary focuses on the first part of subsection (a)(2), arguing that telling a canvasser they will not be paid unless they receive a certain number of applications creates fraud incentives similar to the pay-per-application practice. But the latter part—the ban on conditioning “employment” on the number of applications collected—remains problematic in that it would continue to ban ordinary performance-based employment decisions. Numbers-based and performance-based terminations are often one and the same as the following examples demonstrates. Assume after conducting performance reviews that the Organizational Plaintiffs determine that a canvasser has only collected two applications in the preceding month. They meet with the canvasser and, following a standard business practice, implement a performance-improvement plan that notifies the canvasser that he will be terminated unless he is more productive. *See Preliminary Inj. Hr’g Tr.* 58–61, June 11, 2012 (discussing the training and “second chance” that Plaintiffs provide for poor performers). In the month that follows, the canvasser only submits one application and is fired for not improving. Subsection (a)(2), even when read to apply only to setting prospective numbers-based performance requirements as a condition of future employment, would still ban this common performance-based employment action. It would also criminalize

an organization's practice of requiring some bare minimum level of productivity—even if the level were set well below average productivity levels, including requiring the collection of a single application during an eight-hour shift—as a condition of payment or continued employment.

At the hearing, the Secretary seemed to understand that prohibiting such ordinary business practices was problematic and tried to argue that subsection (a)(2) only prohibits excessively high quotas and not the termination of low-performing employees discussed above. *See* Preliminary Inj. Hr'g. Tr. 215, June 12, 2012. But the Secretary does not identify where to draw the line between impermissibly high and acceptably low numbers for use in evaluating performance. In any event, there is no textual basis for reading any such demarcation into the statute. Thus, while subsection (a)(2) encompasses conduct in which Plaintiffs do not engage, including the setting of the “high” quotas that the Secretary contends creates fraud incentives similar to payment-per-application practices, it also reaches customary performance-based employment practices that Plaintiffs utilize and contend are protected First Amendment activity.

This statutory analysis confirms that the Compensation Prohibition bans many performance-based decisions. Subsection (a)(3)'s primary aim is such conduct and, as discussed above, even when read narrowly subsection

(a)(2) reaches a substantial amount of these common business practices and thus is susceptible to an overbreadth challenge. *See Stevens*, 130 S. Ct. at 1587 (stating that in the First Amendment context, “a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep’”) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The Court now proceeds to the First Amendment inquiry and will assess the burden that subsections 13.008(a)(2) and (3) impose upon the Organizational Plaintiffs by criminalizing their conduct and the degree to which the prohibitions further Texas’s interest in fraud prevention.

ii. Plaintiffs’ Burden

Other courts have recognized that prohibiting performance-based employment practices severely burdens First Amendment activity. *See Citizens for Tax Reform v. Deters*, 518 F.3d 375, 385–87 (6th Cir. 2008); *Project Vote v. Kelly*, 805 F. Supp. 2d 152, 166–67 (W.D. Pa. 2011) (interpreting a Pennsylvania compensation ban to avoid what even the Pennsylvania Attorney General conceded would be constitutional problems with a law preventing voter registration organizations from terminating

unproductive workers).²⁵ Indeed, as an “outright ban, backed by criminal sanctions,” the Compensation Prohibition is one of the more burdensome types of First Amendment restrictions. *Citizens United*, 130 S. Ct. at 897. It prevents the Organizational Plaintiffs from terminating ineffective employees whose efforts are not worth the wages paid or from rewarding those who are particularly effective.²⁶

Impeding the ability to make performance-based employment decisions inevitably diminishes the number of voters the Organizational Plaintiffs may register.²⁷ As the Sixth Circuit explained in striking down an Ohio compensation prohibition that banned “pay[ing] any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked”:

²⁵ In *Kelly*, the Western District of Pennsylvania rejected a challenge to a Pennsylvania compensation ban much narrower than Texas’s. *See Kelly*, 805 F. Supp. 2d at 170. The Pennsylvania law in *Kelly* prohibited only the “payment or financial incentive to obtain a voter registration if the payment or incentive is based upon the number of registrations or applications obtained.” *Id.* at 158. In that case, the Pennsylvania Attorney General conceded that the law would be unconstitutional if it banned the Organizational Plaintiffs from terminating unproductive workers. *Id.* at 166–67. The *Kelly* court found that the burden on the Organizational Plaintiffs was *de minimis* and upheld the ban, but only after construing the statute to only prohibit per-application compensation. *Id.* at 170–71, 181.

²⁶ This is partially because there are no good alternative means of detecting ineffective canvassers. *See Preliminary Inj. Hr’g Tr.* 58, June 11, 2012 (“[T]hat’s the only measurement we have that someone has gone out and talked to people.”). The number of applications a canvasser collects is a quantitative benchmark that can easily and efficiently be used to judge that canvasser’s performance; other methods—such as direct supervision of the canvasser in the field—require significant time and money, thereby reducing the amount of resources devoted to actual registration activity.

²⁷ Plaintiffs’ expert witness, Dr. Rousseau, made this point clear in her testimony. As Dr. Rousseau noted, an organization that could not fire unproductive canvassers would “[o]bviously be less effective.” *Preliminary Inj. Hr’g Tr.* 251, June 12, 2012.

Under a plain reading of [the Ohio law, petitioners] could not give a bonus to a circulator based on productivity or longevity. [Petitioners] could not set a minimum signature requirement Arguably, [petitioners] could not terminate a circulator who consistently did not collect enough signatures because, again, to earn a wage (and keep the job) the circulator would, among other things, have to collect a minimum number of signatures

. . . .
. . . [W]hen [petitioners'] means are limited to volunteers and to paid hourly workers who cannot be rewarded for being productive and arguably cannot be punished for being unproductive, they carry a significant burden in exercising their right to core political speech.

Deters, 518 F.3d at 377–78, 385–87.

The Compensation Prohibition means that funds that could be used to hire productive canvassers will instead be absorbed by unproductive employees who could not be fired as a result of a performance evaluation taking account of their level of success in collecting applications. Indeed, the longer a drive lasts, the more likely it is to accumulate deadweight employees, particularly once word spreads that termination is impossible based on poor performance. Such a result would not only decrease the number of voter registrations that the Organizational Plaintiffs could facilitate in a given drive; it would also make it more difficult for them to convince their donors to provide the financial support necessary for future drives, and it poses a risk of forcing them to cease large-scale voter registration drives. Preliminary Inj. Hr'g Tr. 21, June 11, 2012. Each of

these results “limits the number of voices who will convey [Plaintiffs’] message and the hours they can speak and, therefore, limits the size of the audience they can reach.” *Meyer*, 486 U.S. at 422–23 (striking down Colorado’s ban on paid petition circulators).

It is no consolation that the Organizational Plaintiffs can still use unpaid volunteers without running afoul of the Compensation Prohibition, just as it was no saving grace in *Citizens United* that a corporation banned from speaking directly could still speak through a Political Action Committee (“PAC”). *See Citizens United*, 130 S. Ct. at 897 (“Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.”). PACs were “burdensome alternatives” that were “expensive to administer” when compared to direct speech; so too, the evidence shows, are unpaid volunteers when compared to paid canvassers. *Id.*; Preliminary Inj. Hr’g Tr. 69–70, June 11, 2012.

As noted, the language of sections 13.008(a)(2) and (3), even narrowly construed, bans Plaintiffs from taking many performance-based disciplinary actions. Like the broad compensation bans in *Deters* and *Meyer*, the Compensation Prohibition has “the inevitable effect of reducing the total quantum of speech” in which the Organizational Plaintiffs may

engage. *Meyer*, 486 U.S. at 423. It imposes a severe burden upon their constitutionally protected activities.

iii. Defendants' Legitimate Interest

Although there is a compelling argument that strict scrutiny applies to this Compensation Prohibition,²⁸ subsections (a)(2) and (3) of the Compensation Prohibition fall even under the *Anderson–Burdick* balancing test and thus it is not necessary at this preliminary stage to rule whether strict scrutiny applies. Defendants have advanced a legitimate state interest for the Compensation Prohibition: the need to combat voter registration fraud. *See* Def. Andrade's Mot. to Dismiss 35. The Organizational Plaintiffs agree that this is a legitimate interest, and that a ban on paying compensation per application—as is included in section 13.008(a)(1) and which Plaintiffs do not challenge—serves this interest. Preliminary Inj. Hr'g Tr. 59–60, 107, June 11, 2012. But they disagree that a ban on many commonly accepted performance measures furthers the state's interest.

At the preliminary injunction hearing, the Secretary argued that the state's legitimate goal of preventing voter registration fraud was advanced

²⁸ As it was applied to compensation bans in *Meyer*, 486 U.S. 414 (an absolute ban on paid petition circulators), *Deters*, 518 F.3d 375, 377 (a ban on paying for signatures or registrations “except on the basis of time worked”), *Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159 (D. Idaho 2001) (a ban on paying petition circulators per signature), *Term Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470 (S.D. Miss. 1997) (same), and *Limit v. Maleng*, 874 F. Supp. 1138 (W.D. Wash. 1994) (same).

by a ban on the use of arbitrarily high quotas but was not advanced by a ban on productivity goals and performance standards. She stated that this is because only impossibly “high” quotas create significant incentives for fraud. Preliminary Inj. Hr’g Tr. 215, June 12, 2012 (“[E]very job comes with [pressure] to perform. . . . [T]hat normal sort of pressure is fine. It’s the idea of tying that pressure specifically to a very high quota of voter registration applications that I think the Legislature was getting at, because that’s when you’ve got pressure to start getting names out of the phone book and Mickey Mouse and whoever.”). The Secretary thus appeared to concede that the state’s interest does not justify a complete ban on basing employment decisions—good or bad—on performance as measured by the number of applications collected, which is why she instead argued for a narrowed reading that only banned impermissibly high quotas.

But, as discussed above, assuming that the state’s interest in preventing fraud is advanced by a ban on the use of unrealistically high, arbitrary quotas, subsections 13.008(a)(2) and (3) extend beyond such quotas to prohibit commonly accepted employment practices. They ban exactly the kinds of performance-based employment actions not typically associated with fraud, actions that even the Secretary seems to concede are a necessary part of normal workplace discipline.

Furthermore, the fact that the Texas provision sweeps more broadly than the laws in other states, coupled with the fact that there is no evidence showing that fraud is more endemic in those states than in Texas, undermines the argument that this new law is necessary to combat fraud. Also telling is that Texas had no compensation prohibition—even the ban on paying per application—prior to 2011 and yet the Secretary did not produce evidence of fraud resulting from such practices. The state’s interest is certainly not so well served by the ban that it warrants the chilling effect it places on voter registration activity by prohibiting effective performance reviews of paid canvassers. *See Anderson*, 460 U.S. at 789 (“In passing judgment, the Court must not only determine the legitimacy and strength of each of [the state’s] interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.”). The Organizational Plaintiffs have demonstrated a substantial likelihood of succeeding on the merits of their First Amendment challenges to the second and third subsections of the Compensation Prohibition.

3. The Remaining Challenges Do Not Meet the “Substantial Likelihood” Standard on the Present Record

With respect to the Organizational Plaintiffs’ preemption and constitutional challenges to the Completeness, Training, and Identification

Requirements, the Court concludes that, on the present record, Plaintiffs have not shown a substantial likelihood of success. Some of these challenges appear more substantial than others, but at present none rise to the high threshold for likely success that the law requires for granting preliminary relief. Consideration of the closer calls may also benefit from further development of the factual record. To cite just one example, the burden imposed by the Training Requirement depends in large part on the frequency at which counties provide training opportunities. At the time of the briefing and hearing on the motion for preliminary injunction, the Training Requirement was newly implemented with little track record. Thus, because of the need for further evidence and the fact that “a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried [its] burden of persuasion,” *Bluefield Water Ass’n, Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009) (quotations omitted), a preliminary injunction shall not issue on the Organizational Plaintiffs’ remaining claims.

B. Second Factor—Irreparable Injury

Returning to all the preemption and constitutional claims discussed above on which the Organizational Plaintiffs have demonstrated a substantial likelihood of success, irreparable harm will result if a preliminary

injunction is not issued. Plaintiffs presented a significant amount of testimonial and documentary evidence detailing how the challenged provisions of the Election Code prevent them from conducting effective voter registration activities in Texas. So long as the provisions remain in force, the likely violations of Organizational Plaintiffs' statutory and constitutional rights continue, and they remain unable to engage in their chosen form of political speech and associational activity.

This finding of irreparable injury tracks the decision of every other federal case in which courts determined that challenges to regulations on third-party voter registration activity were substantially likely to succeed. As the court stated in granting a preliminary injunction against Florida's 48-hour voter registration delivery requirement in *League of Women Voters of Fla. v. Browning*, 2012 WL 1957793, "[t]he plaintiffs will suffer irreparable harm if an injunction is not issued, first because the denial of a right of this magnitude under circumstances like these almost always inflicts irreparable harm, and second because when a plaintiff loses an opportunity to register a voter, the opportunity is gone forever." *Id.* at *11; *see also Blackwell*, 455 F. Supp. 2d at 707–08 ("But for the issuance of an injunction, Plaintiffs will continue to be dissuaded from engaging in an important political activity, and will no longer enjoy the freedom they once had to enthusiastically

register Ohio citizens to vote, and to encourage participation in the electoral process.”); *Cobb*, 447 F. Supp. 2d at 1340 (“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”); *Charles H. Wesley Educ. Found. v. Cox*, 324 F. Supp. 2d 1358, 1368 (N.D. Ga. 2004) (“[N]o monetary remedy can correct the fact that the applications . . . were improperly rejected nor will a monetary remedy prevent the state from rejecting similar applications in the future.”). With respect to Plaintiffs’ First Amendment challenges, the conclusions of these district courts in voter registration cases are consistent with the Supreme Court’s broader pronouncement that the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) (quoting *Elrod* in finding that the district court abused its discretion in holding that the claimed First Amendment injury could not irreparably harm the plaintiff).

Plaintiffs have succeeded in showing that they will suffer irreparable harm if a preliminary injunction does not issue.

C. Third Factor—Balancing of Harms

The balancing of harms also favors the granting of a preliminary injunction. As already noted, Plaintiffs have presented substantial evidence showing that, unless an injunction issues, they will not be able to exercise their statutory and constitutional rights and will suffer irreparable injury. *See, e.g.*, Preliminary Inj. Hr’g Tr. 51–53, June 11, 2012 (testifying that the photocopying prohibition stops the Organizational Plaintiffs from ensuring that applicants are properly registered and reduces their ability to detect fraud); *id.* at 48 (testifying that the Personal Delivery Requirement could increase operational costs in rural areas); *id.* at 61–62 (testifying that the In-State Restriction reduced the Organizational Plaintiffs’ ability to identify canvassing problems and detect fraud); *id.* at 46 (testifying that the County Limitation meant that the Organizational Plaintiffs could not conduct voter registration drives without exposing themselves to prosecution); *id.* at 59 (testifying that the Compensation Prohibition would force the Organizational Plaintiffs to keep unproductive employees on staff and “go broke”).

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. The Secretary offered no witnesses or documentary evidence at all. There is thus no evidence in the record documenting the magnitude of any voter registration fraud in Texas or, more importantly, how the prohibited practices are tied to such fraud. *See Buckley*, 525 U.S. at 210 (Thomas, J., concurring) (“In any event, the State has failed to satisfy its burden demonstrating that fraud is a real, rather than a conjectural, problem.”).

The recency of the In-State Restriction and Compensation Prohibition means that the Secretary does not have to hypothesize about a world in which these prohibitions do not exist. Such a world, which allowed the now-banned compensation practices and VDR appointment of non-Texans, existed for every general election in Texas history prior to 2011. If these practices did contribute to fraud, concrete examples of such fraud would likely exist from these decades of experience.²⁹ With respect to the longer standing provisions such as the County Limitation, the Secretary has pre-1987 Texas elections and the experience of all the states that do not require county-by-county appointment of those handling third-party applications

²⁹ Indeed, the only evidence on this point is the testimony of Governor White: “[T]he history in Texas has been that individual voters are not likely to commit any violation of the law. It’s much more highly, much more historically correct to say that the administrators of the election are the ones that are most likely to violate the law or abuse the law.” Preliminary Inj. Hr’g Tr. 293, June 12, 2012.

from which to draw evidence of fraud. But no such evidence was introduced for the Court to weigh against the harm to Plaintiffs.³⁰

Voter registration fraud is illegal in Texas. An injunction would not interfere with any attempt to prosecute anyone who knowingly creates or submits a fraudulent voter registration application. *See* Tex. Elec. Code Ann. § 13.007 (stating that a person commits an offense if he or she “knowingly makes a false statement or requests, commands, or attempts to induce another person to make a false statement on a registration application”). But the Defendants have not demonstrated that the challenged provisions are needed to buttress the direct tool of preventing fraud by prosecuting those who actually engage in fraud.

As Judge Gibbons of the Sixth Circuit stated in her concurring opinion in *Ohio Republican Party v. Brunner*, “[b]ased on the Secretary’s representations in the district court, the only public harm at issue was that asserted by the plaintiffs. There was no suggestion and certainly no

³⁰ Moreover, evidence at the injunction hearing showing inconsistent or lax enforcement of the VDR appointment scheme undercuts the Defendant’s argument that the scheme plays an important role in combating fraud. Galveston County is allowing certain non-VDRs to submit third-party applications. Galveston incorrectly believes that any individual can serve as an “agent” under section 13.003 and deliver an application if she has the applicant’s permission to do so—a belief which flatly conflicts with section 13.003(b)’s requirement that an agent be a qualified voter who is the spouse, parent, or child of the applicant. Preliminary Inj. Hr’g Tr. 342, June 12, 2012. Galveston’s practice of not strictly following the VDR scheme casts doubt on the Secretary’s claim that enforcement of the scheme plays a vital role in combating fraud.

evidence that granting the plaintiffs’ request might disrupt the electoral process or harm the public in any way.” 544 F.3d 711, 723 (6th Cir. 2008) (Gibbons, J., concurring), *vacated on other grounds*, 555 U.S. 5 (2008). The substantial injury that the challenged provisions impose on the Organizational Plaintiffs outweighs any harm to the state that might result from the issuance of a preliminary injunction.

D. Fourth Factor—The Public Interest

Finally, granting a preliminary injunction will serve the public interest. Enjoining the challenged statutes would ensure “[t]he vindication of constitutional rights and the enforcement of a federal statute,” an achievement which “serve[s] the public interest almost by definition.” *League of Women Voters of Florida v. Browning*, 2012 WL 1957793, at *11. As another federal district court reasoned when enjoining less burdensome regulations in Ohio:

Because the restrictions on voter registration activities outlined above, viewed separately or in combination, do not promote the exercise of the right to vote but, rather, chill the exercise of that right through an unusual and burdensome maze of laws and *penalties* relating to a major step in the voting process—registration—the public interest can only be protected through elimination of these barriers.

Blackwell, 455 F.Supp.2d at 708 (emphasis in original). Indeed, 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); *see also Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964))). A preliminary injunction must issue.

IV. ORDER

For the foregoing reasons, **IT IS ORDERED**:

1. Defendant Cheryl Johnson's Motion to Dismiss (ECF No. 9) and Defendant Hope Andrade's Motion to Dismiss (ECF No. 13) are **DENIED IN PART** to the extent specified in the foregoing opinion.

2. The Plaintiffs' Motion for Preliminary Injunction and Accompanying Memorandum of Law (ECF No. 33) is **GRANTED IN PART** and **DENIED IN PART** as specified in the foregoing opinion.

3. Until entry of a final judgment or until otherwise ordered, Defendants are **ENJOINED** from taking any steps to demand compliance with or enforce the following provisions:

(a) Tex. Elec. Code Ann. § 13.038, to the extent that it prohibits lawfully appointed and trained VDRs from photocopying or scanning voter registration applications that have been submitted to a VDR but not yet delivered to the appropriate county registrar, so long as the information copied or scanned does not include the information listed as confidential under section 13.004(c) of the Texas Election Code;

(b) Tex. Elec. Code Ann. § 13.042, to the extent that it prohibits lawfully appointed and trained VDRs from delivering submitted applications to the appropriate county registrar via U.S. mail;

(c) Tex. Elec. Code Ann. § 13.031(d)(3), to the extent that it, by incorporating Tex. Elec. Code Ann. § 11.002(a)(5), forbids non-Texas residents from serving as VDRs;

(d) Tex. Elec. Code Ann. § 13.038, to the extent that it prohibits lawfully appointed and trained VDRs from distributing applications to or collecting applications from residents of counties other than the county in which the VDRs are appointed and trained, and to the extent that it prohibits lawfully appointed and trained VDRs from delivering applications in person or by U.S. mail to the registrars of counties other than the county in which the VDRs are appointed and trained;

(e) Tex. Elec. Code Ann. § 13.008(a)(2);

(f) Tex. Elec. Code Ann. § 13.008(a)(3);

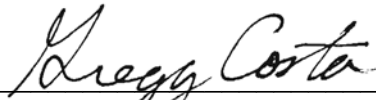
4. This preliminary injunction binds both Defendants and each of their officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this preliminary injunction by personal service or otherwise.

5. Defendant Hope Andrade is **ORDERED** to send notice of the issuance and effect of this Order by reasonable and appropriate methods to all Texas county registrars within twenty days of the docketing of this order.

6. This preliminary injunction will take effect upon the posting of security in the amount of \$100, or, if the parties so stipulate, on the filing of an undertaking by each Plaintiff in lieu of security. The clerk must accept a cash bond or other security in this amount. The parties must confer in good faith on substituting an undertaking in lieu of security. Any party may move to adjust the amount of security.

IT IS SO ORDERED.

SIGNED this 2d day of August, 2012.



Gregg Costa
United States District Judge

5

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

VOTING FOR AMERICA, INC., §
BRAD RICHEY, and §
PENELOPE McFADDEN, §
Plaintiffs, §

V. §

CIVIL ACTION NO. 3:12-CV-00044

HOPE ANDRADE, in her Official §
Capacity as Texas Secretary of State, and §
CHERYL E. JOHNSON, in her Official §
Capacity as Galveston County Assessor §
And Collector of Taxes and Voter §
Registrar, §
Defendants. §

**DEFENDANT TEXAS SECRETARY OF STATE HOPE ANDRADE'S
MOTION FOR STAY**

TO THE HONORABLE JUDGE OF SAID COURT:

On August 2, this Court entered its ruling on the Plaintiffs' Motion for Preliminary Injunction. Five Texas provisions related to the regulation of volunteer deputy registrars (VDRs) have incorrectly been enjoined, specifically: 1) the provision limiting a VDR's power to collect and deliver voter registration applications to the county where the VDR was deputized; 2) the requirement that a VDR personally deliver the application to the county registrar of voters; 3) the state's prohibition against photocopying voter registration applications before delivering them to the county registrar; 4) the state's requirement that a VDR be a Texas resident; and 5) the prohibition against imposing a quota or any other system that uses the number of registrations facilitated as a means of calculating compensation to a VDR. Defendant Texas Secretary of State Hope Andrade now seeks a stay pending appeal of the court's injunction under Rule 8 of the Federal Rules of

Appellate Procedure. The Court's order will decimate the longstanding, county-based system of voter registration in Texas. This is particularly true with respect to the parts of the order that enjoin the Election Code's provisions that limit a VDR's power to the counties in which he was deputized and require a VDR to personally deliver completed voter-registration applications.

Local oversight over third-parties that are entrusted by Texas citizens to aid in the voter-registration process is the means by which the state protects voters by guaranteeing that their voter-registration applications will actually be delivered to the appropriate authorities. It imposes accountability on the person who receives the application by affording a means to track the application until it reaches the appropriate authority. Without these protections, many voters may incorrectly believe they are eligible to vote when in fact they may not actually be registered.

The Court's order, which eliminates local control over and reduces accountability for the voter registration process, has already caused great confusion. *See* Affidavit of K. Ingram, Attachment 1. An injunction of this kind and this close to the October 9, 2012 deadline for voter-registration is certain to cause chaos among both the electorate and the county officials involved in the registration process, injecting even more confusion into an election season that has already seen its primaries significantly delayed.

Indeed, the chaos and confusion may very well result in the real and irreparable disenfranchisement of many Texas voters. A VDR who is appointed in Beaumont may travel to Amarillo, incorrectly advise on the completion of voter-registration applications in every county along the way, and mail all incorrectly completed voter-registration applications before leaving the state. Those voters may not be registered, and no one would realize that it was due to the work of one VDR. The result: many unwitting Texans' right to vote would be disenfranchised. Moreover,

an additional problem must be noted: the VDR practices now enjoined by this court have been precleared under Section 5 of the Voting Rights Act by the U.S. Department of Justice (DOJ). *See id.* at 1. Any clarifications on the voter-registration process needed in the wake of this Court's order may require preclearance by DOJ.

Fatigue about keeping up with orders from federal courts is highly likely to set in with the Texas electorate. In *Purcell v. Gonzalez*, a unanimous Supreme Court reversed an injunction against a voter fraud statute. 549 U.S. 1, 4-5 (2006). As the unanimous Supreme Court cautioned, "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* "As an election draws closer, that risk will increase." *Id.* at 5. The present injunction relates to voter registration--a process that is not merely "draw[ing] close," it is ongoing. And as explained above, the injunction will create the kind of confusion *Purcell* cautions against.

CONCLUSION

Secretary Andrade therefore respectfully requests that the Court stay its order pending appeal to the Fifth Circuit.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

ROBERT O'KEEFE
General Litigation, Division Chief

/s/ Kathlyn C. Wilson
KATHLYN C. WILSON
Texas Bar No. 21702630
Southern District ID No. 10763
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
(512) 320-0667 FAX

Drew L. Harris
Texas Bar No. 24057887
Southern District ID No. 1114798
Attorneys for Defendant Hope Andrade

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed with the Clerk of the Court and served using the CM/ECF system on this the 8th day of June, 2012, to:

Chad W. Dunn
K. Scott Brazil
Brazil & Dunn, L.L.P.
4201 Cypress Creek Parkway, Suite 530
Houston, Texas 77068
Facsimile: (281) 580-6362

Ryan Malone
Ropes & Gray, L.L.P.
700 12th St. NW Suite 900
Washington, DC 20005
Facsimile: (202) 383-8322

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
Facsimile: (512) 474-8035

Brian Mellor
Michelle Rupp
Project Vote
1350 Eye Street NW
Washington, DC 20005
Facsimile: (202) 629-3754

/s/ Kathlyn C. Wilson
Kathlyn C. Wilson
Assistant Attorney General



The State of Texas

Secretary of State

AFFIDAVIT OF BRIAN KEITH INGRAM

Before me the undersigned authority personally appeared Keith Ingram and being duly sworn, deposed on oath and stated:

I am over the age of 18 and competent in all respects to make this affidavit. I am currently the director of the Elections Division of the Texas Secretary of State's office and I have personal knowledge of the facts herein stated.

The Elections Division is statutorily responsible for maintaining uniformity in the administration of the election laws in Texas, including the Volunteer Deputy Registrar provisions in Chapter 13 of the Election Code. Each of the statutory provisions regarding Volunteer Deputy Registrars contained in Chapter 13 - including those that were added to Chapter 13 by the 82nd Legislature during its most recent Regular Session in 2011 - have been pre-cleared under Section 5 of the Voting Rights Act by the United States Department of Justice. Similarly, the training materials that were written and prepared by this division for use in training Volunteer Deputy Registrars have also been pre-cleared under Section 5.

The Volunteer Deputy Registrar system currently in use in Texas has been in place for almost 30 years. It is worth noting that Texas' system of Volunteer Deputy Registrars was designed to work closely with the county-based approach to voter registration in this State.

In Texas, voter registration is primarily a county function. It is the counties - not the State - that are primarily responsible for accepting and processing voter registration applications from members of the public. These tasks are performed in each county by the voter registrar.

The decision to accept or deny an application to serve as a Deputy Voter Registrar is purely a local one. Once a county decides to deputize a person as a Volunteer Deputy Registrar, that person then becomes authorized to act on behalf of the county - not the State - to register citizens to vote and to return completed voter registrations in person to the Voter Registrar for further action.

The Court's order of August 2, which issued a preliminary injunction against some, but not all, of the provisions in Chapter 13 regarding Volunteer Deputy Registrars in Texas, has already caused significant confusion. County Voter Registrars from all over the State have contacted our office with questions about the order's effect. Almost uniformly, these local officials have expressed concerns about how to conduct training sessions for potential Volunteer Deputy Registrars.

Additional issues that have been brought to our attention include:

- Concerns that county Voter Registrars and their deputies will not be trained fast enough for them to understand and communicate the new requirements after this order.
- Concerns about the status of currently scheduled training sessions for Volunteer Deputy Registrars.
- Questions about the status of Volunteer Deputy Registrars who have been previously trained and deputized, and whether they may or must be retrained.
- Whether it will be possible to successfully re-train existing Volunteer Deputy Registrars about the need to redact information from completed voter registration forms.
- Questions about whether a Voter Registrar must contact a Volunteer Deputy Registrar with regard to a voter registration application that was accepted in a different county. This may require the Voter Registrar to determine the county where the Volunteer Deputy Registrar was deputized, which may be onerous.
- There is uncertainty and confusion regarding the impact of this order on current Volunteer Deputy Registrars and the voter registration activities currently underway.
- There are questions about whether Voter Registrars need to reassess previously rejected applications for appointment as Volunteer Deputy Registrars by non-residents of Texas.

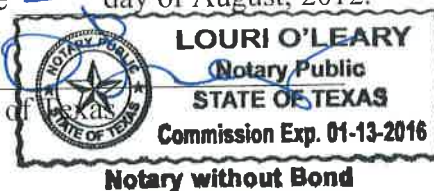
Finally, some Voter Registrars have expressed reservations about appointing additional Volunteer Deputy Registrars until the confusion caused by this order has subsided and more questions have been answered.

The timing of this Preliminary Injunction Order has thrown the voter registration system in Texas into significant confusion just at the time when Voter Registrars need to be focused on registering as many voters as possible prior to the general election on November 6. There are just over 60 days left to register voters for that election and time is of the essence. Keeping the current system in place for these 60 days will do more to enhance voter registration than throwing the whole system into confusion.


KEITH INGRAM

SUBSCRIBED AND SWORN to before me on the 3 day of August, 2012.


Notary Public, State of



**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

VOTING FOR AMERICA, INC., §
BRAD RICHEY, and §
PENELOPE McFADDEN, §
Plaintiffs, §

V. §

HOPE ANDRADE, in her Official §
Capacity as Texas Secretary of State, and §
CHERYL E. JOHNSON, in her Official §
Capacity as Galveston County Assessor §
And Collector of Taxes and Voter §
Registrar, §
Defendants. §

CIVIL ACTION NO. 3:12-CV-00044

**ORDER GRANTING DEFENDANT TEXAS SECRETARY OF STATE HOPE
ANDRADE'S MOTION FOR STAY**

On this day the Court considered Defendant Texas Secretary of State Hope Andrade's Motion for Stay. After due consideration, the Court finds the motion meritorious. It is therefore,

ORDERED that Defendant Texas Secretary of State Hope Andrade's Motion for Stay is hereby GRANTED.

IT IS FURTHER ORDERED THAT the injunction issued on August 2, 2012 is hereby stayed pending appeal.

SIGNED this _____ day of _____, 2012.

THE HONORABLE GREGG COSTA
UNITED STATES DISTRICT JUDGE

6

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

**VOTING FOR AMERICA,
PROJECT VOTE INC.,
BRAD RICHEY, and
PENELOPE MCFADDEN**

Plaintiffs,

 \mathbf{V}_i

HOPE ANDRADE.

In Her Official Capacity as Texas Secretary of State, and

CHERYL E. JOHNSON

*In Her Official Capacity as Galveston County
Assessor and Collector of Taxes and Voter
Registrar*

Defendants, and

STATE OF TEXAS.

Defendant-Intervenor.

(Decorative separator consisting of a vertical line with repeating scroll-like motifs)

CIVIL ACTION NO. 3:12-cv-00044

**PLAINTIFFS VOTING FOR AMERICA AND PROJECT VOTE, INC.'S
OPPOSITION TO DEFENDANT ANDRADE'S MOTION FOR STAY**

On August 2, 2012, the Court issued an order preliminarily enjoining five Texas provisions regulating individuals and organizations involved in voter registration drives: the Photocopying Prohibition, the Personal Delivery Requirement, the In-State Restriction, the County Limitation, and, in part, the Compensation Prohibition. *See Voting for Am. v. Andrade*, No. 3:12-cv-00044, slip op. at 4 (S.D. Tex. Aug. 2, 2012). Defendant Andrade now asks the Court to effectively set aside its ruling for an indefinite period by issuing a stay pending appeal

under Rule 8 of the Federal Rules of Appellate Procedure. Def. Andrade's Mot. for Stay at 1 (ECF No. 66).

The factors that could support a stay are nearly identical to those that justify a preliminary injunction—an analysis that the Court conducted less than a week ago. The Court should assess “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceedings; and (4) [whether] public interest [favors a stay].” *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011) (internal quotation marks and citations omitted).

Though Defendant Andrade has barely attempted to make a showing on these factors, it is clear that each prong weighs heavily against her. The Court's 94-page opinion conclusively resolves the question of likelihood of success on the merits, carefully applying the relevant statutory and Constitutional provisions to Texas's third-party voter registration laws. *Voting for Am.*, slip op. at 4. Defendant Andrade offers no argument why the Court's legal analysis was incorrect, or why she has otherwise satisfied the first factor for a stay pending appeal.

Although that is reason enough to deny Defendant Andrade's Motion, she has also failed to demonstrate irreparable harm absent a stay. Instead, Defendant Andrade recites the same catalogue of unproven and incredible consequences that the Court rejected in its Opinion and Order, now adding the colorful image of a VDR riding from county to county sowing disenfranchisement, then slipping from the state ahead of the authorities. There is no basis in the record for a finding of irreparable harm to Defendant Andrade. 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 87-88 (“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.”).

Defendant Andrade’s argument for irreparable injury appears to depend from the assertion that the Court’s order is so confusing that it has caused havoc among Texas’s county registrars.¹ This asserted confusion centers largely on the Training Requirement, a provision that the Court did not enjoin. In support, Defendant Andrade cites an affidavit of Brian Keith Ingram, Director of the Elections Division of the Texas Secretary of State’s office. Although Ingram was present during the evidentiary hearing, Defendant Andrade did not call him as a witness, depriving the Organizational Plaintiffs of the opportunity to cross-examine him. *See* Prelim. Inj. Hr’g Tr., 2, June 11, 2012.

Ingram was cross-examined, however, in another pending election case, where he conceded that prior to his appointment as Director of Elections earlier *this* year, he had “virtually no experience in election law.” Ex. A, Transcript of Record at 76-77, *Texas v. Holder*, No. 12-128 (D.D.C. July 9, 2012); *see also* Ex. B, Ingram Dep. at 53-68, *Texas v. Holder*, No. 12-128 (D.D.C. June 5, 2012) (discussing his legal experience prior to appointment as Director of the Elections Division). Strikingly, Ingram’s position that it is impossible to provide timely guidance on the Court’s preliminary injunction is in direct contrast to his statement in *Texas v. Holder* that the Secretary of State’s office could comply with a Voter ID order if it were decided by August 15 or even August 31 of this year. Ex. B, Ingram Dep. at 251-252. Moreover, Mr. Ingram testified to the three-judge court considering the Voter ID law that the statewide training program regularly conducted by the Secretary of State’s office in advance of the election would

¹ Any confusion, if it exists, predates the Court’s order: evidence adduced at the preliminary injunction hearing demonstrated “inconsistent or lax enforcement of the VDR appointment scheme” among the county registrars. *Voting for Am.*, slip op. at 89 n.30.

not be held until August 20 therefore giving the Secretary of State ample time to inform the election apparatus of election law changes. *See* Ex. C, Status Conference Tr. at 8-9, 25-26, *Texas v. Holder*, No. 12-128 (D.D.C. May 3, 2012) (Mr. Ingram testifies between 700 and 900 election workers from around the state will attend the training).²

Defendant Andrade wholly fails to articulate what difficulty arises from allowing voting organizations to use performance-based metrics, photocopy completed voter registration applications, submit the applications by mail, or operate in multiple counties. To the extent that out-of-state canvassers cause an increased administrative burden on counties to accept and process VDR applications, the burden is slight. Moreover, two of the provisions—the Compensation Prohibition and the In-State Restriction—are recent enactments. Similarly, others are only recent policy interpretations. *See Voting for Am.*, slip op. at 13-14 (citing Pls.’ Ex. 1, Letter from Ann McGeehan to Niyati Shah at 4 (May 13, 2011)) (explaining that the Secretary’s 2011 letter clarified how stringently the state interprets the VDR regulations). Therefore the “Secretary does not have to hypothesize about a world in which these prohibitions do not exist.” *Voting for Am.*, slip op. at 88.

² The problem with attempting to support a Motion to Stay with out-of-court hearsay affidavits is that it deprives Plaintiffs of any opportunity to cross-examine the witness on his unsubstantiated averments. If there was competent evidence of the sort offered by Ingram in his affidavit, it should have been presented at the hearing. Plaintiffs object to Ingram’s affidavit and move to strike it. Further, facts stated in an affidavit, if the Court were to accept it post-hearing, must affirmatively show that that affiant or declarant is competent to testify on the matters in the affidavit. *See* Fed. R. of Civ. Pro. 56(c)(4). The testimony must be grounded in observation or other personal experience and must not be based on speculation, intuition, or rumors. *See Visser v. Packer Eng’g Assocs.*, 924 F.2d 655, 659 (7th Cir. 1991). Conclusory allegations, speculation, unsubstantiated assertions and legalistic argumentation are no substitute for specific facts. *See TIG Ins. Co. v. Sedgwick James*, 276 F.3d 754, 759 (5th Cir. 2002). Ingram’s affidavit fails to make such a showing, presenting only speculation that demonstrates Defendants are not interested in a good-faith effort to educate volunteer deputy registrars on the current applicable law, but instead are willing to go to great lengths to keep in place a restrictive, burdensome voter registration scheme.

Even if the Court were to believe, without in-court competent evidence, that the inconvenience of clarifying the law to county officials is an actual problem, any injury to Defendant Andrade is clearly outweighed by the damage to established constitutional and statutory interests that will occur if a stay is granted. *See Id.* at 85 (“[W]hen a plaintiff loses an opportunity to register a voter, the opportunity is gone forever.”) (quoting *League of Women Voters of Fla. v. Browning*, 2012 WL 1957793, at *11 (N.D. Fla. May 31, 2012)). Should the stay be granted, the Organizational Plaintiffs will be denied the opportunity to exercise the freedoms guaranteed by the First Amendment of the Constitution in advance of a federal presidential election, a harm that is “unquestionably” an irreparable injury. *Id.* at 86. The fear of criminal prosecution will prevent citizens from speaking. *Id.* at 60 (An “outright ban” on speech “backed by criminal sanctions” has “the inevitable effect of reducing the total quantum of speech.”) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010)). The vindication of such rights serves “the public interest almost by definition.” *Id.* at 90 (quoting *League of Women Voters of Fla.*, 2012 WL 1957793, at *11).

The Court has already ruled on the likelihood of success on the merits and weighed the equities in this case. Because Defendant Andrade makes no attempt to establish that she meets the standard for a stay pending appeal under Fed. R. App. P. 8, because she offered no evidence in support of her position during the evidentiary hearing and because she could not meet the standard under even a charitable reading of her motion, the Court should deny the Motion for Stay.

Respectfully Submitted,

/s/ Chad W. Dunn

Chad W. Dunn
State Bar No. 24036507
Southern District of Texas No. 33467
K. Scott Brazil
State Bar No. 02934050
Brazil & Dunn, L.L.P.
4201 Cypress Creek Parkway, Suite 530
Houston, Texas 77068
Telephone: (281) 580-6310
Facsimile: (281) 580-6362

Richard Alan Grigg
State Bar No. 08487500
Southern District of Texas No. 08487500
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
Telephone: (512) 474-6061
Facsimile: (512) 474-8035

*Attorneys for Plaintiffs Voting For America,
Project Vote, Inc., Brad Richey and
Penelope McFadden*

Ryan M. Malone
D.C. Bar No. 483172
Southern District of Texas No. 598906
Julia M. Lewis
D.C. Bar No. 995759
(admitted *pro hac vice*)
Ropes & Gray LLP
700 12th St. NW Suite 900
Washington, D.C. 20005
Telephone: (202) 508-4669
Facsimile: (202) 383-8322

Brian Mellor
MA Bar No. 43072
(admitted *pro hac vice*)
Michelle Kanter Cohen
MA Bar No. 672792
(admitted *pro hac vice*)
Project Vote, Inc.
1350 Eye Street NW
Washington, D.C. 20005
Telephone: (202) 546-4173
Facsimile: (202) 629-3754
*Attorneys for Voting for America and
Project Vote, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on the seventh day of August, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/ Chad W. Dunn

Chad W. Dunn

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	:	
	:	
Plaintiff,	:	Docket No. CA 12-128
	:	
vs.	:	Washington, D.C.
	:	Monday, July 9, 2012
ERIC H. HOLDER, JR., in his	:	9:00 a.m.
official capacity as	:	
Attorney General of	:	
the United States,	:	
	:	
Defendant, and	:	
	:	
ERIC KENNIE, et al.,	:	
	:	
Intervenor-Defendants.	:	
-----	:	x

(A.M. SESSION)
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE DAVID S. TATEL
UNITED STATES CIRCUIT JUDGE
THE HONORABLE ROSEMARY M. COLLYER
THE HONORABLE ROBERT L. WILKINS
UNITED STATES DISTRICT JUDGES

APPEARANCES:

For the Plaintiff:	ADAM MORTARA, Esquire
	ASHA SPENCER, Esquire
	JOHN M. HUGHES, Esquire
	Bartlit Beck Herman
	Palenchar & Scott LLP
	54 West Hubbard Street
	Suite 300
	Chicago, IL 60654

Appearances continued: JONATHAN F. MITCHELL, Esquire
MATTHEW FREDERICK, Esquire
PATRICK SWEETEN, Esquire
JOHN MCKENZIE, Esquire
STACEY NAPIER, Esquire
Office of Attorney General of Texas
209 West 14th Street, 7th Floor
Austin, TX 78701

For the Defendant: ELIZABETH S. WESTFALL, Esquire
DANIEL J. FREEMAN, Esquire
MEREDITH E.B. BELL-PLATTS, Esquire
BRUCE I. GEAR, Esquire
JENNIFER L. MARANZO, Esquire
RISA BERKOWER, Esquire
BRYAN L. SELLS, Esquire
SPENCER FISHER, Esquire
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

For Intervenor- EZRA D. ROSENBERG, Esquire
Defendants: Dechert LLP
902 Carnegie Center
Suite 500
Princeton, NJ 08540-6531

JOSEPH GERALD HEBERT, Esquire
J. Gerald Hebert, P.C.
191 Somerville Street,
Suite 405
Alexandria, VA 22304

NANCY ABUDU, Esquire
American Civil Liberties Union
Foundation, Inc.
230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303

CHAD W. DUNN, Esquire
Brazil & Dunn
4201 FM 1960 West
Suite 530
Houston, Texas 77068

1 Appearances continued:

2 ADAM HARRIS, Esquire
3 Fried, Frank, Harris, Shriver
& Jacobson, LLP
4 One New York Plaza
New York, New York 1004

5 Court Reporter: CRYSTAL M. PILGRIM, RPR
6 Official Court Reporter
United States District Court
7 District of Columbia
333 Constitution Avenue, NW
8 Washington, DC 20001

9 Proceedings recorded by machine shorthand, transcript produced
10 by computer-aided transcription.
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 P-R-O-C-E-E-D-I-N-G-S

2 THE DEPUTY CLERK: Civil action 12-128, State of
3 Texas versus Eric H. Holder, Jr.

4 For the plaintiffs, Jonathan Mitchell, Patrick Sweeten,
5 Matthew Frederick, Reynolds Briffenden, Stacey Napier, Adam
6 Mortara, John McKenzie, Asha Spencer and John Hughes.

7 For the defense, Meredith Bell-Platts, Jennifer
8 Maranzano, Elizabeth Westfall.

9 For the intervenor defendants Chad Dunn, Gerald Hebert,
10 Ezra Rosenberg, Nancy Abudu, Adam Harris and Brian Sells.

11 JUDGE COLLYER: Good morning everyone. I'm Judge
12 Collyer and to my left is Judge Tatel of the Circuit Court and
13 to my right is Judge Wilkins of the District Court.

14 We're here today for trial in Texas versus Holder and
15 Texas bears the burden so it will go first.

16 I am going to be timing things. Texas has, what is it
17 ten hours, the United States has ten hours, and the intervenors
18 have five hours. The direct examination counts against a
19 party, the cross examination counts against the party doing the
20 cross.

21 As I understand it, Mr. Mortara, welcome back to you and
22 your colleague and colleagues. I understand that you wanted to
23 make an opening statement and you understand that will come
24 from your time?

25 MR. MORTARA: Yes, Your Honor.

1 Yeah.

2 All right, we're going to take a 15 minute break. And
3 we'll be back at 15 minutes from now.

4 Thank you, sir.

5 (Witness excused.)

6 (Recess at 10:35 a.m.)

7 (Proceedings resumed at 10:55 a.m)

8 JUDGE COLLYER: I have to say that many of the
9 counsel here were in the Texas redistricting trial, and it's
10 like see old friends.

11 I've been thinking a lot about you, I promise. As
12 have -- as have other people. I promise.

13 All right. Ms. Westfield -- Westfall, sorry.

14 MS. WESTFALL: Thank you, Your Honor.

15 **CROSS EXAMINATION**

16 BY MS. WESTFALL:

17 Q. Good morning, Mr. Ingram.

18 A. Good morning.

19 Q. You currently serve as the Director of the Elections
20 Division for the State of Texas; is that correct?

21 A. That is, yes, ma'am.

22 Q. And you started serving in that position on January 5th,
23 2012; is that correct?

24 A. I did.

25 Q. Prior to becoming Director of the Elections Division, you

1 had virtually no experience in election law; is that right?

2 A. That's true, yes.

3 Q. You've never been in a polling location to observe an
4 election; is that correct?

5 A. That is correct.

6 Q. Mr. Ingram, you were involved in the development of SB 14;
7 is that correct?

8 A. That is true.

9 Q. You gave no input on Senate Bill 14; is that right?

10 A. I did not.

11 Q. You did not craft the language of SB 14; is that correct?

12 A. No, ma'am.

13 Q. You didn't vote on Senate Bill 14; is that correct?

14 A. I did not.

15 Q. You had no role whatsoever in the passage of Senate Bill
16 14; is that right?

17 A. I didn't.

18 Q. And you had no communications with anyone about Senate
19 Bill 14 while the legislature was considering SB 14; is that
20 correct?

21 A. That's true.

22 Q. In fact, you were not involved in any previous voter ID
23 bills considered by the Texas legislature; is that correct?

24 A. That is correct.

25 Q. And today you've never worked with the legislature in

1 MR. DUNN: Good morning. My name is Chad Dunn, and I
2 represent the Defendant-Intervenors.

3 JUDGE COLLYER: Thank you, sir.

4 **CROSS EXAMINATION**

5 BY MR. DUNN:

6 Q. Mr. Ingram, good to see you again.

7 A. Good to see you.

8 Q. As I understand your testimony, you work for the Secretary
9 of State's Office in the administration of elections; is that
10 true?

11 A. That is true.

12 Q. And the job, of course, of that office is to call the
13 balls and strikes of the election, you're sort of the empire;
14 is that a fact?

15 A. That's true.

16 Q. And when you administer these election laws, you want to
17 do so not just for partisan reasons or not just for the public
18 perception reason, but also to make sure the laws are fair to
19 individual races, whether it's Anglos, Latinos, et cetera; is
20 that a fact?

21 A. I agree with that.

22 Q. Yeah. It's true, though, that it is your opinion, your
23 personal opinion that the Senate Bill 14 is a good piece of
24 legislation; is that a fact?

25 A. That is true, my personal opinion is that it was a good

1 law.

2 Q. And it's one that you think ought to be implemented; is
3 that true?

4 A. Well, I think it -- I think that both personally as well
5 as officially. You know, the Secretary of State's job is to
6 implement laws passed by the legislature, and so it is my job
7 to see that this law is implemented.

8 Q. Now, your predecessor, Ms. McGeehan, that had been in your
9 office for more than a decade was unwilling to quite go that
10 far in her testimony before the legislature; is that true?

11 A. I don't know.

12 Q. In fact, she said it wasn't her position to take a
13 position on the law; is that a fact?

14 A. That's true, and before law is passed, it is not our
15 position to take a position on a bill.

16 Q. She also didn't take a position, as you have, in her
17 deposition in this case?

18 A. I don't know, I haven't read her depo.

19 Q. Now, I'd like to move on to the NVRA. And I'm sure it was
20 just a slip of the tongue, but His Honor asked you what NVRA
21 stood for, you said the National Voting Rights Act, it's
22 actually the National Voter Registration Act?

23 A. That's right, I always get those two mixed up. I have
24 dyslexia.

25 Q. I understand. And the state has recently been sued, has

1 it not, for violation of the National Voter Registration Act?

2 A. It has.

3 Q. In fact, there's a case pending in Galveston where Judge
4 Costa is awaiting a ruling on with respect to several
5 allegations of violation of the National Voter Registration
6 Act?

7 A. We've got several alleged violations, there hasn't been a
8 finding by the court yet. I've expected a decision by now.
9 How about you?

10 Q. I have been expecting it. There's other decisions I
11 expect, too, but they don't always come when I expect them.

12 Now, some of the complaints made under the NVRA include out
13 of county. For example, it's now under new legislation passed
14 by this state legislature, the Texas legislature, it's now
15 unlawful for somebody to accept a voter registration
16 application from somebody who lives in an adjoining county; is
17 that true?

18 A. That is not true.

19 Q. In other words, if somebody runs a voter registration
20 drive in downtown Houston and happens to receive a voter
21 registration application from a resident of Montgomery County,
22 it's your testimony that's lawful under Texas law today?

23 A. Of course, it is. If they are registered in that
24 adjoining county as a volunteer deputy registrar, you bet.

25 Q. Okay. But if the deputy registrar is only registered in

1 Harris County where they're running the drive, they've
2 committed a law violation by accepting that application; is
3 that true?

4 A. Probably.

5 Q. Another recent restriction in voter registration in Texas
6 includes the requirement that a voter registration person,
7 somebody who accepts a voter registration can only accept one
8 that's complete; is that true?

9 A. That is not true. There is an obligation to check it for
10 completeness and ask the voter to finish it, but they can
11 receive them if they're not complete, you bet.

12 Q. In fact, it's a crime if a deputy voter registrar turns in
13 an incomplete voter registration application?

14 A. That is not true.

15 Q. On collecting applications, it is now state law in Texas
16 that a deputy registrar, a person who accepts an application
17 must be deputized; is that true?

18 A. That's true, but that's been the law for thirty years.

19 Q. And, in fact, an individual who went about and collected
20 voter registration applications in their high school class, for
21 example, and turned them in, if they had not been deputized,
22 would have violated the state law?

23 A. That's right, for the last thirty years or so.

24 Q. Now, there's also a number of restrictions that have been
25 recently implemented on processing voter registration

1 applications; isn't that true?

2 A. I don't know what you mean.

3 Q. For example, there are some counties in Texas, and to use
4 Mr. Mortara's example, if José De la Cruz fills out his voter
5 registration application, and the Harris County voter
6 registration clerk inputs it into the TEAM system without
7 spaces, and it's not matched, although it's in the TEAM system
8 with spaces, that person gets rejected in some counties; isn't
9 that a fact? Or do you not know?

10 A. I don't know one way or the other on that.

11 Q. In Harris County, for example, in 2008, they had rejected
12 sixty-eight thousand voter registration applications in the
13 lead up to the historic 2008 presidential election; is that
14 true?

15 A. I don't know.

16 Q. In fact, after that case, there had been a lawsuit against
17 Harris County, and there was a consent order entered that
18 prohibited many of Harris County's practices as they relate to
19 voter registration; is that a fact?

20 A. I don't know about your characterization of it. I know
21 there was a lawsuit.

22 Q. And you know there was a settlement that was entered by
23 the federal court?

24 A. I don't know the resolution of that lawsuit.

25 Q. The point is, Mr. Mortara makes the case here that there's

1 this ease of registration. Do you remember him using that
2 phrase?

3 A. That's true.

4 Q. But, in fact, Texas in many of its counties on an ad hoc
5 basis have erected barriers to voter registration in Texas?

6 A. That is not true.

7 Q. Now, there was also some testimony I heard from you with
8 respect to the challenging of a voter on the roll and that it's
9 difficult under HAVA for county officials to remove voters from
10 the roll. Did I hear that right?

11 A. No, I believe that I was talking about the NVRA at that
12 point, but federal law makes it more difficult to remove voters
13 who have moved from the county.

14 Q. But in speaking of laws that you said have been around for
15 30 or so years, there is in Chapter 16 of the Election Code a
16 challenge procedure where any voter who's on the rolls
17 unlawfully can be challenged and removed; is that true?

18 A. Sure.

19 Q. In fact, any registered voter in Texas can challenge the
20 registration of any other registered voter; is that a fact?

21 A. That's true, and that's one of the things the sheriff in
22 Loving County and I talked about.

23 Q. And, in fact, some counties, including Harris County, and
24 now Loving County, are instituting their own challenges of
25 voters who are on the rolls?

1 A. I don't know anything about that.

2 Q. But to the extent that there are people on the voter roles
3 who shouldn't be there, there are tools in place for the state
4 and the county officials to do something about that; isn't that
5 true?

6 A. Within the constraints of federal law, you bet.

7 Q. And, but now I assume that your testimony in support of
8 Senate Bill 14 would be despite any negligence or malfeasance
9 by counties of the state and administration of the voter roll,
10 an additional barrier to voting ought to be erected to the
11 voters to undertake.

12 A. I don't know if I agree with that or not.

13 Q. Since we're talking about recent voting issues, you're
14 aware of a complaint that was made in Atascosa County to your
15 office on a May 12th city election where a Latino citizen was
16 denied the right to vote because they wouldn't produce a photo
17 ID; are you not?

18 A. I'm not aware of that complaint.

19 Q. You're not aware that a written complaint has been filed
20 with your office where a Latino citizen was prevented from
21 voting because they couldn't present a photo ID?

22 A. I am not aware of that complaint. I'm not saying that we
23 don't have it, I just haven't seen it yet. It hasn't --

24 Q. Is it the case -- I beg your pardon, sir. Were you
25 finished?

1 A. I was not.

2 Q. All right. Go ahead.

3 A. It hasn't come to my desk yet.

4 Q. Okay. Is it the case in your office that only the cases
5 that might support Senate Bill 14 make it to your desk, but the
6 other complaints do not?

7 A. That is most certainly not true.

8 Q. Now, you also mentioned that you being registered in
9 Williamson County and Travis County have the ability to vote in
10 both counties; is that true?

11 A. I could if I wanted to break the law.

12 Q. And I assume it's your position under Senate Bill 14 that
13 since you would have to present a driver's license under that
14 law, one of the counties would prevent you from doing so?

15 A. Probably.

16 Q. In other words, you live in Williamson County. If you
17 went to Travis County and your address showed your Williamson
18 County home, if the system is working correctly, you're going
19 to get rejected; is that true?

20 A. I'd probably be allowed to vote provisionally, but yeah.

21 Q. Similarly if you moved to Williamson County and changed
22 your registration, but had not yet had your address on your
23 driver's license changed, Williamson County, your home county
24 where you're supposed to vote, could similarly reject you; is
25 that a fact?

1 A. They could offer a provisional ballot, and you could go
2 explain the discrepancy within the next six days.

3 Q. You also mentioned the Donna Howard race. Donna Howard
4 was a state representative, she ran against the republican
5 nominee and won by a handful of votes; is that true?

6 A. That's right.

7 Q. And there was an election contest adjudicated by the
8 legislature in that case?

9 A. There was.

10 Q. And there was multiple allegations made by republican
11 nominee of rampant in-person voting; was there not?

12 A. There was rampant in-person voting in that election,
13 that's how those people vote, yes.

14 Q. There was allegations of rampant in-person voting fraud in
15 favor of the democratic nominee in that case?

16 A. I believe so, yes. I don't know about rampant, but there
17 were allegations of voter fraud, you bet.

18 Q. And despite adjudication by this very same legislature, no
19 such case was proven and Donna Howard was installed as the
20 state representative; is that true?

21 A. I don't know if they found no such case, but they did
22 install Donna Howard. There was not enough found to overturn
23 the race.

24 JUDGE COLLYER: When was that?

25 MR. DUNN: I believe it was 2008.

1 THE WITNESS: No, I think it was the 2010 election,
2 and the legislative session in 2011 is the one that held the
3 hearing.

4 MR. DUNN: That's right.

5 JUDGE COLLYER: And what did you do before January of
6 2012?

7 THE WITNESS: I worked for the governor in the
8 Appointments Office, appointments manager.

9 JUDGE COLLYER: So you didn't have anything to do
10 with elections?

11 THE WITNESS: No, the specific positions that I
12 appointed were judicial positions, and so I had to interface
13 with the Election Code with regard to the elections of judges.

14 JUDGE COLLYER: Thank you, sir.

15 MR. DUNN: Just a couple more questions.

16 BY MR. DUNN:

17 Q. On to this issue of whether or not a name is substantially
18 similar and discretion given to local voter registrars, are you
19 aware of some of the nicknames or other names used for the
20 first name Jesus?

21 A. Jesse.

22 Q. Any others?

23 A. I don't know of any others.

24 Q. Would it surprise you that Shuage and Shucko [phonetic]
25 are also names?

1 A. No, those fit.

2 Q. Do you expect that individual voter registrars in 254
3 counties are going to know these other names?

4 A. I don't know what they know. I would assume if they live
5 in a county with a fairly high Hispanic population that they
6 know it.

7 Q. And finally, in the recent legislative activity there have
8 been different regulations erected for voter registration,
9 there's been regulations adopted to stop organized registration
10 drives. There's been redistricting plans that at least one
11 court has enjoined, and now this photo ID law.

12 Would you agree that has been the lion share of the
13 election efforts by the Texas legislature?

14 A. I don't know about the characterization. It is what it
15 is.

16 Q. You are aware in Texas that there are some two million
17 Latino citizen voting age population that are not registered to
18 vote; is that true?

19 A. I know that that's what you said in Galveston, I haven't
20 independently verified it.

21 Q. You haven't looked at the census figures on your own to
22 determine that?

23 A. I have not.

24 Q. So you also don't know that there's three quarters of a
25 million African-American citizen voting ages not registered?

1 A. Right, we don't track voter registration by race, so I
2 have no idea.

3 Q. But the legislature spent considerable time concerned
4 about voter fraud, but really has passed nothing to further the
5 registration of these -- of these minority citizens; isn't that
6 a fact?

7 A. I don't know. The voter registration process is easy. So
8 I don't know what would facilitate that registration.

9 MR. DUNN: Thank you, Your Honors.

10 JUDGE COLLYER: All right. Is there any redirect?

11 MR. MORTARA: No, Your Honor.

12 THE COURT: All right, thank you very much. Sir,
13 you're excused.

14 THE WITNESS: Thank you, Your Honor.

15 (Witness excused.)

16 MR. McKENZIE: Good morning, Your Honors.

17 JUDGE COLLYER: Good morning.

18 MR. McKENZIE: John McKenzie for the State of Texas.

19 JUDGE COLLYER: Thank you, sir. Go right ahead, are
20 you going to call your next witness?

21 MR. McKENZIE: We'd like to call Representative José
22 Aliseda.

23 **JOSÉ LUIS ALISEDA, JR., PLAINTIFF WITNESS, SWORN**

24 THE DEPUTY CLERK: You may be seated.

25 MR. McKENZIE: May I begin?

BRIAN INGRAM

June 5, 2012

<p>1</p> <p>IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA</p> <p>STATE OF TEXAS,) Plaintiff,) VS.) ERIC H. HOLDER, JR. in his) official capacity as Attorney) General of the United States,) Defendant,) ERIC KENNIE, et al,) Defendant-Intervenors,) TEXAS STATE CONFERENCE OF) CASE NO. 1:12-CV-00128 NAACP BRANCHES,) (RMC-DST-RLW) Defendant-Intervenors,) Three-Judge Court TEXAS LEAGUE OF YOUNG VOTERS) EDUCATION FUND, et al,) Defendant-Intervenors,) TEXAS LEGISLATIVE BLACK) CAUCUS, et al,) Defendant-Intervenors,) VICTORIA RODRIGUEZ, et al.,) Defendant-Intervenors.)</p> <p>***** ORAL DEPOSITION OF BRIAN KEITH INGRAM JUNE 5, 2012 *****</p>	<p>3</p> <p>1 2 3 APPEARANCES 4 FOR THE PLAINTIFF, STATE OF TEXAS: 5 Patrick K. Sweeten 6 John McKenzie 7 Jay Dyer 8 OFFICE OF THE ATTORNEY GENERAL OF TEXAS 9 P.O. Box 12548 10 Austin, TX 78711-2548 11 12 209 West 14th Street 13 8th Floor 14 Austin, TX 78701 15 (512) 936-1307 16 patrick.sweeten@texasattorneygeneral.gov 17 18 FOR THE DEFENDANT, HOLDER, ET AL: 19 Bruce Gear 20 Jennifer Maranzano 21 U.S. DEPARTMENT OF JUSTICE 22 950 Pennsylvania Avenue, NW 23 NWB - Room 7202 24 Washington, DC 20530 25 (202) 305-7766 bruce.gear@usdoj.gov jennifer.maranzano@usdoj.gov FOR THE DEFENDANT-INTERVENOR TEXAS STATE CONFERENCE OF NAACP BRANCHES AND THE MEXICAN AMERICAN LEGISLATIVE CAUCUS: Ian Vandewalker (by telephone) Myrna Perez (by telephone) THE BRENNAN CENTER FOR JUSTICE AT NYU LAW SCHOOL 161 Avenue of the Americas, Floor 12 New York, NY 10013-1205 (646) 292-8362 ian.vandewalker@nyu.edu myrna.perez@nyu.edu</p>
<p>2</p> <p>1 ORAL DEPOSITION OF BRIAN KEITH INGRAM, produced as 2 a witness at the instance of the Defendant, was duly 3 sworn, was taken in the above-styled and numbered cause 4 on the JUNE 5, 2012, from 9:36 a.m. to 5:25 p.m., before 5 Chris Carpenter, CSR, in and for the State of Texas, 6 reported by machine shorthand, at the offices of The 7 United States Attorney's Office, 816 Congress Avenue, 8 Suite 1000, Austin, Texas 78701, pursuant to the Federal 9 Rules of Civil Procedure and the provisions stated on 10 the record or attached hereto. 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>4</p> <p>1 INDEX 2 Appearances.....3 3 BRIAN KEITH INGRAM 4 Examination by Mr. Gear.....5 5 Examination by Mr. Vandewalker.....231 6 Further Examination by Mr. Gear.....263 7 Further Examination by Mr. Vandewalker..266 8 Examination by Mr. Sweeten.....274 9 Signature and Changes.....276 10 Reporter's Certificate.....278 11 EXHIBITS 12 NO. DESCRIPTION PAGE MARKED 13 5 SB No. 14 126 14 28 HB No. 218 111 15 44 HB No. 1706 163 16 101 Texas Legislature Online History, HB 1706 107 17 552 Notice of Deposition 36 18 553 E-Mail, June 5, 2012 28 19 554 E-Mails and Attachments, TX_00148056 thru 94 20 TX_00148170 21 22 555 Group of Documents Pertaining to Angelina 96 23 County Investigation 24 556 SB No. 362 162 25 557 Election Irregularities Reported During 215 the May 9, 2009 General Election 558 Affidavit of Keith Ingram 240 559 Plaintiff's Supplemental Objections and 263 Responses to Defendant's First Set of Interrogatories</p>



Toll Free: 800.211.DEPO
Facsimile: 202.296.8652

Suite 350
1425 K Street NW
Washington, DC 20005
www.esquiresolutions.com

BRIAN INGRAM

June 5, 2012

<p style="text-align: right;">49</p> <p>1 A. I don't know.</p> <p>2 Q. Who would know what's maintained within the</p> <p>3 electronic file pertaining to SB 14?</p> <p>4 A. I don't know.</p> <p>5 Q. Is there a particular person that's responsible</p> <p>6 for maintaining that file?</p> <p>7 A. Well, yes. There's a lady in my office who's</p> <p>8 got a -- you know, a list of stuff.</p> <p>9 Q. Okay. And so let's flesh that out a little</p> <p>10 bit. There's a lady in your office. Who is the lady?</p> <p>11 A. Jennifer Templeton.</p> <p>12 Q. And what are -- what are Jennifer Templeton's</p> <p>13 responsibilities?</p> <p>14 A. Well, applicable to this, it's her</p> <p>15 responsibility to gather information and keep public</p> <p>16 information requests in order and on track.</p> <p>17 Q. And you testified to stuff, and I'm just trying</p> <p>18 to put that into context.</p> <p>19 A. Well, I haven't -- I haven't looked at her</p> <p>20 list, so I don't know how detailed the description is</p> <p>21 of, of the items. It's -- she got a list of everything</p> <p>22 that we've turned over to the OAG in connection with</p> <p>23 this litigation. But what I think is that's it's a real</p> <p>24 high-level list.</p> <p>25 Q. And when you say high level, what do you mean?</p>	<p style="text-align: right;">51</p> <p>1 Q. (By Mr. Gear) I don't believe I asked that one,</p> <p>2 but you can answer.</p> <p>3 A. I don't know. I mean, it's a hard question to</p> <p>4 answer, because Ann McGeehan didn't have files. You</p> <p>5 know, that's -- that's not a category that exists.</p> <p>6 There are files that contain Ann McGeehan's work in</p> <p>7 them, and I have looked at some of those, sure.</p> <p>8 Q. Okay.</p> <p>9 A. It is in response to the Suzanne Gamboa PIR, we</p> <p>10 were trying to go through them and assert objections.</p> <p>11 Q. So you said, if I understand your testimony</p> <p>12 correctly, she did not have a file that exists on a</p> <p>13 electronic drive, but she had -- she had work that</p> <p>14 existed on the electronic drive, correct?</p> <p>15 A. That's the best of my ability to describe it,</p> <p>16 yes.</p> <p>17 Q. And are you familiar with the work that she</p> <p>18 produced pertaining to SB 14?</p> <p>19 A. Am I familiar with all of it? I don't know.</p> <p>20 Q. But you've reviewed --</p> <p>21 A. Some.</p> <p>22 Q. -- some of that work?</p> <p>23 A. (Witness nods head yes.)</p> <p>24 Q. In addition to the electronic files, are there</p> <p>25 paper files maintained within your office pertaining to</p>
<p style="text-align: right;">50</p> <p>1 A. I mean, you know, three banker boxes of</p> <p>2 documents.</p> <p>3 Q. Okay.</p> <p>4 A. So, I don't think it's of much help is my</p> <p>5 point.</p> <p>6 Q. Has the list itself been turned over to the</p> <p>7 OAG?</p> <p>8 A. No.</p> <p>9 Q. But that list would identify everything that</p> <p>10 has been turned over and everything that's within the</p> <p>11 electronic file pertaining to SB 14?</p> <p>12 A. In a very general way.</p> <p>13 Q. Did you review Ann McGeehan's files pertaining</p> <p>14 to SB 14?</p> <p>15 A. I don't know.</p> <p>16 Q. Would Ann McGeehan's files, notes, speeches,</p> <p>17 whatever exists be contained within the electronic file</p> <p>18 that you've been testifying here today?</p> <p>19 A. Yeah. It would be in the electronic and paper</p> <p>20 files. We gathered everything.</p> <p>21 Q. And so did you review Ann McGeehan's files</p> <p>22 pertaining to SB 14 when you began in January of 2012?</p> <p>23 MR. SWEETEN: Objection, asked and</p> <p>24 answered.</p> <p>25 A. Yeah.</p>	<p style="text-align: right;">52</p> <p>1 SB 14 or voter ID legislation generally?</p> <p>2 A. Yes.</p> <p>3 Q. And were those searched in response to the</p> <p>4 notice of deposition?</p> <p>5 A. No.</p> <p>6 Q. Do you know -- do you know or do you have</p> <p>7 knowledge as to whether the paper files contained any</p> <p>8 different documentation other than the -- beyond the</p> <p>9 electronic file?</p> <p>10 A. I have no idea.</p> <p>11 Q. I'm going to change the focus for a second to</p> <p>12 your educational background. Can you tell me a little</p> <p>13 bit about your educational background?</p> <p>14 A. I graduated Permian Basin Christian School with</p> <p>15 a high school diploma in 1985. I graduated Texas A&M</p> <p>16 University with a BA in political science in 1989.</p> <p>17 Graduated UT Law with a JD in 1993.</p> <p>18 Q. All right. And I just need to slow down a</p> <p>19 little bit. So we can skip past high school. You</p> <p>20 graduated. Congratulations. Let's go to 1999.</p> <p>21 A. But in high school, I was the top 20 percent of</p> <p>22 my class. You don't want to just pass right over that.</p> <p>23 Q. And that is important.</p> <p>24 A. I wasn't in the top 20 present. I was the top</p> <p>25 20 present. It was a small school.</p>



ESQUIRE
DEPOSITION SOLUTIONS

Toll Free: 800.211.DEPO
Facsimile: 202.296.8652

Suite 350
1425 K Street NW
Washington, DC 20005
www.esquiresolutions.com

BRIAN INGRAM

June 5, 2012

<p>53</p> <p>1 Q. So in 1999, you said you graduated from 2 undergrad, correct? 3 A. 1989. 4 Q. 1989 you graduated from undergrad. And did I 5 -- did I hear University of Texas? 6 A. That's law school. 7 Q. Law school. So the undergrad was -- 8 A. Texas A&M. 9 Q. Texas A&M. Okay. And then UT law school was 10 in? 11 A. 1993. 12 Q. '93. And do you have an active law license? 13 A. I do. 14 Q. And which states do you have an active law 15 license in? 16 A. Texas and Arkansas. 17 Q. Okay. Well, let's just talk about your work 18 history, if we -- if we can. Did you come to practice 19 law at any particular time? 20 A. I did. 21 Q. And tell me just a little bit about your law 22 practice. 23 A. Sure. September of '93 to February of '96, I 24 was at a firm in McAllen, Texas named Atlas and Hall, 25 LLP. And I was a litigation associate, but did a little</p>	<p>55</p> <p>1 A. That's fair. 2 Q. Okay. And so in 2006, you indicated you left 3 and went to Arkansas? 4 A. I did. 5 Q. And where did you go when you went to Arkansas? 6 A. I went to a firm called Kutak Rock in Little 7 Rock, Arkansas. They're an Omaha-based national firm. 8 Q. And how long did you stay there? 9 A. About a year. 10 Q. 2006 to 2007? 11 A. Yes. 12 Q. And after that? 13 A. I had my own firm for a year, January of '07 to 14 January of '08; figured self-employed in Austin was 15 better than Kutak Rock in Little Rock. 16 Q. Was that -- was that in Arkansas as well, or 17 was that back here? 18 A. No, it was here in Austin. 19 Q. Austin. And after 2008? 20 A. January of 2008, I went to work for the 21 Governor of Texas. 22 Q. And how long did you work for the Governor? 23 A. Four years. 24 Q. So that would have been what, 2008 to 2012? 25 A. '12, yes.</p>
<p>54</p> <p>1 bit of a lot of stuff. 2 Q. Okay. Beyond 1996? 3 A. In February 1996, I came to Austin to work in a 4 litigation boutique. At the time, it was Maroney, 5 Crowley, Bankston, Richardson & Hull, LLP, where I was 6 also a litigation associate. But instead of doing as 7 many different things as I was doing in McAllen, now I 8 had focused primarily on product liability litigation, 9 breast implants, medical malpractice and general 10 insurance defense, mainly of Sears and Jefferson 11 Insurance. 12 Q. And you did that from '96 to -- 13 A. The guys that I came to work for in '96, we 14 stayed together until 2006. It was different firms. We 15 merged with Locke, Purnell, Rain & Harrell. Locke, 16 Purnell merged with Liddell, Sapp, Zivley, Hill & 17 LaBoon. And then it merged with Liddell, Sapp, Zivley, 18 Hill & LaBoon, and then we left again to form our own 19 litigation boutique. 20 Q. And you left again in 2006 or you left -- 21 A. No. We left in April of 2000, and then had our 22 own firm until March of 2006, when I went to Arkansas. 23 Q. So between 1996 to 2006, you were a lawyer with 24 Maroney or some capacity of Maroney. Is that fair to 25 say?</p>	<p>56</p> <p>1 Q. All right. So let's just go back briefly to 2 1993 to 1996, where you worked for -- I believe you said 3 Atlas and Hall? 4 A. Yes. 5 Q. And during that time period, did you do 6 anything related to election law? 7 A. No. 8 Q. And then the next period would have been 1996 9 to 2006. You want make a correction? 10 A. Yeah. I'm not sure is a better answer to that 11 question. I did do some work for a lawyer named Travis 12 Hiester, and he had a whole lot of school districts that 13 he did work for, so it is completely possible that I did 14 some election law question for him on a memo. But I 15 don't remember anything specifically about it. 16 And when I was in law school, my first 17 summer, I clerked at Bickerstaff, Heath, Smiley, and 18 there was a huge election law case involving Applewhite 19 Dam, a San Antonio voter initiative. It was a big 20 constitutional mess. 21 Q. So let's go back to your internship briefly. 22 Bickerstaff, Heath & Riley I believe you said? 23 A. Smiley. 24 Q. Smiley. Smiley. And you -- you spoke a little 25 bit about what the issue was that you've referred to a</p>



Toll Free: 800.211.DEPO
Facsimile: 202.296.8652

Suite 350
1425 K Street NW
Washington, DC 20005
www.esquiresolutions.com

BRIAN INGRAM

June 5, 2012

<p>57</p> <p>1 constitutional mess. Can you tell me a little bit more 2 about the particular case that you were working on? 3 A. Well, I'm not sure exactly what all the 4 parameters were, but the question was whether or not the 5 issue put before the voters on an initiative was 6 constitutionally allowable for voters to decide in an 7 initiative process. 8 Q. And do you know what the issue was that was 9 before voters? 10 A. Applewhite Dam, a water project. 11 Q. So that had nothing do with voter ID? 12 A. No. 13 Q. Is that correct? 14 A. Definitely not. 15 Q. Okay. All right. So going back from moving 16 forward, as it was, to 1993, 1996, I believe I asked if 17 you had any responsibilities dealing with voter ID or 18 election law, and -- 19 A. Definitely not. 20 Q. No. Okay. So in 1996 to 2006, when you were 21 working in some capacity with Maroney, did you deal with 22 election law at all during that time period? 23 A. I don't think so. Not that I recall. 24 Q. And in 2006 to 2007, when you were at Kutak 25 Rock, I believe, did you deal with anything related to</p>	<p>59</p> <p>1 appointments. 2 Q. Did you have any other responsibilities? 3 A. Yes. You know, a variety of other things. 4 Q. Tell me what those are. 5 A. Well, since I was a lawyer and I was in the 6 Appointments Office, I did legal work for the division 7 with the -- you know, in consultation of the general 8 counsel's office. But I was the lawyer on the side of 9 the division. 10 Q. Okay. And I want to make sure I understand 11 that testimony. You did legal work for the division. 12 And you're talking about within Governor Perry's Office? 13 A. Right, within the Appointments Division inside 14 of Governor Perry's Office. 15 Q. Okay. And what did that legal work involve? 16 A. Mainly statutory interpretation. 17 Q. Of which provisions or what provisions? 18 A. Well, anything that comes up in Appointments, 19 from water law, river authorities to election code. 20 Q. Okay. And would your work have involved 21 anything dealing with voter ID legislation? 22 A. No. I was on a team that did bill analysis for 23 the Governor, you know, with his Policy Office. And so 24 one of the groups that I was in, was in legal, and that 25 would have dealt with voter ID legislation. But I don't</p>
<p>58</p> <p>1 election law or voter ID legislation? 2 A. Did not. 3 Q. And that was in Arkansas, if I recall 4 correctly. 5 A. It was. 6 Q. Okay. So then in 2007 to 2008, you came back 7 to your own firm in Austin. Did you deal with anything 8 related to election law or voter ID? 9 A. Did not. 10 Q. No. All right. And now we're to 2008 to 2012 11 where you worked for the Governor, correct? 12 A. Right. 13 Q. And that would have been Governor Rick Perry at 14 the time? 15 A. Yes. 16 Q. And when you came in to Governor Perry's 17 Office, what was your title or what was your title? 18 A. Appointments Manager. 19 Q. And did you continue to hold that title as 20 Appointments Manager through -- through the time that 21 you worked for the Governor? 22 A. I did. 23 Q. Okay. And what were your responsibilities as 24 an Appointments Manager? 25 A. To assist the Governor in making gubernatorial</p>	<p>60</p> <p>1 have any specific recall of a bill coming up. 2 Q. Okay. And just so I understand your testimony 3 there, you were on a team that did bill analysis? 4 A. Right. 5 Q. Who was -- who else was on that team? 6 A. Well, it varied, depending on which category we 7 were in. My role on the team is that if any 8 appointments issue comes up in a bill, to be the 9 Appointments person to talk about whether or not, you 10 know, a good idea, a bad idea, it needs to be tweaked or 11 whatever. So my role as not wholistic. My role was 12 limited. 13 Q. And again, so I understand what you're talking 14 about, when you talk about Appointments issues, how 15 would Appointments issues be related to election law, 16 for instance? 17 A. Well, it wouldn't necessarily be related to 18 election law, but it would be related to a whole bunch 19 of other kinds of laws. They always -- the Legislature 20 always thinks it's a good idea to appointment more 21 boards and commissions. 22 Q. Okay. Was Michael Schofield on the team that 23 you were referencing? 24 A. He was in some of the groups that I was in. 25 Q. And specifically, do you have any -- any memory</p>



ESQUIRE
DEPOSITION SOLUTIONS

Toll Free: 800.211.DEPO
Facsimile: 202.296.8652

Suite 350
1425 K Street NW
Washington, DC 20005
www.esquiresolutions.com

BRIAN INGRAM

June 5, 2012

<p>61</p> <p>1 of analyzing any voter ID legislation?</p> <p>2 A. I do not.</p> <p>3 Q. Were you involved in any communications</p> <p>4 regarding voter ID legislation while you were in the</p> <p>5 Governor's Office?</p> <p>6 A. No.</p> <p>7 Q. Are you aware of any existing analysis or</p> <p>8 reports regarding voter ID legislation that you may have</p> <p>9 reviewed while you were in the Governor's Office?</p> <p>10 A. No. I didn't review anything.</p> <p>11 Q. So you said you didn't review anything, but you</p> <p>12 said -- you also testified that you were involved in a</p> <p>13 team that conducted bill analysis?</p> <p>14 A. That's right.</p> <p>15 Q. And my understanding is, is you may have been</p> <p>16 involved in the analysis of voter ID legislation?</p> <p>17 A. Right.</p> <p>18 Q. But you don't recall reviewing anything related</p> <p>19 to that?</p> <p>20 A. Bill analysis doesn't mean that everybody in</p> <p>21 the room reviews things.</p> <p>22 Q. Okay.</p> <p>23 A. One person reviews and reports. Everybody else</p> <p>24 has questions, so I didn't -- I didn't have any of my</p> <p>25 own bills.</p>	<p>63</p> <p>1 limited role in the Governor's Office working on a team</p> <p>2 that may have reviewed voter ID legislation and a memo</p> <p>3 that you may have prepared some time back during your</p> <p>4 law practice, did you have any other responsibilities or</p> <p>5 involvement in voter ID legislation prior to becoming</p> <p>6 the Director of Elections?</p> <p>7 A. None.</p> <p>8 Q. And I guess I should ask, just to make sure I'm</p> <p>9 clear: Were you involved in any groups prior to</p> <p>10 becoming the Director of Elections that -- that</p> <p>11 supported or promoted voter ID legislation?</p> <p>12 A. No. I don't know what you mean.</p> <p>13 Q. Any groups, any outside groups, groups outside</p> <p>14 of the government?</p> <p>15 A. Advocacy kind of groups?</p> <p>16 Q. Yes.</p> <p>17 A. No.</p> <p>18 Q. Are you a member of any groups outside of the</p> <p>19 government? Political groups?</p> <p>20 A. I'm a member of my church.</p> <p>21 Q. That's a group.</p> <p>22 A. Yeah, that's a group. I don't know of any</p> <p>23 other groups that I would be a member of. I'm a member</p> <p>24 of the Texas Bar Association, the Arkansas Bar</p> <p>25 Association. I'm a member of -- I'm no longer a member</p>
<p>62</p> <p>1 Q. Okay.</p> <p>2 A. So I didn't review anything.</p> <p>3 Q. So help me to understand what it is that you</p> <p>4 would have done, what your responsibilities on the team</p> <p>5 would have been.</p> <p>6 MR. SWEETEN: You can answer that as a</p> <p>7 general matter.</p> <p>8 A. And generally speaking, my role was to provide</p> <p>9 input with regard to Appointments issues that come up in</p> <p>10 the bills.</p> <p>11 Q. (By Mr. Gear) Were you present during any</p> <p>12 communications while in the Governor's Office where</p> <p>13 voter ID legislation was the subject matter?</p> <p>14 A. No.</p> <p>15 Q. Have you ever worked as an election judge or an</p> <p>16 election worker in any elections in the state of Texas?</p> <p>17 A. I have not.</p> <p>18 Q. And so my understanding is, is that you are the</p> <p>19 Director of Elections within the Secretary of State's</p> <p>20 Office?</p> <p>21 A. That's correct.</p> <p>22 Q. All right. And you began that January 5th,</p> <p>23 2012?</p> <p>24 A. I did.</p> <p>25 Q. So prior to January 5th, 2012, other than your</p>	<p>64</p> <p>1 of any other Young Lawyer group. That's by the</p> <p>2 wayside. But, you know, I don't know. Nothing advocacy</p> <p>3 oriented.</p> <p>4 Q. Are you a member of any -- any political</p> <p>5 organizations, other than the organizations that you've</p> <p>6 mentioned?</p> <p>7 A. No.</p> <p>8 Q. Do you sit on any committees of any kind?</p> <p>9 A. No. In the Governor's Office, one of the</p> <p>10 things that I did was, I was his designee on the Texas</p> <p>11 Access to Justice Commission, but I resigned that when I</p> <p>12 came over to the Secretary of State's Office.</p> <p>13 Q. Texas Access to Justice, can you tell me what</p> <p>14 that is?</p> <p>15 A. It is a group that was formed by the Supreme</p> <p>16 Court, where the Supreme Court, in its order, invited</p> <p>17 the Governor to have a designee present at the</p> <p>18 meetings. And the purpose of the Texas Access to</p> <p>19 Justice Commission is to make sure that indigent persons</p> <p>20 in the state of Texas have access to civil legal</p> <p>21 services.</p> <p>22 MR. SWEETEN: Bruce, I've got an answer to</p> <p>23 your question on the SOS information.</p> <p>24 MR. GEAR: Okay.</p> <p>25 MR. SWEETEN: We can do that at a break,</p>



Toll Free: 800.211.DEPO
Facsimile: 202.296.8652

Suite 350
1425 K Street NW
Washington, DC 20005
www.esquiresolutions.com

BRIAN INGRAM

June 5, 2012

<p>1 or I can just tell you now. 2 MR. GEAR: We can go off the record for a 3 second. 4 MR. SWEETEN: All right. 5 (Brief discussion off the record at 6 11:01 a.m.) 7 MR. SWEETEN: I let Bruce, at the break, 8 know that we had produced a spreadsheet from the 9 Secretary of State, and I gave him the Bates numbers. 10 MR. GEAR: And I appreciate that. Thank 11 you. 12 My watch says 12:00 o'clock. Do you need 13 a break at all? 14 THE REPORTER: Yeah, I would like a break. 15 It's 11:00 o'clock, though. 16 MR. GEAR: Why don't we take a ten-minute 17 break. 18 (Recess from 11:02 a.m. to 11:13 a.m.) 19 Q. (By Mr. Gear) So we moved through your long 20 and illustrious history, work history, and so now we've 21 gotten to the point where you are employed with the 22 Secretary of State's Office. And so why don't we start 23 off by talking about how you came to be employed by the 24 Secretary of State? 25 A. I had an -- obviously, the Deputy Secretary of</p>	<p>1 No, never have." You know. Just 2 strange -- "John, what's this about?" 3 "Can't tell you right now." 4 Okay. And so then another weird phone 5 call about a week later, "Have you ever met the 6 Secretary?" 7 "No." 8 "Why don't you come over and meet the 9 Secretary?" 10 "Okay. Love to." 11 So we dropped by and met the Secretary, 12 you know, just coming by to see John and he happened to 13 be over there by her, and we just happened to be -- 14 anyway, it was all very strange, cloak and dagger, and I 15 don't know what the deal was. 16 But at some point, I had a conversation 17 with Coby Shorter who says that Ann McGeehan was 18 retiring, and that he had thought of me as a possibility 19 to replace her and wanted to know if I was interested. 20 And I said "yes." He had already talked to Teresa, my 21 boss, so they'd already -- 22 Q. So was there a formal interviewing process? 23 A. There was. I had a formal interview with Coby, 24 I don't know sometime after that. 25 Q. Okay. So had you ever attended any party</p>
<p>1 State, Coby Shorter, used to be in the Appointments 2 Office. He was the Deputy Secretary. He was the Deputy 3 Director of Appointments. And whenever I came, he had 4 just left, so I was at his desk in the Appointments 5 Office. And over the years I got to know Coby. I would 6 go to the senior staff meetings sometimes, and he was up 7 there, and you know, you just get to know people. 8 And after this last legislative session, 9 you start the process of thinking about what comes 10 next. You can't do appointments for the Governor 11 forever, and you have to go back to the work at some 12 point. So talked to my director about, you know, 13 keeping our ear to the ground and kind of putting 14 feelers out, you know, for anything that might be coming 15 up. 16 And got a weird phone call from John 17 Sepehri. It was weird. John Sepehri, I had known for a 18 while. He's general counsel in the Secretary of State's 19 Office for the last few years. And so I had known him 20 in that capacity, and we had lunch a few times. And you 21 know, we were friends. And he calls and he says -- just 22 asking random questions, election law experience, not 23 much. A little bit as it pertains to judicial 24 appointments, but not much. And "Ever worked" -- "Ever 25 been to party conventions?" "</p>	<p>1 conventions? 2 A. No. No. I did the Williamson County 3 convention for the Republicans in '08, just because I'd 4 never had done any of that stuff before. So at precinct 5 convention level, I became the precinct convention 6 chairman of the three of us that were meeting, one of 7 which was my wife. And we nominated ourselves to be 8 delegates to the Williamson County convention, and we 9 went. That was quite an entertaining process. You 10 would not believe the amount of energy spent in debating 11 whether or not the 17th Amendment should stay on the 12 platform or not. It was interesting. So that was the 13 only time. 14 Q. And the 17th Amendment would -- 15 A. Direct election of senators, yeah. That was a 16 hot issue at the Williamson County Republican 17 convention. 18 Q. And so as we've established already, you -- you 19 became employed with the Secretary of State's Office on 20 January 5th, 2012? 21 A. Yes. 22 Q. And did you come in as the Director of 23 Elections? 24 A. I did. 25 Q. And because I don't know, can you tell me what</p>



ESQUIRE
DEPOSITION SOLUTIONS

Toll Free: 800.211.DEPO
Facsimile: 202.296.8652

Suite 350
1425 K Street NW
Washington, DC 20005
www.esquiresolutions.com

BRIAN INGRAM

June 5, 2012

<p style="text-align: right;">69</p> <p>1 the -- what the structure of the Secretary of State's 2 Office is, particularly as it pertains to election laws? 3 A. Well, we have the Secretary and the Deputy 4 Secretary. And then under the Deputy Secretary, we've 5 got several division directors, one of which is the 6 Elections, so that's me. And then I've got managers, 7 four of them that are in my division that management 8 different teams. 9 Q. So let's talk about the managers, and I believe 10 you said there were four of them. Can you tell me who 11 they are and what they manage? 12 A. Sure. There's Louri O'Leary, who is the 13 administration manager, so she -- all the administrative 14 stuff in the office. She's not really an office 15 manager. We don't have an office manager, but all of 16 the administrative support staff kind of things, she's 17 in charge of, as well as other duties as assigned, 18 including the ordering of voter registration application 19 cards, which has turned into a pretty complicated 20 process. 21 She has within her group kind of a 22 subgroup of administration. It's called "special 23 projects." And it's managed by Leticia Salazar, and she 24 is in charge of doing the training video for volunteer 25 deputy registrars for election workers. She's in charge</p>	<p style="text-align: right;">71</p> <p>1 team, Betsy Schonhoff is the manager of it. And they 2 manage the team database and interface with the counties 3 on any questions the counties have with regard to the 4 team voter registration database. Betsy's job is to 5 make sure that her ladies that she's got in her division 6 are being productive, as well as interfacing with the IT 7 part of the Secretary of State's Office, which is in a 8 different division. So she's got one of the IT groups 9 is devoted to voter registration so she interfaces with 10 them, and she's the face of the Secretary of State's 11 Office with the counties. 12 Q. And when you mean "the face," or when you say 13 "the face," do you mean the point person? 14 A. She's the point person. If the counties have 15 an issue, they get in touch with Betsy, and Betsy 16 distributes it out to whoever needs to work on it. 17 And then we've got the Electronic Funds 18 Management portion of the office. Dan Glotzer is the 19 one in charge of it. And they are in charge of passing 20 out money. 21 Q. So if SB 14 was implemented, would -- did you 22 say Dan Glotzer? 23 A. Glotzer. 24 Q. Glotzer. The funding for SB 14, would it come 25 through the Electronic Funds division?</p>
<p style="text-align: right;">70</p> <p>1 of organizing the seminar and making sure that all the 2 materials are, you know, that we've got an organized 3 process for putting the seminar together in August. As 4 well as she's the Elections Division interface with the 5 voter education campaigns that the Secretary's engaged 6 in, you know, any kind of graphic design, website stuff, 7 that's all special projects. 8 Q. And that's a subgroup under Louri O'Leary? 9 A. Under administration, that's right. 10 Q. Okay. 11 A. So she's kind of -- she's a manager, but she's 12 a submanager under Louri. 13 And then we've got the Legal Division and 14 the director of it is -- the manager of it is Elizabeth 15 Winn. She has been in the Secretary of State's Office 16 for about 20 years. 17 Q. So she's the institutional knowledge in the 18 office. 19 A. She's invaluable. Smart, pleasant, hard 20 worker. Invaluable. And she's got several lawyers 21 working for her as well as two support people. 22 Q. Okay. 23 A. We're about to have two more lawyers start 24 three days from now, two days from now. 25 And then we've got the voter registration</p>	<p style="text-align: right;">72</p> <p>1 A. No. I don't think that there any funding with 2 SB 14 except for the education component, and it would 3 come through Electronic Funds Management. It would come 4 through HAVA. 5 Q. HAVA. 6 A. Yes. HAVA grant. 7 Q. So your testimony is it would not come 8 through -- 9 A. Just that piece. 10 Q. Okay. 11 A. The voter education piece. 12 Q. Okay. 13 A. Any other costs associated with SB 14 14 implementation would be absorbed by the regular budget. 15 Q. Okay. All right. I think I understand 16 that. So as the Director of Elections, were you hired 17 to -- as a lawyer for the Secretary of State? You have 18 a law degree. Do you -- were you hired to practice law? 19 A. They feel that it's important. Ann McGeehan 20 was a lawyer. They feel like it's important to have a 21 lawyer in this position, because there's a whole lot of 22 legal interpretation that has to go on necessarily with 23 the election code and the rule making. 24 Q. Do your job -- does your job title or does your 25 job responsibilities include providing legal advice?</p>



ESQUIRE
DEPOSITION SOLUTIONS

Toll Free: 800.211.DEPO
Facsimile: 202.296.8652

Suite 350
1425 K Street NW
Washington, DC 20005
www.esquiresolutions.com

BRIAN INGRAM

June 5, 2012

<p style="text-align: right;">249</p> <p>1 requirement under SB 14?</p> <p>2 A. We have created an app, both for Android and</p> <p>3 for iPhones, and the content on that app can change to</p> <p>4 voter ID whenever we get precleared.</p> <p>5 Q. What other ways have the Special Projects Team</p> <p>6 made efforts to reach minority voters with the voter</p> <p>7 education plan about photo ID requirements?</p> <p>8 A. I don't know of anything specific that I can</p> <p>9 recall as we sit here today. There's a strong social</p> <p>10 media component, and it's multi-layered. I don't know</p> <p>11 what they all are.</p> <p>12 Q. Would you know if they were doing things other</p> <p>13 than relying on social media? I mean, you said they</p> <p>14 give you reports about what they are doing. Are those</p> <p>15 the kinds of things that are in those reports?</p> <p>16 A. No, they don't give me specific reports about</p> <p>17 what radio spots they're running where and what TVs</p> <p>18 they're running where. I mean, I don't know those kind</p> <p>19 of details. That's not -- would be a Rich question.</p> <p>20 Do you understand what I'm saying? The</p> <p>21 question about Spanish markets and African American</p> <p>22 markets and how those are being targeted with specific</p> <p>23 ads, I would never get in the middle of that level of</p> <p>24 detail. That would not be productive.</p> <p>25 Q. And have you directed your staff to engage</p>	<p style="text-align: right;">251</p> <p>1 August 15th, but you don't actually know what their</p> <p>2 progress is?</p> <p>3 A. That's right.</p> <p>4 Q. And do you know if any of those TV ads are</p> <p>5 going to be in Spanish?</p> <p>6 A. I don't know. I know in the first round, they</p> <p>7 were.</p> <p>8 Q. Do you know if the plan will make use of radio</p> <p>9 ads?</p> <p>10 A. I assume that it will. The first phase did.</p> <p>11 Q. And do you know if any of those will be in</p> <p>12 Spanish?</p> <p>13 A. I imagine they will be, yes.</p> <p>14 Q. Okay. If we could go back your affidavit,</p> <p>15 which has been marked as MALC <u>Exhibit 558</u>.</p> <p>16 A. Yes, I have it.</p> <p>17 Q. If I could just direct you to Paragraph 7. You</p> <p>18 say there that, "In order to have a basic education</p> <p>19 program, the Secretary of State's Office would need a</p> <p>20 final decision by August 15th," and then you contrast</p> <p>21 that with a complete program, which would need a</p> <p>22 decision by no later than July 6th. I wonder if you</p> <p>23 could tell me: What's the difference between a basic</p> <p>24 program and a complete program?</p> <p>25 A. I cannot. That would be a Rich Parsons</p>
<p style="text-align: right;">250</p> <p>1 those things, even though you're not keeping track of</p> <p>2 the what they are doing?</p> <p>3 A. As I told you before, I don't have to direct</p> <p>4 them than that; they are well aware of their obligations</p> <p>5 in that regard.</p> <p>6 Q. Does the -- or will the education plan to</p> <p>7 educate voters about photo ID requirements make use of</p> <p>8 newspapers?</p> <p>9 A. I don't know. Probably, but it would be a</p> <p>10 small component, I bet.</p> <p>11 Q. Do you know if any newspaper ads have been</p> <p>12 designed yet?</p> <p>13 A. I do not.</p> <p>14 Q. Does the education plan to educate voters about</p> <p>15 photo ID under SB 14 make use of television advertising?</p> <p>16 A. Yes.</p> <p>17 Q. Do you know if TV advertisements have been</p> <p>18 designed or produced yet?</p> <p>19 A. I do not know the status of those. I</p> <p>20 anticipate that they are in some level of production,</p> <p>21 because the goal is to have a plan in place ready to go</p> <p>22 by August the 15th or August 31st, in case this gets</p> <p>23 precleared, so I don't know how long the front end is on</p> <p>24 that, but they'll be ready.</p> <p>25 Q. So you expect that those will be ready by</p>	<p style="text-align: right;">252</p> <p>1 question.</p> <p>2 Q. Could you turn to the next page and tell me:</p> <p>3 Did you sign this affidavit?</p> <p>4 A. I did.</p> <p>5 Q. And so when you signed this affidavit, did you</p> <p>6 understand what Paragraph 7 meant?</p> <p>7 A. I understand that it's what Rich told me.</p> <p>8 Q. Now, you also state here that -- I'm sorry. As</p> <p>9 I said before, you say that you would need a final</p> <p>10 decision by August 15th in order to have even the basic</p> <p>11 education program. If I were to represent to you that</p> <p>12 the court has predicted that it won't make a decision</p> <p>13 until August 31st, does that mean the Secretary of State</p> <p>14 will not be able to have even a basic education program?</p> <p>15 A. It means that we're going to get it done.</p> <p>16 Q. Will the program be less well developed than</p> <p>17 whatever this basic education program that's</p> <p>18 contemplated in your affidavit is?</p> <p>19 A. I'm sure it will be the same as the August</p> <p>20 15th, just with less time to have an impact.</p> <p>21 Q. So what is does it mean that it will have less</p> <p>22 time to have an impact?</p> <p>23 A. It will be 16 more days down the road toward</p> <p>24 election.</p> <p>25 Q. Will it reach fewer voters?</p>



ESQUIRE
DEPOSITION SOLUTIONS

Toll Free: 800.211.DEPO
Facsimile: 202.296.8652

Suite 350
1425 K Street NW
Washington, DC 20005
www.esquiresolutions.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	:	
	:	
Plaintiff,	:	Docket No. CA 12-128
	:	
vs.	:	Washington, D.C.
	:	Thursday, May 3, 2012
ERIC H. HOLDER, Jr.	:	3:05 p.m.
	:	
Defendant, and	:	
	:	
ERIC KENNIE, et al,	:	
	:	
Intervenor-Defendants.	:	
-----	:	x

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE DAVID S. TATEL
UNITED STATES CIRCUIT JUDGE
THE HONORABLE ROSEMARY M. COLLYER
THE HONORABLE ROBERT L. WILKINS
UNITED STATES DISTRICT JUDGES

APPEARANCES:

For the Plaintiff: MATTHEW FREDERICK, Esquire
PATRICK SWEETEN, Esquire
JONATHAN F. MITCHELL, Esquire
(via phone)
STACEY NAPIER, Esquire
(via phone)
Office of Attorney General of Texas
209 West 14th Street, 7th Floor
Austin, TX 78701

For the Defendant: ELIZABETH S. WESTFALL, Esquire
DANIEL J. FREEMAN, Esquire
BRUCE I. GEAR, Esquire
JENNIFER L. MARANZANO, Esquire
MEREDITH E.B. BELL-PLATTS, Esquire
RISA BERKOWER, Esquire
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

1 sworn, and then Judge Wilkins has a series of questions he
2 would like to make, advance to Mr. Ingram.

3 Would you proceed, Ms. White, please.

4 THE DEPUTY CLERK: Yes, Your Honor.

5 PLAINTIFF WITNESS KEITH INGRAM SWORN

6 JUDGE COLLYER: All right.

7 JUDGE WILKINS: Good afternoon, Mr. Ingram, this is
8 Judge Wilkins.

9 How are you this afternoon?

10 THE WITNESS: Doing well, Judge. How are you?

11 JUDGE WILKINS: Good.

12 I had some questions about the August 15th date and the
13 one place where I see that they appear in paragraph four in the
14 context of discussions with printing vendors.

15 THE WITNESS: Right.

16 JUDGE WILKINS: So I wanted to inquire further about
17 this issue.

18 THE WITNESS: Sure.

19 JUDGE WILKINS: Sir, you indicate that there are a
20 handful of forms that would need to change in order to comply
21 with SB 14 requirements.

22 Can you tell me what you mean by that sentence, how many
23 forms and what forms are there?

24 THE WITNESS: We're talking about seven forms there
25 both the election date, combination sign-in form and the early

1 voting combination sign-in form.

2 Then we've got a notice of the post of the polling
3 places for acceptable forms of ID.

4 Then we've got four documents related to provisional
5 voting including the affidavit, the envelope, the provisional
6 voting form itself, and the notice to provisional voters about
7 their right to get an ID within the next six days and get back
8 to the County Clerk. So it's seven forms.

9 JUDGE WILKINS: How many of those forms would you
10 anticipate needing to be printed? How many total of each?

11 THE WITNESS: Now that I don't know. This vendor
12 that I was talking to is Hart Intercivic. They print the
13 election kits for most of the counties in Texas. It depends on
14 how many each county orders.

15 I don't know because we've not had this log before, so I
16 don't know how many of the provisional ballots we're going to
17 need for people who don't have ID and then they've got six days
18 to go get the ID and get back to the County Clerk. I have no
19 idea. I know that the counties will be ordering from this
20 vendor. Other than that, I don't know. It's for all of Texas.

21 JUDGE WILKINS: Just so that I can understand. You
22 said that the counties will order them from the vendor. The
23 State doesn't do one order and then distribute them to the
24 counties? Instead, the counties order directly from the
25 vendor; is that what you're saying?

1 THE WITNESS: Yes, sir, that's right.

2 The State approves the forms and the counties order
3 them.

4 JUDGE WILKINS: Okay. Now you indicate that other
5 forms are going to be I guess they will begin production on
6 other forms in late June and during July; is that right?

7 THE WITNESS: That's right. That's the preferred
8 time for the orders to be received and done is in June. And
9 they're actually going to do all of the forms in June. What
10 we're talking about doing is as late as August 15th is a
11 supplemental election judge kit with these different forms in
12 it.

13 JUDGE WILKINS: All right. Well, my question to you
14 is this, why can't Texas simply print these seven forms as if
15 the law has been precleared and have it ready so that you
16 basically have two sets of forms, one if the law ends up being
17 precleared and another set of the seven forms in case it's not
18 precleared and depending upon our decision, you just end up
19 throwing one set of forms away and not using them at the
20 election?

21 THE WITNESS: Right. I guess the answer to that
22 question is cost more than anything else.

23 Secondly, I think it would probably confuse the
24 county officials more than a supplemental kit with the few
25 extra forms in it, you know what I mean.

1 We're dealing with various levels of sophistication and
2 resources at the county level, and so we're already doing or
3 contemplating doing something off the map and if we, you know,
4 the goal is to make it as uncomplicated as possible for those
5 people at the local level.

6 JUDGE WILKINS: All right. If we deal with the first
7 issue which is cost, what's your estimate as to how much that
8 would increase the cost?

9 THE WITNESS: I do not know.

10 JUDGE WILKINS: All right. We'll come back to that
11 in a minute.

12 I guess the other question that I have for you relates
13 to the training materials which are discussed in paragraph five
14 and there you say that the materials, those training materials,
15 you say that you need to get those materials to the counties
16 and local entities for the November early voting period and in
17 order to do so you need to have everything distributed by
18 August of 2010.

19 Help me understand with respect to these training
20 materials, are those printed by the same printing vendors or
21 are those printed inhouse or what do you mean by distributing?

22 THE WITNESS: That's actually going to be SB 14. If
23 it's going to be precleared, it's going to be a combination
24 video and power point presentation. And the reason we have got
25 an August date in here is we're kicking off the election worker

1 training with a seminar on August the 20th, and that's, that's
2 the big election worker training seminar for the fall. We're
3 going to have anywhere from 7 to 900 election workers present
4 in August that week and that's what we would need it for.

5 If we miss that then, you know, it's not the end of the
6 world, but it sure is better to have it on by August the 20th.
7 We'll have those materials ready by then, it's just that we
8 would like to use them then if we need to.

9 JUDGE WILKINS: Okay. So that's what you mean by
10 having everything distributed?

11 THE WITNESS: Right. We're going to start the
12 distribution at our seminar on August the 20th.

13 JUDGE WILKINS: And it's distributing videos and
14 power point presentations?

15 THE WITNESS: That's right.

16 JUDGE WILKINS: All right. Is that the type of thing
17 that can be distributed by, you know, e-mail or electronically
18 or what do you mean by needing to distribute those?

19 THE WITNESS: That's right and posted to our website
20 is the main way that we distribute the E materials. We post
21 them and the counties do training sessions at the local level
22 and run our video.

23 JUDGE WILKINS: Okay, and with respect to paragraph
24 six and voter education.

25 THE WITNESS: Right, that's the most flexible piece.

1 JUDGE WILKINS: All right. There's an indication
2 that if the voter education and that there's a road tour
3 scheduled to begin in August of 2010 and then it indicates the
4 next sentence in paragraph six that you anticipate that paid
5 advertising for the general election and education program
6 would start running in the August/September time frame.

7 So you just indicated that that was the most flexible.
8 Is that something that, that advertising would begin in
9 September that would cause any particular hardship or
10 prejudice?

11 THE WITNESS: No, I wouldn't think so. The advantage
12 to more time is more people can get the message.

13 The campaign is already in place. The spots are already
14 reserved, so it's just a question of changing the contents on
15 the commercials and so if we start the campaign with one set of
16 commercials, we get precleared, then it's easier to switch the
17 content for the remaining commercials. We would have just
18 missed some of the paid time that we've bought.

19 JUDGE WILKINS: All right. I guess if the deadline,
20 if we determine that there's not sufficient time between July
21 the 9th and August 15th, the July the 9th trial date and August
22 15th to rule and get our decision out and we need let's say
23 approximately two more weeks until around August the 29th or
24 the 30th, explain to me exactly how that would effect these
25 three areas of the printing of the forms and election

1 materials, the training materials and the voter education
2 campaign?

3 THE WITNESS: Right. The voter education campaign
4 would be, you know, relatively uneffected.

5 We would miss the seminar for the training of the mass
6 of 700 key people from counties with regards to the training.

7 And then the printing from the vendor, I don't know how
8 it would effect them. I don't know if it would make all of the
9 difference in the world or if they have gotten slack in their
10 estimate to me. I do know that I talked to the program manager
11 at Hart, she's responsible for making sure that these election
12 kits get printed. And, you know, I sort of had to push her a
13 little bit to get August the 15th. So I don't know if they've
14 got any slack after that or not.

15 JUDGE WILKINS: What information do you need in order
16 to give us an estimate of the cost increase if you print the
17 forms both ways?

18 THE WITNESS: I would just have to call the Hart
19 again. I could probably do that pretty quickly.

20 JUDGE WILKINS: What you would ask them would be what
21 the State has ordered in the past and just determine based on
22 that number of forms that were ordered in the past if we have
23 to do these seven forms both ways ordering the same number that
24 you've used in the past, how much increase cost that would be,
25 is that what you would be doing?

1 THE WITNESS: Yes, sir. Try to think about how we
2 would distribute them. That I think is a more complicated
3 piece than the cost.

4 JUDGE WILKINS: All right. I think those are my
5 questions.

6 Judge Tatel or Judge Collyer, if you have further
7 questions.

8 JUDGE COLLYER: I'm not sure, sir. Thank you, Judge
9 Wilkins.

10 This is Judge Collyer, Mr. Ingram.

11 I'm not sure that I quite understood your last comment
12 which was that it would be more complex to figure out how you
13 would distribute these materials, the seven documents you were
14 talking about if they, if our decision were not out by August
15 15th.

16 I thought that you said that you would just post them to
17 your website and then people could use them locally. Did I
18 miss a step of your analysis?

19 THE WITNESS: Yes, ma'am. The part that gets posted
20 is for the election worker training. These materials that
21 we're talking about that need to be printed in advance are what
22 the election workers use at the polling place whenever they're
23 dealing with voters.

24 Putting on an election is a very complex logistical
25 exercise and, you know, that's the part that I don't know how

1 we would make sure that the forms that the election judge has
2 at a particular polling place at Shelby County let's say, are
3 the right forms, not the wrong terms.

4 If we give her two sets and they've got two sets and
5 they have got to use their judgment we're inviting a layer of
6 complication that would be difficult to overcome on the fly.

7 JUDGE COLLYER: Well, the seven forms that you
8 identified, those forms would be relevant only if the and when
9 the law is proved, correct?

10 THE WITNESS: That's right.

11 JUDGE COLLYER: So if you printed them now according
12 to whatever numbers the county said they would need and then
13 held them in Austin, could you not then distribute them once
14 the Court's decision was out but well in advance of any
15 November election?

16 THE WITNESS: Conceivably, but the problem that I'm
17 trying to, probably not doing a very good job of explaining, is
18 that these Hart Intercivic sends out kits in response to county
19 orders. So if a county has ordered 10,000 of these kits and
20 forms made they come in packages.

21 You know, if later we do a supplemental kit and which is
22 what we're thinking about doing by August the 15th, then the
23 county could order as many of those as they want and would have
24 all that they need.

25 If we submit all of the forms to Hart and then print

1 them all in response to an election kit order from a county,
2 then I don't know how, you know, it's another question for Hart
3 how they could do that, how they could make sure that these
4 forms are only if the law is precleared and the rest of them
5 you can use.

6 You know what I'm saying? It adds a layer of complexity
7 that would have to be thought about at least.

8 JUDGE COLLYER: Well, what you're saying is that the
9 printer would have to understand that forms one through 15 are
10 to be put into the election kit for a response to any orders
11 from the counties and forms 16 through 22, are to be held for
12 supplemental distribution on order, order from the State
13 Government. That's what we're really saying isn't it?

14 THE WITNESS: Exactly. That's what we're talking
15 about. That has to be done by August the 15th. They need to
16 get to work August 15th if we are going to need these other
17 forms or not.

18 We've got the forms. I think all of them I've seen and
19 I'm pretty sure they're in final form. It's not a question of
20 making sure that we have got those forms. It's a question of
21 the time line for ordering and getting them into the kits.

22 JUDGE COLLYER: Well, my point is that I thought you
23 said earlier that you were going to be distributing all of the
24 traditional election forms the end of June, sometime in July
25 and we're going to do a supplemental distribution in August; is

1 that right?

2 THE WITNESS: That's right.

3 JUDGE COLLYER: So if the supplemental distribution
4 happened in the first week of September instead of in August,
5 what difference would it make to your election managers? I
6 mean, you would miss the August 20th training date, I agree
7 with that, but other than that, what difference does it make?

8 THE WITNESS: Well, I don't know. I know that
9 whenever I had this conversation with Hart August the 15th is
10 the date that they told me they needed the decision so that the
11 counties could start ordering to make sure that they all got
12 them. It might not make any difference. I don't know. What I
13 know is what they told me is that they needed it by August the
14 15th.

15 JUDGE COLLYER: But that was for the counties to get
16 it by what date? It can't be for them to get it before
17 November because Texas is large, but it's not that large. So
18 it must be before a date certain.

19 Do you know what date that is?

20 THE WITNESS: I do not. And I imagine that it varies
21 from county to county. But they've got to have it in
22 sufficient time to make sure that each precinct election judge
23 has it in their kit.

24 You know, it's Bexar County alone has about 385
25 precincts so the operation that they have got in place in their

1 warehouse is just a phenomenal logistical operation where they
2 have got to make sure that all 385, they've got to have it for
3 everybody too which is a good 15, 17 days before the election.
4 But either way they have got to have it in time to get it
5 distributed to each kit.

6 I don't know, I don't have any idea how much time it takes
7 for the printer, how much time it takes for the shipping, how
8 much time it takes for the logistical stuff at the end. But
9 the people who have been doing this say that they need at least
10 until by August 15th. You know, I don't want to second guess
11 them.

12 JUDGE COLLYER: Did you have questions? Yes, Judge
13 Tatel?

14 JUDGE TATEL: Yes.

15 Mr. Ingram, this is Judge Tatel. How are you today?

16 THE WITNESS: Sure.

17 JUDGE TATEL: One is on the cost. I assume the State
18 has budgeted this whole thing based on the assumption that you
19 will be able to implement this statute in November, right?

20 THE WITNESS: Yes, sir.

21 JUDGE TATEL: So when Judge Wilkins was asking you
22 about the cost, I assume what we're taking about is the fact
23 that if the materials might be prepared, materials that would
24 be prepared to be used if a voter ID law is approved might not
25 be needed if it isn't approved. So there's no additional cost

1 is there?

2 You are assuming in your budget that you are going to
3 have to prepare all of this, right?

4 THE WITNESS: That's right.

5 JUDGE TATEL: So the only question really --

6 THE WITNESS: If we had been precleared
7 administratively --

8 JUDGE TATEL: Exactly.

9 THE WITNESS: -- a long time ago, a few months ago --

10 JUDGE TATEL: No, I understand.

11 THE WITNESS: -- then we wouldn't have to print two
12 sets of provisional ballots and provisional ballot envelopes.

13 JUDGE TATEL: Yes, I understand that.

14 My only point is that you're now, the State is now in
15 the situation since it hasn't been precleared where it has to
16 prepare both sets anyway. So I don't, I guess I don't see
17 where there's any additional cost to the State.

18 THE WITNESS: Right.

19 JUDGE TATEL: My second point is more general and
20 that is as you think about your answers to these questions,
21 keep in mind that what you're hearing here is you have a Court
22 that is prepared to lean over backwards to get this case tried
23 and decided so that if the statute is precleared, Texas can
24 implement it for the November election. The Court is really
25 prepared today to do everything we can to accomplish that.

1 THE WITNESS: Yes.

2 JUDGE TATEL: I realize that you are hearing from
3 your people they have a management problem and I totally
4 understand the problem they've got. They probably, I can
5 understand why they'd like it by August 15th, they would
6 probably like it a lot earlier, right?

7 THE WITNESS: Yes.

8 JUDGE TATEL: Of course. But the question is given
9 the State's, you know, preeminent interest in getting this
10 thing done, you know, can you and your colleagues, you know,
11 get from your people a little more flexibility at the other end
12 of this process?

13 Namely, the Court's need perhaps for a little more time
14 to get the decision done even though that might cause some
15 increased administrative burdens for your people if they
16 understood that well, yes, it's going to be more difficult, we
17 may have to do things a little differently but it might be
18 worth it if we can get a decision in time. If they would look
19 at it that way, I think -- do you see my point?

20 THE WITNESS: Yes, sir, I completely see your point.

21 I do want to make a --

22 JUDGE TATEL: Now if you tell us look, we've really
23 thought about it and there's absolutely no way we can have, use
24 this statute at the November election unless we have all of
25 this done by August 15th, if that's in fact your bottom line,

1 we need to know that.

2 But what you're hearing from us today is, is one of the
3 questions we have in our mind about whether we can accommodate
4 Texas' interests, getting this case tried and decided is
5 whether that's a real date, okay.

6 THE WITNESS: Right. And as I sit here today without
7 pushing on Hart some more, it's a real date. Maybe if I push
8 on Hart some more, I can have a little more flexibility.

9 I'm sure they have built in a little bit, but I don't
10 know if it's two days or two weeks. I have no idea.

11 I do know that everybody is interested in doing whatever
12 they can do to make this work. This has been a very unique
13 year in Texas elections and we've had phenomenal work effort by
14 the counties and, you know, everybody involved from the
15 Secretary of State's office to the election clerks in the local
16 level have all done a phenomenal job of pushing themselves to
17 the limit of making this happen already, already.

18 JUDGE TATEL: I'm sure they have.

19 THE WITNESS: I think that is just the way this year
20 is going to be and I think everybody is ready to do whatever it
21 takes to get it done.

22 JUDGE WILKINS: If I could just ask a couple of
23 follow up questions.

24 When you describe a kit that's ordered by a county, and
25 then you know, a supplemental kit that you are envisioning

1 being ready by August the 15th, just help me understand what
2 would be in those two kits? What would be in the first kit and
3 what would be in the supplemental kit?

4 THE WITNESS: Right. The first kit would be all of
5 the normal forms that, you know, assuming this law doesn't get
6 precleared will be ready for use, and that's the kit that
7 counties are going to start ordering here in a couple of weeks.

8 For a supplemental kit, it will consist of these seven
9 forms that are different, so the county, the word will come on
10 or before August 15th, the counties will order the number of
11 supplemental kits they are going to need, the printer will type
12 set it, and print them and send it out.

13 JUDGE WILKINS: Just so that we're clear, a decision
14 could be made to just send out one kit that has the normal
15 forms as you call them and then two sets of the seven
16 additional forms.

17 One set would be if the law is precleared and one set of
18 seven forms would be if the law is not precleared and when the
19 county makes its order that one time they would get basically a
20 kit that would be divided into three parts in that fashion.

21 And help me understand again why if that were done what
22 would be the logistical problem of the county then just
23 discarding the kit of the seven forms that will not be used on
24 election based on our decision whether it's precleared or not?

25 THE WITNESS: Right. If that's the way that Hart can

1 do it, then I don't see that that would create a terribly -- I
2 mean, there will be, I can promise you, out of 254 counties
3 there will be some number rebel who will disregard the wrong
4 set of seven, but I don't know how many that will be.

5 And, you know, the reason I'm thinking that it adds some
6 complexity because if they get a normal set and then y'all deny
7 preclearance, then they don't ever have to think about anything
8 else. From my perspective that makes it easier for them.

9 If y'all decide to preclear it, you are right, they
10 would have had to think about it anyway and they wouldn't have
11 to print it twice anyway and it's just going to be what it's
12 going to be.

13 But that's just a part of getting it done, but the
14 decision about whether we have to do it can go as long as
15 August 15th. But, you know what I'm saying? It's just --

16 JUDGE WILKINS: I guess what I'm trying to understand
17 is why can't the State work with your vendor to say that we're
18 going to have basically three sets of forms?

19 THE WITNESS: Right.

20 JUDGE WILKINS: Set A are quote unquote the normal
21 forms.

22 Set B are the seven forms as if the law is precleared.

23 And set C are the seven forms if the law is not
24 precleared.

25 And when the county orders however many kits they get

1 one kit that has a set of A forms, B forms and the C forms.
2 They make one order and they get all of those forms. Once we
3 make our decision, you or the others and the Secretary of
4 State's office can say okay, at the election we'll use forms A
5 and B, throw away C or you'll use forms A and C, throw away B.

6 THE WITNESS: Right.

7 JUDGE WILKINS: Why can't we do that and why can't we
8 buy ourselves some additional time by proceeding in that
9 fashion?

10 THE WITNESS: All I can say is what I said before, if
11 you give somebody the opportunity to make a mistake, the
12 chances go up that they will. And so that's what we were
13 trying to avoid.

14 If we, I don't know if we actually buy ourselves any
15 time but it's worth talking to Hart about and finding out.

16 JUDGE WILKINS: Well, don't you automatically buy
17 yourselves some time because you know right now what the forms
18 will have to look like?

19 THE WITNESS: Right.

20 JUDGE WILKINS: You know what the normal forms that
21 would be in my example set A would look like. You would know
22 what the forms in set B would look like, and you would know
23 what the forms in set C should look like.

24 So you could go ahead and have all of those forms
25 designed. They could all be ordered in a couple of weeks under

1 your normal time frame, and it will just be a matter of the
2 additional cost of having, you know, the forms B and C instead
3 of one set of those, right?

4 THE WITNESS: That's right. I don't know, that ought
5 to work. I can talk to Hart and see what they think.

6 JUDGE WILKINS: All right. Well, we can -- why
7 don't -- we'll follow up with you about, I'm sure about some
8 further direction in that regard.

9 THE WITNESS: Great.

10 JUDGE WILKINS: That's all I have, Judge Collyer, on
11 that point.

12 JUDGE COLLYER: Thank you, Judge Tatel.

13 Did you have any other questions?

14 JUDGE TATEL: No.

15 JUDGE COLLYER: Did any other of the parties in light
16 of the Court's questions wish to advance any other questions to
17 Mr. Ingram?

18 MS. WESTFALL: Yes, Your Honor.

19 JUDGE COLLYER: Since we are at the telephone, we
20 need to speak right at the microphone or else he won't be able
21 to hear you.

22 This is Elizabeth Westfall, Mr. Ingram, is that correct?

23 MS. WESTFALL: Yes.

24 JUDGE WILKINS: Who represents --

25 That's correct, isn't it, Ms. Westfall?

1 MS. WESTFALL: Yes.

2 JUDGE COLLYER: Who represents the United States.

3 MS. WESTFALL: Good afternoon, Mr. Ingram. This is
4 Elizabeth Westfall for the Attorney General.

5 Have you drafted the alternative forms that you
6 referenced earlier in your testimony?

7 THE WITNESS: Yes.

8 MS. WESTFALL: Have you approached other vendors
9 besides Hart to see whether they could prepare and print these
10 forms in a more rapid manner?

11 THE WITNESS: I have not. That's between Hart and
12 the county which vendor they want to use.

13 MS. WESTFALL: Mr. Ingram, how long have you worked
14 in the elections office?

15 THE WITNESS: I have been there since January the
16 5th.

17 MS. WESTFALL: Are you aware of last minute
18 supplemental materials being submitted and circulated in
19 polling places previously?

20 THE WITNESS: No. I did talk to the program manager,
21 the project manager at Hart about that. She said that they
22 talked about doing supplemental election kits before but they
23 hadn't actually done one.

24 MS. WESTFALL: Thank you. I have no further
25 questions.

1 JUDGE COLLYER: All right, thank you.

2 Mr. Hebert, yes.

3 This is Jerry Hebert, Mr. Ingram. He represents
4 intervenors.

5 Go ahead, sir.

6 MR. HEBERT: Thank you, Your Honor.

7 I only have a couple of questions.

8 First, Mr. Ingram, do you recall a time when a Texas
9 Federal Court invalidated a state law that prohibited voters
10 from carrying election pamphlets into the polling place? Do
11 you remember that about a decade or so ago?

12 Well, whether you remember it or not, let me ask the
13 follow up question because that's the more important one.

14 At that time isn't it true that the Secretary of State's
15 office at the last minute just before the election sent a
16 notice to all of the election officials who were running the
17 election advising them just prior to the election that voters
18 could in fact do this in light of that court ruling?

19 THE WITNESS: I don't know anything about that. But
20 it wouldn't surprise me. That would be a much easier task to
21 give notice out to the counties.

22 MR. HEBERT: Okay. Well, my point was that it is
23 somewhat typical I think for the Secretary of State just prior
24 to the election to communicate with election officials
25 statewide about some either last minute change or some last

1 minute form; isn't that true?

2 THE WITNESS: I don't know if that's true or not. I
3 do know that it is very common for the Secretary of State's
4 office to communicate with county officials statewide on a
5 regular basis.

6 MR. HEBERT: One final question, on your August 20th
7 seminar that you are doing on the election worker training, the
8 Secretary of State's office set that date didn't they?

9 THE WITNESS: That's right.

10 MR. HEBERT: So you set that date knowing the
11 election schedule?

12 THE WITNESS: That's right. And we delayed it. It
13 is usually in July.

14 MR. HEBERT: By the way, isn't true that your office
15 also said during the legislative debate on the voter ID that
16 the only fiscal impact of implementing it would be two million
17 dollars, but that the two million dollars would be paid
18 entirely with Federal HAVA money and no state money would be
19 used?

20 THE WITNESS: I don't know what they did in the
21 legislative session.

22 I do know that in the legislative session they were
23 planning on this law going into effect on January 1st and that
24 way we wouldn't have had to print two separate forms.

25 MR. HEBERT: Right. But you don't know anything

1 about whether or not the representations from your office were
2 that that HAVA money would cover it entirely?

3 THE WITNESS: HAVA money is for the education --

4 MR. SWEETEN: Objection, Your Honor.

5 JUDGE WILKINS: Overruled once.

6 JUDGE COLLYER: Thank you.

7 MR. HEBERT: What was your answer, Mr. Ingram, I
8 didn't hear it?

9 THE WITNESS: HAVA money that they were talking about
10 is for the voter education piece that has to be 15 requires for
11 the voters to be aware of the new ID requirements and where
12 they can get a free ID.

13 MR. HEBERT: I'm not sure I understand your answer.
14 Was that a yes or I couldn't quite follow what you were
15 saying. I'm sorry.

16 THE WITNESS: I'm sorry.

17 The HAVA money that they were talking about, I don't
18 know, I wasn't there, but I'm sure that the HAVA money that
19 they were discussing using was for the voter education campaign
20 that's required by SB 14 so that the voters know what ID is
21 going to be required and where they can get a free one.

22 MR. HEBERT: And that would not include some of the
23 forms necessary to give the voters?

24 THE WITNESS: No.

25 MR. HEBERT: No?

1 THE WITNESS: No.

2 MR. HEBERT: Okay. Thank you.

3 JUDGE COLLYER: All right. Is everybody satisfied
4 with their questions to Mr. Ingram?

5 MR. SWEETEN: Yes, Your Honor.

6 The State of Texas has no questions.

7 JUDGE COLLYER: All right. The State of Texas says
8 it has no questions, Mr. Ingram.

9 And forgive me for asking, are you Mr. Sweeten or
10 Mr. Frederick?

11 MR. SWEETEN: I'm Mr. Sweeten.

12 JUDGE COLLYER: That was Mr. Sweeten because he said
13 I'm telling Mr. Sweeten because he can't hear you when he said,
14 he said Texas has no questions for you, sir.

15 So you can now step down and thank you for your
16 attendance.

17 THE WITNESS: Shall I stay on the line or --

18 JUDGE COLLYER: We're perfectly happy to have you
19 stay if you wish as a member of the public, or as far as we're
20 concerned, you can hang up and go about your business.

21 THE WITNESS: Thank you, ma'am.

22 JUDGE COLLYER: Thank you, sir.

23 (Witness excused.)

24 All right, the next set of issues related to what the
25 parties still have to do or not do or might accomplish or might

7

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

VOTING FOR AMERICA, INC., §
BRAD RICHEY, and §
PENELOPE McFADDEN, §
Plaintiffs, §

V. §

HOPE ANDRADE, in her Official §
Capacity as Texas Secretary of State, §
and CHERYL E. JOHNSON, in her §
Official Capacity as Galveston County §
Assessor And Collector of Taxes and §
Voter Registrar, §
Defendants. §

CIVIL ACTION NO. 3:12-CV-00044

**DEFENDANT HOPE ANDRADE'S REPLY IN SUPPORT OF HER
MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**

Late last week, this Court entered an order enjoining the enforcement of five provisions of the Texas Election Code (“Order”). One day later, on August 3, 2012, Defendant Hope Andrade, Secretary of State of the State for Texas, filed a motion pursuant to Federal Rule of Civil Procedure 62(c) seeking a stay of the Order pending an appeal. Plaintiffs Voting For America and Project Vote filed their opposition yesterday, August 7, 2012. The five provisions enjoined by the Order serve primarily to implement Texas’ Volunteer Deputy Registrar (VDR) program. That program helps regulate and police the interface of the voter-registration process and third-party registration drives of the kind operated by the plaintiffs.

As outlined more fully below and in her previous filings before this Court, Defendant Andrade respectfully disagrees with this Court’s ruling that these five provisions of the Election Code likely conflict with the Constitution and the

National Voter Registration Act (NVRA). Defendant does agree wholeheartedly, however, with one important finding of this Court: “[t]he most elementary form of political participation is voting . . . [b]ut, in order to vote, one must first be registered, and many citizens are not registered.” Preliminary Injunction Order, at 1 (citation omitted). It is precisely because of voting’s fundamental importance that Texas is given wide latitude to safeguard this important right by providing for an orderly and fair election process (and, in turn, the voter registration process). See *Storer v. Brown*, 415 U.S. 724, 730 (1974). For that very same reason, the Election Code strikes a fine balance between encouraging the protected speech of third-parties engaged in voter registration drives and providing fair and orderly elections. The Order upsets that balance. With the deadline for voter registration a mere two months away and the election a mere three months away, the Order injects considerable uncertainty and confusion into the voter registration process, causing harm both to Defendant and to Texas’ voters. And it does so with only marginal benefit – at best – to the plaintiffs. For those reasons, which are more fully explained below, Defendant respectfully reiterates her request that the Court stay its Order.

Standard of Review

The standard for a motion brought pursuant to FRCP 62(c) is a familiar one. The court must consider four factors: (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay

would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). Plaintiffs have incorrectly stated that the standard requires “a strong showing” on the merits. Plaintiffs’ Opposition to Motion for Stay, at 1. But to succeed on a motion for stay pending appeal, the movant need not always show even a “probability” of success on the merits. *Ruiz*, 650 F.2d at 565. “If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed.” *Id.* Instead, in considering a Rule 62(c) motion, the “movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.” *Id.*

Argument

I. The Preliminary Injunction Is Causing Immediate and Irreparable Harm.

The VDR program is one of the ways in which Texas promotes an orderly voter registration process. It helps ensure orderly and fair elections while striving to achieve maximum participation among its eligible voters. The Order guts the VDR program a mere two months before the voter registration period is set to close, and only three months before the November 2012 election. As outlined in Defendant’s motion to stay, the Order injects substantial confusion into the voter

registration process at the most inopportune time.¹ *See* Motion to Stay, Affidavit of Keith Ingram, at 2.

Specifically, the Order introduces substantial confusion regarding the administration of the VDR program at the county level. For instance, the County Limitation enjoined by the court, which requires a VDR to be appointed in each county in which he intends to receive and transmit voter registration applications, allows counties to achieve some measure of accountability and quality control in the VDR program. With that restriction gone, local county registrars will have great difficulty in addressing any problems that may arise with a particular VDR. For instance, if a VDR appointed by Tarrant County consistently submits incomplete voter-registration applications to the Travis County voter registrar, the voter registrar in Travis County may have difficulty knowing where the VDR is appointed (or if he is appointed at all) and, more importantly, is powerless to strip the VDR of his appointment. This problem is exacerbated by the injunction against the enforcement of the Personal Delivery Requirement. The Personal Delivery Requirement requires VDRs to personally deliver completed voter-registration applications to the local county registrar. Without it, VDRs are now able to submit

¹ Plaintiffs spend much of their opposition complaining about the submission of Mr. Ingram's Affidavit and move to strike it. Plaintiffs' Opposition, at 2-3. Their complaints are unfounded. It is irrelevant whether Mr. Ingram testified during the hearing on the plaintiffs' motion for preliminary injunction. Mr. Ingram's affidavit, filed in support of Defendant Andrade's motion to stay the preliminary injunction pending its appeal, presents testimony about the effect of the Court's Order. Such testimony hardly could have been required (or even possible) before such an order was entered. In any event, Defendant's motion presents different issues than the plaintiffs' motion for preliminary injunction, and, thus, it is perfectly within Defendant Andrade's rights to produce evidence to support the merits of her motion.

applications in bulk and by mail – removing yet another important level of accountability.

While the administrative nightmare caused by such confusion alone warrants a stay of the Order pending its appeal, there are more fundamental concerns at stake. To be sure, the primary purpose of the VDR program is to encourage voter registration while maintaining the integrity of the State’s electoral process. The Order introduces a greater likelihood that the State’s electoral process could be tainted by fraud. Although it almost certainly exists, the legitimacy of that concern is not undermined by the failure to show specific instances of fraud. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 194-97 (opinion of Stevens, J.) (recognizing “the legitimacy [and] importance of the State’s interest in counting only the votes of eligible voters” even where “[t]he record contains no evidence of any such fraud”). Also, by permitting a person to be compensated based on quotas or other practices tied to the number of voter-registration applications the person facilitates, the Order allows entities such as the plaintiffs to reinstate compensation practices known to increase the incidents of voter-registration fraud.

The Order permits other, less malicious ways in which the State’s electoral process may be compromised. Without the accountability provided by the provisions that have been enjoined, the number of incomplete or inadequate voter-registrations applications is likely to increase. In short, because of the Order, participation in the November 2012 elections is likely to be characterized by voter rolls that are both over- and under-inclusive.

The State is likely to be harmed in other ways as well. The Photocopying Prohibition, which prohibits VDRs from making photocopies of the voter-registration applications they receive and submit, helps the State and counties enforce its laws preventing the disclosure of confidential information. Even assuming voter-registration applications fall within the meaning of the NVRA's public disclosure provisions (and they do not), the Order permits the photocopying of such applications with little supervision or oversight by the Secretary of State or county officials.

II. A Stay Will Greatly Serve the Public Interest

For many of the reasons already stated, the public interest will be greatly served by a stay of the preliminary injunction pending its appeal. First, the confusion that the preliminary injunction has injected into the voter-registration process will likely cause voter rolls to be inaccurate – through either decreased participation in the VDR program, voter confusion about the registration process, or the mistakes (or fraud) of unaccountable VDRs. As a result, the State's chances of an orderly and fair election with full participation from its electorate are significantly diminished.

Since the VDR program was designed to increase voter registration while protecting the integrity of the State's election process, it's not surprising that the program's provisions also protect the voters themselves. Thus, the public interest will also be served because, without a stay, some eligible voters may find that due to the lack of accountability normally present in the VDR program, they are unable to

cast their vote (caused either by mishap or fraud), while other *ineligible* voters may cast votes. Because the Photocopying Prohibition has been enjoined, registered voters also face the unnecessary threat of the disclosure of their personal information. For all these reasons, a stay of the Order will greatly serve the public interest.

III. No Party, Even the Plaintiffs, Will Be Harmed By A Stay

By and large the preliminary injunction enjoins provisions of the VDR program, i.e., the receipt and submission of completed voter-registration applications. The plaintiffs, who operate and manage voter-registration drives, are still able to engage in the primary speech and associational conduct for which voter-registration drives are known and encouraged. The VDR program does not prevent the plaintiffs from putting boots on the ground, connecting with eligible voters, and engaging in worthwhile discussions about political change and a potential voter's role in that change. Nor does anything in the VDR program prevent third-parties from facilitating the completion of voter-registration applications. In short, staying the preliminary injunction, and preserving the status quo, will allow the plaintiffs to continue to conduct the core activities associated with voter-registration drives.

IV. Defendant Is Likely to Succeed on the Merits.

Defendant Andrade has clearly shown that the balance of equities weighs strongly in favor of a stay of the preliminary injunction. Nevertheless, Defendant Andrade respectfully disagrees with this Court and believes that the enjoined provisions of the Election Code are not in conflict with either the Constitution or the

NVRA. Although Defendant Andrade has already presented to this Court her argument on the merits, she briefly recites them again here.

A. First Amendment Claims

This Court enjoined three provisions, the In-State Restriction (limiting participation in the VDR program to Texas residents), the County Limitation (requiring VDRs to be appointed a VDR in any county in which they receive and submit voter-registration applications), and part of the Compensation Requirement (prohibiting compensation practices based on a quota or number of applications facilitated), because it found they likely violated the First Amendment. The Supreme Court stated that, when analyzing state election provisions under a constitutional challenge, the rigorousness of the inquiry depends upon the extent of the burden on First and Fourteenth Amendment rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When state statutes impose “severe” restrictions, the statute must be narrowly drawn to advance a compelling interest. However, when a state law imposes only “reasonable, nondiscriminatory restrictions” on those rights, the state’s important regulatory interests are generally sufficient to uphold the statute. *Id.* The Fifth Circuit recognized and applied this standard in *Texas Independent Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996). This test results from the recognition that the State can and must enact regulations safeguarding the election process. *See Storer*, 415 U.S. at 730 (“[T]here must be substantial regulation of elections if they are to be fair and honest and if some sort of order . . . is to accompany the democratic process.”). Many regulations of the electoral process

“may indirectly burden speech” that is a “step removed” from the “interactive communication concerning political change” for which the Supreme Court affords special protection. *Buckley v. Amer. Const. Law Foundation*, 525 U.S. 182, 215 (1999) (O’Connor, J. concurring in part, dissenting in part). Such regulations are normally justified by the state’s important interest in safeguarding its election process.

As a preliminary matter, the regulations governing the VDR scheme do not regulate or burden the admittedly protected speech associated with voter-registration drives. The limited hurdles put in place by the VDR program are not hurdles to participation in voter-registration drives and, thus, do not implicate the First Amendment. For that reason alone, the In-State Restriction and the County Limitation should not be enjoined.

Similarly, the most that can be said about the Compensation Prohibition is that it regulates, albeit very indirectly, voter registration more generally. At most, however, it represents only a minor, insignificant burden on speech associated with third-party voter registration. And, importantly, it does not directly restrict or burden the protected speech associated with voter-registration drives (i.e., the one-on-one communication between eligible voters and third-parties regarding the need for political change and the voter’s role in that change). Because the Compensation Prohibition is at most an insignificant and indirect burden on the protected speech associated with voter-registration drives, it is subject to a more relaxed review by this Court. And, the State’s interests in deterring fraud, promoting accurate voter

rolls, and safeguarding the election process easily justify a prohibition on compensation practices which are known to incentivize fraud. Finally, to the extent this Court finds that the In-State Restriction and County Limitation do burden protected speech, they also represent an indirect and limited burden, and are easily justified by those same interests.

B. Preemption Claims

The Court enjoined two provisions of the Election Code because it found they were preempted by the NVRA: the Photocopying Prohibition (prohibiting VDRs from making photocopies of completed voter-registration applications) and the Personal Delivery Requirement (requiring VDRs to personally deliver applications they receive to the local county registrar). In examining a preemption claim under the Elections Clause, the law in this Circuit is clear: “a state’s discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject.” *Voting Integrity Project v. Bomer*, 199 F. 3d 773, 775 (5th Cir. 2000). The standard is, therefore, whether a statute directly conflicts with a Congressional enactment. Here, neither provision should be enjoined, because neither is in direct conflict with the NVRA.

The Photocopying Prohibition is not in conflict with the NVRA’s public disclosure requirements for two reasons. First, voter-registration applications are not state records within the meaning of section 1973gg-6(i). Local county registrars are charged with the primary duty of registering eligible voters. And voters submit

their registration application to their local county registrar. The State never receives or processes the application. Second, and more to the point, the NVRA does not require states to allow VDRs to photocopy completed applications before they are submitted to the local county registrar. The NVRA charges states with making covered records available to the *public*; it does not require the State to permit the duplication of any covered record by agents of the local county registrar. Thus, the Photocopying Prohibition, by prohibiting VDRs from making photocopies of applications they receive, does not directly conflict with the NVRA's public disclosure requirements.

Similarly, the Personal Delivery Requirement does not directly conflict with the NVRA. The NVRA does require each State to accept and use the mail voter-registration application form detailed in the NVRA. 42 U.S.C. § 1973gg-4. The State does allow eligible voters to register by mail. But, the NVRA does not require the State to accept and use the mail registration application in all instances. And, indeed, it specifically gives states latitude to provide for "other methods of voter registration" and "establish procedures" for registering by mail. *Id.* § 1973gg-2(a)(2). Consequently, the State also allows applicants to submit their application through a locally appointed VDR. The State's provision of this additional method of voter registration does not conflict with the NVRA.

Conclusion

As demonstrated above, the balance of equities weighs heavily in favor of granting a stay of the preliminary injunction pending its appeal. The State has also

presented a substantial case on the merits of the important issues currently before the Court. As such, Defendant Andrade respectfully reiterates her request that this Court stay its preliminary injunction.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for
Defense Litigation

ROBERT O'KEEFE
General Litigation, Division Chief

/s/ Kathlyn C. Wilson
KATHLYN C. WILSON
Texas Bar No. 21702630
Southern District ID No. 10763
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
(512) 320-0667 FAX

Attorneys for Defendant Hope Andrade

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed with the Clerk of the Court and served using the CM/ECF system on this the 8th day of August 2012, to:

Chad W. Dunn
K. Scott Brazil
Brazil & Dunn, L.L.P.
4201 Cypress Creek Parkway, Suite 530
Houston, Texas 77068
Facsimile: (281) 580-6362

Ryan Malone
Ropes & Gray, L.L.P.
700 12th St. NW Suite 900
Washington, DC 20005
Facsimile: (202) 383-8322

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 7870
Facsimile: (512) 474-8035

Brian Mellor
Michelle Rupp
Project Vote
1350 Eye Street NW
Washington, DC 20005
Facsimile: (202) 629-3754

/s/ Kathlyn C. Wilson
Kathlyn C. Wilson
Assistant Attorney General

8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

VOTING FOR AMERICA, INC., <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. G-12-44
	§	
HOPE ANDRADE, <i>et al</i> ,	§	
	§	
Defendants.	§	

ORDER MODIFYING PRELIMINARY INJUNCTION
AND DENYING MOTION FOR STAY

The Secretary of State seeks a stay of the preliminary injunction this Court issued August 2nd enjoining five of eight challenged provisions of the Texas Election Code that regulate third-party voter registration activities. Though the Secretary requests a stay of the entire injunction, in her motion and subsequent argument at a hearing before this Court, she focused on the Court's ruling enjoining the provision that limits volunteer deputy registrars ("VDRs") to only accepting and delivering applications given to them by residents of the county in which the VDRs were appointed (the "County Limitation"), and the requirement that VDRs personally deliver, rather than mail, registration applications (the "Personal Delivery Requirement").

In moving for a stay, the Secretary argues that the County Limitation and Personal Delivery Requirement are necessary to track applications and impose accountability on VDRs who might commit fraud. She also

contends that the injunction disrupts traditional county control over voter registration and causes “chaos and confusion” prior to the November election. Def. Tex. Secretary of State Hope Andrade’s Mot. for Stay 2, ECF No. 66; Aff. of Brian Keith Ingram 1–2, ECF No. 66-1. For the reasons discussed below, the Secretary’s arguments do not meet the high burden for a stay, and the Motion for Stay is **DENIED**. The Court will, however, make a minor modification to the injunction to ensure adequate tracking of VDRs.

I. STANDARD FOR GRANTING A STAY

District courts have the power to modify or stay the injunctions they issue pending appeal. *See* Fed. R. Civ. P. 62(c). When deciding to issue a stay, a district court must consider the following factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). These factors must not be applied “in a rigid mechanical fashion,” *Reading & Bates Petroleum Co. v. Musslewhite*, 14 F.3d 271, 272 (5th Cir. 1994) (quoting *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (per curiam)), and a stay may be granted if the moving party “present[s] a substantial case on the

merits when a serious legal question is involved and show[s] that the balance of the equities weighs heavily in favor of granting the stay.” *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (per curiam). “Because the burden of meeting this standard is a heavy one, 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.” 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2904 (2d ed. 1995).

II. DISCUSSION

The injunction does not disrupt the traditional county based system of voter registration in Texas. Elected county registrars are still the officials who must receive any voter registration application for an applicant residing in their county. Those county registrars are still the ones who must review applications and determine the eligibility of any applicant who resides in their jurisdiction. With respect to the County Limitation and Personal Delivery Requirement, there are only two differences between the pre and postinjunction regimes. The first is that VDRs duly appointed and trained in another county will be among those able to accept and submit applications to a registrar in a different county. *See Op. and Order Granting in Part and Den. in Part Pls.’ Mot. for Prelim. Inj.* 65–69, ECF No. 65. The second is

that VDRs may mail, rather than personally deliver, the applications they collect, as federal law requires. *See id.* at 46–49. Other states with county-based voter registration systems, Mississippi to name just one,¹ impose no restrictions on members of a voter registration drive mailing the voter registration applications that are collected to the appropriate county official.² They apparently do so without any apparent disruption to a county-based registration system, “chaos,” or greater reported incidence of fraud than exists in Texas.

Nor does the injunction prevent county registrars from tracking the VDRs who are receiving applications from prospective voters and submitting them to registrars. As explained in the Court’s opinion accompanying the injunction, the County Limitation “has only a tenuous connection” to application tracking. *See Op. and Order Granting in Part and Den. in Part Pls.’ Mot. for Prelim. Inj.* 67–69. Other provisions of the Election Code, which were not enjoined, enable tracking. Section 13.033 gives the applicant the right to inspect the VDR’s certificate of

¹ *See* Miss. Code Ann. § 23-15-47 (requiring mail-in applications to be directed to the registrar of the county in which the applicants live).

² Moreover, Arkansas maintains a system in which county officials register voters despite allowing those conducting voter registration drives to mail collected applications to the Secretary of State, who then distributes the applications to the appropriate county official. *See Conducting a Voter Registration Drive*, available at http://www.sos.arkansas.gov/elections/Documents/voter_registration_guide.pdf.

appointment—a certificate which denotes the VDR's county of appointment.³ Tex. Elec. Code Ann. § 13.033. Section 13.040 also allows some measure of tracking by requiring the collecting VDR to give signed receipts to each applicant who submits an application and to transmit a copy of those receipts to the county registrar with the delivered applications. *Id.* § 13.040. Because the receipt requirement is still in force, it applies to applications submitted in person or by mail. Finally, to the extent they make an effort to do so given the typical day-to-day traffic at many county offices, county registrars still possess the ability to identify the VDRs who personally deliver applications to their offices.

To ensure the receipts enable sufficient tracking, the Court will modify the injunction to make clear that the required receipt that a VDR must give to the applicant and submit to the county registrar with the application must indicate that county in which the VDR is appointed.

As developed at the stay hearing, the Secretary's arguments about tracking largely end up being not that the county registrars will be unable to identify the VDR appointed in another county who collects an application, but that it will take additional effort to hold VDRs accountable—that is, the Galveston County registrar will have to notify the Harris County registrar to

³ See, e.g., *Certificate of Appointment for Volunteer Deputy Registrar*, available at <http://www.sos.state.tx.us/elections/laws/tavrlaws.shtml> (last updated March 2012).

report problems with a VDR appointed and trained in Harris County. But this is not a significant burden, especially given that registrars in different counties already have experience interacting on registration issues. *See* Tex. Elec. Code Ann. § 13.072(d) (requiring registrars to forward applications received from out-of-county residents to the registrar of the appropriate county within two days of receipt, and, if the other county is not contiguous, to give written notice of that action to the applicants within seven days of receipt).

The Secretary's stay motion also proposes a hypothetical in which a VDR collects incomplete applications from residents of various counties. Def. Tex. Secretary of State Hope Andrade's Mot. for Stay 2. But the training requirement remains in effect and there is little incentive for a trained VDR to take the time, and often the expense, of collecting applications with the goal of submitting applications that are destined to be rejected. In any event, this argument about potential disenfranchisement ignores the requirement that registrars notify applicants whose applications are rejected or challenged, *see* Tex. Elec. Code Ann. §§ 13.073, 13.075, after which the applicants may submit corrected applications.

While the Secretary argues that that the proximity of the upcoming election accentuates the harms she contends result from the injunction—

harms that this Court concludes are minimal at best because the postinjunction regime still enables tracking—it also means that a stay would continue for the duration of this election the impediments to voter registration efforts that the enjoined provisions imposed.

For the reasons discussed above and previously documented in the Court’s opinion accompanying the injunction, the Court concludes that the Secretary has not demonstrated that the “balance of the equities weighs heavily in favor of granting the stay.” *Ruiz*, 650 F.2d at 565.

III. ORDER

For the foregoing reasons, **IT IS ORDERED:**

1. Defendant Texas Secretary of State Hope Andrade's Motion for Stay (ECF No. 66) is **DENIED**.

2. The Opinion and Order Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction (ECF No. 65) is **MODIFIED** as follows:

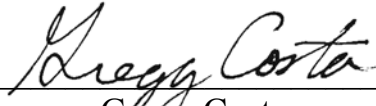
(a) The text of Paragraph 3(d) of the Order, reading "Tex. Elec. Code Ann. § 13.038, to the extent that it prohibits lawfully appointed and trained VDRs from distributing applications to or collecting applications from residents of counties other than the county in which the VDRs are appointed and trained, and to the extent that it prohibits lawfully appointed and trained VDRs from delivering applications in person or by U.S. mail to the registrars of counties other than the county in which the VDRs are appointed and trained;" is **WITHDRAWN** and **REPLACED WITH** "Tex. Elec. Code Ann. § 13.038, to the extent that it prohibits lawfully appointed and trained VDRs from distributing applications to or collecting applications from residents of counties other than the county in which the VDRs are appointed and trained, so long as those VDRs indicate their county of

appointment on the receipts that they are required to issue to applicants under Tex. Elec. Code Ann. § 13.040, and to the extent that it prohibits lawfully appointed and trained VDRs from delivering applications in person or by U.S. mail to the registrars of counties other than the county in which the VDRs are appointed and trained;”

(b) All other parts of the Order are to **REMAIN IN EFFECT**. A complete version of the modified injunction is attached to this Order.

IT IS SO ORDERED.

SIGNED this 14th day of August, 2012.



Gregg Costa
United States District Judge

9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

VOTING FOR AMERICA, INC., <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. G-12-44
	§	
HOPE ANDRADE, <i>et al</i> ,	§	
	§	
Defendants.	§	

MODIFIED PRELIMINARY INJUNCTION

1. Until entry of a final judgment or until otherwise ordered, Defendants are **ENJOINED** from taking any steps to demand compliance with or enforce the following provisions:

(a) Tex. Elec. Code Ann. § 13.038, to the extent that it prohibits lawfully appointed and trained VDRs from photocopying or scanning voter registration applications that have been submitted to a VDR but not yet delivered to the appropriate county registrar, so long as the information copied or scanned does not include the information listed as confidential under section 13.004(c) of the Texas Election Code;

(b) Tex. Elec. Code Ann. § 13.042, to the extent that it prohibits lawfully appointed and trained VDRs from delivering submitted applications to the appropriate county registrar via U.S. mail;

(c) Tex. Elec. Code Ann. § 13.031(d)(3), to the extent that it, by incorporating Tex. Elec. Code Ann. § 11.002(a)(5), forbids non-Texas residents from serving as VDRs;

(d) Tex. Elec. Code Ann. § 13.038, to the extent that it prohibits lawfully appointed and trained VDRs from distributing applications to or collecting applications from residents of counties other than the county in which the VDRs are appointed and trained, so long as those VDRs indicate their county of appointment on the receipts that they are required to issue to applicants under Tex. Elec. Code Ann. § 13.040, and to the extent that it prohibits lawfully appointed and trained VDRs from delivering applications in person or by U.S. mail to the registrars of counties other than the county in which the VDRs are appointed and trained;

(e) Tex. Elec. Code Ann. § 13.008(a)(2);

(f) Tex. Elec. Code Ann. § 13.008(a)(3);

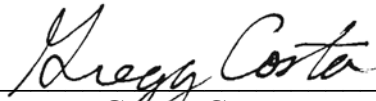
2. This preliminary injunction binds both Defendants and each of their officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this preliminary injunction by personal service or otherwise.

3. Defendant Hope Andrade is **ORDERED** to send notice of the issuance and effect of this Order by reasonable and appropriate methods to all Texas county registrars within twenty days of the docketing of this order.

4. The Plaintiffs have already posted a security in the amount of \$100. Any party may move to adjust the amount of security.

IT IS SO ORDERED.

SIGNED this 14th day of August, 2012.



Gregg Costa
United States District Judge