No. 12-40914

In The United States Court of Appeals For the Fifth Circuit

VOTING FOR AMERICA, INC., PROJECT VOTE, 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 BRIEF

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***Andrande v. Vote for America, Inc., et al.*,**

No. 12-40914

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, Douglas Hallward-Driemeier**, 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, Arthur C. D'Andrea, Douglas D. Geyser, J. Reed Clay, Jr.**, Office of the Attorney General—counsel for Defendant Hope Andrade.

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

STATEMENT REGARDING ORAL ARGUMENT

The Court has already instructed the clerk to set this case for argument during the December 2012 sitting. Secretary Andrade agrees that the issues in this case are sufficiently important and complex to warrant oral argument.

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APPELLANT'S BRIEF

Defendant-Appellant Hope Andrade (the State) appeals the district court's order of August 2, 2012, which preliminarily enjoins the State from enforcing numerous provisions of Texas's election-integrity laws. *See* USCA5 1574-1667.

STATEMENT OF JURISDICTION

The Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1), which allows appeals from district-court orders granting injunctions. On August 2, 2012, the district court granted the plaintiffs' motion for a preliminary injunction, in part, and enjoined the State from enforcing several provisions of Texas's election-integrity laws. *See id.* The State filed a timely notice of appeal. *See* USCA5 1765-1767.

STATEMENT OF THE ISSUES

1. The First Amendment protects the "freedom of speech" but allows States to regulate non-expressive conduct. Did the district court err by holding that the act of collecting and delivering a third party's completed voter-registration form qualifies as "speech" protected by the First Amendment?

2. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), upheld Indiana's voter-identification law under the balancing test used in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 438-42 (1992), even though Indiana was unable to produce any evidence of in-person voter impersonation. Did the district court err by demanding that Texas produce evidence of in-state fraud committed by volunteer deputy registrars (VDRs) as a condition for regulating VDRs under the *Anderson/Burdick* balancing test?

3. Federal courts are required to defer to a state official's narrowing construction of state law, and are further required to interpret state laws in a manner that will avoid constitutional conflicts. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990). Did the district court err by refusing to defer to the Secretary of State's narrowing construction of Texas Election Code § 13.008(a) when that construction would have avoided the constitutional concerns that the district court raised against the statute?

4. The National Voter Registration Act (NVRA) requires States to "accept and use" a mail voter-registration form prescribed by the Federal Election Commission. *See* 42 U.S.C. § 1973gg-4(a)(1). Did the district err by interpreting this provision to give third-party voter-registration organizations a right to deliver voter-registration applications on behalf of others and to deliver those applications through the mail?

5. The NVRA requires each State to "maintain for at least 2 years" and "make available for . . . photocopying" 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). Texas forbids volunteer deputy registrars (VDRs) to photocopy the completed voter-registration applications they collect before delivering them to local election officials. Did the district court err in holding that completed voter-registration applications in the possession of VDRs qualify as "records" that the State must "maintain" and "make available for . . . photocopying"?

6. The Supreme Court and this Court have held that a preliminary injunction is not to be granted unless the applicant makes a clear showing of likelihood of success

on the merits. Yet district-court judges throughout the Fifth Circuit have been preliminarily enjoining the enforcement of state laws whose validity is at least debatable among jurists of reason. Should this Court issue a more emphatic reminder that district courts are not to preliminarily enjoin the enforcement of duly enacted state laws absent a clear showing that the law is invalid or unconstitutional?

STATEMENT OF THE CASE

On February 13, 2012, the plaintiff-appellees filed suit against Texas Secretary of State Hope Andrade and Cheryl E. Johnson, the Voter Registrar of Galveston County. *See* USCA5 11-47. The complaint alleged that provisions of Texas's election-integrity laws violate the First Amendment and the National Voter Registration Act, 42 U.S.C. § 1973gg to -10. *See* USCA5 32-42.

On May 10, 2012, the plaintiff-appellees moved for a preliminary injunction on their First Amendment and NVRA claims. *See* USCA5 587-616. After a two-day hearing, the district court granted preliminary relief on most of those claims. *See* USCA5 1574-1667. On August 3, 2012, Secretary Andrade moved for a stay pending appeal in the district court, which was denied on August 14, 2012. *See* USCA5 1668-1672.

Secretary Andrade then filed a motion for stay pending appeal in this court. On September 6, 2012, a motions panel of this Court held oral argument on the Secretary's motion, and later that day granted the State's motion (over dissent) in a short order indicating that an opinion would issue at a later date. *See* USCA5 1963-1964. The motions panel also set the case for expedited briefing.

The plaintiff-appellees then filed an emergency application with Justice Scalia, seeking to vacate the stay issued by the motions panel. *See* Emergency Appl. To Vacate the Fifth Circuit's Stay Pending Appeal, *Voting for Am., Inc. v. Andrade*, No. 12A266 (U.S. Sept. 14, 2012). Justice Scalia called for a response from the State and referred the emergency application to the full Court. On September 25, 2012, the Supreme Court denied the emergency application. *See* Order, *Voting for Am., Inc. v. Andrade*, No. 12A266 (U.S. Sept. 25, 2012). Justice Sotomayor noted her dissent from the Court's order and would have granted the application in part. *Id.* Finally, on September 26, 2012, the motions panel of this Court issued an unpublished opinion explaining its reasons for granting the stay pending appeal, while specifically disclaiming any intent to bind the merits panel. *See Voting for Am., Inc. v. Andrade*, No. 12-40914, 2012 WL 4373779 (5th Cir. Sept. 26, 2012).

STATEMENT OF FACTS

Texas law allows anyone to participate in voter-registration drives by canvassing neighborhoods, distributing blank voter-registration forms, encouraging others to register, and assisting others in filling out voter-registration applications. These components of voter-registration drives are left entirely unregulated. But sometimes canvassers will *collect* other people's completed voter-registration applications, promising to deliver those forms to the county registrar on the applicant's behalf. This collection activity, if left unregulated by the State, presents several dangers to the voting rights of Texans. Negligent canvassers might misplace

or fail to deliver completed voter-registration forms, or fail to protect the confidential data (such as home addresses, telephone numbers, dates of birth, and social-security numbers) that appear on a voter-registration application. Dishonest canvassers might submit fictitious voter-registration forms, especially if their compensation is linked to the number of voter-registration forms that they collect. Misconduct of this sort has been well documented in past voter-registration drives conducted by Project Vote and its former affiliate, ACORN.[1] *See, e.g.*, *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1310 (S.D. Fla. 2008) (noting that the State of Florida received 13 written complaints in 2004 from "persons who registered to vote with third-party organizations" but who "[a]t the time of voting . . . were advised they were not registered to vote because the forms they had filled out had never been turned in."); STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 111TH CONG., FOLLOW THE MONEY: ACORN, SEUI, AND THEIR POLITICAL ALLIES 49 (Feb. 18, 2010) ("Project Vote employee was convicted . . . for submitting more than 400 fake voter registration applications."); STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 111TH CONG., IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? 4 (July 23, 2009) ("[N]early 70 ACORN employees have been convicted in 12 states for voter registration fraud . . .."); *see also League of Women Voters of Fla.*, 575 F. Supp. 2d at 1308

[1] *See* Ford Fessenden, *A Big Increase in New Voters in Swing States*, N.Y. TIMES, Sept. 26, 2004 (describing Project Vote as "the nonpartisan arm of the Association of Community Organizations for Reform Now, or Acorn.").

(noting that Professor Donald P. Green, an expert witness hired by the plaintiff third-party voter-registration organizations in that case, "concedes that, in his experience, canvassers collecting forms sometimes engage in registration fraud, particularly those who are new on the job.").

Texas 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. And Texas regulates the behavior of these VDRs, both to prevent the inadvertent mistakes that can arise when VDRs collect and deliver completed voter-registration applications on behalf of their fellow citizens, and to ensure that VDRs will be held accountable for any misdeeds. Because voter registration is conducted at the county level in Texas, VDRs must be appointed by the local county registrar. *See id.* §§ 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. *See id.* § 13.031(e). 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 regulates the manner in which VDRs handle the applications that they receive from prospective voters. Because registration applications contain sensitive personal 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 county-appointment rule, the personal-delivery requirement, and the prohibition on photocopying completed voter-registration applications have been in effect since at least 1985. The in-state residency requirement and the limitations on compensation were enacted by the legislature in 2011.

SUMMARY OF THE ARGUMENT

Texas's regulations of volunteer deputy registrars do not implicate the Speech Clause 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. Although some discrete components of voter-registration drives 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 enjoined.[2] There is no First Amendment

[2] In their filing in the Supreme Court, the plaintiff-appellees falsely asserted that "[t]he State of Texas requires that *individuals who wish to participate in a voter registration drive* first be appointed as Volunteer Deputy Registrars by a county registrar." *See* Emergency Appl. at 5-6 (emphasis added). As the plaintiffs themselves acknowledged later in their brief, a VDR appointment is needed only for those who "accept, handle, or deliver" another person's completed voter-registration application. *See id.* at 6 & n.2. There are many ways to "participate in a voter registration drive" without accepting or handling or delivering someone else's completed voter-registration application. Non-VDRs may distribute blank voter-registration forms, encourage others to register, assist applicants in filling out their forms, urge applicants to mail their completed voter-registration forms, and drive or walk with applicants to the mailbox to ensure that their completed registration forms get mailed. Anyone in Texas may undertake these activities; there are no residency or age limits and no requirement to be appointed as a VDR.

right to collect another person's completed voter-registration application and deliver it to county officials. *See, e.g.*, *League of Women Voters of Fla.*, 575 F. Supp. 2d at 1321-22.

The plaintiffs have tried to evade this problem by declaring that the abstract category of "voter-registration activity" is protected by the Speech Clause, without acknowledging that only certain components of voter-registration drives qualify as speech or expressive conduct protected by the First Amendment. *See, e.g.*, Emergency Appl. at 10-11 ("*Voter registration drives* are a quintessential form of expressive conduct protected under the First Amendment of the Constitution." (emphasis added)). The district court invoked the same abstraction in its preliminary-injunction order. *See, e.g.*, USCA5 1630. But one cannot establish a constitutional violation by lumping the undeniably protected speech activity of urging one's fellow citizens to register to vote with the non-speech activities regulated by the State's VDR regime. *See Washington v. Glucksberg*, 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 and abstractions). Texas does not regulate the speech-activity components of voter-registration drives; anyone in Texas is free to obtain blank voter-registration forms, distribute them to others, encourage others to register to vote, and assist them in completing the voter-registration form.

Even if this Court were to conclude that the Speech Clause applies to the State's VDR regulations, this Court should *still* reject the plaintiffs' First Amendment

claims under the balancing test used in *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983), *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Crawford v. Marion County Election Board*, 553 U.S. 181, 190-91 (2008). Each of the VDR regulations that the district court enjoined is a rational fraud-prevention device, and the district court contradicted *Crawford* by demanding that the State produce evidence of past fraud committed by VDRs in the State of Texas. *See* USCA5 1637, 1656. Any burdens or inconveniences imposed by these laws are minor and easily pass muster under the *Anderson/Burdick* balancing test.

The district court also erred by enjoining the Secretary from enforcing the statutory provisions that regulate the compensation of VDRs, rather than accepting the Secretary's limiting construction of those provisions. The Secretary's narrowing construction would have avoided all of the constitutional concerns raised in the district court's opinion, and the Court was obligated to accept her saving construction under the canon of constitutional avoidance. *See, e.g.*, *Akron Ctr. for Reprod. Health*, 497 U.S. at 514 ("[W]here fairly possible, courts should construe a [state] statute to avoid a danger of unconstitutionality." (citation and internal quotation marks omitted)). The district court compounded its errors by failing to allow the state courts an opportunity to construe this recently enacted statute before declaring it unconstitutional and by enjoining the disputed statutory provisions in their entirety rather than severing the applications that would remain constitutional even under the district court's analysis.

Finally, there is no "direct conflict" between state law and the NVRA. The district court thought that the State's personal-delivery requirement conflicts with 42 U.S.C. § 1973gg-4(a)(1), but that statute requires only that the State "accept and use the mail voter registration application form" prescribed by the Federal Election Commission when registering voters for federal election. Texas fully complies with this statutory requirement because it permits any voter to mail his own voter-registration form, and it "accepts" and "uses" every completed voter-registration form that arrives through the mail—even when a VDR violates the state's personal-delivery requirement by mailing in a third party's completed voter-registration application. Nothing in section 1973gg-4(a)(1), or in any other provision of the NVRA, establishes a federal right for third-party voter-registration organizations to provide delivery services for persons registering to vote.

The district court also concluded that the State could not prohibit VDRs from photocopying completed voter-registration forms in their possession before submitting those forms to the county registrar. The district court relied on 42 U.S.C. § 1973gg-6(i), which requires each State to "maintain for at least 2 years and . . . 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." But this provision can apply only to records that a State is capable of "maintain[ing]"—*i.e.*, those records within the State's custody and control. It does not

apply to records held by VDRs that have not yet been delivered to the county authorities. For these and other reasons, this Court should vacate the district court's preliminary-injunction order and remand the case for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED BY HOLDING THAT THE SPEECH CLAUSE PRECLUDES THE STATE'S LAWS LIMITING VDR APPOINTMENTS TO TEXAS RESIDENTS AND REQUIRING VDRS TO OBTAIN APPOINTMENTS FROM EACH COUNTY IN WHICH THEY SUBMIT APPLICATIONS.

A. The Act of Collecting and Delivering Another Person's Completed Voter-Registration Form 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. *See, e.g.*, *League of Women Voters of Fla.*, 575 F. Supp. 2d at 1322.

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," 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 (second and third alterations in original) (citation omitted). Neither of these factors is present here. A VDR does not seek to make a public display of the voter-registration applications that he collects, nor does he use the completed applications in his custody to communicate a message to others. And even if a few VDRs hope to communicate an expressive message by taking custody of other people's completed voter-registration applications, the First Amendment protects only "conduct that is *inherently* expressive." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (emphasis added). Collecting and delivering voter-registration applications is not "inherently expressive" conduct. *See League of Women Voters of Fla.*, 575 F. Supp. 2d at 1319 ("[T]he collection and handling of voter registration applications is not inherently expressive activity.").

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 qualifies 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 with the non-speech activities regulated by the State's VDR regime. *See, e.g.*, USCA5 1623 ("The Organizational Plaintiffs contend that *their voter registration activities* are a constitutionally protected form of speech and associational activity." (emphasis added)); USCA5 1627 ("*[T]hird-party voter registration activity* implicates not just freedom of speech, but also freedom of association." (emphasis added)); USCA5 1627-1628 ("*Voter registration drives*, in which citizens engage with one another to increase participation in the political process, are paradigmatic associational activity." (emphasis added)); USCA5 1630 ("[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 forms, distribute them to passers-by, encourage others to register to vote, and assist them in completing the voter-registration form. These activities are protected by the Supreme Court's free-speech jurisprudence—and they are not regulated by Texas.[3]

[3] The plaintiffs have repeatedly mischaracterized the State's First Amendment argument by asserting that the State believes that "voter registration drives" are categorically excluded from the protections of the Speech Clause. *See* Emergency Appl. at 12 ("The Secretary's argument in defense of the VDR system, which the court of appeals has apparently accepted, is predicated on the flawed premise that *voter registration drives are not protected under the First Amendment*." (emphasis added)); *id.* at 13 ("Respondent's contention *that voter registration drives constitute 'conduct' outside the First Amendment's scope* is untenable . . .." (emphasis added)). Yet the State made clear at every stage of this litigation—before the district court, in its briefing before the motions panel of this Court, at oral argument before the Fifth Circuit, and in briefing to the Supreme Court—that speech-related components of voter-registration drives *are* protected by the First Amendment. *See* USCA5 1625 ("The Secretary acknowledges that the act of encouraging another citizen to register is a form of protected speech.");

To its credit, the district court acknowledged and understood the State's argument on this point. *See* USCA5 1625. 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* USCA5 249, 938-942, 1178-1179, 1584-1585; *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 statute challenging the compensation of VDRs implicates 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.

State's Mot. for Emergency Stay at 3 (acknowledging that the acts of "distribut[ing] voter-registration forms and encourag[ing] their fellow citizens to register . . . are undoubtedly protected by current First Amendment doctrine."); Oral Argument at 2:38 (Mr. Mitchell: "The brief submitted by our friends in opposition is attacking a straw man on page 9 when it claims that the State is asserting that the First Amendment is not implicated by voter-registration activity. That is not the State's argument, and it never was the State's argument in the district court. The State readily concedes that Project Vote has the right to distribute voter-registration forms to its fellow citizens, to urge its fellow citizens to register, and it has the right to assist and counsel them in how to fill out that form.").

In addition, the verb "facilitates" is ambiguous and reasonably susceptible of a construction that extends only to non-speech activity (such as collecting the completed applications from prospective voters). The district court should have followed the numerous Supreme Court decisions that require federal courts to interpret state laws to *avoid* constitutional conflicts, rather than interpreting section 13.008(a) expansively and then enjoining it for violating the First Amendment. *See Akron Ctr. for Reprod. Health*, 497 U.S. at 514; *Frisby*, 487 U.S. at 483. And if the district court was unwilling to impose a narrowing construction on the meaning of "facilitates" in section 13.008(a), then the proper response is to abstain and give the state courts an opportunity to interpret the statute. *See Bellotti v. Baird*, 428 U.S. 132, 146-47 (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* USCA5 1626-1627. But the district court never explained how the act of collecting and delivering another voter's registration form could qualify as "expressive conduct" under *Texas v. Johnson* and *Rumsfeld v. FAIR*. 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); *[Project Vote v.]Blackwell,* 455 F. Supp. 2d [694,] 700 [(N.D. Ohio 2006)]." *Id.*

Yet the first of the two cases that the district court cites establishes exactly the opposite proposition; 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 *Blackwell*, the opinion in that case asserts 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 at 700. 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.

Blackwell does nothing to answer the State's argument that the acts of collecting and delivering other people's completed voter-registration applications fall outside the First Amendment.

And the district court's opinion never mentions *League of Women Voters of Florida*, 575 F. Supp. 2d 1298, which explicitly recognized the distinction between the expressive and non-expressive components of voter-registration drives in the course of rejecting a First Amendment challenge to Florida's election-integrity laws:

> Undoubtedly, Plaintiffs' interactions with prospective voters in connection with their solicitation of voter registration applications constitutes constitutionally protected activity. However, and in contrast to both *Meyer* and *Schaumburg*, the Amended Law does not place any direct restrictions or preconditions on those interactions. For instance, it does not place any restrictions on who is eligible to participate in voter registration drives or what methods or means third-party voter registration organizations may use to solicit new voters and distribute registration applications. Instead, the Amended Law simply regulates an administrative aspect of the electoral process—the handling of voter registration applications by third-party voter registration organizations *after* they have been collected from applicants.

Id. at 1321-1322. Likewise for Texas's VDR regulations. They do not regulate the "solicitation of voter registration applications," which is protected by the First Amendment. They govern only "the handling of voter registration applications by third-party voter registration organizations *after* they have been collected from applicants," which is not protected by the First Amendment or by any precedent of the Supreme Court.

There is another problem with the district court's First Amendment analysis. *If* gathering and transmitting completed voter-registration applications truly qualify as "speech" or expressive conduct 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 Supreme Court has described this ban on prior restraints in near-absolute terms. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (citation and internal quotation marks omitted)). 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 do not qualify as constitutionally protected speech or expressive conduct.

At oral argument before the motions panel, counsel for Project Vote insisted that the State's entire VDR regime was an unconstitutional prior restraint on speech. *See* Oral Argument at 45:11 (Mr. Dunn: "[I]t is absolutely unconstitutional to have to go get a Mother May I from the government before we can go out and try to register citizens and I can state with all the certainty that I can that there is no way this United States Supreme Court will justify that behavior."). While the State respectfully disagrees with the plaintiffs' legal conclusion on this matter, we certainly agree that the logical implication of the district court's First Amendment holding (and the plaintiffs'

First Amendment argument) is that States would be powerless to limit the collection of completed voter-registration applications to persons deputized in advance by state or county officials. The consequences of the district court's First Amendment holding are considerably more radical than what the court lets on in its opinion.

The act of collecting and delivering another person's completed voter-registration application is not "speech" or expressive conduct protected by the First Amendment. The district court erred and abused its discretion by concluding otherwise, and its preliminary-injunction order must be vacated to the extent it relies on the First Amendment to enjoin the State from enforcing its regulations of VDRs.

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. Celebreeze*, *Burdick v. Takushi*, and *Crawford v. Marion County*.

If 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 balancing test used in *Anderson*, 460 U.S. at 789-90, *Burdick*, 504 U.S. at 434, and *Crawford*, 553 U.S. at 190-91. When an election regulation implicates First Amendment interests, a court:

> 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.

Anderson, 460 U.S. at 789-90.

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 in Texas. *See* USCA5 1637, 1656.[4] 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. And in all events, there is plenty of evidence of voter-registration fraud throughout the country, including from Project Vote and other groups closely associated with the plaintiffs. *See supra* at 5-6.

[4] In the Supreme Court, the plaintiff-appellees encored the district court's performance by insisting (contrary to *Crawford*) that Texas must produce evidence of past voter-registration fraud committed in Texas fraud to justify its regulations of VDRs. *See* Reply of Pet'rs in Support of Emergency Appl. to Vacate the Fifth Circuit's Stay Pending Appeal at 11 (No. 12A266) (filed Sept. 21, 2012).

1. The In-State Residency Requirement.

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 remove themselves from the jurisdiction of state investigators and prosecutors. This is precisely the rationale that the Eighth Circuit adopted in upholding a state residency requirement for those who circulate petitions for popular referenda. *See Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (holding that "the State has a compelling interest in preventing fraud" and that "[t]he residency requirement allows North Dakota's Secretary of State to protect the petition process from fraud and abuse by ensuring that circulators answer to the Secretary's subpoena power."). Although the Eighth Circuit's ruling does not bind this panel, the plaintiffs cannot deny that their First Amendment argument compels the conclusion that *Jaegar* was wrongly decided, and a ruling in their favor would create a circuit split for the Supreme Court to resolve.

The State is not required to prove that out-of-state VDRs have committed more fraud than Texans who serve as VDRs, and, in criticizing the State for failing to produce evidence on this score, the district court never cited *Crawford* nor considered how the Supreme Court's treatment of Indiana's Voter-ID law should inform the analysis here. Voter-registration fraud, like 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 *Crawford* holds that states need not produce evidence of past fraud to justify their election-fraud prevention laws. *See Crawford*, 553 U.S. at 194, 204; *see also Ala. State Fed'n of Labor, Local Union No. 103 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."); *League of Women Voters of Fla.*, 575 F. Supp. 2d at 1324 ("It is well established that, in the election context, there is no need for an elaborate, empirical verification of the weightiness of the State's asserted justifications.") (citations and internal quotation marks omitted).

The district court also invoked the image of Mississippi's Freedom Summer, suggesting that Texas would have made criminals of the non-Mississippians who heroically traveled to that State to help disenfranchised black residents register to vote. *See* USCA5 1635-1637. But once it becomes evident that Texas permits anyone—including out-of-state residents—to distribute blank voter-registration forms, encourage others to register, assist applicants in filling out their forms, urge applicants to mail their completed voter-registration forms, and drive or accompany applicants to the mailbox or to the county registrar to submit their completed registration forms, the district court's rhetoric falls flat. Out-of-state canvassers are welcome in Texas, and the State values the assistance they provide to citizens who wish to register to vote. Although out-of-state canvassers cannot *collect* a Texas

resident's completed voter-registration, there is still much that out-of-state canvassers and other non-VDRs can do to participate in voter-registration drives and help Texans register to vote.

2. The County-Specific VDR Appointment Requirement.

The county-appointment requirement serves a similar accountability function by enabling county officials to revoke the appointments of VDRs who submit incomplete or fraudulent applications or fail to deliver completed applications that they collect. *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."). Texas requires VDRs to 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, .038. Individual county officials can't revoke the appointments of negligent or delinquent VDRs if they are compelled to recognize any VDR who holds an appointment from any other county in Texas.

The county-appointment requirement is not burdensome. The plaintiffs have falsely asserted that it requires VDRs to "repeat in each county the same state-mandated training they received when first appointed as a VDR." Supreme Court Emergency Appl. at 15-16. But training need only occur in one county and after that

VDRs may apply by mail for appointment in other counties. And county registrars are *required* to appoint everyone who applies for the job and satisfies the statutory criteria. *See* TEX. ELEC. CODE § 13.032 ("Prohibition on Refusing to Appoint. A registrar may not refuse to appoint as a volunteer deputy registrar: (1) a person eligible for appointment under Section 13.031(d); or (2) any person on the basis of sex, race, creed, color, or national origin or ancestry."). The county-appointment requirement has been in place since 1985 and it has not prevented organizations such as Project Vote from conducting voter-registration drives in Texas. *See* USCA5 1086.

The plaintiffs have described the State's interests in accountability and fraud prevention as "empty" and the prospect of VDRs engaging in negligent or fraudulent behavior as "fanciful." *See* Emergency Appl. at 16. Yet there are well-documented examples of negligence and voter-registration fraud committed by canvassers employed by ACORN and Project Vote. In *League of Women Voters of Florida*, 575 F. Supp. 2d 1298, the State of Florida introduced into evidence 13 written complaints from "persons who registered to vote with third-party organizations" but who "[a]t the time of voting . . . were advised they were not registered to vote because the forms they had filled out had never been turned in." *Id.* at 1310. The expert witness hired by the plaintiffs in *League of Women Voters of Florida* admitted that "canvassers collecting forms sometimes engage in registration fraud, particularly those who are new on the job." *Id.* at 1308-09. And Florida introduced "evidence of instances in which third-party voter registration organizations have 'hoarded' applications; failed

to submit applications prior to the book-closing deadline; or even failed to submit applications at all." *Id.* at 1324 (citations omitted).

It is also easy to imagine how a canvasser might be motivated to "lose" someone's completed voter-registration application. Many participants in voter-registration drives are seeking to advance the electoral prospects of a specific candidate or political party. *See, e.g.*, *Preminger v. Peake*, 552 F.3d 757, 761 (9th Cir. 2008). And applicants are likely to reveal their political preferences to the person offering to assist them in registering to vote, especially when the federal mail-in form includes a "choice of party" box. A dishonest canvasser might submit only the applications filled out by members of the political party that he supports, and throw the others in the trash can.[5] Even though the vast majority of canvassers are honorable and competent, a State may adopt measures to ensure that corruption of this sort—however rare it may be—is prevented and punished.

Canvassers have also submitted fraudulent voter-registration applications to state and county officials. In 1998, a Project Vote employee was convicted for submitting over 400 fake voter-registration applications. *See* FOLLOW THE MONEY, *supra*, at 49. He apparently had a financial motive for the fraud, as Project Vote at the time paid its employees $1.00 for each voter registration application it received. *Id.*

[5] *See* George Knapp, *Investigation Into Trashed Voter Registrations* (Oct. 13, 2004), http://www.8newsnow.com/story/2421595/investigation-into-trashed-voter-registrations (last visited on Oct. 25, 2012) (reporting that "[a]n employee of a private voter registration firm alleges that his bosses trashed registration forms filled out by Democratic voters because they only wanted to sign up Republican voters.").

Many other examples of this behavior can be cited. *See* IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE?, *supra*, at 4 ("Nearly 70 ACORN employees have been convicted in 12 states for voter registration fraud."). This is not "hypothesized conduct," as the plaintiffs claim. *See* Emergency Appl. at 17. But even if it were, *Crawford* holds that a State is not required to introduce evidence of past fraud to justify an election-fraud prevention measure under the *Anderson/Burdick* balancing test. *See* 553 U.S. at 194, 204; *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively . . . ."); *Voting for Am., Inc. v. Andrade*, 2012 WL 4373779, at *13 (5th Cir. Sept. 26, 2012) (Dennis, J., dissenting) (acknowledging that "a state may enact a law based on a hunch that it will curb fraudulent conduct.").

So even if this Court were to believe that the act of collecting and delivering someone else's completed voter-registration form qualifies as "speech" protected by the First Amendment, the State's accountability and fraud-prevention rationales are sufficient to sustain the county-appointment rule under *Anderson*, *Burdick*, and *Crawford*.

II. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY ENJOINING THE STATE FROM ENFORCING THE COMPENSATION LIMITS IN TEX. ELEC. CODE § 13.008(a).

Texas Election Code § 13.008(a) provides that a person commits an offense if he:

> (1) compensates another person based on the number of voter registrations that the other person successfully facilitates;
>
> (2) presents another person with a quota of voter registrations to facilitate as a condition of payment or employment;
>
> (3) engages 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; or
>
> (4) accepts compensation for an activity described by Subdivision (1), (2), or (3).

The Secretary of State interprets this statute to prohibit only two practices: (1) paying canvassers on a per-application basis and (2) conditioning payment or employment *solely* on the submission of a fixed number of applications. *See* USCA5 1844. The district court, however, insisted that the statute must be read more broadly to prohibit *any* performance-based employment decision that considers the number of voter registrations that a canvasser facilitates, even when other factors inform the employment decision. *See* USCA5 1646. Under the district court's construction of the statute, Project Vote would violate section 13.008(a)(3) if it terminated a canvasser who slept on the job and collected zero voter-registration applications, because that would "cause another person's compensation from or employment status" to "be dependent on the number of voter registrations that the other person facilitates." USCA5 1647 (citing TEX. ELEC. CODE § 13.008(a)(1)-(3)). The district court thought this would violate the First Amendment because "prohibiting performance-based employment practices seriously burdens First Amendment activity." USCA5 1849.

Yet the district court refused to defer to the Secretary's narrowing construction of the statute—even though this would have avoided the district court's constitutional concerns—and imposed its own interpretation on section 13.008 that caused it to violate the court's interpretation of the Speech Clause. *See* USCA5 1847-1848. This was error for three independent reasons.

A. The District Court Erred And Abused Its Discretion By Refusing to Defer to the Secretary of State's Narrowing Construction of TEX. ELEC. CODE § 13.008(a).

Federal courts must defer to a state official's narrowing construction of state law. *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 representations 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."); *Doe v. Bolton*, 410 U.S. 179, 183 n.5 (1973). 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)); *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 327 (5th Cir. 2005) (holding that federal courts must construe statutes to avoid conflicts with federal law whenever the state legislation "admit[s] of" a "potentially saving construction."). The district

court's treatment of section 13.008 contravenes each of these cardinal principles of constitutional adjudication.

The only basis on which the district court could lawfully disregard the Secretary of State's narrowing construction of section 13.008(a) is if the Secretary's interpretation represents a "re-writing" rather than an "interpretation" of the relevant statutory provisions. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (opinion of Roberts, C.J.); *id.* at 2651 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The district court claimed that it could reject the Secretary of State's interpretation of section 13.008 because (in his view) the Secretary's construction of the statute would render section 13.008(a)(3) "superfluous"; the district court claimed that section 13.008(a)(3) would fail to reach any activity not already prohibited by section 13.008(a)(2). USCA5 1845. The district court was wrong. Section 13.008(a)(2) applies when someone "*presents another person with* a quota of voter registrations to facilitate as a condition of payment or employment." TEX. ELEC. CODE § 13.008(a)(2) (emphasis added). Section 13.008(a)(3) applies when that fixed quota is used as the sole basis for determining compensation or employment, regardless of whether it has been "presented" to the employee. The Secretary's interpretation leaves subsection (a)(3) with plenty of work to do, and the fact that subsection (a)(3) says "another practice" shows that subsection (a)(2) is meant to describe a paradigm of the activity

that (a)(3)'s formulation is intended to abolish.[6] The Secretary's interpretation of the statute is permissible, and the district court was obligated to defer to it. Had the district court deferred, there would be no potential problems under the Speech Clause and no basis for a preliminary injunction.

The district court committed an additional error by equating the statutory ban on "quotas" with a ban on performance-based reviews. According to the Secretary of State's authoritative construction, sections 13.008(a)(2) and (a)(3) are implicated only when a quota is used as the *sole* basis for determining compensation of employment status. Neither provision precludes a generalized inquiry into an employee's productivity, one that takes account of the number of applications he has facilitated without making that number dispositive of the ultimate decision. The State of Texas has banned Project Vote and similar entities from holding their employees to rigid quotas, but it does not preclude them from undertaking a holistic review of an employee's performance that considers, as one aspect of that review, the number of voter-registration applications that the employee has effected. The district court had no basis on which to reject the Secretary's narrowing construction of section 13.008.

[6] Indeed, the district court recognized that subsection (a)(3) was "the broader of the two challenged subsections" and acknowledged that "the word 'presenting' . . . can be read as limited to quotas announced prior to performance." USCA5 1646-1647. We are nonplussed that the district court failed to see that the word "presenting" imposes similar limits on the scope of subsection (a)(2) under the Secretary's interpretation of the statute.

B. The District Court Erred and Abused Its Discretion by Failing to Abstain.

Even if the district court could justify its failure to accept the Secretary of State's narrowing construction of section 13.008, the district court committed an additional error by failing to abstain. *Arizona v. United States*, 132 S. Ct. 2492 (2012), holds that federal courts should not issue a preliminary injunction when a state statute "could be read" by the state courts to avoid constitutional or preemption concerns. *Id.* at 2509-10; *see also 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.") (citation and internal quotation marks omitted); *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 411 (6th Cir. 2008) (abstaining under *Bellotti* in face of a "novel and previously uninterpreted state statute" and reversing district court that had declared the statute void for vagueness).

It cannot be disputed that the Secretary of State's interpretation of section 13.008(a) "could be" adopted by the state courts, and the district court was compelled to presume that the state courts would construe section 13.008(a) to avoid potential constitutional problems. *See Fox v. Washington*, 236 U.S. 273, 277 (1915) ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *and it is to be presumed that state laws will be*

construed in that way by the state courts" (emphasis added) (citation omitted)). If the district court was unwilling to adopt the Secretary of State's narrowing construction of section 13.008(a), then it was at the very least obligated to abstain and allow the issue to be litigated in the state courts.

In their brief opposing the State's request for an emergency stay pending appeal, the plaintiff-appellees never attempted to defend the district court's failure to abstain. Instead, they suggested that the State's abstention argument "should not be considered by this court" because it was not "raised in the court below." *See* Appellee's Opp'n to Mot. for Emergency Stay at 9 n.3, Doc. No. 00511960832 (5th Cir. Aug. 17, 2012). But it has long been established that courts may consider abstention on their own initiative—even when a State has failed to present the argument to *any* court. *See Bellotti*, 428 U.S. at 143 n.10 (1976); *Schlesinger v. Councilman,* 420 U.S. 738, 743 (1975); *Younger v. Harris*, 401 U.S. 37, 40-41 (1971). And in *Arizona v. United States*, the Supreme Court accepted Arizona's abstention argument even though it had never been presented to the district court and was raised for the first time in the Supreme Court. *Compare* Br. for Pet'rs, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 416748, at *40-41, *with* Appellants' Opening Br., *United States v. Arizona*, 689 F.3d 1132 (9th Cir. 2012) (No. 10-16645), 2010 WL 5162518, at *23-43, *and* Defs.' Resp. to Pl.'s Mot. for Prelim. Inj. at 15-21, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-CV-01413), 2010 WL 3154413.

Even though abstention doctrines do not limit the federal courts' subject-matter jurisdiction, the Supreme Court has held on many occasions that non-jurisdictional issues governing the relations between state and federal governments may be raised on a court's own initiative. *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 134 (1987) (holding that courts may consider non-exhaustion defenses in federal habeas proceedings even in "cases in which the State fails, whether inadvertently or otherwise, to raise an arguably meritorious nonexhaustion defense."); *Caspari v. Bohlen*, 510 U.S. 383, 389-90 (1994) (holding that courts may raise *Teague* defenses sua sponte in federal habeas proceedings); *Day v. McDonough*, 547 U.S. 198, 209 (2006) (holding that courts may raise statute-of-limitations defenses sua sponte in federal habeas proceedings); *Bellotti*, 428 U.S. at 143 n.10; *Councilman,* 420 U.S. at 743; *Younger*, 401 U.S. at 40-41; *see also ACORN v. Edgar*, 56 F.3d 791, 796-97 (7th Cir. 1995) (Posner, C.J.) (noting that "there are exceptions" to the waiver doctrine and that "[w]hen the ground involves the relation between governments, including the relation between the federal government and the states [or] relates to the propriety or scope of an injunction" the appellate court "may invoke it on the court's own initiative."). The Supreme Court applies a rule against waiver in this context because of the added burdens that would be imposed on federal courts if issues of abstention were governed by a strict rule of waiver—a regime that would increase both the decision costs and the error costs of federal-court litigation.

C. The District Court Erred and Abused Its Discretion By Enjoining Sections 13.008(a)(2) and (a)(3) On Their Face And Refusing to Sever the Applications That Would Comply with the District Court's Interpretation of the First Amendment.

The district court also erred by enjoining sections 13.008(a)(2) and (a)(3) on their face. Both the Supreme Court and this Court have repeatedly held that federal courts cannot enjoin a statute on its face unless every application of the statute will violate the Constitution or some other provision of supreme federal law. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." (citation and internal quotation marks omitted) (emphasis in original)); *Akron Ctr. for Reprod. Health*, 497 U.S. at 514 ("[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid.") (citation and internal quotation marks omitted); *see also Dep't of Tex., Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, No. 11-50932, 2012 WL 4788406, at *5 (5th Cir. Oct. 9, 2012); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 548 (5th Cir. 2008). Yet the district court enjoined the Secretary of State from enforcing sections 13.008(a)(2) and (a)(3) *in their entirety*, even though each of these statutory provisions

could be constitutionally applied (even under the district court's reasoning) to prohibit excessively high quotas that may induce canvassers to commit fraud.

Even apart from these binding pronouncements from the Supreme Court, facial invalidation of sections 13.008(a)(2) and (a)(3) is impermissible for another reason: Texas law provides that constitutional *applications* of a statutory provision are severable from the statute's unconstitutional applications. The Texas Code Construction Act provides:

> In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute *or its application to any person or circumstance is held invalid*, the invalidity does not affect other provisions *or applications of the statute that can be given effect without the invalid provision or application*, and to this end the provisions of the statute are severable.

TEX. GOV'T CODE § 311.032(c) (emphasis added). Texas law therefore requires both text severability (by severing the "provision[s]" of a statute) and also application severability (by severing the "applications of the statute"). Federal courts have no authority to disregard state severability law. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) ("Severability is of course a matter of state law."); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (holding that a state court's "decision as to the severability of a provision is conclusive upon this Court."). And the Supreme Court has long enforced state-law provisions that require courts to sever unconstitutional applications of state statutes, while leaving valid applications in force, even in the First Amendment context. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 460-61 (1992) ("Severability clauses may easily be written to provide that if application of a statute to some classes

is found unconstitutional, severance of those clauses permits application to the acceptable classes."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501, 506 & n.14 (1985) (enforcing an application-severability requirement in a state statute that contained an overbroad definition of prurience, holding that "facial invalidation of the statute was . . . improvident"). So even if this Court accepts the district court's First Amendment analysis, the district court *still* was obligated to sever the constitutionally valid applications of sections 13.008(a)(2) and (a)(3) rather than enjoining the enforcement of those statutory provisions in their entirety.[7]

[7] In the Supreme Court, the plaintiff-appellees tried to defend the district court's decision to facially invalidate sections 13.008(a)(2) and (a)(3) by suggesting that those provisions "were susceptible to an overbreadth challenge." *See* Reply in Support of Appl. for Emergency Stay at 17-18. This is mistaken for three reasons. First, an "overbreadth" challenge does not absolve a federal court of its responsibility to impose a saving construction on the disputed legislation. *See Am. Booksellers Ass'n*, 484 U.S. at 397 ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." (citation omitted)). Second, an overbreadth challenge cannot be entertained when state law requires unconstitutional *applications* of a statute to be severed from the constitutional ones. *See Brockett*, 472 U.S. at 501 & n.14. Facial invalidation on overbreadth grounds would violate state severability law, which a federal court is bound to enforce. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996). Finally, federal courts are required to resolve as-applied challenges to statutes before they consider an "overbreadth" challenge to such a law. *See Bd. of Trs. v. Fox*, 492 U.S. 469, 484-85 (1989). Because the plaintiff-appellees allege that their compensation practices are constitutionally protected, they must first assert an as-applied challenge against sections 13.008(a)(2) and (a)(3). Only when an as-applied challenge fails (because the plaintiffs' conduct is unprotected by the First Amendment) should a federal court proceed to consider the overbreadth challenge. *See Fox*, 492 U.S. at 484-85.

III. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY HOLDING THAT THE PERSONAL-DELIVERY REQUIREMENT "DIRECTLY CONFLICTS" WITH THE NVRA.

Texas Election Code section 13.042(a) provides 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, as provided by this section." VDRs are not allowed to submit the completed voter-registration applications through the mail. This 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 get "lost" in the delivery process. And it would become difficult if not impossible for a prosecutor to prove beyond a reasonable doubt that a VDR should be held responsible for any completed voter-registration applications that he loses or destroys. Nevertheless, the State of Texas will accept *every* completed 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* USCA5 1622 (acknowledging that "improperly mailed forms will still be accepted"). And of course every voter is permitted to mail *his own* voter-registration application to the county registrar.

The district court held that section 13.042(a) "directly conflicts" with 42 U.S.C. § 1973gg-4(a)(1), which provides:

> Each State *shall accept and use* the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.

42 U.S.C. § 1973gg-4(a)(1) (emphasis added). But the Texas personal-delivery requirement does not conflict with this statute because the State will "accept and use" *every* completed voter-registration form that arrives through the mail, even when a VDR illegally submits a third party's completed application through the mail. The VDR will have broken the law, but the mailed application will still be accepted and used. There is no violation of 42 U.S.C. § 1973gg-4(a)(1) unless the State fails to "accept" or "use" a completed voter-registration application form that arrives in the mail, or unless the State establishes rules that make it impossible for individual voters to mail their own FEC-approved voter-registration form to county officials. That has not happened, and the plaintiffs do not allege that it will happen.

There is no provision in the NVRA that requires States to permit third parties to use the mail when delivering voter-registration applications on behalf of someone else. The plaintiffs have correctly noted that the NVRA requires States to make *blank* voter-registration forms "available for organized voter registration programs." Emergency Appl. at 20. But this provision says nothing about whether a State must allow organized voter-registration programs to *take* another person's *completed* voter-registration application and then mail it to the county registrar, and the plaintiffs' argument therefore runs headlong into the maxim of *expressio unius est exclusio alterius*.

Indeed, the plaintiffs are unable to quote any language from the NVRA that requires the States to permit *any* form of third-party collection and delivery of completed voter-registration applications. The NVRA establishes a federal statutory right for organized voter registration programs to *gather* and *distribute* blank registration forms; it does not confer any right on these organizations to act as couriers for applicants who have completed their voter-registration forms.

Finally, the Eleventh Circuit's ruling in *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005), offers no help to the plaintiffs. That case held that 42 U.S.C. § 1973gg-4(a)(1) prohibits county officials from *rejecting* mailed-in voter applications submitted by deputy registrars; the court found that violates the statutory duty to "accept and use" the federal mail-in form. *Wesley* has no application to this case because the State of Texas will not reject *any* completed voter-registration form that arrives through the mail.

IV. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY HOLDING THAT THE PHOTOCOPYING PROHIBITION "DIRECTLY CONFLICTS" WITH THE NVRA.

The Secretary of State does not allow VDRs to photocopy completed voter-registration applications in their possession. The district court concluded that this photocopying prohibition "directly conflict[s]" with 42 U.S.C. § 1973gg-6(i), which provides:

> *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 . . ..

42 U.S.C. § 1973gg-6(i)(1) (emphasis added). The "records" described in 42 U.S.C. § 1973gg-6(i) are records that the State must "maintain for at least 2 years," in addition to making them available for public inspection and photocopying. The requirement to "maintain" these records means that the statutory obligation in 42 U.S.C. § 1973gg-6(i) can extend 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 to county election officials, as it is impossible for a State to "maintain for at least 2 years" and "make available for public inspection" documents that have not been delivered to any state or county official.

A. The District Court Erred and Abused Its Discretion By Holding That Section 1973gg-6(i) Extends To Records Outside the Custody and Control of the County Registrar.

The district court's opinion ignores the statutory requirement to "maintain for at least 2 years" the records described in section 1973gg-6(i) and makes no attempt to reconcile its preliminary-injunction order with that statutory requirement. Instead, the district court asserted that "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." *See* USCA5 1618. *Constructive* possession? If a member of the public were to appear at a county registrar's office and demand to see all completed voter-

registration applications held by VDRs but not yet delivered to the county registrar's office, the registrar would have no way to accommodate that request. Yet under the district court's opinion, the county registrar would become a lawbreaker because he failed to "make available for public inspection" documents in the county's "constructive possession." The district court is certainly correct to note that VDRs are deputized by county officials, but they are deputized to serve *as couriers*, not as persons who maintain the county's records and make them available to the general public. Documents mailed to a federal agency do not fall within the agency's "constructive possession" as soon as they are picked up by the mailman—even when the postal-service employee serves as an agent and employee of the federal government. Under the district court's reasoning, every *VDR* is required to "make available for public inspection and . . . photocopying" the completed voter-registration applications in his possession to any person who asks for them—and becomes a lawbreaker if he refuses to do so.

The district court also asserted that "it would be an absurd result to forbid private parties [to] copy[] applications before finally submitting them" because "[i]t makes no sense to forbid someone who has collected a voter registration application [to] copy[] that application while it is in their possession but to then allow them to make a copy once the government has received it." USCA5 1818. But the regime that the district court describes is eminently sensible. Voter-registration forms contain confidential personal data. If photocopying of these forms is to be permitted,

and if the State must ensure the protection of confidential data on these forms, then it is not "absurd" to allow that photocopying to occur only after the completed voter-registration applications are in the custody of the county registrar, who is far more likely to understand applicable privacy laws and ensure that confidential data is protected. Allowing every individual VDR to photocopy the applications whenever and wherever he chooses before turning them over to the county officials greatly increases the risk that one of them may accidentally photocopy or disclose confidential information on the form. And in all events, preemption does not turn on whether the photocopying provision "makes sense" to a federal judge. The district court must show how 42 U.S.C. § 1973gg-6(i) can be construed to extend to records other than those that the State is capable of "maintain[ing]." *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012), does not support the district court or the plaintiff-appellees on this point because the completed voter-registration applications in that case were already in the State's custody and control. *See* USCA5 1616-1617.

B. The District Court Erred and Abused Its Discretion By Holding That Section 1973gg-6(i) Extends To Completed Voter-Registration Forms.

The district court also erred by holding that completed voter-registration forms qualify as "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." This language is most plausibly read to extend only to "programs and

activities" that seek to purge convicted felons, deceased persons, out-of-state residents, and other non-eligible persons from the list of registered voters. And the statutory provisions surrounding 42 U.S.C. § 1973gg-6(i) all regulate "programs" that seek to cleanse the voter-registration lists of ineligible voters.

The most serious problem with the district court's holding is that completed voter-registration forms contain confidential and sensitive data, including home addresses, telephone numbers, social-security numbers, and dates of birth. Yet there is *no* provision in the NVRA that protects confidential information that might be contained in the "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." Quite the contrary, the disclosure obligation in 42 U.S.C. § 1973gg-6(i) is absolute: "*[A]ll records* concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" must be made available for disclosure and photocopying. (emphasis added).

Did Congress really enact a federal statute that would allow anyone to march into a county courthouse and demand the right to photocopy anyone's completed voter-registration application? The district court's preliminary-injunction order tries to get around this problem by allowing VDRs to photocopy and scan completed voter-registration applications "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." USCA5 1864. The State is grateful that the district court limited its preliminary-injunction order in this manner, but the district court had no legal authority to do this once he had concluded that completed voter-registration applications qualify as "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" under 42 U.S.C. § 1973gg-6(i). State privacy law is not permitted to trump a federal statutory mandate, and 42 U.S.C. § 1973gg-6(i) says that "all records" shall be made available for public disclosure and photocopying.

To accept the district court's construction of 42 U.S.C. § 1973gg-6(i), one would have to believe that either: (a) Congress simply forgot to include a statutory provision protecting the confidential information on completed voter-registration forms, or (b) Congress intended to allow *anyone* to access *any* information on *any* completed voter-registration form in the custody of State officials. Fortunately, there is a third and far more plausible possibility: That completed voter-registration forms do not qualify as "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" within the meaning of 42 U.S.C. § 1973gg-6(i).

Finally, the district court failed to provide any reasoning to support its belief that completed voter-registration forms fall within the "records" described in 42 U.S.C. § 1973gg-6(i). The district court was content to note that the Fourth Circuit in *Long* held that completed voter-registration forms fall within the scope of the statute,

and repeated the conclusory assertions that appear throughout the Fourth Circuit's opinion. *See, e.g.*, USCA5 1616-1617 (declaring that section 1973gg-6(i) "'unmistakably encompasses completed voter registration applications.'" (quoting *Long*, 682 F.3d at 335-36)). Yet the district court never *analyzed* the reasoning in *Long* before touting it as persuasive authority, and seemed to think that the mere fact that it was written by Judge Wilkinson can somehow serve as evidence of its correctness. *See id.* Yet there are serious shortcomings with the Fourth Circuit's textual analysis of section 1973gg-6 and with its treatment of the confidential-data issue.

The State of Virginia argued in *Long* that section 1973gg-6(i) is limited to records relating to efforts to maintain and purge the voting rolls, and does not include completed voter-registration applications. The State's argument relied on the text and structure of section 1973gg-6(i), which reads as follows:

> (i) Public disclosure of voter registration activities
>
> (1) 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.
>
> (2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

42 U.S.C. § 1973gg-6(i). Subsection (2) is crucial to understanding the scope of subsection (1). It requires that "[t]he records maintained pursuant to paragraph (1)" include lists of "all persons to whom notices described in subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made." Subsection (d)(2), in turn, governs the process by which a State removes persons who have changed residences from the lists of registered voters. *See id.* § 1973gg-6(d) (forbidding States to purge persons who have moved from the voting rolls unless they fail to respond to a notice sent by the State in postage prepaid and pre-addressed return card, sent by forwardable mail, and also fail to vote in two consecutive elections for federal office held after the date of the notice). The other statutory provisions surrounding section 1973gg-6(i) are likewise directed at state programs that seek to purge ineligible voters from the lists of registered voters; all of this implies that the "records" described in section 1973gg-6(i) pertain only to programs that remove registered voters from the rolls. *See id.* § 1973gg-6(c) ("Voter removal programs"); *id.* § 1973gg-6(d) ("Removal of names from voting rolls"); *id.* § 1973gg-6(e) ("Procedure for voting following failure to return card"); *id.* § 1973gg-6(f) ("Change of voting address within a jurisdiction"); *id.* § 1973gg-6(g) ("Conviction in Federal court"). When these structural inferences are combined with the seemingly absurd result that follows from requiring the public disclosure of completed voter-registration applications and the confidential data included on those forms, it becomes difficult to

defend the Fourth Circuit's assertion that completed voter-registration applications "unquestionably fall within" the scope of § 1973gg-6(i). *Long*, 682 F.3d at 337; *see also id.* at 335 (stating that completed applications are "clearly" records under § 1973gg-6(i)(1)); *id.* ("[T]he 'program' and 'activity' of evaluating voter registration applications is plainly 'conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters.'" (quoting § 1973gg-6(i)(1))); *id.* at 335-36 (registration applications are "clearly" records under § 1973gg-6(i)(1)); *id.* at 340 (completed applications are "unquestionably" records).

The Fourth Circuit's treatment of the confidential-data issue is even more problematic. As we have noted, the NVRA contains no provision protecting confidential data such as home addresses, telephone numbers, and social-security numbers from disclosure, which strongly implies that completed voter-registration applications do not fall within the "records" that section 1973gg-6(i) requires States to "make available" for "photocopying" to the general public. The Fourth Circuit, however, was untroubled by the prospect that its decision would open the door to the disclosure of confidential data, because it noted that the plaintiff in that case had "never requested completed applications with unredacted Social Security numbers" and "does not object" to the district-court order " 'grant[ing] the plaintiff access to completed voter registration applications with the voters' SSNs redacted for inspection and photocopying.' " *Long*, 682 F.3d at 339 (quoting *Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738, 743 (E.D. Va. 2011)). This response is not

adequate. What is to happen in the next case if a plaintiff demands access to the *unredacted* social-security numbers on completed voter-registration forms? There is no authority cited in the Fourth Circuit's opinion that allows a federal court to thwart that request—once completed voter-registration forms are held to be "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" under 42 U.S.C. § 1973gg-6(i). The Fourth Circuit's opinion in *Long* also admits that confidential information other than social-security numbers that appears on a completed voter-registration form is fair game for disclosure and photocopying under 42 U.S.C. § 1973gg-6(i). *Long*, 682 F.3d at 339-40. It is staggering to think that Congress would enact a statute that makes the home address and telephone number of every registered voter so easily accessible to every member of the public, and no statute should be given that construction unless clear and unambiguous statutory language requires it.

V. THE BALANCE OF HARMS IN THIS CASE FAVORS THE STATE.

Throughout this litigation the plaintiff-appellees have made hyperbolic claims about the effects of the State's VDR regulations. *See, e.g.*, Emergency Appl. at 15 ("[T]he cumulative effect of the regulations is to make it impossible to conduct voter registration drives in Texas."); *id.* at 4 ("[T]he court of appeals' stay will effectively eliminate Petitioners' ability to register voters during this crucial period."); *id.* at 23-24 ("[T]he court of appeals' stay effectively silences Petitioners for this election cycle.").

Yet most of these challenged restrictions, including the photocopying prohibition, the personal-delivery requirement, and the requirement of county-specific VDR appointments, have been on the books since 1985. None of these laws have prevented Project Vote or other organizations from conducting large-scale voter-registration drives in Texas, and Project Vote does not describe any irreparable injuries that occurred during that time period. Indeed, Michael Slater, the executive director of Project Vote, testified at the preliminary-injunction hearing that his organization was able to conduct voter-registration drives in Harris County and El Paso in 2008, at a time when each of those laws was being enforced by the State. *See* USCA5 1086.

The only new provisions at issue in this case are the in-state residency requirement and the limits on VDR compensation, which the Legislature enacted in 2011. According to Project Vote's testimony, the in-state residency requirement will not seriously burden Project Vote's voter-registration drives. Slater testified that his organization uses only in-state residents as canvassers and as managers of those canvassers:

> We actually have found that the best messengers for our message is people from local communities. . . . What we do is we tend to grant money to a local organization to help them develop their program, and then work with their managers to do, to run that program, *so that the people who are hired are local, and the people that the canvassers see managing them are also people from that community.*

See USCA5 1090-1091 (emphasis added). Although Project Vote hopes to have non-Texas residents serve as consultants to these in-state managers, *see* USCA5 1091-1093, these out-of-state consultants do not need to be deputized as VDRs unless they collect or handle completed voter-registration applications. The tasks that Slater envisions for these out-of-state consultants do not involve the collection or handling of completed voter-registration applications. *See* USCA5 1091-1092 ("Their responsibilities are to sit down with our local partners and help them develop a program, customize the various aspects of our program to the local needs to work with the staff on troubleshooting problems, and also to provide an additional set of eyes and quality and performance, so that if our national staff see a problem by looking at the data, they can flag that to the local people and then help try and troubleshoot the problem."). Project Vote's out-of-state employees remain free to "train managers of local registration drives" and "demonstrate the proper methods of engaging and assisting residents." USCA5 606-607. All of this can be done without collecting or handling someone else's completed voter-registration form.

As for harm to the State, it has long been recognized that a State suffers irreparable harm whenever its laws are enjoined by a federal court. *See, e.g.*, *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 although any effort to quantify the amount of voter fraud prevented by these laws will be somewhat speculative, it is certainly fair to say that new opportunities for voter-registration fraud will be presented if the district court's preliminary injunction is reinstated, and that negligent or corrupt canvassers will more easily evade accountability for their misdeeds.

VI. THIS COURT SHOULD REMIND THE DISTRICT COURTS THAT A PRELIMINARY INJUNCTION IS AN "EXTRAORDINARY REMEDY," WHICH IS NOT TO BE GRANTED ABSENT A "CLEAR SHOWING" OF A LIKELIHOOD OF SUCCESS ON THE MERITS.

The Supreme Court and this Court have repeatedly held that a preliminary injunction is not to be granted unless the applicant makes a *clear showing* that he is likely to succeed on the merits and that the balance of harms tips in his favor. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (" 'It frequently is observed that 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.' ") (quoting 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995) (alteration in original)); *Ex Parte Young*, 209 U.S. 123, 166 (1908) ("[N]o injunction ought to be granted unless in a case reasonably free from doubt."); *Planned Parenthood of Houston*, 403 F.3d at 329 ("To obtain a preliminary injunction plaintiffs must show (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiffs will suffer irreparable injury if the

injunction is not granted, (3) that the threatened injury outweighs any damage that the injunction might cause the defendant, and (4) that the injunction will not disserve the public interest. A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements." (citations and internal quotation marks omitted)); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012) (same); *Planned Parenthood Ass'n of Hidalgo Cnty., Inc. v. Suehs*, 692 F.3d 343, 348 (5th Cir. 2012) (same). Yet the district court issued a preliminary injunction even though the plaintiffs' legal contentions in this case are (at best) subject to debate among jurists of reason. It has become regrettably common for district judges in this circuit to issue preliminary injunctions under similar circumstances. In 2012 alone, this Court has reversed or stayed no fewer than four preliminary-injunction orders issued by district courts that unjustifiably blocked the State of Texas from enforcing its duly enacted laws. *See, e.g.*, *Voting for Am., Inc. v. Andrade*, 2012 WL 4373779, at *10; *Dep't of Tex., Veterans of Foreign Wars of U.S.*, 2012 WL 4788406, at *9; *Planned Parenthood*, 692 F.3d at 352; *Tex. Med. Providers Performing Abortion Servs.*, 667 F.3d at 578. None of the preliminary injunctions issued in those cases satisfied the "clear showing" requirement of *Mazurek*, even if the district-court opinions relied on colorable legal arguments.

This Court eventually reversed or stayed these preliminary-injunction orders, but it is unacceptable that a State's duly enacted laws can be temporarily thwarted by a single district judge in the absence of a "clear showing" that the law is invalid. *See*

generally David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 6 (1964) (noting that "[r]eversal of an erroneous injunction is often little solace to the victim; in the interval, irreparable damage may have been done"); *Orrin W. Fox Co.*, 434 U.S. at 1351 (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."). This Court's repeated pronouncements that preliminary injunctions may not issue absent a "clear showing" of likelihood of success on the merits have not been enough to stop district judges from casually enjoining enforcement of our State's laws on far less than the "clear showing" of invalidity required by the binding authority of this Court. We respectfully ask this Court to issue a more emphatic statement that preliminary injunctions—especially those that enjoin the enforcement of a State's duly enacted laws—are not to issue absent a "clear showing" of a likelihood of success on the merits.

CONCLUSION

The district court's preliminary-injunction order should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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Counsel also certifies that on October 26, 2012, this brief 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/.

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USDC No. 3:12-CV-44

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