No. 12- 40914

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

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

APPELLEES' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Voting for America, et al. v. Andrade

No. 12-40914

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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

/s/ Ryan M. Malone
Ryan M. Malone
Attorney for Plaintiffs-Appellees

STATEMENT REGARDING ORAL ARGUMENT

By order of this court, oral arguments in this case are scheduled to take place on Wednesday, December 5, 2012 at 9:00 a.m. In light of the significance of this case to the voting rights of millions of Americans, Voting for America and Project Vote, Inc., concur with the Court and Appellant Hope Andrade that oral arguments are warranted.

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APPELLEES' BRIEF

Project Vote, Inc., and Voting for America file this brief in opposition to Texas Secretary of State Hope Andrade's appeal of the district court's preliminarily injunction of provisions of Texas law inconsistent with the First and Fourteenth Amendments to the United States Constitution and the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg, et seq.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1292(a)(1) over this appeal of the district court's August 2, 2012 preliminary injunction order. USCA5 1574-1667.

STATEMENT OF ISSUES

1. Did the district court err by finding under *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992) that Texas law violated the First Amendment, when the plaintiffs presented credible evidence of the burden these laws imposed on speech, and the state's justification was neither legitimate nor necessary to justify the burden imposed?

2. The First Amendment protects against election laws that affect speech and associational rights. Was the district court correct as a matter of law that Texas's regulation of voter registration drives warranted First Amendment scrutiny?

3. Was the district court correct that Tex. Elec. Code § 13.008(a) unconstitutionally limited the voting registration organizations ability to compensate its employees and manage its workforce?

4. Was the district court correct in enjoining a Texas law criminalizing volunteer deputy registrars' use of the U.S. mail system to send completed applications, in light of the National Voter Registration Act's mandate that states distribute, utilize, and accept mail voter registration forms in federal elections?

5. The NVRA requires each State to "make available for . . . photocopying" all "records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of the official lists of eligible voters." 42 U.S.C. § 1973gg-6(i)(1). Was the district court correct in enjoining a Texas law that prohibits a Volunteer Deputy Registrar's photocopying of voter registration applications completed by potential future voters?

6. Was the district court correct in enjoining certain sections of the Texas Election Code inhibiting plaintiffs' constitutional and statutory rights to engage with the voting public where defendant failed to present any evidence to justify the burden on plaintiffs' rights?

STATEMENT OF THE CASE

On February 13, 2012, appellees Voting for America, Penelope McFadden, and Brad Richey filed a complaint in the United States District Court for the Southern District of Texas alleging that Texas's regulation of voter registration drives violated the free speech and association rights guaranteed by the First and Fourteenth Amendments, as well as the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg, et seq.[1] USCA5 11-65. The complaint named as defendants Texas Secretary of State Hope Andrade, the appellant in this action, as well as Cheryl Johnson, the Galveston County Assessor and Collector of Taxes and Voter Registrar. On March 15, 2012, the plaintiffs filed a first amended complaint to include appellee Project Vote, Inc., as a plaintiff in the action.[2] USCA5 78-134. Both Andrade and Johnson moved to dismiss for failure to state a claim and lack of subject matter jurisdiction under sections 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. USCA5 135-199; 221-286. On May 10, 2012, the plaintiffs filed a motion for a preliminary injunction prohibiting the enforcement of several of the election statutes alleged in the first amended complaint to be

[1] In addition to the allegations at issue in this appeal, the February 13, 2012 Complaint pleaded violations of the Equal Protection clause of the Fourteenth Amendment; section 5 of the Voting Rights Act of 1965, and provisions of Texas law requiring that the registrar provide notice prior to removing registered voters from the rolls. USCA5 25, 42-43.

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

unconstitutional or preempted by the NVRA. USCA5 587-744. On May 24, 2012, the case was transferred to Judge Gregg J. Costa from Judge Kenneth M. Hoyt, who was previously assigned the case. USCA5 777.

On June 11-12, 2012, Judge Costa held a hearing on the defendants' motions to dismiss and the plaintiffs' motion for a preliminary injunction, wherein Project Vote and Voting for America presented the testimony of Michael Slater, Executive Director of Project Vote, Dr. Denise Rousseau, Professor of Organizational Behavior and Public Policy for Carnegie Mellon University, the Honorable Mark White, Governor of Texas from 1983 to 1987, and several individuals who testified to their experiences assisting voter registration in Texas. USCA5 1069-1572. Defendant Cheryl Johnson presented her own testimony, as well as that of Dominique Allen, Senior Voter Registration Specialist for Galveston County. *Id.* Secretary of State Andrade presented no witnesses or evidence.

On August 2, 2012, Judge Costa issued a 94-page opinion and order denying the defendants' motions to dismiss and granting relief on five of the eight challenges raised in the plaintiffs' motion for a preliminary injunction. USCA5 1574-1667. Secretary of State Andrade then moved to stay the preliminary injunction pending appeal. USCA5 1668-1675. The district court held a second hearing on August 8, 2012, and issued an order on August 14, 2012, denying the

motion to stay and modifying the initial preliminary injunction order. USCA5 1750-1761.

On August 16, 2012, Secretary of State Andrade appealed the preliminary injunction to the United States Court of Appeals for the Fifth Circuit, and the following day moved for a stay pending appeal. USCA5 1765-1767. On September 6, 2012, a Fifth Circuit panel held oral arguments on the stay motion and that same day issued a one-page order granting the stay pending appeal, noting that Judge James L. Dennis dissented, and explaining that an opinion assigning reasons for the order was forthcoming. USCA5 1963. On September 14, 2012, Project Vote and Voting for America filed an emergency application with Justice Antonin G. Scalia requesting that the Supreme Court of the United States vacate the stay pending appeal. 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 referred the application to the full court, which denied the application on September 25, 2012. Order, *Voting for Am., Inc. v. Andrade*, No. 12A266 (U.S. Sept. 25, 2012). Justice Scalia's order indicated that Justice Sonia M. Sotomayor would grant the application in part. *Id.* On September 26, 2012, the Fifth Circuit motion panel issued a non-dispositive, non-binding per curiam opinion, along with Judge Dennis's dissenting opinion. *Voting for Am., Inc. v.*

Andrade, No. 12-40914, 2012 WL 4373779 (5th Cir. Sept. 26, 2012). The order "disclaim[ed] any intent to bind a subsequent merits panel." *Id.* at *2.

STATEMENT OF FACTS

Since the civil rights era, the voter registration drive has been an important means of political association, used to advance the interests of partisans and special interest groups and employed by advocacy groups to draw public attention to voter apathy, disenfranchisement, and voter suppression. Census data shows that to this day the voter registration drive remains a particularly significant means for reaching disengaged voters, especially those in African American and Latino communities, where a greater percentage of voter registration occurs through voter drives than in Caucasian communities. USCA5 1575. Approximately two million Latinos and three-quarters of a million African Americans are unregistered but otherwise eligible to vote in Texas. *Id.*

Project Vote and Voting for America are national nonpartisan organizations dedicated to promoting and facilitating voter registration and encouraging registered voters to exercise their franchise on Election Day. USCA5 1578. The organizations accomplish this mission through advocacy, educational programs, and voter registration drives, which are targeted primarily at historically underrepresented groups. USCA5 1578-79.

When Project Vote and Voting for America perform a voter registration drive, they first gather canvassers who are paid either a flat or hourly wage. USCA5 1579. While retaining control over the registration drive, Project Vote and Voting for America generally partner with organizations local to the targeted area. *Id*. Although the organizations generally employ canvassers from the local community, they sometimes rely on out-of-state canvassers, and frequently rely on out-of-state organizers and supervisors to manage drives, train employees, and demonstrate proper techniques for conducting voter registration. USCA5 1579-80.

Once the canvassers are appropriately trained, they are deployed in strategic locations throughout the community to persuade eligible citizens to register to vote. USCA5 1579. To accomplish this, canvassers engage the potential registrant in a discussion about an issue of local importance and impress on them that voting is a forum to voice their views. USCA5 1095. The canvasser provides a blank application to the applicant and assists in completing the application if necessary. The canvasser then collects the completed application and returns it to the organization, where it is reviewed by another employee for completeness and signs of fraud. USCA5 1579. Afterwards, the non-confidential portions of applications are scanned or photocopied for tracking purposes and delivered, either by hand or by mail, to the appropriate registrar. USCA5 1579-80. When conducting voter registration drives in major cities or at transportation hubs, regional events near

county lines, or large public gatherings, canvassers regularly encounter residents from multiple counties or electoral districts—even individuals who are unsure of which county to register in—and in these cases the organizations will ensure that the voter registration is submitted to the correct election official. USCA5 1113-14.

After submitting the registration, the organizations use the photocopy to follow up with the registrar to ensure that the registration application has been processed and has resulted in a registered voter. USCA5 1580. If not, the organizations determine whether the application was rejected for a legitimate reason, and may follow up with demand requests, public pressure, or legal action. *Id.* Following registration, the organization will follow up with the voters to encourage them to vote and may help facilitate their vote by offering transportation to the polling area. *Id.*; USCA5 1200-1.

The State of Texas has over the years erected complex regulations and barriers that severely impact the ability to conduct a large-scale voter registration drive. At the center of this regime is the requirement that only individuals appointed by the county registrar may accept, handle, or deliver to the registrar completed voter registration applications. The Secretary interprets this limitation to arise by implication from the structure of the "Volunteer Deputy Registrar" system set forth in Tex. Elec. Code § 13.001, et seq., and particularly section 13.038, which provides that VDRs "may distribute voter registration application

forms throughout the county and receive registration applications submitted to the deputy in person." Although this language would seem to suggest that VDRs have either exclusive authority to both distribute and collect registration applications, or that VDRs share both these powers with the public at large, the Secretary's interpretation is not so straightforward. Rather, in her view, Texas law allows anyone to distribute voter registration applications, but only VDRs may collect, handle, or deliver them to the registrar. USCA5 1584-85. The district court accepted the Secretary's interpretation that non-VDRs are prohibited from handling registration applications, and, invoking the principle of constitutional avoidance, accepted that Texas law does not prevent anyone from distributing blank voter registration applications. *Id.*

Prior to being appointed, VDRs must undergo state-prescribed training, and acting as a VDR without a valid appointment carries criminal penalties. Tex. Elec. Code §§ 13.031(e), 13.044. In 2011, the Texas legislature enacted an amendment to the election code limiting VDR appointments to Texas residents ("the In-State Restriction"), eliminating the organizations' ability to bring permanent employees from other states to perform managerial duties and demonstrate the proper methods of engaging and assisting registrants. Tex. Elec. Code §§ 11.002(a)(5), 13.031(d)(3). As construed by the Secretary, section 13.038 mandates that a VDR may only collect voter registration applications from residents of the county in

which he or she is appointed ("the County Limitation"). USCA5 1591-92. As a result, one must be registered in multiple counties if it is anticipated that voters from multiple counties will submit applications during a drive. USCA5 1639. VDRs must carry certificates of appointment containing their full names and residential addresses when conducting voter registration drives, and must present the certificates to applicants who request them. Tex. Elec. Code § 13.033.

Once collected, VDRs must submit registration applications by hand to the county registrar within five days of receipt or face criminal penalties ("the Personal Delivery Requirement"). *Id.* §§ 13.042; 13.043. VDRs who fail to "adequately review" an application for completeness are subject to termination at the discretion of the registrar. *Id.* § 13.036(b). The Secretary construes section 13.038 to prohibit photocopying of completed voter registration applications ("the Photocopying Prohibition")—although the statute makes no mention of photocopying—making it difficult or impossible to perform quality control on the completed registration applications, follow up with the registrar to ensure registration, or contact the applicant to encourage him or her to vote. USCA5 1592.

As of the 2011 amendment, Texas law also interrupts the organizations' ability to manage and compensate its workforce ("the Performance-Based Compensation Prohibition"). Tex. Elec. Code § 13.008. This statute—which is

entitled "Performance-Based Compensation for Registering Voters Prohibited"—makes it unlawful (1) to compensate a canvasser based on the number of voter registrations the canvasser "successfully facilitates"; (2) to present a person with a quota of voter registrations to "facilitate" as a condition of payment or employment; or (3) to otherwise cause compensation or employment status to be "dependent on the number of voter registrations that the other person facilitates." *Id.*

The Performance-Based Compensation Prohibition dramatically undermines the organizations' ability to manage their workforce and engage in common business practices such as performance evaluation and performance-based pay. By prohibiting performance-based reviews, Texas law leaves the organizations without recourse to deal with incompetent and ineffective employees, making drives inefficient and even forcing the organizations to shut down operations. USCA5 1643-45, 1649-53. By its terms, the Performance-Based Compensation Prohibition is "not tied to VDRs but instead imposes criminal sanctions on *any person* who makes or receives the prohibited forms of payment in exchange for 'facilitating' voter registrations." USCA5 1626 (citing Tex. Elec. Code § 13.008) (emphasis added).

SUMMARY OF THE ARGUMENT

Appellees are private organizations that encourage and assist citizens to participate in democracy, using the tools granted by the First Amendment and the NVRA. The State of Texas has, through legislation and legal reinterpretation, erected uniquely onerous voter registration regulations and barriers that effectively ban their protected activities. The District Court, following established and emerging judicial law in this area, correctly enjoined several oppressive provisions of this scheme.

In *Meyer v. Grant* and *Buckley v. American Constitutional Law Foundation, Inc.*, the Supreme Court held unconstitutional under the First Amendment regulations prohibiting the payment of petition circulators who collect signatures for state ballot initiatives, and requiring that they be registered to vote in the state where the ballot initiative is being proposed, wear identification badges, and make various disclosures to the state. 486 U.S. 414, 421 (1988); 525 U.S. 182, 186-87 (1999). Circuit Court decisions have extended these holdings to rule that residency requirements on petition circulators are similarly unconstitutional. *See, e.g.*, *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008). Efforts of voter registration advocacy groups to engage voters through registration drives are no less important to a functioning democracy than the petition circulators in *Meyer* and *Buckley*. Like petition circulators, canvassers who collect registration applications seek to

convince other citizens to take democratic action through interactive communication that can only be described as core political speech. Under this precedent, Texas's regulation of individuals and groups who collect voter registration applications—which prohibits non-residents from collecting and submitting voter registration applications on behalf of fellow citizens, requires multiple unnecessary forms of registration, and interferes with the compensation of canvassers—clearly violates the speech and association rights guaranteed by the First Amendment.

In addition to these constitutional claims, Texas law is preempted under the Elections Clause by the NVRA. The NVRA mandates that states "accept" and "use" voter registration applications submitted by mail, yet Texas criminalizes third-party submission of voter registration applications using this method, and instead requires that the applications be submitted personally to the county registrar and be handled only by VDRs. *See* 42 U.S.C. § 1973gg-4(a)(1); *see also id.* §§ gg-2(a), gg-6(a)(1)(B). In addition, the Texas law prohibiting VDRs from photocopying registration applications violates the NVRA's requirement that states "make available for public inspection and . . . photocopying," with specified exceptions, "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).

ARGUMENT

I. The First Amendment Protects the Speech and Associational Rights Inherent in Voter Registration Drives

Voter registration drives are a quintessential form of expression and political association protected by the First Amendment of the Constitution. Like petition circulation, voter registration drives necessarily involve "both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). Such "interactive communication concerning political change" is at the "zenith" of constitutionally protected speech. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999) (citation omitted). It is clear, therefore, that "core political speech" involving "interactive communication concerning political change" lies at the very heart of voter registration drives. *Meyer*, 486 U.S. at 421-22. The state's restraint of this core political speech is particularly untenable because it also frustrates the right to vote, which is "a fundamental political right," which is "preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

"Every court that has addressed a constitutional challenge to provisions regulating voter-registration drives has concluded that the governing standards are those set out in *Anderson v. Celebrezze*." *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1159 (N.D. Fla. 2012). Under the *Anderson-*

Burdick test, election laws affecting speech and association require a searching review comparing the "character and magnitude" of the injury to speech and association with the "precise interests" put forward by the state as justifications for the law. *Anderson*, 460 U.S. at 789; *see also Burdick*, 504 U.S. at 434. "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." *Anderson*, 460 U.S. at 789. When the burden on speech and association is "severe," courts apply strict scrutiny or a similarly exacting form of scrutiny. *Burdick*, 504 U.S. at 434. An election regulation touching on core political speech and association is "severe" *per se* and is subject to strict scrutiny. *Buckley*, 525 U.S. at 206-08 (Thomas, J. concurring) ("When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech.").

A. The District Court Properly Enjoined Aspects of Texas's Volunteer Deputy Registrar System that Violate the First Amendment

1. The In-State Restriction is a Facially-Discriminatory Restriction that Reduces the Total Quantum of Pro-Registration Speech

Through the enactment of the In-State Restriction in 2011, Texas has shut down the ability of national organizations to foster voter registration in Texas through registration drives. Now only Texas residents may be appointed as VDRs,

and therefore non-residents are prohibited from receiving, delivering to the registrar, or even touching another's voter registration application. *See* Tex. Elec. Code §§ 13.031(d)(3), 11.002(a)(5). This restriction—which is unique to Texas—on its face excludes 91.86% of Americans[3] from serving as VDRs, hence reducing the total "number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach." *Meyer*, 486 U.S. at 422-23. Such restrictions are "harmful to the unity of our nation because they penalize and discriminate against [groups] who wish to associate with and utilize the speech of non-residents." *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). Because the Texas law affects core political speech, discriminates based on the identity of the canvasser, reduces the overall quantum of speech, and hamstrings expressive association between groups and out-of-state canvassers and managers, the proper test is strict scrutiny. *See Citizens United v. Fed. Election Comm'n.*, 130 S. Ct. 876, 899 (2010); *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1029 (2008).

Residency restrictions create "a severe burden on [the organizations] and [their] out-of-state supporters' speech, voting and associational rights." *Brewer*, 531 F.3d at 1036. Out-of-state managers cannot train, lead, demonstrate best practices, or perform quality control without ever touching an application—the

[3] *See* http://2010.census.gov/2010census/data/.

drives' central tool for engaging voters. The law outright prohibits out-of-state canvassers from assisting their fellow citizens by collecting registration applications, despite the remarkable impact out-of-state residents have had on our democracy:

> The Mississippi Freedom Summer of 1964, one of the most famous voter registration drives in this country's history, involved hundreds of out-of-state residents working with local African-Americans to end that state's history of pervasive racial discrimination in voting. The astounding transformation of African-American political participation in Mississippi that the Freedom Summer helped launch—by 2002, Mississippi had the most elected African-Americans of any state—demonstrates the power of voter registration drives and in particular one that relied heavily on out-of-state participants.

USCA5 1635.

Although she struggled to articulate a rationale behind the In-State Restriction, USCA5 1525, the Secretary now argues that the it is necessary to prevent voter registration fraud. But distinguishing between Texans and non-Texans is a crude and illogical mechanism to achieve this goal. No evidence suggests that non-residents perpetrate more voter fraud than residents, nor is there any reason to think they are more likely to do so. Federal courts have widely rejected residency limitations in closely analogous cases addressing residency requirements imposed on petition circulators. *See Yes On Term Limits, Inc.*, 550 F.3d at 1029 ("[T]he record does not support the . . . conclusion that non-resident circulators as a class engage in fraudulent activity to a greater degree than resident

circulators."); *Brewer*, 531 F.3d 1028; *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) ("[I]t is undisputable that [a residency requirement for petition circulators] sharply limited Nader's ability to convey his message to Ohio voters and thereby curtailed Nader's core political speech."); *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002); *Krislov*, 226 F.3d at 860 ("By preventing the candidates from employing millions of potential advocates to carry their political message to the people of Illinois, the statute places a formidable burden on the candidates' right to disseminate their message."); *Libertarian Party of Va. v. Judd*, No. 3:12cv367-JAG, 2012 WL 3111894 (E.D. Va. July 30, 2012); *Lux v. Judd*, 842 F. Supp. 2d 895 (E.D. Va. 2012); *Daien v. Ysursa*, 711 F. Supp. 2d 1215 (D. Idaho 2010); *Frami v. Ponto*, 255 F. Supp. 2d 962 (W.D. Wis. 2003).

The Secretary argues that the In-State Restriction is justified because non-residents are not subject to Texas's subpoena power, and are therefore more likely to commit fraud, citing *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001). Appellant's Br. 21. But the authority cited above has conclusively rejected *Jaeger*, a four-page decision with little substantive analysis.[4] These cases explicitly reject the subpoena power argument that the Secretary advances for the first time on appeal, because a requirement that out-of-state circulators consent to

[4] Other decisions from the Eighth Circuit have invalidated in-state, voter registration requirements for petition circulators, in apparent conflict with *Jaeger*. *See Bernbeck v. Moore*, 126 F.3d 1114 (8th Cir. 1997).

jurisdiction for purposes of subpoena enforcement is a less burdensome means to achieve the same result. *See Brewer*, 531 F.3d at 1037 ("Federal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such requirements as a more narrowly tailored means than a residency requirement to achieve the same result."); *Yes On Term Limits, Inc.*, 550 F.3d at 1030.

Finally, the Secretary claims that the district court improperly demanded evidence of out-of-state fraud. Appellant's Br. 2, 20. It is certainly true that the Supreme Court in *Crawford v. Marion County Election Board* found that the State did not need to produce evidence of fraud when the statute "imposes only a limited burden on voters' rights." 553 U.S. 181, 203 (2008). But *Crawford* did not overrule the long line of cases that require the State to demonstrate that a speech-restrictive statute is justified by a legitimate state interest, and that establish conjecture and speculation do not suffice to make that showing. *See Buckley*, 525 U.S. at 210 (Thomas, J., concurring) ("[T]he State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural problem."); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (To justify a restriction on speech, the Government must "do more than simply 'posit the existence of the disease sought to be cured.'").

The district court did not improperly "demand" evidence of fraud. Rather, the Secretary has failed at each turn of the litigation to offer a persuasive or even coherent explanation for how the challenged provisions operate to reduce fraud, and, on top of that, did not feel compelled to present any evidence—be it evidence of past fraud, an affidavit explaining how Texas law targets fraud, expert testimony indicating why out-of-state canvassers may be more prone to commit voter fraud, evidence of how the restriction is not in fact burdensome, testimony of a registrar about their dealings with VDRs, or anything else—to justify its one-of-a-kind law. Although the state in *Crawford* could not produce evidence that the particular voter fraud in question had occurred in that state, the state did present evidence to support the necessity and legitimacy of the regulation. *See Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 792-94 (2006) (presenting expert testimony of inflated voter registration numbers in Indiana, including deceased persons and duplicate registrations, evidence of in-person voter registration fraud in other states, and evidence of public concern about voter registration fraud and support for the measure in question). The Secretary's argument that *Crawford* absolves states of any obligation to justify their laws is simply unsupported.

Texas has shown no serious connection between the In-State Requirement and the prevention of voter fraud.

2. The County Limitation Imposes Regulatory and Administrative Burdens on Protected Speech with No Benefit to the State

In addition to the residency requirement, Texas shuts down voter registration drives by requiring that VDRs receive authorization on a county-by-county basis, with the threat of criminal sanctions for even accepting an out-of-county application.[5] Appellant's Br. 23. Under Texas's interpretation, merely collecting an application from a resident of a neighboring county is a crime. Tex. Elec. Code § 13.044. As a result, the organizations cannot hold voter registration drives in major metropolitan areas without fear of prosecution, given the high likelihood that that a person from another county will deliver a completed application to the canvasser. Groups engaged in large-scale registration efforts must have their staff appointed in multiple counties, imposing "severe time burdens and administrative expenses on voter registration activity." USCA5 1640.

The vastness of the state and large number of counties only "magnifies the burden the County Limitation imposes." USCA5 1639. In order to conduct statewide and congressional campaigns, voter registration organizations would

[5] The County Limitation arises solely from the Secretary's interpretative authority. *See* USCA5 1592, 1638. Section 13.031 of the Texas Election Code provides "To encourage voter registration, the registrar shall appoint as deputy registrars persons who volunteer to serve," but says nothing of the geographic scope of appointment. The training requirement is tied to the registration process, and so it would appear that training is required for each county of appointment, although the Secretary now disavows this requirement, and has determined that a single training is sufficient. *Compare* Appellant's Br. 23 *with* Tex. Elec. Code § 13.031(e).

need VDRs "appointed in scores of counties." USCA5 1640. To minimize the risk of running afoul of the law, a VDR wishing to collect applications in the city of Dallas would need to be appointed in the counties of Dallas, Denton, Collin, Rockwall, and Kaufman. USCA5 1639. A subset of these large urban areas may include regions populated by a pool of commuter applicants domiciled in an even broader range of counties, increasing the number of appointments necessary and the threat of criminal sanctions. *Id.*

The Secretary responds only with vague assertions that the County Limitation serves an important "accountability function" because it allows registrars to revoke the appointments of those VDRs who submit incomplete or fraudulent applications. Appellant's Br. 23. But the Secretary fails to establish the connection between the dangers of voter fraud and the need for county-by-county appointment. The laws of the state—not the county—govern voter registration. USCA5 1639. Indeed, a statewide official, Secretary of State Andrade herself, issues the requisite standards for county registrars to follow. *See* Tex. Elec. Code § 13.047. And county registrars must already forward applications received from out-of-county residents to the applicant's county registrar. Tex. Elec. Code § 13.072(d). That this balkanized system is unique to Texas demonstrates that there is no need for the County Limitation.

The County Limitation adds nothing to the already effective system for detecting fraud that is untouched—even strengthened—by the district court's order. VDRs must provide a receipt to both the registrar and the applicant that personally identifies the VDR. *See* Tex. Elec. Code § 13.040. Thus "[e]ven when a VDR appointed in County X submits applications via mail or hand delivery to the registrar in County Y, the County Y registrar will still know the identity of the person making the submission." USCA5 1641. Moreover, the canvasser must present her certificate of appointment to any applicant who demands it, Tex. Elec. Code § 13.033, allowing individuals to "report any suspicious presubmission VDR activity to county registrars." USCA5 1641 n.24. Armed with this preexisting means of monitoring VDRs, the County Limitation "has only a tenuous connection to increasing the ability of registrars to track applications." USCA5 1641. Judge Costa's order requires VDRs to indicate their county of deputization on the receipt, allowing the registrar to expediently revoke VDR privileges statewide when improper activity is detected. USCA5 1757-58. If anything, the county-by-county system reduces accountability, because an errant VDR who is terminated in one county may nevertheless remain deputized in other counties.

Instead of responding to these arguments, the Secretary recites evidence of voter-registration fraud in the form of non-record evidence that is either hearsay or was reportedly presented to other tribunals. Appellant's Br. 24-26. The

Secretary's purpose is apparently to work in an ad-hominem attack about a single Project Vote employee who fourteen years ago submitted fake voter registration applications. But none of this explains how a county-by-county VDR system is rationally connected to the prevention of voter fraud. While the state unquestionably has a legitimate interest in preventing voter registration fraud, it must nevertheless do so in accordance with the United States Constitution.

3. The VDR System Severely Impacts Core Political Speech Protected by the First Amendment

Project Vote and Voting for America are engaged in the First Amendment activities of encouraging and assisting voters in registering to vote and eventually casting a vote. The organizations' voter registration drives are their primary means of promoting a more democratically engaged citizenry. USCA5 1579-80. This process begins with the hiring of canvassers to persuade eligible citizens to vote. *Id.* When an eligible citizen wishes to register, the canvasser provides a blank registration application, assists with completion of the application, and collects the registration application for delivery to the proper registrar. *Id.* The organizations then follow up with the registrar to ensure that the voter has been added to the rolls. *Id.* Finally, the organizations contact the registered voter to encourage her to vote on Election Day. *Id.*

The Secretary faults the district court for looking at the wrong frame of reference—the voter registration drive—in analyzing the First Amendment

interests at stake in this case. Instead, the Secretary insists that the voter registration drive must be compartmentalized into discrete activities, and each should be assessed separately.[6] The Secretary's argument in defense of the VDR system is predicated on the notion that Texas may escape the purview of the First Amendment—irrespective of the effects on speech—by regulating only the collection and submission of voter registration applications.[7] In light of the Secretary's utter failure to articulate any legitimate interest behind these regulations, the reason she seeks to foreclose constitutional scrutiny of the VDR laws is abundantly clear. But her overly cramped approach to the First Amendment, which the majority panel accepted for purposes of the stay motion, is "literally unprecedented." *Voting for Am., Inc.*, 2012 WL 4374779, at *22 (Dennis, J. dissenting). Every precedent—from the Supreme Court's teachings on petition circulators to the district courts' consideration of voter registration drives—invariably leads to the conclusion that collection and submission of voter registration applications and the attendant speech encouraging and assisting voters

[6] Tellingly, the only case the Secretary cites for this proposition is *Washington v. Glucksberg*, which is not a First Amendment case, but rather addresses whether there is a fundamental liberty interest protected by the due process clause in physician assisted suicide. 521 U.S. 702 (1997). The proposition cited is an element of the substantive due process analysis.

[7] The Secretary's theory is not even internally consistent. The Secretary concedes that the distribution of blank voter registration applications is "protected by the Supreme Court's free speech jurisprudence." Appellant's Br. 13. But the Secretary cannot explain why distribution of voter registration applications is speech while their collection is not. Neither is an "utterance of a written or spoken word." *Id.* at 11. If the delivery of a blank form, drafted by the state of Texas, to the voter is indisputably protected, it is difficult to see why returning the completed form to the state is not.

to register and vote are one single activity, inextricably intertwined, and that the voter registration drive is protected in its entirety by the First Amendment.

Courts have universally rejected arguments that speech-restrictive legislation may nevertheless escape review as mere regulations of "conduct." The Supreme Court has made clear that even expressive conduct that does not rise to the level of pure speech is protected by the First Amendment if it contains a particularized message. *See Texas v. Johnson*, 491 U.S. 397, 404-406 (1989); *see also Am. Ass'n of People with Disabilities v. Herrera* 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010) ("Conduct, such as facilitating prospective voters to register, may have a ministerial component, and yet acquire First-Amendment protection when done in a setting or manner in which the message becomes apparent. . . . Rather than lacking communicative force, efforts to register people to vote communicates a message that democratic participation is important."). The mere addition of some "legal effect to an expressive activity" does not "deprive[] that activity of its expressive component, taking it outside the scope of the First Amendment." *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010).

Likewise, the Supreme Court has consistently rejected the notion that purely economic regulations, when they affect speech, may be enacted without First Amendment scrutiny. For example, regulations that dictate how charitable organizations may disburse the funds they collect are unconstitutional under the

First Amendment given the fact that the act of soliciting charitable contributions is intertwined with speech:

> Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (emphasis added). Thus a state may not even regulate contracts between a charitable organization and its fundraisers to limit the percentage of the money raised that may be paid to the fundraiser, given the downstream effects on speech. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790 (1988) (rejecting the state's "almost talismanic reliance on the mere assertion . . . that this provision is simply an economic regulation with no First Amendment implication."); *see also Sec'y of State of Md. v. Joseph H. Munson, Co., Inc.*, 467 U.S. 947 (1984).

These fundamental principles are woven into the very fabric of the *Anderson-Burdick* test. Precedent makes clear that the proper question is not whether speech and association are "directly" or "indirectly" regulated, but what is the degree to which speech rights are injured by the regulation as compared to the state's justification for the restriction, an analysis that is not "automatic" and for

which no "litmus-paper test will separate" valid from invalid laws. *See Anderson*, 460 U.S. at 789; *Buckley*, 525 U.S. at 192.

In *Meyer v. Grant*, the Supreme Court addressed a Colorado statute prohibiting the payment of petition circulators who gathered signatures for ballot initiatives. 486 U.S. at 416. The district court had concluded that the statute was not subject to First Amendment review because it prohibited only circulation of petitions, not speech in favor of a ballot initiative. *Id.* at 418 (noting that the district court found that "restriction on [ballot initiative proponents'] ability to hire paid circulators to speak for them was not significant because they remained free to use their money to employ other spokesmen who could advertise their cause."). Before the Supreme Court, Colorado attempted to defend the statute much as Texas does in this case: "[T]he petition circulator [is] the person with the public duty to determine the validity of the signatures of the persons who sign the petitions. . . . The verification of signatures does not constitute speech, and the prohibition against payment of petition circulators constitutes nothing more than the prohibition against payment for the act of verifying signatures. The fact that a person voluntarily links his conduct with a speech component does not transform the conduct into speech." Appellant's Br., *Meyer v. Grant*, No. 87-920, 1987 WL 880992, at *12 (U.S. Oct. 1987). The Supreme Court rejected this argument and concluded that petition circulation involved "interactive communication

concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421-22. The Court cited *Schaumburg*, and observed that core political speech was inextricably tied with petition circulation, and therefore that petition circulation was an activity protected by the First Amendment. *Id.* at 422 n.5. Consequently, the restriction was struck down because it had "the inevitable effect of reducing the total quantum of speech." *Meyer*, 486 U.S. at 422-23.

The Supreme Court extended this holding a decade later in *Buckley v. American Constitutional Law Foundation*, also regarding petition circulators. 525 U.S. 182 (1999). There, the state and amici again argued on appeal that the core political speech at issue was distinct from the collection of signatures, which was a ministerial function performed on behalf of the state. *See* Br. of the States as Amicus Curiae on behalf of Colo., *Buckley v. Am. Constitutional Law Found., Inc.*, No. 97-930, 1998 WL 221378, at *8-9 (U.S. April 30, 1998) ("There is no doubt that petition circulators do exercise core political speech when they explain and advocate a proposed ballot measure. . . . Although it is related to a petition circulator's exercise of core political speech, the election function of gathering signatures is distinct."); *see also* Pet. for Cert., *Buckley v. Am. Constitutional Law Found., Inc.*, No. 97-930, 1997 WL 33485681, at *11 (U.S. Dec. 4, 1997). But the

court again concluded that the regulation of the collection of signatures violated the First Amendment. As Justice Thomas explained in his concurrence,

> Even where a State's law does not directly regulate core political speech, we have applied strict scrutiny. . . . We applied strict scrutiny because we determined that initiative petition circulation of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.

Buckley, 525 U.S. at 207 (citations and quotation marks omitted). Justice Thomas therefore observed that "[a]lthough Colorado's registration requirement does not *directly* regulate speech, it operates in the same fashion that Colorado's prohibition on paid circulators did in *Meyer*—the requirement reduces the voices available to convey political messages." *Id.* at 210 (emphasis in original). So too here, where voter registration canvassers are unquestionably engaged in core political speech, and the number of voices available to spread the political message of voter registration organizations is reduced and silenced by the In-State and County limitations.

Given this binding precedent, it is unsurprising that the district courts have entirely rejected the argument that regulation of the handling of voter registration applications concerns purely ministerial conduct and does not affect speech or association rights. In *League of Women Voters of Florida v. Cobb*, the Southern District of Florida evaluated criminal laws that imposed strict liability on third parties who failed to return completed applications promptly. 447 F. Supp. 2d

1314, 1322 (S.D. Fla. 2006). Brushing aside the assertion that the law "regulates only conduct," the court granted a preliminary injunction prohibiting enforcement of the law. *Id.* at 1316. Likewise, in *Project Vote v. Blackwell*, plaintiffs challenged Ohio laws requiring registry and training of individuals who are compensated for assisting people to register to vote. 455 F. Supp. 2d 694, 702 (N.D. Ohio 2006). The laws also required that all voter registration applications be personally returned by the canvasser either by mail or in person. *Id.* The court granted summary judgment for Project Vote, concluding that "participation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment." *Id.* at 700.

In *American Association of People with Disabilities v. Herrera*, the District of New Mexico found that voter registration was itself expressive conduct, that speech is intertwined with voter registration, and that voter registration implicates expressive association.[8] 690 F. Supp. 2d at 1214-17. As a result, the court denied the defendant's motion to dismiss on the grounds that the burden imposed by voter registration laws and the justifications supporting the law are questions of fact not suitable for disposition on a 12(b)(6) motion. *Id.* at 1220. Most recently, the Northern District of Florida enjoined aspects of Florida's regulation of voter

[8] The Secretary mistakenly insists that *Herrera* did not hold that voter registration by third parties is protected as expressive conduct. It unequivocally did. *See Am. Ass'n of People with Disabilities*, 690 F. Supp. 2d at 1216.

registration drives, noting that courts examining state laws regulating voter-registration drives has looked to *Anderson v. Celebrezze* to guide their analyses.[9] *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d at 1159.

The disposition of this case is foreclosed by *Meyer* and *Buckley*. The Secretary seeks to distinguish these cases by arguing that there are still other avenues for participation in voter drives, and that nothing prevents the organizations from employing out-of-state or out of county persons to distribute registration applications and encourage them to vote. But the same thing is true in the case of persons wishing to be petition circulators, who, if they are prohibited from doing so, may still "contribute to campaigns supporting or opposing an initiated measure, to advocate for the passage or defeat of an . . . initiative or referendum as they see fit, to give their support and assistance in the petition process (save for acting as circulators), and to coordinate, organize, train and even accompany the circulators." *Chandler*, 292 F.3d 1244. But the Supreme Court nevertheless concluded that the mere fact that there remain "other means to disseminate [one's] ideas does not take their speech through petition circulators

[9] The Secretary cites only *League of Women Voters of Florida v. Browning*, 575 F. Supp. 2d 1298 (S.D. Fla. 2008), to support its contrary position. Even if this single district court decision did support their position, it would be against the overwhelming weight of authority addressing this question. Yet despite the language cited by the Secretary, the court in *Browning* concluded that it is possible that "the indirect restrictions" may place a "severe burden" on speech and that the law necessitated balancing under the *Anderson-Burdick* test. *Id.* at 1322.

outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424; *see also* USCA5 1653.

The Secretary's argument ignores the obvious: while it is certainly possible that one may encourage voter registration without collecting voter registration applications (albeit less effectively, as the record evidence demonstrates), it is impossible to collect voter registration applications without engaging in "core political speech" and political association which are at the apex of protected activities under the First Amendment. Thus regulations which proscribe who can or cannot collect voter registration applications "necessarily reduces the quantity of expression." *Citizens United*, 130 S. Ct. at 898. And the collection of applications through voter registration drives involves not only speech rights, but also the "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The laws impede association between the organizations and the applicants, who are potential members and who associate with the organizations beyond the submission of the registration application. *See Cobb*, 447 F. Supp. 2d at 1320-21 ("The ability to collect voter registration applications enables [the plaintiffs] to have follow-up communications with registrants about issues of common concern."); USCA5 1179-80, 1200-1201. The In-State Restriction is particularly harmful to the expressive association of the organizations by preventing the organization from

engaging with out-of-state canvassers who would support their cause. *See Krislov*, 226 F.3d at 861 (residency requirements "inhibit[] the expressive utility of associating with these individuals because these potential circulators cannot invite voters to sign the candidates' petitions in an effort to gain ballot access.").

However a state—or Congress—chooses to structure its process for voter registration, it must respect the First Amendment rights of its citizens in the context that it then creates. *See Meyer*, 486 U.S. at 424 (rejecting the argument that "because the power of initiative is a state-created right, it is free to impose limitations on the exercise of that right."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509-514 (1996) (state's power to regulate alcohol does not provide the right to regulate commercial speech about liquor). In the NVRA, Congress created a statutory right of citizens to mail application forms, and made clear that such forms were to be made available for organized voter registration programs. 42 U.S.C. § 1973gg-2(a), gg-4(a)-(b), gg-6(a)(1)(B). The First Amendment protects the rights of citizens to speak and associate within this framework. *See Meyer*, 486 U.S. at 424. But the Secretary seeks to prohibit such basic associations as a neighbor giving another neighbor his stamped mail registration application and asking him to mail it on his behalf.

Speech that occurs when collecting voter registration applications during registration drives is at the very "zenith" of constitutionally protected

speech. *Buckley*, 525 U.S. at 186-87. In light of this unequivocal precedent, the district court in this case concluded that regulations concerning the collection, handling, and delivery of voter registration applications implicated the First Amendment. The district court was correct to so hold, and the Secretary presents no persuasive argument for this court to conclude otherwise.

B. Texas's Intrusion on the Organizations' Ability to Compensate Canvassers Violates the First Amendment

Section 13.008(a) of the Texas Election Code is entitled "Performance-based Compensation for Registering Voters Prohibited." This section provides criminal liability for any person who:

> (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; [or]
>
> (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[.]

Tex. Elec. Code § 13.008(a).[10]

The statute also provides liability for officers, directors, and agents of a company that commits any of these acts. Tex. Elec. Code § 13.008(c). It is also a crime to accept compensation in violation of 13.008(a)(1)-(3). Unlike the other

[10] While the district court did not have occasion to rule on the issue, Appellees maintain that the Performance-Based Compensation Prohibition is unconstitutionally vague and ambiguous, as previously alleged in Count IV of their Complaint for Injunctive and Declaratory Relief. USCA5 41.

statutes at issue in this case, the Performance-Based Compensation Prohibition is not contingent on receiving or submitting voter registration applications, like the VDR provisions, but rather applies to anyone involved in voter registration that receives a payment. Because Project Vote and Voting for America do not compensate their canvassers on a per-application basis, this litigation deals only with 13.008(a)(2) and 13.008(a)(3).

1. The Secretary's Construction of Section 13.008 Is Not Supported by the Text of the Statute, Nor Does It Address the Constitutional Deficiencies Identified by the District Court

The Secretary seeks to foreclose constitutional scrutiny of the statute by arguing that section 13.008(a) bans only two practices: "(1) paying canvassers on a per-application basis[,] and (2) conditioning of payment or employment solely on the submission of a fixed number of applications." Appellant Br. 27. This interpretation is simply not supported by the text of the statute, and, because it prohibits workers from terminating employees for failing to submit voter registration applications, does not resolve the constitutional issue identified by the district court.

Indisputably, the court is bound by narrowing constructions that would obviate the need for constitutional scrutiny of section 13.008(a). But in order for the limiting interpretation to apply, the statute must be "readily susceptible" to the proposed narrowing construction. *Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S.

383, 397 (1988). Courts should not "rewrite a . . . law to conform it to constitutional requirements for doing so would constitute a serious invasion of the legislative domain and sharply diminish [the legislature's] incentive to draft a narrowly tailored law in the first place." *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (citations and quotation marks omitted).

Subsection 13.008(a)(3) provides that it is a crime to "engage[] in another practice that causes another person's compensation from or employment status with the person to be dependent on the number of voter registrations that the other person facilitates." The district court concluded that subsection 13.008(a)(3)'s scope is so broad as to prohibit any performance-based compensation for assisting with voter registration, which, as the section's title suggests, is precisely the goal of the enactment. As the district court noted, the statute prohibits terminating a canvasser for poor performance, or even promoting a canvasser for gathering a high yield of applications. USCA5 1646. Thus the district court concluded that the Secretary's proposed construction of the statute is a clear departure from the text: no fair reading could lead a jurist to conclude that it prohibits only "conditioning payment or employment solely on the submission of a preset number of applications." USCA5 1645. The district court reasoned that if both section 13.008(a)(3), and 13.008(a)(2) mean the same thing, then section 13.008(a)(3) is

superfluous.[11] USCA5 1646. Because the Secretary's interpretation of 13.008(a)(3) is untenable in light of the text of the statute, the district court was correct to reject the Secretary's constitutional avoidance argument. USCA5 1646-47. Indeed, the linguistic contortions the Secretary subjects upon section 13.008(a)(3) only underscore its patent unconstitutionality. *See Stevens*, 130 S. Ct. at 1591 ("The Government's assurance that it will apply [a statute] far more restrictively than its language provides is pertinent only as an implicit acknowledgement of the potential constitutional problems of a more natural reading.").

Subsection 13.008(a)(2) makes it a crime to "present[] another person with a quota of voter registrations to facilitate as a condition of payment or employment." USCA5 1647. The Secretary proposes that this subsection also prohibits "conditioning of payment or employment solely on the submission of a fixed number of applications." USCA5 1645. Even though this subsection is more readily susceptible to the Secretary's limiting construction, her interpretation does not save the statute. It is axiomatic that in order for the constitutional avoidance principle to apply, the proposed limitation must actually avoid the constitutional

[11] The Secretary appears to acknowledge this weakness in her argument and now suggests that section 13.008(a)(2) applies when a quota has been presented to an employee, and that section 13.008(a)(3) applies when a quota is applied to the employee but has somehow not been "presented" to that employee. Appellant's Br. 29. This interpretation is nonsensical and has no basis in the text of the statute. But even if this interpretation were correct it still does not cure the constitutional deficiency identified by the district court, as discussed below.

conflict. But here, even the interpretation proffered is unconstitutional because it prohibits standard managerial practices. As the district court explained:

> Assume after conducting performance reviews that the Organizational Plaintiffs determine that a canvasser has only collected two applications in the preceding month. They meet with the canvasser and, following a standard business practice, implement a performance-improvement plan that notifies the canvasser that he will be terminated unless he is more productive. . . . In the month that follows, the canvasser only submits one application and is fired for not improving.

USCA5 1648. Even under the Secretary's interpretation, by Texas's own admission, the law would criminalize requiring some bare minimum level of productivity as a condition of continued employment—even if requiring only two applications to be collected during an eight-hour shift. USCA5 1520; 1648-49. Even accepting the Secretary's interpretation of subsection 13.008(a)(2) and (a)(3), the statute still fails on constitutional grounds.

2. The District Court Correctly Concluded that the Compensation Provision Violated the First Amendment

Because section 13.008 is an "outright ban on speech backed by criminal sanctions that has the inevitable effect of reducing the total quantum of speech," the proper constitutional test is strict scrutiny. USCA5 1633 (quoting *Citizens United*, 130 S. Ct at 897). The district court nevertheless applied the *Anderson-Burdick* test since sections 13.008(a)(2) and (3) fail even that less exacting form of scrutiny. USCA5 1633.

The Performance-Based Compensation Prohibition severely burdens speech and association by denying voter registration organizations the ability to manage their staff, criminalizing commonly accepted business practices such as performance evaluation, performance-based pay, and the requirement of performance as a condition of employment. As the factual record and district court demonstrated, the Performance-Based Compensation Prohibition leaves organizations without recourse to deal with incompetent and ineffective employees, making drives ineffective and inefficient, and forcing the organizations to shut down operations.[12] USCA5 1644, 1651-52. Even worse, the organizations must choose between constitutional rights and freedom from criminal penalties. Rather than risk criminal liability, Appellees have stopped their voter registration work in Texas from fear of criminal prosecution. USCA5 619, 1084, 1086-87.

The Appellees agree that the State has a legitimate interest in combatting fraud, and that section 13.008(a)(1)—a ban on compensation per application which Appellees do not challenge—serves that interest. USCA5 1654. However, a ban on commonly accepted performance measures, "a necessary part of normal workplace discipline," does not serve that interest. USCA5 1655. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). In any event, the state's

[12] The evidence showed that using unpaid canvassers was a more burdensome alternative, and thus no consolation under *Citizens United*. USCA5 1653.

interest does not warrant the chilling effect that prohibiting commonly accepted employment practices places on voter registration activity. *See Anderson*, 460 U.S. at 789 ("In passing judgment, the Court must not only determine the legitimacy and strength of each of [the state's] interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."). In the First Amendment context, Texas cannot use a hatchet where a scalpel would do. Thus Texas cannot effectively ban all paid voter registration drives in order to vanquish the specter of fraud, where the existing and unchallenged regulation under § 13.008(a)(1) addresses the problem. These uniquely burdensome and unwarranted restrictions fail even under the *Anderson-Burdick* balancing test. USCA5 1653.

3. Abstention Is Not Warranted Where a Ruling by State Courts Would Not Avoid the Constitutional Question Presented

Under the abstention doctrine, a district court may decline to exercise or postpone the exercise of its jurisdiction in "narrowly limited special circumstances." *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973) (internal quotation marks omitted). Although never raised at the district court, the Secretary now appears to be advocating for *Pullman* abstention, which applies when a state court's clarification of an uncertain state law might make a federal court's constitutional ruling unnecessary. Abstention is appropriate only when "a

definitive ruling on the state issue would terminate the controversy." *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941). If it cannot be fairly concluded that the statute is susceptible to an interpretation that would avoid a constitutional question, "abstention would amount to shirking the solemn responsibility of the federal courts." *Pontikes*, 414 U.S. at 55; *see also Lipscomb v. Columbus Min. Separate School Dist.*, 145 F.3d 238, 243 (5th Cir. 1998) ("[B]efore abstaining '[a] district court must carefully assess the totality of circumstances presented by a particular case. This requires a broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication.")

Here, the Secretary, who is the chief election official of the state of Texas, and is in charge of the interpretation of the Texas election laws, *see* Tex. Elec. Code § 31.003, has explained how she intends to interpret this statute. USCA5 1645. Her current interpretation clearly prohibits voter registration organizations from setting even minimal standards of efficiency, nor does she dispute that she will enforce the statute as such. Not only does the text of this statute not reasonably bear the construction that she has offered, but her proposed construction of the statute does not resolve the constitutional issues identified by the district court. The Secretary has not proposed a plausible construction that would save the statute from unconstitutionality, and so abstention is inappropriate. *See City of Houston, Tex. v. Hill*, 482 U.S. 451, 468 (1987) ("If the statute is not

obviously susceptible of a limiting construction, then even if the statute has never [been] interpreted by a state tribunal . . . it is the duty of the federal court to exercise its properly invoked jurisdiction.") (citations and quotation marks omitted). This is particularly true in the area of the First Amendment: "[A]bstention serves no legitimate purpose where a statute regulating speech is properly attacked on its face. . . . In these circumstance, to abstain is to subject those affected to the uncertainties and vagaries of criminal prosecution, whereas the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute." *Dombrowski v. Pfister*, 380 U.S. 479, 491-92 (1965), *see also Hill*, 482 U.S. at 467 ("[W]e have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment."). Thus, all that will result from an abstention in this case is considerable delay. Appellees' constitutional rights should not be put on hold when this statute leaves no room for Texas courts to avoid the necessity for federal constitutional adjudication.

4. The District Court Acted Properly in Enjoining Sections 13.008(a)(2) and (a)(3) of the Performance-Based Compensation Prohibition in Their Entirety

The Secretary argues that even if the Performance-Based Compensation Prohibition is unconstitutional, the district court should not have enjoined its application to "excessively high quotas." Appellant's Br. 35. First, the Secretary

argues that a court should not enjoin a statute on its face unless "every application of the statute will violate the Constitution or some other provision of supreme Federal law." *Id.* at 34. In the First Amendment context, however, the Supreme Court has recognized "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 130 S. Ct. at 1587 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)) (internal quotation marks omitted). Likewise, the Supreme Court has "invalidate[d] a criminal statute on its face even when it could conceivably have had some valid application." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). Even as read by the Secretary, the relevant subsections prohibit common and necessary employment practices. These plainly invalid applications of the statute decisively outweigh hypothetically valid applications, even assuming it is constitutional to prohibit "excessively high quotas."

Even if it were inappropriate to enjoin the statute in its entirety, the statute should still be enjoined "as-applied" to the Appellees.[13] The majority opinion for

[13]The Supreme Court has noted that the difference between facial and as-applied challenges "is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United*, 130 S. Ct. at 893. The Appellees have explained their compensation practices in sworn testimony, and the Secretary—the chief election official for the state of Texas—has made clear how she intends to enforce this criminal statute. Therefore, the Appellees challenge the statutes not only facially but also as-applied. Moreover, the court is under no obligation to resolve the as-applied challenges before addressing the facial challenges. *See Citizens United*, 130 S. Ct. at 893 (ruling on a facial

the motion panel found that an as-applied challenge was based on a hypothetical circumstance. But there is nothing "speculative" about the effect that the Secretary's interpretation of Section 13.008(a) will have on organizations conducting voter registration drives. *See* USCA5 1520. The Secretary has articulated her interpretation of the statute and does not dispute that it prohibits termination of canvassers for failing to meet even a minimal level of productivity or for failing to improve poor performance. Instead, she says that termination decisions may not be made "solely" on the basis of registration applications collected. But as the district court observed, in large scale voter registration drives, the number of registration applications collected is the only effective or efficient criterion that voter registration organizations have to review canvassers. USCA5 1651 & n.26-27. The Secretary's interpretation thus interferes directly with the practice that Appellees employ to manage their workforce, and effectively shuts down Appellees' voter registration drives as a result. *See* USCA5 633-35, 1126. Thus, regardless of a "facial" or "as-applied" classification, the Appellees should prevail in their constitutional challenge.

The Secretary also claims that unconstitutional applications of the Performance-Based Compensation Prohibition should be severed pursuant to Tex.

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basis despite being pleaded as-applied); *see also Young v. City of Simi Valley*, 216 F.3d 807, 814 (9th Cir. 2000) (ruling a statute facially unconstitutional and declining to address an as-applied challenge).

Gov't Code § 311.032. The Supreme Court of Texas has explained the operation of the severability clause as follows:

> The point is not whether [the constitutional and unconstitutional applications] are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.

Rose v. Doctors Hosp., 801 S.W.2d 841, 844 (Tex. 1990). The court should not sever a provision if it "would require the court to write words into the statute, to leave gaping loopholes in the statute, or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found." *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 798 n.5 (Tex. Ct. App. 2008).

Far from severing the unconstitutional applications, the Secretary in fact asks the court to rewrite Section 13.008(a)(2) to reference "unreasonably high quotas" instead of merely the word, "quotas." "Quotas" and the "high quotas" posited by the Secretary cannot be said to be so "perfectly distinct and separable" that one may be severed from the other; they remain substantively connected. Without guidelines to differentiate unreasonably high and acceptable quotas, the Secretary's proposed revision to the statute fails to provide a person of "ordinary

intelligence a reasonable opportunity to know what is prohibited" by this criminal statute. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

II. The National Voter Registration Act Preempts Texas Laws Restricting Delivery of Completed Applications and Preventing Access to Such Applications

Congress enacted the NVRA to remove state law barriers that impede voter registration and participation in the democratic process. *See* 42 U.S.C. § 1973gg(a)(3) (observing that "discriminatory and unfair registration laws and procedures" have "a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities."). The NVRA "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies." *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 334-35 (4th Cir. 2012).

The NVRA streamlined existing state laws by requiring motor vehicle and public assistance agencies to provide voter registration services, prescribing the contents of a voter registration application, and creating a federal application for universal use in all relevant states.[14] By creating the federal mail application and requiring that it be both accepted by election officials and made available for

[14] A few select states are not subject to the NVRA.

organized voter registration programs, the NVRA recognized a role for such programs by establishing both a guaranteed means for voter registration drives to obtain and submit applications. *See* 42 U.S.C. § 1973gg-2(a), gg-4(a)-(b), gg-6(a)(1)(B).

The Elections Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (citations omitted); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), *cert. granted sub nom Arizona v. The Inter Tribal Council, Inc.*, No. 12-71, 2012 WL 2921874 (U.S. Oct. 15, 2012). Thus, state laws that "directly conflict" with or are "inconsistent with" the NVRA are preempted under the Elections Clause of the Constitution. *See Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000).

A. The Personal Delivery Requirement directly conflicts with the NVRA.

One way in which the NVRA promotes voter registration is by requiring states to "accept and use" a voter registration application form that may be submitted by mail. *See* 42 U.S.C. § 1973gg-4(a)(1); *see also id.* §§ gg-2(a), g, gg-6(a)(1)(B). The state must also make the mail registration forms available for distribution, with a "particular emphasis on making them available for organized voter registration programs." *Id.* § gg-4(a)(2). By requiring states to accept voter registration applications delivered by mail, the NVRA regulates "the method of

delivery" of voter registration applications, "and by doing so overrides state law inconsistent with its mandates." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005) ("*Cox I*").[15] "The NVRA makes no distinction between applications submitted directly by a voter and those submitted by a third party like a VDR." USCA5 1622. Thus, the NVRA preempts laws prohibiting both voters themselves and third parties from submitting voter registration applications by mail. *See Cox I*, 408 F.3d at 1354-55 (holding that state could not prohibit third parties from collecting and submitting applications by refusing to accept voter registration applications mailed by them); *Project Vote v. Blackwell*, 455 F. Supp. 2d at 702 n.6 (explaining that an Ohio law requiring personal delivery of voter registration forms would "clearly run afoul of the NVRA").

Texas law runs afoul of the NVRA by prohibiting VDRs from delivering applications using the mail system. *See* Tex. Elec. Code § 13.042(a) (requiring VDRs to deliver completed applications "in person, or by personal delivery through another [VDR]."). VDRs who fail to personally deliver completed

[15] The specific state action preempted by the Court in *Cox II* had the same effect as the practice challenged in this case. *See Charles H. Wesley Educ. Found., Inc. v. Cox* ("*Cox II*"), 324 F. Supp. 2d 1358, 1366 (N.D. Ga. 2004). Both make it impossible for voter registration programs to submit valid applications that would lead to an increase in voter registration. Georgia did so by rejecting applications that were legally collected by voter registration programs. *Cox I*, 408 F.3d at 1351. Texas asserts that it may arrest the individuals that submit the applications. The *Cox* court explicitly recognized that the NVRA pre-empted restrictions on collecting applications by stating that, if the Georgia statute had implicated plaintiffs' practice of private actors assisting citizens with forms and bundling them by mail, the prohibition "would have to give way to the clear mandates of the NVRA." *Id.* at 1355.

applications are subject to criminal penalties. *See* Tex. Elec. Code § 13.042(a)-(b) (requiring that VDRs personally deliver applications to the county registrar within five days of receipt); *id.* § 13.043 (making failure to comply with section 13.042 a crime). Texas law therefore conflicts with the NVRA, which requires that the states "accept" mail-in voter registration applications. 42 U.S.C. § 1973gg-4(a)(1). The Secretary argues that the state's prohibition on mail delivery by VDRs does not violate the NVRA because the state still receives and processes mailed applications from VDRs; it just makes their submission by organized voter registration programs illegal. *See* Appellant's Br. 38. But the Secretary's argument proves too much. Texas cannot reasonably be said to "accept" voter registration applications by mail, when it simultaneously makes their submission a crime. If Texas's reading of the statute is correct, then the State could also make it a crime for an individual voter to submit a registration application by mail, so long as the state "accepted" and "used" the application.[16] *See United States v. Am. Trucking Ass'n*, 310 U.S. 534, 544 (1940) (courts will not construe a statute in a manner that leads to "absurd or futile results"). Clearly a statute that makes it a crime to exercise a federal right "directly conflicts" with and is "inconsistent" with that federal right. *Bomer*, 199 F.3d at 775.

[16] Congress understood that "voter registration programs" consisted of both collecting and submitting applications. A report from the National Association of Secretaries of State report recognized: "Completed registration forms may be returned to registration authorities in person, by mail, or through another person." *Barriers to Voting: Hearing Before the Subcomm. on Elections of the Comm. on House Admin.*, 101st Cong. 67 at 9 (1989).

Such a narrow approach fails to give effect to the express terms of the NVRA and Congress's explicitly stated purpose to promote voter registration. *See* 42 U.S.C. § 1973gg. The NVRA unquestionably requires States to accept mail applications, and make those mail applications available to organized voter registration programs. Given these terms and the stated purpose of increasing voter registration, a state statute cannot criminalize the activity between the distribution of the mail form and its acceptance.

B. The Photocopying Prohibition Directly Conflicts with the NVRA's Public Disclosure Provision

The ability to photocopy records is vital to allow citizens to follow up with state officials on the status of registration, correct voter rolls when errors occur, and encourage new voters to come to the polls. But the Secretary also challenges the organizations' right to photocopy completed voter registration applications under the NVRA. In the federal law, Congress mandated that states "make available for public inspection and . . . photocopying," with specified exceptions, "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). No statute explicitly prohibits photocopying of voter registration applications; instead Section 13.038 provides that a "volunteer deputy registrar may distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person."

The Secretary interprets this section to limit the powers of VDRs to the distribution and receipt of registration applications and to therefore prohibit VDRs from photocopying completed voter registration applications after they have collected them. *Id.* Because registration applications fall within the category of records contemplated by Section 6(i) of the NVRA (the "Public Disclosure Provision"), Texas law is in direct conflict with the NVRA. As such, it is preempted under the Elections Clause.

1. Completed Voter Registration Applications Constitute Records Falling Within the Purview of the NVRA's Public Disclosure Provision

The Secretary challenges the district court's ruling on the grounds that the Public Disclosure Provision does not cover completed voter registration applications. She argues that the language refers only to programs used to remove non-eligible individuals from the voting rolls.

The Secretary's interpretation is mistaken because completed voter registration applications are the primary means by which individuals provide Texas the information necessary for officials to carry out their evaluative process. *See Long*, 682 F.3d at 335. The registration application asks applicants to provide information necessary to evaluate whether an individual meets the statutory requirements to be added to the voting lists, such as an individual's age or criminal record status. Because completed voter registration applications are records

concerning the implementation of this program or activity, they fall under the Provision's general mandate that "all" such records be disclosed. *See* 42 U.S.C. § 1973gg-6(i)(1).

The Secretary also calls attention to purported privacy concerns regarding the release of certain information contained in completed voter registration applications, such as an applicant's date of birth, address, and social security number. As the Fourth Circuit noted, "[i]t is not the province of this court . . . to strike the proper balance between transparency and voter privacy . . . Congress has already answered the question by enacting [the Public Disclosure Provision], which plainly requires disclosure of completed voter registration applications." *Long*, 682 F.3d at 339. Like the plaintiffs in *Long*, Voting for America and Project Vote do not demand disclosure of potentially sensitive information, such as a social security number. *See Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993) (enjoining a statute conditioning voting on the release of a voter's social security number). The district court properly recognized that Appellees do not request any information that is not already available by way of Section 18.066 of the Texas Election Code, which allows for disclosure of information from the Secretary's statewide computerized voter registration list. USCA5 1617 n.16. Accordingly, the Secretary's privacy concerns do not outweigh the public interest in transparency of the voting system, as recognized by Congress through the NVRA.

The language and purposes of the NVRA demonstrate that the Public Disclosure Provision "unquestionably" applies to completed voter registration applications. *See Long*, 682 F.3d at 337. For this reason, the district court properly concluded that Texas's prohibition on photocopying directly conflicts with the NVRA's express permission to engage in such activity. "It makes no sense to forbid someone who has collected a voter registration application from copying that application while it is in their possession but to then allow them to make a copy once the government has received it. That would be to succumb to exactly the 'administrative chicanery, oversights, [and] inefficiencies' that the NVRA's public disclosure provision was meant to eliminate." USCA5 1619.

2. Possession by VDRs of Completed Applications Does Not Defeat the Applicability of the NVRA's Public Disclosure Provision.

In claiming that the Public Disclosure Provision does not apply because the state does not exert control over registration applications in the possession of VDRs, the Secretary is willfully blind to the highly regulated world of third-party voter registration in Texas for which she is responsible. The Secretary executes a state system that requires VDRs to be more than mere "couriers" of completed forms, but rather functional substitutes for the state. An applicant's effective date of registration is determined not by the date of actual delivery to the registrar, but rather by the date that an applicant submits her application to a VDR. Tex. Elec.

Code § 13.041. In addition to receiving completed applications, VDRs are tasked with distributing registration forms, evaluating voter registration applications for completeness, and overseeing the applicant's completion of required fields. Tex. Elec. Code §§ 13.038, 13.039. The execution of these duties requires mandatory training from state officials. Tex. Elec. Code §§ 13.031(e), 13.047. VDRs must also identify themselves, upon request, when receiving completed applications. Tex. Elec. Code § 13.033(d). Failure to properly execute these duties could result in criminal prosecution. Tex. Elec. Code §§ 13.042, 13.043.[17] The Secretary also suggests that VDRs are subject to records retention laws by recommending that VDRs maintain "receipt books" for twenty-two months following the election closest to the applications' effective date. *See Texas Volunteer Deputy Registrar Guide*, OFFICE OF THE SECRETARY OF STATE OF TEXAS, http://www.sos.state.tx.us/elections/pamphlets/deputy.shtml (last visited Nov. 16, 2012).

The Secretary also asserts that physical delivery to the county registrar's office is a predicate to the application of the Public Disclosure Provision. In the Secretary's view, county registrars are powerless to produce records in the possession of VDRs. However, Texas law already regulates the amount of time VDRs may maintain possession of completed applications by mandating delivery

[17] None of these requirements are at issue in this appeal.

to registrars no later than five days from the date of receipt from applicants. Tex. Elec. Code § 13.042(b). This form of control ensures the State's continued oversight of completed registration applications from the moment they reach the hands of a VDR to the date of actual physical delivery. In this way, the Election Code ensures that the registrar will not be powerless to accommodate a request for disclosure directed to a VDR.

Yet leaving aside this pre-existing state statutory control, the Secretary's focus on actual physical custody of such records is misplaced. As the district court recognized, the NVRA's plain language does not render the state powerless to disclose records without physical possession. "Congress did not require states to 'release' or 'turn over' records . . . . the words chosen, 'make available,' are more open-ended." USCA5 1618. One means of making such records available would be to add to the litany of regulations on VDRs and explicitly allow them the power to photocopy and disclose registration applications. Based on the plain language of the federal law and pre-existing safeguards under Texas law, the state's lack of actual physical custody does not excuse the Secretary from compliance with the Public Disclosure Provision.

III. The District Court Correctly Granted A Preliminary Injunction Based on Appellees' Record of Extensive Harm and the Secretary's Lack of Cognizable Injury

The injury to Project Vote and Voting for America clearly outweighs any alleged harm to the Secretary. "This country values above perhaps all others the guarantee of an 'unfettered interchange of ideas.'" *Bond Pharm., Inc. v. AnazaoHealth Corp.*, 815 F. Supp. 2d 966, 976 (S.D. Miss. 2011) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). A preliminary injunction is necessary to obviate this extensive harm to Project Vote and Voting for America's constitutional and federal rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Cox II*, 324 F. Supp. 2d at 1368 ("[N]o monetary award can remedy the fact that [plaintiff] will not be permitted to vote in the precinct of her new residence."), *aff'd*, 408 F.3d 1349 (11th Cir. 2005).

This is not a matter of conjecture, as Project Vote and Voting for America have proffered substantial evidence of the irreparable harm Texas law inflicts on their ability to engage in voter registration activities protected by the First Amendment and the NVRA. USCA5 1656-1664. By contrast, Andrade has produced not a whit of evidence to show how Texas would be harmed by the district court's preliminary injunction. *Id.* The Secretary attempts to sidestep this shortcoming by positing that it is "fair to say" that an injunction would beget voter

fraud. *See* Appellant's Br. 51. But the Secretary left the district court with no means to evaluate the extent to which the prohibited practices are tied to voter fraud. In this way, the purported harm to Texas stretches beyond merely "*somewhat* speculative," Appellant's Br. 51 (emphasis added), to entirely conjectural.

Even accepting that Texas's hypothesized conduct is conceivable, the district court's injunction leaves in place ample means by which the state can protect against fraud. Voter registration fraud is illegal in Texas. *See* Tex. Elec. Code § 13.007. The receipt VDRs must provide the voter and the registrar upon accepting a voter registration application provides for a reliable means for identifying and apprehending errant VDRs, not only by the state but also by the prospective voter who has entrusted an application with the VDR. Tex. Elec. Code § 13.040(a); USCA5 1759-61. VDRs who are found to perform their role fraudulently, or even improperly, are subject to immediate termination and criminal sanctions. *See* Tex. Elec. Code § 13.007 (criminalizing voter registration fraud); 13.036 (providing for termination of VDR status for failing to deliver voter registration applications within five days of receipt); 13.043 (providing criminal liability for the same). The additional regulations that the district court enjoined do nothing to ferret out voter fraud, and given this effective and less burdensome

system already in place, the state faces no harm from allowing the district court's injunction to go forward.

Finally, this court should resist the Secretary's invitation to issue a "more emphatic statement" with respect to preliminary injunctions. *See* Appellant's Br. 53. The district court faithfully applied this circuit's governing standard, noting that the remedy required the party seeking the injunction to "clearly carr[y] its burden of persuasion." USCA5 1657 (quoting *Bluefield Water Ass'n, Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009). The district court only granted a preliminary injunction on certain challenged provisions, noting that the Appellees had not demonstrated a substantial likelihood of success on its challenges to the Completeness, Training, and Identification Requirements. *See* USCA5 1656-57. Appellant attempts to transform her disagreement with the district court's conclusion into an unnecessary full-scale reform of the standard for issuing an already extraordinary remedy. Such a decision is unnecessary to the resolution of the present case.

The district court properly considered the wealth of evidence demonstrating that, absent an injunction, Texas law prevents Appellees from exercising their statutory and constitutional rights. Because of the gravity of this harm as well as the Appellees' substantial likelihood of success on the merits of their constitutional

and statutory claims, the district court properly enjoined the Secretary's enforcement of the challenged provisions of the Texas Election Code.

CONCLUSION

For these reasons, Voting for America and Project Vote request that the Court affirm the district court and remand for further adjudication.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th of November, 2012, a copy of this document was served via the CM/ECF system to:

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Dated: November 16, 2012

APPENDIX

STATUTES **Page(s)**

42 U.S.C.A. § 1973gg

(a) Findings

The Congress finds that--

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this subchapter are--

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C.A. § 1973gg-2

Effective: January 6, 1996

(a) In general

Except as provided in subsection (b) of this section, notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office--

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 1973gg-3 of this title;

(2) by mail application pursuant to section 1973gg-4 of this title; and

(3) by application in person--

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 1973gg-5 of this title.

(b) Nonapplicability to certain States

This subchapter does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after August 1, 1994, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which, under law that is in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994, and by its terms is to come into effect upon the enactment of this subchapter, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

42 U.S.C.A. § 1973gg-4

(a) Form

(1) 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.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) of this section available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if--

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person--

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C.A. § 1973ff et seq.];

(B) who is provided the right to vote otherwise than in person under section

1973ee-1(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 1973gg-6(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 1973gg-6(d) of this title.

42 U.S.C.A. § 1973gg-6

Effective: October 29, 2002

(a) In general

In the administration of voter registration for elections for Federal office, each State shall--

(1) ensure that any eligible applicant is registered to vote in an election--

(A) in the case of registration with a motor vehicle application under section 1973gg-3 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except--

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section;

(5) inform applicants under sections 1973gg-3, 1973gg-4, and 1973gg-5 of this title of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) of this section to remove an individual from the official list of eligible voters if the

individual--

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) of this section by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) of this section to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a) of this section; or

(ii) correction of registration records pursuant to this subchapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B) of this section. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for

Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant--

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address

in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d) of this section.

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 1973gg-8 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include--

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is

overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(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.

(j) “Registrar's jurisdiction” defined

For the purposes of this section, the term “registrar's jurisdiction” means--

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

Tex. Elec. Code Ann. § 11.002

Effective: June 17, 2011

(a) In this code, "qualified voter" means a person who:

(1) is 18 years of age or older;

(2) is a United States citizen;

(3) has not been determined by a final judgment of a court exercising probate jurisdiction to be:

(A) totally mentally incapacitated; or

(B) partially mentally incapacitated without the right to vote;

(4) has not been finally convicted of a felony or, if so convicted, has:

(A) fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court; or

(B) been pardoned or otherwise released from the resulting disability to vote;

(5) is a resident of this state; and

(6) is a registered voter.

(b) For purposes of Subsection (a)(4), a person is not considered to have been finally convicted of an offense for which the criminal proceedings are deferred without an adjudication of guilt.

Tex. Elec. Code Ann. § 13.008

Effective: September 1, 2011

(a) A person commits an offense if the person:

(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).

(b) An offense under this section is a Class A misdemeanor.

(c) An officer, director, or other agent of an entity that commits an offense under this section is punishable for the offense.

Tex. Elec. Code Ann. § 13.031

Effective: September 1, 2011

(a) To encourage voter registration, the registrar shall appoint as deputy registrars persons who volunteer to serve.

(b) In this code, "volunteer deputy registrar" means a deputy registrar appointed under this section.

(c) Volunteer deputy registrars serve for terms expiring December 31 of even-numbered years.

(d) To be eligible for appointment as a volunteer deputy registrar, a person must:

(1) be 18 years of age or older;

(2) not have been finally convicted of a felony or, if so convicted, must have:

(A) fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court; or

(B) been pardoned or otherwise released from the resulting disability to vote; and

<Text of subsec. (d)(3), as added by Acts 2011, 82nd Leg., ch. 1002 (H.B. 2194), § 3>

(3) meet the requirements to be a qualified voter under Section 11.002 except that the person is not required to be a registered voter.

<Text of subsec. (d)(3), as added by Acts 2011, 82nd Leg., ch. 1164 (H.B. 2817), § 2>

(3) not have been finally convicted of an offense under Section 32.51, Penal Code.

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

Tex. Elec. Code Ann. § 13.033

(a) A person desiring to serve as a volunteer deputy registrar must request appointment by the registrar in person or by mail.

(b) If a person is to be appointed, the registrar shall prepare a certificate of appointment in duplicate containing:

(1) the date of appointment;

(2) the statement: "I, _____, Voter Registrar for _____ County, do hereby appoint _____ as a volunteer deputy registrar for _____ County.";

(3) the person's residence address;

(4) the person's voter registration number, if any;

(5) a statement that the term of the appointment expires December 31 of an even-numbered year; and

(6) a statement that the appointment terminates on the person's final conviction for an offense for failure to deliver a registration application and may terminate on the registrar's determination that the person failed to adequately review a registration application.

(c) The registrar shall sign the certificate and issue the original to the appointee, who shall sign it on receipt.

(d) A volunteer deputy shall present the certificate as identification to an applicant for registration, on request, when receiving the application for delivery to the registrar.

Tex. Elec. Code Ann. § 13.038

A volunteer deputy registrar may distribute voter registration application forms throughout the county and receive registration applications submitted to the deputy in person.

Tex. Elec. Code Ann. § 13.039

(a) On receipt of a registration application, a volunteer deputy registrar shall review it for completeness in the applicant's presence.

(b) If the application does not contain all the required information and the required signature, the volunteer deputy shall return the application to the applicant for completion and resubmission.

Tex. Elec. Code Ann. § 13.040

(a) On receipt of a completed registration application, a volunteer deputy registrar shall prepare a receipt in duplicate on a form furnished by the registrar.

(b) The receipt must contain:

(1) the name of the applicant and, if applicable, the name of the applicant's agent; and

(2) the date the completed application is submitted to the volunteer deputy.

(c) The volunteer deputy shall sign the receipt in the applicant's presence and shall give the original to the applicant.

(d) The volunteer deputy shall deliver the duplicate receipt to the registrar with the registration application. The registrar shall retain the receipt on file with the application.

(e) The secretary of state may prescribe a procedure that is an alternative to the procedure prescribed by this section that will ensure the accountability of the registration applications.

Tex. Elec. Code Ann. § 13.041

The date of submission of a completed registration application to a volunteer deputy registrar is considered to be the date of submission to the registrar for the purpose of determining the effective date of registration only.

Tex. Elec. Code Ann. § 13.042

(a) 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. The secretary of state shall prescribe any procedures necessary to ensure the proper and timely delivery of completed applications that are not delivered in person by the volunteer deputy who receives them.

(b) Except as provided by Subsection (c), an application shall be delivered to the registrar not later than 5 p.m. of the fifth day after the date the application is submitted to the volunteer deputy registrar.

(c) An application submitted after the 34th day and before the 29th day before the date of an election in which any qualified voter of the county is eligible to vote shall be delivered not later than 5 p.m. of the 29th day before election day.

Tex. Elec. Code Ann. § 13.043

(a) A volunteer deputy registrar commits an offense if the deputy fails to comply with Section 13.042.

(b) Except as provided by Subsection (c), an offense under this section is a Class C misdemeanor.

(c) An offense under this section is a Class A misdemeanor if the deputy's failure to comply is intentional.

Tex. Elec. Code Ann. § 13.044

(a) A person commits an offense if the person purports to act as a volunteer deputy registrar when the person does not have an effective appointment as a volunteer deputy registrar.

(b) An offense under this section is a Class C misdemeanor.

Tex. Elec. Code Ann. § 13.046

(a) Each principal of a public or private high school or the principal's designee shall serve as a deputy registrar for the county in which the school is located.

(b) In this code, “high school deputy registrar” means a deputy registrar serving under this section.

(c) A high school deputy registrar may distribute registration application forms to and receive registration applications submitted to the deputy in person from students and employees of the school only.

(d) At least twice each school year, a high school deputy registrar shall distribute an officially prescribed registration application form to each student who is or will be 18 years of age or older during that year, subject to rules prescribed by the secretary of state.

(e) Each application form distributed under this section must be accompanied by a notice informing the student or employee that the application may be submitted in person or by mail to the voter registrar of the county in which the applicant resides or in person to a high school deputy registrar or volunteer deputy registrar for delivery to the voter registrar of the county in which the applicant resides.

(f) Except as provided by this subsection, Sections 13.039, 13.041, and 13.042 apply to the submission and delivery of registration applications under this section, and for that purpose, “volunteer deputy registrar” in those sections includes a high school deputy registrar. A high school deputy registrar may review an application for completeness out of the applicant's presence. A deputy may deliver a group of applications to the registrar by mail in an envelope or package, and, for the purpose of determining compliance with the delivery deadline, an application delivered by mail is considered to be delivered at the time of its receipt by the registrar.

(g) A high school deputy registrar commits an offense if the deputy fails to comply with Section 13.042. An offense under this subsection is a Class C misdemeanor unless the deputy's failure to comply is intentional, in which case the offense is a Class A misdemeanor.

(h) The secretary of state shall prescribe any additional procedures necessary to

implement this section.

Tex. Elec. Code Ann. § 13.047

Effective: September 1, 2011

(a) The secretary of state shall:

(1) adopt standards of training in election law relating to the registration of voters;

(2) develop materials for a standardized curriculum for that training; and

(3) distribute the materials as necessary to each county voter registrar.

(b) The training standards may include the passage of an examination at the end of a training program.

Tex. Elec. Code Ann. § 18.066

Effective: September 1, 2009

(a) The secretary of state shall furnish information in the statewide computerized voter registration list to any person on request not later than the 15th day after the date the request is received.

(b) Information furnished under this section may not include:

(1) a voter's social security number; or

(2) the residence address of a voter who is a federal judge or state judge, as defined by Section 13.0021, or the spouse of a federal judge or state judge, if the voter included an affidavit with the voter's registration application under Section 13.0021 or the applicable registrar has received an affidavit submitted under Section 15.0215.

(c) The secretary shall furnish the information in the form and order in which it is stored or if practicable in any other form or order requested.

(d) To receive information under this section, a person must submit an affidavit to the secretary stating that the person will not use the information obtained in connection with advertising or promoting commercial products or services.

(e) The secretary may prescribe a schedule of fees for furnishing information under this section. A fee may not exceed the actual expense incurred in reproducing the information requested.

(f) The secretary shall use fees collected under this section to defray expenses incurred in the furnishing of the information.

Tex. Elec. Code Ann. § 31.003

The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws.

United States Court of Appeals

FIFTH CIRCUIT
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No. 12-40914, Voting for America, Inc., et al v. Hope Andrade
USDC No. 3:12-CV-44

The following pertains to your brief electronically filed on 11/16/12.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies will result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Peter A. Conners, Deputy Clerk
504-310-7685

cc: Mr. Michelle Kanter Cohen
Mr. Lawrence John Joseph
Mr. Brian Mellor
Mr. Jonathan F. Mitchell
Mr. David C. Peet

Ms. Kathlyn C. Wilson