No. 12-40914

In the United States Court of Appeals for the Fifth Circuit

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

v.

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

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

APPELLANT'S REPLY BRIEF

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A preliminary injunction is "an extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation and internal quotation marks omitted). It cannot be granted unless the movant has "clearly carried" his burden of persuasion on all four prongs of the preliminary-injunction inquiry. *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005).

The appellees' brief does not make a clear showing that they will succeed on the merits of any of their constitutional or statutory claims. In particular, the appellees have not made a clear showing that the act of collecting and delivering someone's completed voter-registration qualifies as "speech" protected by the First

Amendment; without this showing their constitutional claims cannot get off the ground.

I. TEXAS'S VDR REGULATIONS DO NOT REGULATE OR LIMIT SPEECH.

The appellees' brief opens by attacking the State's VDR regulations under the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See* Appellees' Brief at 25-35. Only later do the appellees attempt to explain how the act of collecting and delivering another person's completed voter-registration can qualify as "speech." This analysis is backward. One must *first* establish that the activities governed by Texas's VDR regulations constitute speech or expressive conduct under the First Amendment; otherwise the *Anderson/Burdick* test is inapplicable.

The appellees say that they engage in numerous "First Amendment activities," such as persuading citizens to vote, distributing voter-registration applications, helping voters complete their applications, asking the registrar whether a voter has been added to the rolls, and encouraging voters to vote on Election Day. *See* Appellees' Brief at 35. But Texas does not regulate *any* of those activities and does not require a VDR appointment for them. Texas regulates only the *collection and delivery* of another person's completed voter-registration application. This is not "speech," and the Speech Clause is not implicated by Texas's VDR regulations.

The appellees do not argue that the act of collecting and delivering another person's completed voter-registration application will *always* qualify as "speech."

Rather, they assert that the "collection and submission of voter registration applications and the attendant speech encouraging and assisting voters 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." Appellees' Brief at 36-37. The appellees seem to be saying that if a random person unaffiliated with a voter-registration drive collects someone's completed voter-registration application, his conduct would not implicate the First Amendment. But participants in a voter-registration drive secure a constitutional entitlement to collect others' completed voter applications when this conduct is accompanied by "speech encouraging and assisting voters to register and vote." *Id.* at 36-37.

There are several problems with this argument. The first is that it cannot be reconciled with *Washington v. Glucksberg*, 521 U.S. 702 (1997). *Glucksberg* requires "a careful description" from litigants who assert a fundamental liberty interest under the Fourteenth Amendment's due-process clause. *Id.* at 721, 724. The appellees in this case are not asserting a "careful description" of the conduct that they allege to be protected by the Constitution, but a vague abstraction—the right to engage in a "voter registration drive." Appellees' Brief at 37. The appellees suggest that *Glucksberg* is inapplicable because it was "not a First Amendment case" and established the careful-description requirement as "an element of the substantive due process analysis." *Id.* at 36 n.7. But the appellees overlook the fact that their free-speech claims have been brought against the State of Texas. That means they are

asserting a "fundamental liberty interest" under the substantive-due-process component of the Fourteenth Amendment—just like the respondents in *Glucksberg*. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925); John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1298 (1993) ("[T]he development of what we often think of as First Amendment law is in fact linked to the broader doctrine that bears the once unpopular name of 'substantive due process.'"). *Glucksberg* makes clear that its careful-description requirement extends to *all* substantive-due-process claims. It is not limited to claims involving physician-assisted suicide (as the appellees suggest); nor is it limited to assertions of fundamental liberty interests that are not protected elsewhere in the Bill of Rights. *See Glucksberg*, 521 U.S. at 720-21 ("*Our established method of substantive-due-process analysis* has two primary features." (emphasis added)).

The second problem is that the Supreme Court has rejected the notion that litigants can extend constitutional protections to non-expressive conduct[1] by mingling that conduct with First Amendment activity. *Virginia v. Hicks*, 539 U.S. 113 (2003), holds that States may exclude individuals from entering government-owned property after warning them not to return—and may enforce this exclusion against persons seeking to engage in speech-related activity. Wrote the Court:

[1] The appellees do not present any argument that the act of collecting and delivering completed voter-registration forms qualifies as "expressive conduct" under the standards of *Texas v. Johnson*, 491 U.S. 397, 404 (1989), and *Rumsfeld v. FAIR*, 547 U.S. 47, 65-66 (2006). The Brennan Center asserts that these are "expressive activities" but never even cites *Johnson* or *FAIR*, and does not attempt to demonstrate how these activities could satisfy the demanding standards for "expressive conduct" set forth in those cases. *See* Br. for Amici Curiae Brennan Center for Justice et al. at 13-14.

> Even assuming the streets of Whitcomb Court are a public forum, the notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return—*regardless* of whether, upon their return, they seek to engage in speech. Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment. Punishing its violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hicks' nonexpressive *conduct*—his entry in violation of the notice-barment rule—not his speech, for which he is punished as a trespasser.

Id. at 123. The same is true of Texas's VDR regulations. Texas law forbids non-VDRs to collect another person's completed voter-registration application, regardless of whether they do so as part of a voter-registration drive or any other First Amendment activity. A non-VDR who breaks this law is punished only for the *conduct* of collecting the completed applications, not for speech activity that may (or may not) have accompanied his forbidden act. In like manner, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (*CCNV*), upheld a regulation prohibiting camping in Lafayette Park, even as applied to demonstrators sleeping in the park as part of a political demonstration. *See id.* at 289, 299. The "conduct" of camping did not become "speech" protected by the First Amendment—even though it formed an integral part of the demonstration's efforts to call attention to the plight of the homeless, and even though it was "intertwined" with activity that undeniably qualified as protected speech under the First Amendment. *See id.* at 297-98; *see also id.* at 300 (Burger, C.J., concurring) ("The actions here claimed as speech entitled to the

protections of the First Amendment simply are not speech; rather they constitute conduct."). The appellees' argument also cannot be reconciled with *United States v. O'Brien*, 391 U.S. 367 (1968), which upheld the conviction of a protestor who destroyed his draft card while engaging in speech activity. The appellees' argument would require a court to regard the conduct of destroying the draft card and the accompanying speech as "one single activity, inextricably intertwined, . . . protected in its entirety by the First Amendment." Appellees' Br. at 37. But the Supreme Court refused to take that approach, and considered only whether the destruction of the draft card was "speech" under the First Amendment. *See O'Brien*, 391 U.S. at 376; *see also id.* ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Nor can the appellees' argument be squared with *Rumsfeld v. FAIR*, which re-affirmed that conduct does not become protected by the First Amendment when it is accompanied by speech activity:

> The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it.

547 U.S. at 66. The appellees' argument would require all of these cases—*Hicks*, *CCNV*, *O'Brien*, and *FAIR*—to come out the other way.

The third problem is that the appellees are factually mistaken to assert that the speech of encouraging voters to register, and the conduct of collecting and submitting their completed voter-registration applications are "one single activity, inextricably intertwined." Appellees' Brief at 36-37. Imagine a prospective voter who listens to the canvasser's exhortations to register and fills out an application. Then, when the canvasser offers to collect the completed application, the voter says, "No thanks, I'd rather mail it myself." This decision does not take anything away from the speech that persuaded the voter to register, nor does it reduce in any way the persuasive power of the canvasser's speech. And although the voter has deprived the canvasser of the opportunity to collect and deliver her voter-registration form, she has not hindered the canvasser's opportunities to persuade her (or others) to register and vote. Or imagine a 17-year-old canvasser who cannot secure an appointment as a VDR. *See* TEX. ELECTION CODE § 13.031(d)(1). His inability to collect completed voter-registration forms does not in any way reduce or inhibit his ability to exhort others to register or assist them in completing their applications. The fact that it is possible for a 17-year-old, non-VDR canvasser to engage in the speech-related activities of a voter-registration drive—and do so as effectively as a deputized VDR—shows that the act of collecting and delivering a completed voter-registration application is not "inextricably intertwined" with the speech of persuading one to register to vote. It also shows that the appellees are wrong to characterize Texas's VDR regulations as "speech-restrictive legislation." Appellees' Brief at 37. Texas could prohibit *all*

private citizens from collecting completed voter-registration applications without affecting in any way their ability to speak or persuade.[2]

Of course it is possible that a canvasser's inability to collect a completed voter-registration application might reduce the likelihood that the application will be submitted; some prospective voters may misplace their applications or never bother to turn them in. But the Speech Clause does not guarantee a right to *effect* political change; it protects only the right to attempt to persuade others to one's point of view through the spoken word or expressive conduct. The appellees' right to persuade others to register and vote is unaffected by the State's VDR regulations—and it would remain unaffected if Texas were to abolish the office of volunteer deputy registrar and prohibit all non-state employees from collecting and delivering completed voter-registration applications.

The fourth problem with the appellees' argument is that the "voter registration drive" includes a great deal of non-expressive conduct that cannot plausibly be said to implicate the Speech Clause. For example, canvassers must use some mode of transportation when delivering completed voter-registration applications to the county

[2] The appellees claim that "it is impossible to collect voter registration applications without engaging in 'core political speech' and political association." Appellees' Brief at 44. That is simply not true. Project Vote could set up a collection box for the applications, monitored by a VDR who sits quietly reading a book, while voters who have been assisted by non-VDRs are directed to place their completed applications in that receptacle. It is not necessary for "core political speech" to accompany the hand-off of a completed voter-registration application, and in all events a law that disables someone from accepting another's completed voter-registration application does not prevent him from engaging in any of the "core political speech" that might have taken place when the voter-registration application gets transferred.

registrar. Suppose that a canvasser does not have a driver's license, which hinders his ability to deliver the completed voter-registration applications that he collects. If this canvasser attempted to attack the State's driver's licensing laws under the Speech Clause, by asserting that they interfered with his ability to participate in a voter-registration drive, we do not think that any court would seriously entertain the notion that the First Amendment could apply to this challenge. But that logically follows from the appellees' claim that "the voter registration drive is protected *in its entirety* by the First Amendment." Appellees' Brief at 37 (emphasis added). The appellees are wrong; non-expressive conduct is not protected by the Speech Clause, and it does not become protected whenever it is undertaken as part of a voter-registration drive (or any other speech-related activity).

The fifth problem is that if the gathering of completed voter-registration applications is "speech" protected by the First Amendment, then the entire VDR regime becomes an unconstitutional prior restraint. *See* Appellants Br. at 18-19. The appellees may not see this as a problem; indeed, they have argued that Texas cannot limit the collection of completed voter-registration applications to persons deputized by the State. *See* First Amended Complaint at 29-30. But it does contradict their assertion that a ruling in their favor will "leave[] in place ample means by which the state can protect against fraud." Appellees' Brief at 69. An opinion from this Court that affirms the preliminary-injunction order will logically entail the invalidity of the State's entire VDR regime, because a State cannot limit speech or expressive conduct

to persons employed or deputized in advance by the State. The appellees' brief does not deny that a ruling in their favor will lead to this dramatic and far-reaching result.

The appellees rely on five Supreme Court rulings in their efforts to overcome the fact that collecting a completed voter-registration application is conduct rather than speech. *See* Appellees Brief at 37-41. None of them supports the appellees' contention that the collection of completed voter-registration applications qualifies as "speech" or expressive conduct, or that it becomes "speech" whenever it is undertaken as part of a voter-registration drive.

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), disapproved an ordinance "prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for 'charitable purposes.'" *Id.* at 622. The appellees note that the Supreme Court observed that "solicitation is characteristically intertwined with informative and perhaps persuasive speech," and they try to analogize solicitation to voter-registration drives in this regard. *See* Appellees' Brief at 38 (quoting *Schaumburg*, 444 U.S. at 632). But this analogy does not help the appellees because the ordinance in *Schaumburg* directly regulated speech activity—it banned *all* solicitation by charitable organizations that allocate too much of their receipts to overhead, and the act of solicitation undoubtedly involves speech. *See* 444 U.S. at 633 (stating that "solicitations . . . are within the protections of the First Amendment"). *Schaumburg*'s holding would be relevant only if Texas completely prohibited non-VDRs from participating in voter-

registration drives. But Texas allows anyone to participate in voter-registration drives and in speech-related activities associated with such drives; it regulates only the collection and delivery of third parties' completed voter-registration forms. The State agrees with the appellees that voter-registration drives (like solicitation) include some speech-related activities. It does not follow that every component of a voter-registration drive (or charitable fundraiser) must be treated as "speech" under the First Amendment.

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988), and *Secretary of State of Maryland v. Joseph H. Munson, Co., Inc.*, 467 U.S. 947 (1984), disapproved laws limiting the fees that charitable fundraisers could charge *for engaging in solicitation*, which is speech. These laws regulated speech because they limited the circumstances in which a charity could hire someone to speak on its behalf. Neither of these cases helps the appellees, however, because the Texas VDR regulations do not restrict anyone from speaking or attempting to persuade others to register and vote, and they do not regulate the circumstances under which that speech (or any type of speech) may take place. They regulate only the circumstances under which one may collect a completed voter-registration application on behalf of the county registrar. That does not limit or interfere with speech or expressive conduct. Non-VDRs remain free to persuade others to register, distribute blank applications, help others complete their applications, collect names and addresses from people who register, ensure that the county registrar has added them to the rolls, and contact

registered voters on Election Day and encourage them to vote. The appellees' brief cannot identify *any* speech activity that a non-VDR is unable (or less able) to undertake on account of the State's VDR regulations. Vague and unexplained references to "downstream effects on speech" or "the degree to which speech rights are injured by the regulation" do not suffice. *See* Appellees' Brief at 38.[3]

Finally, the appellees invoke *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), which extended the Speech Clause to laws limiting the types of persons who may act as petition circulators for popular referenda. *See* Appellees' Br. at 39-41. The appellees claim that if petition circulation is protected by the Speech Clause, then the act of collecting a completed voter-registration application must also be protected. But the appellees' brief never explains the Supreme Court's reasons for concluding that petition circulation is "speech" within the meaning of the First Amendment, nor does it consider whether those reasons carry over to the act of collecting a third party's completed voter-registration application. This passage from *Meyer* explains *why* petition circulation qualifies as "speech":

> We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny. . . . Unquestionably, whether the trucking industry should be

[3] The Brennan Center is wrong to assert that non-VDRs have no "ability to track whether their efforts lead to actual registrations." Brennan Center Amicus Brief at 11. A non-VDR may collect a voter's name and address and use that to verify whether the county registrar has added the voter to the rolls.

> deregulated in Colorado is a matter of societal concern that appellees have a right to discuss publicly without risking criminal sanctions. . . . The circulation of an initiative petition *of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.* Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

525 U.S. at 420-22 (emphasis added).

Unlike the circulation of a petition, the collection of a completed voter-registration application does not "of necessity involve[] both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421. The voter has already filled out her voter-registration application after being encouraged to do so by the canvasser. The only remaining issue is whether the voter will mail the application herself, or hand it off to a canvasser who will deliver it for her. Any discussion that might take place between the voter and canvasser about this decision has nothing to with encouraging "political change," but involves only the competing merits of first-party and third-party delivery processes. 525 U.S. at 421. *Meyer* did not embrace anything resembling the proposition that the appellees advance: that any conduct undertaken as part of a voter-registration drive (or the circulation of an initiative petition) qualifies as "speech" under the First Amendment. *See* Appellees' Brief at 36-37, 39-40, 44. *Meyer* would be relevant if Texas had banned

out-of-state residents from participating in voter-registration drives or serving as canvassers, because those activities (unlike the act of collecting a completed voter-registration application) necessarily involve core political speech. But no provision of Texas law imposes such a restriction.[4]

The majority opinion in *Buckley* adds nothing to *Meyer*'s analysis on this point, content to rely on *Meyer*'s earlier holding that petition circulation is "core political speech." *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (citation and internal quotation marks omitted). Justice Thomas's concurrence in *Buckley* (which did not receive the five votes needed to become law) faulted the state laws in *Meyer* and *Buckley* for "operat[ing] . . . [to] reduce[ ] the voices available to convey political messages." 525 U.S. at 210 (Thomas, J., concurring). The appellees' brief quotes this passage and adds a conclusory statement that "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." Appellees' Brief at 41. But the

[4] The Brennan Center claims that *Meyer* and *Buckley* hold that "solicitation and collection that are conducted contemporaneously with political activity, are protected activities." *See* Amicus Brief at 8. The Brennan Center does not quote any language from those opinions endorsing that proposition, and no statement to this effect can be found on the pages that it cites. *Meyer* held that petition circulation is "speech" for one reason only: because "[t]he circulation of an initiative petition *of necessity involves* both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 421 (emphasis added). This cannot be said of the act of collecting another person's completed voter-registration form.

The Brennan Center's invitation to construe *Meyer* and *Buckley* as implicitly approving a much broader proposition—that the act of collecting a completed voter-registration application (or anything else) is protected by the First Amendment whenever it is "conducted contemporaneously" with constitutionally protected speech—must be rejected because this notion is incompatible with numerous rulings of the Supreme Court. *See* supra at 4-6.

appellees never explain *how* the State's VDR regulations "reduce[ ] the voices" available to spread their political message. As the State has noted throughout this litigation, Texas law permits anyone—with or without a VDR appointment—to persuade others to register, distribute blank voter-registration applications, help others complete their applications, collect names and addresses from people who register to ensure that the county registrar will add them to the rolls, and contact newly registered voters on Election Day and encourage them to vote. The appellees seem to be suggesting (although they do not say this in their brief) that no one will be willing to undertake the speech-related activities of a voter-registration drive, such as persuading others to register and following up with them on Election Day, unless they can collect other people's completed voter-registration forms—and that they will remain unwilling to undertake these First Amendment activities regardless of how much they are paid. That does not seem plausible, and the appellees have no evidence (and have not argued) that this occurring.[5] The in-state and county requirements may reduce the number of people who can collect other people's completed voter-registration applications, but it does not reduce the number of people who can spread

[5] The Brennan Center asserts that "[i]f groups cannot offer to collect and submit voter registration forms, the interest and incentive for organizing, and participating in, drives declines substantially" because "[w]ithout the ability to track whether their efforts lead to actual registrations, organizations may decide that these drives are not a good use of the significant resources that they require." *See* Amicus Brief at 11. The Brennan Center misstates the effects of Texas's VDR regulations. Non-VDRs retain the "ability to track" whether the voters they assist get registered. All they need to do is ask the voter to provide his name and address and then use that to determine whether the county registrar has added that voter to the rolls. The Brennan Center's assertion therefore is not credible.

the appellees' political message by urging others to register and vote—because none of those activities requires a VDR appointment.

The more serious problem for the appellees is that Justice Thomas's concurrence in *Buckley* is not law,[6] and the proposition that they draw from that concurrence proves too much. It cannot be the case that any law that "operates . . . [to] reduce[ ] the voices available to convey political messages" triggers strict scrutiny under the Speech Clause. The appellees' argument would mean that minimum-wage laws violate the Speech Clause (at least as applied to voter-registration organizations) because they reduce the number of canvassers that could be hired by an organization with a finite budget. Other laws restricting whom employees may hire would likewise be open to First Amendment attack. Perhaps these laws could survive strict scrutiny, but the notion that they would even implicate the First Amendment is absurd. If the appellees want to resist these conclusions, they must back away from their claim that any law with the effect of reducing the number of voices available to spread a political message implicates the Speech Clause.

The appellees do not dispute the motion panel's observation that "no circuit court has held that the actual receipt and delivery process is, itself, entitled to First Amendment protection." 2012 WL 4373779, at *6. Instead, the appellees rely on

[6] The appellees immediately follow their discussion of Justice Thomas's concurrence with this statement: "Given *this binding* precedent . . ." Appellees' Brief at 41 (emphasis added). But Justice Thomas's concurrence is not binding precedent.

four district-court decisions, which (they claim) "reject[] the argument that regulation of the handling of voter registration applications . . . does not affect speech or association rights." Appellees' Brief at 41. But district-court opinions have no precedential effect, even within the district in which they were decided. *See Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011). They are relevant only to the extent they provide persuasive reasons for their conclusions. Yet the appellees never analyze any of the reasoning in these district-court opinions, and seem to believe that the mere fact that a district court ruled their way provides a reason for this Court to do the same. *But see* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 155 (2005) (criticizing the notion that courts should "defer[] to numbers, not reasons"). A district-court opinion can never permit a federal court of appeals to deviate from its best interpretation of the First and Fourteenth Amendments.

The opinion in *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006), is not persuasive. The court enjoined a Florida law requiring voter-registration organizations to submit completed voter-registration forms within 10 days of receiving them; the court thought this violated the Speech Clause because "the collection and submission of voter registration drives is intertwined with speech and association." 447 F. Supp. 2d at 1334. This statement does not answer any of the arguments that the State has presented here. It does not address *Glucksberg*'s requirement of a "careful description" when litigants assert fundamental liberty interests; it does not address the Supreme Court's rulings that conduct does not

become protected by the First Amendment whenever it is combined with speech activity; and it does not address the fact that the speech of urging someone to register and the conduct of collecting someone's completed voter-registration application are not "inextricably intertwined" because non-VDRs can carry out all of the speech-related components of voter-registration drives. There is no First Amendment right to collect someone's completed voter-registration application and hold on to it for more than 10 days before turning it in, and we respectfully submit that the court in *League of Women Voters* erred by concluding otherwise.

Project Vote v. Blackwell, 455 F. Supp. 2d 694 (N.D. Ohio 2006), and *American Association of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183 (D.N.M. 2010), discuss only whether voter-registration activity *in the abstract* implicates the First Amendment; they do not analyze whether the act of collecting a completed voter-registration qualifies as "speech" or expressive conduct. *See Project Vote*, 455 F. Supp. 2d at 700-01; *American Ass'n of People with Disabilities*, 690 F. Supp. 2d at 1214-19. The motions panel of this Court found these decisions unpersuasive for that reason. 2012 WL 4373779, at *6 ("The courts broadly considered voter registration activities as protected activity generally, instead of drawing distinctions between the type of conduct and type of regulation at issue. Thus, we find their analyses unpersuasive."). Everyone agrees that voter-registration drives implicate the First Amendment. Cases endorsing that general proposition give no leverage in answering whether the discrete act of collecting a completed voter-registration application

qualifies as "speech." *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012), does not discuss whether the First Amendment should apply to voter-registration activity, but simply assumes that it does. *Id.* at 1159.

Finally, the appellees attempt to put words in the State's mouth by claiming that the State "seeks to distinguish [*Meyer* and *Buckley*] by arguing that there are still other avenues for participation in voter drives."[7] Appellees' Brief at 43. The State's argument is more straightforward. *Meyer* and *Buckley* are not on point because petition circulation is "speech," and collecting someone else's completed voter-registration application is not speech. The reason that solicitation (in *Schaumburg*) and petition circulation (in *Meyer*) were found to be protected by the First Amendment is because it is not possible to prohibit those activities without also restricting speech. *Schaumburg*, 444 U.S. at 632-33; *Meyer*, 486 U.S. at 421-22. It *is* possible to limit the act of collecting another's completed voter-registration application without restricting speech. The appellees have not refuted this claim, and they cannot refute it when non-VDRs are able to undertake *all* of the speech-related activities of voter-registration drives. There is no First Amendment right to act as a courier for persons registering to vote, any more than there is a First Amendment right to collect other

[7] *Meyer* and *Buckley* were not even cited in the State's opening brief, so we are bewildered that the appellees would attribute this argument to the State. They do not cite any of the State's filings in this case to support their claim.

people's completed 1040 forms and deliver them to the IRS, or a First Amendment right to be hired as a mailman.

II. EVEN IF THE FIRST AMENDMENT APPLIES, THE STATE'S VDR REGULATIONS ARE CONSTITUTIONAL UNDER THE *ANDERSON/BURDICK* TEST.

This Court should not apply the *Anderson/Burdick* test because none of the State's VDR regulations applies to the "speech" activities of voter-registration drives. If this Court disagrees and concludes that First Amendment scrutiny is appropriate, the in-state residency requirement and county-appointment requirement easily pass muster under the *Anderson/Burdick* balancing test.[8]

A. The In-State Residency Requirement

The appellees claim that the in-state residency requirement "has shut down the ability of national organizations to foster voter registration in Texas through registration drives." Appellees' Brief at 26. This is hard to believe. As the State noted in its opening brief, Michael Slater (the executive director of Project Vote) testified that his organization uses only in-state residents as canvassers and as managers of those canvassers. *See* Appellants' Brief at 49; *see also* USCA5 1090-91 ("We actually have found that the best messengers for our message is people from

[8] One of the amicus briefs claims that the Secretary has misinterpreted the State's election code. *See* Amicus of Former Governor Mark White at 16-18. The appellees make similar insinuations throughout their brief. *See* Appellees' Brief at 20. But federal courts lack jurisdiction to review whether a state official has violated or misconstrued state law, so these arguments have no relevance to the federal-law issues presented in this case. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

local communities."). The appellees do not acknowledge Slater's testimony in their brief, yet they expect this Court to believe that the in-state residency requirement has "shut down" Project Vote's ability (and every other national organization's ability) to conduct voter-registration drives in Texas.[9] In all events, an organization can still conduct a voter-registration drive even if *all* of its members were prohibited from collecting the completed voter-registration forms.

The appellees incorrectly state that Texas law forbids non-VDRs to "touch" a completed voter-registration application. *See* Appellees' Brief at 27. The Secretary has not interpreted the statute in that manner; her letter to Voting for America advised only that non-VDRs should not "collect" or "handle" completed applications. This does not prohibit incidental or inadvertent touching, and it does not prevent non-VDR managers from "train[ing]," "lead[ing]," or performing any of the other tasks cited by the appellees. *See* Appellee's Br. 27. And the in-state residency requirement does not burden speech at all, because non-VDRs remain free to engage in *all* of the speech-related activities of voter-registration drives, including persuading others to register, distributing blank voter-registration applications, helping others complete their applications, collecting names and addresses from people who register to ensure that the county registrar will add them to the rolls, and contacting newly registered

[9] Hyperbole of this sort has been common throughout this litigation. The appellees told the Supreme Court that "the cumulative effect of [Texas's VDR] regulations is to make it impossible to conduct voter registration drives in Texas." Emergency Appl. at 18. Now the appellees appear to be saying that only "national organizations" are categorically prevented from conducting voter-registration drives, and solely on account of the in-state residency requirement.

voters on Election Day and encourage them to vote. The appellees do not acknowledge this fact in their discussion of the in-state residency requirement.

The court of appeals decisions cited by the appellees do not represent binding precedent in this Court, and they are all distinguishable because they involve residency requirements for petition circulation (which is speech) rather than the collection of completed voter-registration applications (which is not). *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), is a binding precedent, and it holds that States need not produce evidence (or expert testimony) to show that an election-fraud-prevention measure is necessary under the *Anderson/Burdick* test. The appellees' effort to limit *Crawford* to laws that "impose[] only a limited burden on voters' rights" is unavailing. Appellees' Brief at 30. The in-state residency requirement merely precludes out-of-state residents from collecting completed voter-registration applications; if that fails to qualify as a law imposing a "limited burden" on the rights of voters then no law will. Nor does *Crawford* establish that States must present expert testimony to support the "necessity and legitimacy" of an election-fraud-prevention measure. Appellees' Brief at 31. Indiana introduced this evidence out of an abundance of caution, and the appellees cannot point to any language in any of the *Crawford* opinions stating that this expert testimony was necessary (or even relevant) to the Court's holding. Courts and litigants are not permitted to "distinguish" a Supreme Court ruling by relying on facts that played no role in the Court's disposition of a case. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997). Finally,

Crawford holds that States may enact election-fraud-prevention measures to safeguard public confidence in the electoral process, independent of the State's interest in deterring and detecting fraud. *See Crawford*, 553 U.S. at 197 (opinion of Stevens, J.) ("While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."). The in-state residency requirement undoubtedly serves this goal by ensuring that VDRs will remain subject to the State's subpoena power. A State is not required to use the "least restrictive means" to further this goal under the *Anderson/Burdick* test, contrary to the appellees' suggestion. See Appellees' Br. at 29-30; *see also Voting for Am.*, 2012 WL 4373779, at *13 (Dennis, J., dissenting) ("[A] state may enact a law based on a hunch that it will curb fraudulent conduct . . . .").

Rational conjecture unsupported by empirical evidence is sufficient to sustain an election-fraud-prevention measure under *Crawford*—especially when the State has cited evidence of past voter-registration fraud throughout the country[10]—and the Secretary's defense of the in-state residency requirement easily satisfies that standard.

B. The County-Appointment Requirement

The appellees claim that "Texas shuts down voter registration drives by requiring that VDRs receive authorization on a county-by-county basis." Appellees'

[10] *See* Appellant's Br. at 5-6, 24-26 & n.5.

Brief at 32. But the State's opening brief explained that the county-appointment requirement has been in effect since 1985, and Michael Slater testified that Project Vote was able to conduct successful voter-registration drives in Harris County and El Paso in 2008. *See* USCA5 1086; Appellant's Brief at 49. The appellees do not deny that Slater is telling the truth; indeed, they presented Slater's testimony in the preliminary-injunction hearing. The appellees' assertion that the county-appointment requirement "shuts down voter registration drives" therefore is not credible.

Applying to become a VDR is easy after one has completed the training for the initial VDR appointment. The appellees do not deny that "training need only occur in one county and after that VDRs may apply by mail for appointment in other counties." Appellant's Brief at 23-24. Nor do they deny that county registrars are required to appoint everyone who applies for the job and satisfies the statutory criteria. *Id.* at 24. In light of these facts, the appellees need to describe the "severe time burden and administrative expenses" that they allege in their brief, rather than merely assert that they exist.

The preliminary-injunction order requires county registrars to recognize VDRs who have been appointed in any single county. County registrars therefore cannot revoke the appointments of errant VDRs until *all* the appointing counties follow suit. County registrars have no power to "revoke VDR privileges statewide," as the appellees assert. *See* Appellees' Brief at 34.

* * *

The appellees and their amicus curiae continually mention that Texas's VDR regulations are "unique," as if that somehow affects whether Texas's laws comply with the First Amendment. *See, e.g.*, Appellees' Brief at 23, 27, 52. The uniqueness of Texas's laws is not relevant under the *Anderson/Burdick* test. Indiana's voter-identification law was the most stringent in the nation at the time it was enacted, and the law's opponents complained loudly about that fact during the *Crawford* litigation. *See* Br. for Pets., 2007 WL 3276506, at *27 (U.S. Nov. 5, 2007); Br. of Amicus Curiae Richard L. Hasen, 2007 WL 3353103, at *27 (U.S. Nov. 9, 2007); Br. of Amici Curiae Nat'l Congress of Am. Indians et al., 2007 WL 3440943, at *5 (U.S. Nov. 12, 2007); Br. of Amici Curiae Brennan Center for Justice et al., 2007 WL 4102238, at *33-34 (U.S. Nov. 13, 2007); Br. of Amici Curiae Rock the Vote et al., 2007 WL 4102235, at *10 (U.S. Nov. 13, 2007); Br. for Amici Curiae Lawyers' Committee for Civil Rights Under Law et al., 2007 WL 3407030, at *2 (U.S. Nov. 13, 2007). Yet neither the plurality nor the concurring opinion in *Crawford* mentioned this as a relevant factor. *But see* 553 U.S. at 222, 236 (Souter, J., dissenting). And for good reason: constitutional federalism is designed to enable States to serve as laboratories of experimentation and maximize political-preference satisfaction by enabling citizens to migrate to jurisdictions with more agreeable laws. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of

the country."); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987). This is especially true with regard to the regulation of elections, a matter that the Constitution specifically entrusts to the States. *See* U.S. CONST. art. I, § 4. All other things being equal, the uniqueness of Texas's election-integrity laws is something to applaud, not condemn, as other States can observe and learn from Texas's experience and decide whether to emulate or avoid its approach.

If the appellees are trying to imply that the "uniqueness" of Texas's election-integrity laws means that those laws are not necessary to prevent fraud, or that the burdens imposed by their laws are "severe," then their argument again runs headlong into *Crawford*. Not only was Indiana's voter-identification law "unique," Indiana could not cite a single episode of voter impersonation occurring in the State. But the Supreme Court upheld the law under the *Anderson/Burdick* test without faulting the State on either ground. States are not required to justify election-fraud-prevention measures by pointing to past episodes of fraud *or* by showing that other jurisdictions have enacted similar laws. It is enough to show that it is possible for fraud to occur and that the State's laws will help deter the "bad man" who wants to commit election fraud. *Cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). The cases cited by the appellees are inapposite because they apply strict or intermediate scrutiny, rather than the more deferential balancing approach of *Anderson*, *Burdick*, and *Crawford*. *See* Appellees' Brief at 30.

III. THE DISTRICT COURT ERRED BY ENJOINING THE COMPENSATION LIMITATIONS.

The appellees claim that the Secretary's narrowing construction of § 13.008 is "untenable" but they never explain why. *See* Appellees' Brief at 49. They mention the district court's belief that the Secretary's interpretation renders subsection (a)(3) "superfluous." *See* Appellees' Brief at 48-49. But our opening brief explained why this is wrong. Subsection (a)(2) applies when a quota is "presented" to the canvasser as a sole condition of employment, while subsection (a)(3) applies when employment is conditioned solely on a quota without regard to whether this quota is "presented" to the canvasser. The appellees do not engage the State's textual argument, but assert in a footnote that "[t]his interpretation is nonsensical." Appellees' Br. 11 n.11. Denying an argument does not refute it.

The appellees also suggest that the Secretary's narrowing construction fails to avoid constitutional problems, but they misrepresent the Secretary's interpretation of the statute. Section 13.008 allows employers to fire canvassers for shirking and instruct them to increase their productivity. It prohibits only employment decisions made *solely* on the basis of the number of applications facilitated. Employers may consider the number of applications facilitated as part of a contextualized evaluation of a canvasser's performance.

Finally, the appellees' abstention discussion fails to address *Arizona v. United States*, 132 S. Ct. 2492 (2012), which unequivocally holds that federal courts are not to

issue a preliminary injunction when a state statute "could be read" by the state courts to avoid constitutional or preemption concerns. *Id.* at 2509-10; *see also* TEX. GOV'T CODE § 311.021(1) ("In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended.").

IV. THE DISTRICT COURT ERRED BY ENJOINING THE PERSONAL-DELIVERY REQUIREMENT.

The appellees mistakenly assert that the State's interpretation of 42 U.S.C. § 1973gg-4(a)(1) means that "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." Appellees' Brief at 61. The State explicitly rejected that possibility in its opening brief:

> There is no violation of 42 U.S.C. § 1973gg-4(a)(1) unless the State fails to "accept" or "use" a completed voter-registration application form that arrives in the mail, *or unless the State establishes rules that make it impossible for individual voters to mail their own FEC-approved voter-registration form to county officials*.

Appellant's Brief at 38 (emphasis added). If a State prohibited individuals from mailing *their own* applications, there would be an obstacle-preemption problem under § 1973gg-4(a)(1). But there is no obstacle-preemption issue (and no express-preemption issue) when a State accepts every voter-registration form that arrives through the mail *and* provides ample channels of delivery for voters who wish to use the federal mail-in form.

V. THE DISTRICT COURT ERRED BY ENJOINING THE PHOTOCOPYING PROVISION.

The appellees do not deny that the statutory provisions surrounding 42 U.S.C. § 1973gg-6(i) all involve "programs" that remove ineligible voters from the rolls. *See* Appellants' Brief at 45-47. Nor do the appellees deny that it would produce an absurd result if § 1973gg-6(i) were construed to require the disclosure of confidential data on voter-registration applications. It is therefore hard to resist the conclusion that completed voter-registration applications are not within the "records" described in § 1973gg-6(i).

The appellees' brief is non-responsive to the privacy concerns discussed in the State's opening brief. It is true that Project Vote does not want to photocopy the confidential information in voter-registration applications, but the appellees' construction of this statute gives everyone (including stalkers) a *legal entitlement* to do so, and turns state officials into federal lawbreakers if they withhold dates of birth, phone numbers, or social-security numbers from anyone demanding to photocopy someone's completed voter-registration application. The appellees do not cite any provision of federal law that could limit the scope of § 1973gg-6(i)'s public-disclosure obligation, and they do not attempt to defend the district court's decision to allow state privacy law to curtail a federal statutory command.

The appellees are also wrong to equate VDRs with the State or the county that they serve. VDRs have been licensed to carry out a task and must follow the laws of

the State in fulfilling that role, but that does not make them "functional substitutes for the state"—any more than a lawyer or doctor who needs a license from the State and must obey the State's rules of professional conduct. *Cf. Buckley*, 525 U.S. at 182 (rejecting the notion that initiative-petition circulators are "agents of the State," because "[a]lthough circulators are subject to state regulation and are accountable to the State for compliance with legitimate controls . . . circulators act on behalf of themselves or the proponents of ballot initiatives."). Completed voter-registration applications held by VDRs are not in the State's "constructive possession," as county officials have no power to "make available" voter-registration applications that have not yet been delivered to them.

The appellees do not deny that their construction of § 1973gg-6(i) would require VDRs to make completed voter-registration applications in their possession available for photocopying by the general public, before they turn them in to county officials. *See* Appellant's Brief at 40-41, 43-44. That seems to us an absurd result, and the appellees do not attempt to defend this regime in their brief. Nor do they explain how the statute might be construed to avoid it.

VI. THE APPELLEES HAVE NOT MADE A "CLEAR SHOWING" THAT THE BALANCE OF HARMS CUTS IN THEIR FAVOR.

The State's opening brief showed that the harms imposed on the appellees are slight, as most of the challenged restrictions have been enforced since 1985 and have not stopped Project Vote from carrying out voter-registration drives. Appellants'

Brief at 48-50. The only new restrictions are the in-state residency requirement and the statutory limits on compensation, and they will not harm the appellees because Project Vote uses only in-state residents as canvassers and managers and the Secretary's narrowing construction of the compensation statute will avoid any burdens on voter-registration drives. The appellees do not acknowledge or respond to any of this.

A State always suffers irreparable harm when its laws are enjoined by a federal court. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers). The district court's preliminary-injunction order further harms the State by creating new opportunities for voter-registration fraud and making it more difficult for the State to hold errant VDRs accountable. The State is not required to produce evidence that voter fraud actually will occur if the preliminary injunction is affirmed. *See Crawford*, 553 U.S. at 194, 204.

It is no answer for the appellees to say that voter-registration fraud is already illegal in Texas. *See* Appellees' Brief at 69. Criminal prohibitions are effective only to the extent that they can deter,[11] and the laws that the district court enjoined seek to increase the deterrent effect by making voter-registration fraud harder to commit and easier to detect. The "receipt" system helps to deter and detect fraud, but it does nothing to help the authorities apprehend an out-of-state canvasser who absconds,

[11] *See generally* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

nor does it stop or deter a canvasser who submits fake voter-application forms (with fake receipts) through the mail.

VII. THIS COURT SHOULD REAFFIRM THAT FEDERAL DISTRICT COURTS ARE NOT TO PRELIMINARILY ENJOIN THE ENFORCEMENT OF STATE LAW ABSENT A "CLEAR SHOWING" THAT THE PLAINTIFFS WILL LIKELY SUCCEED ON THE MERITS.

The appellees note that the district court recited the proper standard for a preliminary injunction. *See* dct opinion at 84 ("[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried [its] burden of persuasion.") (citation and internal quotation marks omitted). But the district court never claimed that the State's arguments were "clearly" wrong when he rejected them, nor did he explain how the appellees' arguments were not merely correct, but "clearly" so. It cannot be denied that appellees' claims in this case are at least debatable among jurists of reason. And in these situations a preliminary injunction should not issue—even if a district judge thinks that the appellees have the better of the argument. *See Mazurek*, 520 U.S. at 972; *Planned Parenthood of Houston*, 403 F.3d at 329.

The State is not questioning the good faith of the district judges who have issued preliminary injunctions against state officials in recent years. But it has become all too common for district-court opinions to issue preliminary injunctions against state officials after effectively conducting a de novo analysis of the legal claims, rather than putting a thumb on the scale and requiring a "clear showing" of likelihood of

success from the litigants challenging the State's laws. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 976-77 (W.D. Tex. 2011), *vacated in part by* 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood Ass'n of Hidalgo Cnty. v. Suehs*, 828 F. Supp. 2d 872, 888 (W.D. Tex. 2012), *vacated by* 692 F.3d 343 (5th Cir. 2012); Order of Injunction, *Dep't of Tex., et al v. Tex. Lottery Comm'n, et al*, 1:10-cv-00465-SS (W.D. Tex. Oct. 29, 2010); *cf. Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (correcting a federal court of appeals for effectively applying de novo review of a state-court decision when a federal statute called for a more deferential standard). The State of Texas respectfully asks this Court to reiterate that the "extraordinary" remedy of a preliminary injunction is reserved for cases in which a movant "clearly" carries his burden of demonstrating a likelihood of success on the merits. That burden was not met here.

CONCLUSION

The district court's preliminary-injunction order should be vacated.

Respectfully submitted.

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Counsel also certifies that on November 26, 2012, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

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