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

VOTING FOR AMERICA, INC., BRAD RICHEY, and PENELOPE McFADDEN, *Plaintiffs,*	§	
V.	§	**CIVIL ACTION NO. 3:12-CV-00044**
HOPE ANDRADE, in her Official Capacity as Texas Secretary of State, and CHERYL E. JOHNSON, in her Official Capacity as Galveston County Assessor And Collector of Taxes and Voter Registrar, *Defendants.*	§	

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

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

ROBERT O'KEEFE
General Litigation, Division Chief

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

Attorneys for Defendant Hope Andrade

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TO THE HONORABLE JUDGE OF SAID COURT:

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

I.
NATURE AND STAGE OF THE PROCEEDINGS

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

II.
ISSUES TO BE RULED UPON WITH STANDARD OF REVIEW

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

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

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

III.
SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

IV.
RESPONSE

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

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

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

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. IRREPARABLE INJURY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. HARM TO PLAINTIFFS DOES NOT OUTWEIGH HARM TO DEFENDANTS

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

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

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

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

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

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

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

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

D. A PRELIMINARY INJUNCTION WOULD DISSERVE THE PUBLIC INTEREST

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

ROBERT O'KEEFE
General Litigation, Division Chief

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

Attorneys for Defendant Hope Andrade

CERTIFICATE OF SERVICE

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

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

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

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

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

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