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

INTRODUCTION

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

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

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

intrusions on their right to engage prospective voters.

NATURE AND STAGE OF THE PROCEEDING

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

STATEMENT OF ISSUES

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

SUMMARY OF ARGUMENT

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“[I]t is always in the public interest to protect constitutional rights.” *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)). As the Northern District of Texas has noted, “the public interest does not extend so far as to allow actions that interfere with the exercise of fundamental rights.” *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007); see *Netherland v. City of Zachary*, 527 F. Supp. 2d 507, 521-22 (M.D. La. 2007).

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

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

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

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

CONCLUSION

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

This 10th day of May, 2012.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Chad W. Dunn
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