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 ANDRADE'S BRIEFING ON FIRST AMENDMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant Texas Secretary of State Hope Andrade and files this her Briefing on First Amendment.

I.

During its status conference on June 5, the Court indicated that it would allow additional briefing from Texas Secretary of State Andrade on the first amendment issue. As undersigned counsel understands the court's question, it was whether the volunteer deputy registrar (VDR) has constitutional rights after accepting an application for delivery, and if so, does the *Anderson/Burdick* test apply. The answer is that the Secretary of State does not believe that accepting and delivering a completed application is constitutionally protected speech, and assuming arguendo that it is protected, then the *Anderson/Burdick* test governs the analysis of whether the Texas statutes improperly infringe on those rights.

II.

A. ACCEPTING AN APPLICATION IS NOT SPEECH

The state's position is that the challenged statutes do not regulate the Plaintiffs' protected speech; they regulate the activity of registering Texas citizens to vote. This is indisputably a government function. At the point where an individual accepts the completed voter registration application of another person for delivery, the issue is no longer just that of the relationship between the state and the individual who accepts the application, although Plaintiffs' lawsuit is cast in those terms. When an individual accepts the completed registration, the state is now also dealing with a prospective voter who has first and fourteenth amendment rights to vote. If the application is not filled out correctly or, worse, it does not reach the county registrar of voters, then the constitutional right to vote is lost.

The state scheme does not regulate the exchange between a voter registration advocate and a citizen while the advocate is convincing the citizen to register. The Texas statutes have no effect until the point at which a completed application leaves the applicant's hands and is collected by the advocate. At that point, the advocate is performing the task of delivering the application to the county registrar on behalf of the voter, which he has no constitutional right to do. Texas law assumes that the state has the ability to protect that application by regulating how it is handled until it is in the hands of the local registrar.

Plaintiffs do not engage in core political speech when delivering the voter registration applications of others. Core political speech is described as "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422, 108 S.Ct. 1886, 1892 (1988). Plaintiffs undoubtedly engage in core political speech when they engage eligible voters and advocate for

change through voter registration and participation in the political process. When they have successfully advocated for voter registration and convinced a citizen to vote, however, the interactive communication concerning political change is at an end because it has effected the change that Plaintiffs seek. Their first amendment speech has been effective. The voter has agreed to register. At that point, the volunteer is no longer exercising first amendment rights. Instead, it is without question the prospective voter whose constitutional rights have now come into play, and the state's scheme is focused on protecting the first and fourteenth amendment rights of the voters. The state scheme says to VDRs, in effect, if you undertake the responsibility of registering Texas citizens to vote, you are taking their constitutional rights in your hands, and state law will guard the constitutional right of that prospective voter from the time that you take it from his hand until you deliver it to the county registrar.

Nothing in the scheme prevents any of the plaintiffs from discussing the importance of registering to vote with anyone; the statutes do not impose any burden on that right at all. But the statutes do impose constraints on the VDR's that serve as a protection for those who ultimately will vote. And given the balance of protecting the right to vote of persons not parties to this case against those whose actions are regulated only after the prospective voter has signed a registration card, the goal of protecting the voters rights are paramount.

B. IF ACCEPTING AN APPLICATION IS SPEECH, THEN *ANDERSON/BURDICK* APPLIES

Secretary Andrade is aware that, contrary to this position, courts analyzing this issue have found that with respect to voter registration drives, the act of registering voters is intertwined with political speech. See *League of Women Voters v. Cobb,* 447 F.Supp.2d 1314 (S.D. Fla. 2006),

American Association of Disabilities v. Herrera, 690 F.Supp.2d 1183 (D.N.M. 2010), and *Project Vote v Blackwell,* 455 F. Supp.2d 694 (N.D.Ohio 2006). Plaintiffs argue that this Court should follow those cases, but they also argue that this Court should follow traditional first amendment analysis without applying the *Anderson/Burdick* test for election statutes.[1] See *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059 (1992). These district court that found an intertwined right, however, applied *Anderson/Burdick* in determining whether the statutes at issue were constitutional. See *League of Women Voters v. Cobb,* 447 F.Supp.2d at 1332, n. 1, *American Association of Disabilities v. Herrera,* 690 F.Supp.2d at 1211, *Project Vote v Blackwell,* 455 F. Supp.2d at 701.

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[1] See Plaintiffs' Opposition to Defendants' Motions to Dismiss, Doc. No. 25, p. 33. There, Plaintiffs argue that these election statutes, because they burden speech, are for that reason subject to strict scrutiny. In support of this rule of law they cite *MD II Entm't, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994), a non-election case in which a content based Dallas ordinance on bars was subjected to strict scrutiny. That ordinance regulated establishments that used specific words, such as topless. *Id.*, 28 F. 3d at 493. The VDR laws, however, do not directly regulate speech at all in the sense of naming specific words and attaching legal conclusions to them.

Plaintiffs also point to Justice Thomas's concurrence in *Buckley v. Am.Constitutional Law Found.,* 525 U.S. 182, 119 S.Ct. 636 (1999). There, Justice Thomas said, "When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest." 525 U.S. at 207, 119 S.Ct at 649. Plaintiffs characterize this statement as meaning that "An election regulation touching on core political speech and association is 'severe' per se and is subject to strict scrutiny...." Plaintiffs' Opposition, Doc. 25, p. 33. Justice Thomas, however, was not considering an election regulation "touching" on core political speech. He was addressing petition circulation, which had been previously held to be "core political speech." *Id.* at 186, 119 S.Ct at 639, citing *Meyer v. Grant*, 486 U.S. at 422 108 S.Ct. at 1886. He also cites to the high court's acknowledgment in *Burdick* that, "[t]o require that every voting, ballot, and campaign regulation be narrowly tailored to serve a compelling interest 'would tie the hands of States seeking to assure that elections are operated equitably and efficiently.'" *Id.* at 206, 119 S.Ct at 649.

If these cases apply, then they apply both in the determination that a constitutional right exists and in applying the *Anderson/Burdick* test to those rights. Those courts did not apply traditional first amendment analysis and assume strict scrutiny.

Under the *Anderson/Burdick* test, only regulations that severely burden constitutional rights must be narrowly tailored to serve a compelling state interest. *Clingman v. Beaver,* 544 U.S. 581, 586, 125 S.Ct. 2029 (2005). When a statute imposes slight burdens, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. at 788, 103 S.Ct. at 1570. Reasonable, neutral regulation are generally upheld. *Burdick v. Takushi*, 504 U.S. at 438, 112 S.Ct. at 2066.

The challenged laws, as shown above, do not regulate core political speech at all. If the court finds an intertwined right, however, then *Anderson/Burdick* is the test that applies, and Plaintiffs meet that test because these statutes do not severely burden Plaintiffs' constitutional rights. Even under the strict scrutiny test that the Plaintiffs urge, however, these statutes are narrowly tailored in that they draw a clear line where the application leaves the voters's hands, and they serve the compelling interest of protecting the right to vote.

CONCLUSION

There is no constitutional right to register others to vote. However, if there were such a constitutional right, the proper analysis is *Anderson/Burdick.*

Respectfully submitted,

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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 8th day of June, 2012, to:

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