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

VOTING FOR AMERICA, INC., **PROJECT VOTE, INC.,** **BRAD RICHEY,** and **PENELOPE MCFADDEN,** *Plaintiffs*, vs. **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*.	§ § § § § § § § § § § § § § § § § § §	**CIVIL ACTION NO. 3:12-cv-00044**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND SUPPORTING MEMORANDUM OF LAW

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Plaintiffs Voting for America, Inc., Project Vote, Inc., Brad Richey, and Penelope McFadden respectfully file this Opposition to Defendants' Motions to Dismiss in the above-referenced cause of action.

INTRODUCTION

Plaintiffs have requested that this Court grant declaratory and injunctive relief prohibiting Defendants from enforcing provisions of the Texas Election Code that violate the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq*., and the First and Fourteenth Amendments to the United States Constitution. The Public Disclosure Provision of the NVRA gives Plaintiffs the right to inspect and copy completed voter registration records. Nonetheless, Texas's Chief Election Official, Secretary of State Defendant Andrade, has turned a blind eye to Harris County's refusal to allow review of rejected voter registration applications by Voting for America and Project Vote (the "Organizational Plaintiffs"). This blatant violation of federal law may well prevent the Texas citizens whose applications were unfairly rejected from participating in the 2012 elections. Defendants have also crafted a system of burdensome election practices and provisions that individually and collectively violate the minimum federal standards for fair and efficient voter registration. These recent additions to the Texas Election Code do little to prevent voter fraud but significantly curb the core political speech and expressive conduct of the volunteer deputy registrars ("VDRs") who serve as the frontline advocates and facilitators of voter registration, particularly on behalf of minorities and lower income populations. These ambiguous restrictions, criminal penalties, and onerous requirements in the state provisions are viewpoint discriminatory and impose severe burdens on the activities and speech of VDRs in violation of the First and Fourteenth Amendments and the NVRA.

The importance and urgency of Plaintiffs' petition is heightened by the impending presidential election. This Court's decision will directly affect whether thousands of Texas

residents are able to fulfill their civic duty and exercise their right to vote. Defendants' refusal to allow the disclosure and photocopying of completed voter registration applications prevents the Organizational Plaintiffs and the public from identifying and correcting any systemic election administration problems in Galveston County, Harris County, and other jurisdictions around the state in advance of the 2012 election. The discriminatory and burdensome provisions and interpretations of Texas law now prevent the Organizational Plaintiffs and similarly situated entities from many activities that they reasonably assumed were perfectly legal, including assisting Texans in registering to vote. In light of the clear violations of federal law occurring through Defendants' ongoing enforcement of the challenged provisions, and the necessity of curing these violations in advance of the 2012 election, Plaintiffs request that this Court deny Defendants' Motions to Dismiss.

NATURE AND STAGE OF THE PROCEEDING

This case is a challenge to Texas's laws regarding VDRs, which Plaintiffs allege violate the NVRA and the Constitution. Defendant Andrade has filed an Answer to Plaintiffs' Amended Complaint, and both Defendants have filed Motions to Dismiss under Rule 12(b)(2) and (6). Plaintiffs have filed this Opposition to Defendants' Motions to Dismiss.

ISSUES TO BE RULED ON AND STANDARD OF REVIEW

The issues to be ruled on are 1) whether the Amended Complaint presents a case or controversy against Defendants; 2) whether Tex. Elec. Code §§ 552.108(a) (the "Law Enforcement Exception"), 13.008 (the "Photocopying Prohibition" and the "County Limitation"), 13.031 (the "Training Requirement"), 13.036 and 13.039 (the "Completeness Requirement"), 13.042 (the "Personal Delivery Requirement"), violate the NVRA; 3) whether Tex. Elec. Code §§ 12.006(3) (the "In-State Restriction"), 13.008 (the "Compensation

Prohibition"), 13.031 (the "Appointment Requirement"), 13.033 (the "Identification Requirement"), the County Limitation, and the Personal Delivery, Completeness, and Training Requirements violate the First and Fourteenth Amendments; and 4) whether the enforcement of Senate Bill 14 (the "Photo Identification Requirement") violates the Equal Protection Clause, Section 5 of the Voting Rights Act of 1965, and Tex. Elec. Code §§ 15.051-53.

Defendants seek to dismiss Plaintiffs' claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In reviewing the questions of law presented under these rules *de novo*, the Court should construe the complaint in favor of Plaintiffs and accept all its well-pleaded factual allegations as true. *See Woodard v. Andrus,* 419 F.3d 348, 351 (5th Cir. 2005); *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981).

When evaluating under Rule 12(b)(1) whether plaintiffs have alleged sufficient facts in their complaint to establish the existence of a case or controversy, courts "must consider the allegations in the plaintiff's complaint as true" and should not look to facts outside the complaint. *Williamson*, 645 F.2d at 412-14; *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Courts must also "construe the complaint in favor of the complaining party." *Warth,* 422 U.S. at 501. A "motion [to dismiss] under 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F. 3d 1006, 1010 (5th Cir. 1998).

In general, a "motion to dismiss under rule 12(b)(6) is viewed with disfavor and is rarely granted." *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). Courts are to accept all well-pleaded facts as true and construe those facts in the light most favorable to the plaintiff. *See* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-51 (2009); *Lowrey*, 117 F.3d at 245-47. Dismissal is proper only if "it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Brown v. NationsBank Corp.,* 188 F.3d 579, 585-86 (5th Cir. 1999) (citations omitted); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (dismissal is appropriate only where the "[f]actual allegations [fail] to raise a right to relief above the speculative level").

ARGUMENT

I. Defendants Andrade and Johnson are properly named as defendants in this lawsuit.

Defendants argue that Plaintiffs' claims should be dismissed under Federal Rule of Civil Procedure 12(b)(1) for failure to establish an actual case or controversy between the parties. Def. Andrade's Mot. to Dismiss 7; Def. Johnson's Mot. to Dismiss 8. But based on their official roles and enforcement responsibilities, both defendants have the requisite connection to Plaintiffs' claims and the challenged statutory schemes, and they therefore may be sued in their official capacities under 42 U.S.C. § 1983. Each Defendant admits that the other is properly named in this lawsuit, and the law is clear that both are proper defendants.

A. Plaintiffs may sue the Defendants in their official capacities under 42 U.S.C. § 1983.

Plaintiffs do not base their claims on substantive rights under 42 U.S.C. § 1983, but merely rely on that statute as it provides a right to sue a government official in her official capacity. *See Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Johnston v. Harris Cty. Flood Control Distr.*, 869 F.2d 1565, 1574 (5th Cir. 1989). Section 1983 provides a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution or the laws of the United States. *See Maine v. Thiboutot,* 448 U.S. 1, 4-8 (1980). "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, . . . such officer must have some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157 (1908); *Okpalobi v. Foster*, 244 F.3d 405, 414-

16 (5th Cir. 2001). This connection can be found either in a direct charge to an official in the challenged statute, or through "sufficient indicia of the defendant's enforcement powers found elsewhere in the laws of the state." *Okpalobi*, 244 F.3d at 419. As discussed below, Defendants Andrade and Johnson are the officials responsible for enforcing the challenged laws, and thus are proper defendants under § 1983.

B. Plaintiffs' claims against Defendants Andrade and Johnson satisfy the requirements for demonstrating a justiciable case or controversy.

Article III of the Constitution grants federal courts jurisdiction over claims that present a "case or controversy" between the parties. *See Okpalobi*, 244 F.3d at 425 (citing *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). Plaintiffs must satisfy the three requirements of standing to establish jurisdiction: 1) Plaintiffs have suffered an actual injury; 2) the injury was caused by Defendants' conduct; and 3) the injury can properly be redressed by an order from the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Okpalobi*, 244 F.3d at 425. As long as the Court finds that any one of the Plaintiffs has standing as to all the asserted claims, the Court has jurisdiction over the case. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977). Here, Plaintiffs have satisfied the three standing requirements of injury, causation, and redressability for both Defendants.

1. Defendants agree that Plaintiffs have suffered a host of injuries stemming from the challenged Texas election laws.

Defendants do not seriously contest that Plaintiffs have alleged actual injuries in their complaint. Defendants argue instead that they are not causally connected to Plaintiffs' injuries in any way. *See* Def. Andrade Mot. to Dismiss 9; Def. Johnson Mot. to Dismiss 9. The pleading of actual injuries in the complaint more than satisfies this first element of standing.

2. Plaintiffs have satisfied the causation and redressability requirements by naming as defendants the state officials responsible for enforcing the challenged provisions.

"Causation," the second element of standing, "does not require a party to establish proximate causation, but only requires that the injury be 'fairly traceable' to the defendant." *League of United Latin Am. Citizens v. City of Boerne*, 659 F. 3d 421, 431 (5th Cir. 2011). Both Defendant Andrade and Defendant Johnson have been charged under state and federal statutes with implementing the challenged regulations. These Defendants also have the power to remedy the harm that Plaintiffs continue to experience by changing how the laws are interpreted and administered. Plaintiffs' injuries under those statutes are therefore traceable to and may be redressed by Defendants, satisfying the case or controversy requirements. *See Okpalobi*, 244 F. 3d at 414-16, 419.

a. Defendant Andrade is charged under federal and state law with enforcing Texas's election provisions.

As the state official in charge of supervising county registrars and interpreting and enforcing the challenged Texas election laws, Defendant Andrade is causally connected to Plaintiffs' injuries and has the power to remedy those injuries if ordered to do so by this Court. The NVRA mandates that "[e]ach State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under [the NVRA]." 42 U.S.C. § 1973gg-8. According to the NVRA's legislative history, this officer is "responsible for implementing the state's functions under the bill." S. Rep. No. 103-6, at 39 (1993). The NVRA clearly intended that these officers have the ability to redress injuries and enforce compliance under the statute, as it commands citizens aggrieved by a violation of the NVRA to give written notice of the violation to their Chief Election Official. 42 U.S.C. § 1973gg-9(b)(1)-(2). Citizens may only file a lawsuit if the violation is not corrected within 90 days after the Chief Election Official receives the written notice. *Id.*

Defendant Andrade is the designated Chief Election Official for Texas. *See* Tex. Elec. Code § 31.001. In this position, Defendant Andrade has ultimate responsibility for "maintain[ing] uniformity in the applications, operation, and interpretation of . . . the election laws." *Id.* § 31.003. State law gives her the power to enforce such uniformity by ordering the attorney general to take legal action against individuals who do not adhere to her interpretations of the relevant election laws or do not comply with federal requirements. *See id.* § 31.005. In addition to these general grants of authority, at least one of the challenged statutes itself contains a direct charge to the Secretary of State. *See id.* § 13.042 ("The secretary of state shall prescribe any procedures necessary to ensure the proper and timely delivery of completed applications that are not delivered in person by the volunteer deputy who receives them."). The combination of the statutory charges given to Defendant Andrade under these state laws and the NVRA endow

her with sufficient enforcement powers to establish a controversy between her and the Plaintiffs. *See Gritts v. Fisher*, 224 U.S. 640 (1912) (finding that defendant state official was charged with specific duties to enforce the challenged statute and thus was sufficiently adverse to the plaintiffs to create an Article III controversy).

Despite being invested with these powers by the Texas legislature, Defendant Andrade claims that she has no enforcement power with respect to the challenged laws because local registrars like Defendant Johnson are the officials who actually implement the election provisions, and she cannot control their behavior. Def. Andrade's Mot. to Dismiss 10. In *Harkless v. Brunner*, the Sixth Circuit rejected exactly this argument by the Ohio Secretary of State, who also claimed that she was not a proper defendant in a suit alleging violations of the NVRA because she was not responsible for the actions of county officials. 545 F.3d 445, 449 (6th Cir. 2008). As the court noted, "[r]equiring would-be plaintiffs to send notice to their [C]hief [E]lection [O]fficial about ongoing NVRA violations would hardly make sense if that official did not have the authority to remedy NVRA violations." *Id.* at 453. Nor can Defendant Andrade shirk her official duties by blaming the local county registrars.[1] *Id.* With respect to the records that Plaintiffs requested from Harris County, Defendant Andrade may not have personally denied Plaintiffs' initial request, but she is unquestionably responsible for overseeing the conformity of the entire state and its officials with the NVRA, particularly once she was informed of the violation by Plaintiffs' 90-day notice letter. *See* 42 U.S.C. § 1973gg-9(b)(1)-(2).

State law, including Tex. Elec. Code § 15.051, which commands registrars to adhere to "rules prescribed by the secretary of state," further illustrates that Defendant Andrade has plenary authority over Texas election officials. In short, since Defendant Andrade has the power

[1] Defendant Johnson, a county registrar, agrees that Defendant Andrade is a proper defendant in this suit. Def. Johnson's Mot. to Dismiss 11-12.

to interpret Texas laws to comply with the NVRA and can trigger the prosecution of individuals who fail to obey the federal requirements, she is able to remedy Plaintiffs' injuries, and is a proper defendant here. *See, e.g., Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005) (plaintiffs had standing to sue Georgia's Chief Election Official, the Secretary of State, for violations of the NVRA).

b. Defendant Johnson is responsible for the enforcement of the challenged laws and practices.

The requirements of causation and redressability are similarly met with respect to Defendant Johnson, who serves under the Secretary of State and implements the challenged provisions on a local level. *See, e.g.*, Tex. Elec. Code § 15.051 (ordering registrars to maintain voter lists "in accordance with rules prescribed by the secretary of state"). Although Defendant Johnson argues that Plaintiffs have failed to identify a causal connection between their injuries and her policies or conduct, Plaintiffs' allegations in their complaint that Defendant Johnson is responsible for their injuries are enough to establish standing. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court presumes] that general allegations embrace those specific facts that are necessary to support the claim.'" *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 357 (5th Cir. 1999) (quoting *Lujan,* 504 U.S. at 561).

Even though Defendant Johnson is not the Chief Election Official for Texas, she has the ability to enforce the challenged laws within her own jurisdiction of Galveston County. *Cf. Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697 (E.D. Va. 2010) (Plaintiffs had standing in suit alleging violations of the NVRA against both local registrar and secretary of the state board of elections). The NVRA defines a "registrar's jurisdiction" as the geographic area covered by the relevant unit of government. 42 U.S.C. § 1973gg-6(j). In Texas, the county tax

assessor-collector serves as the voter registrar for the county. Tex. Elec. Code § 12.001. Within that county, the local registrar is responsible for performing numerous functions related to registration and voting. *See id.* § 12.006. Many of the challenged Texas provisions contain direct charges to local registrars, granting them authority over activities such as the certification of VDRs and the receipt of voter registration applications within their respective counties. *See id.* §§ 13.031, 13.033. As Defendant Andrade points out, "the appointment and supervision of volunteer deputy registrars" is a "task [that] falls to the registrars," as is the enforcement of the numerous "requirements about which Plaintiffs complain." Def. Andrade's Mot. to Dismiss 7, 10-11. Such authority ties Defendant Johnson to Plaintiffs' injuries and gives her the ability to remedy those harms.

II. Plaintiffs have sufficiently alleged in Count I of their complaint that Texas election laws directly conflict with the NVRA's mandates.

Defendant Andrade claims that none of the challenged provisions actually conflicts with the NVRA, and the complaint should thus be dismissed for failure to state a claim under Rule 12(b)(6).[2] Congress enacted the NVRA under the authority of the Constitution's Elections Clause, which gives Congress the power "to make or alter" laws affecting states' federal election policies. U.S. Const. art. I, § 4, cl. 1. The Clause also "gives Congress the power to conscript state agencies to carry out federal mandates." *Gonzalez v. Arizona*, No. 08-17115, 2012 WL 1293149, at *3 (9th Cir. Apr. 17, 2012) (en banc) (internal quotation marks and citations omitted). Given this framework, to the extent that any state voter registration laws or state

[2] In this section, Plaintiffs will primarily address the arguments raised in Defendant Andrade's 12(b)(6) motion, as Defendant Johnson's 12(b)(6) motion suffers from the same infirmities as her motion under 12(b)(1). Defendant Johnson introduces no additional arguments in support of her 12(b)(6) motion, but relies on the same assertion that she made with respect to her 12(b)(1) motion—namely, that she has no connection to the Plaintiffs' alleged injuries. *See* Def. Johnson's Mot. to Dismiss 18-19. As discussed above, this is an inaccurate portrayal of her responsibilities and authority as Galveston County Registrar.

procedures for federal elections conflict with the NVRA or otherwise burden its requirements, the NVRA "necessarily supersedes" the state laws. *Ex parte Siebold*, 100 U.S. 371, 392 (1880); *Gonzalez*, 2012 WL 1293149, at *4 (holding that the Elections Clause is a "standalone preemption provision"). Consequently, any Texas law that is inconsistent with the NVRA violates federal law. *See Gonzalez*, 2012 WL 1293149, at *713 (holding that "under Congress's expansive Elections Clause power," a state provision that violated the NVRA was preempted by the federal statute).

In determining whether Texas's laws conflict with the NVRA, the Court must interpret the relevant statues according to the meaning of their plain language. "[T]he starting point in every case involving construction of a statute is the [statute's] language itself." *CleanCOAlition v. TXU Power*, 536 F.3d 469, 473 (5th Cir. 2008) (quoting *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978)). When the text's plain meaning is obvious, such that "the intent of Congress is clear, that is the end of the matter." *Id.* As the Supreme Court has recognized, "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925).

If a term in one of the provisions at issue is not "specifically defined within [the] statute, that term must therefore be given [its] ordinary and natural meaning. . . . Dictionaries are a principal source for ascertaining the ordinary meaning of statutory language.'" *United States v. Castro-Trevino*, 464 F.3d 536, 541 (5th Cir. 2006). Courts will "not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions" when determining

the plain meaning of undefined terms. *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 464 (1934). All of the laws challenged in Count I of Plaintiffs' complaint, as they are interpreted and enforced by Defendants Andrade and Johnson, conflict with the plain meaning of the NVRA's various provisions.

A. The Photocopying Prohibition and the Law Enforcement Exception directly conflict with the NVRA's Public Disclosure Provision.

Defendant Andrade has interpreted Tex. Elec. Code § 13.038 (the "Photocopying Prohibition") to preclude VDRs from making copies of completed registration applications that they collect. Def. Andrade's Mot. to Dismiss 14. She has also refused to rectify Harris County's denial under the Law Enforcement Exception of the Organizational Plaintiffs' request to inspect and copy applications. *See* Tex. Gov't Code § 552.108(a). Defendant Andrade's position is inconsistent with the NVRA's Public Disclosure Provision, which unambiguously provides for the disclosure and photocopying of voter registration applications. *See* 42 U.S.C. § 1973gg-6(i)(1).

1. The plain language of the NVRA's Public Disclosure Provision requires that Texas permit the disclosure and copying of voter registration applications.

The Public Disclosure Provision's plain language clearly requires the public disclosure and photocopying of completed voter registration applications. The statute provides:

> Each State shall maintain for at least 2 years and shall *make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters*, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

42 U.S.C. § 1973gg-6(i)(1) (emphasis added). The Provision thus 1) sets out a general category of records that must be made available for public inspection and copying and 2) excludes two types of specific records from this requirement. Since completed voter registration records fall

within the Provision's general mandate and are not covered by its exceptions clause, they must be publicly disclosed.

Defendant Andrade takes an extremely narrow view of the statute, contending that the evaluation of voter registration applications is unrelated to the maintenance of voter lists and that keeping updated and errorless voter lists only necessitates removing ineligible voters from the rolls, as opposed to also adding new, eligible voters. Def. Andrade's Mot. to Dismiss 15. This theory is inconsistent with canons of statutory construction, the text of the NVRA, Texas law, and common sense.

a. The evaluation of voter registration applications is a program or activity conducted to ensure the accuracy and currency of official lists of eligible voters.

The process of evaluating voter registration applications to determine whether an applicant should be included on the official list of eligible voters is a program and activity conducted for the purpose of ensuring the accuracy and currency of such lists. The term "current" refers to something that is "most recent," and the term "accurate" refers to something that is "free from error." *Project Vote/Voting for Am.,* 752 F. Supp. 2d at 706. It follows, then, that "a program or activity covered by the Public Disclosure Provision is one conducted to ensure that the state is keeping a 'most recent' and errorless account of which persons are qualified or entitled to vote within the state." *Id.*

Texas law further clarifies that voter registration is a program or activity that affects voter lists. In Texas, to be eligible to vote, an individual must first be deemed a "qualified voter." *See* Tex. Elec. Code § 11.001. In order to be considered a "qualified voter," an individual must meet numerous statutory qualifications, and also take the active step of registering to vote. *See id.* § 11.002. Registering to vote requires an individual to submit a completed voter registration application to election officials, who evaluate the information contained in the application, then

either grant or deny an individual's request for inclusion on the official list of eligible voters. *See id.* § 13.071 *et seq.* This evaluative process ensures that the voting rolls are accurate by including only those individuals meeting the statutory requirements, while excluding individuals who do not satisfy those requirements. *See*, *e.g.*, *id.* § 11.002 (stating that "qualified voters" must be residents of Texas and not convicted felons or adjudged incapacitated, unless such person's voting rights have been restored by law). The process also ensures that the official lists are current by providing all otherwise eligible voters the opportunity to be added to the list on an ongoing basis—for example, when they reach the minimum voting age of 18, have their voting rights restored, or move to the county.[3] *Id*.

This evaluative process is a "program or activity" covered by the Public Disclosure Provision. Neither the term "program" nor "activity" is defined in the NVRA, so the Court should look to the dictionary definition of both terms. *Castro-Trevino*, 464 F.3d at 541; *United States v. Moreland,* 665 F.3d 137, 142 (5th Cir. 2011). The term "program" means "a plan or procedure" and "a schedule or system under which action may be taken toward a desired goal." *Webster's Third New International Dictionary* 1812 (1993)*; see also Moreland,* 665 F.3d at 142 (citing *Webster's Third New International Dictionary* as an authoritative source of a term's common meaning). The term "activity" means the "duties or functions" of "an organizational unit for performing a specific function." *Webster's* at 22. The process by which Texas election officials evaluate voter applications in order to determine whether a potentially eligible applicant is to be placed on the official list of eligible voters is thus both a "program" and an "activity." It is a "program" because it is a procedure and system under which action is taken towards the

[3] Texas election officials may cancel a voter's registration and remove that person from the rolls once any of the statutory requirements are no longer met. *See* Tex. Elec. Code § 16.031 (stating that the registrar shall cancel the registration of all persons disqualified to vote by a felony conviction, adjudication of incompetency, or by reason of that person moving from the county).

desired goal of registering eligible applicants and rejecting ineligible applicants. *See* Tex. Elec. Code § 13.071 *et seq*. It is also a duty and function of the state officials charged with carrying out this process, and therefore an activity. *See id.*

b. Completed voter registration applications are records concerning the implementation of this program or activity.

Completed voter registration applications are "records concerning the implementation" of this "program or activity." 42 U.S.C. § 1973gg-6(i)(1). The term "implementation" means "the acting of implementing" and "implement" means "to carry out." *Webster's* at 1134-35. Completed voter registration applications are the primary means by which individuals provide Texas the information necessary for officials to carry out their evaluative process. The registration application asks applicants to provide information verifying that they are citizens of both the United States and the State of Texas. *See* App. B to Def. Andrade's Mot. to Dismiss. It requires individuals to report whether they will be 18 years old by the next general election, and applications are denied if this condition is not met. *Id*. The application also requires that convicted felons report whether their voting rights have been restored—another condition for inclusion of the official list of eligible voters. *Id*. All of this information is necessary to evaluate whether an individual meets the statutory requirements to be added to the voting lists. Since completed voter registration applications are records concerning the implementation of this program or activity, they fall under the Provision's general mandate that "all" such records be disclosed. *See* 42 U.S.C. § 1973gg-6(i)(1).

The Exceptions Clause also refutes Defendant Andrade's interpretation that the Public Disclosure Provision applies only to records concerning voter removal because that interpretation would render the Exceptions Clause nonsensical. *See Whitaker Constr. Co. v. Benton & Brown, Inc.*, 411 F.3d 197, 205 (5th Cir. 2005) ("Courts should give effect to all parts

of a statute and should not adopt a statutory construction that makes any part superfluous or meaningless, if that result can be avoided."). For this reason alone, Defendant Andrade's arguments must fail. *Id.* The Exceptions Clause exempts two specific categories of records concerning voter *registration*—forms relating to a declination to *register*, or the agency through which an individual *registered*—not voter *removal*. 42 U.S.C. § 1973gg-6(i)(1). These categories of materials would already be excluded under Defendant Andrade's proposed interpretation of the Provision, and thus the exceptions clause would be meaningless. Such a construction should be avoided. *See In re Crist,* 632 F.2d 1226, 1233 n.11 (5th Cir. 1980) (courts should give effect "to all parts of a statute and avoid an interpretation which makes a part redundant or superfluous").

Furthermore, Defendant Andrade misconstrues the meaning of the term "maintenance" by assuming list maintenance is limited to voter *removal*. "Maintenance" actually refers to "the labor of keeping something . . . in a state of repair or efficiency: care, upkeep." *Webster's* at 1362. With respect to voting lists, "maintenance" includes *adding* those individuals to the rolls who meet Texas's statutory requirements and should be included. This is effectuated in Texas through voter registration, using voter registration applications. *See* Tex. Elec. Code § 13.071 *et seq.* Therefore, although Defendant Andrade argues that the terms "program" and "activities" only "refer to the . . . maint[enance of] voter lists, not to the maintenance of completed voter registration forms," Def. Andrade Mot. To Dismiss 15, she fails to recognize that voter registration *is* list maintenance that adds newly eligible voters to the rolls. Without voter registration processes, including the registration applications, Texas's official lists of eligible voters would be neither accurate nor current. Indeed, they would be quickly outdated and eventually nonexistent. *See* Tex. Elec. Code § 16.031 (outlining procedures for removing

deceased persons from the registration rolls). Even by Defendant Andrade's proposed standards, voter registration is a "program or activity" within the meaning of the Provision.

Defendant Andrade also misunderstands the context in which these terms are used in the NVRA. Neither the NVRA as a whole nor the Public Disclosure Provision is a voter *removal* statute—instead, the statute is designed to promote voter registration and participation. Tellingly, the applicable statutory titles and the NVRA's purpose demonstrate that Defendant Andrade's narrow interpretation is incorrect. *See INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991) (a statute's or a section's titles can aid in interpreting the text); *United States v. Ramos*, 537 F.3d 439, 461-62 (5th Cir. 2008) (legislative purpose included in the statute itself can aid a court's interpretation). The NVRA's full title is the "National Voter Registration Act" and is codified under a subchapter entitled "National Voter Registration." 42 U.S.C. § 1973gg *et seq*. The section under which the Public Disclosure Provision is found, § 1973gg-6, is titled "Requirements with respect to administration of *voter registration*." *Id.* (emphasis added). Even the Public Disclosure Provision's subsection title reads "Public disclosure of *voter registration activities*."[4] *Id.* § 1973gg-6(i) (emphasis added). The assertion that "program or activity" only arises in the context of *removing* voters from the rolls is simply not true. The Congressional findings also embrace voter registration. In enacting the NVRA, Congress found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." *Id.* §

[4] Defendant Andrade assert that the words "programs and activities," other than in the public disclosure provision, only occur in three subsections in connection with "the state's responsibility to maintain voter lists." Def. Andrade's Mot. to Dismiss 15. This assertion conveniently ignores the Provision's very title, which refers to *voter registration activities*, and refutes her argument. *See* 42 U.S.C. § 1973gg-6(i).

1973gg(a)(3).

In sum, the NVRA facilitates voter registration and participation with the aim of preventing the disenfranchisement of registered or potentially eligible voters. The Public Disclosure Provision is a key part of this statutory scheme because it gives the public the ability to investigate and uncover any practice that causes such harm. Excluding completed voter applications from the reach of the Public Disclosure Provision runs directly counter to this purpose of the NVRA, as well as the Provision's plain language.

2. The Public Disclosure Provision does not conflict with 42 U.S.C. § 1974, MOVE, or HAVA.

Defendant Andrade asserts that the records referred to in the Public Disclosure Provision cannot include voter registration applications, because such a provision would be inconsistent with other federal statutes. But those other statutes have no bearing on the interpretation of the NVRA and do not conflict with its mandate regarding the disclosure and photocopying of completed applications.

a. Because the meaning of the Public Disclosure Provision is plain, analysis of other statutes is neither necessary nor helpful.

Defendant Andrade argues that a natural reading of the Provision's plain meaning conflicts with three other federal statutes. Def. Andrade's Mot. to Dismiss 16 (citing 42 U.S.C. § 1974, 42 U.S.C. § 15482 ("HAVA"), and 42 U.S.C. § 1793ff-1(e)(6)(B) ("MOVE")). But the Court need not consider the provisions of other statutes when the meaning of the statute at issue is plain and unambiguous. "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaluom v. Stolt Offshore, Inc.*, 504 F.3d 511, 515 (5th Cir. 2007) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108

(1980)) (internal citations omitted). "Fifth Circuit law is crystal clear that when, as here, the language of a statute is unambiguous, this Court has no need to and will not defer to extrinsic aids or legislative history." *Guilzon v. Comm'r of Internal Revenue*, 985 F.2d 819, 823 n.11 (5th Cir. 1993). Accordingly, "[w]here the statutory language has a plain meaning, the court's inquiry is complete and it will enforce the statute as written." *Project Vote/Voting for America, Inc.*, 752 F. Supp. 2d at 705.

Given the clear language and unambiguous meaning of the Public Disclosure Provision, there is no reason to look to § 1974, MOVE, or HAVA to interpret the NVRA. *See Willenbring v. United States*, 559 F.3d 225, 235 (4th Cir. 2009) (when "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," the "first canon [of statutory interpretation] is also the last [and] judicial inquiry is complete") (internal quotation marks and citations omitted). But even if the Court were to consider these statutes, there is no conflict between them and the Public Disclosure Provision's plain language. As the Eastern District of Virginia correctly held, disclosure and photocopying of applications "does not implicate the MOVE Act's security and privacy protections, which only apply to the 'voter registration and absentee ballot *application request processes'* [and] does not implicate HAVA's security and privacy protections, which only apply to provisional ballots." *Project Vote/Voting for America, Inc. v. Long*, 813 F. Supp. 2d 738, 743 (E.D. Va. 2011) (quoting 42 U.S.C. § 1973ff–1(e)(6)).

b. Interpreting the Public Disclosure Provision to cover voter registration applications does not create a conflict with § 1974.

Defendant Andrade mistakenly asserts that because the NVRA requires records to be maintained for two years, and 42 U.S.C. § 1974 requires records to be maintained for 22 months post-election, the two statutes "cannot be referring to the same records." Def. Andrade's Mot. to

Dismiss 16. A two-month discrepancy is hardly significant, particularly as the NVRA mandates an unconditional maintenance requirement for the relevant records, whereas § 1974's retention requirement only applies following an election. *See* 42 U.S.C. § 1973gg-6; 42 U.S.C. § 1974. Moreover, § 1974 was enacted in 1960, well before the NVRA's enactment in 1993. To the extent that the NVRA increases the length or scope of election officials' document retention obligations, the NVRA's provision should be seen as building upon § 1974 rather than contradicting it.

c. Disclosure and photocopying of applications under the NVRA does not conflict with HAVA.

Disclosure of completed voter registration applications does not conflict with HAVA's security and privacy protections, *see* Def. Andrade's Mot. to Dismiss 17, which apply only to provisional ballots. *See* 42 U.S.C. § 15482(a)(5). "For the most part, the NVRA and HAVA operate in separate spheres: the NVRA regulates voter registration, whereas HAVA is concerned with updating election technologies and other election-day issues at polling places." *Gonzalez*, 2012 WL 1293149, at *11. HAVA requires states to establish a provisional voting system, complete with a free access system that allows voters to check the status of their provisional vote online. *See id*. HAVA's provisional voting system also includes procedures designed to protect the confidentiality of the provisional votes. *See id*. As evidenced by HAVA's legislative history, the focus of these security procedures is to protect the right to a secret ballot, not to prevent disclosure of information contained in voter registration applications. According to Congress's Joint Explanatory Statement, HAVA "[r]equires that . . . the ballot be promptly verified and counted if determined to be valid under State law, and *the voter (and no one else) be able to ascertain whether the ballot was counted (and if not, why not)* through a free-access system and be informed of that option when the ballot is cast." H.R. Conf. Rep. No. 107-730, pt.

1, at 75, *reprinted in* 2002 U.S.C.A.N.N. 1086, 1094-95 (emphasis added). *See also Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981) (noting that the right to a secret ballot is "one of the fundamental civil liberties of our democracy") (citing *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), *rev'd on other grounds*, 424 U.S. 1 (1976)).

Defendant Andrade's contention that HAVA is relevant to the interpretation of the NVRA in this case is further undermined by the Ninth Circuit's recent decision in *Gonzalez v. Arizona*. In *Gonzalez*, the Ninth Circuit considered whether the enactment of HAVA should affect the court's interpretation of the NVRA. 2012 WL 1293149, at *11. In addition to noting that "the NVRA and HAVA operate in separate spheres," the Court recognized that HAVA includes specific language limiting its scope. *Id.* at *11-12. Section 15545 of HAVA is a savings clause providing that, except for the changes to the NVRA specified in HAVA, "nothing in this Act may be construed to authorize or require conduct prohibited under [a number of federal laws, including the NVRA], or to supersede, restrict, or limit the application of [those federal laws]." *Id.* at *12 (quoting 42 U.S.C. § 15545(a) (internal quotation marks omitted)). In other words, § 15545 "makes clear that Congress intended to *preserve* the NVRA except as to the *specific changes* it enacted in HAVA." *Id.* (emphasis added).

d. Disclosing applications under the NVRA does not conflict with MOVE.

Disclosure and photocopying of completed voter registration applications under the NVRA does not offend MOVE's privacy provisions, *see* Def. Andrade's Mot. to Dismiss 16, which are concerned with the security of information transmitted during electronic requests for voter forms. MOVE orders the states to establish procedures to "ensure that the privacy of the identity and other personal data of an absent uniformed services voter or overseas voter who requests or is sent a voter registration application or absentee ballot application . . . is protected

throughout the process of making such request or being sent such application." 42 U.S.C. § 1973ff-1(e)(6)(B) (emphasis added). These privacy protections, contained in a section entitled "Designation of means of electronic communication for absent . . . voters," are limited to electronic communications during the "voter registration and absentee ballot application *request processes*." *Id.* § 1973ff-1(e)(6)(A) (emphasis added).

Congress's intent in enacting MOVE was to designate a secure path for electronic communication between absentee voters and registration officials, lest the identifying information of absentee voters be compromised. *See* 156 Cong. Rec. S4,513, S4,517 (daily ed. May 27, 2010) (noting that MOVE combats the issues military and overseas voters face in corresponding with election officials). Because it is necessary at this stage of the registration process that request forms include information such as an individual's Social Security Number ("SSN") for identification purposes,[5] MOVE ensures that this uniquely private information will not be disclosed as the forms are transmitted through electronic channels.

MOVE's language and legislative history do not suggest that disclosure of voter registration forms will undermine the security of the absentee voting process. Congress protected "the privacy of the contents of absentee ballots," 42 U.S.C. § 1973ff(b)(9)(B), not completed voter registration applications. MOVE's provisions shield the identities of absentee voters and the contents of their unredacted applications while they move through electronic channels. Disclosing the completed applications in a redacted form after they have reached and been reviewed by voting officials does not affect the absentee voting process. In fact, the Public Disclosure Provision serves to further MOVE's goals by ensuring that absentee voters receive

[5] *See* Federal Voting Assistance Program, *Registration and Absentee Ballot Request – Federal Post Card Application (FPCA)*, *available at* http://www.fvap.gov/resources/media/fpca.pdf (federal request form requires an individual's Social Security Number).

the same protection from voter fraud and discrimination as their local counterparts.

3. Defendant Andrade cannot rely on extrinsic facts to justify her position.

In a final attempt to bolster her interpretation of the Public Disclosure Provision, Defendant Andrade turns to arguments unrelated to the allegations in Plaintiffs' complaint or the text of the NVRA. Defendant Andrade argues that photocopying of applications is unnecessary because VDRs can copy the receipts for submitted applications or request copies of rejected applications under the Texas Public Information Act. *See* Def. Andrade's Mot. to Dismiss 12. Even assuming that those options were a satisfactory and reliable replacement for the disclosure and copying of completed applications, such an argument is completely irrelevant to the question of whether or not the Public Disclosure Provision's plain language permits photocopying of voter registration applications. In addition, the Fifth Circuit has clearly established that, in deciding whether to grant a motion to dismiss, courts may not "go outside the complaint." *See Scanlan v. Tex. A&M Univ.,* 343 F.3d 533, 536 (5th Cir. 2003). Moreover, as clearly alleged in the complaint, Plaintiffs have *not* been able to obtain copies of rejected applications, at least in Harris County, by making a request under the Texas Public Information Act. Am. Compl. ¶¶ 61-68.

The Court should also not consider Defendant Andrade's unsubstantiated and extrinsic assertion that prospective voters will not register to vote if they know that their personal information, including names, addresses, and personal identification numbers, might be subject to disclosure. *See* Def. Andrade's Mot. to Dismiss 17-18. The Organizational Plaintiffs have already stipulated in their notice letter to Defendant Andrade that they are not requesting to photocopy applications with social security numbers ("SSNs") on them, and they specifically requested that SSNs be redacted before any applications are disclosed. *See* Am. Compl. Ex. D.

The Fifth Circuit has recognized that SSNs are uniquely private and distinguishable from other forms of identifying information. *See Sherman v. United States Dep't of Army*, 244 F.3d 357, 365 (5th Cir. 2001) (noting the heightened risk of identity theft and fraud resulting from disclosure of an individual's SSN). The Fourth Circuit in *Greidinger v. Davis* permitted the disclosure of completed voter registration applications with the SSNs redacted, differentiating between the disclosure of SSNs and personal information on a registration form and stating that "disclosure of . . . [an] address [or] date of birth" would actually promote the NVRA's overall statutory purposes. 988 F.2d 1344, 1354 (4th Cir. 1993).

Contrary to Defendant Andrade's claim, voters do not have a viable privacy interest in their names and addresses, as such information is already public. *See, e.g., Avondale Indus., Inc. v. NLRB*, 90 F.3d 955 (5th Cir. 1996) (disclosing lists containing names and addresses of plaintiff's employees who voted at NLRB sponsored union representative election was not an invasion of personal privacy). In fact, the NVRA already explicitly requires that lists including names and addresses of people to whom notices are sent regarding their removal from the voter roles be subject to disclosure. *See* 42 U.S.C. § 1973gg-6(i)(2).

Moreover, Defendant Andrade's concerns as to information regarding felony convictions and court rulings about mental incapacity are misplaced. *See* Def. Andrade's Mot. to Dismiss 18. At the outset, these arguments are meritless because applicants do not have to provide this information to register to vote in federal elections in Texas. *See* 42 U.S.C. § 1973gg-4(a) (requiring states to accept a *federal* voter registration form in addition to any other particular form the state develops). Texas must accept the federal registration form, developed by the Federal Election Commission, as a valid voter registration application for federal elections. *Id.* This form does not require that applicants enter any information regarding felony convictions or

adjudications of mental incapacity.[6] Moreover, on Texas's own state form, registrants merely have to affirm that they have not been declared mentally incompetent and have not been convicted of a felony (or have completed their term of punishment). *See* Def. Andrade's Mot. to Dismiss Ex B. The form does not distinguish between those individuals who have or have not committed a felony, nor does it require those individuals who have been declared mentally incompetent to acknowledge that fact. *See id.*

If the form itself does not erase all cause for concern, court records of felony convictions are already readily accessible by the public, negating Defendant Andrade's argument that disclosure of such minimal information will decrease voter registration numbers. *See Smith v. Doe*, 538 U.S. 84, 101 (2003) ("Although the public availability of the information may have a lasting and painful impact . . . the fact of [an individual's] conviction [is] already a matter of public record."); *Stevenson v. State & Local Police Agencies*, 42 F. Supp. 2d 229, 232 (W.D.N.Y. 1999) (finding that the impact of disclosure of plaintiff's status as a sex offender under the Sex Offender Registration Act "is diminished by the fact that his conviction is already a matter of public record"); *Jackson v. State*, 504 S.W.2d 488, 489-90 (Tex. Ct. App. 1974) (noting that Defendant's "record of conviction was a public record equally accessible to the appellant and the State."). Court orders of mental incapacity are also not purely private information. *See McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 77-78 (8th Cir. 1976). In *McNally*, the Eighth Circuit Court of Appeals found that a newspaper's publication of portions of a psychiatric evaluation of McNally did not amount to an invasion of privacy as "substantial information regarding [plaintiff's] mental competency was a matter of public record." *Id.* The

[6] *See* Register To Vote In Your State By Using This Postcard Form and Guide, *available at* http://www.eac.gov/assets/1/Documents/national%20mail%20voter%20registration%20form%20english%20February%2015%202011.pdf.

court reasoned that the newspaper article in question substantially repeated sections of the report read in open court as part of McNally's competency hearing. *Id.* at 77. Determinations of mental competency made in open court are available to the public and, like the report at issue in *McNally*, do not amount to sensitive private information. Here, the privacy concern is even more attenuated than in *McNally*, because Texas's form does not require individuals who have been judged incompetent to state as much. *See* Def. Andrade's Mot. to Dismiss Ex. B.

In sum, Defendant Andrade's arguments against the disclosure and photocopying of applications under the NVRA fail, and the Court should deny Defendants' Motions to Dismiss for failure to state a claim on this portion of Count I.

B. As alleged in Count I, the Elections Clause prohibits the state from imposing additional requirements on a voter registration application's degree of "completeness" under 13.039.

The Completeness Requirement directs VDRs to reject and return voter registration forms to applicants when such applications lack "completeness." *See* Tex. Elec. Code § 13.039. This regulation directly conflicts with the NVRA by imposing restrictions on the content and delivery of registration applications. For this reason, Defendants' Motions to Dismiss Count I of the Amended Complaint should be denied.

The NVRA regulates the "final content and method of delivery" of voter registration application forms and limits states' ability to reject forms meeting the standards of the federal statute. *See Cox*, 408 F.3d at 1353. Specifically, the federal statute requires that states register all eligible applicants who use a valid federal form (or comparable state equivalent). *See* 42 U.S.C. § 1973gg-4, -6(a)(1). In so doing, federal law—not state law—governs the terms of acceptance of voter registration forms. Notably, the NVRA does not provide for rejection of federal voter registration applications on the grounds of "completeness."

Texas law, on the other hand, requires a VDR to evaluate whether an applicant has included "all the required information and the required signature" on an application. *See* Tex. Elec. Code § 13.039. Thus, Texas law requires VDRs to deny applications caused by an applicant's failure to fill in just one field on a voter registration application.

The NVRA does not contemplate such treatment for partially completed registration applications. 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), this term does not carry the same implication as the Texas law. An application is sufficient under the NVRA even if it is only partially complete as long as it has been "completed" by the individual applicant. By contrast, if a VDR delivered a partially complete application to a county registrar it would be rejected under state law.

This disparate treatment of partially completed applications unfairly penalizes prospective voters and voter organizations who establish drives in order to promote public participation. Because the NVRA already regulates the content of forms as well as the submission of applications, Texas law has no room to impose its own restrictions on the federal law. Put simply, where an application lacking "completeness" under Texas law would still be deemed appropriate for submission under the NVRA, the Elections Clause demands that the latter govern. *Gonzalez*, 2012 WL 1293149, at *3-4. For these reasons, the Elections Clause prohibits the enforcement of the Completeness Requirement. As a result, the Defendants' Motions to Dismiss should be denied.

C. As further alleged in Count I, 13.042's Personal Delivery Requirement attempts to supersede the NVRA's provision for delivery of applications by mail.

Tex. Elec. Code § 13.042 requires that any VDR who accepts an application from a potential voter cannot place that application in the mail, but must personally deliver it to the

county registrar. This requirement is clearly inconsistent with the NVRA's prescribed methods of permissible delivery. The NVRA sets forth three methods of voter registration that states must officially recognize and incorporate: registration by mail, registration in person at an official location[7], and registration in conjunction with driver licensing. *See* 42 U.S.C. § 1973gg-2(a). States may choose to accept additional forms of registration as well, but they cannot interfere with the methods established by § 1973gg-2(a). *See id.*; *Cox*, 408 F.3d 1353 (holding that the NVRA's three "methods are not intended to be exclusive; rather, the Act seeks to encourage voter registration by setting a floor on registration acceptance methods.").

The NVRA places no limits on who must actually place the application in the mail, nor does it mandate that a chain of custody must be established before the registrar will accept an application. *See generally* 42 U.S.C. §§ 1973gg-2(a), gg-6(a)(1)(B). The Personal Delivery Requirement, however, prohibits a potential voter who fills out an application as part of a voter registration drive from allowing a VDR to collect and mail in the application on his behalf, essentially preventing the voter's full utilization of the NVRA's mail-in provision. Tex. Elec. Code § 13.042. When faced with this issue in *Cox*, the Eleventh Circuit rejected the defendants' argument that the NVRA prohibits private voter registration drives because it does not list them as one of the acceptable "modes of registration." 408 F.3d at 1353. Rather, the court held that such drives are a "method by which private parties may facilitate the use of the mode of registration by mail," as provided for by the NVRA. *Id.* The same is true for the services of VDRs.[8]

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[7] Official locations include the state-designated registration sites for each county as well as public assistance agencies and other offices designated by the state as voter registration agencies under the NVRA. *See* 42 U.S.C. §§ 1973gg-2(a)(3), gg-5.

[8] Texas actually allows other types of third-party delivery, undermining any assertion that the Personal Delivery Requirement is necessary to prevent fraud. In addition to personally

D. The absence of standards outlining the scope of the Training Requirement of 13.031 forecloses VDRs from exercising their duties as custodians of voter registration applications, as alleged in Count I.

The Training Requirement requires newly appointed VDRs to submit to training sessions for each and every county in which they wish to conduct voter registration drives. *See* Tex. Elec. Code § 13.031. By providing no guidelines regarding the time, place, or frequency of training sessions, the Training Requirement leaves potential VDRs at the mercy of county registrars to schedule these mandatory meetings at inconvenient times or locations. Defendants' Motions to Dismiss Count I of the Amended Complaint with respect to the Training Requirement should be denied because of the harm suffered by VDRs and, by extension, the Organizational Plaintiffs with whom they are affiliated.

Limitations on VDRs have the effect of restricting voter organizations by curtailing their principal activity—sponsorship of voter registration drives. For example, a county may elect to hold only the minimum of one training session per month. *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 April 27, 2012) (outlining the Secretary of State's guidelines for training of volunteer deputy registrars). If this training session is inconvenient or is not properly publicized, voter organizations would be unable to enlist an adequate number of VDRs to serve at voter registration drives in the county. Because the Organizational Plaintiffs are highly dependent on VDRs, infrequent training sessions will disconnect groups like the Organizational Plaintiffs from their principal means of

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delivering the application himself, a VDR may hand it off to another VDR to deliver, or a relative of the applicant may mail the application. Moreover, even if the Personal Delivery Requirement did combat voter fraud, it would still be trumped by the NVRA's clear mandate that states accept applications by mail.

outreach in Texas. *See* Am. Compl. ¶ 54 (estimating the required number of VDRs to enlist 1,000 citizens to complete registration applications).

Additionally, by requiring that a VDR receive training in every county in which she registers voters, Texas puts an incredible burden on those individuals, effectively making it impossible for them to perform their core function. In this way, Defendant Andrade is incorrect in her assertion that the lack of discernible standards in the Training Requirement is unrelated to any injury to the Organizational Plaintiffs. As organizations sponsoring voter registration programs, the Organizational Plaintiffs have lost, and will continue to lose, the ability to conduct and fund effective voter drives in the state of Texas. *See Cox*, 408 F.3d at 1353 (finding that voter registration organizations have standing to enforce the NVRA where state law affects their ability to perform core functions).

The Organizational Plaintiffs suffer as a direct result of this burden on newly appointed VDRs. Organizations such as Project Vote and Voting for America depend upon the assistance of volunteers and employees to carry out their missions, yet the Training Requirement limits the availability of these vital resources at voter registration drives. *See* Tex. Elec. Code § 13.031; Am. Compl. ¶¶ 5, 6, 31. Without frequent training at convenient times, VDRs are unable to complete the final prerequisite to serving as part of a voter registration drive in the state of Texas. *See* Tex. Elec. Code § 13.031; Am. Compl. ¶¶ 31, 91. Without VDRs trained and certified under state law, the Organizational Plaintiffs lose their ability to engage and assist prospective voters and, in turn, accomplish their goals of encouraging voter participation and emphasizing the importance of the democratic process. *See* Am. Compl. ¶¶ 5, 6. For these reasons, the Training Requirement is inconsistent with the NVRA.

E. As described in Count I, the County Limitation of 13.038 improperly imposes geographic limitations on a VDR's receipt and delivery of voter registration applications.

In conjunction with the other restrictive Texas regulations, the County Limitation directly impinges upon the Organizational Plaintiffs' ability to register prospective voters according to the terms of the NVRA. For this reason, the Defendants' Motions to Dismiss Count I with respect to the County Limitation should be denied.

Defendant Andrade attempts to minimize the effect of the County Limitation, claiming that the Plaintiffs can remedy this harm by ensuring that voting drive workers have been deputized as VDRs in a limitless number of counties. *See* Def. Andrade's Mot. to Dismiss 27. To follow Defendant Andrade's advice, a prospective VDR who desires the ability to serve prospective voters in each part of the city of Dallas would first seek appointment from the county registrars in Dallas, Denton, Collin, Rockwall, and Kaufman counties. *See* Tex. Elec. Code § 13.031. In order to accomplish this feat, the prospective VDR would need to first undergo training in each of the five counties at the required times and locations. *See id*. If the prospective VDR can complete the training for each of the five counties, she would then receive identification certificates from each county confirming her ability to serve as a VDR and accept voter registration applications. *See* Tex. Elec. Code § 13.033. Upon receiving voter registration applications in each of the five counties, the VDR would then be required to carry all completed applications during her trip to personally deliver completed applications to each registrar in the five county area. *See id.* § 13.042. Failure to comply with this procedure and with each county's requirements is punishable as a crime. *See id.* § 13.043.

Defendant Andrade's construction of the County Limitation is inconsistent with the fundamental purpose of the NVRA, which is to promote voter registration. *See* 42 U.S.C. § 1973gg(b). The NVRA does not provide for this litany of burdens on voter registration drives,

but rather explicitly aims to alleviate such constraints at these events. *See id.* § 1973gg-4(b) (directing state election officials to make registration forms available "for distribution through . . . private entities, with particular emphasis on making them available for *organized voter registration programs*") (emphasis added); *Gonzalez,* 2012 WL 1293149, at *11 ("The goal of the NVRA was to streamline the registration process for all applicants."); *see also ACORN v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997) (noting that Congress passed the NVRA "[i]n an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements").

Defendant Andrade also asserts that the County Limitation does not actually conflict with the NVRA because the former merely regulates "third party delivery" of voter registration applications. *See* Def. Andrade's Mot. to Dismiss 27. But this argument is unpersuasive because the language and purposes of the NVRA demonstrate that the statute applies to all circumstances involving the delivery of voter registration applications, including third party delivery. After describing specific state requirements for individuals registering as part of motor vehicle applications, by mail, or at a voter registration agency, the NVRA requires that a state register any eligible applicant "in any other case" provided that the applicant has submitted the registration form to the proper state official within 30 days of an election or a time period defined by state law. *See* 42 U.S.C. § 1973gg-6(a)(1)(D). This mandate is violated when a state imposes arbitrary and onerous requirements.

III. The specific allegations in Plaintiffs' complaint demonstrate that Texas election law inflicts a cognizable threat of harm to VDRs' ability to engage in political speech.

A. Plaintiffs have sufficiently alleged in Counts II & III of their complaint that the Texas Election Code violates the First Amendment.

The First Amendment of the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." As a general matter, the First Amendment prevents the

restriction of expression "because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct 1577, 1584 (2010); *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) ("[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints ."). Even actions or conduct may not be regulated based on disapproval of the ideas or content expressed or the viewpoint of the "actor." *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1991); *see also Texas v. Johnson*, 491 U.S. 397, 406 (1989) (the government may not "proscribe particular conduct because it has expressive elements"). Thus, content-based regulations—whether applied to speech or conduct—are subject to strict scrutiny, and must "be narrowly tailored to a compelling governmental interest." *MD II Entm't, Inc. v. City of Dallas,* 28 F.3d 492, 495 (5th Cir. 1994).

Likewise, where election regulations impose "severe" burdens to speech or association, the laws are subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). An election regulation touching on core political speech and association is "severe" *per se* and is subject to strict scrutiny or an otherwise stringent form of "exacting scrutiny." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 206-08 (1999) (Thomas, J. concurring) ("When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech."). Election regulations found not to be "severe" nevertheless require a searching review comparing the "character and magnitude" of the injury to speech and association with the "precise interests" put forward by the state as justifications for the law. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Seven distinct provisions of Texas's election laws restrict speech based on content and viewpoint, both facially and as applied. Am. Compl. ¶¶ 94-107 (Count II). These laws also impose severe burdens on voter registration activity and core political speech in violation of the

First and Fourteenth Amendments. *Id.* ¶¶ 108-110 (Count III). Because Plaintiffs have pleaded plausible facts showing that this statutory regime is content-based and discriminatory, and imposes a severe and unjustified impact on Plaintiffs' core political speech and association rights, Defendant Andrade's Motion to Dismiss for failure to state a claim must be denied.

1. The Texas Election Code regulates both speech and expressive conduct.

Defendant Andrade argues that Texas's voter registration law does not implicate the First Amendment because it regulates only conduct, not speech. But this argument misses the mark, since the First Amendment shields voter registration both because it is expressive conduct and because it, like petition circulation, necessarily involves "the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). Thus the question for the Court does not turn on whether voter registration is speech or conduct, as suggested by Defendant Andrade.

Voter registration drives inherently contain two elements: registration advocacy and facilitation of the registration process. As alleged in the complaint, canvassers educate prospective voters "not only about how political participation can lead to social change and make democratic institutions more responsive to community needs, but also how the mere act of becoming eligible to vote helps disadvantaged persons establish their political worth, standing, and right to speak at the polls." Am. Compl. ¶ 51. The canvasser's role is also "to assist the citizen in filling out voter-registration applications, to collect those applications, to review the applications for errors or omissions, to assist the applicants to correct those errors or omissions, to deliver applications to the appropriate state offices, and to follow up with the state to ensure that the new voters have been added to the rolls." *Id*. ¶ 53.

Without the ability to circulate applications, assist in the completion of the applications,

and submit the applications to the state for processing, voter registration organizations cannot engage in effective pro-registration speech. As such, the Texas law violates the First Amendment because the subject matter it regulates—voter registration—is "characteristically intertwined with informative and perhaps persuasive speech." *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Texas's voter registration law has "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*, 486 U.S. at 422-23. Such a burden triggers strict scrutiny even when the law does not directly regulate the core political speech or association at issue. *See id.*; *see also Am. Constitutional Law Found.*, 525 U.S. at 207 (Thomas, J. concurring) ("Even where a State's law does not directly regulate core political speech, we have applied strict scrutiny."). That Plaintiffs "remain free to employ other means to disseminate their ideas" does not take their speech through registration drives "outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424-25 (1988).

Defendant Andrade concedes that the First Amendment protects the right to advocate for voter registration. Def. Andrade's Mot. to Dismiss 29. But she fails to recognize that the very act of assisting people to register to vote is also expressive conduct protected by the First Amendment. *See Johnson*, 491 U.S. at 406 (burning of American flag is expressive conduct invoking the First Amendment); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (sit-in by African Americans in a "whites only" area expressive conduct). In deciding whether conduct implicates the First Amendment, courts must look to whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410–411

(1974). Voter registration drives have a simple, clear message: *Citizens should vote*. Likewise, Plaintiffs' focus on low- and moderate-income neighborhoods, minorities, and youth sends a clear message that our democracy is weakened "by excluding from major public policy decisions the voices of the most vulnerable and least powerful." *Our Mission*, Project Vote, http://www.projectvote.org/our-mission.html (last visited April 12, 2012). Because participation "in voter registration is to take a position and express a point of view in the ongoing debate whether to engage or to disengage from the political process," the very act of voter registration "is expressive conduct worthy of First-Amendment protection." *Am. Ass'n of Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216-17 (D.N.M. 2010); *see also Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 706-07 (2006) (the speech element of registration drives "is obvious: they convey the message that participation in the political process through voting is important to a democratic society."). And although the act of processing a voter registration application falls squarely within the province of the state, the ability of private citizens to assist one another in registering to vote has long been an uncontroversial and laudable civic activity. "[A]n inherently expressive act remains so despite its having governmental effect." *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 (2011).

In fact, the use of voting registration drives to draw attention to disenfranchisement goes back at least as far as the civil rights era:

> In January 1965, for example, Selma, Alabama had allowed only two percent of voting age blacks to register when Dr. Martin Luther King, Jr., initiated demonstrations in Selma *in support of a voter registration drive*. The city's vicious response, in which local whites killed two white civil rights activists from Massachusetts and Michigan, was well covered by the media and resulted in national and international shock and denunciation. President Johnson urged new voting legislation in an emotional speech to the nation on March 15, 1965. Five months later, in August 1965, President Johnson signed the Voting Rights Act of 1965 into law.

W. Sherman Rogers, *The Black Quest For Economic Liberty: Legal, Historical, and Related Considerations*, 48 How. L.J. 1, 83 (2004) (emphasis added); *see also* Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 Harv. L. Rev. 973, 1015 (2004) (The "violence perpetrated on civil rights demonstrators changed 'national opinion' and led to the Civil Rights Act of 1964 and the Voting Rights Act of 1965. . . . The most dramatic violence—in Alabama, Mississippi, Louisiana, and Georgia—came in response to voter registration drives.").

Given this history, it is unsurprising that courts have routinely rejected the argument that regulation of voter-registration drives is purely ministerial and without effect on speech or association rights. In *League of Women Voters of Florida v. Cobb*, the Southern District of Florida evaluated criminal laws that imposed strict liability on third parties who failed to return completed applications promptly. 447 F. Supp. 2d 1314, 1322 (S.D. Fla. 2006). Brushing aside the assertion that the law "regulates only conduct," the court granted a preliminary injunction prohibiting enforcement of the law. *Id.* at 1333. Likewise, in *Project Vote v. Blackwell*, Plaintiffs challenged Ohio laws requiring registry and training of individuals who are compensated for assisting people to register to vote. 455 F. Supp. 2d at 702. The laws also required that all voter registration applications be personally returned by the canvasser either by mail or in person. *Id.* The Northern District of Ohio granted summary judgment for Project Vote, concluding that "participation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment." *Id.* at 700. Finally, in *American Association of People with Disabilities v. Herrera*, the District of New Mexico found that voter registration was itself expressive conduct, that speech is intertwined with voter registration, and that voter registration implicates expressive association. 690 F. Supp. 2d at

1214-17. As a result, the court denied the defendant's motion to dismiss on the grounds that the burden imposed by voter registration laws and the justifications supporting the law are questions of fact not suitable for disposition on a 12(b)(6) motion. *Id.* at 1220.

In short, the Organizational Plaintiffs have well-recognized speech and associational rights in voter registration activities, and as such have stated a claim upon which relief can be granted. Because it is a question of fact how much of a burden the regulations impose on speech and whether the asserted state interests justify these burdens, Defendant Andrade's Motion to Dismiss for failure to state a claim should be denied.

2. The Texas election code is viewpoint discriminatory and severely burdens core political speech.

First Amendment protection for "interactive communication concerning political change . . . . is at its zenith." *Am. Constitutional Law Found.,* 525 U.S. at 186-87 (internal quotation marks omitted). The Texas Election Code targets just such interactive communications through heavy regulation, prior restraints on speech and association, and impossible administrative burdens. Regulations with such a "severe" impact on speech and association are subject to strict scrutiny. *See id.* at 206-07 (Thomas, J. concurring) (where "a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest"). These burdens also reduce the quantum of the Organizational Plaintiffs' core political speech, which is inextricably tied to voter registration drives. *Id.* (restrictions of "core political speech" subject to strict scrutiny whether or not the state law directly or indirectly affects speech). Because the laws are viewpoint discriminatory against voting registration organizations and individuals wishing to engage in pro-registration speech, there is yet another basis for imposing strict scrutiny. *See United States v. Stevens*, 130 S. Ct at 1584 (regulations restricting expression on basis of content is "presumptively invalid"). Even if

the court finds that the laws are not subject to strict scrutiny, the laws must be evaluated under the fact-intensive standard articulated in *Anderson*, where the "character and magnitude" of the injury to speech and association is compared against the "precise interests" put forward by the state as justifications for the law. 460 U.S. at 789. With these principles in mind, the Organizational Plaintiffs have sufficiently stated a claim for the invalidation of Texas's voter registration laws.

a. The laws concerning Volunteer Deputy Registrars

Under Texas law, anyone wishing to participate in constitutionally protected voter registration activities must first be deputized by the state as a Volunteer Deputy Registrar ("VDR"). *See* Tex. Elec. Code §§ 13.031, 13.038. VDRs are appointed on a county-by-county basis, and VDR status in one county does not transfer to neighboring counties. *See id.*; Letter from Ann McGeehan at 2. 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.[9] Am. Compl. ¶ 103. Texas law categorically prohibits non-residents from serving as VDRs, prohibiting out-of-state individuals experienced in voter registration drives as well as volunteer college students from participating in voter registration drives. Tex. Elec. Code §§ 13.002, 13.006. In addition, the Texas legislature has mandated that VDRs complete a course of training—without providing any guidance on the scope, duration, or contents required—further burdening the Organizational Plaintiffs' speech and associational rights. *See id.* § 13.047.

[9] Defendant Andrade attempts to minimize the effect of this restriction, claiming that the Organizational Plaintiffs do not actually face any hurdles because voting drive workers may serve as VDRs in a limitless number of counties. *See* Def. Andrade's Mot. to Dismiss 27. However, this argument understates the effect of the restrictions in question. VDRs face an onerous burden in complying with the litany of pre-registration requirements of only *one* county, let alone those of the remaining 253.

Collectively, these requirements present severe limitations on the Organizational Plaintiffs' ability to conduct registration drives. The Supreme Court has noted that it "is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002). But that is precisely what Texas law requires. The burden imposed by pre-registration will cause voting registration organizations to struggle to assemble a sufficient number of canvassers and experienced managers for an effective statewide registration campaign, particularly in an election year. The Registration Requirement eliminates the ability of nonmembers spontaneously to join with the Organizational Plaintiffs and assist in voter registration. The threat of fines and criminal penalties further deters citizens from pro-registration speech. These requirements particularly target the non-partisan speech of voter-registration organizations, which rely on inter- and intra-state canvassing to spread their message. *See* Am. Compl. ¶¶ 101, 103, 107. Political parties, by contrast, have established infrastructure in each county in the state and can more readily encourage registration among their constituencies. *See, e.g.*, *County Chairmen*, Republican Party of Texas, http://www.texasgop.org/county-chairmen (last visited April 20, 2012); *County Parties*, Texas Democratic Party, http://www.txdemocrats.org/people/county-parties/ (last visited April 20, 2012).

The Training Requirement similarly curtails the ability of the Organizational Plaintiffs to perform their core functions. Counties responsible for holding VDR training sessions may elect to hold only the minimum of one training session per month. *See* Section 3.1, Letter from Keith Ingram (outlining the Secretary of State's guidelines for training of volunteer deputy registrars).

If this training session is inconvenient or is not properly publicized, voter organizations would be unable to enlist an adequate number of VDRs to serve at voter registration drives in the county. Because the Organizational Plaintiffs are highly dependent on VDRs, infrequent training sessions will disconnect those entities and the organizations they assist from their principal means of outreach in Texas. *See* Am. Compl. ¶ 54 (estimating the required number of VDRs to enlist 1,000 citizens to complete registration applications). As organizations sponsoring voter registration programs, the Organizational Plaintiffs have lost, and will continue to lose, the ability to conduct effective voter drives in the state of Texas. *See Cox*, 408 F.3d at 1353 (finding that voter registration organizations have standing to enforce the NVRA where state law affects their ability to perform core functions).

By reducing the number of canvassers that the Organizational Plaintiffs may call upon, Texas law reduces the quantum of core political speech encouraging voter registration. In *American Constitutional Law Foundation, Inc.*, the Supreme Court held unconstitutional the requirement that petition circulators be registered Colorado voters because it "limi[ts] the number of voices who will convey [the initiative proponents'] message and, consequently, cut[s] down the size of the audience [proponents] can reach." 525 U.S. at 194-95. The logic of *Buckley* applies equally to voter registration canvassers, whose ranks are cut down by the VDR restrictions, limiting the number of voices who may champion Plaintiffs' message of enfranchisement and democratic participation. Defendant Andrade argues that Plaintiffs' First Amendment claims concerning VDRs are unredressable because VDR status "is the only means in Texas by which a third party may handle and deliver the voter registration application of another." Def. Andrade Mot. to Dismiss 40; *see also id.* at 47. Therefore, if the court rules that the Appointment Requirement is unconstitutional, there will be no means in Texas for third

parties to conduct voter-registration drives. *Id.* But if the Texas Election Code unlawfully restricts speech and association when allowing for VDRs, the total prohibition of third-party voter registration would also be unconstitutional.

b. The Personal Delivery Requirement

Texas law also requires that VDRs personally return voter registration applications to the county registrar. Tex. Elec. Code § 13.042. Texas interprets this provision to mean that "anyone handling an application must be a volunteer registrar or registrar." *See* Letter from Ann McGeehan, Am. Compl. Ex. A, at 2. The Personal Delivery requirement significantly increases Plaintiffs' costs by banning the delivery of applications by mail or support staff, drawing time and resources away from voter registration speech. Voting rights organizations regularly hold registration drives at community gatherings where there is a strong likelihood of attendance by citizens from multiple surrounding counties. Am. Compl. ¶ 50. If a VDR accepts a single application in Dallas County from an El Paso resident, she must transport the application approximately 640 miles within five days or face criminal prosecution. Tex. Elec. Code § 13.043. By increasing cost per registration, maximizing inconvenience, and imposing the risk of criminal prosecution, the Personal Delivery Requirement decreases the number of potential voters that the Organizational Plaintiffs can reach and the number of canvassers willing to join the Organizational Plaintiffs, limiting amount of core political speech in favor of voter registration. It is difficult to imagine how this statute reasonably advances the state's proffered governmental interest, unless Texas suspects the United States Postal Service or commercial carriers of having a particular proclivity for voter fraud.

c. The Compensation Prohibition

Texas law makes it a crime for voting registration organizations to compensate employees based on the number of voter registrations the employee "successfully facilitates."

Tex. Elec. Code § 13.008(a)(1). It is also prohibited to condition payment or employment on a quota of registrations to be "facilitate[d]." *Id.* § 13.008(a)(2). Violators are subject to penalties of $4,000, a year in jail, or both. *See id.* §13.008(b); Tex. Penal Code § 12.21. This statute severely burdens speech and association by denying Plaintiffs the ability to manage their staff, criminalizing commonly accepted business practices such as performance evaluation, performance-based pay, and the requirement of performance as a condition of employment. The term "facilitates," under Defendant Andrade's construction, includes any activity where a person "assists or aids" another with a voter registration. Def. Andrade's Mot. to Dismiss 45-46. This construction of the Compensation Prohibition prevents the Organizational Plaintiffs from rewarding effective core political speech and association. By restricting the amount and effectiveness of money spent on voter registration campaigns, the Compensation Prohibition "necessarily 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*, 130 S. Ct. at 898 (internal quotation marks omitted) (quoting *Buckley v. Valeo,* 424 U.S. 1, 19 (1976)). In fact, the Supreme Court has held that a similar prohibition against paying petition circulators violates the First Amendment. *See Meyer,* 486 U.S. at 422-28.

d. The Identification Requirement

Texas law also requires that VDRs carry—and produce to the applicant upon request—a certificate of appointment stating the county in which the VDR is appointed, the person's name and address, and the terms of appointment. Tex. Elec. Code § 13.033. A canvasser in a statewide campaign would have to carry a binder containing 254 certificates of appointment during a registration event in order to ensure compliance with this law. This Identification Requirement also deters individuals from engaging in protected voter registration speech by requiring the canvasser to disclose her full name and home address upon request. *See Am.*

Constitutional Law Found., Inc., 525 U.S. at 200 (requirement that petition circulators wear personal identification badges violates First Amendment as it "discourages participation in the petition circulation process by forcing name identification without sufficient cause."). "The injury to speech is heightened . . . because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." *Id.* at 199. This requirement discourages participation in voter registration drives and imposes severe burdens reducing the total quantum of pro-registration speech.

3. The State cannot justify the law's burdens on speech in a motion to dismiss.

After examining the impact on speech interests, the court must analyze the state's justification for the law. If strict scrutiny applies, then the state must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898 (internal quotation omitted). If the *Anderson* test applies, then the court must weigh the injury to speech against the "precise interests put forward by the State as justifications for the burden imposed by its rule." 460 U.S. at 789. This standard is a "balancing approach" rather than a "'litmus test' that would neatly separate valid from invalid restrictions." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008).

Refashioning the refrain that the Organizational Plaintiffs have no speech interest in voter registration drives, Defendant Andrade asserts that the burden on speech is minimal (because, in her view, no speech is affected), and even if strict scrutiny were to apply, the laws are narrowly tailored to the state's interest in preventing voter fraud (again, because no speech is affected). Def. Andrade's Mot. to Dismiss 30-41. Although she frequently characterizes the Plaintiff's factual allegations as "conclusory," it is in fact Defendant Andrade who proffers naked factual assertions in an attempt to rebut factual allegations pleaded in the First Amended Complaint,

which at this stage of the proceedings must be presumed to be true. *Iqbal*, 556 U.S. at 678 (for purposes of a motion to dismiss, "a court must accept as true all of the allegations contained in a complaint"). Regardless of whether strict scrutiny or the *Anderson* test applies, the burden is on the Defendants to justify the law on the facts presented. *See Herrera*, 690 F. Supp. 2d at 1220 (denying defendant's motion to dismiss because the state cannot merely "assert that the burdens are minimal" or "that its interests in regulating third-party voter registration are important" in order to "defeat the Plaintiffs' claim at this stage in the litigation"). Therefore, Defendant Andrade's Motion to Dismiss should be denied.

B. Plaintiffs have stated a claim in Count IV of the Amended Complaint that the Compensation Provision of the Texas Election Code is overbroad and unconstitutionally vague.

The Compensation Prohibition set forth in § 13.008 of the Texas Election Code violates two additional, interrelated doctrines of the First and Fourteenth Amendments. *See* Am. Compl. ¶¶ 114-115 (Count IV). First, the overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612–15 (1973)). Second, under the vagueness doctrine, a statute may be found facially unconstitutional "because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* The vagueness doctrine requires that a statute give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Without "such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The standards of "permissible

statutory vagueness are strict in the area of free expression," and if the line between "permitted and prohibited activities" is ambiguous, the court should not "presume that the statute curtails constitutionally protected activity as little as possible."[10] *NAACP v. Button*, 371 U.S. 415, 432 (1963).

The Compensation Prohibition creates a criminal prohibition of alarming breadth, sweeping in a wide range of protected speech and expressive conduct. 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 would run afoul of this prohibition. *Id.* It is impermissible under the statute to require a canvasser to register a single voter in order to receive remuneration. *Id.* In fact, Defendant Andrade concedes that the statute criminalizes protected speech: She construes the word *facilitate* to mean "assist or aid," and *successfully facilitates* to mean "that one's assistance has resulted in a successful registration." Def. Andrade's Mot. to Dismiss 45-46. But only pages before, Defendant Andrade acknowledges the Organizational Plaintiffs' right to "canvass neighborhoods, strike up conversations, identify unregistered voters, encourage them to vote,

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[10] Defendant Andrade asserts that in order for the statute to be unconstitutionally vague, it must be "impermissibly vague in all its applications." Def. Andrade's Mot. to Dismiss 44 (quoting *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 551 (5th Cir. 2008)). To the contrary, where a vague statute provides for criminal sanctions or affects constitutional rights, the statute need not meet this standard. *See Kolender*, 461 U.S. at 358 n.8 (courts may invalidate a "criminal statute on its face even when it could conceivably have had some valid application."). Even assuming the vague-in-all-applications standard applies, Fifth Circuit precedent instructs that a law "is vague in all its applications where it subjects the exercise of [a] right . . . to an unascertainable standard, or if, in other words, men of common intelligence must necessarily guess at its meaning." *United States v. Clark*, 582 F.3d 607, 613 (5th Cir. 2009) (internal quotation marks and citations omitted).

provide them with stamped envelopes where needed, and walk them to a mailbox." *Id.* at 29. Under Defendant Andrade's own construction, compensation based on any of these constitutionally protected activities would run afoul of the Compensation Prohibition.

The Compensation Prohibition is also unconstitutionally vague: It provides no guidance to "provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008). It is unclear whether Plaintiff organizations 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. As another example, the statute calls into question the ability of a voter registration organization to terminate an ineffective manager, given that the termination would be in part due to the organization's failure to register voters.

The word "facilitate" also causes problems: Plaintiffs must guess whether they "facilitate" voter registration by handing out registration applications, accompanying voters to the post office, or answering questions about voter eligibility. Through its broad phrasing, the statute leaves it entirely in the discretion and prejudices of law enforcement and prosecutors to apply the statute to the conduct of their choosing. This fails to meet the exacting standard of clarity required where a law affects constitutional rights at the risk of criminal penalties. *See Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982); *Roark & Hardee LP*, 522 F.3d at 551 n.19 (courts apply "a very stringent vagueness test" when "dealing with a criminal ordinance that reache[s] a substantial amount of constitutionally protected conduct."). And as a strict liability crime, the statute has no *mens rea* requirement to mitigate the lack of notice to citizens attempting to conform to the laws requirement. For these reasons, "vagueness permeates the text of such a law, [and] it is subject to facial attack." *Morales*, 527 U.S. at 55. Defendant Andrade's

Motion to Dismiss for failure to state a claim must therefore be denied.

C. Plaintiffs have stated a claim in Count V of the Amended Complaint that the Completeness Requirement of the Texas Election Code is unconstitutionally vague.

Plaintiffs have also stated a claim that the Completeness Requirement in §§ 13.036 and 13.039 of the Texas Election Code is unconstitutionally vague. *See* Am. Compl. ¶¶ 114-115 (Count V). Under these provisions, registrars "may terminate" the appointment of a VDR because she "failed to adequately review" a voter registration application for "completeness." But without a definition of what constitutes an "adequate review" or "completeness," VDRs are left to wonder what they must do to avoid termination by the registrar. Moreover, the statute provides untethered discretion over whether or not to terminate VDR status. At a registrar's whim, a VDR may be terminated for a single incomplete voter registration application or absolved of a chronic history of incomplete applications. As such, the statute invites arbitrary, discriminatory, and balkanized enforcement among Texas's 254 registrars. Because registration as a VDR is the only means for a Texan to engage in voter registration activities, this statute burdens expressive conduct and the inextricably intertwined advocacy that attends voter registration, and a stringent test of vagueness applies. *Hoffman Estates*, 455 U.S. at 499 (if "the law interferes with the right of free speech or of association, a more stringent vagueness test should apply"). Defendant Andrade argues that this claim must be dismissed because the Organizational Plaintiffs do not allege a specific act of arbitrary, discriminatory, or inconsistent enforcement. Def. Andrade's Mot. to Dismiss 47. But this confuses the nature of a vagueness challenge, which inquires whether the *text* of a statute fails to provide adequate notice and allows for prejudicial enforcement by law enforcement. *See, e.g.*, *Morales*, 527 U.S. at 56-64 (examining the text of a statute to conclude that it is unconstitutionally vague). As such, Plaintiffs were under no requirement to plead specific instances of arbitrary enforcement. Given

the chilling effect on speech and associational rights, Plaintiffs have stated a claim that §§ 13.036 and 13.039 of the Texas Election Code are unconstitutionally vague.

IV. Counts VI-VIII, alleging violations of the Equal Protection Clause, Section 5 of the Voting Rights Act of 1965, and Tex. Elec. Code §§ 15.051-53, respectively, should proceed.

Senate Bill 14 requires voters to present photo identification at the polls before they may vote ("Photo ID Requirement"). Count VI of the Amended Complaint alleges a violation of the Equal Protection Clause because Galveston County voters have been singled out to obey this requirement, while all other counties in Texas remain free of that burden. Am. Compl. ¶¶ 116-122. In addition, the requirement violates the Equal Protection Clause because of its disproportionate impact on minority, poor, disabled, and elderly voters who cannot readily obtain or afford government-issued photo identification. *Id.* ¶ 121. Section 5 of the Voting Rights Act of 1965 also mandates that any state law related to voting be pre-cleared by the federal government before the state can enforce it. Count VII alleges that the voters in Galveston County are subject to the Photo ID Requirement even though Senate Bill 14 has not been pre-cleared. *Id.* ¶¶ 123-127. Finally, Tex. Elec. Code §§ 15.051-53 requires county registrars to send written notice to voters before removing them from the official list of registered voters. Count VIII alleges that Plaintiffs Richey and McFadden have been put on a suspension list without prior notice in violation of §§ 15.051-53. Am. Compl. ¶¶ 128-131.

Defendant Andrade offers no argument as to why these three counts should be dismissed for failure to state a claim, and therefore the claims must stand so long as the court determines, as argued above, that there is a justiciable case or controversy. To the extent that Defendant Johnson argues that she has not actually implemented or enforced the Photo ID Requirement in Galveston County nor placed Plaintiffs Richey and McFadden on a suspension list, *see* Def.

Johnson's Mot. to Dismiss 13, 15-16, those are factual questions that are not appropriate for resolution on a Rule 12(b)(6) motion to dismiss.

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April 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
Chad W. Dunn