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

VOTING FOR AMERICA, **PROJECT VOTE INC.,** **BRAD RICHEY**, and **PENELOPE MCFADDEN** Plaintiffs, v. **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' REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Voting for America and Project Vote, Inc. (the "Organizational Plaintiffs") respectfully submit this reply in support of their motion for a preliminary injunction. A preliminary injunction is necessary to vindicate the Organizational Plaintiffs' constitutional and statutory rights. With the national election looming, the necessity of injunctive relief at this stage of the litigation cannot be overstated. The Texas laws not only impose severe administrative burdens, but also criminal penalties that cause speakers not to speak and violate private conduct in a fundamental way. The Organizational Plaintiffs also anticipate that the upcoming evidentiary hearing on June 11 will allow the Court to hear first-hand the significant hardships that they and others are experiencing as a result of these laws.

ARGUMENT

I. The Organizational Plaintiffs' Claims Have a Substantial Likelihood of Success on the Merits

A. The Texas Voting Restrictions Are Unconstitutional Whether Under a Strict Scrutiny Analysis or the *Anderson v. Celebrezze* Framework

The content-based and viewpoint-discriminatory Texas laws at issue in this case should be subjected to a strict scrutiny analysis. By restricting advocacy and the facilitation of the registration process, the Texas laws impose severe burdens. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (finding that election regulations that impose "severe" burdens to speech or association are subject to strict scrutiny). Even if a balancing test is utilized, however, the Texas laws are unconstitutional.

If the election regulations are found not to be severe, the court will undergo the "balancing approach" articulated in *Anderson v. Celebrezze*. Under this fact-intensive standard, the "character and magnitude" of the injury to speech and association is compared against the "precise interests" put forward by the state in attempting to justify the law. *Anderson v.*

Celebrezze, 460 U.S. 780, 789 (1983).

The Defendants claim that they will be unable to hold accountable employers or their workers who commit voter fraud. But the Defendants have no evidence that this supposed fraud has ever occurred, or is likely to. Even if Defendants' speculative fears had any basis, other state laws already address concerns over voter fraud by imposing criminal penalties.

The Defendants mischaracterize the harm to the Organizational Plaintiffs as simply administrative burdens. However, the Defendants fail to realize that the very act of assisting people to register to vote is expressive conduct protected by the First Amendment and that furthers the purposes of the NVRA:

> The assertion that the challenged provisions implicate no constitutional rights is plainly wrong. The plaintiffs wish to speak, encouraging others to register to vote, and some of the challenged provisions…regulate pure speech. This is core First Amendment activity. Further, the plaintiffs wish to speak and act collectively with others, implicating the First Amendment right of association. More importantly, the plaintiffs wish to assist others with the process of registering and thus, in due course, voting. Voting is a right protected by several constitutional provisions; state election codes thus are subject to constitutional scrutiny. Together speech and voting are constitutional rights of special significance; they are the rights most protective of all others, joined in this respect by the ability to vindicate one's rights in a federal court.

League of Women Voters of Fla. v. Browning, No. 04:11-cv-00628-RH-CAS, slip op. at *4 (N.D. Fla. May 31, 2012) (rejecting restrictions on voter registration drives including a restriction that made use of mail to return applications practicably impossible).

During the upcoming hearing, Project Vote will present witnesses who will testify not only to severe administrative burdens, but also to criminal penalties that are preventing citizens from engaging in speech that they would otherwise engage in.

B. The Texas Election Code Restrictions Are Superseded by the NVRA

The Texas provisions in question frustrate the NVRA's goal of "streamlin[ing] the registration process for all applicants…" *Gonzalez v. Arizona*, No. 08-17115, 2012 WL

1293149, at *11 (9th Cir. Apr. 17, 2012) (en banc). Unlike a Supremacy Clause analysis, where courts deciding whether a state law is preempted must strive to maintain the delicate balance between the state and federal governments, under the Elections Clause courts generally construe Congress's authority expansively. *Id*. at *3. Thus, the Supremacy Clause "presumption against preemption" and "plain statement rule" does not apply here, in the Elections Clause context. *Id.* at *4. Thus, here the court does not "strain to reconcile a state's federal elections regulations with those of Congress, but consider[s] whether the state and federal procedures operate harmoniously when read together naturally." *Id*. at *8.

The Texas laws conflict with the goals and purposes of the NVRA. For example, requiring personal delivery of completed voter registration applications stands in stark contrast to the NVRA's requirement that states make the mail system an available means of delivery. *Charles H Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). (The NVRA "simply requires that valid registration forms delivered by mail and postmarked in time to be processed."). Indeed, a federal district court in Florida just last week struck down a 48-hour delivery requirement that effectively precluded use of the mail:

> The state has no legitimate interest, and claims none, in prohibiting a voter-registration organization from using the mails to send in voter-registration applications. The state's election officials routinely rely on the mails….[T]he burden that this statute and rule impose on a voter-registration organization's use of the mails, coupled with the absence of any legitimate state interest on the other side of the balance, probably renders these provisions unconstitutional.

League of Women Voters of Fla., No. 04:11-cv-00628-RH-CAS, slip op. at *12. In addition to finding that the requirement was probably unconstitutional, the court found that it violated the NVRA:

> The NVRA encourages voter-registration drives; the NVRA requires a state to accept voter- registration applications collected at such a drive and mailed in to a voter-registration office; the NVRA gives a voter-registration organization like each of the

> plaintiffs here a "legally protected interest" in seeing that this is done; and when a state adopts measures that have the practical effect of preventing an organization from conducting a drive, collecting applications, and mailing them in, the state violates the NVRA.

League of Women Voters of Fla., No. 04:11-cv-00628-RH-CAS, slip op. at *14 (citing *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005)).

Similarly, by hamstringing the core functions and mission of the Organizational Plaintiffs, the Training Requirement and the County Limitation are in conflict with the purpose of the NVRA. *See Cox*, 408 F.3d at 1354. Moreover, the Completeness Requirement, which imposes additional restrictions on the content and delivery of registration applications, directly conflicts with the NVRA's regulation of the "final content and method of delivery" of voter registration applications. *See Id*. at 1353; 42 U.S.C. § 1973gg-4, -6(a)(1).

Finally, regarding the Photocopying Prohibition, Defendants are correct that at this stage of the proceedings, see Pls.' Mot. for Prelim. Inj. at 6 n.3, Plaintiffs are not seeking records withheld by Harris County, as such a request is not consistent with preliminary relief. However, Plaintiffs are currently seeking that the Photocopying Prohibition, reflecting the States' interpretation of Tex. Elec. Code. 13.038 to prohibit copying of applications before they are submitted, be preliminarily enjoined as part of the burdensome scheme for at least the reasons stated in Pls.' Opp. to Defs'. Mot. to Dismiss at 12-26, Pls.' Mot. for Prelim. Inj. at 12, 16-20, as well as in the Declaration of Michael Slater ¶¶ 27-29, Exhibit A to Pls.' Mot. for Prelim. Inj. (discussing, among other things, harm to efforts to get out the vote among new registrants if Plaintiffs and organizations cannot photocopy applications before submission). To the extent that Plaintiffs inadvertently included a request with respect to copies of records in Harris County's possession in their motion for preliminary injunction, see Pls.' Mot. for Prelim. Inj. at 24, Plaintiffs clarify their request not to seek those records at this time.

C. The Organizational Plaintiffs Are Not Engaging in Any Governmental Function When They Simply Collect Applications and Turn Them Over to the State

The Defendants repeatedly mischaracterize the role that Project Vote and other entities play in voter registration. The Organizational Plaintiffs attempt only to assist potential voters. This function, however, is private. They are not registering voters or processing applications. Rather, the Organizational Plaintiffs are simply *collecting* applications and turning them into the state. Thus, they are not performing a governmental function. The court in *Cox II* dismissed a similar argument by stating that "[t]he Act does not dictate that only state actors may perform the simple function of assisting citizens with voter registration forms, and plaintiffs do not claim authority to receive such forms on behalf of the state." *Id.* at 1355. Indeed, "a private registration drive is not a mode of registration at all" but instead is a "method by which private parties may facilitate the use of the mode of registration…" *Id.* at 1353. Similarly, Defendants' assertion that if the court enjoins the statutes at issue, then only an "agent" of a voter may mail a completed application is incorrect. Defendants incorrectly assume a default system that may have existed prior to the NVRA, in which Texas prescribes all potential avenues for voter registration. But the NVRA changed the national default, with which Texas law must be harmonious: "And under the National Voting Rights Act, an organization has a federal right to conduct a voter-registration drive, collect voter-registration applications, and mail in the applications to a state voter-registration office." *League of Women Voters of Fla.*, No. 04:11-cv-00628-RH-CAS, slip op. at *2. Individuals and organizations in Texas do not need a Texas law such as the Appointment provision to specifically allow them to assist individuals to register to vote; the Constitution and the NVRA provide that right.[1]

[1] As further demonstration of the scheme's vagueness, Texas's statute is not even clear on its face that a member of the public who is not a VDR cannot assist applicants with

Texas has imposed a uniquely burdensome system that sets the state's laws apart from any registration requirements that have been permitted by courts. The statutory schemes in Pennsylvania and Ohio were not as onerous as in Texas. Defendant Andrade claims that Section 13.039 does not shift the burden of a government function, but instead provides a means for a volunteer to perform a governmental function. Def. Andrade's Mot. To Dismiss at 22. But by conscripting the Organizational Plaintiffs into a VDR scheme when they are simply *assisting* and not *registering* voters, the Defendants violate both the NVRA and the Organizational Plaintiffs' fundamental speech rights and association.

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

The Compensation Requirement is unconstitutionally overbroad because it criminalizes the payment of VDRs based on their engagement in protected speech activities. This requirement also is vague because it fails to "provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008).

Defendant Andrade has conceded that "[p]laintiffs are only prohibited from offering workers a fixed amount for each voter registration they facilitate or from refusing to pay workers unless they reach a certain quota." Def. Andrade's Resp. to Pls.' Mot. for Prelim. Inj. at 12. In an attempt to resolve this issue, the Organizational Plaintiffs have proposed a stipulation to the Defendants in which the parties would agree that § 13.008 does not criminalize or prohibit the use of performance evaluations by voter registration organizations, their employees or their

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applications and collect them, as long as that person does not "purport to act as a volunteer deputy registrar" when he is not one and does not want to act as one. See Tex. Elec. Code § 13.044. However, Texas has clearly interpreted the statute to require VDR appointment. *See* Pls. Hearing Exhibit 1; Def, Andrade's Mot. to Dismiss at 32.

agents, including terminations or wage decreases for poor productivity, or increased payment, incentives, or promotions for increased productivity. The Defendants are currently considering whether to agree to the stipulation.

Contrary to Defendants' assertions, the Completeness Requirement in §§ 13.036 and 13.039 of the Texas Election Code is unconstitutionally vague. Under these provisions, registrars "may terminate" the appointment of a VDR because she "failed to adequately review" a voter registration for "completeness." The Organizational Plaintiffs firmly believe that the state must accept all applications, even if they cannot take any positive actions based on the applications. Federal law—not state law—governs the terms of acceptance of voter registration forms. *See Cox*, 408 F.3d at 1353 (The NVRA regulates the "final content and method of delivery" of voter registration). The NVRA "only requires that valid registration forms delivered by mail and postmarked in time be processed." *Id.* at 1354. As an example of the statute's vagueness, Texas requires an applicant to provide a Drivers' License, State ID, or Social Security number if the voter has been assigned one, but according to the Texas VDR Guide, a VDR cannot require a voter to provide it. *Compare* Texas Voter Registration Form for Travis County, *available* at www.traviscountytax.org/pdfs/VOTERREGAPP.pdf ("Texas VR Form") *with* Texas Volunteer Deputy Registrar Guide at 4, (Pls.' Hearing Exhibit 6). Contrary to Defendants' claims, this requested information is not marked "optional" on Texas's voter registration form and it is therefore unclear whether the application is "complete," even when a VDR follows Texas's own guide. *Compare* Texas VR Form *with* Def. Andrade's Resp. to Pls.' Mot. for Prelim. Inj. at 13.

Surely, the Organizational Plaintiffs agree that applications should be complete because submitting incomplete applications that are not processed wastes valuable resources and could

harm the applicant. However, they do object to the state being able to unilaterally prevent a private citizen from accepting voter registration applications on the basis of an indeterminate number of completed applications, possibly one, especially when the term "complete" is ambiguous. As stated above, the Organizational Plaintiffs are not seeking to perform any governmental function such as registering voters or processing applications. They are simply assisting voters by collecting applications and turning them over to the state. *Id*. at 1355 (The NVRA "does not dictate that only state actors may perform the simple function of assisting citizens with voter registration forms…"). As the statute currently stands, any one of Texas's 254 registrars may engage in arbitrary and discriminatory enforcement that burdens expressive conduct and the inextricably intertwined advocacy that accompanies voter registration.

II. The Organizational Plaintiffs Will Suffer Irreparable Injury Under Texas's Burdensome Scheme if This Court Does Not Grant a Preliminary Injunction

The Organizational Plaintiffs have adequately shown that they will suffer irreparable injury. However, Defendant Andrade misses the point when she claims that the harms of the Texas statutes are "hardly insurmountable." Def. Andrade's Resp. to Pls.' Mot. for Prelim. Inj. at 14. Indeed, "there is a strong presumption of irreparable injury . . . when a case involves infringement on First Amendment rights." *Millennium Rests. Grp., Inc. v. City of Dall.*, 181 F. Supp. 2d 659, 667 (N.D. Tex. 2001) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Furthermore, the "loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) (citing *Elrod*, 347 U.S. at 373). Further, as noted by the court in *League of Women Voters v. Browning*, "denial of a right of this magnitude under circumstances like these almost always inflicts irreparable harm…because when a plaintiff loses an opportunity to register a voter, the opportunity is gone

forever." No. 04:11-cv-00628-RH-CAS, slip op. at *24.

Without an injunction, the barriers imposed by Defendants will continue to chill the Organizational Plaintiffs' First Amendment speech rights, violate their rights under the NVRA, and frustrate its purpose.

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

The harm to the Organizational Plaintiffs clearly outweighs any harm that an injunction may cause Defendants. In the absence of injunctive relief, the Organizational Plaintiffs will continue to lose their federally and constitutionally protected rights as Texas's voter registration laws continue to chill and restrict speech about voter registration. By contrast, Texas has no legitimate interest in enforcing unconstitutional statutes. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981) ("there is no significant state or public interest in curtailing" freedom of expression); *Humana Ins. Co. v. Leblanc,* 524 F. Supp. 2d 764, 777 (M.D. La. 2007) ("the State has no interest in enforcing an unconstitutional statute"). Interestingly, the Defendants are only able to express fears that are entirely speculative and already addressed by other Texas laws. As such, the ongoing violation of the Organizational Plaintiffs' constitutional rights, or the frustration of the organizations' attempts to fulfill the purposes of the NVRA, clearly outweigh the Defendants' speculative harms.

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

The Organizational Plaintiffs have shown that an injunction is in the public's interest. But the Defendants continue to express unfounded and unlikely fears that the Organizational Plaintiffs will disenfranchise the very voters that they seek to enroll. It is the desire of the

Organizational Plaintiffs not only to protect their constitutional rights, but also the constitutional rights of eligible citizens to vote. "The vindication of constitutional rights and the enforcement of a federal statute serve the public interest almost by definition. And allowing responsible organizations to conduct voter-registration drives—thus making it easier for citizens to register and vote—promotes democracy." *League of Women Voters of Fla.*, No. 04:11-cv-00628-RH-CAS, slip op. at *24; *see also Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)) ("[I]t is always in the public interest to protect constitutional rights.").

V. Defendant Johnson is a Proper Party to Enjoin in this Case

Defendant Johnson's claims that she is not a proper party to enjoin in this case are without merit. Due to Defendant Johnson's independent enforcement authority at the local level, she has discretion to enforce the voting regulations. As the local registrar, Defendant Johnson performs numerous functions related to registration and voting. Indeed, she has been the official in Galveston County who has been interacting with voters and enforcing the regulations at issue.[2] Thus, it is proper to enjoin the conduct of Defendant Johnson.

CONCLUSION

For the foregoing reasons, and the reasons stated in their Motion for Preliminary Injunction, as well as in their Opposition to Defendants' Motion to Dismiss, Organizational Plaintiffs request that this Court enter a preliminary injunction enjoining Defendants from enforcing Tex. Elec. Code §§ 13.008, 13.031, 13.033, 13.036, 13.038, 13.039, and 13.042.

DATED this 4th day of June, 2012.

[2] The very fact that Defendant Johnson—whose official title is the Galveston County Tax Assessor—is at all responsible for voter registration is a vestige of the time when Texas charged a poll tax. *See* Acts 1951, 52nd Leg., p. 1114-1118, ch. 492, § 41-50 (charging the County Assessor and Collector of Taxes with administration of the poll tax).

Respectfully Submitted,

/s/ Chad W. Dunn

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/ Chad W. Dunn
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