No. 12-40914

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VOTING FOR AMERICA, PROJECT VOTE, INC., BRAD RICHEY,
and PENELOPE MCFADDEN,
Plaintiffs-Appellees,

v.

HOPE ANDRADE, Texas Secretary of State, in her official capacity,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Galveston Division
Case No. 3:12-cv-44

BRIEF OF AMICI CURIAE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, LEAGUE OF WOMEN VOTERS, AND ROCK THE VOTE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF JUDGMENT BELOW

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Robert A. Atkins
Farrah R. Berse
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. 212-373-3000
Fax 212-757-3990

Alex Young K. Oh*
2001 K Street, NW
Washington, DC 20006-1047
Tel. 202-223-7300
Fax 202-223-7420

BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW
Diana Kasdan
Ian Vandewalker
161 Avenue of the Americas, 12th Floor
New York, New York 10013-1205
Tel. 646-292-8310
Fax 212-463-7308

* Admission pending

CERTIFICATE OF INTERESTED PARTIES

Voting for America, et al.* v. *Andrade

No. 12-40914

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

- **Voting for America**, Plaintiff;
- **Project Vote, Inc.**, Plaintiff;
- **Brad Richey**, Plaintiff;
- **Penelope McFadden**, Plaintiff;
- **Brian Mellor**, Project Vote, Inc., Counsel for Plaintiff Voting for America;
- **Michelle Kantor Cohen**, Project Vote, Inc., Counsel for Plaintiffs Voting for American and Project Vote, Inc.;
- **Douglass Hallward-Driemeier, Ryan M. Malone, David C. Peet**, Ropes & Gray LLP, Counsel for Plaintiffs Voting for American and Project Vote, Inc.;
- **Chad W. Dunn**, Brazil & Dunn, L.L.P., Counsel for Plaintiffs;
- **Hope Andrade**, Defendant;
- **Cheryl E. Johnson**, Defendant;
- **Donald S. Glywasky**, Galveston County, Counsel for Defendant Cheryl Johnson;
- **Jonathan F. Mitchell, Arthur C. D'Andrea, Douglas D. Geyser, J. Reed Clay, Jr.**, Office of the Attorney General, Counsel for Defendant Hope Andrade;
- **State of Texas**, Defendant-Intervenor;
- **Tax Assessors-Collectors and Election Administrators for all 254 Texas Counties;**
- **Eagle Forum Education & Legal Defense Fund**, Amicus Curiae;
- **Lawrence J. Joseph**, Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund;

- **Brennan Center for Justice at New York University School of Law,** Amicus Curiae;
- **League of Women Voters,** Amicus Curiae;
- **Rock the Vote,** Amicus Curiae;
- **Robert A. Atkins, Alex Young K. Oh, Farrah R. Berse, Paul, Weiss, Rifkind, Wharton & Garrison LLP**, Counsel for Amici Curiae Brennan Center for Justice at New York University School of Law, League of Women Voters, and Rock the Vote; and
- **Diana Kasdan, Ian Vandewalker,** Brennan Center for Justice at New York University School of Law, Counsel for Amici Curiae Brennan Center for Justice at New York University School of Law, League of Women Voters, and Rock the Vote.

/s/ Farrah R. Berse
Farrah R. Berse
New York Bar Registration Number 4129706
fberse@paulweiss.com
Paul, Weiss, Rifkind, Wharton and Garrison LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. 212-373-3000
Fax 212-757-3990

Counsel for Amici Curiae Brennan Center of Justice at New York University School of Law, League of Women Voters, and Rock the Vote

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Brennan Center for Justice at New York University School of Law ("the Brennan Center"), the League of Women Voters, and Rock the Vote respectfully submit this brief as *amici curiae* pursuant to Federal Rule of Appellate Procedure 29 in support of Plaintiffs-Appellees and urging affirmance.[1, 2]

AMICI AND THEIR INTEREST IN THIS CASE

The Brennan Center is a nonpartisan public policy and law institute that focuses on issues of democracy and justice.[3] The Brennan Center combines scholarship, legislative and legal advocacy, and communications to advocate meaningful change in the public sector and to protect the rights of all Americans to participate in electoral politics. In advancing this mission, the Brennan Center has developed significant experience and expertise in policy matters and litigation pertaining to voter registration and state regulation of voter registration drives throughout the country. Specifically, the Brennan Center issued one of the first comprehensive reports examining state restrictions on voter registration drives and has served as counsel in successful legal challenges to restrictions that

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1 *Amici curiae* received consent from all parties to file this brief.

2 Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that this brief was authored by counsel for *amici* in its entirety; no counsel for a party authored this brief in any respect; no party or a party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

3 This brief does not purport to convey the position of New York University School of Law.

unconstitutionally burden the First Amendment rights of groups conducting voter registration drives.

The League of Women Voters is a nonpartisan, not-for-profit, community-based national organization that promotes political responsibility by encouraging the informed and active participation of all Americans in government and the electoral process. Founded in 1920 as an outgrowth of the efforts to obtain voting rights for women, the League now has more than 140,000 members and supporters, and operates through nearly 800 state and local chapters in all 50 states and the District of Columbia, including 29 chapters in Texas. In performing its mission of promoting civic engagement, the League assists citizens in Texas and across the country in registering to vote and influences public policy through education and advocacy. As one of the nation's largest and oldest voter registration groups, the League of Women Voters and its volunteers help hundreds of thousands of citizens register or update their registration each election year. The League of Women Voters focuses on reaching underrepresented groups such as young voters, minorities, and first-time voters. Community voter registration drives at which volunteers collect and submit completed voter registration forms are central to promoting the League's mission.

Rock the Vote is a national, nonpartisan, not-for-profit organization with a fundamental mission of engaging and building political power for young people in

our country by increasing voter registration rates and voter turnout among younger voters. Rock the Vote began its first field campaign to encourage young Americans to vote in 1992. Since that time, it has helped more than five million people register to vote. Rock the Vote's core activities include conducting in-person voter registration drives in Texas and throughout the country, at which volunteers assist prospective voters with completing application forms, collect those forms, and submit them to elections officials.

SUMMARY OF ARGUMENT

Texas's restrictions on voter registration, *which are among the most severe in the country*, unconstitutionally and unjustifiably burden the core First Amendment rights of groups like the League of Women Voters and Rock the Vote, who encourage civic engagement by conducting voter registration drives. Voter registration drives implicate core political speech and association rights protected by the First Amendment. Individuals with shared beliefs come together at such drives to convey to others the value and importance of political participation, and to persuade fellow citizens to become registered voters. These activities are essential to promoting democracy—both by assisting and encouraging individuals to register and vote, and by fostering the very type of political speech and association that sustains our democracy.

The physical collection and submission of voter registration forms cannot be separated artificially from other aspects of a voter registration drive to evade First Amendment scrutiny. To the contrary, both practical experience and constitutional law instruct that collection and submission of voter registration forms are integral components intertwined with all other aspects of constitutionally protected voter registration drives. By collecting and submitting a voter registration form, a group makes it far more likely that the potential voter will actually be registered. In addition, the group would have a meaningful measure of the change it is effectuating in its community. This tangible accomplishment further encourages volunteers to get involved with the group, allowing the group to expand the reach of its message and its associational activities. If the group were permitted only to distribute, but not collect or submit, voter registration forms, the group would have no way of evaluating the success of its activities, which likely would lead to fewer resources being dedicated to voter registration drives, and the quantum of speech and association inherent in such drives would be diminished.

Moreover, the acts of collecting and submitting a form are themselves expressive. They convey to a potential voter that his or her voice is important enough to the political process that the volunteer is willing to expend the time and effort necessary to safely deliver the completed application. This concept is essential to the message that groups like the League of Women Voters and Rock

the Vote seek to communicate. Defendant's attempt to isolate the collection and submission components from the other aspects of voter registration drives is unsupported, artificial, and intended solely to avoid First Amendment scrutiny.

Texas's uniquely onerous web of restrictions on voter registration activity—which are far more severe than any other state's—requires close scrutiny by this Court. Because Texas has not demonstrated that its restrictions on First Amendment rights are appropriately tailored and are necessary to any specific and weighty government interest, the district court's preliminary injunction order should be upheld.

Texas's prohibition on using the mail to submit forms collected at registration drives also violates, and is preempted by, the National Voter Registration Act (the "NVRA"), which is intended to increase voter registration and expand opportunities for citizens to become involved in the electoral process.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS VOTER REGISTRATION DRIVES.

A. Voter Registration Drives Implicate Core Political Speech and Association Rights.

Groups like the League of Women Voters and Rock the Vote exercise core political speech and associational rights when they conduct local voter registration drives as part of their mission to encourage and help other citizens register to vote. These events nurture discussions about issues and candidates on the ballot,

encourage group volunteerism and organizing, and provide opportunities for these groups to inform and amplify the political power of other citizens. They are opportunities for people with common values and shared beliefs to associate with one another and to share those values and beliefs with other citizens. Indeed, "allowing responsible organizations to conduct voter-registration drives . . . promotes democracy." *League of Women Voters of Fla.* v. *Detzner*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("*LWVF III*").

An unbroken chain of cases from across the country holds that voter registration drives—which involve both expression and association—are at the very core of the First Amendment's protections. *See, e.g.*, *Preminger* v. *Peake*, 552 F.3d 757, 765 (9th Cir. 2008) ("The parties do not dispute that voter registration is speech protected by the First Amendment."); *LWVF III*, 863 F. Supp. 2d at 1158 ("The plaintiffs wish to speak, encouraging others to register to vote . . . . This is core First Amendment activity. Further, the plaintiffs wish to speak and act collectively with others, implicating the First Amendment right of association."); *League of Women Voters of Fla.* v. *Browning*, 575 F. Supp. 2d 1298, 1322 (S.D. Fla. 2008) ("*LWVF II*") ("Plaintiffs' interactions with prospective voters in connection with their solicitation of voter registration applications constitutes constitutionally protected activity"); *Ass'n of Cmty. Orgs. for Reform Now* v. *Cox*, No. 1:06-CV-1891-JTC, 2006 WL 6866680, at *7 (N.D. Ga. 2006)

(recognizing voter registration drives deserve "the traditional protection of participation in the political process required by the Constitution") (internal citation omitted). This is, in part, because through their registration drives, voter registration groups "persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared political, economic, and social positions." *League of Women Voters of Fla.* v. *Cobb*, 447 F. Supp. 2d 1314, 1333 (S.D. Fla. 2006) ("*LWVF I*").

The interactive nature of these activities "is obvious: they convey the message that participation in the political process through voting is important to a democratic society." *Project Vote* v. *Blackwell*, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006). The right to engage in these activities is thus "clearly protected by the First Amendment." *Id.*[4]

[4] Voter registration drives are akin to petition circulation, which enjoys First Amendment protection. Like petition circulation, asking someone to register to vote is far from a "fleeting encounter"—volunteers must persuade potential registrants of the merits of voting and civic engagement. *See Buckley* v. *Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999); *Meyer* v. *Grant* , 486 U.S. 414, 422-23 (1988). Like petition circulation, voter registration drives inevitably involve "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 422 (footnote omitted).

B. The First Amendment Protects Voter Registration Drives in their Entirety—Including the Collection and Submission of Completed Applications.

In an attempt to avoid First Amendment scrutiny, Defendant takes an artificially narrow view of expressive conduct (and thus what is constitutionally protected). In doing so, Defendant ignores the symbolic and associational components of voter registration drives—including the collection and submission of forms.

Courts have refused to compartmentalize political activity into ministerial and pure speech or expressive components. Indeed, the Supreme Court has held repeatedly that solicitation and collection that are conducted contemporaneously with political activity, are protected activities. *See, e.g.*, *Buckley*, 525 U.S. at 191-92, 204-05 (all aspects of initiative petition circulation—including solicitation, collection, and submission of initiative signatures—are protected under the First Amendment); *Meyer*, 486 U.S. at 421-22, 426 (rejecting Colorado's argument that its regulation only impacted the ministerial aspects of petition circulation—the verification of signatures—and had no impact on the First amendment); *Vill. of Schaumberg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (rejecting defendant's attempt to separate plaintiff's solicitation of financial contributions from the accompanying speech, noting that "solicitation is characteristically intertwined with informative and perhaps persuasive speech"). *See also Nat'l*

Fed'n of the Blind of Tex., Inc. v. *Abbot,* 647 F.3d 202, 212-13 (5th Cir. 2011) (explaining speech interests implicated by charities' use of bins to collect donations of clothing and household items); *Bernbeck* v. *Moore*, 126 F.3d 1114, 1115 (8th Cir. 1997) ("We reject the Secretary of State's attempt to distinguish *Meyer* with the argument that registered-voter requirements does not regulate 'political speech,' but rather the 'process' of conducting an initiative election, thereby raising no First Amendment concerns."). Accordingly, Defendant's argument that collecting and delivering forms "do[es] not qualify as 'speech' or 'expressive conduct' of any sort," Appellant's Brief ("App. Br.") at 7, should be rejected. These activities are no less integral to the expressive and associational purpose of voter registration drives than are the solicitation of donations for charity, or collection of petitions to promote ballot initiatives—which have been deemed protected First Amendment activities.

Separating the collection and submission of voter registration forms from the rest of the process ignores the fundamental nature of voter registration drives. As detailed below, collection and submission are central to the concept of voter registration drives and are necessary for groups like the League of Women Voters and Rock the Vote to convey their core belief in the benefits of political participation. In the context of a voter registration drive, these activities are, themselves, expressive conduct.

1. Collection is an Integral Component of Registration Drives and is Essential to the Ability of Organizations Effectively to Associate with Volunteers and Potential Voters.

The collection of voter registration forms is a critical component of voter registration drives. Collecting and submitting applications from eligible voters allows groups like the League of Women Voters and Rock the Vote to better achieve their core mission by decreasing the transaction cost of registering to vote, and minimizing the risk that the potential voter will not complete or return the registration form. The voter registration groups' ability not only to encourage, but to successfully assist, individuals to register to vote is particularly important in areas where individuals are not otherwise likely to register to vote.[5] To take just one example, among the millions missing from voter rolls, a disproportionate share are persons of color.[6] Yet, these persons of color are nearly twice as likely to register through third-party registration drives as white voters.[7]

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[5] *See. e.g.*, Bruce E. Cain and Ken McCue, *The Efficacy of Registration Drives*, 47 J. Pol. 1221 (1985); Sidney Verba, Kay Lehman Schlosman & Henry Brady, *Voice and Inequality: Civil Volunteerism in American Politics* (1995); Jan E. Leighley, *Strength in Numbers? The Political Mobilization of Racial and Ethnic Minorities* 35-36 (2001).

[6] As of 2010, Census data shows that 37 percent of eligible Blacks and 48 percent of eligible Hispanics are not registered to vote. In comparison, roughly 25 percent of all voting-age Americans are not registered. Diana Kasdan, Brennan Ctr. for Justice, *State Registrations on Voter Registration Drives*, 2 and n.3 (2012) (the "Brennan Center Report"), *available at* http://brennan.3cdn.net/2665c26afbdd9a4bce_inm6blqw1.pdf.

[7] *Id*. at 3 and n.21; *see also* Wendy R. Weiser & Lawrence Norden, Brennan Ctr. for Justice, *Voting Law Changes in 2012*, 20 (2011), *available at* http://brennan.3cdn.net/92635ddafbc09e8d88_i3m6bjdeh.pdf.

Moreover, collection and submission of forms enables third-party groups to see the fruits of their efforts. A completed form is a measurable, essential accomplishment for both volunteers and potential voters. Without this, volunteers have no tangible way of knowing whether their message and efforts have been successful. If voter registration organizations cannot collect and submit completed forms, they will have no way of measuring the impact of their efforts. Nor will they be able to monitor and control the quality of their registration drives. [8]

If groups cannot offer to collect and submit voter registration forms, the interest and incentive for organizing, and participating in, drives declines substantially. In-person voter registration and mobilization drives are very costly and require substantial time and organizational capacity, particularly for groups like the League of Women Voters and Rock the Vote, which are not-for-profit organizations. *See* Lisa Garcia Bedolla & Melissa R. Michelson, *Mobilizing Inclusion: Transforming the Electorate through "Get-Out-the-Vote Campaigns*" 25-26 (2012) ("*Mobilizing Inclusion*"). Without the ability to track whether their efforts lead to actual registrations, organizations may decide that these drives are not a good use of the significant resources that they require and may divert their

[8] It is commonly recognized among experts who study the operation and impact of voter registration drives that measurable outcomes are critical to the sustainability of drives. *See, e.g.*, Decl. of Lisa Garcia Bedolla ¶¶ 13, 18-19, *League of Women Voters of Fla.* v. *Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. Feb. 14, 2012) (No. 4:11-CV-00628-RH-WCS), ECF No. 44-7, *available at* http://brennan.3cdn.net/336b484681def70b38_gqm6b44fw.pdf.

limited resources elsewhere. *See* Donald P. Green & Alan S. Gerber, *Get Out the Vote: How to Increase Voter Turnout* (2d ed. 2008).

For potential voters, registering to vote is a step towards greater participation in the political process. People who have taken a concrete step in the voting process are much more likely to vote, and to make it a habit to vote. *See Mobilizing Inclusion*, at 173-90; Donald P. Green & Ron R. Schachar, *Habit Formation and Political Behaviour: Evidence of Consuetude in Voter Turnout*, 30 Brit. J. Pol. Sci. 561 (2000). Collection of registration forms by groups like the League of Women Voters and Rock the Vote greatly facilitates this first step.

Potential voters recognize and appreciate these groups' commitment to their vote precisely because the groups take responsibility for voters' registration applications. Eliminating collection would weaken the bond between groups and the communities they serve. This bond is particularly important in the communities that have the lowest registration rates, whose members are more likely to become engaged in political speech and the political process with the help of these organizations. *See* Robert D. Brown, *Voter Registration Turnout, Representation and Reform*, *in The Oxford Handbook of American Elections and Political Behavior* 162, 174-76 (Jan E. Leighley ed., 2010).

2. Collection and Submission of Voter Registration Forms Are Expressive Activities.

The message that registering to vote is important is communicated not only through words but also through the collection and submission of applications. Collecting a form sends a very powerful message to the applicant that his or her political voice is important and that the volunteer is willing to take the time and resources necessary to add that individual voter's voice to the political process. Collection and submission are not merely administrative; these acts express views and are vital to the constitutionally protected message expressed by voter registration organizations. *See Nat'l Fed'n of the Blind of Tex., Inc.*, 647 F.3d at 213 (charitable solicitation is more than a "mere proposal of a commercial transaction" but is "characteristically intertwined with informative and perhaps persuasive speech") (internal quotation marks omitted) (quoting *Vill. of Schaumburg*, 444 U.S. at 632). Collection simply cannot be cut out of the process without altering the message that voter registration groups aim to convey. *See LWVF I*, 447 F. Supp. 2d at 1334 ("the collection and submission of voter registration drives is intertwined with speech and association").

Despite the fact that voter registration drives plainly encourage political participation, Defendant argues that collection and submission of applications during drives is not protected because it is not an "utterance of a written or spoken word," and the act of possessing someone else's form does not communicate a

message to onlookers. App. Br. at 11-12. That view misapprehends the inherently expressive nature of collection embodied in the interaction between the volunteer and the prospective voter herself. The point is not that by taking a prospective voter's form, the volunteer communicates a message to onlookers. Rather, the point is that by collecting a prospective voter's form, the volunteer is expressing to that prospective voter that her vote is important enough to the political process that the volunteer is willing to expend the time and resources necessary to ensure personally that the application safely reaches its destination. And this is a promise that voter registration groups like the League of Women Voters and Rock the Vote take seriously. These groups expend considerable time and resources to ensure that all collected forms are completed by the voter and timely submitted to election officials.

The cases cited by Defendant do not suggest that the collection component should be evaluated in isolation from the rest of the voter registration activity. The *LWVF II* court analyzed the entirety of the challenged laws under the *Anderson* balancing test—a test of intermediate scrutiny applied to state election laws that burden protected speech and conduct. 575 F. Supp. 2d at 1319 ("[F]or purposes of the present analysis, the Court accepts the characterization of the Amended law as an election regulation and evaluates it under the *Anderson* standard."). And, Defendant's suggestion that the Texas volunteer deputy registrar ("VDR") system

is no more onerous than the Florida law upheld in *LWVF II*, is also wrong. Under the Florida statute, *anyone*—not only Florida residents—could collect applications, persons conducting private drives did not have to be officially trained and deputized—let alone in each county—before they could collect forms, and pre-registration of drives with the State was not enforced by threat of criminal penalty.[9]

By contrast, Florida's first set of restrictions on voter registration efforts—enacted in 2005 and struck down in 2006 in a decision ignored by Defendant—was more like the Texas law in that it imposed severe penalties for noncompliance with rules governing the collection and submission of voter registration forms. In reviewing that earlier law, a district court held that a ten-day deadline punishable by substantial fines for which plaintiffs and their members could be held jointly and severally liable created an unconstitutional chilling effect on protected activities, which, in turn, "reduced the total quantum of speech" in Florida. *See LWVF I*, 447 F. Supp. 2d at 1322-23.[10]

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[9] The scheme mandated a ten-day delivery deadline for completed forms to be submitted to election officials; its pre-registration and quarterly reporting provisions were optional. *See LWVF II*, 575 F. Supp. 2d at 1304, 1322. The ten-day return requirement was upheld, but only after the district court found that such a provision did not "place any direct restrictions or preconditions" on First Amendment activity. *Id.* at 1322. Also, in reaching this conclusion, the court nonetheless recognized that "it is certainly still possible that the indirect restrictions imposed by this type of regulation may be so significant that the law will have the effect of placing a severe burden on Plaintiffs' protected speech." *Id*.

[10] Likewise, Defendant fails to address the most recent decision striking down much of Florida's third attempt to restrict voter registration drives. *See LWVF III*, 863 F. Supp. 2d 1155. Because this latest set of restrictions was so complex and difficult to comply with, and exposed groups to unforgiving penalties, many voter registration groups ceased conducting

Defendant also misreads *Herrera* and *Blackwell*. The court in *Herrera* also applied *Anderson* to New Mexico's requirement that completed registration forms be submitted within 48 hours. *See Am. Ass'n of People with Disabilities* v. *Herrera*, 690 F. Supp. 2d 1183, 1214 (D. N.M. 2010). And Defendant's claim that *Blackwell* did not analyze whether the discrete acts of collecting completed voter registration applications are protected by the Speech Clause is incorrect. App. Br. at 16-17. To the contrary, *Blackwell* applied First Amendment protections to these activities in enjoining Ohio's requirement that anyone who received a voter registration card from another person must personally return the card. 455 F. Supp. 2d at 702. The court found that this personal return requirement imposed "an extreme burden on the First Amendment rights of those who participate in voter registration drives without serving any legitimate state purpose." *Id.* at 706.

Ultimately, the assertion that groups like the League of Women Voters and Rock the Vote can adequately express their organizational messages by merely handing out blank registration forms, or by leaving applicants to finish the registration process themselves, miscomprehends the nature of political expression engaged in by these groups and others like them.

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drives for the entire time the law was in effect. *See id.* at 1167 (noting plaintiffs' loss of opportunities to register voters due to law's restrictive provisions). As in *LWVF I*, the impact of these harsh restrictions, and the court's analysis of the severe burden they imposed on drives, is analogous and instructive to consideration of the Texas law.

II. TEXAS'S RESTRICTIONS ON VOTER REGISTRATION DRIVES VIOLATE THE FIRST AMENDMENT.

A. Texas's Restriction of Core First Amendment Activity Warrants Close Constitutional Scrutiny.

Under controlling Supreme Court precedent, when state restrictions on elections implicate the First Amendment, they are evaluated under the sliding-scale test first articulated in *Anderson* v. *Celebrezze,* 460 U.S. 780, 788-90 (1983), and reaffirmed in *Crawford* v. *Marion County Election Board*, 553 U.S. 181, 190 (2008). Indeed, "*[e]very* court that has addressed a constitutional challenge to provisions regulating voter-registration drives has concluded that the governing standards are those set out in *Anderson*." *LWVF III*, 863 F. Supp. 2d at 1159 (emphasis added).

Anderson requires a reviewing court to first determine the "character and magnitude of the asserted injury" and then to evaluate the State's "precise interests" before "consider[ing] the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. As the severity of the burden increases, the level of scrutiny rises. Here, because of the severity of Texas's scheme of restrictions, *Anderson*'s sliding-scale requires the State to put forth a "narrowly drawn state interest of compelling importance." *Crawford*, 553 U.S. at 190. Texas's harsh and punitive regulatory scheme—*which is among the most severe in the nation*—cannot stand unless the Court, after close consideration of the specific burdens imposed, concludes

that the State has met its high burden of justifying the relationship between the burdens imposed and important state interests.

B. Texas's Law Constitutes One of the Most Severe and Unnecessarily Burdensome Restrictions on Voter Registration Drives in the Country and is Not Sufficiently Tailored to Legitimate State Interests.

Texas's law—when reviewed as a whole, as it must be[11]—imposes acute constitutional harm. Each of the VDR restrictions standing alone tends to decrease the abilities and opportunities of private voter registration groups to engage citizens in the political process and persuade them to vote. But when viewed in the aggregate, this statute clearly frustrates the primary purpose of voter registration drives and imposes impermissibly severe burdens on core First Amendment rights.[12] *See* above at Section I.A.

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[11] "In reading a statute, [the Court] must not look merely to a particular clause, but consider [each clause] in connection with . . . the whole statute." *Dada* v. *Mukasey*, 554 U.S. 1, 16 (2008) (citation and internal quotation marks omitted).

[12] But even standing alone, the type of restrictions Texas imposes—such as training and registration prior to engaging in expressive activities, burdensome administrative requirements, and formalization of relationships with members and volunteers, all under pain of civil and criminal penalties—are of the type that the Supreme Court has consistently recognized as creating First Amendment injury in analogous contexts. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y.* v. *Vill. of Stratton*, 536 U.S. 150, 167-68 (2002) (holding that a requirement for permission *before* engaging in protected speech activity constitutes burden on speech); *Fed. Election Comm'n* v. *Mass. Citizens for Life*, 479 U.S. 238, 254 (1986) (striking down complex requirements that "create a disincentive for . . . organizations to engage in political speech"); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622-623 (1984) (finding law that "interfere[d] with the internal organization or affairs of . . . group[s]" engaged in "various protected activities" impinged on associational freedoms); *Brandenburg* v. *Ohio*, 395 U.S. 444, 449 (1969) (invalidating law that "forbid[s], on pain of criminal punishment, assembly with others merely to advocate").

The statute makes assisting others in registering to vote a prohibitively cumbersome activity and one subject to severe financial and criminal penalties. For instance, the statute permits only persons who are appointed and trained VDRs to collect voter registration applications. Tex. Elec. Code §13.031. Only Texas residents are permitted to be VDRs—which vastly reduces the pool of potential volunteers—even though the State has put forth *no* evidence that out-of-state citizens are any more likely to engage in voter registration fraud. *See* Tex. Elec. Code §13.031(d)(3); 11.002(a)(5).[13] And the State limits the pool even further, allowing VDRs to collect voter registration applications only from citizens who reside in the same county in which the VDR was appointed. *See* Tex. Elec. Code §13.038. This creates an insurmountable administrative burden in Texas, which contains 254 counties and would require VDRs to be appointed in every county. Indeed, Texas has the *only* mandatory VDR system that requires county-by-county

[13] Courts have routinely found the assertion that non-residents are more likely to commit fraud to be without support. *See, e.g.*, *Nadar* v. *Brewer*, 531 F.3d 1028, 1037 (9th Cir. 2008) (finding the absence of evidence that "its history of fraud was related to non-resident circulators" determinative); *Daien* v. *Ysursa*, 711 F. Supp. 2d 1215, 1235 (D. Idaho 2010) (stating that "there is no evidence in the record nor is there any common sense argument that Idaho residents are less likely to commit voter fraud than out-of-state residents."); *Term Limits Leadership Council, Inc.* v. *Clark*, 984 F. Supp. 470, 475 (S.D. Miss. 1997) (concluding that the State failed to prove that non-resident circulators were more likely to commit fraud).

registration. *See* Brennan Center Report, at 5.[14] *See also id.* at 13-53 (summarizing restrictions on voter registration drives on a state-by-state basis).

The law also requires that VDRs *hand*-deliver completed voter registration applications to the State within a short 5-day window from collection of the application. *See* Tex. Elec. Code §13.042. The State may impose criminal penalties if the VDR submits the voter registration application by mail. Tex. Elec. Code §13.043. Without the option of mail delivery, the already short five-day window becomes even more burdensome—particularly for any group trying to conduct large scale drives in multiple counties.

The severity of the burden imposed by this web of restrictions becomes even more obvious when compared to restrictions imposed by other states that undoubtedly share the same goals of preventing fraud. *See Voting for America, Inc.* v. *Andrade*, No. G-12-44, 2012 WL 3155566, at *6 (S.D. Tex. Aug. 2, 2012) ("[T]he Texas regime is restrictive—and uniquely so."). A recent report by the GAO compares states' restrictions governing third-party voter registration organizations and reflects clearly that Texas's restrictions far surpass those enacted

[14] In August 2012, *amicus* the Brennan Center reviewed each state's election laws and regulations and conducted a comparative analysis of all laws reviewed, as well as compiled a summary of each state's key laws and regulations. The findings of the Brennan Center are consistent with those found in a recently released report by the Government Accountability Office ("GAO Report") and reflect that Texas's restrictions are among the—if not the—most severe in the nation.

in other states.[15] *See* GAO Report, at 29-30 tabl.7;[16] *see also* Brennan Center Report, at 2, 4-6, 46-47.

Texas is one of only 13 states that still applies its official volunteer, or deputy registrar, system to private voter registration drives. *See* Brennan Center Report, at 5. And, it is the *only* state to make it a criminal offense to conduct a voter registration drive without prior deputization. GAO Report, at 29; *see also* Brennan Center Report, at 5, 46. Moreover, Texas's five-day deadline for submitting registration forms, *in person,* is one of the most restrictive rules in the nation. GAO Report, at 32 fig.4; *cf.* Brennan Center Report, at 6-7. Twenty-eight states impose *no* deadline prior to the close of registration to submit registration forms collected at drives. Brennan Center Report, at 7. Of the majority of the remaining twenty-two states that, like Texas, require groups to return collected voter registration applications before the close of registration, most allow ten days

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[15] Two states that allow Election Day Registration, New Hampshire and Wyoming, do not permit third-parties to collect voter registration applications and one state, North Dakota, does not have a voter registration requirement. Whether states must, under the First Amendment, allow third parties to collect voter registration applications is not at issue here. There is no question that if a state does in fact have a voter registration system allowing third-party collection, the state is not permitted to impose unreasonable and unduly burdensome restrictions on groups and individuals who advance their political message of encouraging voter registration by collecting forms. *See Meyer*, 486 U.S. at 424 (rejecting the argument "that because the power of initiative is a state-created right [the state] is free to impose limitations on the exercise of that right").

[16] In its report, the Government Accountability Office undertook a review of state laws on selected issues addressing voter registration and voting. Government Accountability Office, *ELECTIONS: State Laws Addressing Voter Registration and Voting on or before Election Day* (2012), *available at* http://www.gao.gov/assets/650/649203.pdf., at 1. The GAO Report was submitted to the Senate on October 4, 2012.

or more. Brennan Center Report, at 7, 12-53; *see also LWVF III*, 863 F. Supp. 2d at 1167 (enjoining voter registration application delivery requirement for any period less than ten days). And *no* other state requires the submission of all collected forms—including federal voter registration forms—with no option of mail submission. Brennan Center Report, at 12-53. Texas is also one of only two states that requires every person involved in collecting federal forms at voter registration drives to complete training beforehand, and it is the *only* state in which that training must be approved by every county in which the person collects a form. *Id.* at 5-6.[17]

Under *Anderson*, the Court must not only weigh the severity of these particular burdens imposed by Texas, but it must consider "the extent to which [the state's] interests make it necessary to burden the plaintiff's rights" in these specific ways. *Anderson*, 460 U.S. at 789. Thus, Defendant must demonstrate that, in light of the onerous burdens described above, the challenged provisions are necessary to promote sufficiently weighty government interests. Defendant is unable to do so.

Here, Defendant asserts that Texas has an interest in deterring and preventing registration fraud, App. Br. at 20, and also argues that the law is

[17] New Mexico is the only other state that requires every person collecting voter registration forms to receive state-approved training. But that training is available from county clerks, the Secretary of State, and online. *See* Brennan Center Report, at 5, 39-40. In Colorado, one organizer of a voter registration drive must successfully complete the state's online training, after which that person can train other volunteers and employees. *Id.* at 5, 16-18.

necessary to protect against the dangers of volunteers (a) misplacing applications, (b) failing to deliver applications, (c) failing to protect confidential information listed on applications, and (d) submitting fictitious forms. *Id*. at 4-5. There is no doubt that, as a general matter, Texas has a legitimate interest in deterring and preventing this type of conduct. But *Anderson* requires that Defendant show that the combination of restrictions is appropriately tailored to advance those interests. Defendant has not done so. *See* App.Br. at 29-30, 51-52. Notably, other states share these same interests but have enacted considerably less severe restrictions to address them. *See* Brennan Center Report, at 2. Defendant offers no suggestion that these less burdensome approaches are inadequate to address its shared concerns. And, as the court in *LWVF III* persuasively explained, where it is evident that less severe, and reasonable, regulations already address a state's interests, imposing additional, overly harsh, restrictions is not necessary or constitutionally sound. *See LWVF III*, 863 F. Supp. 2d at 1167 ("[T]here is no reason to believe the injunction [of the voter registration statute] will cause any damage to the state at all. Before the adoption of the 2011 statute, the state was operating under provisions that, at least insofar as shown by this record, were working well."). Like Florida, Texas simply cannot show that its exceptionally onerous new restrictions further its asserted interests beyond the preexisting

scheme, or beyond less onerous alternatives, let alone that the statute is necessary to achieve them. Thus, the statute cannot stand under *Anderson*.

III. THE LAW'S DIRECT DELIVERY REQUIREMENT VIOLATES AND IS PREEMPTED BY THE NVRA.

Congress enacted the NVRA to "establish procedures that will increase the number of eligible citizens who register to vote in elections" and "enhance[] the participation of eligible citizens as voters." 42 U.S.C. § 1973gg(b); *see also, e.g.*, *Welker* v. *Clarke*, 239 F.3d 596, 598 (3d Cir. 2001) ("One of the NVRA's central purposes was to dramatically expand opportunities for voter registration."); *Ferrand* v. *Schedler*¸ No. 11–926, 2012 WL 1570094, at *10-11 (E.D. La. May 3, 2012) ("The NVRA was intended as an aggressive effort to counteract low levels of participation in federal elections" and "was concerned with making sure that every person was given the opportunity to register to vote."). Specifically, the NVRA "attempt[s] to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements." *Ass'n of Cmty. Orgs. for Reform Now* v. *Miller*, 129 F.3d 833, 835 (6th Cir. 1997); *see also* 42 U.S.C. § 1973gg(a)(3) ("discriminatory and unfair registration laws and procedures" hinder voter participation, especially by racial minorities). The NVRA is thus "a frontal assault on the burdens state registration laws have placed in the past on the right to vote." Kevin K. Green, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. Legis. 45, 47 (1996).

In furtherance of Congress's objectives, the NVRA encourages voter registration drives conducted by third parties, and it protects those organizations' rights to participate in the process of registering new voters. *See Charles H. Wesley Educ. Found.* v. *Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005) (NVRA "impliedly encourages" voter registration drives and renders the "right to conduct voter registration drives . . . a legally protected interest"); *Ass'n of Cmty. Orgs. for Reform Now* v. *Fowler*, 178 F.3d 350, 365 (5th Cir. 1999) ("[T]he legislative history of the NVRA makes clear that Congress intended that organizations be able to sue under the Act."). The NVRA also requires non-exempt states,[18] including Texas, to provide for voter registration by mail, among other methods, and it draws no distinctions between registration forms submitted directly by prospective registrants and those submitted by third-party organizations or their representatives. *See* 42 U.S.C. §§ 1973gg-2(a)(2), 1973gg-4. Indeed, the NVRA's legislative history confirms that Congress particularly intended for "[b]road dissemination of mail application forms" to be "a key element of the voter outreach" protected by the statute. P.L. 103-31, S. Rep. 103-6, at *26. Accordingly, "[t]he NVRA protects Plaintiffs' rights to conduct registration drives and submit voter registration forms by mail." *Charles H. Wesley Educ. Found.*,

[18] The NVRA exempts from its requirements any state that, unlike Texas, either has no voter registration requirement with respect to elections for federal office or permits all voters to register at their polling place at the time they vote in a general election for federal office. 42 U.S.C. § 1973gg-2(b).

408 F.3d at 1354; *see also LWVF III*, 863 F. Supp. 2d at 1157 ("[U]nder the National Voter Registration Act, an organization has a federal right to . . . mail in the applications to a state voter-registration office.").[19]

Texas law, which prohibits canvassers and volunteers from using the mail to submit the voter registration forms they collect, directly conflicts with this NVRA-protected right. *See* Tex. Elec. Code § 13.042(a) (requiring that VDR deliver applications in person or through personal delivery by another designated VDR). The fact that Texas accepts and processes all forms it receives by mail does not ameliorate this conflict, because the state law still subjects a VDR to potential criminal prosecution for exercising his or her federally protected right to submit a form by mail. *See id.*, at § 13.043. In holding that "'[t]he NVRA protects Plaintiffs' rights to . . . submit voter registration forms by mail,'" the Eleventh Circuit "squarely rejected the contention" that Texas makes here, "that there is no federal right to conduct a voter registration drive or to mail in applications collected at such a drive." *LWVF III*, 863 F. Supp. 2d at 1162-63 (quoting *Charles H. Wesley Educ. Found.*, 408 F.3d at 1354). Defendant's attempt to argue that the Eleventh Circuit's decision in *Wesley Education Foundation* "has no application to this case" because Texas accepts all completed forms it receives by mail thus falls

[19] As an alternative to personal delivery by VDRs, Defendant suggests that applicants can just submit their own applications by mail. This suggestion completely ignores the purpose of voter registration drives: to provide complete assistance to voters wishing to register—which includes collection and submission—and get prospective voters registered.

flat. *See* App. Br. at 39. The Eleventh Circuit's decision, while not binding on this court, carefully examines the rights of voter registration groups under the NVRA and persuasively concludes that "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." *LWVF III*, 863 F. Supp. 2d at 1163. Any state law—including Texas's—that "require[s] personal delivery of voter registration forms . . . clearly run[s] afoul of the NVRA." *Blackwell*, 455 F. Supp. 2d at 702 n.6.

CONCLUSION

For the foregoing reasons, *amici* the Brennan Center, the League of Women Voters, and Rock the Vote respectfully submit that this Court should affirm the district court's preliminary injunction order.

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BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW
Diana Kasdan
Ian Vandewalker
161 Avenue of the Americas, 12th Floor
New York, New York 10013-1205
Tel. 646-292-8310
Fax 212-463-7308

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

/s/ Farrah R. Berse
Robert A. Atkins
Farrah R. Berse (N.Y. Bar Reg. No. 4129706)
fberse@paulweiss.com
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. 212-373-3000
Fax 212-757-3990

Alex Young K. Oh*
2001 K Street, NW
Washington, DC 20006-1047
Tel. 202-223-7300
Fax 202-223-7420

*Admission pending

Counsel for Amici Curiae Brennan Center, League of Women Voters, and Rock the Vote

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that correct copies of the foregoing *Brief of Amici Curiae Brennan Center for Justice at New York University School of Law, League of Women Voters, and Rock the Vote in Support of Plaintiffs-Appellees and Affirmance of the Judgment Below* was served by filing in this Court's CM/ECF system this 21st day of November, 2012 on all attorneys of record in this matter.

/s/ Farrah R. Berse
Farrah R. Berse
New York Bar Registration Number 4129706
fberse@paulweiss.com
Paul, Weiss, Rifkind, Wharton and Garrison LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. 212-373-3000
Fax 212-757-3990

Counsel for Amici Curiae Brennan Center, League of Women Voters, and Rock the Vote

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/s/ Farrah R. Berse
Farrah R. Berse
fberse@paulweiss.com
Paul, Weiss, Rifkind, Wharton and Garrison LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. 212-373-3000
Fax 212-757-3990

Counsel for Amici Curiae Brennan Center, League of Women Voters, and Rock the Vote

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/s/ Farrah R. Berse
Farrah R. Berse
fberse@paulweiss.com
Paul, Weiss, Rifkind, Wharton and Garrison LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. 212-373-3000
Fax 212-757-3990

Counsel for Amici Curiae Brennan Center, League of Women Voters, and Rock the Vote