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What Starts in Texas Doesn't Always Stay in Texas: Why Texas's Systematic Elimination of Grassroots Voter Registration Drives Could Spread

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In the last two years, tens of millions of everyday Americans—totaling 20% of all adults—have taken to the streets, the airports, the courthouses, state capitals, and other public places to make their voices heard.² More have spoken out online.³ And, activism has not been confined to large urban centers—in Alpine Texas, for example, a small town with a population just shy of 6,000 people, nearly 100 protestors hiked across the desert (in a rare rain storm no less!) during the 2017 Women's March.⁴

“History doesn't repeat itself but it often rhymes.”⁵ Throughout American history, state and federal governments have all too often met periods of social and political activism with backlash—restricting our First Amendment rights of expression, association, and petition. And indeed, there

¹ The authors are deeply grateful to several individuals from Ms. Marziani's organization, the Texas Civil Rights Project, for their assistance with research and review: Voting Rights Director Beth Stevens; Communications Director Zenén Jaimes Pérez; Content Manager Ash Hall; and, intern and University of Texas School of Law student Alexander Clark. We also thank Mr. Landicho's colleague, Kristina Meyer, an associate of Vinson & Elkins LLP, for her heroic work double-checking and cleaning up our citations, as well as Ellyn Josef, the pro bono coordinator at Vinson & Elkins LLP, for her encouragement and support. The views expressed herein are our own and do not necessarily reflect the position of the institutions with which we are affiliated.

² *One in five adults have attended a political protest, rally or speech*, WASH. POST, April 21, 2018,

https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2018/04/06/National-Politics/Polling/release_516.xml

³ Tens of millions of people posted about #MeToo alone on social media in the days following the start of that movement. *More than 12M "Me Too" Facebook posts, comments, reactions in 24 hours*, CBS NEWS, Oct. 17, 2017,

<https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/>.

⁴ Lydia O'Connor, *Living In A Small Town Didn't Stop These People From Starting Women's Marches*, HUFFPOST, Jan. 23, 2017, https://www.huffpost.com/entry/small-town-womens-march_us_5884e049e4b0e3a73569abcc. Heartwarming photographic evidence included.

⁵ This quote is often attributed to Mark Twain but the actual origin appears unknown. See Jeff Sommer, *Funny, but I've Heard This Market Song Before*, N.Y. TIMES (June 18, 2011), <https://www.nytimes.com/2011/06/19/your-money/stocks-and-bonds/19stra.html>.

is evidence of growing hostility towards protesting, community organizing, efforts to turn out the vote, and other protected forms of civic engagement.

Perhaps most notably in recent times, President Donald J. Trump has repeatedly used Twitter to try to undermine grassroots activism and threaten protestors,⁶ tweeting arguments that have been repeated by media personalities, politicians, and other high-profile Americans—despite the utter lack of evidence.⁷ This immediately followed the 2016 election when, infamously, then President-elect Trump relied upon a photo of buses posted by a business owner in (of course) Austin, Texas to claim that post-election protests were populated by “professional protestors, incited by the media,” sparking a viral fake news story to spread even further.⁸ (In fact, the buses were rented by a software company to transport attendees of a conference it had organized, and were doing exactly that).⁹

History teaches that blowback against activism and community organizing can be particularly intense when grassroots movements become strong enough to threaten the balance of political power. For instance, Douglas McAdam, a Stanford sociology professor, has explained that “southern legislatures—especially in the Deep South—responded to the Montgomery Bus Boycott (and the Supreme Court’s decision in *Brown v. Board of Education*) with dozens and dozens of new bills outlawing civil rights groups, limiting the rights of assembly, *etc.* all in an effort to make civil rights organizing more difficult,” often invoking claims of “outside” or “professional” agitators to undermine the notion of a grassroots movement.¹⁰

In the early months of 2017 alone, lawmakers in at least 18 states (including in Texas) introduced laws geared to curb protests and community organizing,¹¹ including a string of laws decreasing or

⁶ See, e.g., Daniella Silva, *Trump Calls for Investigation Into Tax Day Protesters, Tweets ‘Election Is Over!’*, NBC NEWS, April 16, 2017, <https://www.nbcnews.com/politics/donald-trump/trump-calls-investigation-tax-day-protesters-tweets-election-over-n747101>; Tessa Berenson, *President Trump Attacks ‘Professional Anarchist’ Protesters on Twitter*, TIME, Feb. 3, 2017, <http://time.com/4659323/president-trump-tweets-protests-arnold-schwarzenegger/>; Damien Sharkov, *Donald Trump Claims Media Incited ‘Professional Protesters’ Against Him*, NEWSWEEK, Nov. 11, 2016, <http://www.newsweek.com/trump-claims-media-incites-professional-protestors-against-him-520020>.

⁷ See, e.g., Steve Benen, *Trump and his Republican allies cling to the ‘paid protester’ myth*, MSNBC.com, Feb. 3, 2017, <http://www.msnbc.com/rachel-maddow-show/trump-and-his-republican-allies-cling-the-paid-protester-myth>; Callum Brothers, *Tucker Carlson’s surprising, much-needed takedown of a ‘paid protester’ hoax*, WASH. POST, Jan. 18, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/01/18/tucker-carlsons-surprising-much-needed-takedown-of-a-paid-protester-hoax/?utm_term=.b0f1079981ab.

⁸ Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES, Nov. 20, 2016, <https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html>.

⁹ *Id.*

¹⁰ Christopher Ingraham, *Republican lawmakers introduce bills to curb protesting in at least 18 states*, WASH. POST, Feb. 24, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm_term=.a091bfa40482.

¹¹ *Id.*

eliminating the liability of drivers who injure protestors who are blocking roads.¹² The spook of “professional protestors” is often explicitly evoked to justify such changes. For instance, one Republican state senator argued, in support of a bill that would allow racketeering charges against some protestors, “You now have a situation where you have full-time, quasi-professional agent-provocateurs that attempt to create public disorder.”¹³

As of the date of publication, we are still waiting to see whether and how broad-based, grassroots movements like #MeToo, #NeverAgain, and the #Resistance translate to new policies and new representatives in elected office. But, there’s little doubt that, like the 1960s, we are in a time of unusually high grassroots energy, particularly among persons of color, women, and young people that will likely gain speed as the midterm elections approach. As a result, we must expect—and be prepared to fight—efforts to restrict protesting, organizing, and voter engagement activity, usually under the guise of targeting “professional” or “outside” agitators.

Cue Texas. Anyone looking for a blueprint to suppress grassroots power-building will inevitably look toward the Lone Star State. The possibility that the grassroots energy of historically disenfranchised groups could translate to political change has been at the forefront of the Texas legislature’s mind since at least 2011. Indeed, numerous courts have now agreed that the reality of changing demographics¹⁴ and fears of new political strength among persons of color motivated Texas to draw racially discriminatory legislative districts¹⁵ and enact a racially discriminatory voter

¹² Dakin Andone, “These states have introduced bills to protect drivers who run over protestors,” CNN, Aug. 19, 2017, <https://www.cnn.com/2017/08/18/us/legislation-protects-drivers-injure-protesters/index.html>. Notably, unlike legislation elsewhere, the bill introduced in Texas, H.B. 250, excuses injury to a protestor so long as the driver was “exercising due care,” leaving open the question of whether purposeful conduct could be shielded from liability.

¹³ Ingraham, *supra* n. 10.

¹⁴ Following rapid growth in the early 2000s, Texas became the “majority-minority” state it is today. According to 2017 Census estimates, just 42.6% of Texas’s 28.3 million population is non-Hispanic White or (as we say in Texas, “Anglo”). *QuickFacts: Texas*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/TX/PST045217#viewtop> (last visited May 4, 2018).

¹⁵ Texas’s congressional and state legislative maps have been embroiled in litigation since they were originally passed in 2011. Initially, a three-judge panel of the D.C. District Court refused to preclear Texas’s maps under Section 5 of the Voting Rights Act because the maps abridged minority voting rights by using “deliberate, race-conscious method[s]” to “manipulate” outcomes, and contained substantial evidence of purposeful racial discrimination. *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). In 2013, the legislature adopted interim maps drawn by a district court in Texas and the U.S. Supreme Court vacated and remanded the D.C. panel’s opinion, in light of *Shelby Cty. v. Holder*. *See Texas v. United States*, 133 S.Ct. 2885 (2013); *see also Texas v. United States*, 49 F. Supp. 3d 33 (D.D.C. 2014). Since then, the 2011 and 2013 maps have been litigated before a three-judge district court panel in San Antonio under a number of claims, including that the maps violate Section 2 of the Voting Rights Act and the Equal Protection Clause. Most notably, in 2017, following two week-long trials, the district court panel in San Antonio ruled that key portions of the 2013 congressional and state house maps were racially discriminatory—and were intentionally designed to suppress the voting rights of Black and Latino Texans in light of the possibility of their growing political power. *Perez v. Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017); *Perez v. Abbott*, 274 F. Supp. 3d 624 (W.D. Tex. 2017). These decisions are now pending before the U.S. Supreme Court, with a decision expected at the end of the 2017-2018 term. *See Abbott v. Perez*, No. 17-586 (U.S. Sup. Ct., filed Oct. 17, 2017, argued Apr. 24, 2018).

photo ID law.¹⁶ The associated court battles have been widely publicized and exhaustively analyzed.

But in 2011, the State of Texas also introduced onerous new rules (or fortified existing procedures) governing third-party voter registration activities (for simplicity's sake, we often refer to these activities as "voter registration drives," even though that is a simplification of organizing methods).¹⁷ The upshot of this morass, described in detail below, is to make the process of organizing voter registration drives complicated, confusing, and wrought with legal (and sometimes felony) liability. As one community organizer memorably put it, Texas law requires "a PhD in voter-obstacle-ology to navigate the system."¹⁸ Even worse, in 2017, the Texas legislature passed a new layer of criminal penalties, further upping the stakes.

For the reasons that follow, the voter registration restrictions in Texas are, at bottom, equally as threatening to voter engagement and expressive activity as (for example) discriminatory redistricting maps or photo ID laws—but restrictions on voter registration activity have been largely overlooked by the public, and not properly scrutinized by the courts. This paper seeks to correct this imbalance, at a critical time in our nation's history. Just as those who seek to undermine grassroots expressive activity in 2018 and beyond might look to Texas, our experience in Texas also provides a roadmap to fight back.

In Part I, we provide an overview of existing Texas voter registration laws, situated in comparison with other states. As next discussed, no other state has enacted such a complex, punishing web of regulations on voter registration drives.¹⁹ In Part II, we turn to one panel of the Fifth Circuit's 2013

¹⁶ After years of extensive discovery, multiple trials, and several appeals, the Fifth Circuit, sitting *en banc*, struck down the 2011 Texas voter ID law in July 2016, finding that it discriminated against Black and Latino Texans in violation of Section 2 of the Voting Rights Act. See *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). While the Court declined to rule on the plaintiffs' claim of discriminatory intent, it acknowledged probative record evidence of discriminatory intent, including that the legislature was at least aware of the "likely disproportionate effect of the law on minorities" but nevertheless failed to take any ameliorative measures. *Id.* at 236. And, "[f]urther supporting the district court's finding [of discriminatory intent] is the fact that the extraordinary measures accompanying the passage of [the photo ID law] occurred in the wake of a 'seismic demographic shift,' as minority populations rapidly increased in Texas, such that the district court found that the party currently in power is 'facing a declining voter base and can gain partisan advantage' through a strict voter ID law." *Id.* at 241. While, more recently, the Fifth Circuit upheld a modified version of the ID law passed by the legislature in 2017, these findings remain undisturbed. See *Veasey v. Abbott*, 17-40884, 2018 WL 1995517 (5th Cir. Apr. 27, 2018).

¹⁷ We use "voter registration drive" as a shorthand for all third-party voter registration activity because the concept of a registration drive will be familiar to many readers. Know that we are also including registration with door-to-door canvassing, petition initiative drives that include voter registration, individual efforts to register friends and family on a continual basis, and many acts that stretch beyond the usual image of college students sitting at a folding table in the campus quad.

¹⁸ See Ari Berman, *Texas's Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, THE NATION, Oct. 6, 2016, <https://www.thenation.com/article/texas-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook/>.

¹⁹ See *Election 2012: Voting Laws Roundup*, BRENNAN CTR. FOR JUSTICE (Oct. 11, 2012) (hereinafter, "Brennan 2012 Roundup"), <https://www.brennancenter.org/analysis/election-2012-voting-laws-roundup>.

examination of a facial challenge to the constitutionality of these laws, *Voting for America v. Steen*, a case that (we argue) departs from existing First Amendment jurisprudence on expressive political activity.²⁰ In the authors' view, the Fifth Circuit's reasoning in *Steen* is stale, flawed, and ripe for challenge. In Part III, we provide possible claims that could be brought against Texas's suffocating voter registration scheme in future litigation.

I. The Regulation of Voter Registration Drives in Texas and Elsewhere

A. The Unique Role of Voter Registration Drives

It is critical to understand the centrality of voter registration drives as a tool to boost civic participation and build grassroots power. Given the important human-to-human interaction at the core of such activities, voter registration drives are a key tool of community organizers to educate new voters and boost engagement. Accordingly, since the 1960s, voter registration drives have played a central role in increasing registration and participation rates, particularly among underrepresented communities of color and young voters.²¹ Indeed, Census data has long demonstrated that persons of color, young people, and low-income persons are much more likely to register to vote through a voter registration drive than white, older, wealthier Americans.²²

This remains true today. In the November 2016 election, Black and Latino voters were nearly twice as likely as white voters to have registered through a voter registration drive than through other means.²³ More than 10% of all young voters registered to vote at school, resulting (almost certainly) from voter registration drives at those schools.²⁴

Recognizing the importance of voter registration drives, Congress sought to provide support for such efforts in its 1993 National Voter Registration Act (NVRA).²⁵ Overall, the NVRA's purpose is to remedy "discriminatory and unfair registration laws and procedures" that have "direct and

²⁰ *Voting for America v. Steen*, 732 F.3d 382 (2013).

²¹ The Voting Rights Act of 1965 provided additional support for registration efforts in the South. Following that Law's historic passage, community organizers like Congressman John Lewis worked tirelessly to register millions of Black voters, many of whom had been turned away by state election and voter registration officials throughout their lives. Because of their efforts, the number of Black voter registrations in Alabama (for example) more than doubled in the ten months following the passage of the VRA, from 113,000 to 235,000. See Ari Berman, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA, 37-45 (2015). In Selma alone, Black voter registration increased from 1,516 before the VRA to a whopping 10,186 just months later. *Id.* at 37.

²² See Stephen Mortellaro & Michelle Kanter Cohen, *Restricting Voter Registration Drives*, PROJECT VOTE 2 (September 2014), <http://www.projectvote.org/wp-content/uploads/2015/06/RESTRICTING-VR-DRIVES-POLICY-PAPER-SEPT-2014.pdf>.

²³ See U.S. CENSUS BUREAU, *Voting and Registration in the Election of November 2016* (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>. Note that while these counts include voter registration by other means, voter registration drives are viewed as an increasingly important source, "especially for low-income citizens, students, members of racial and ethnic minority groups, and people with disabilities." WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES IN 2012 (2011), available at <https://www.brennancenter.org/publication/voting-law-changes-2012>.

²⁴ See Census data, *supra* note 23.

²⁵ The National Voter Registration Act of 1993, 52 U.S.C. § 20501–52 U.S.C. § 20511 (1993).

damaging” effects on voter participation in federal elections, particularly unfair registration laws that “disproportionately harm voter participation among racial minorities.”²⁶ The NVRA attacks barriers to voter registration on a number of fronts, including by requiring states to accept voter registration applications by mail through a standard federal registration form.²⁷ It specifically emphasizes making the federal form available “for organized voter registration programs,”²⁸ such as national and grassroots organizations conducting voter registration drives.

After the passage of the NVRA, most states loosened their regulation of third-party voter registration activities.²⁹ But, in the last ten years, voter registration drives have been a repeated political target in two related ways. First, there has been an increase in allegations of fraud directed at voter registration drive efforts, particularly when run by progressive organizations. Relatedly, there have been new state efforts, including the introduction of new bills and the passage of new legislation, to restrict such efforts.³⁰

On this first point, ACORN, once arguably the most prominent community organizing group in the country,³¹ provides a cautionary tale. Between 2004 and 2008, ACORN registered 1.6 million voters in pursuit of its mission to eliminate poverty through grassroots power-building.³² In 2008 to 2009, the nonprofit was raided by the FBI, defunded by Congress and eventually forced to shutter its doors, in part due to allegations of voter fraud that were examined, and dismissed, by the nonpartisan Congressional Research Service.³³ Explosive (and sensationalized) allegations

²⁶ *Id.* at § 20501. Upon the signing of the NVRA in 1993, former President Bill Clinton said:

“...this bill was necessary. As many as 35% of otherwise eligible voters in our Nation are not registered, and the failure to register is the primary reason given by eligible citizens for their not voting. The principle behind this legislation is clear: Voting should be about discerning the will of the majority, not about testing the administrative capacity of a citizen.”

See President William J. Clinton, Remarks on Signing the NVRA of 1993 (May 20, 1993) (transcript available at <https://www.gpo.gov/fdsys/pkg/WCPD-1993-05-24/pdf/WCPD-1993-05-24.pdf>) (last accessed May 6, 2018).

²⁷ See 52 U.S.C. § 20505(a)(1).

²⁸ See *id.* at § 20505(a)(b).

²⁹ See DIANA KASDAN, BRENNAN CTR. FOR JUSTICE, STATE RESTRICTIONS ON VOTER REGISTRATION DRIVES (2012), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/State%20Restrictions%20on%20Voter%20Registration%20Drives.pdf>.

³⁰ See *id.*; see also Mortellaro, *supra* note 22.

³¹ In 2010, the Second Circuit noted that ACORN, with 50,000 members nationwide, “has helped over two million people register to vote, advocated for increasing the minimum wage, worked against predatory lending, prevented foreclosures, assisted over 150,000 people file their tax returns, and ‘worked on thousands of issues that arise from the predicaments and problems of the poor, the homeless, the underpaid, the hungry and the sick.’” *ACORN v. United States*, 618 F.3d 125, 129 (2d Cir. 2010).

³² Art Levine, *The Republican War on Voting*, AMERICAN PROSPECT (March 19, 2008), <http://prospect.org/article/republican-war-voting>

³³ See Memorandum by Congressional Research Service to House Judiciary Committee on Association of Community Organizations for Reform Now (ACORN), Dec. 22, 2009, available at <https://www.scribd.com/document/39693888/Judiciary-Report-on-ACORN-December-2009>; See also John Schwartz, *Report Uncovers No Voting Fraud by Acorn*, N.Y. TIMES (Dec. 23, 2009), <https://www.nytimes.com/2009/12/24/us/24acorn.html>. But

came from the highest level of politics: in the fall of 2008, prominent Republicans argued that ACORN was “now on the verge of maybe perpetrating one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy.”³⁴

Just years later, motivated by claims of widespread fraud, including the attacks on ACORN, the country saw a wave of restrictive voting laws after the 2010 midterm elections, fueled by newly empowered conservative state legislatures. Public attention focused on new laws mandating photo ID or proof of citizenship at polling locations,³⁵ as well as roll-backs on early voting and absentee balloting.³⁶ But at least eight states introduced laws to restrict voter registration drives.³⁷ Like Texas, Florida passed its bill into law, passing regulations so onerous that the local League of Women Voters chapter was forced to suspend operations after more than 70 years of conducting

see ACORN v. United States, 618 F.3d 125, 130-31 (2d Cir. 2010) (describing mismanagement within ACORN and finding that two individual ACORN workers had been convicted of voter registration fraud).

³⁴ Katherine Seelye, *McCain's Warning About Voter Fraud Stokes a Fiery Campaign Even Further*, N.Y. TIMES (Oct. 26, 2008), <https://www.nytimes.com/2008/10/27/us/politics/27vote.html>.

³⁵ *See, e.g.*, Weiser & Norden, *supra* note 23.

³⁶ A particularly egregious example is the cancellation of early voting on Sundays in Ohio, which disproportionately impacted Black voters who successfully were brought directly from churches to early voting sites as part of “Souls to the Polls” programs. *See* Paige Lavender, *Ohio Early Voting Will No Longer Take Place on Sundays, Weekday Evenings*, HUFFINGTON POST, Feb. 25, 2014, https://www.huffingtonpost.com/2014/02/25/ohio-early-voting_n_4855834.html.

³⁷ *See e.g.*, Weiser & Norden, *supra* note 23; Kasdan, *supra* note 29; Brennan 2012 Roundup, *supra* note 19; *see also Voter ID History*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>). Notably, a comprehensive empirical analysis of suppressive voting laws passed nationwide between 2006-2011, concluded that:

From all this [modelling and specialized regression analysis] a striking story emerges: the proposal of restrictive voter access legislation has been substantially more likely to occur where African-Americans are concentrated and both minorities and low-income individuals have begun turning out at the polls more frequently . . . States where these developments were felt more intensely were correspondingly more likely to propose legislation. While we can only infer motivation, these results strongly suggest that the proposal of these policies has been driven by electoral concerns differentially attuned to demobilizing African-American and lower-income Americans.

See Keith Gunnar Bentele & Erin E. O'Brien, *Jim Crow 2.0?: Why States Consider and Adopt Restrictive Voter Access Policies* (2013) Sociology Faculty Publication Series, *Paper 11* at 19,

http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1010&context=sociology_faculty_pubs.

drives in the state.³⁸ Florida’s law was enjoined by a federal court in 2012, while Texas’s law persists.³⁹

Today, the laws of other states contain parts of Texas’s law, although Texas is the only state to mandate pre-certification in a “deputy registrar” system.⁴⁰ Most notably, 22 states impose a turnaround deadline prior to the end of the registration period; 19 of these 22 states attach criminal sanctions or fines for a failure to timely deliver voter registration applications.⁴¹ Along with Texas, Colorado and New Mexico require training for all persons who wish to register voters.⁴² But no other state combines so many restrictions with such harsh penalties for mistakes as Texas.⁴³ And, as described below, to our knowledge no other state has been so successful in reducing the amount of voter registration activity on the ground.

B. The Texas Scheme

1. Background

Amazingly, Texas’s scheme started with good intentions. Originally, in the 1980s, Texas officials created the regime for ordinary citizens to become “volunteer deputy registrars” (VDRs) through a state certification process—at the time, this was a progressive reform. VDRs were intended to boost participation in elections by “encourag[ing] voter registration” for all eligible Texans.⁴⁴ As then-Governor of Texas Mark White explained, the VDR regime was created to “open the doors as wide as possible to every single, eligible qualified voter . . . and not exclude anybody under any circumstance.”⁴⁵

³⁸ See Plaintiffs’ Memorandum of Law in Support of Their Motion for Preliminary Injunction, *League of Women Voters of Florida v. Browning*, No. 4:11-cv-00628-RH-WCS, 2011 WL 12585275 (N.D.Fla. Dec. 19, 2011). Similar challenges to proof of citizenship requirements for voter registration introduced in 2011 and 2012 in Kansas, Alabama, and Georgia are pending—although the DC Circuit recently enjoined such requirements for the 2016 election. See *League of Women Voters of United States v. Newby*, No. 16-5196, 2016 WL 5349779, at *2 (D.C. Cir. Sept. 26, 2016); see generally Merrit Kennedy, *Court Blocks Proof-of-Citizenship Requirement For Voters in 3 States*, NPR, Sept. 10, 2016, <http://www.npr.org/sections/thetwo-way/2016/09/10/493405211/court-blocks-proof-of-citizenship-requirement-for-voters-in-3-states>.

³⁹ *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012). Ms. Marziani served as counsel for plaintiffs in this litigation.

⁴⁰ For a detailed survey of state law in this area, see Kasdan, *supra* note 29.

⁴¹ *Id.* at 7.

⁴² *Id.*

⁴³ See generally *id.*

⁴⁴ See Tex. S.B. 616, 69th Leg., R.S., (1985) (engrossed) § 13.031(a) (emphasis added).

⁴⁵ Brief of Former Governor Mark White, Former Lieutenant Governor William P. Hobby, Jr. and Members of the 69th Texas Legislature as Amicus Curiae in Support of Appellee at 14-15, *Voting for America v. Steen*, 732 F.3d 382 (5th Cir. 2013) (No. 12-40914), 2012 WL 5996185 (hereafter, “Amicus Brief of Governor White”). Governor White testified that, as Texas’s Secretary of State in the 1970s, he had to personally visit local voter registration officials in Waller County, near the Prairie View A&M University campus, because the election officials refused to register Black students. See *id.* at 8-9; see also *United States v. State of Texas*, 445 F. Supp. 1245, 1250-51 (S.D. Tex. 1978). The Amicus Brief of Governor White explained that the 1985 election code specifically “sought to encourage full participation in voter registration and voting

Over time, however, Texas voter registration laws became stale, failing to keep pace with technological advances and national efforts to encourage voter registration drives, such as the NVRA. Then, in 2011, the old VDR laws were significantly tightened in the name of preventing voter registration fraud, but without any evidence of misconduct or any credible threat to the integrity of Texas elections. That year, the Texas Secretary of State quickly dealt another blow, re-interpreting existing rules to make them more restrictive—declaring, for instance, that certification was county-specific so one county’s certification did not translate to another.⁴⁶ Community organizers were left tangled in a complex web of regulations, differing from one county to the next, where one wrong move could lead to criminal penalties.

Even worse, in 2017, the Texas legislature went further still, passing a sweeping law allegedly aimed at so-called “Vote Harvesting Organizations”⁴⁷ that, in actuality, makes it a *state jail felony* to act with three or more persons in running afoul of certain provisions of the VDR law. Such violations, if prosecuted under this new scheme, are punishable by a mandatory minimum sentence of at least 180 days in jail.⁴⁸

Notably, the 2017 law was encouraged by Texas Attorney General, Ken Paxton, who tweeted on October 6, 2016 that he was investigating “the largest voter fraud in Texas history” (without providing any evidence). Tellingly, Direct Action Texas, a conservative political advocacy group in Dallas/Fort Worth, then published an article emphasizing that vote harvesters “are stealing votes” and are typically “first or second generation Americans who speak fluent Spanish and are sent into Spanish speaking neighborhoods. They are African-American women, including well-known members of the largest local churches.”⁴⁹ In other words, they expressly advocated targeting community organizers and grassroots activists in predominantly minority neighborhoods.

The result of Texas’s laws is evident. Since 2011, voter registration activity in Texas has frozen. “National groups that specialize in voter registration [were] forced to abandon Texas.”⁵⁰ A small

with an eye toward curbing malicious behavior not by voters or voter registration drives, but by local registrars who sought to limit voter participation of disfavored groups.” Amicus Brief of Governor White at 14.

⁴⁶ See *Voting for America, Inc. v. Andrade*, 888 F. Supp. 2d 816, 845 (S.D. Tex. 2012) (hereinafter, *Andrade I*). The Texas Secretary of State’s Director of Elections, Ann McGeehan, expressed the new interpretation of the law to Voting for America, a national non-partisan voter registration organization, in a letter responding to a request for clarification of Texas’s County limitation in May 2011.

⁴⁷ See Tex. Elec. Code Ann. § 276.011 (West 2017); see also Tex. H.B. 1735, 85th Leg., R.S. (2017) § 62, amending § 276.011 of the Texas Election Code.

⁴⁸ See Tex. Elec. Code Ann. §§ 13.006, 13.008(a)(1)-(3), 13.145 (West 2017) (VDR provisions for Class A misdemeanors); *id.* at § 276.011(b) (elevating Class A misdemeanors to state jail felonies); Tex. Penal Code §12.35 (West 1996) (penalties for state jail felonies).

⁴⁹ Christine Welborn, *The Fort Worth Way: Election Fraud is Taking Place and It Must be Stopped*, DIRECT ACTION TEX. (Oct. 19, 2016), <http://directactiontx.com/fort-worth-election-fraud/>.

⁵⁰ See Berman, *supra* note 18.

number of local groups persevered, standing their ground in the face of constant scrutiny and mounting hostility from state officials.⁵¹

Texas voters have suffered. Voter registration rates in Texas rank 44th nationally, with only 68% of eligible voters on the rolls.⁵² Ms. Marziani’s organization, the Texas Civil Rights Project, estimates that well over 4.4 million eligible Texans are unable to vote because they are either unregistered or their registration data is inaccurate or outdated.⁵³ Moreover, there are troubling disparities among the electorate. Asian-American and Latino voters are significantly less likely to be registered than their white peers,⁵⁴ and young voters are woefully underrepresented,⁵⁵ translating to an electorate that is older and whiter than Texas’ citizen voting-age population.⁵⁶

2. How the Volunteer Deputy Registrar Law Works

The law is complicated, so bear with us.

As noted above, anyone who wishes to handle a completed voter registration form must be deputized as a “volunteer deputy registrar” or “VDR” in every county where he or she wishes to conduct voter registration.⁵⁷ VDR eligibility is limited to persons who are 18 years of age or old, U.S. citizens, and Texas residents.⁵⁸ This excludes young Texans (including most high school students), all non-citizens (including those with legal status), and persons who are not residents of Texas (the “Non-Resident Prohibition”) from engaging in voter registration drives.

VDRs may only collect forms from residents of Texas counties where they have been specifically deputized (the “County Limitation”).⁵⁹ Anyone who mistakenly collects a form from a voter who

⁵¹ *Id.*

⁵² JAY JENNINGS & EMILY EINSOHN BHANDARI, 2018 TEXAS CIVIC HEALTH INDEX 4-5 (University of Texas at Austin 2018), https://moody.utexas.edu/sites/default/files/2018-Texas_Civic_Health_Index.pdf.

⁵³ Beth Stevens, *There are 4.4 million Texas votes missing*, TEX. CIVIL RIGHTS PROJECT (Feb. 8, 2017), <https://www.texascivilrightsproject.org/en/2017/02/08/4-million-texas-votes-missing/>.

⁵⁴ See U.S. CENSUS BUREAU, *Voting and Registration in the Election of November 2016* (Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States) (Nov. 2016), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>. According to this recent census data released in May 2017, nationwide, nearly 73.9% of non-Hispanic white citizens are registered to vote, as compared to 69.4% of Black citizens, 56.3% of Asian-American citizens, and 57.3% of Hispanic citizens. In Texas, Black citizens are registered at a 73.1% rate and white non-Hispanic citizens are registered at a 72.7% rate — but Asian-American citizens are registered at only a 58.5% rate, and Hispanic-American citizens have an even lower rate of registration at 55.5%. Notably, these statistics do not speak to whether current registration records are accurate. In Texas, as nationwide, frequent movers, including poorer persons and young people, are much more likely to have out-of-date registration records. See U.S. CENSUS BUREAU, *Voting and Registration in the Election of November 2016* (Table 7: Reported Voting and Registration of Family Members, by Age and Family Income) (Nov. 2016), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>.

⁵⁵ Jennings & Bhandari, *supra* note 42, at 5.

⁵⁶ See U.S. CENSUS BUREAU, *supra* note 54 at Table 4c, Column H (indicating that, in Texas, 78.3% of eligible voters of 65 years of age or older are registered, as compared with 47.6% of eligible voters from 18-24 years old.).

⁵⁷ See Tex. Elec. Code Ann. § 13.031 (West 2017). There is a narrow exception for a voter’s spouse, child, or parent. *Id.*

⁵⁸ See *id.*

⁵⁹ See Tex. Elec. Code Ann. § 13.038 (West 2017).

resides in another county, where she has not been deputized, “purports to act as a [VDR]” without “effective appointment” and commits a misdemeanor crime⁶⁰ punishable by a \$500 fine.⁶¹

To become a VDR, one must attend a mandatory training session that is run at the county level—but counties are required to host only one training a month and many do so in the middle of the work day.⁶² Each of Texas’s 254 counties has its own distinct procedures, meaning that anyone interested in conducting large-scale registration efforts must navigate a web of certification requirements specific to each county. Particularly in counties where training opportunities are severely limited, the process can take months.

As explained in an article by voting rights expert Ari Berman on the experiences of a VDR named “Tunde,” the County Limitation makes statewide drives practically impossible:

If Tunde led a registration drive outside a San Antonio Spurs basketball game, for example, he could collect forms only from people who live in Bexar County, where he’s deputized, and wouldn’t be able to register anyone attending the game from Austin, Dallas, or Houston. This is a huge problem in Texas, where many cities sprawl over multiple counties. A voter-registration drive in the state’s 13th Congressional District, which encompasses most of the Panhandle, would require deputizing workers in 41 counties.⁶³

Dissenting in *Voting for America v. Steen*, Court of Appeals Judge W. Eugene Davis, made a similar point:

[A] VDR must be appointed in every county in which an applicant resides so that a VDR who is appointed in County A yet submits an application for a citizen who resides in County B is subject to criminal prosecution. . . . These rules force the organizations to have their canvassers and managerial staff appointed as VDRs in multiple counties. This is especially burdensome in the larger metropolitan areas where voters may reside in one of several area counties. As pointed out by the district court, a VDR active in the City of Dallas would need to be appointed in five different counties in order to accept applications in all parts of the city. . . . A VDR will not always know in which county a potential voter resides simply by the fact that he is present at a registration drive rally. Thus, the VDR in this situation risks criminal sanctions for accepting a voter registration application from a resident of a

⁶⁰ See Tex. Elec. Code Ann. § 13.044 (West 2017).

⁶¹ See Tex. Penal Code Ann. § 12.23 (West 2017).

⁶² See Zachary Roth, *With new year comes new obstacle to voting in Texas*, MSNBC, Dec. 31, 2014, <http://www.msnbc.com/msnbc/new-year-comes-new-obstacle-voting-texas>.

⁶³ *Supra* note 18.

county in which the VDR has not been appointed. It is obvious how this rule would chill the plaintiffs' registration activities.⁶⁴

Once appointed, Texas also heavily regulates the *conduct* of VDRs and thus, of voter registration drives themselves.⁶⁵ For instance, under the law:

- VDRs must personally deliver every registration form collected to the respective county registrar within five days of collection or face criminal penalties, prohibiting the mailing of forms (the "Mail Prohibition").⁶⁶
- VDRs must carry signed certificates of appointment with their name and address, and must present these certificates to anyone who requests it.⁶⁷
- VDRs must provide a receipt with every registration form collected.⁶⁸ Receipt obligations vary significantly from county to county—in certain counties, a VDR must use a specially created perforated form or a form with carbon copies; in others, a VDR might be asked to supply her own receipt book. In practice, this means that the standard federal form mandated by the NVRA is not permitted for use by VDRs in many counties because the federal form lacks a built-in receipt.
- VDRs have an obligation to "return to the applicant" any incomplete form for "completion and resubmission,"⁶⁹ seemingly conflicting with the requirement to deliver *all* registration forms collected. The law provides no explanation for what to do if a potential applicant completes part of a form, but then suddenly leaves,⁷⁰ but allows for one's VDR certificate to be revoked at the discretion of the county registrar for failing to "adequately review a registration application."⁷¹
- Texas prohibits VDRs from photocopying collected forms, a common practice to stay in contact with new voters and encourage them to vote, even though registration records are

⁶⁴ *Steen*, 732 F.3d at 405–06.

⁶⁵ See generally TEXAS VOLUNTEER DEPUTY REGISTRAR GUIDE, OFFICE OF THE SECRETARY OF STATE, available at <https://www.sos.state.tx.us/exlections/pamphlets/deputy.shtml>.

⁶⁶ Tex. Elec. Code Ann. § 13.043(a)-(b) (West 2017).

⁶⁷ Tex. Elec. Code § 13.033(d) (West 2017).

⁶⁸ Tex. Elec. Code § 13.040 (West 2017); see also TEXAS VOLUNTEER DEPUTY REGISTRAR GUIDE, *supra* note 65 (noting that "[t]he voter registrar will issue you a certificate of appointment and give you a receipt book or voter registration applications with a tear off receipt" and suggesting that, despite the lack of express law, that county registrars may proscribe procedures for how long receipts must be retained.)

⁶⁹ Tex. Elec. Code § 13.039 (West 2017).

⁷⁰ See *id.*

⁷¹ Tex. Elec. Code Ann. § 13.036 (West 2018).

available for public inspection as soon as they are submitted to the county registrar (the “Photocopying Prohibition”).⁷²

- Finally, all VDR certifications expire at the end of every even numbered year.⁷³

In addition to enacting the Texas residency requirement and training requirement, the 2011 amendments to the VDR law included a new provision which bans “engaging in [...] practice that causes another person’s compensation from or employment status with the person to be dependent on the number of voter registrations that the other person *facilitates*” (the “Compensation Prohibition”). While a “pay-by-form” prohibition or quota prohibition on compensation of canvassers or voter registrars is common in other states (and was accordingly not challenged in Texas), Texas’s version of the prohibition is vague and overbroad, as it fails to adequately explain what types of actions constitute “facilitating” a voter registration, and, importantly, fails to explain whether Texas bans organizations from making *any* employment or compensation decision (such as employment-based disciplinary actions) based on productivity.⁷⁴ Violations of the Compensation Prohibition are criminally punishable, Class A misdemeanors, and if an entity is the violator, the entity’s officers, directors, and agents can be individually liable for the offense.⁷⁵ As the plaintiff, Voting for America, alleged in the Complaint in *Voting for America v. Steen* (then captioned “*Voting for America v. Andrade*,” referred to here as *Andrade I*):

Given the vagueness of the undefined term “facilitates,” it is not clear what the legitimate scope of the law would be. Therefore, the statute violates [the] First Amendment of the United States Constitution.

Furthermore, the term “facilitates” is so vague as to force citizens to guess what conduct is prohibited and to give law enforcement and election officials no guidance or standards to avoid unconstitutional application, therefore chilling the

⁷² See Tex. Elec. Code § 13.038 (West 2017).

⁷³ See Tex. Elec. Code § 13.033(b)(5) (West 2017).

⁷⁴ See Tex. Elec. Code § 13.008(a)(2)-(3) (West 2017) (the “Compensation Prohibition”). This restriction applies not only to VDRs but for anyone involved in third-party voter registration activity even if they do not accept or deliver voter-registration applications, so long as they “facilitate” a voter registration application. The Compensation Prohibition bans “presenting another person with a quota of voter registrations to *facilitate* as a condition of payment or employment,” and “engaging in another practice that causes another person’s compensation from or employment status with the person to be dependent on the number of voter registrations that the other person *facilitates*.” See *id* (emphasis added); see also *Andrade I*, 888 F. Supp. 2d at 851 (“As noted, the language of sections 13.008(a)(2) and (3), even narrowly construed, bans Plaintiffs from taking many performance-based disciplinary actions. Like the broad based compensation bans in *Deters and Meyer*, the Compensation Prohibition has ‘the inevitable effect of reducing the total quantum of speech’ in which the Organizational Plaintiffs may engage.”).

⁷⁵ *Andrade I*, 888 F. Supp. 2d at 825 citing Tex. Elec. Code Ann. § 13.008(c) (West 2017).

exercise of First Amendment rights and violating the Due Process Clause of the Fourteenth Amendment.⁷⁶

In 2017, the Texas legislature went further still, passing a law allegedly aimed at so-called “Vote Harvesting Organizations”⁷⁷ that makes it a *state jail felony* to act with three or more persons to violate any part of Title 2 of the Texas Election Code, which contains the VDR laws. This new addition raises the criminal penalties in Texas’s VDR law “one category higher” than those found in the VDR law itself, if the violation is committed by way of a “conspir[acy]” (defined as an agreement, which can be inferred) through a “vote harvesting organization” (defined as “three or more persons who collaborate” in running afoul of the Texas Election Code). This makes certain violations of the VDR scheme—including the County Limitation, Compensation Prohibition, or the Mail Prohibition—a *state jail felony*, which carries a mandatory minimum sentence of not less than 180 days in jail (with a maximum of two years in jail, a fine of up to \$10,000, or both).⁷⁸ In other words, if Tunde was running a registration drive with two other grassroots volunteers, and they each accidentally collected a completed registration form from an out-of-town Spurs fan, they could face between six months and two years of jail time.⁷⁹

Unfortunately, Texas’s sustained attack on grassroots activism and community organizing has been, to date, quite successful. As noted, the 2011 version of the VDR law has significantly chilled

⁷⁶ See Complaint in *VOTING FOR AMERICA, INC. Brad Richey Penelope McFadden, Plaintiffs, v. Hope ANDRADE, In Her Official Capacity as Texas Secretary of State Cheryl E. Johnson In Her Official Capacity as Galveston County Assessor and Collector of Taxes and Voter Registrar, Defendants.*, 2012 WL 443349 (S.D. Tex.), at paras. 110-111.

⁷⁷ See Tex. Elec. Code Ann. § 276.011 (West 2017); see also Tex. H.B. 1735, 85th Leg., R.S. (2017) § 62, amending § 276.011 of the Texas Election Code.

⁷⁸ See Tex. Elec. Code Ann. §§ 13.006, 13.008(a)(1)-(3), 13.145 (West 2017) (VDR provisions for Class A misdemeanors); Tex. Elec. Code Ann. § 276.011(b) (West 2017) (elevating Class A misdemeanors to state jail felonies); Tex. Penal Code §12.35 (West 2017) (penalties for state jail felonies). In relevant parts, the law provides:

ENGAGING IN ORGANIZED ELECTION FRAUD ACTIVITY.

(a) A person commits an offense if, with the intent to establish, maintain, or participate in a vote harvesting organization, the person commits or conspires to commit one or more offenses under Titles 1 through 7.

(b) [...] an offense under this section is one category higher than the most serious offense listed in Subsection (a) that is committed, and if the most serious offense is a Class A misdemeanor, the offense is a state jail felony. [...]

(d) In this section, “vote harvesting organization” means three or more persons who collaborate in committing offenses under Titles 1 through 7, although participants may not know each other’s identity, membership in the organization may change from time to time, and participants may stand in a candidate-consultant, donor-consultant, consultant-filed operative, or other arm’s length relationship in the organization’s operations.

(e) For purposes of this section, “conspires to commit” means that a person agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them perform an overt act in pursuance of the agreement. An agreement constituting conspiring to commit may be inferred from the acts of the parties.

⁷⁹ As a note, the collection of a completed form does not automatically register a person to vote. The County Registrar will run the applicant’s information when the completed form is received by its office, and ineligible applicants will not be registered.

voter registration activity. Now, with the stakes raised even higher, it seems increasingly likely that Texas’s laws, if not challenged, could freeze voter registration drives into extinction.

II. The Fifth Circuit Wrongly Upheld Texas’s Regime

To date, every federal court—with the notable exception of the Fifth Circuit in *Steen*—has viewed voter registration activity as inextricably intertwined with protected speech, association, and political rights under the First and Fourteenth Amendments.⁸⁰ Accordingly, federal courts have required stiff justifications to sustain burdensome regulations. Federal courts have also relied heavily upon the NVRA to strike down certain restrictions on registration drives, including prohibitions on submitting forms by mail.⁸¹

Following the 2011 changes to the VDR law, two national community-organizing groups brought a facial challenge to certain aspects of Texas’s VDR regime.⁸² Court of Appeals Judge Gregg Costa (then a district court judge) struck down five provisions, holding that those provisions violated the First Amendment or Fourteenth Amendment, or were preempted by the NVRA. Specifically, he invalidated:

1. The Non-Resident Prohibition,⁸³ for forbidding non-Texas residents from serving as VDRs;
2. The County Limitation,⁸⁴ for prohibiting VDRs in one county from registering voters in another county without being appointed as a VDR in that other county;
3. The Photocopying Prohibition,⁸⁵ for banning VDRs from photocopying or scanning voter registration applications (with certain exceptions for confidential information);
4. The Mail Prohibition,⁸⁶ for requiring hand delivery of completed voter registration applications and prohibiting VDRs from sending completed voter registration applications via U.S. mail; and

⁸⁰ See, e.g., *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216-17 (D.N.M. 2010) (rejecting state’s argument that voter registration activity is “ministerial,” and holding that “efforts to register people to vote communicates a message that democratic participation is important”); *Project Vote v. Blackwell*, 455 F. Supp.2d 695, 701 (N.D. Ohio 2006) (holding that interests impacted by third-party voter registration law subjecting voter registration workers to felony charges if registration forms were not submitted within ten days impacted “critical First Amendment rights”).

⁸¹ See, e.g., *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155, 1162 (N.D. Fl. 2012) (observing that state election officials “routinely rely on the mails,” “distribute absentee ballots through the mails,” and “allow voters to send [absentee ballots] back using the mails.”).

⁸² *Andrade I*, 888 F. Supp. 2d at 856.

⁸³ Tex. Elec. Code § 13.031(d)(3) (West 2017).

⁸⁴ Tex. Elec. Code § 13.038 (West 2017).

⁸⁵ Tex. Elec. Code § 13.038 (West 2017).

⁸⁶ Tex. Elec. Code § 13.042 (West 2017).

5. The Compensation Prohibition, due to vagueness and overbreadth for potentially criminalizing companies and individuals for any performance-based employment or compensation decisions (such as promoting productive canvassers, or disciplining unproductive canvassers).⁸⁷

Under the *Anderson-Burdick* balancing test for evaluating Equal Protection claims, federal courts must determine the legitimacy and strength of each of the state's asserted interests and balance those asserted interests against the burden on voting.⁸⁸ Judge Costa found grave First Amendment concerns with the Non-Resident Prohibition, County Prohibition, and Compensation Prohibition.⁸⁹ Citing *Citizens United*, Judge Costa explained that the Compensation Prohibition was an "'outright ban' on speech 'backed by criminal sanctions' that has 'the inevitable effect of reducing the total quantum of speech.'"⁹⁰ As for the Non-Resident Prohibition, Judge Costa further held that it was "inherently discriminatory" because it prohibits political participation of an entire "identifiable political group whose members share a particular viewpoint"⁹¹ and "excludes millions of Americans from serving as VDRs in Texas."⁹² The County Limitation "imposes heavy administrative burdens on organizations that conduct voter registration [...] by forcing organizations engaged in large-scale registration efforts to have their canvassers and managerial staff appointed and trained as VDRs in multiple counties."⁹³

Texas, in contrast, failed to adequately articulate or provide any evidence that these provisions actually advanced the state's interest in preventing fraud.

⁸⁷ See *Andrade I*, 888 F. Supp. 2d at 847-52; Note that the plaintiffs in *Andrade I* did not challenge a prohibition on paying canvassers per application collected, because that is not a practice that they employ. *Id.* at 847. Rather, the plaintiffs challenged the vagueness and overbreadth of the Compensation Prohibition, as it did not adequately explain what activities were criminalized..

⁸⁸ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Judge Costa noted that both the Non-Resident Prohibition and the Compensation Prohibition were "arguably subject to strict scrutiny," but he nonetheless applied the *Anderson-Burdick* balancing test "because the challenged sections of those two provisions do not survive even under that less exacting scrutiny." See *Andrade I*, 888 F. Supp. 2d at 843.

⁸⁹ See *Andrade I*, 888 F. Supp. 2d at 843-52.

⁹⁰ See *id.* at 843, citing *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 337 (2010).

⁹¹ See *Andrade I*, 888 F. Supp. 2d at 843.

⁹² *Id.* at 842.

⁹³ *Id.* at 845-47.

Regarding the Photocopying Prohibition and the Mail Prohibition, Judge Costa held⁹⁴ that the NVRA, given force by the Elections Clause of the U.S. Constitution, preempted both provisions.⁹⁵ Preemption claims are typically evaluated under the Supremacy Clause of the U.S. Constitution, but the Elections Clause governs preemption challenges brought against state election laws. As discussed further below, shortly after Judge Costa issued his opinion in *Andrade I*, the U.S. Supreme Court in *Arizona v. Inter Tribal Council of Arizona, Inc.* agreed with Judge Costa’s reasoning that there is no rule of construction requiring courts to make a “presumption against preemption,” because the Elections Clause confers on Congress the express power to alter or supplant state laws prescribing the time, place, and manner of conducting federal elections.⁹⁶

A. Overview of Fifth Circuit’s Opinion

Despite the careful, detailed analysis of the district court, the Fifth Circuit reversed, in an opinion that departed from existing First Amendment jurisprudence and recognized preemption standards for state election laws.

To start, the Fifth Circuit’s First Amendment analysis dissected the core components of voter registration drives into separable parts (*i.e.*, the act of setting up tables, urging people to register, handing out application forms, collecting completed forms, delivering forms to a registrar, *etc.*). After separating each component, the *Steen* court performed a *separate* First Amendment analysis on each discrete activity.⁹⁷ Through this unprecedented “dissecting” approach, the Fifth Circuit found that Texas mostly regulated conduct—namely, the “collecting and delivering completed

⁹⁴ Judge Costa held that the Photocopying Provision was preempted by the NVRA and the Elections Clause. The NVRA requires states to “make available for public inspection and, where available, photocopying at a reasonable cost,” records “ensuring the accuracy and currency of official lists of eligible voters” except in limited circumstances. See 52 U.S.C. § 20507(i)(1). Judge Costa reasoned that, where the NVRA requires states to allow VDRs to make copies once the government has received it, it was an “absurd result” which “makes no sense” to prohibit VDRs from photocopying records before they are submitted—especially in light of the NVRA’s purpose to eliminate “administrative chicanery, oversights, and inefficiencies.” *Andrade I*, 888 F. Supp. 2d at 837 (citing *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012)).

Judge Costa also struck down the Mail Prohibition on the same preemption grounds. Because the NVRA requires states to accept voter registration applications by mail, requires state officials to “accept and use” the federal mail voter registration form, and emphasizes the use of these forms “for organized voter registration programs,” see 52 U.S.C. § 20505, Judge Costa held that the NVRA’s mandate “makes no distinction between applications submitted directly by a voter and those submitted by a third party like a VDR.” See *Andrade I*, 888 F. Supp. 2d at 838 (citing *Charles H. Wesley Educ. Found. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005)).

⁹⁵ The Elections Clause provides that “the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I § 4, cl. 1.

⁹⁶ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S.Ct. 2247, 2256–57 (2013).

⁹⁷ See *Steen*, 732 F.3d at 388.

voter registration forms” — ministerial acts that could be considered in isolation from other elements of the voter registration drive.⁹⁸

This finding, reached without reference to any facts in the record, set into motion a crucial distinction between the district court’s First Amendment analysis and that of the Fifth Circuit. Namely, the district court held that the challenged Texas VDR provisions dealt with the “expressive activity” of conducting voter registration drives as a whole, whereas the Fifth Circuit held that collection and delivery of voter registration forms is not by itself “expressive conduct,” and was therefore subject to only “rational-basis” scrutiny.⁹⁹

The Fifth Circuit failed to consider the associational activity of canvassers in organizing with *each other*, and with like-minded new voters, while engaging in voter registration activities. While the district court concluded that the work of voter registration organizations is a “paradigmatic associational activity” protected by the First Amendment,¹⁰⁰ the Fifth Circuit ignored this aspect of the First Amendment entirely.

Similarly, the Fifth Circuit’s narrow First Amendment analysis focused only on the speech of the voter, disregarding the speech of the canvasser or organizer. The Fifth Circuit held that the collection and submission of voter registration applications is *not* a protected form of expressive activity by community organizers, nonprofit organizations, or individual canvassers, but is *only* the speech of the voter seeking to be registered.¹⁰¹ The Fifth Circuit’s critical misstep here ignores established First Amendment jurisprudence protecting the expressive activity of canvassers set forth by the Supreme Court in *Meyer* (striking down Colorado’s ban on paying petition circulators) and *Buckley* (striking down Colorado’s requirement that those collecting petition signatures wear a badge and be registered voters).¹⁰² The Fifth Circuit’s holding that the expressive activity of VDRs is distinguishable from the petition circulation in *Meyer* and *Buckley*, based on the flawed assumption that VDR’s submission of a completed voter registration application cannot be considered speech by the VDR herself, undermines settled First Amendment jurisprudence.¹⁰³

In the Fifth Circuit’s estimation, very few acts in a registration drive qualified for *any* First Amendment protection, so it rejected the notion that the VDR law “chilled” any protected activity

⁹⁸ *Id.* at 392–93. The Fifth Circuit added that even if it was protected expressive activity, the regulations pass First Amendment scrutiny.

⁹⁹ *Id.* at 392–93; compare with *Andrade I*, 888 F. Supp. 2d at 840–41.

¹⁰⁰ *Andrade I*, 888 F. Supp. 2d at 840–41.

¹⁰¹ *Steen*, 732 F.3d at 392 (declaring that “supporting voter registration is the canvasser’s speech, while actually completing the forms is the voter’s speech, and collecting and delivering the forms are merely conduct.”)

¹⁰² See *Meyer v. Grant*, 486 U.S. 414 (1988) (striking down Colorado’s ban on paying petition circulators) and *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 197, 200 (1999) (striking down Colorado’s requirement that those collecting petition signatures wear a badge and be registered voters).

¹⁰³ See *Steen*, 732 F.3d at 390.

out of hand without considering evidence. This conclusory reasoning failed to grapple with the district court's findings that the VDR laws "do not promote the exercise of the right to vote, but rather, *chill* the exercise of that right through an unusual and burdensome maze of laws and penalties related to a major step in the voting process—registration."¹⁰⁴ *Steen* concluded, without any record evidence, that "[w]ith an appropriate division of labor and organizational forethought, no participant in the drive need suffer a detriment of the ability to urge, advocate, interact, or persuade."¹⁰⁵

The Fifth Circuit's assumptions and reasoning led it to hold (under the permissive rational-basis test) that the state's "legitimate interest in preventing voter fraud" justified the onerous VDR-appointment requirements,¹⁰⁶ despite the fact that the state presented *no* credible evidence of electoral misconduct in Texas, let alone any evidence that the challenged provisions were at all related to increasing the security of voter registration.

It bears noting that the Fifth Circuit similarly assumed that the state's interest in "preventing fraud" was strong enough even under the more exacting *Anderson/Burdick* balancing test,¹⁰⁷ regardless of Texas's inability to show *any* specific evidence of fraud to justify preventive measures.¹⁰⁸ The Fifth Circuit likewise upheld Texas's interpretation of the Compensation Prohibition based on the same fraud justification, deferring to the State's narrowing interpretation of the Compensation Prohibition and rejecting the district court's findings on vagueness and overbreadth.¹⁰⁹

On top of this, the Fifth Circuit applied a narrow reading of the Elections Clause, an interpretation which was (and still is) expressly inconsistent with U.S. Supreme Court precedent.¹¹⁰ Months before, the U.S. Supreme Court in *Arizona v. Inter Tribal Council of Arizona, Inc.* struck down an Arizona law that required voter registration officials to reject any voter registration application

¹⁰⁴ See *Andrade I*, 888 F. Supp. 2d at 855 (quoting *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 708 (N.D. Ohio 2006)).

¹⁰⁵ *Steen*, 732 F.3d at 390, 392 (citing *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008)). In so holding, the Fifth Circuit distinguished on their facts. The Fifth Circuit's reliance on *Browning* is misplaced. There, while the Southern District of Florida stated that it did not think that the "collection and handling" of voter applications was "inherently expressive" activity, it nevertheless proceeded to evaluate the conduct under the *Anderson/Burdick* test. 575 F. Supp. 2d at 1319.

¹⁰⁶ *Id.* Of specific emphasis were the Non-Resident Prohibition and County Limitation, discussed *supra*.

¹⁰⁷ *Steen*, 732 F.3d at 395. Under the *Anderson/Burdick* balancing test, a court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," and then "identify and evaluate the precise interest put forward by the State as justifications for the burden." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). State rules that impose a severe burden on First Amendment rights must be narrowly tailored to advance a compelling state interest, see *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), but lesser burdens trigger less exacting review, and a state's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory measures." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

¹⁰⁸ *Id.* at 394–95.

¹⁰⁹ *Id.* at 398–99.

¹¹⁰ See *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S.Ct. 2247 (2013).

that was not accompanied by *documentary* evidence of citizenship, including rejecting the federal mail-in registration form provided for in the NVRA. The Court reasoned that the NVRA provides that states must accept and use the federal form which requires only that an applicant aver, under penalty of perjury, that she is a citizen—not documentary proof of citizenship. The Court held that the NVRA’s mandate that states accept the federal form preempted Arizona’s law, whose additional requirements eviscerated the purpose of the NVRA to “increas[e] the number of eligible citizens who register to vote in elections for Federal office.”¹¹¹ Moreover, the Court emphasized that the Elections Clause, unlike the Supremacy Clause, has no rule of construction prescribing a “presumption against preemption” because the Elections Clause confers on Congress the express power to alter or supplant state laws prescribing the time, place, and manner of conducting federal elections.¹¹² Furthermore, unlike a state’s historic “police powers” at play in the Supremacy Clause context, a state’s role in regulating congressional elections “has always existed subject to the express qualification that it terminates according to federal law.”¹¹³

The Fifth Circuit disregarded the Supreme Court’s reasoning in *Inter Tribal* when it upheld Texas’s “Mail Prohibition,”¹¹⁴ which criminally sanctions VDRs for mailing applications to the appropriate county registrar. Despite the NVRA’s clear instruction that states must *accept and use the federal mail-in registration form*, the Fifth Circuit held that so long as the state “accepts” forms that come through the mail, even if the VDR who sent it is later criminally sanctioned, there is no preemption concern.¹¹⁵ It was on this reading that the Fifth Circuit purportedly distinguished the Mail Prohibition from the Arizona law deemed unconstitutional in *Inter Tribal*,¹¹⁶ without any recognition that the Supreme Court rejected this narrow reading of the Elections Clause. It bears repeating that the Fifth Circuit’s decision bent over backwards to find no preemption, absurdly finding that Texas was allowed to continue to criminally sanction VDRs who submit voter registration applications by mail, even while acknowledging that the state *must accept those same voter registration applications* under the NVRA.

The Fifth Circuit also upheld the Photocopying Prohibition, despite the NVRA’s Public Disclosure provision requiring the state to make voter records available for photocopying.¹¹⁷ In doing so, the

¹¹¹ *Id.* at 2255–56.

¹¹² *Id.* at 2256–57.

¹¹³ *Id.* at 2257 (citing *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001) (internal quotations omitted)).

¹¹⁴ The Mail Prohibition provides that “a volunteer deputy registrar shall deliver in person, or by personal delivery through another designated volunteer deputy, to the registrar each completed voter registration application submitted to the deputy....” Tex. Elec. Code Ann. § 13.042(a) (West 2017); see *Andrade I*, 888 F. Supp. 2d at 837–38.

¹¹⁵ *Steen*, 732 F.3d at 400.

¹¹⁶ See *id.* at 400 (citing *Inter Tribal*, 133 S.Ct. 2247).

¹¹⁷ See 52 U.S.C. § 20507(i)(1). The Public Disclosure requirement mandates that states “maintain . . . and make available for public and inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purposes of ensuring the accuracy and currency of official lists of eligible voters.”

court drew an artificial distinction between “records *maintained* by the State”¹¹⁸ and those same records in a VDR’s possession *prior* to the State’s receipt. According to the Fifth Circuit, a VDR could request to photocopy records *after* turning completed records in to the county registrar, *but not before*, resting on an unexplained greater risk to a registrant’s private information while in the hands of a VDR.¹¹⁹ Unlike the district court, the Fifth Circuit was seemingly unconcerned that its holding *promoted* the very same “administrative chicanery, oversights, and inefficiencies” that the NVRA was created to eliminate.¹²⁰

B. Criticisms of the Fifth Circuit’s reasoning in *Voting for America v. Steen*

The Fifth Circuit’s reasoning is deeply flawed in many respects, including for the reasons that follow.

First, in refusing to consider the entire regulatory scheme, the Fifth Circuit misses the forest for the trees. Today in Texas, as in the South in the 1960s and like the ballot initiative activity that has been expressly protected by the Supreme Court, voter registration drives “of necessity involve[] both the expression of a desire for political change and a discussion of the merits of the proposed change.”¹²¹ The Supreme Court has found that political speech of this nature is entitled to the highest degree of protection and has struck down governmental regulations that “reduce the total quantum of speech on a public issue.”¹²² Here, there is evidence that the VDR scheme deters voter registration activity and has reduced the overall amount of registration drives, which should trigger heightened scrutiny from the federal courts. Moreover, given the context of voter suppression laws in Texas and nationwide in 2011, a full evidentiary examination is likely to show that lawmakers *intended* to silence the speech of community organizers in particular when it tightened the laws, which would be impermissible viewpoint discrimination.

Second, the Fifth Circuit failed to plausibly explain how the various activities that make up voter registration drives can be deemed “separable” for purposes of a First Amendment analysis, particularly given the lack of case law justifying this type of approach. In particular, this holding makes little sense in the context of First Amendment “expressive conduct” jurisprudence—the expressive act of a sit-in to protest segregation, for example, may likewise have distinct component parts (organizing members, transporting members to the protest site, actually “sitting-in,” chanting, *etc.*), but such expressive activity is plainly protected by the First Amendment.¹²³ The Fifth Circuit’s departure from established First Amendment jurisprudence regarding expressive

¹¹⁸ *I.e.*, the text found in the NVRA.

¹¹⁹ *Steen*, 732 F.3d at 399.

¹²⁰ *Andrade I*, 888 F. Supp. 2d at 837, citing *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012).

¹²¹ See *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

¹²² *Id.* at 423; see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“[P]olitical speech must prevail against laws that would suppress it by design or inadvertence.”).

¹²³ See *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

activity is not explained anywhere in its opinion, and fails to consider that the Supreme Court has applied the Speech Clause to a myriad of types of expressive conduct that do not involve “pure speech,” yet convey a particularized message (including flag burning,¹²⁴ the wearing of armbands used to protest war,¹²⁵ sit-ins,¹²⁶ and nude dancing¹²⁷—to name just a few).

The messages conveyed by participants in a voter registration drive are expressive acts protected by the First Amendment—which, among them, include the message that greater and more equal voter participation is critical to the functioning of our democracy and that the voices of all eligible voters deserve to be heard.¹²⁸ The Fifth Circuit’s application of the rational-basis test to voter registration activities is wrong.

Third, the court took an exceedingly narrow view of Elections Clause preemption, holding that a state law regulating elections must “directly conflict” with federal legislation. The Fifth Circuit applied the wrong test to evaluate the constitutionality of state election laws that are already governed by federal law. Moreover, the Fifth Circuit’s holding ignores the manifest differences between Supremacy Clause and Elections Clause preemption made clear by the Supreme Court in *Inter Tribal*,¹²⁹ four months before the Fifth Circuit’s opinion in *Steen*. Instead of properly considering and applying *Inter Tribal*, the Fifth Circuit erroneously relied upon a “direct conflict” test for Elections Clause preemption.

Fourth, the Fifth Circuit’s assumption that a canvasser’s submission of another’s voter registration application cannot be the canvasser’s speech (but only the voter’s speech) is wrong.¹³⁰ The purpose of the expressive activity of “supporting voter registration” does not stop once a canvasser helps a potential voter fill out an application; rather, the canvasser continues and furthers her message by submitting the applications to the appropriate county registrar. Nonpartisan grassroots and national voter registration organizations convey a clear message in *actually submitting* voter registration applications—including the message that “participation in the political process

¹²⁴ See *Texas v. Johnson*, 491 U.S. 397, 404–06 (1989).

¹²⁵ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (wearing armbands to protest Vietnam War).

¹²⁶ See *Brown*, 383 U.S. at 141–42.

¹²⁷ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991).

¹²⁸ *Steen* erroneously relies upon *Planned Parenthood v. Suehs*, 692 F.3d 343, 349 (5th Cir. 2012) for its novel holding that different steps within a voter registration drive are separable and governed by different legal standards. *Suehs* is inapposite—there, the Fifth Circuit vacated a preliminary injunction halting enforcement of certain Texas Health and Human Services (HHS) regulations that blocked Medicaid-like funding to any health care providers that perform abortions, or promote or affiliate with abortion providers. 692 F.3d at 346. The Fifth Circuit criticized the district court for evaluating the *Texas HHS regulations as whole* rather than analyzing each restriction in Texas’ code separately. 692 F.3d at 349. *Suehs* therefore had nothing to do with slicing and dicing the various acts that may constitute protected speech (e.g., voter registration drives), and holding that only some of those acts are entitled to First Amendment protection.

¹²⁹ 133 S. Ct. at 2257.

¹³⁰ See *Steen*, 732 F.3d at 392.

through voting is important to a democratic society.”¹³¹ For many groups, achieving a new registration is critical to advancing the mission of building power in traditionally excluded communities. Courts have held that seeking to increase voter participation is a message in it of itself,¹³² as that act “take[s] a position and express[es] a point of view in the ongoing debate whether to engage or disengage from the political process.”¹³³

The Fifth Circuit’s failure to consider the associational rights of canvassers and organizations conducting voter registration drives, a “paradigmatic associational activity” protected by the First Amendment,¹³⁴ is another fundamental weakness of the opinion. Voter registration drives are rarely itself, if ever, organized without a point of view, whether that point of view is to promote voter registration and civic participation (*e.g.*, The League of Women Voters), to support a political candidate or candidates (*e.g.*, campus Republicans or Democrats), to empower a particular community (*e.g.*, NAACP and Voto Latino) or to advocate for certain policies (*e.g.*, the National Rifle Association and Planned Parenthood). Indeed, it is well-settled law that “interactive communication concerning political change” — of whatever nature — stands at the “zenith” of conduct entitled to First Amendment protection, including for nonprofit corporations like those that typically employ community organizers and use voter registration as part of a larger strategy.¹³⁵ The process of discussing such issues, assisting with someone’s registration to vote, and following up with that individual and encouraging them to actually vote all implicate strong associational rights on behalf of canvassers, nonprofit organizations, and individuals.¹³⁶ The Fifth Circuit’s opinion ignores the chilling effect that the VDR laws have on an individual’s ability to “associate with others for the common advancement of political beliefs and ideas, [which is plainly] a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments.”¹³⁷

Fifth, in balancing interests under the *Anderson/Burdick* test, the Fifth Circuit wrongly gave the State *carte blanche* to regulate voter registration drives in the name of preventing “voter fraud” without requiring the government to present evidence that voter registration drive fraud in Texas was or is a legitimate concern, or that such evidence actually motivated the 2011 legislature, or that Texas’s laws are closely tailored (in practice) to address any issues. Instead, the only “evidence” the Fifth Circuit identified was “evidence of voter registration fraud committed by

¹³¹ See *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700, 705-06 (N.D. Ohio 2006).

¹³² *Id.* at 706.

¹³³ *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010).

¹³⁴ *Andrade I*, 888 F. Supp. 2d at 840-41.

¹³⁵ *Buckley*, 525 U.S. at 186–87 (quoting *Meyer v. Grant*, 486 U.S. 414 at 422, 425 (1988)); see also *Citizens United*, 558 U.S. at 337.

¹³⁶ See, *e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

¹³⁷ See *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

canvassers, including those who worked for . . . ACORN,” all of which came from sources outside of the Texas and outside of the record.¹³⁸

Established case law makes clear that, to justify any sort of burden on voting rights, the *Anderson/Burdick* test requires a state to establish a precise, “sufficiently weighty” justification rather than “advanc[ing] only a vague interest in the smooth functioning” of the electoral process.¹³⁹ Close examination of the legislative record is particularly important here, given the evidence showing that the prevention of “fraud” was a pretextual justification used by the 2011 legislature to support the Texas photo ID law.¹⁴⁰

Finally, the Fifth Circuit’s opinion in *Steen* was based on several facts or assumptions not justified by the record, including (but not limited to): (1) assuming that non-residents or residents outside the county in which they were deputized are actually more likely to commit voter fraud than Texas residents, even where the state presented no evidence to substantiate such an assumption;¹⁴¹ (2) assuming that a VDR trained in one county would be automatically appointed as a VDR in other counties, where the law made no such provision;¹⁴² and (3) inserting its own ideas for how individuals and organizations *should* run their voter registration drives under the Texas scheme,¹⁴³ rather than upholding First Amendment protections allowing individuals and organizations to implement the types of First Amendment activities they believe are most effective.¹⁴⁴

C. Potential Future Challenges to Texas’s VDR Law and Similar Schemes

¹³⁸ See *Steen*, 732 F.3d at 393-94.

¹³⁹ *Obama for America v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012); see also *id.* at 432-36 (closely scrutinizing and rejecting the two justifications offered by Ohio for eliminating certain early voting days for a sub-set of voters); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (“In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as *Harper* demonstrates, ***it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’***” (emphasis added)).

¹⁴⁰ The Fifth Circuit’s ruling in the Texas photo ID litigation was based on Section 2 of the Voting Rights Act, other cases across the country examining constitutional claims against state photo ID laws have involved a searching examining of the state interests alleged to support such laws and further confirmed the heightened standard required by *Anderson/Burdick* test. See, e.g., *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 235-36 (4th Cir. 2016) (holding that “the State has failed to identify even a single individual who has failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina,” and that the state’s Voter ID law “creat[es] hoops through which certain citizens must jump with little discernable gain in deterrence of voter fraud”); see also, Christopher Ingraham, *7 papers, 4 government inquiries, 2 news investigations, and 1 court ruling proving voter fraud is mostly a myth*, WASH. POST (July 9, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/07/09/7-papers-4-government-inquiries-2-news-investigations-and-1-court-ruling-proving-voter-fraud-is-mostly-a-myth/>.

¹⁴¹ See *Steen*, 732 F.3d at 395.

¹⁴² *Id.* at 389.

¹⁴³ *Id.* at 391-92.

¹⁴⁴ See, e.g., *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (“The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing”).

Below are three examples of how practitioners may frame future challenges to certain provisions of Texas's VDR law and other similar schemes:¹⁴⁵

1. Facial and As-Applied Challenges under the First Amendment and Equal Protection Clause

Given the contentious holding, assumptions, and novel First Amendment analysis of the Fifth Circuit in *Steen*, it is possible that a different panel of the Fifth Circuit (or the U.S. Supreme Court on appeal) would rule differently if it had a more developed record upon an “as applied” First Amendment challenge to provisions of the Texas VDR law.¹⁴⁶ For instance, community organizers engaged in voter registration activity in Texas would now be able to present data and statistics at trial that demonstrate the chilling effects the Texas VDR law has had on their protected expressive activity. Comparing the number of voter registration drives or actual voter registration applications submitted by voter registration organizations before and after Texas enacted its new VDR provisions in May 2011—or comparing jurisdictions in Texas with similarly situated jurisdictions in other states with less onerous laws—could be persuasive evidence in demonstrating the effect of the Texas scheme on protected activity. Organizational plaintiffs can also present any factual evidence indicating that the VDR laws do not adequately advance the government's interest in preventing voter fraud (*e.g.*, by presenting data from states as counterfactuals, *etc.*).

Specifically as to the new Vote Harvesting law, the law is seemingly ripe for a facial challenge¹⁴⁷ for overbreadth under the First and Fourteenth Amendments and for vagueness, because of the chilling effect on grassroots voter registration activity and internal inconsistencies within the regulatory scheme itself. This is particularly true now that potential criminal penalties have been amplified. For instance, because of the increased criminalization of compensation and employment decisions for workers engaged in voter registration and its consequent effect on organizations, additional First Amendment challenges may have success based on the principle that such heightened criminal penalties place unconstitutional barriers on the ability of grassroots

¹⁴⁵ Other challenges may be possible. For instance, “void for vagueness” or “overbreadth” challenges to the criminal sanctions in the VDR law, which punishes individuals and persons for “*facilitating*” voter registrations in return for certain types of compensation, may be successful. Another challenge that may be considered is that voting and voter registration is a “fundamental right” as is stated in the NVRA, 52 U.S.C. § 20501(a)(1)—an argument with some early support in case law immediately after the passage of the Voting Rights Act, *see, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1968), before the Supreme Court departed from that view and held that there must be “substantial regulation of elections,” with restrictions on voting upheld unless they were “invidious[ly] discriminatory.” *See, e.g., Storer v. Brown*, 415 U.S. 724, 730 (1974). For further background, *see generally*, Armand Derfner and J. Gerald Hebert, *Voting is Speech*, 34 YALE L. & POL'Y REV. 741 (Jun. 28, 2016).

¹⁴⁶ A regulation may be held constitutionally invalid “as applied” when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is not squarely in dispute. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 379–80 (1971).

¹⁴⁷ It may be ineffective to wait for an as-applied challenge to H.B.1735, because it is unclear how Texas will enforce the law. It is precisely this lack of clarity which creates a chilling effect on grassroots activity under the First Amendment.

organizations to engage in expressive activity.¹⁴⁸ Now, organizations and their officers and directors face state felony jail charges for violating the Compensation Prohibition—possibly for even making employment decisions based on productivity. Likewise, their employees could be convicted of a felony for unlawful delivery of completed voter registration applications¹⁴⁹ or purporting to act as an agent in connection with a voter registration application.¹⁵⁰ Texas’s draconian enhancement of criminal penalties applies to all criminal offenses in the VDR law where the VDR “conspires” with other individuals, even for honest mistakes, such as the failure of a VDR to deliver applications within five days of receiving them. This must be challenged. In any facial challenge, it will be important to establish that there is no evidence (in the legislative record or otherwise) that these broad-sweeping criminal penalties have any relation to decreasing “voter fraud.”

2. NVRA Preemption Challenges based on Supreme Court Precedent

As noted above, the *Steen* decision took an exceedingly narrow view of Elections Clause preemption. While prior Fifth Circuit precedent provided that “state and federal law must ‘directly conflict’ in order for Elections Clause preemption to occur,”¹⁵¹ this reasoning was expressly overruled by the U.S. Supreme Court in *Inter Tribal*.¹⁵²

The Court in *Inter Tribal* held that Arizona’s proof of citizenship requirement was “‘inconsistent with the NVRA’s mandate” to accept and use the federal mail-in registration form. In so holding, the Court reasoned that, unlike the preemption analysis applied in some Supremacy Clause cases, the Election Clause does not require courts to make a “presumption against preemption,” or apply the “plain statement rule” of statutory construction (which requires a federal statute to make unmistakably clear that Congress intended to legislate in areas traditionally regulated by states).¹⁵³ Because, as the Court observed, the Elections Clause “empowers Congress to ‘make or alter’ state election regulations” and therefore “is none other than the power to preempt,” and because Arizona’s proof of citizenship requirement for voter registration imposed additional requirements beyond what is required to be submitted with the federal form itself, the NVRA preempted Arizona’s law—rendering it unconstitutional.

¹⁴⁸ See, e.g., *Citizens United*, 558 U.S. at 337–40 (“The law before us is an outright ban, backed by criminal sanctions [...] Section 441b’s prohibition [...] is thus a ban on speech. [...] Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. [...] Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subject or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.”); see *id.* at 365–66 (holding that there is no compelling government interest for prohibiting corporations and unions from using general treasury funds to make election-related independent expenditures.).

¹⁴⁹ See Tex. Elec. Code § 13.145 (West 2017).

¹⁵⁰ See Tex. Elec. Code § 13.006 (West 2017).

¹⁵¹ See *Voting Integrity Project v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000).

¹⁵² 133 S. Ct. at 2257.

¹⁵³ *Id.* at 2256.

Despite the Supreme Court’s analysis under *Inter Tribal* being entered just months earlier, the Fifth Circuit in *Steen* nevertheless upheld the Mail Prohibition and the Photocopying Prohibition—despite the prohibitions’ apparent purpose to promote a contrary result to the NVRA.¹⁵⁴ Regarding the Mail Prohibition, although the NVRA requires states to “accept and use” a federal voter registration application sent through the U.S. mail, the Fifth Circuit obtusely upheld the Texas Election Code’s ban on a VDR’s submission of completed registration forms through the U.S. mail. The Fifth Circuit reasoned that “county registrars must accept *every* application received by mail, even those sent by VDRs in violation of the [Mail Prohibition].” In other words, the Fifth Circuit upheld a Texas law which *criminalizes* a VDR mailing of a completed voter registration form—even though it acknowledged that the NVRA mandates that county registrars accept and use that same completed voter registration form. In the author’s view, this convoluted result fails to adequately engage with the text and the express purposes of the NVRA.

Likewise, the *Steen* court failed to apply the Supreme Court’s reasoning in *Inter Tribal* to the Photocopying Prohibition and the Texas Secretary of State’s novel interpretation of the Election Code. The NVRA mandates each state to “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 voters.”¹⁵⁵ The Fifth Circuit held that completed voter registration forms in the hands of VDRs are not records of the state—at least not until they are hand-delivered by VDRs to the county registrar.¹⁵⁶ Like the Mail Prohibition, this leads to a convoluted result in which a VDR is prohibited from photocopying completed forms before delivery (which may allow for follow up with a prospective voter to remind them to vote), but requires the state to make available those same records to the public after they are delivered.

One final problem, not previously explored, is that most Texas counties do not in practice “accept and use” the federal form from VDRs, because they have created their own forms with built-in receipts. In a subsequent challenge, this fact should be developed on the record and used as an additional basis to claim NVRA preemption.

3. Vote Denial Challenges based on Section 2 of the Voting Rights Act.¹⁵⁷

¹⁵⁴ See *Steen*, 732 F.3d at 400.

¹⁵⁵ Tex. Elec. Code Ann. § 13.038.

¹⁵⁶ See *Steen*, 732 F.3d at 400.

¹⁵⁷ The VRA, Section 2 provides in its subsection (a) that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .” (emphasis added). Subsection (b) of Section 2 provides that a violation of subsection (a) is established based on a totality of the circumstances test, evaluating whether the political processes are “not equally open to participation by members of a class of citizens protected by subsection (a) in that *its members have less opportunity than other members of the electorate to participate in the political process* and elect representatives of their choice.” (emphasis added). Establishing a violation of

A plaintiff challenging provisions of the Texas VDR law under Section 2 of the Voting Rights Act would need to establish that, by preventing third-party organizations from effectively carrying out voter registration drives in Texas's communities of color, Texas's VDR scheme has a substantial disparate impact on Black, Latino, or Asian-American registration rates, and that the disparity results in minority members of the electorate having less of an opportunity to participate in the political process. This admittedly-difficult standard would likely require substantial cross-sectional data on the effect of voter registration drives on minority registration rates, the effectiveness of third-party voter registration drives as a means for minority communities to register (as compared to other means of voter registration), and the preclusive effect of the Texas VDR scheme on these voter registration drives. If plaintiffs are able to compile comprehensive data that supports the conclusion that the Texas VDR law disparately impacts Black, Latino and/or Asian-American Texans, resulting in these members of the electorate having less opportunity to participate in the political process, a Section 2 challenge may be successful.

Conclusion

For better and worse, what starts in Texas does not always stay in Texas. As grassroots activism continues to swell across the country, people in power *will* feel threatened, and there *will* be backlash against those on the ground. Severe restrictions on voter registration drives, like laws in Texas, are particularly threatening to First Amendment freedoms—and, as our experience in Texas shows, can be particularly effective ways to dampen grassroots power-building if allowed to stand.

Like so many laws on the books nationwide that have (for too long) curtailed the right to vote in America, we believe that the time is ripe to challenge Texas's unconstitutional regulation of voter registration drives. We hope that quickly leads to greater equality and justice in our home state. We also hope that the lessons from Texas can be useful elsewhere, in guarding our First Amendment freedoms during legislative sessions in 2019 and beyond.

Section 2 of the VRA is exceedingly difficult, even though Section 2 does not require proof of discriminatory intent—only discriminatory effect. See *Chisom v. Roemer*, 501 U.S. 380, 383–84 (1991). This is because, in most voter denial cases, courts require a “causal connection” between the electoral practice at issue and the inequality in the *opportunities* enjoyed by different groups of voters. While rare, voter registration laws have been challenged successfully under Section 2 of the VRA. See, e.g., *Miss. State Chapter, Operation Push v. Alain*, 674 F. Supp. 1245, 1268 (N.D. Miss. 1987) (“*Operation PUSH I*”), *aff'd sub nom. Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991) (“*Operation PUSH III*”) (holding that (1) Mississippi's “dual registration process,” which required citizens to register first with a county registrar in order to vote in federal, state, and county elections, and again with a municipal clerk in order to vote in municipal elections; and (2) Mississippi's prohibition of “satellite registration” each disparately impacted black registration rates, resulting in black members of the electorate having less of an opportunity to participate in the political process, in violation of Section 2 of the VRA).

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