

No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE RAY, *et al.*,

Applicants,

v.

GREG ABBOTT, *et al.*,

Respondents.

**EMERGENCY APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED
BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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To the Honorable Antonin Scalia, Associate Justice of the United States and Circuit Justice for the Fifth Circuit.

Applicants¹ seek vacation of a stay pending appeal issued by the Fifth Circuit late this morning. *See Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J.) (granting motion to vacate a stay order entered by the Court of Appeals). The Fifth Circuit's ruling stays the narrow preliminary injunction issued by the District Court to alleviate severe voter and volunteer confusion regarding mail-in balloting in Texas, which is presently underway for the November 7, 2006 General Election.

The stay must be vacated because the Fifth Circuit's Order directly contravenes this Court's recent decision in *Purcell v. Gonzalez*, Nos. 06A375 (06-532) and 06A379 (06-533), 2006 U.S. LEXIS 8000 (U.S. Oct. 20, 2006) (*per curiam*), which held that Courts of Appeals may not, without any explanation or reasoning, disturb a preliminary injunction order issued by a District Court in advance of an election, particularly where – as here – the District Court's order “alleviate[s] voter confusion and consequent incentive to remain away from the polls.” *Id.* at *6. Indeed, the only difference between *Purcell* and this case is the affiliation of the political forces receiving a legally insufficient ruling from the Court of Appeals. Because “[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect,” *id.* at *7 – in particular, the District Court's conclusion that an injunction is necessary to prevent irreparable harm to Plaintiffs' First and Fourteenth Amendment rights related to ongoing mail-in balloting efforts – the Fifth Circuit's Order must be vacated.

¹ Applicants are individuals who seek to provide assistance to mail-in voters (Willie Ray, Gloria Meeks, Jamillah Johnson, Rebecca Minneweather, and Walter Hinojosa), an elderly, homebound voter in need of such assistance (Parthenia McDonald), and a political party whose efforts to encourage and assist mail-in voting have been severely impaired by the provision of Texas law at issue (The Texas Democratic Party).

FACTUAL AND PROCEDURAL BACKGROUND²

On September 21, 2006, Applicants filed suit in the United States District Court for the Eastern District of Texas, alleging several federal constitutional and statutory challenges to unprecedented provisions of the Texas Election Code restricting the mail-in ballot process. Plaintiffs brought this suit because the challenged provisions infringe upon fundamental voting and expressive rights, are unconstitutionally vague and overbroad, and have been enforced by State agents in a racially discriminatory manner. Particularly relevant to this application is Texas Election Code Section 86.006(f), which criminalizes the mere possession of a mail-in ballot of another voter. Under Texas law, a ballot returned in violation of Section 86.006(f)'s broad prohibition "may not be counted." Tex. Elec. Code § 86.006(h) (emphasis added).

On October 13, 2006, Applicants moved for preliminary injunctive relief in the District Court, in light of the State's stepped-up enforcement efforts in advance of the upcoming election. In particular, as the mail-in voting period neared, the chilling effect of the challenged provisions materialized acutely, as Texas voters and volunteers – including many affiliated with the Texas Democratic Party – reported being intimidated and chilled by the State's enforcement of the challenged provisions. In particular, voters and volunteers were confused about what activities would trigger investigation and prosecution under Section 86.006(f). This confusion and fear was exacerbated by the fact that all but one of the State's election code prosecutions since 2003 had been targeted at black or Hispanic individuals, and all had been targeted at Democrats.

On October 30, 2006, the District Court held an evidentiary hearing on the preliminary injunction motion. That hearing lasted several hours, and included testimony from several live

² Due to the urgent need to rectify the confusion created by the Fifth Circuit's ruling, this Application provides only a short summary of the matters at issue. A more complete description can be found in Applicants' Stay Opposition, which was filed with the Fifth Circuit, which has been submitted to the Court with this Application, and the substance of which Applicants incorporate by reference.

and videotaped witnesses describing the chilling effect created by Section 86.006(f) on voting and voter assistance efforts. The District Court also received substantial documentary evidence, including confusing directives issued by State officials concerning Section 86.006(f).

On October 31, 2006, in order to clarify the confusion created by the facial breadth of Section 86.006(f), the District Court issued a narrow preliminary injunction against certain enforcement of Sections 86.006(f) and (h). This injunction order was supported by fourteen pages of factual findings and conclusions of law. In particular, the District Court determined – based on the substantial evidence introduced at the hearing that the District Court “found to be persuasive” – that Section 86.006 “prevents [Plaintiffs] and dissuades others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout.” Findings of Fact and Conclusions of Law (“Findings”) at 7, ¶ 27.

Based on these findings, the District Court ruled that, pursuant to the First and Fourteenth Amendments, which together protect the fundamental right to vote against unduly burdensome state regulations, the State is barred from prosecuting Section 86.006(f) violations “in circumstances in which a person, other than the voter, has merely possessed the official ballot or official carrier envelope and such possession is with the actual consent of the voter.” Injunction Order at 1. Yet the District Court went on to preserve the State’s ability to require those mailing ballots for voters to provide identifying information: “Nothing in this order should be read to enjoin the defendants from enforcing the provisions of Tex. Elec. Code § 86.006(f) or (h) under any other circumstances.” *Id.* In particular, the District Court provided that its Order did not prevent the State “from enforcing Tex. Elec. Code § 86.0051 under the circumstances in which a person, other than the voter, deposits the carrier envelope in the mail or with a common or contract carrier and does not provide the person’s signature, printed name, and residence address

on the reverse side of the envelope.” *Id.* at 1-2. Thus, under the injunction, if an individual mails a ballot for a mail-in voter, even with that voter’s consent, the assistor must provide identifying information pursuant to Sections 86.006(f) and 86.0051 of the Texas Election Code.

Despite the clarifying and limited nature of the injunction, the State moved the Fifth Circuit for a stay pending appeal in the evening of November 1, 2006. Most remarkably, the State claimed that the “district court’s injunction has the *immediate* effect of enjoining Appellants from preventing voter fraud,” CA5 Mot. at 20, despite conceding that it has no desire or intent to prosecute individuals for violations that fall within the scope of the District Court’s injunction: “Indeed, the particular circumstance that is the focus of the district court’s injunction – prosecution for the mere possession of another’s ballot without having actually placed it in the mail – has never been the basis of any prosecution by the Office of the Attorney General,” *id.* at 17 n.6. Applicants opposed the State’s motion by papers filed on November 2, 2006.

On the morning of November 3, 2006, the Fifth Circuit issued a one-line order granting the State’s motion: “It is ordered that appellants’ motion to stay the Preliminary Injunction filed in the Eastern District of Texas, Marshall Division on October 31, 2006, pending appeal is granted.” Order at 1.³ Circuit Judge Dennis concurred, finding it “difficult . . . to say that the district court abused its discretion in its carefully drawn preliminary injunction of what appears to be the state’s overly broad criminalization of conduct intended to assist disabled voters and its resulting disqualification of disabled voters’ mail-in ballots.” *Id.* at 2. Yet – in conflict with the District Court’s factual findings based on substantial evidence – Judge Dennis claimed that the harms to voting and expressive rights caused by Section 86.006 “are somewhat speculative.” *Id.*

Applicants now request emergency relief from this Court because the Fifth Circuit’s stay pending appeal is creating and will continue to create massive confusion about the application of

³ The Fifth Circuit also denied the State’s motion to expedite the appeal.

Section 86.006(f) to the mail-balloting now taking place in Texas (mail-in ballots may be received until the polls close on Tuesday, November 7), causing immediate and irreparable harm to the First and Fourteenth Amendment rights of Plaintiffs and similarly situated individuals and the denial of the right to vote to those who will now not be able to get the assistance they need. In contrast, if the District Court's injunction is left in place, it will cause no harm to the State's interest in preventing voter fraud and may even enhance the State's ability to do so by clarifying the requirements for assistors. In light of the Fifth Circuit's ruling this morning, this Court is the only venue in which Applicants can receive the relief that they seek. *See* S. Ct. R. 23(3).

ARGUMENT

The Fifth Circuit's stay must be vacated where (1) "the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed [by this Court] upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay," and (2) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U.S. at 1304. Both of these requirements for vacation are plainly met here.

I. THE FIFTH CIRCUIT'S RULING IS DEMONSTRABLY WRONG.

First, the Fifth Circuit's stay order is "demonstrably wrong" because it directly contravenes this Court's recent decision in *Purcell*. In that case, a district court held an evidentiary hearing and then denied injunctive relief in a First and Fourteenth Amendment challenge to an election law of the State of Arizona. On appeal, the Ninth Circuit "issued a four sentence order" reversing the district court's injunction order, but "[t]he Court of Appeals offered no explanation or justification for its order." 2006 U.S. LEXIS 8000, at *4.

This Court vacated the Ninth Circuit’s Order in *Purcell*. Because the injunction related to an upcoming election, “the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases.” *Id.* at *6. Yet, “[i]t was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court.” *Id.* at *6-7. This Court found “no indication that [the Ninth Circuit] did so,” and “conclude[d] this was error.” *Id.* at *7. Specifically, “[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect.” *Id.* at *7. Thus, vacation was required, “[i]n view of the impending election, the necessity for clear guidance to the State of Arizona, and [the Court’s] conclusion regarding the Court of Appeals’ issuance of the Order.” *Id.*

This case is squarely controlled by *Purcell*. As in *Purcell*, the District Court issued a ruling on a motion for preliminary injunction after receiving substantial evidence developed at an evidentiary hearing.⁴ Also as in *Purcell*, the Court of Appeals summarily stayed the District Court’s order without offering any explanation for that action – let alone any reason to doubt the District Court’s findings of fact. Finally, as in *Purcell*, the Court of Appeals’ ruling has muddied the waters concerning the proper interpretation of state law, “result[ing] in voter confusion and consequent incentive to remain away from the polls.” 2006 U.S. LEXIS 8000, at *6. Indeed, the only difference between this case and *Purcell* is the political affiliation of the parties prevailing in the District Court and then receiving an indefensible ruling from the Court of Appeals.⁵

⁴ Although in *Purcell* the district court denied the request for a preliminary injunction, that was not the basis for this Court’s reversal of the Court of Appeals. Rather, as this Court made clear, the basis for reversal was the Court of Appeals’ failure to show deference to the district court’s findings, its failure to provide any reasoning of its own, and its failure to weigh “considerations specific to election cases.”

⁵ In contrast to the state voter ID laws left in place by this Court’s vacation of the Ninth Circuit’s preliminary injunction in *Purcell*, which this Court noted provided safeguards that potentially permitted those without IDs on Election Day to have their votes counted, Texas law provides that those mail-in ballots cast in mere technical violation of Section 86.006(f), even in the complete absence of fraud, “may not be counted.” Tex. Elec. Code § 86.006(h).

Notably, the District Court was extraordinarily mindful of this Court’s ruling in *Purcell* in granting its limited but significant injunction. The District Court carefully weighed “considerations specific to election cases,” Findings at 9, ¶ 7 (quoting *Purcell*), including “whether an order affecting elections may result in voter confusion and incentive to remain away from the polls,” *id.* With these considerations in mind, the District Court granted partial injunctive relief with respect to only one of Plaintiffs’ claims, their challenge to Section 86.006. As the Court explained, “[a]lthough plaintiffs raise challenges to several statutory provisions included in the 2003 amendments, the court will address only one [Section 86.006] for purposes of preliminary injunctive relief,” because “even assuming that the plaintiffs’ claims are meritorious, the court could not award meaningful relief in the form of a preliminary injunction given the current timetable governing the elections.” *Id.* at 5 ¶¶, 23, 24.

Moreover, far from threatening confusion, let alone of the sort contemplated in *Purcell*, the District Court’s injunction actually provided much-needed clarity concerning when mail-in ballot assistors must identify themselves under Texas law. Under the District Court’s injunction, identifying information is required if an assistor deposits a ballot in the mail for a voter, but is not required if an assistor merely possesses the ballot with a voter’s consent. Furthermore, under Texas law before the district court’s injunction, a person mailing a ballot for another (even a relative, or someone living at the same address as the voter, or a neighbor) could be indicted under Texas law for simply possessing the ballot. And while that ballot possessor had an affirmative defense in such a prosecution, the person who helped the voter bore the burden of proving that defense in court. The district court’s injunction merely clarified and confirmed that those non-relatives or persons who do not reside with the voter could mail ballots for a voter with their consent and avoid criminal prosecution if they followed Texas law and signed the

ballot envelope. By delineating this bright line, the limited injunction alleviated the confusion and chilling effect felt by voters and willing assistants as a result of Section 86.006(f), thereby ensuring that as many eligible voters as possible are able to vote in this election.

The Fifth Circuit's one-line Order is indistinguishable from the order vacated in *Purcell* and does nothing but aggravate voter confusion and chill the exercise of First and Fourteenth Amendment rights during this critical period of mail-in balloting in Texas. Again, identical to the circumstances found by this Court in *Purcell, supra*, the stay entered by the Court of Appeals will result in fewer voters casting ballots by mail, particularly the elderly and disabled.

Accordingly, the Fifth Circuit's Order should be vacated.

II. THE FIFTH CIRCUIT'S ORDER CAUSES IMMEDIATE AND IRREPARABLE HARM TO FIRST AND FOURTEENTH AMENDMENT RIGHTS.

“[S]erious[] and irreparable” injury from the Fifth Circuit's stay is patent. *Coleman*, 424 U.S. at 1304. As the District Court found, based on the substantial evidence “found to be persuasive” at an evidentiary hearing, Section 86.006(f) “prevents [Plaintiffs] and dissuades others, under the pain of prosecution, from participating in legitimate organizational efforts designed to maximize early voter turnout.” Findings at 7, ¶ 27. Because Section 86.006(f) restricts Plaintiffs and other similarly situated individuals and entities from exercising their First and Fourteenth Amendment rights, Applicants present a clear showing of irreparable harm. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, because the mail-in voting period will shortly be over, Applicants require immediate relief to vindicate these rights.

In stark contrast to the grave and immediate harms to Plaintiffs' voting, expressive, and associational rights caused by the Fifth Circuit's decision, the State will suffer no harm from vacation of the stay. The District Court's narrow injunction expressly preserved the State's right to enforce all other provisions of the Texas Election Code – including Section 86.006, as it

applies to individuals who deposit a voter's mail-in ballot in the mail without placing identifying information on the carrier envelope. Thus, the Court's ruling fully preserves the State's ability to combat voter fraud. Moreover, the State has conceded that it has no desire or intent to prosecute individuals for violations that fall within the scope of the District Court's injunction: "Indeed, the particular circumstance that is the focus of the district court's injunction – prosecution for the mere possession of another's ballot without having actually placed it in the mail – has *never* been the basis of any prosecution by the Office of the Attorney General." CA5 Mot. at 17 n.6. This concession completely undermines the claims of urgency that the State presented to the Fifth Circuit – claims which the District Court, in its considered judgment, rejected.⁶

CONCLUSION

For the foregoing reasons, and all others apparent to the Court, Applicants respectfully urge that the Fifth Circuit's stay pending appeal be vacated.

Respectfully submitted,



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⁶ For the reasons discussed in *supra* Section I, as well as in Applicants' Fifth Circuit briefing submitted to this Court and incorporated into this Application by reference, this case "could and very likely would be reviewed [by this Court] upon final disposition in the court of appeals." *Coleman*, 424 U.S. at 1304.

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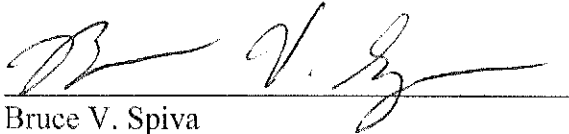
November 3, 2006

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was sent by electronic mail and overnight mail, on this 3rd day of November, 2006, to:

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