IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAURA PRESSLEY, ROBERT BAGWELL, TERESA SOLL, THOMAS L. KORKMAS, and MADELON HIGHSMITH, Plaintiffs, v. JANE NELSON, *in her official capacity as the Texas Secretary of State*, et al., *Defendants*.	§ § § § § § § § § § § §	CIVIL ACTION NO. 1:24-CV-318-DII

DEFENDANT WILSON'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO RULES 12(b)(1) AND 12(b)(6)

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Andrea Wilson, in her official capacity as Llano County Elections Administrator, files this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

A. INTRODUCTION

Plaintiffs include one registered voter of Llano County in this lawsuit, Plaintiff Madelon Highsmith. Dkt. 32, ¶ 16. The Defendants include the Texas Secretary of State and its Elections Director (collectively, "SOS Defendants") and the election administrators for Bell, Williamson, and Llano Counties (collectively, "County Defendants"). Plaintiffs challenge the use of certain state-approved electronic voting systems alleging that these systems are improper as they "randomly assign unique identifier 'ballot tracking' numbers" rather than a consecutively-numbered ballot" and have "wireless external network connectivity." Dkt. 32, ¶¶ 16; 27–29. Plaintiffs allege that these state-approved features violate state and federal law and thereby violates

the First and Fourteenth Amendments. Dkt. 32, §§ IV.C., VII. These allegations have no merit and fail to state a valid claim for which relief can be granted.

In the First Amended Complaint, Plaintiffs attach a Declaration from Madelon Highsmith, the alleged Llano County voter. Dkt. No. 32-62. The Declaration provides a discussion of Ms. Highsmith's review of documentation from Williamson County[1]. Plaintiff Highsmith fails to provide any facts to substantiate any of the claims asserted against the Llano County Elections Administrator Andrea Wilson. In fact, the Declaration is completely silent as to any allegations related to Llano County and/or Elections Administrator Andrea Wilson.

Plaintiffs' allegation regarding theses state-approved voting systems is clearly a "generalized grievance" that is insufficient to allege a particularized injury. The Fifth Circuit has held that there is no standing to bring claims challenging the use of electronic voting systems. Specifically, these types of claims constitute a "generalized grievance" shared by all voters utilizing the electronic voting systems and, therefore, do not state a particularized injury as necessary for Article III standing. Further, Plaintiffs' allegations fail in their entirely as they have not and cannot assert either an ongoing or non-speculative threat of future injury, making only speculative and vague assertions about potential voter fraud or ballot secrecy issues.

Plaintiffs are required to articulate either a procedural or substantive Due Process claim; however, they have failed to identify any procedural requirement that was alleged to have been violated. Further, Plaintiffs have failed to allege any action that is so egregious or outrageous that it may fairly be said to shock the contemporary conscience.

[1] Pursuant to the First Amended Complaint, "[t]he Secretary's voting system certification approval orders for the voting systems used by Williamson County (ES&S EVS 6.1.1.0 and 6.3.0.0 systems) document the ExpressLink software and the ExpressVote Activation ballot printer as a component of the certified voting systems. Dkt. 32 at ¶ 125. "Llano County utilizes computerized ballot numbering through the Hart InterCivic voting system software for in-person voters, as authorized by the Secretary." Id. at ¶ 131.

Additionally, Plaintiffs have further failed to state any Equal Protection claim. There are no facts alleged to indicate that Plaintiff Madelon Highsmith' s ballot was or will imminently be treated differently by Llano County Elections Administrator Andrea Wilson than those of other similarly situated voters.

Finally, Plaintiffs have not and cannot state a First Amendment claim. There are no facts alleged that

Here, Plaintiffs seek extraordinary declaratory and injunctive relief supplanting the policy and contracting decisions of the political branches at both the state and local levels with respect to election administration.

Therefore; this Court should dismiss Plaintiffs' suit asserted against the Defendants.

B. MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

A motion brought pursuant to Federal Rule of Civil Procedure 12(b)(1) seeks dismissal based on the grounds that the court lacks subject matter jurisdiction over the action. FED. R. CIV. P. 12(b)(1). The federal courts' jurisdiction is limited, and federal courts generally may only hear a case if it involves a question of federal law or where diversity of citizenship exists between the parties and the amount in controversy exceeds the jurisdictional minimum. *See* 28 U.S.C. §§ 1331, 1332. Federal question jurisdiction exists in all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. §1331. A claim "arises under" federal law when the federal question is presented on the face of the plaintiff's well-pleaded complaint. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004).

A motion to dismiss filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure "allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Such a motion may be decided by

the court on one of three bases: (1) the complaint alone; (2) the complaint and the undisputed facts in the record; or (3) the complaint, the undisputed facts in the record, and the court's own resolution of disputed facts. *Ynclan v. Dep't of the Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). In a Rule 12(b)(1) motion, the burden of proving that jurisdiction does exist falls to the party asserting jurisdiction. *Ramming*, 281 F.3d at 161.). "A 'facial attack' on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Menchaca v. Chrysler Credit Corp*., 613 F.2d 507, 511 (5th Cir. 1980) (citing *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

1. <u>Lack of Subject Matter Jurisdiction -- Plaintiffs lack standing because their generalized, conjectural grievances would not be redressable by any relief this Court could provide.</u>

Plaintiffs lack standing to bring their claims against Elections Administrator Wilson. The subject-matter jurisdiction of federal courts is limited to "Cases" and "Controversies" and the requirement that the plaintiff have standing imposes a "fundamental limitation" upon a federal court's subject-matter jurisdiction. U.S. CONST. art. III, § 2; *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). "[S]tanding is perhaps the most important of the jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal quotation omitted). "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, (1992). To establish standing, the plaintiff must show "(1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Daves v. Dallas*

Cnty., Texas, 22 F.4th 522, 541–42 (5th Cir. 2022)(*quoting Thole v. U.S. Bank N.A.*, —— U.S. ——, 140 S. Ct. 1615, 1618, 207 L.Ed.2d 85 (2020). Specifically, Plaintiffs "must demonstrate 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.* (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)).

The Courts have determined that the plaintiff "bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130). "[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Federal Elec. Comm'n*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)(internal citation omitted).

a. Plaintiffs lack standing because their claims are merely generalized grievances.

The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–574. A "'generalized grievance'—no matter how sincere—is insufficient to confer standing." *Hollingsworth v. Perry*, 570 U.S. 693, 694 (2013). Here, Plaintiffs raise only generalized grievances that—were they legitimate—would be shared by the general public at large. Therefore, Plaintiffs lack standing to file suit against Llano County Elections Administrator Andrea Wilson.

In *Eubanks v. Nelson*, the Fifth Circuit affirmed the Northern District's ruling that the plaintiffs lacked standing to challenge multiple counties' use of allegedly "noncompliant, uncertified voting equipment and systems." *Eubanks v. Nelson*, No. 23-10936, 2024 WL 1434449 (5th Cir. Apr. 3, 2024). The Court cited to its decision last year in *Lutostanski v. Brown.* There,

the Fifth Circuit noted that the plaintiffs, in both cases, did not allege that their votes were treated differently from other votes, but that all voters who used the challenged voting systems were at risk of having their votes not counted as intended. *Id*. at *2; *see also Lutostanski v. Brown*, 88 F.4th 582, 586 (5th Cir. 2023) ("[P]laintiffs' theory would apply equally to all voters in Travis County."). Likewise, with respect to their allegations that ballot secrecy could be compromised, their claims were not specific nor particular to them. *Eubanks*, 2024 WL 1434449 at *1. Therefore, these two recent decisions from the Fifth Circuit establish that Plaintiffs have no standing to bring this suit.

Such alleged injuries do not confer standing because the plaintiffs are only raising a "generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Id.* Plaintiffs' allegations do not state an Article III case or controversy but attempt to assert undifferentiated, generalized grievances about the conduct of government. *Id.*; *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam).

Similarly, the Supreme Court of Texas has also had reviewed and dismissed such claims for this reason. *See Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011). In *Andrade*, the NAACP of Austin and several Travis County voters sued the Texas Secretary of State alleging that her certification of an electronic voting machine violated the Texas Election Code and the Texas Constitution. *Id.* at 6. The Supreme Court concluded that "most of the voters' allegations involve[d] generalized grievances about the lawfulness of government acts" and that "their remaining claims fail[ed] on their merits." *Id.* at 4.

As relevant here, the *Andrade* plaintiffs argued that "failing to require a paper ballot undermines the framers' intent in drafting the numbering requirement [of TEX. CONST. art. VI, § 4]—a requirement they claim[ed] was intended to secure the integrity of the election process."

Id. at 15. The Texas Supreme Court held that even "[a]ssuming, as we must, that these allegations are true, they amount only to a generalized grievance shared in substantially equal measure by all or a large class of citizens." *Id*.

Plaintiff Madelon Highsmith fails to make any allegations that are specific or particular related to Elections Administrator Wilson. As previously discussed, Plaintiff Highsmith's Declaration focusing on Williamson County and provides not factual support for any allegations against Llano County and/or Elections Administrator Wilson. The generalized grievance of Plaintiffs – that Llano County relies upon state-issued advice and certifications of elections systems – does not constitute a showing that Elections Administrator Wilson has harmed Plaintiff Madelon Highsmith or treated her any differently than any other member of the general public in Llano County. Plaintiff Highsmith's distrust that her "ballot cast in person is not secure or secret in Llano County" (based on Williamson County) does not constitute a government action abridging her First Amendment rights. Dkt. No. 32-62. Therefore, Plaintiffs have failed to state an Article III case or controversy and lack standing.

b. Plaintiffs lack standing because their claims are merely conjectural rather than actual or imminent.

To satisfy the injury-in-fact requirement for standing, a plaintiff's injury must also be "actual or imminent" as opposed to merely "conjectural or hypothetical." *See Lujan*, 504 U.S. at 560. The hypothetical nature of Plaintiffs' alleged injury-in-fact is apparent throughout the First Amended Complaint. *See*, *e.g.*, Dkt. No. 31 at ¶ 121 ("Knowing how voters vote is a very valuable commodity. Those having access to the relevant election records, such as county election officials, voting system vendors or agents, electronic pollbook vendors and their employees, have data to…") (emphasis added); *Id.* ¶ 148 (asserting that "[c]onsecutive numbering is intended to detect and prevent ballot box fraud"…but failing to allege any actual or imminent threat of fraud); *Id.* ¶

28 (asserting "Plaintiffs are relegated to a class of voters whose votes are neither assured secrecy nor protected from being undermined, diluted and debased by lawlessness and fraud" but again failing to describe any actual dilution, fraud, or security breach of ballot secrecy). The Fifth Circuit "does not 'recognize the concept of probabilistic standing based on a non-particularized increased risk—that is, an increased risk that equally affects the general public.'" *E.T. v. Paxton*, 41 F.4th 709, 716(5th Cir. 2020)(plurality opinion) (quoting *Shrimpers & Fisherman of RGV v. Tex. Comm'n on Env't Quality*, 968 F.3d 419, 424 (5th Cir. 2020) (per curiam)).

As previously demonstrated, Plaintiffs' allegations do not involve Llano County Elections Administrator Andrea Wilson, Llano County elections or any specific allegations related to a Llano County voter. Instead, Plaintiffs focus on the fact that one of the Plaintiffs, Laura Pressley, a Williamson County resident, was able to develop an undefined algorithm which she applied to records obtained through Public Information Act ("PIA") requests for only Williamson County. Dkt. No. 32, ¶¶ 113–123.

Plaintiffs have not and cannot allege, including Plaintiff Madelon Highsmith, has accessed Llano Election records and determined how any Llano County voter, including Highsmith, has voted. Therefore, for these reasons, Plaintiffs lack standing, and the Court should dismiss the claim for want of jurisdiction. As the Fifth Circuit noted in *Eubanks* and *Lutostanksi*, the types of allegations in the Complaint are "too 'speculative' to provide a basis for standing." *Eubanks*, 2024 WL 1434449 at *2; *Lutostanksi*, 88 F.4th at 587 (noting plaintiffs did not explain why, how, when, or to whom data was unlawfully released (or sold or compromised)).

c. The *ex parte Young* exception does not apply to claims arising under state law.

While generally assert allegations concerning the Fourteenth Amendment, their primary complaints relate to assertions that the Defendants violated the Texas Constitution and various

provisions of the Election Code. *See, e.g.*, Dkt. No. 32, § IV.C. Alleging a violation of state law "is neither a necessary nor a sufficient condition for a finding of a due process violation [or equal protection]." *See Stern v. Tarrant County Hospital Dist.*, 778 F.2d 1052, 1059 (5th Cir.1985) (en banc), *cert. denied* 476 U.S. 1108 (1986).

Sovereign immunity would bar any state law claims—to the extent alleged—against Llano County Elections Administrator Wilson. The *Ex parte Young* exception "is not a way to enforce state law through the back door." *Williams On Behalf of J.E. v. Reeves*, 954 F.3d 729, 740 (5th Cir. 2020). The narrow exception of *Ex parte Young* is "inapplicable in a suit against state officials on the basis of state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 556 (5th Cir. 1988) (noting that the *Ex parte Young* exception does not apply to "suits which would seek to have federal judges order state officials to conform their conduct to state law"); *Papasan v. Allain*, 478 U.S. 265, 277 (1986) (holding that *Ex parte Young* "does not foreclose an Eleventh Amendment challenge where the official action is asserted to be illegal as a matter of state law alone").

If Plaintiffs have asserted claims against Llano County Elections Administrator Wilson based on violations of state law, such claims are barred by sovereign immunity and should be wholly disregarded.

2. <u>Lack of Subject Matter Jurisdiction -- Article III prevents adjudication of Plaintiffs' claims, as Political Questions are inextricably present</u>.

The political question doctrine "reflects the principle that, under our Constitution, there are some questions that cannot be answered by the judicial branch. Out of due respect for our coordinate branches and recognizing that a court is incompetent to make final resolution of certain matters, these political questions are deemed 'nonjusticiable.'" *Lane v. Halliburton,* 529 F.3d 548, 557 (5th Cir. 2008)(citing *Baker v. Carr*, 369 U.S. 186, 198 (1962).

The political question doctrine "presupposes that another branch of government is both capable of and better suited for resolving the" question. *Id.* Sometimes "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004)(citing, *e.g., Nixon v. United States,* 506 U.S. 224 (1993) (challenge to procedures used in Senate impeachment proceedings); *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U.S. 118, 32 S.Ct. 224 (1912) (claims arising under the Guaranty Clause of Article IV, §4)). Further, "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S.221, 229-230 (1986)(quoting *United States ex rel. Joseph v. Cannon,* 206 U.S.App.D.C. 405, 411, 642 F.2d 1373, 1379 (1981) (footnote omitted), cert. denied, 455 U.S. 999, 102 S.Ct. 1630, 71 L.Ed.2d 865 (1982)).

The matter of nonjusticiability requires the Court's inquiry to "proceed to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker*, 369 U.S. at 198. The Supreme Court identified "several formulations" to determine whether "a particular case raises a political question, which" the Fifth Circuit enumerates as:

> (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;"
> (2) "a lack of judicially discoverable and manageable standards for resolving it;"
> (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;"

> (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;"
> (5) "an unusual need for unquestioning adherence to a political decision already made;"
> (6) "or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Lane, 529 F.3d at 558 (citing *Baker*, 369 U.S. at 217).

The United States Constitution limits federal courts to deciding only "cases" and "controversies." U.S. Const. art. III. The Supreme Court acknowledges that this limitation means "that federal courts can address only questions 'historically viewed as capable of resolution through the judicial process.'" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493–94 (2019)(quoting *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942 (1968)). First, the Court must determine that the question before it presents "a 'case' or 'controversy' that is in James Madison's words, 'of a Judiciary Nature.'" *Id*. (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854 (2006)). Therefore, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Lane*, 529 F.3d at 557 (quoting *Marbury v. Madison*, 1 Cranch 137, 5 U.S.137, 170 (1803)). As the Fifth Circuit notes:

> The Supreme Court clearly recognized that the political question doctrine partakes not only of the existence of separation of powers, but also of the limitation of the judiciary as a decisional body. The Court stated: "In determining whether a question falls within (the political question category), the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." The Court was merely admitting that they were not tribal wisemen dispensing divinely or theoretically inspired judgments, but were a court limited to the application of predetermined law.

Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978)(quoting *Coleman v. Miller*, 307 U.S. 433 (1939)). Thus, "the inextricable presence of one or more of these [*Baker*] factors will render the case nonjusticiable under the Article III 'case or controversy' requirement, and therefore, the

Court would be without jurisdiction." *Id*.

The Fifth Circuit has indicated that the decision of "whether to use electronic voting machines or paper ballots" is a challenge to "the wisdom of [a state's] policy choices." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 398 (5th Cir. 2020) (comparing the justiciability of the use of a voting machines or paper ballots to whether "provisions of the Texas Election Code run afoul of the Constitution") (citing *Coal. For Good Governance v. Raffensperger*, 2020 WL 2509092 (N.D. Ga. May 14, 2020) (dismissing claims seeking to require use of paper ballots rather than touchscreen ballots for virus prevention purposes "because they present a nonjusticiable political questions.")). Here, the Fifth Circuit views the question at hand as a political one not suited for judicial discretion.

Further, "[t]he dominant consideration in any political question inquiry is whether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department.'" *Spectrum Stores, Inc. v. Citgo Petroleum Corp.,* 632 F.3d 938, 950 (5th Cir. 2011) (quoting *Saldano v. O'Connell*, 322 F.3d 365, 369 (5th Cir. 2003). In this case, election-related matters are constitutionally committed to the legislatures of the states. U.S. CONST. art. I, § 4, cl. 1 (Elections Clause) ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . .").[2]

Plaintiffs fail to demonstrate this Court's jurisdiction based on the political question doctrine. Therefore, Llano County Elections Administrator Andrea Wilson requests that the Court grant her Motion to Dismiss pursuant to Rule 12(b)(1).

[2] "Congress may at any time by Law make or alter such [state] Regulations." U.S. CONST. art. I, § 4, cl. 1. Congressional supervisory authority over the state legislatures with respect to the Elections Clause only provides yet more evidence that this issue is demonstrably committed to other political branches.

C. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

1. Failure to State a Claim

The federal pleading standard does not require detailed factual allegations, "but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. [A] complaint [does not] suffice if it tenders naked assertions devoid of further factual enhancements." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, the complaint must include sufficient information, accepted as true, to state a claim to relief that is plausible on its face. *See Iqbal*, 556 U.S. at 678–79; *see also Twombly*, 550 U.S. 544, 555. This plausibility standard asks for more than a sheer possibility that a defendant acted unlawfully. *See Iqbal*, 556 U.S. at 678–79; *see also Atkins v. City of Chicago*, 631 F.3d 823, 831–32 (7th Cir. 2011). "The fact that the allegations undergirding a [plaintiff's] claim could be true is no longer enough to save it. [T]he complaint taken as a whole must establish a nonnegligible probability that the claim is valid, though it need not be so great a probability as such terms as 'preponderance of the evidence' connote." *See Atkins*, 631 F.3d at 831–32.

To survive a motion to dismiss, the complaint must present sufficient facts that would allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *See Iqbal*, 556 U.S. at 678. While the court must take all allegations contained in the complaint as true, mere conclusory statements will not suffice. *Id.* Further, the court is not required to accept as true any legal conclusions couched as factual allegations. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

a. Plaintiffs have not stated a procedural due process claim against Andrea Wilson.

Plaintiffs do not clearly specify whether they have alleged a violation of due process under its procedural or substantive component. See generally Dkt. No. 32. If Plaintiffs intended to allege

procedural due process claims against Llano County Elections Administrator Wilson for relying upon state-issued advisories and voting system that were certified by the State, Plaintiffs claims must fail because procedural due process does not constrain the creation of generally applicable laws or policies. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption."). Plaintiff Madelon Highsmith failed to allege the deprivation of any cognizable property interest resulting from Llano County's decision to rely upon election advisories and voting system certifications issued by the Secretary of State.

b. Plaintiffs have not stated a substantive due process claim against Andrea Wilson.

If Plaintiffs are attempting to allege a substantive-due-process violation, such a claim also fails. "Substantive due process analysis is appropriate only in cases in which government arbitrarily abuses its power to deprive individuals of constitutionally protected rights," namely a constitutionally protected liberty or property interest. *Simi Inv. Co., Inc. v. Harris Cnty.*, 236 F.3d 240, 249 (5th Cir. 2000); *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988) (internal quotation marks and citations omitted). "Substantive due process analysis," the Supreme Court has cautioned, "must begin with a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302 (1993). To constitute a substantive due process violation, the governmental officer's actions must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Morris v. Dearborne*, 181 F.3d 657, 668 (5th Cir. 1999) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)); *see also*, *Reyes v. North Texas Tollway Authority*, 861 F.3d 558, 562 (5th Cir. 2017)

Plaintiffs cannot simply assert conclusory and unsubstantiated allegations that Llano County's reliance on the Secretary of State's election rules somehow leads to voter fraud,

compromises ballot secrecy, and violation of the one person/one vote standard. Plaintiffs failed to demonstrate, is completely devoid of, any allegations of any "egregious" conduct by Llano County Elections Administrator Wilson. Although Plaintiffs repeatedly claim that their "harms are real" (Dkt. No. 32, ¶¶ 158, 164, 172, and 179), none of the Plaintiffs have shown that Election Administrator Wilson has denied any Plaintiff's right to vote, diluted the vote of any Plaintiff, disclosed any Plaintiffs vote, or otherwise disenfranchised any Plaintiff.

c. Plaintiffs have not stated an equal protection against Andrea Wilson.

"To state a claim for equal protection, 'the plaintiff must prove that similarly situated individuals were treated differently.'" *Hines v. Quillivan*, 982 F.3d 266, 272 (5th Cir. 2020) (quoting *Beeler v. Rounsavall*, 328 F.3d 813, 816 (5th Cir. 2003).

While Plaintiffs have alleged that mail-in ballots are numbered consecutively and that ballots used in certain counties from the state-approved electronic voting systems are randomly generated, they have failed to allege facts plausibly showing that this difference results or will imminently result in any difference in outcome. They allege unsubstantiated fears that non-consecutive numbering is less secure than consecutive numbering, but failed to allege that any Plaintiff's vote has been denied, diluted, disclosed, or distributed. See, e.g., Dkt. No. 32, ¶ 111 (complaining only of "potential ballot fraud"), ¶ 144 (alleging merely lack of fraud "protection" but containing no facts indicating fraud is imminent, much less explaining how fraud might be accomplished). Accordingly, Plaintiffs have failed to allege facts showing that the difference in the numbering methods for mail-in and in-person ballots causes Plaintiffs' votes to be treated differently. As such, they have failed to state an equal protection claim.

d. Plaintiffs have not stated a First Amendment claim against Andrea Wilson.

Plaintiffs make vague allusions to the First Amendment of the U.S. Constitution (Dkt. No. 32, ¶ 162) but fail to assert any evidence of a governmental actor abridging the First Amendment rights of any Plaintiff. Plaintiffs claim that the ballot numbering regime approved by the Secretary of State somehow chills their exercise of the right to vote. (Dkt. No., ¶ 161) However, the allegations and declarations contain no factual assertion that a state actor has inhibited any Plaintiffs right to vote. Plaintiff Highsmith is the only alleged registered voter in Llano County and her declaration is silent to any allegation that her right to vote was chilled, infringed or inhibited by any state actor.

e. Plaintiffs' First Amended Complaint fails to provide any factual allegations that would implicate any other federal statutes.

Plaintiff has not and cannot provide any factual allegations to support valid claims for any of the various federal statutes cited in the First Amended Complaint.

D. CONCLUSION

For these reasons, this Court lacks subject matter jurisdiction over Plaintiffs' claims. Additionally, Plaintiffs failed to state a claim upon which relief can be granted because Plaintiffs have not and cannot offer well-pled allegations to support their claims against Llano County Elections Administrator Andrea Wilson.

Therefore, Llano County Elections Administrator Andrea Wilson respectfully requests that the Court dismiss Plaintiffs' claims asserted against her.

Respectfully submitted,

/s/ J. Eric Magee
J. Eric Magee
SBN: 24007585
e.magee@allison-bass.com
ALLISON, BASS & MAGEE, L.L.P.
1301 Nueces Street, Suite 201
Austin, Texas 78701
(512) 482-0701 telephone
(512) 480-0902 facsimile

CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of June, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will automatically send notification of such filing to each attorney who has made an appearance in this case.

/s/ J. Eric Magee
J. Eric Magee