

**IN THE UNITED STATES DISTRICT 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, CHRISTINA ADKINS,  
in her official capacity as Director of the Elections  
Division of the Texas Secretary of State,  
BRIDGETTE ESCOBEDO, in her official  
capacity as Williamson County Elections  
Administrator; DESI ROBERTS, in his official  
capacity as Bell County Elections Administrator,  
and ANDREA WILSON, in her official capacity  
as Llano County Elections Administrator,

Defendants.

Civil Action No. 1:24-cv-00318-DII

**PLAINTIFFS' RESPONSE TO DEFENDANTS NELSON AND ADKINS'  
RULE 12(b)(1) AND 12(b)(6) MOTION TO DISMISS  
PLAINTIFFS' AMENDED COMPLAINT**

Plaintiff Laura Pressley, Ph.D. (*pro se*), along with plaintiffs Robert Bagwell, Teresa Soll, Thomas L. Korkmas, and Madelon Highsmith, (by and through their undersigned counsel), file this their Response to Defendants Nelson and Adkins' Rule 12(b)(1) and 12(b)(6) Motion to Dismiss Plaintiffs' Amended Complaint, and allege as follows:

**I. INTRODUCTION**

1. Defendants Jane Nelson and Christina Adkins ("State Defendants") have filed a Rule 12(b)(1) and 12(b)(6) Motion to Dismiss, claiming that this Court lacks subject matter

jurisdiction and that Plaintiffs have failed to state a claim. As described in detail herein, the State Defendants' motion must fail because it wholly misunderstands and/or misstates both the facts and the legal issues. Further, the State Defendants' actions, both prior and ongoing, are inconsistent with their legal positions in this case.

2. The State Defendants, based on improper legal grounds, waive and/or misinterpret existing law, create new law in violation of the separation of powers doctrine, and enable the very harms of which Plaintiffs complain, yet claim that their actions are shielded from judicial scrutiny and, regardless, are not harming Plaintiffs. This is not so.

3. In dismissing this case on the bases argued by the State Defendants, the Court would effectively grant unfettered legislative power to members of the executive branch of state government to disenfranchise Plaintiffs, while ignoring the real, ongoing, and redressable injury being caused to Plaintiffs. Such a result is unsupported by the law and simply untenable.

#### **A. Standard of Review**

4. Whether under 12(b)(1) or (b)(6), the Court should accept Plaintiffs' allegations as true, construe them in the light most favorable to Plaintiffs, and indulge all reasonable inferences in Plaintiffs' favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)]; *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5<sup>th</sup> Cir. 2000). Given this standard of review, the State Defendants' arguments are particularly extraordinary.

#### **B. Summary of Plaintiffs' Allegations**

5. Plaintiffs incorporate all of the factual allegations contained in their First Amended Complaint as though set forth in full herein.

6. For purposes of the State Defendants' motion to dismiss, Plaintiffs' material allegations may be generally summarized as follows:

- a) State Defendants, through Election Advisory 2019-23,<sup>1</sup> are authorizing County Defendants to utilize unique identifier ballot tracking numbers through voting system software in their respective elections (in which Plaintiffs are voters),
- b) State Defendants are authorizing the use of unique identifier ballot tracking numbers placed on ballots through voting system software, along with numerous other "waivers" of state and federal election law, effectively rendering Texas ballot numbering laws meaningless,
- c) Plaintiffs, as in-person voters, are forced to utilize a Texas ballot lacking consecutive numbering if they wish to vote (unlike those who vote by mail);
- d) Plaintiffs, as in-person voters, are forced to accept a ballot containing a random, computer-generated, unique identifier ballot tracking number generated by voting system software;
- e) The unique identifier ballot tracking number on Williamson County in-person ballots has been shown to enable more than 60,000 voters to be traced to their exact ballot, *i.e.*, the voter's ballot is no longer secret;<sup>2</sup>
- f) State Defendants have authorized the use of electronic pollbooks loaded with voting system software and hardware not reviewed, tested, or examined nationally or locally and County Defendants in Williamson and Bell Counties have chosen to utilize such pollbooks;
- g) Williamson and Bell County Plaintiffs, as in-person voters, must utilize electronic pollbooks installed with ExpressLink voting system software that was not reviewed by the Election Assistance Commission, not tested by a nationally accredited testing laboratory, and not reviewed by State Defendants' own examiners;

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<sup>1</sup> Plaintiffs' Amended Complaint, Dkt 32-58

<sup>2</sup> Plaintiffs attached evidence of this ballot secrecy breach in Williamson County to their First Amended Complaint in redacted form, with a request to present such evidence in its unredacted form to the Court *in camera*. Plaintiffs renew that request herein. Additionally, should the Court be inclined to grant any or all of the motions to dismiss, Plaintiffs request leave to file such evidence under seal for the Court's consideration. Plaintiffs also have a motion for protective order pending.

- h) The electronic pollbook databases in Williamson County have been released in open records requests and reveal that more than 60,000 voters are linked to their exact ballot, violating their ballot secrecy;
- i) State Defendants have consistently operated as though they have authority to provide for ballot numbering in Texas (*i.e.*, by waiving existing laws and effectively creating other laws providing for computerized ballot numbering through voting system software) and continue to do so in elections occurring since the initiation of this litigation (Secretary Election Advisory 2019-23, Sec. 13.1.b and Secretary Election Advisory 2024-21)

7. Accepting these allegations as true, and particularly in light of the evidence demonstrating that they are, in fact, true, the State Defendants' arguments do not withstand scrutiny.

## **II. THIS COURT HAS SUBJECT-MATTER JURISDICTION**

8. The State Defendants argue that, even taking the above allegations as true, this Court does not have jurisdiction to consider Plaintiffs' claims that the State Defendants are operating based on improper legal grounds. Indeed, the State Defendants contend that NO court could have jurisdiction over these claims because Plaintiffs do not have standing, the State Defendants have immunity, and Plaintiffs' claims present "political questions." If the State Defendants were correct (which they are not), unelected bureaucrats confused about the law would become the beneficiaries of self-appointed powers normally restricted by the separation of powers doctrine. Additionally, the ballot secrecy guarantees of state and federal law would become meaningless, as there would be no judicial recourse or enforcement mechanisms against those charged with ensuring the lawful conduct of elections.

9. Plaintiffs' First Amended Complaint clearly demonstrates that Plaintiffs have standing, sovereign immunity is inapplicable, and the political question doctrine is inapposite to Plaintiffs' claims.

**A. Plaintiffs have standing because they have alleged particularized, redressable grievances and suffered actual injury.**

10. As an initial matter, the State Defendants mischaracterize Plaintiffs' claims as a general challenge to electronic voting systems. These mischaracterizations are fatal to the State Defendants' analysis.

11. Unlike the plaintiffs in *Andrade v. NAACP of Austin* and *Eubanks v. Nelson*, the main cases on which the State Defendants rely for their standing argument, Plaintiffs are NOT challenging the use of electronic voting systems. Rather, Plaintiffs are challenging the State Defendants' waiver of state and federal election laws based on improper and erroneous legal grounds, specifically, the illegal and unconstitutional waiver of the consecutively-numbered ballot requirement contained in Texas law and the illegal authorization of randomly generated unique identifying ballot numbers through voting system software that result in the breach of ballot secrecy. This case is much more specific than the general voting system challenges in *Andrade* and *Eubanks*. Were Plaintiffs seeking an injunction against the use of electronic voting systems, *Andrade* and *Eubanks* would be relevant to this Court's analysis of the issues. Contrary to the State Defendants' mischaracterizations, however, Plaintiffs want the State Defendants to cease wrongful interpretations of ballot numbering laws, stop waiving existing ballot numbering and pollbook certification laws, stop creating ballot numbering methods outside the legislative process, and stop enabling the resulting breach of ballot secrecy. *Andrade*, *Eubanks*, and the other cases on which the State Defendants rely are simply inapposite.

12. Additionally, the injury Plaintiffs have suffered is more particularized than the injuries in the State Defendants' cited cases. While it is true that all in-person voters in the Defendant counties have been harmed, such a group is far more specific than simply the public at large. Plaintiffs are part of a specific class of citizens whose votes and ballots do not enjoy the

same legal protections as other voters, namely citizens who vote by mail or who vote in counties that do not utilize computerized random ballot tracking numbers. Plaintiffs are not required to show that they are the *only* members of the harmed class – if such were the case, the courthouse doors would be all but locked. Rather, Plaintiffs allege, and have demonstrated in the evidence attached to their First Amended Complaint, that they are members of a distinct and particularized class of in-person voters in counties that utilize illegally certified voting system software and hardware connected to electronic pollbooks. This class does not include all Texas voters, or even necessarily all in-person voters.

13. The Supreme Court found standing when voters brought a constitutional challenge “on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated.” *Baker v. Carr*, 369 U.S. 186, 204-05 (1962). Plaintiffs here are an even narrower class than that found to have standing in *Baker*.

14. Moreover, even a widely shared interest does not, on its own, defeat standing. As the Supreme Court noted in *Federal Election Comm’n v. Akins*:

[W]here a harm is concrete, though widely shared, the Court has found ‘injury in fact’...Thus the fact that a political forum may be more readily available where an injury is widely shared...does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an ‘injury in fact.’ This conclusion seems particularly obvious where (to use a hypothetical example) ...large numbers of voters suffer interference with voting rights conferred by law.

524 U.S. 11, 24 (1998) (internal citations omitted).

15. Consistent with *Baker* and *Akins*, Plaintiffs’ claims are particularized and withstand a Rule 12(b)(1) challenge.

16. Furthermore, Plaintiffs’ First Amended Complaint clearly establishes the actual and/or imminent nature of their injuries. Plaintiffs have been required to utilize ballots with

computerized random ballot tracking numbers printed *in situ* and without consecutively pre-numbered ballots. The secrecy of the Williamson County Plaintiffs' ballots has already been violated. There is nothing conjectural or hypothetical about the harm Plaintiffs have suffered. The harm is actively occurring and will continue to occur in the future absent this Court's exercise of jurisdiction.

17. The State Defendants assert that Plaintiffs have "merely alleged a possibility" of harm but this simply flies in the face of the detailed allegations and evidence contained in the First Amended Complaint. It is not *a possibility* that the secrecy of Plaintiffs' ballots could be violated – **it has already happened**. It is not *a possibility* that third parties *could* have access to Plaintiffs' ballots – Plaintiffs have alleged, and the evidence shows, that the information needed to connect Plaintiffs to their exact ballots in multiple elections is available to multiple third parties, including the public.

18. Moreover, the State Defendants have publicly admitted to the actual and/or imminent nature of the injury. Defendant Christina Adkins acknowledged to the House Elections Committee Hearing on Oversight of Ballot Secrecy that a "very significant universe" of people have access to the publicly available election information needed to discern how voters voted.<sup>3</sup> To view Ms. Adkins' testimony, click on the image below.<sup>4</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> Excerpted testimony by Christina Adkins Texas House Elections Committee Hearing on June 12, 2024. <https://u.pcloud.link/publink/show?code=XZQtss0ZVDiXI145ND7167fiuDdlfBHAYNUX> (last visited June 14, 2024).



19. The ballot secrecy breaches have already occurred for over 60,000 voters in Williamson County. The harm is not theoretical – it is actual and occurring. The electronic pollbooks have already collected and stored, and Williamson County has released, the ballot secrecy data to Plaintiffs. Ballot secrecy data for multiple elections in Williamson County is currently accessible to the county and its employees, agents, and vendors.

20. Unlike the electronic voting machine cases cited by the State Defendants, here the events of which Plaintiffs complain have already occurred and will recur. The State Defendants ignore this clear distinction, which defeats their arguments.

21. Finally, while agencies such as the Secretary of State may have discretion in certain areas, those adversely affected by an agency's decision "generally have standing to complain that the agency based its decision upon an improper legal ground." *Akins* at 25. Here, State Defendants have misinterpreted their authority under Section 52.075 of the Texas Election Code and have issued advisories and guidance based on the misinterpretation of a variety of other Election Code provisions, as described in the First Amended Complaint.

**B. The State Defendants cannot avoid liability under the cloak of sovereign immunity.**

22. While Plaintiffs certainly do not dispute that the State Defendants have waived, violated, and ignored state law, the gravamen of their First Amended Complaint is that, as a result



of these actions, the State Defendants have deprived Plaintiffs of their rights under the First and Fourteenth Amendments. It happens that Defendants are violating state law while doing so, but Plaintiffs' allegations are not solely reliant on those state law violations. Rather, Plaintiffs' claims arise out of the guarantees contained in the First and Fourteenth Amendments. As the Fifth Circuit has noted, "It is permissible under *Ex Parte Young* for a court to "command [ ] a state official to do nothing more than refrain from violating federal law." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 180 (5<sup>th</sup> Cir. 2020) (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255). Additionally, "insulation [from federal judicial review] is not carried over when state power is used as an instrument for circumventing a federally protected right." *Baker v. Carr*, 369 U.S. 186, 231 (1962). The Eleventh Amendment does not shield the State Defendants from liability in this case.

**C. None of Plaintiffs' claims invoke the political question doctrine.**

23. Next, the State Defendants would have the Court believe that it lacks jurisdiction because Plaintiffs' allegations fall solely within the purview of the Texas Legislature. Again, the State Defendants mischaracterize the nature of this case.

24. It is not the electronic voting systems, in and of themselves, that are the problem, nor are Plaintiffs challenging policy decisions made by the legislative branch as it relates to the use of electronic voting systems in the conduct of Texas elections. To the contrary, Plaintiffs believe the other branches of government should honor the legislature's policy choices. What the State Defendants carefully overlook is the fact that the Texas legislature has NOT made a policy choice to utilize random computerized ballot tracking numbers through voting system software, which would have been the legislature's prerogative to do. Defendants fail to recognize that both the Texas House and the Texas Senate rejected that exact policy change in both 2021 and 2023.

Dkt. 32, paragraph 69.<sup>5</sup> Rather, the State Defendants, based on improper legal grounds, made an unauthorized policy choice to permit such computerized unique ballot tracking numbers instead of the consecutive numbers the legislature DID make the policy choice to authorize in Tex. Elec. Code Secs. 52.062, 51.006, 52.007, 51.008, 51.010, 62.007 and 62.009.

25. In other words, the State Defendants have usurped the role of the legislature while claiming that Plaintiffs have no right to challenge such a usurpation (one that directly harms Plaintiffs) because the policy decisions the State Defendants made *were the role of the legislature*. The circularity of such an argument defies logic.

### **III. PLAINTIFFS HAVE STATED CLAIMS THAT WITHSTAND A RULE 12(B)(6) CHALLENGE**

#### **A. Plaintiffs are not suing the state for Plaintiffs' own conduct.**

26. The State Defendants' Rule 12(b)(6) challenge is similarly unavailing.

27. In a novel approach, the State Defendants first accuse *Plaintiffs* of the harmful conduct at issue, in an attempt to recast this case as one outside the realm of state conduct. Though creative, this contention wholly lacks merit.

28. As the State Defendants know, Plaintiffs are actively attempting to protect the secrecy of the Williamson County ballots at issue. Indeed, Plaintiffs have redacted all evidence that could potentially reveal the method by which voters can be mapped to their exact ballot numbers and ballots and have a pending motion for protective order to further ensure against breaches of ballot secrecy in this case. It is not Plaintiff Dr. Pressley's discovery of the algorithm<sup>6</sup> that caused

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<sup>5</sup> In 2021, Texas House Bill HB 3698 and Texas Senate Bill SB 1215 proposed modifying consecutive ballot numbering for electronic ballot voting systems, Tex. Elec. Code Sec. 124.062. Neither bill was granted a hearing in their respective legislative committees, and neither bill was re-introduced in the subsequent three Special Sessions of the 87th Legislature in 2021. Further, neither bill was re-introduced in the most recent Regular or Special Sessions of the 87th Legislature in 2023.

<sup>6</sup> It should be noted that, contrary to Defendants' characterizations, Dr. Pressley did not "create" an algorithm. The algorithm at issue exists within the election records; Dr. Pressley simply discovered it. Dkt. 32 ¶¶ 114-117.

the secrecy violation, but the State Defendants' illegal election advisories and waiver of election laws, as detailed extensively in the First Amended Complaint. Plaintiffs' allegations concern the State Defendants' erroneous, illegal, and unconstitutional interpretations of state and federal election laws directed to Texas counties through advisories and emails, not the actions of third parties.

29. State Defendants erroneously claim that "Plaintiffs' theory of the case is not that any state actor is intentionally or knowingly violating Plaintiffs' constitutional or statutory rights" and that "the Secretary of State is not failing in its duty to protect the secret ballot." Dkt. 46, p. 2 ¶3. On the contrary, Plaintiffs' First Amended Complaint unequivocally alleges, with ample supporting evidence, that Defendant Nelson was personally presented with evidence on April 13, 2023 of the exact ballot numbering waivers and pollbook issues that are central to this case and that she and Defendant Adkins have done nothing to address those concerns for over a year. Dkt. 32 ¶138.vii and Dkt. 32-8 pp. 1-10, 11-12, 23-24 and 25-26. The State Defendants have acted intentionally and/or knowingly in the deprivation of Plaintiffs' constitutional and statutory rights.

30. The State Defendants acknowledge their "duty to protect the secret ballot" but refuse to recognize that their actions and inactions as alleged in this case have been a complete abdication of that duty. Though State Defendants attempt to cast their new election advisory 2024-20 as evidence of the upholding of their duty, they overlook two significant points. First, the personally identifying information election officials are now being directed to redact *should not exist in election records in the first place*. Second, the redaction of such information makes an election audit impossible and thus violates Sections 1.012 and 122.001(a)10 of the Texas Election Code. While this new advisory 2024-20 is not a subject of Plaintiffs' claims in this case, the Court should not be confused by the State Defendants' attempt to cast their recent actions as a remedy for

the wrongdoing of which Plaintiffs complain. Rather, the significance of the new advisory actually lies in the State Defendants' admission that they have both the duty and the ability to make changes relevant to Plaintiffs' complaints, contradicting the majority of the arguments in their motion.

**B. Plaintiffs have alleged procedural and substantive due process claims.**

31. For the reasons already described in detail *supra*, Plaintiffs have properly stated a procedural due process claim against the State Defendants. By usurping the give and take of both the Senate and House legislative processes of publicly introducing bills, referrals to committees, public committee meetings, public and expert testimony in committee hearings, floor actions, return to the originating committee, conference committee, and governor's action<sup>7</sup>, the State Defendants have unilaterally, illegally, and without accountability waived, violated, and ignored ballot numbering laws that *were* passed through the legislative process of public input, debate, and scrutiny. Dkt. 32 ¶ 25, 86, 94. While the State Defendants do not file bills, they have direct access to legislators and the governor in the drafting of bills and are invited speakers at legislative hearings. The State Defendants, by waiving ballot numbering and certification laws, have effectively put aside their fidelity to the requirements of bicameralism and presentment and the republic form guarantees of two constitutions, violating Plaintiffs' due process rights to participate in the law-making process of representative government. Dkt. 32 ¶ 86.

32. Additionally, the State Defendants violated due process by illegally certifying ballot numbering software and hardware, ExpressLink and the Activation card printer, that:

- a) were not certified by the Election Assistance Commission, in violation of Tex. Elec. Code Sec. 122.001(a)3. Dkt. 32 ¶ 129.i and iv.

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<sup>7</sup> See "The Legislature Process in Texas" published by the Texas Legislative Council in 2022 at <https://tlc.texas.gov/docs/legref/legislativeprocess.pdf>. This document lays out the process for Senate bills and House bills. The Texas legislative process is governed by the Texas Constitution and applicable statutes and by the rules of procedure of the Senate and House of Representatives that are adopted at the beginning of a regular session.

- b) were not reviewed by the State's own examiners, in violation of Tex. Elec. Code 122.036. Dkt. 32 ¶¶ 127, 129.iii and iv,
- c) do not preserve the secrecy of the ballot, in violation of Tex. Elec. Code Sec. 122.001(a)1. Dkt. 32 ¶ 129.iv.
- d) do not prohibit the electronic pollbooks from connecting to voting system software and hardware components, in violation of the Texas Technical matrix for Electronic Pollbooks Section 35. Dkt. 32 ¶ 134.

33. The harms suffered by Plaintiffs are a direct result of the State Defendants' abject procedural due process failures. The Fifth Circuit has long recognized that "the due process clause of the fourteenth amendment to the United States Constitution protects against the disenfranchisement of a state electorate in violation of state election law." *Duncan v. Poynthress*, 657 F.2d 691, 693 (5<sup>th</sup> Cir. 1981). Indeed,

[Federal courts have properly intervened when] the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed. Due process...is implicated in such a situation...In cases falling within such confines, we think that a federal judge need not be timid, but may and should do what common sense and justice require.

*Id.* at 703 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1<sup>st</sup> Cir. 1978)).

34. Like the plaintiffs in *Duncan*, Plaintiffs "ask for the election itself, as required by state law." *Id.* Plaintiffs have alleged procedural due process claims sufficient to withstand the State Defendants' Rule 12(b)(1) challenge.

35. Similarly, Plaintiffs have alleged a substantive due process claim. While the State Defendants may believe that the breach of ballot secrecy directly attributable to their actions cannot "be fairly said to shock the contemporary conscience," recent events indicate otherwise.

36. There has been nothing but public outrage in response to the evidence and allegations in this lawsuit and to other ballot secrecy breaches in Texas.<sup>8</sup> The House<sup>9</sup> and Senate<sup>10</sup> of the Texas Legislature both called emergency hearings to discuss breaches of ballot secrecy and the “algorithm” that was discovered by Dr. Pressley.

37. In response to the very public and recent legislative pressure, which evidences the shock to the collective conscience, on June 24, 2024, the Secretary issued Election Advisory 2024-21, titled “Updated Ballot Numbering Requirements.” This new Advisory purports “to address updated requirements relating to the certification of electronic pollbook systems under Texas Election Code 31.014 and to the use of software methods of ballot numbering under Election Code

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<sup>8</sup>The Austin American Statesman – Texas Ballots Might Not Be So Secret as They Think, “And even if it’s only a relative handful of voters whose ballots are identified, the chilling effect could extend beyond them. Will people feel free to vote their conscience — or want to vote at all — if they fear there’s a chance of exposure and retaliation?” Last visited 7/3/2024 at <https://www.statesman.com/story/opinion/columns/2024/06/09/texans-ballots-might-not-be-as-secret-as-they-think-voter-security-elections/73991191007/>.

The Texan – Lawsuit Alleges Flaw in Texas Election Process Exposure of Voters Ballots. “The news has sent the Texas political landscape into a tailspin.” Last visited 7/3/2024 at [https://thetexan.news/elections/2024/lawsuit-alleges-flaw-in-texas-election-process-exposure-of-voters-ballots/article\\_d8958096-187b-11ef-8ce3-bf962abd2e7d.html](https://thetexan.news/elections/2024/lawsuit-alleges-flaw-in-texas-election-process-exposure-of-voters-ballots/article_d8958096-187b-11ef-8ce3-bf962abd2e7d.html)

Creators by Erick Erickson – Someone Needs to Go to Jail. “This is a dangerous issue...Any person who engaged in illegal activity needs to go to jail and be an example of Texas taking the secret ballot seriously.” Last visited 7/3/2024 at <https://www.creators.com/read/erick-erickson/05/24/someone-needs-to-go-to-jail>.

CurrentRevolt – Exclusive: Hacked Ballot Proves Texas Elections In Crisis. “The fatal flaw in this specific breach is alleged to be the random numbers assigned to each ballot... This is a non-partisan issue. Both Republican *and* Democrat ballots are open to exposure.” Last visited 7/3/2024 at <https://www.currentrevolt.com/p/exclusive-hacked-ballot-proves-texas?r=1fucj3&triedRedirect=true>

<sup>9</sup> Texas House Elections Committee Hearing on June 12, 2024 regarding interim charge of Oversight of Ballot Secrecy with invited witnesses from the Texas Secretary of State, Hart InterCivic, Tx. Association of Elections Administrators, County and District Clerks Association of Texas, and Elections Systems and Software at [https://tlchouse.granicus.com/MediaPlayer.php?view\\_id=78&clip\\_id=25259](https://tlchouse.granicus.com/MediaPlayer.php?view_id=78&clip_id=25259) (last visited June 14, 2024). Full testimony for Oversight of Ballot Secrecy at 00:59:00 – 2:20:20.

<sup>10</sup> Texas Senate State Affairs Committee Hearing on May 29, 2024 regarding interim charge on election security with invited witnesses and public testimony. Full testimony last visited on 7/3/2024 at [https://tlcsenate.granicus.com/MediaPlayer.php?clip\\_id=18508](https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=18508). Expert testimony at 2:31:00 - .5:18:24, public testimony at 12:06:10 – 13:00:00.

52.075.” Dkt. 46, p. 2 ¶ 3 and Dkt. 46-1, Appendix 4, on p. 17. Advisory 2024-21 from Dkt. 46-1 is included herein as Exhibit 1.

38. The Secretary’s new Advisory 2024-21 directs counties using electronic pollbooks that currently place a unique identifying number on each in-person voter’s ballot (ES&S counties using the ExpressLink Software on their pollbooks) that they “are now required to use ballot numbering methods that do not involve the use of the electronic pollbook system.” While Advisory 2024-21 is a step in the right direction and Plaintiffs are grateful for it, it is still insufficient as a remedy, and its existence highlights both the magnitude of the public outrage regarding these ballot secrecy breaches and issues and the State Defendants’ direct role in both causing and mitigating them.

**C. Plaintiffs have stated equal protection claims against the State Defendants.**

39. Texas law creates two classes of voter – those who vote by mail and those who vote in person at the polls. Dkt. 32 ¶ 24. Under the U.S. Constitution’s one-person, one-vote guarantee of equal protection, both of these voter classes in Texas are guaranteed equal protection of their ballot and to vote effectively and free from intimidation. State laws ensuring equal application of consecutive ballot numbering and other mandates guaranteeing a secret ballot are all laws that advance a state’s “compelling interests in preventing voter intimidation and election fraud” as noted in *Burson v. Freeman* 504 U.S. 191, 191-192 (1992) (holding that restricted zones around polling places serve to protect ballot secrecy by protecting the right to vote freely and effectively). “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). In cases such as this one, “the crucial

consideration is the right of each qualified voter to participate on an equal footing in the election process.” *Hadley v. Junior College District*, 397 U.S. 50, 55 (1970)

40. Contrary to State Defendants’ contention, Plaintiffs have alleged substantial differential treatment between voters who cast ballots by mail and voters who cast ballots in person. Dkt. 46 p. 18. Plaintiffs, as in-person voters, do not receive a consecutively-numbered ballot, in violation of Texas law, and are required to utilize ballots with computerized unique identifiers placed on them by electronic pollbooks, resulting in the breach of ballot secrecy. Dkt. 32 ¶¶ 37-39, 86, 91, 112, 123, 163. Those who vote by mail receive a legally compliant ballot on which to cast their votes and are not subject to breach of secrecy. It is hard to envision how the treatment of these two classes of voters could be more disparate.

41. A member of the Texas executive branch cannot override the Texas Constitution, particularly where it directs authority (in the form of a command) only to the Legislature, nor can that member simply override the U.S. Constitution’s guarantees of equal protection for ballot secrecy and against ballot fraud for all voters regardless of how they cast their ballots, whether in-person or by-mail. Dkt. 32 ¶¶ 101, 104. Casting a ballot protected from disclosure and fraud is the right of all Texas voters, not just those who cast ballots by mail, and any discrimination in this regard undermines the vote. “Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.” *Wesberry v. Sanders* 376 U.S. 1, 17 (1964); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Dkt. 32 ¶ 143.

42. For these reasons, Plaintiffs have alleged a valid equal protection claim.



**D. Plaintiffs have stated a First Amendment claim against the State Defendants.**

43. Finally, and for the same reasons stated *supra*, Plaintiffs have stated a valid First Amendment claim against State Defendants. State Defendants' actions, as described herein, undermine, infringe upon, and abridge Plaintiffs' right to vote freely, resulting in voter suppression, vote dilution, disenfranchisement, and debasement in violation of the First Amendment. Dkt. 32 ¶ 85.

44. The realistic danger is that State Defendants' actions have caused voter intimidation and the chilling and undermining of the free exercise of Plaintiffs' votes, resulting in disenfranchisement and the violation of Plaintiffs' First Amendment rights. These allegations are detailed extensively in Plaintiffs' Amended Complaint (Dkt. 32 ¶161) and in each Plaintiff's Declaration (Pressley 32-54 pp. 3-5, Bagwell 32-59 ¶¶ 6-7, Korkmas 32-61 ¶ 3, Highsmith 32-62 ¶ 4, Soll 32-60 ¶¶ 5-8). The harms, fears, and dangers detailed by each Plaintiff are real, individual, and personal in nature, and are not unexpected. Indeed, the Supreme Court has noted that "the failure of the law to secure secrecy open[s] the door to bribery and intimidation." *Burson* at 201. A "secret ballot" is a venerable part of the American tradition. *Burson* at 124 (Justice Scalia concurring).

45. Plaintiffs have alleged a First Amendment claim sufficient to withstand a Rule 12(b)(6) challenge.

**IV. THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY**

46. State Defendants' new Election Advisory 2024-21, cited in their motion (Dkt-46-1 p. 17), helpfully illustrates the justiciable controversy present in this case.

47. The new Advisory states that, pursuant to Tex. Elec. Code Sec. 52.075, the Secretary “has the authority to adopt specific standards...including the methods used to comply with...numbering of ballots.” Dkt. 46-1, p. 17. See excerpt below:

Under those sections of the Texas Election Code, our office has the authority to adopt specific standards for the certification of electronic pollbook systems and to adopt specific requirements relating to the form and content of electronic voting system ballots, including the methods used to comply with requirements in Texas law relating to the numbering of ballots.

48. Based on State Defendants’ prior actions and Advisory 2019-23, and now this most recent Advisory 2014-21, they appear to believe that they have authority over ballot numbering methods in Texas and can usurp the appropriate legislative process, resulting in the disenfranchisement of in-person voters. Plaintiffs’ First Amended Complaint (Dkt. 32) outlines the illegal and constitutional errors surrounding the Secretary’s faulty interpretations and the dangerous consequences that have resulted. Ironically, Advisory 2024-21 admits that the electronic pollbooks and the voting machines are compatible **without** the computerized random unique numbering of ballots through voting system software, thus proving there is no necessity for invoking Section 52.075.

49. The Fifth Circuit has already recognized the limited authority Section 52.075 grants to State Defendants, noting that “the Secretary has discretion to alter the...content of electronic ballots, but that discretion is cabined to encoding ballots (prepared by local officials) for compatibility with an electronic voting system.” *Texas Alliance for Retired Americans v. Scott*, 28 F.4th 669, 673 (5<sup>th</sup> Cir. 2022). Dkt. 32 ¶ 99. State Defendants show no sign of heeding such limitation.

50. Additionally, even if Advisory 2024-21 were a legal and effective remedy (which Plaintiffs do not concede<sup>11</sup>), the State Defendants, based on their misunderstanding of the authority granted to them, can easily rescind Advisory 2024-21 or promulgate a new ballot numbering method completely outside legislative processes and devoid of oversight.

## V. CONCLUSION

51. The First and Fourteenth Amendment violations suffered by Plaintiffs as the result of the State Defendants' actions represents one of the most epic and unprecedented failures of a state agency. State Defendants' dictatorial decisions and actions to waive and redefine ballot numbering laws in Texas and illegally certify electronic pollbooks to place unique identifier numbers on in-person ballots has resulted in the actual breach of secrecy of not only Plaintiffs' ballots but more than 60,000 voters' ballots, something that has never been reported in our county's history.

52. This case raises fundamental questions regarding the absence of checks and balances for the State Defendants' decisions and actions and the agency's threat to the legislature by intruding on the core and mandatory state constitutional function the legislature has to provide for ballot numbering laws in Texas.<sup>12</sup> Equally concerning are the State Defendants' failures of accountability to the people to ensure a secret ballot to prevent voter intimidation and disenfranchisement. These issues implicate Plaintiffs' rights to equal protection and due process and their right to cast a secret ballot free from fear, intimation, retaliation, and disenfranchisement. Plaintiffs request that the Court provide relief because their constitutional rights and those of others have been violated on such a massive scale.

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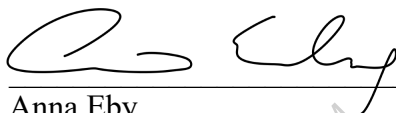
<sup>11</sup> The advisory is insufficient because, among other things, it does not address counties, including Llano, that use the Hart InterCivic computerized ballot number tracking system through voting system software. Dkt. 32 ¶¶ 40, 52-56, 86.

<sup>12</sup> Tex. Const. Art. VI Sec. 4.

**PRAYER**

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants Nelson and Adkins' Rule 12(b)(1) and 12(b)(6) Motion to Dismiss Plaintiff's Amended Complaint and grant to Plaintiffs all such other and further relief to which they may be entitled.

Respectfully submitted:



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all parties herein by way of:

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