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-DAE

PLAINTIFFS' OBJECTION AND RESPONSE TO
DEFENDANT BRIDGETTE ESCOBEDO'S
RULE 12(b)(1) SUPPLEMENTAL MOTION TO DISMISS FOR MOOTNESS

TO THE HONORABLE JUDGE EZRA:

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 Objection and Response to Defendant Bridgette Escobedo's Rule 12(b)(1) Supplemental Motion to Dismiss for Mootness, and allege as follows:

I. OBJECTION

1. Defendant Williamson County Elections Administrator Bridgette Escobedo (referred to herein as "Escobedo" or "Williamson County") has filed a Rule 12(b)(1) Supplemental Motion to Dismiss for Mootness in violation of Local Rule CV-7(e)(1). Accordingly, Plaintiffs object and request that Williamson County's supplemental motion be stricken.

2. Local Rule CV-7(e)(1) requires leave of court for further submissions on a motion once a reply has been filed.

3. Williamson County filed its original Rule 12 motion to dismiss on June 28, 2024 (Dkt. 48), to which Plaintiffs timely filed a response (Dkt. 53) on July 12. Williamson County then filed its reply (Dkt. 57) on July 19. Pursuant to Rule CV-7(e)(1), no further submissions on Williamson County's motion are permitted, absent leave of court.

4. Because Williamson County did not request leave of court to file its supplemental motion, the supplemental motion was improperly filed and should be stricken from the record.

5. Subject to, and without waiving their objection, Plaintiffs nonetheless hereby submit the following response to the substance of Williamson County's motion, in the interest of efficiency and upon the assumption that Williamson County will seek and obtain leave to re-file its supplemental motion.

II. RESPONSE

A. Introduction

6. In addition to being improperly filed, Williamson County's supplemental response also fails on the merits.

7. First, the voluntary cessation doctrine applies to the actions Williamson County alleges have rendered Plaintiffs' claims moot.

8. Next, even if the voluntary cessation doctrine were inapplicable, a justiciable controversy would still exist between Plaintiffs and Williamson County, necessitating this Court's determination of important legal questions.

B. The Voluntary Cessation Doctrine Precludes the Mooting of Plaintiffs' Claims

9. Mootness occurs when there is no longer an actual controversy between the parties to a lawsuit. However, the Supreme Court has long recognized several exceptions to general mootness principles. One of these key exceptions (also characterized as an evidentiary presumption) is the voluntary cessation doctrine. A defendant's voluntary cessation of unlawful practices will usually not moot their opponents' challenge to those practices. *See*, e.g., *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287–89 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.,* 508 U.S. 656, 662 (1993); *Chi. Teachers Union, Loc al No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 305 n.14 (1986); *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982*); Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Allee v. Medrano*, 416 U.S. 802, 810 (1974).

10. Thus, a defendant cannot moot a case simply by ending its unlawful conduct after being sued. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Because litigants could defeat a lawsuit by temporarily ceasing their unlawful practices, with nothing to stop them from engaging in that original unlawful action after the court dismissed the case, this exception to the mootness

doctrine exists to prevent the litigant from "return[ing] to [its] old ways." *Allee*, 416 U.S. at 811 (quoting *Gray v. Sanders*, 372 U.S. 368, 376 (1963) *See also*, *e.g.*, *Friends of the Earth*, 528 U.S. at 189 (same).

1. Williamson County has not been ordered to cease its unlawful conduct by a third party.

11. Williamson County asserts that the voluntary cessation doctrine does not apply because "the action taken to discontinue the use of computer-generated numbering of ballots was non-discretionary – the Secretary of State has now required counties…to cease this practice." (Dkt. 58, p. 5). The County's own Exhibit A (Dkt. 58, p. 12) contradicts this, as does the Secretary of State's Advisory 2024-21, Exhibit B (Dkt. 58, p. 13).

12. According to Exhibit A of Williamson County's motion, shown below, the Secretary of State "recommends using pre-printed ballots."

WILCO ELECTIONS

Williamson County Elections
301 SE Inner Loop Ste. 104,
Georgetown, TX 78626
Phone: 512.943.1630
Fax: 512.943.1643
wilcotx.gov/elections

Call to Order

1. Discuss, consider, and take appropriate action regarding the approval of the Elections Administrator's procurement of election supplies necessary to conduct the November General Election, including the proposal for pre-printed consecutively numbered paper ballots and discontinue the use of computerized random numbering of ballots.

YAY Count: 5, passed unanimously **NAY Count: 0**

Judge had concern for secrecy of ballots/voting, due to multiple PIAs. Elections Dept. has followed correct procedures in handling. Voters should have right to vote with privacy. SOS recommends using pre-printed ballots; Judge agrees with their recommendations. Votes should remain confidential.

13. The County's evidence directly contradicts the claims in its motion that Advisory 2024-21 is a "directive" that is "binding on Defendant Escobedo" (Dkt. 58, p. 2), either to discontinue the use of computer-generated ballot numbers with the electronic pollbook system

(Dkt. 58, p. 2) or to make the implementation of consecutively numbered ballots "non-discretionary" (Dkt. 58, p. 5). Furthermore, the Secretary is a defendant in this case and not a third party, making the exception to the voluntary cessation inapplicable.

14. While the Secretary of State **IS** statutorily authorized to issue orders in limited instances (*see* Tex. Elec. Code Sec. 31.005(b)), the State Defendants have only issued *advisories* to Texas counties, not *orders*, as it relates to the issues in this case.

15. However, Williamson County appears to believe, or at least claims in its motion, that it is bound to follow any advice or guidance issued by the State Defendants, regardless of its legality. The County's motion equates Advisory 2024-21 and the Texas Electronic Pollbook Functional Standards (Dkt. 58, pp. 14-50) with state law: "Since Defendant Escobedo has no ability to alter or supersede state law, the Secretary of State's actions [issuing Advisory 2024-21 and updating the Standards] guarantee as a matter of law that Williamson County does not remain free to return to its old ways" (Dkt. 58, p. 5 (internal citations omitted)). The inconsistencies in Williamson County's evidence and legal arguments are notable.

16. Unlike an order, Advisory 2024-21 does not alert counties that non-compliance would be followed by the intervention of the Texas Attorney General in the form of a restraining order, writ of injunction or mandamus pursuant to Tex. Elec. Code Sec. 31.005(c).[1]

17. Specifically as it relates to Williamson County, the Election Code is clear that a county elections administrator has the sole authority to determine the ballot numbering methods for a county's elections. *See* Tex. Elec. Code Sec. 52.062. *See also*, Texas Attorney General 2022

[1] The Secretary of State does not have actual enforcement powers. Accordingly, the Attorney General must enforce any orders issued by the Secretary. As the Fifth Circuit has noted, "Such 'general duties under the [Texas Election] Code' fail to make the Secretary the enforcer of specific election code provisions." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 180 (5th Cir. 2020), (citing Tex. Elec. Code §§ 31.003–.004). See also *Bullock v. Calvert*, 480 S.W.2d 367, 371–72 (Tex. 1972) (Reavley, J.) (rejecting argument that Secretary's role as "chief election officer" or his duty to "maintain uniformity" in application of election laws is "a delegation of authority to care for any breakdown in the election process"); *In re Hotze*, 627 S.W.3d 642, 646 (Tex. 2020) (Blacklock, J., concurring) (same).

Opinion No. KP-0422 ("[b]ecause the [Texas] statutes do not vest ballot-preparation or supervisory authority in any other entity, the elections administrator has sole authority to select the numbering."). This highlights not only the fiction of the Williamson County Election Board vote but also the necessity of keeping Elections Administrator Escobedo in this case so that the Court can determine all of the justiciable legal issues pending before it.

2. The Williamson County Election Board does not have the legal authority to permanently cease the practice of using computerized unique ballot numbering or to permanently ensure the use of consecutively numbered ballots.

18. Williamson County contends that Plaintiffs' claims have been made moot because the Williamson County Election Board, which has "general supervisory authority for the procurement of election supplies" as provided by Sections 51.002 and 51.003 of the Texas Election Code, met on July 29, 2024 and "unanimously voted to discontinue the use of computer-generated numbering of ballots and to procure pre-printed, sequentially numbered paper ballots." Dkt. 58, p. 2. Williamson County argues that this moots Plaintiffs' claims because this is "substantively the action Plaintiffs are seeking." *Id.* These arguments are inaccurate for several reasons.

19. The voluntary action taken by the Election Board in an eight-minute meeting (Dkt. 58, Ex. A) is misleading. The Election Board only has statutory authority to procure election supplies. *See* Tex. Elec. Code Sec. 51.002-003. It does not have the authority to "discontinue the use of computerized random numbering of ballots," as the meeting minutes purport to do (Dkt. 58, Ex. A, p. 12). Accordingly, even if well-intentioned, such action by the Election Board to discontinue computer-generated random numbering of ballots has no actual legal effect. As discussed in more detail *infra*, only the Elections Administrator has this authority, and Williamson County has not offered any evidence in support of its motion to show that Elections Administrator Escobedo has made a policy decision to permanently discontinue the use of computerized

randomly-numbered ballots in Williamson County and to consecutively number ballots and adhere to all statutes related to such.

20. Further, even if the action of the Election Board carried any legal weight, it is, on its face, limited to the "November General Election" only. *Id*. Accordingly, even assuming that Williamson County only uses consecutively-numbered ballots in the November 2024 general election, Williamson County has offered no evidence to indicate that this practice will continue once the November election, and this litigation, are concluded. This is the very scenario the voluntary cessation doctrine is intended to foreclose.

3. Williamson County has presented no evidence of a permanent policy change.

21. Far from a "conclusive abandonment of the challenged policy" (Dkt. 58, p. 5), Williamson County's motion is devoid of any competent evidence establishing the implementation of a permanent policy change. The cases cited in the County's motion on this point are instructive, as they perfectly highlight what is missing here. *See*, *e.g*., *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd*, 131 S. Ct. 1651 (2011) (TDCJ director's affidavit explaining revision to policy in question); *Coalition of Airline Pilots Ass'n v. F.A.A.*, 370 F.3d 1184 (D.C. Cir. 2004) ("The agencies' commitment to draft new regulations…**a commitment made both to this court and in the formal entry in the TSA rulemaking dockets**…") (emphasis added).

22. Here, Williamson County has offered no evidence demonstrating a permanent policy change or a "commitment" to this Court to make such a change, unlike *Sossamon* and *Coalition*.

23. Furthermore, outside of a court order, any decisions made today by Williamson County officials are not binding on any of their successors; therefore, Plaintiffs continue to have a personal stake and are not permanently protected.

C. Whether or Not the Voluntary Cessation Doctrine Applies, a Justiciable Controversy Still Exists

24. Next, Williamson County contends that the Secretary of State's Election Advisory 2024-21 moots Plaintiffs' claims because the Advisory requires the County to cease using electronic pollbooks that number ballots (Dkt. 58, p. 2 et seq.). In other words, according to the County, the Secretary of State (also a defendant in this case and not a third party) has the authority to provide for and dictate ballot numbering methods in Texas (in contravention of Texas Election Code Sections 31.014, 52.062, 51.006, 51.007, 51.008, 62.007, 62.009, and 129.054) and direct the defendant counties to take, or refrain from taking, actions that would resolve the merits of Plaintiffs' complaint, thus mooting this case. This argument helpfully encapsulates the issue at the very root of this case.

25. In this case, Plaintiffs challenge election guidance through the prior Advisory 2019-23 Section 13(b) promulgated by the Secretary of State to the County Defendants (Dkt. 32-26, p. 3) and the subsequent ballot numbering policies implemented by the County Defendants in response to the 2019 guidance (Dkt. 32 paragraphs 93, 105, 108, 130, 135, 151, 169). In this regard, the County Defendants have consistently laid responsibility at the feet of the State Defendants, pointing to the State Defendants' election advisories and other guidance, as Williamson County does in its supplemental motion. From the County Defendants' perspective, they are simply following the advisories of the State Defendants, which the Counties seem to believe they have no discretion to disregard even if those advisories are based on improper legal grounds. Indeed, Williamson County claims that Election Advisory 2024-21 is, in essence, non-

challengeable by Elections Administrator Escobedo (Dkt. 58, p. 5). In other words, Williamson County believes it is bound to follow the Secretary's guidance, even if based on improper legal grounds.

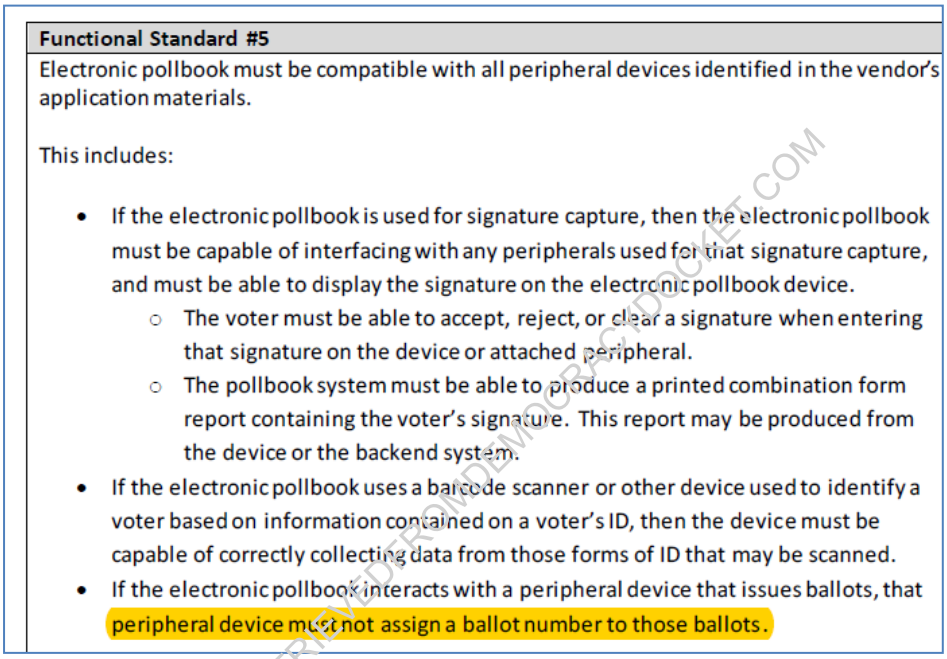
26. On the other hand, the State Defendants have taken the position that they simply render advice and guidance to counties, that they have not imposed any burden on the counties, and that it is the counties' responsibility to establish and implement their respective election policies and procedures (Dkt. 46, p. 23).

27. While this is belied by the fact that the Secretary of State IS statutorily authorized to issue orders in limited instances (*see* Tex. Elec. Code Sec. 31.005(b)), it is true that the State Defendants have only issued *advisories*, not *orders*, relevant to this case.

28. Because the Defendants cannot even agree amongst themselves as to where the ultimate authority and responsibility lie to remedy the wrongs of which Plaintiffs complain, this Court's involvement remains necessary, especially in light of the severe ballot secrecy breach that has impacted Plaintiffs and more than 60,000 other voters in Williamson County.

29. Furthermore, even assuming that Williamson County's purported reliance on the State Defendants' guidance could moot Plaintiffs' claims, Advisory 2024-21 is wholly insufficient in that regard. Among other deficiencies, Advisory 2024-1 does not (1) impact all counties using ballot tracking through voting system software; (2) decertify the existing Williamson County pollbook systems that have the capability to place unique number identifiers/random numbers on in-person ballots; (3) rescind the offending Advisory 2019-23 Section 13(1)(b) that has been in place nearly five years and that enabled the breach of ballot secrecy in the first place; or (4) advise election officials using electronic voting systems to <u>use</u> consecutively numbered ballots pursuant to Tex. Elec. Code Sections 52.062, 51.006, 51.007, 51.008, 62.007, and 62.009.

30. Additionally, the Secretary's modified electronic pollbook "Functional Standards" have only been slightly changed to state that a "peripheral device ***must not assign*** a ballot number to those ballots." Dkt. 58, Exhibit C, p. 14-50 (emphasis added). The Secretary's insufficient modification to pollbook functional standards does not even mandate the devices be decertified and recertified as ***permanently incapable of assigning a computer-generated unique ballot number identifier to in-person voting system ballots.***



Functional Standard #5

Electronic pollbook must be compatible with all peripheral devices identified in the vendor's application materials.

This includes:

- If the electronic pollbook is used for signature capture, then the electronic pollbook must be capable of interfacing with any peripherals used for that signature capture, and must be able to display the signature on the electronic pollbook device.
  - The voter must be able to accept, reject, or clear a signature when entering that signature on the device or attached peripheral.
  - The pollbook system must be able to produce a printed combination form report containing the voter's signature. This report may be produced from the device or the backend system.
- If the electronic pollbook uses a barcode scanner or other device used to identify a voter based on information contained on a voter's ID, then the device must be capable of correctly collecting data from those forms of ID that may be scanned.
- If the electronic pollbook interacts with a peripheral device that issues ballots, that peripheral device must not assign a ballot number to those ballots.

31. Furthermore, there is an ongoing factual controversy between the parties that the voting system software and hardware installed and connected to the electronic pollbooks are not simply "peripheral devices" and are illegally being used and connected to an external network, including the internet (i.e., ExpressLink software and Activation Card Printer). Dkt. 32, paragraphs 46-49, 113(i) and (ii), 117, 124, 129(i-iv), 130, 134 (i-ii), 168-169, and 177.

32. Williamson County's supplemental motion reveals how it continues to misinterpret and trespass upon the ballot numbering laws, change the statutes, and annul the authority of its own elections administrator. The law works when it is being used lawfully; Plaintiffs allege ballot

numbering laws are NOT being used lawfully by Defendants and those illegalities have resulted in the breach of Plaintiffs' secret ballots and over 60,000 other voters' ballots in Williamson County. County leaders are continuing to make bad decisions based on improper legal grounds that result in the breach of voters' ballots, disenfranchisement of voters, and lack of equal protection of their votes, all of which violate the First and Fourteenth Amendments of the U.S. Constitution.

33. Williamson County has a heavy burden of persuading the Court that the alleged constitutional violations cannot reasonably be expected to start up again if the Court dismisses the case. *See Friends of the Earth*, 528 U.S. at 189 (quoting *Concentrated Phosphate Export Ass'n,* 393 U.S. at 203). *See also*, *e.g.*, *Trinity Lutheran Church*, *137 S. Ct. at 2019 n.1; Adar and Constructors,* 528 U.S. at 222. *See also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (explaining that a party's burden to avoid the voluntary cessation doctrine is "formidable").

34. The County has not presented evidence to make it "absolutely clear" to the Court that the alleged wrongful actions of violating and ignoring ballot numbering laws in Texas will not recur. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc.* at 189). *See also*, *e.g.*, *Adarand Constructors, Inc. v. Slater,* 528 U.S. 216, 222 (2000) (per curiam) ("Voluntary cessation of challenged conduct moots a case, however, only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'") (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

35. Any time since the March 2024 filing of Plaintiffs' Original Complaint, Williamson County Elections Administrator Escobedo could have voluntarily ceased the use of random computerized numbering in Williamson County elections and ***did not do so***. As a result, the

Williamson County March 2024 primary, May municipal elections, and May primary runoff elections were all run with computerized unique identifiers on all in-person ballots, adding to and compounding the ballot secrecy breaches and infringement of Plaintiffs' and other Williamson County voters' First and Fourteenth Amendment rights.

36. Williamson County's timing and actions appear to be an attempt at gamesmanship for the purpose of simply making this litigation go away. The Court may assess a defendant's motives by assessing whether the timing of cessation of the unlawful behavior is suspicious. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020) and *Texas v. Biden*, 20 F.4th 928, 963–64 (5th Cir. 2021) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation omitted)), *rev'd and remanded on other grounds*, 142 S. Ct. 2528 (2022).Finally, nowhere in Williamson County's motion does it mention the collateral damage that has occurred as a result of its actions, none of which are remedied by the Election Board's meaningless vote. In addition to ballot secrecy breaches that cannot be undone, the data remains in the possession of the County's employees, vendors, and agents and is still vulnerable to access and misuse, whether or not it is protected from disclosure in response to public information requests (Dkt. 58, p. 5). This harm is real and ongoing, and Williamson County's latest actions do nothing to remedy it. Put simply, **the County has something it should not have under law**, causing ongoing harm to Plaintiffs.

PRAYER

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Bridgette Escobedo's Rule 12(b)(1) Supplemental 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:

__ U.S. Mail, First Class
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___ Facsimile/Electronic Mail
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on this 20th day of August, 2024, to-wit:

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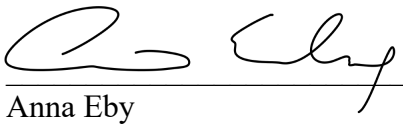

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