

1. Plaintiffs intend to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.4 and ask that the Court enter an order setting forth a suitable discovery control plan.

2. Pursuant to Texas Rule of Civil Procedure 47(c)(2), Plaintiffs solely seeks declaratory and prospective-only injunctive relief. No monetary damages are sought.

PARTIES

3. Plaintiff HCRP is a major political party who had multiple Republican nominees on the ballot for potential election by Harris County registered voters during the November 8, 2022 General Election. Cindy Siegel, as Chair of HCRP, is responsible for the management and conduct of the HCRP, whose job is to ensure that HCRP fulfils its vital role referenced above. In addition, Plaintiff HCRP had multiple persons acting as presiding judges, alternative judges, and election clerks, throughout early voting, as well as election day voting.

4. As the Elections Administrator for Harris County, Defendant Clifford Tatum has the responsibility of enforcing the election laws to ensure a fair and honest election in Harris County. Unfortunately, in his capacity as Election Administrator for Harris County, Defendant Tatum has committed, and, if not restrained, will continue to commit, certain ultra vires acts, the effect of which is to deprive him of successfully asserting governmental immunity as a subject matter jurisdictional bar to Plaintiffs' claims against him herein. In order to reestablish Harris County's legitimate assertion of governmental control over his illegal and unauthorized ultra vires actions, this Defendant is sued in his official capacity as the Election

Administrator for Harris County. Service may be effectuated upon this Defendant by serving him in his official capacity as Election Administrator, 1001 Preston, Houston, Texas 77002, with a copy to the Harris County Attorney, Christian D. Menefee, Legal Department, 1019 Congress, 15th Floor, Houston, Texas 77002.

5. Defendant Harris County, Texas is a body corporate and politic under the laws of the State of Texas. Plaintiffs assert no direct claims against Harris County. However, the relief sought herein by the Plaintiffs will nevertheless affect Harris County because it is the entity that was (and still is) ultimately responsible for the November 8, 2022 General Election. Thus, Defendant Harris County is not only an interested party, but it is a necessary party. Because Defendant Harris County is a necessary party to the declaratory and injunctive relief asserted herein by the Plaintiffs, Chapter 37 of the Texas Civil Practice and Remedies Code contains a statutory waiver of its governmental immunity. Service may be effectuated upon this Defendant by serving the County Judge of Harris County, Lina Hidalgo, at 1001 Preston, Suite 911, Houston, Texas 77002, with a copy to the Harris County Attorney, Christian D. Menefee, Legal Department, 1019 Congress, 15th Floor, Houston, Texas 77002.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this matter by virtue of the relief sought herein. The November 8, 2022 General Election is countywide and

includes candidates who are included in election ballots being used in this election cycle. Each of the Plaintiffs and each of the Defendants are located in Harris County. This Court also has personal jurisdiction over all of the parties as they are either Texas residents or governmental bodies that do business in Texas. Section 273.081 of the Texas Election Code specifically provides that a person who is being harmed or is in danger of being harmed by a violation or threatened violation of the Texas Election Code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.

7. Venue is not only proper, but it is mandatory, in Harris County.

WAIVER OF GOVERNMENTAL IMMUNITY

8. Plaintiffs assert that no immunity exists for a claim brought under the “ultra vires” exception to governmental immunity. As explained in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-76 (Tex. 2009), the ultra vires exception allows a plaintiff to sue a local official in an official capacity, thereby binding the governmental body, through its agent, for injunctive and/or declaratory relief to restrain the official from violating statutory or constitutional provisions. Governmental immunity does not bar such a suit because, in concept, acts of local officials that are not lawfully authorized are *not* considered to be acts of the local government. Thus, the remedy of compelling such officials to comply with the law, while binding on the local governmental body, does not attempt to exert control over

the governmental body, but instead attempts to reassert the control of the local governmental body. It is for this reason that Plaintiffs have sued Clifford Tatum in his official capacity as Election Administrator of Harris County.

9. In addition, the Texas Declaratory Judgments Act contains a waiver of immunity from suit for governmental bodies whose presence is necessary to effectuate and bind them to a judicial declaration. Plaintiffs assert claims under the Texas Declaratory Judgments Act against Defendant Tatum. More specifically, Plaintiffs seek a judicial declaration that, due to multiple instances of certain ill-advised and illegal alterations of election procedures, each of which has been implemented for the November 8, 2022 General Election, Defendant Tatum has repeatedly violated Section 276.019 of the Texas Election Code. Given that fact, Plaintiffs seek a finding that Defendant Tatum did not, and does not, possess the legal or constitutional authority to implement these voting policies for Harris County.

10. In order to bind the governmental body which would be affected by such a judicial declaration, Plaintiffs are required to join Harris County as a necessary party. Accordingly, governmental immunity does not preclude equitable remedies in official-capacity suits against government actors who have violated statutory and constitutional provisions, by acting without legal authority, or by failing to perform a purely ministerial act. *Heinrich*, 284 S.W.3d at 372-73. Of

significance, suits to require government officials to comply with the law and the constitution are not prohibited even if a declaration to that effect compels the payment of money. Thus, to the extent this Court rules in favor of the Plaintiffs, immunity exists to bar that requested declaratory and injunctive relief.

FACTS OF THE CASE

11. Harris County early in-person voting began on Monday, October 24, 2022 and ended on November 4, 2022. Election Day voting took place on Tuesday, November 8, 2022. As the Elections Administrator for Harris County, Respondent Tatum has the responsibility of enforcing the election laws to ensure a fair and honest election in Harris County. Instead of complying with this mandate, Defendant Tatum allowed the election to be run in such a manner that it illegally disenfranchised tens of thousands of registered voters from casting their votes for the candidates of their choice.

Example One:

A. Issuing second ballots to voters who experienced problems with scanning page two (2) of their ballots.

12. One example of how Defendant Tatum deviated from the proper election procedures has to deal with scanning the ballot. The ballot for the November 8, 2022 General Election was two pages in length, both of which are 8.5 by 14 inches in width and length. Once the voter is finished voting, that voter's ballot must be

scanned into a scanner. Once scanned, that ballot is electronically recorded and is officially included in the total hard count for the election.

13. The problem that occurred throughout Harris County at a significant number of the ninety (90) early voting polling locations--as well as the seven hundred eighty-two election day polling locations (782)--is that the scanners were not properly scanning both pages of a voter's ballot. When this occurred, the page that was scanned successfully is recorded electronically onto a V-drive and entered into the total hard count for the election. But the page that is not scanned is not recorded electronically on the V-drive and is not part of the total hard count for the election.

14. Problems like this are not particularly uncommon for Harris County, and there is an established procedure on how to deal with this situation. The remedy for problem ballots involves utilization of what is known as the Emergency Chute, which is a receptacle for placing problem ballots that were not counted (e.g., not recorded on the V-drive) but should be counted. Members of the Central Count team would collaborate with teams to ensure that the unscanned page of the voter's ballot in the Emergency Chute was accurately scanned.

15. Defendant Tatum altered the election procedure for handling unscannable ballot pages, and issued instructions to poll workers to issue a second ballot when problems like this occurred. The voter was supposed to scan in the ballot

page from the second ballot that did not scan from the first ballot. The judges were required to spoil the unscannable page of the first ballot and the duplicate page of the second ballot. This process of creating a new ballot was normally managed by the Central Count team which had numerous checks and balances to ensure that the correct ballot page was placed in the ballot box. The result of this ill-advised instruction to poll workers resulted in voters accidentally scanning both pages of the second ballot and/or placing ballots that should be spoiled in the Emergency Chute, which was later counted by Central Count. These mistakes resulted in double votes by those innocent voters, in direct violation of the Texas Election Code.

16. Defendant Tatum knew better than to do this. In the past May election, the Election Administrator's procedure was to simply place the ballot page that was not scanned properly into what is called the Emergency Chute, which is the collection box for those ballots that were cast and should be counted, but, for whatever reason (e.g., the page will not quite fit into the scanner, for example), was not able to be scanned and therefore is not included in the total hard count. Eventually, all of the ballots placed in the Emergency Chute are triaged by Central Count, where they have the technological ability to match the serial number of the ballot in the Emergency Chute with the serial number in the total hard count, making it feasible to then match the two ballot pages through an audit process and connect

those two pages to a specific voter who voted but could not get one of the two pages of their ballot to properly scan.

17. This new procedure caused a huge problem of a colossal magnitude. This deviation from the Harris County procedures instructed polling officials to spoil the second page of the first ballot that was not able to be scanned, and then scan the second page of the second ballot. Assuming poll workers did this correctly, then the total hard count on the V-drive will have a ballot for one of the two pages with one serial number, while the hard count will also have a ballot for the other page of the two pages with a different serial number. This procedure makes it impossible for Central Count to connect either page of the second ballot with either page of the first ballot, as both ballots have a unique serial number. Thus, once voting was concluded, no one at Central Count is able to audit the results because there is no way to tie these two separate ballots pages together. This also makes it impossible for the Texas Secretary of State's office to conduct a post-election audit, which is has already announced it intends to do.

18. Moreover, candidates who are contemplating an election contest will be unable to demonstrate if a legal vote was wrongfully discarded and/or an illegal vote was wrongfully included, much less tie those two ballot pages together to create one ballot.

19. Even worse, by providing the voter with a second ballot, there are countless instances where either the voter or the poll workers failed to follow Defendant Tatum's new procedure. Indeed, many voters simply scanned in both pages of their new ballots, which means that this specific voter violated the law by voting twice for the candidates on the page that was successfully scanned on the first voting effort when that same page was successfully scanned again on the second ballot. Moreover, poll workers were placing the spoiled ballot in the Emergency Chute, rather than placing them in a segregated envelope solely devoted to holding spoiled ballots. This has caused countless ballots to be counted at Central Count that were not supposed to have been counted, meaning certain voters have had their votes recorded not just once, but twice.

20. As has already been explained, the proper method for managing a partially scanned ballot situation is to place the unscanned ballot in the Emergency Chute and let Central Count audit the ballots to match the unscanned ballot with the matching page of the scanned ballot.

21. But that was not the procedure which Defendant Tatum instructed in writing. Plaintiffs have tried very hard to avoid litigation and to amicably resolve this issue, and even took the time and effort to rewrite the Defendants' ill-advised and illegal instructions, along with a request that the revised instruction be immediately disseminated to all early voting poll workers. Unfortunately, however,

the Defendants refused to do so, which lead to a significant number of double voting or double counting that will not be explainable through normal auditing procedures, and which also caused illegal double counts in flagrant violation of the Texas Election Code.

Example Two:

B. Issuing second ballots to voters who experienced smudges or other legibility problems with scanning their ballots.

22. Just as what described above with scanning problems, the exact same procedure was supposed to have been used for ballots which had legibility problems, such as smudges. But Defendant Tatum instead insisted that a new ballot be issued. What was supposed to occur was to simply place that problem ballot in the Emergency Chute, and Central Count could then recreate that ballot in the presence of multiple observers. Once duplicated, the ballot would then be scanned in and recorded on V-drive. But by issuing a new ballot, all of the same problems as were described above occurred in violation of the law.

Example Three:

C. Not supplying paper to polling places.

23. In an inexplicable failure of epic proportions, Defendant Tatum failed to supply polling locations with a sufficient amount of ballot paper. Numerous polls ran out of ballot paper. This deficit caused thousands of voters to be turned away from the polls, many of whom ultimately gave up and did not vote.

Example Four:

D. Agreeing to a court order to permit voting for an extra hour on election day.

24. An emergency court hearing late in the day of election day resulted in Defendant Tatum agreeing to keep the polls open for one additional hour. Under the terms of that order, all such voters who got in line to vote past 7:00 p.m. were supposed to cast provisional ballots.

25. Plaintiffs appeared in court and asked to be allowed to intervene in the lawsuit. Once permitted to intervene, Plaintiffs objected to this procedure, and asked the Court not to enter the order agreed to by all other parties, as they predicted it would cause more harm than good. The Trial Court entered the order anyway.

26. As predicted, this order permitted more problems to occur. For example, not all polls stayed open for an additional hour, even though state law requires all polling locations, not just some polling locations, to stay open when a court order permits additional time to vote. Moreover, a significant number of polling locations did not have any paper, such that no voters could vote during the extended period. In addition, some polling locations did not require voting to be provisional, and simply allowed these votes to be cast and counted and entered onto the V-drive for election day totals. Finally, not all locations segregated those provisional ballots that were cast during the extra hour, and simply allowed those voters to vote provisionally without regard to the time of their vote.

27. Even though Tatum agreed to keep the polls open for an additional hour, he posted the early voting results online at 7:30 pm, thirty (30) minutes prior to the time that he expected the polls to close in violation of the Texas Election Code.

Example Five:

E. Picking up election results from the polls rather than requiring Judges to fulfill requirements under law.

28. Tatum pressured Election Judges to allow for Harris County personnel to pick up the election results from the polling locations on Election Day in direct contravention to the Texas Election Code.

29. These are just five (5) examples of how Defendant Tatum illegally deviated from the Texas Election Code and violated Chapter 276.019 of that Code. Discovery will demonstrate many more categories of illegal deviation.

30. Harris County has a competitive multiparty political system dominated by the two major political parties, the Democratic Party, and the Republican Party. According to the 2020 Census, Harris County has a total population of 4,731,145 people living within its county borders.

31. Plaintiff HCRP is committed to advancing limited government, lower taxes, less spending and individual liberty. Relator's specific goals are to grow the Republican Party by reaching new voters, advance the Platform, which is grounded in conservative principle, and to keep Texas prosperous and free. HCRP serves:

To promote a conservative philosophy of government:

By promoting conservative principles; and

By providing the infrastructure through which those who share our conservative principles can get involved in the political process, run for, and be elected to public office, and govern according to our principles when elected.

32. Plaintiff Cindy Siegel is the Chair of Relator HCRP. Because her job is to manage HCRP, she has standing to assert the claims herein.

Legal Argument and Authorities

33. Chapter 276.019 of the Texas Election Code prohibits Defendant Tatum from unlawfully altering election procedures. One of the reasons for this law is to ensure that everyone can trust the outcome of an election, and that no voter is disenfranchised.

34. The Texas Supreme Court has held that the right to vote is protected by Article I, Section 3 of the Texas Constitution. *State v. Hodges*, 92 S.W.3d 489, 496, 501-02 (Tex. 2002). In reviewing the constitutionality of laws affecting voting rights under this provision, the Texas Supreme Court has borrowed from the framework established by the U.S. Supreme Court for reviewing alleged infringements on voting rights. *Id.* A court applying this framework "first consider[s] the character and magnitude of the asserted injury to [voting] rights," and then balances the purported injury against the "interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.

Ct. 1564, 75 L. Ed. 2d 547 (1983). Under this "flexible standard," a "severe" impediment to the right to vote must survive strict scrutiny, an exacting standard that places the burden of proof on the government to demonstrate that its restriction is narrowly tailored to achieve a compelling governmental interest. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). The government carries this burden only by establishing "a 'strong basis in evidence,'" *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986) (plurality opinion)), beyond mere "anecdote [or] supposition"—demonstrating that the restriction on constitutional rights is the least restrictive means of achieving legitimate regulatory goals. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

35. "The right to vote is fundamental, as it preserves all other rights." *Andrade*, 345 S.W.3d at 12 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)); see also Tex. Const. art. I, § 3 (providing equal rights). Courts have zealously protected the right to vote. See *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) ("No

right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); *Stewart v. Blackwell*, 444 F.3d 843, 862 (6th Cir. 2006) ("Few rights have been so extensively and vigorously protected as the right to vote. Its fundamental nature and the vigilance of its defense, both from the courts, Congress, and through the constitutional amendment process, stem from the recognition that our democratic structure and the preservation of our rights depends to a great extent on the franchise."); see also *United States v. Mosley*, 238 U.S. 383, 386, 35 S. Ct. 904, 59 L. Ed. 1355 (1915) ("We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."); *Avery v. Midland County*, 406 S.W.2d 422, 425 (Tex. 1966) ("Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights."); Thomas Paine, *Dissertation on the Principles of Government*, 1795 ("The right of voting . . . is the primary right by which all other rights are protected.").

36. Because of the ill-advised and illegal procedure implemented by the Defendants, voter in the November 8, 2022 General Election were susceptible to having their votes totally disenfranchised and/or diluted in violation of the Texas Election Code.

CAUSES OF ACTION

37. Plaintiffs incorporate all previous paragraphs of this Petition by this reference.

A. Suit for Declaratory Judgment and Injunctive Relief.

38. Pursuant to Section 37 of the Texas Civil Practice and Remedies Code, Plaintiffs seek the following declaratory and injunctive relief:

(i) in the situation where a voter's two-page ballot successfully scans one page but not the other page, irrespective of whether it was a mechanical issue and/or there was a legibility problem, then the Defendants, as well as the polling officials in charge of that specific polling location, had no discretion, but they instead had a ministerial and mandatory duty to place the unscanned ballot into the Emergency Chute for further handling by Central Count;

(ii) because the Election Administrator's written instructions on how to manage the situation where a voter's two-page ballot successfully scans one page but not the other page, those written instructions were issued in violation of Section 276.019 of the Texas Election Code;

(iii) because there were spoiled ballots that were improperly placed in the Emergency Chute, the Defendants violated the Texas Election Code;

(iv) because there were additional ballots issued to voters who were experiencing problems with scanning or legibility of their first ballot, double votes resulted and were recorded on the V-drive, in violation of the Texas Election Code;

(v) because there were additional ballots issued to voters who were experiencing problems with scanning or legibility of their first ballot, there is no way to audit those votes because they have unique serial numbers and cannot be connected to the previous ballot for audit purposes, in violation of the Texas Election Code;

(vii) because there was an insufficient supply of paper to the polling locations, countless registered voters who turned away and disenfranchised, in violation of the Texas Election Code;

(viii) because there was an insufficient supply of paper to the polling locations, coupled with the fact that an agreed order was entered permitting voting for an additional hour, countless registered voters who turned away and disenfranchised from those polling locations lacking paper, while other voters continued to vote in other locations that had paper, in violation of the Texas Election Code;

(ix) because Defendant Tatum agreed to keep the pools open for an additional hour, but failed to adequately inform the various polling sites on how to handle the situation, some sites simply closed, while others remained open; other sites failed to ensure that voters voting during the extra hour voted provisionally; other sites did not segregate or otherwise record the fact that some voters who voted provisionally were voting during the extra hour, all of which is in violation of the Texas Election Code;

(x) Defendant Tatum has therefore violated Section 276.019 of the Texas Election Code.

B. Application for Prospective-Only Injunctive Relief.

39. Plaintiffs adopt and incorporate by reference the allegations in the preceding paragraphs as though fully set forth herein, and apply to this Court for an injunction against the Defendants in order to make sure this never happens again in a future election. Such relief is not moot, as it is capable of repetition yet evading review.

40. Plaintiffs have a valid cause of action against each of the Defendants, a probable right to the relief sought, and a probable, immediate, and irreparable injury

in the interim, entitling Plaintiffs to a prospective-only injunction in this matter. Accordingly, harm is imminent, and if the Court does not issue injunctive relief, Plaintiffs will be immeasurably and irrevocably harmed without an adequate remedy at law in that the Defendants will, directly or indirectly, continue to implement the ill-advised and illegal procedures described above.

41. Therefore, in order to preserve the last, actual, peaceable, non-contested status which preceded the pending controversy, Plaintiffs request that this Court issue a prospective-only against both Defendants, along with their respective officers, agents, servants, employees, representatives, assigns and/or any other person or entities acting on behalf of, or in concert or participation with, any of the Defendants, directly or indirectly, are hereby restrained from doing the following: the Defendants are prohibited, directly or indirectly, from continuing to violate Chapter 276.019 of the Texas Election Code as described above.

42. Plaintiffs are prepared to post a reasonable bond in this matter.

PRAYER

WHEREFORE, Plaintiffs HCRP and its Chair, Cindy Siegel, respectfully pray that Defendants Tatum and Harris County be cited to appear and answer, and that declaratory judgment be granted herein. In addition, Plaintiffs seek injunctive relief as describe above. Plaintiffs seeks no relief directly against Harris County, other than to be bound by the judicial declarations and injunctive relief granted

herein. Finally, Plaintiffs seeks the recovery of attorneys' fees and expenses, and court costs against the Defendants.

Respectfully submitted,

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