

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

BEAUMONT BRANCH OF THE NAACP and
JESSICA DAYE,

Plaintiffs,

v.

JEFFERSON COUNTY, TEXAS and JEFFERSON
COUNTY COMMISSIONERS COURT, LAURIE
LEISTER, in her official capacity as the JEFFERSON
COUNTY CLERK, and MARY BETH BOWLING, in
her official capacity as the PRESIDING JUDGE OF
THE JOHN PAUL DAVIS COMMUNITY CENTER,

Defendants.

Civil Action No. 22 Civ. 488 (MJT)

**PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE REGARDING
DEFENDANTS' COMPLIANCE WITH TEMPORARY RESTRAINING ORDER**

Plaintiffs Beaumont Branch of the NAACP and Jessica Daye (collectively, "Plaintiffs") filed this action because Black voters in Beaumont, Texas were being intimidated and disenfranchised—in violation of sacrosanct principles of democracy. Dkt. 1; *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); 52 U.S.C. § 10101; Tex. Elec. Code § 62.0115(b)(2). Plaintiffs' motion for a temporary restraining order sought narrow, tailored relief aimed at the precise voter-directed conduct that, if preliminarily (and ultimately permanently) enjoined, would address much of the concerns underlying Plaintiffs' complaint. And after a three-hour evidentiary hearing the night before Election Day, in the presence of the parties and counsel, this Court issued a ruling from the bench—followed up by a written order—providing critical relief. Dkt. 32-1 (Tr. at 114:15-118:5); Dkt. 14 (Order). It is worth reciting here in full the relevant parts of the Court's Order Granting in Part and Denying in Part Plaintiffs' Emergency Motion for Temporary Restraining Order ("TRO"),

Dkt. 14:

The Court GRANTS Plaintiffs' request to prohibit all election judges, clerks, workers, volunteers, or watchers at the John Paul Davis Community Center from requesting or ordering any voters to publicly recite their addresses before allowing them to vote.

The Court GRANTS Plaintiffs' request to prohibit all election judges, clerks, workers, volunteers, or watchers at the John Paul Davis Community Center from positioning themselves near voters who are marking their ballots such that they can view voters' selections with two exceptions: (1) an election worker or volunteer may assist any voter who requests assistance; and (2) election watchers may position themselves as permitted by Texas Election Code Section 33.057.

The Court GRANTS Plaintiffs' request to prohibit all election judges, clerks, workers, volunteers, or watchers at the John Paul Davis Community Center from refusing to assist any voters in inserting or scanning their completed ballot into the appropriate voting machine.

The Court GRANTS Plaintiffs' request to prohibit all election judges, clerks, workers, volunteers, or watchers at the John Paul Davis Community Center from turning away voters who are duly eligible to vote.

It is further ORDERED that due to the public interest in this matter no bond shall be required.

It is further ORDERED that the County Clerk Laurie Leister to send notice of this order to all affected election judges, clerks, workers, volunteers, and watchers, and to fully implement this order, no later than 7:00 a.m. Central Time on November 8, 2022.

It is further ORDERED that the Court's order shall terminate on November 9, 2022.

At the hearing, Defendants did not object to the Court's ruling nor seek to stay it. After the Court entered its TRO at Dkt. 14, Defendants did not object to nor seek reconsideration of that order, nor seek to stay it. Defendants also did not file an appeal of the Court's TRO nor seek a stay of it at the Fifth Circuit.

The TRO was thus left as-is: an order from a federal court, not halted or challenged or stayed in any respect. It goes without saying that it should have been obeyed. Yet Plaintiffs now have serious questions as to whether Defendants ever did so. Over the course of the last 7 weeks

Plaintiffs' counsel have repeatedly attempted to engage with Defendants' counsel on a multitude of issues, including Defendants' compliance with the TRO. Defendants' counsel have refused to engage. There is a history of such tactics in this case: Plaintiffs were forced into filing their Complaint and motion for a temporary restraining order precisely because, and only after, Defendants and other county officials ignored repeated complaints that Black voters were being harassed and intimidated. Dkt. 32 (Amended Complaint) at ¶¶ 41-45; Dkt. 32-1 (Tr. at 12:17-15:1). It is all the more concerning that counsel, who are under strict conduct obligations in court proceedings, refuse to engage. A brief chronology of all communication efforts by Plaintiffs, since inception of this case, brings this into stark focus:

- November 7, 2022 (11:51am): Plaintiffs' counsel Jeff Homrig emailed Defendants' counsel Kathleen Kennedy to notify her of the complaint and TRO papers, approximately 3 hours before filing. Ex. 1. **No response from Defendants' counsel.**
- November 7, 2022 (2:50 pm): Mr. Homrig sent Ms. Kennedy, via email, the complaint and TRO papers. Ex. 2. **No response from Defendants' counsel.**
- November 7, 2022 (10:43 pm): The Court issued the TRO via ECF. Dkt. 14.
- November 8, 2022 (11:21 am): Mr. Homrig emailed Ms. Kennedy requesting a copy of the Court-mandated notice and information regarding the steps taken to fully implement the TRO. Dkt. 38-1. **No response from Defendants' counsel.**
- November 8, 2022 (11:38 pm): Mr. Homrig emailed Ms. Kennedy, following up on multiple telephone messages left over the course of the day seeking a return call. Dkt. 38-1. **No response from Defendants' counsel.**
- December 5, 2022: Mr. Homrig sent Defendants' counsel Kathleen Kennedy and Quentin Price (both having appeared in this case via ECF) a letter by email and Federal Express. Plaintiffs reiterated their requests for a copy of the Court-mandated notice to the relevant individuals and information regarding full implementation of the Judge's order, and asked whether Defendants would agree to apply the rules set forth in the

Court's TRO to all precincts in all future elections in Jefferson County. Dkt. 32-2.

- December 7, 2022: **Ms. Kennedy sent a 3-sentence facsimile letter in response to this letter—discussed in greater detail below—but did not provide evidence of compliance with or implementation of the TRO and stated instead that the TRO was “void *ab initio*.”** Dkt. 32-3.
- December 10, 2022: Mr. Homrig wrote again to Ms. Kennedy and Mr. Price via email and Federal Express. Dkt. 38-3. Plaintiffs reiterated their requests for a copy of the Court-mandated notice. Plaintiffs also advised Defendants of the November 16 Rule 26(f) conference deadline and proposed various times to meet-and-confer. The Federal Express letter was received and signed for that morning. Dkt. 38-4. **No response from Defendants' counsel.**
- December 14, 2022: Mr. Homrig wrote again to Ms. Kennedy and Mr. Price via email, reiterating the issues previously raised and again proposing times to meet-and-confer. Dkt 38-5. **No response from Defendants' counsel.**
- December 16, 2022: Having received no responses to multiple direct requests to Defendants' counsel, Plaintiffs filed a Notice of Defendants' Non-Compliance with Federal Rule of Civil Procedure 26(f) and Failure to Show Compliance with Temporary Restraining Order. Dkt 38. **No response from Defendants' counsel or filing in response.**
- December 19, 2022: Plaintiffs' counsel Benjamin Behrendt called Mr. Price, leaving a voicemail seeking to discuss these issues, and sent a follow-up email to Mr. Price and Ms. Kennedy. Ex. 3. **The only response from Defendants' counsel was an out-of-office email from Ms. Kennedy saying she would return December 27.** Ex. 4.
- December 20, 2022: Ms. Kennedy filed a motion to dismiss Plaintiffs' First Amended Complaint. Dkt. 40.
- December 22, 2022: Plaintiffs' counsel Nathaniel Bass called Mr. Price and left a voicemail asking to meet and confer regarding: (1) the Rule 26(f) conference; (2) Defendants' compliance with the TRO; and (3) Plaintiffs' forthcoming motions seeking relief from the Court on both fronts. Shortly thereafter, Mr. Bass sent a follow-up email to Mr. Price and Ms. Kennedy. Ex. 5. Mr. Price did not return either message. **Again, the only response from Defendants' counsel was the same out-of-office email from Ms. Kennedy saying she would return December 27.** Ex. 6.

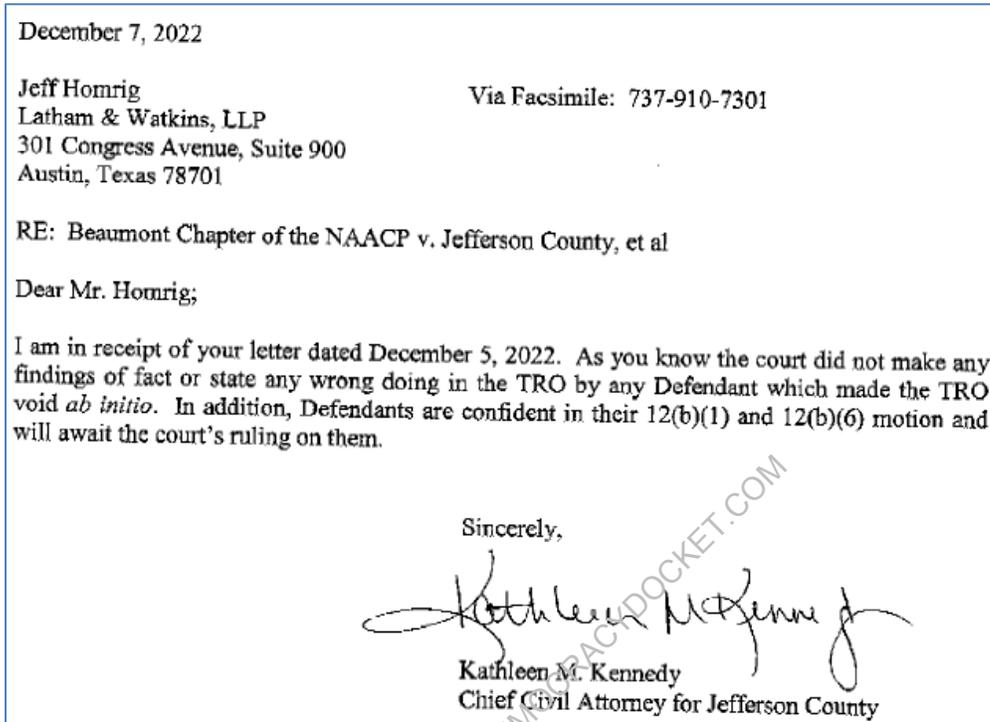
- December 23, 2022: The Court issued an order setting January 11, 2023 as the deadline for the parties to hold the Rule 26(f) conference, mooting Plaintiffs' proposed motion on that front. Dkt. 41.

In light of the holidays and the out-of-office messages from Defendants' counsel (notwithstanding the filing of a motion to dismiss by that same counsel during the time period), Plaintiffs elected to wait until December 28, 2022 to file this motion. On December 27, Ms. Kennedy finally replied to Mr. Bass's December 22 email, providing her availability to conduct the Court-ordered Rule 26(f) conference, but once again conspicuously neglecting to address compliance with the TRO. Ex. 5. It has become crystal clear that, absent intervention from the Court, Defendants' counsel have simply decided not to engage with Plaintiffs in any substantive respect.

This refusal is troubling on multiple fronts. At the threshold, counsel for parties must engage courteously, promptly, and cooperatively in litigation before this (or any) court in order for legal proceedings to operate efficiently. The Eastern District of Texas also has Attorney Rules whereby it expressly requires such behavior from attorneys practicing before it. *See, e.g.*, Local Rule AT-3, "Standards of Practice to be Observed by Attorneys" (setting forth requirements of courtesy, cooperation, diligence, professionalism, and punctuality, including expressly providing that "neglect and tardiness are demeaning to the lawyer and to the judicial system"). For purposes of this litigation moving forward, appropriate counsel communications will be vital.

Most relevant for purposes of the instant motion is Defendants' worrisome failure to provide Plaintiffs with any information (let alone actual proof) of their compliance with, and full implementation of, the TRO. If Defendants complied with the Court's TRO, why would they simply not tell Plaintiffs so, and provide copies of the relevant correspondence and implementing steps? Why ignore a dozen requests asking for such simple information? The lack of response would alone require Plaintiffs to seek assistance from this Court. But the concern is heightened

by the single, 3-line response Defendants' counsel faxed to Plaintiffs' counsel on December 7, 2022, worth copying here:



To pronounce this Court's TRO void *ab initio* for the first time, one month after compliance with the TRO should have been effectuated in full, is a remarkable assertion to make. Defendants' counsel could have asked for reconsideration of the TRO. They did not. Defendants' counsel could have appealed the TRO. They did not. The one thing Defendants' counsel could not do—but apparently did anyway—is to declare unilaterally that the TRO was not effective from the moment it was issued and not comply with it. Defendants' counsel's assertion that the TRO was void *ab initio*—coupled with the refusal to respond to other inquiries or provide any proof—*strongly implies that Defendants simply decided to engage in self-help, and not comply with the Court's TRO at all, while not telling anyone they were doing so.*

Plaintiffs thus reluctantly come to this Court for assistance. The Court has inherent authority to enforce compliance with its orders. *See Goodyear Tire & Rubber Co. v. Haeger*, 137

S. Ct. 1178, 1186 (2017) (“Federal courts possess certain inherent powers, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”) (internal quotation marks omitted); *Shillitani v. United States*, 384 U.S. 364, 370 (1966) (“There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt.”); *In re Goode*, 821 F.3d 553, 558–59 (5th Cir. 2016) (“Federal courts enjoy the inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”) (internal quotation marks omitted). This power includes the issuance of injunctions to “direct[] the conduct of a party.” *Nken v. Holder*, 556 U.S. 418, 428 (2009). It also includes the “power to punish for contempts” and to issue sanctions. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019).¹ And courts are vested with broad discretion in how best to shape sanctions. *See* 1 Sanc. Fed. Law of Lit. Abuse § 28 (2019) (“The court is vested with broad discretion to fashion an appropriate inherent power sanction to redress abusive litigation practices.”); *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (“[I]nherent power sanctions available to courts include fines, awards of attorneys’ fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence.”).

Plaintiffs are not seeking sanctions or an order of contempt. Plaintiffs simply need to know

¹ When civil contempt is at issue, the movant “bears the burden of establishing by clear and convincing evidence 1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court’s order.” *Whitcraft v. Brown*, 570 F.3d 268, 271 (5th Cir. 2009) (citation omitted). The standard “is generally an objective one. We have explained before that a party’s subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable.” *Taggart*, 139 S. Ct. at 1802. Instead, good faith (or the absence thereof) “may help to determine an appropriate sanction.” *Id.*

(1) what Defendants did (if anything at all) to comply with this Court’s TRO, (2) their basis for believing it “void *ab initio*,” and (3) their reasoning for not notifying Plaintiffs or this Court of their views. Defendants’ actions are highly relevant not only to determine whether Defendants complied with the Court’s order pertaining to the November 2022 midterm election, but also to the critical ongoing needs of the claims in this case and to shaping the ultimate permanent injunction—and appropriate enforcement mechanisms—Plaintiffs will seek. Plaintiffs respectfully ask the Court to issue an order to show cause requiring Defendants to provide all of this information, and proof of compliance with and full implementation of the Court’s TRO.

Dated: December 28, 2022

/s/ Jeff Homrig

Jeff Homrig (Bar No. 24129988)
Benjamin J. Behrendt (admitted *pro hac vice*)
Daniel S. Todd (admitted *pro hac vice*)
Madeleine Ball (admitted *pro hac vice*)
LATHAM & WATKINS LLP
301 Congress Avenue, Suite 900
Austin, TX 78701
Telephone: (737) 910-7300
Facsimile: (737) 910-7301
jeff.homrig@lw.com
benjamin.behrendt@lw.com
daniel.todd@lw.com
madeleine.ball@lw.com

Sadik Huseny (admitted *pro hac vice*)
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
sadik.huseny@lw.com

Rachel W. Cohen (admitted *pro hac vice*)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
Telephone: (202) 637-2200

Facsimile: (202) 637-2201
rachel.cohen@lw.com

Nathaniel D. Bass (admitted *pro hac vice*)
LATHAM & WATKINS LLP
811 Main Street, Suite 3700
Houston, TX 77002
Telephone: (713) 546-5400
Facsimile: (713) 546-5401
nat.bass@lw.com

Jon Greenbaum
Ezra D. Rosenberg
Pooja Chaudhuri
Sofia Fernandez Gold[†]
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1500 K Street, Suite 900
Washington, DC 20005
Telephone: (202) 662-8600
Facsimile: (202) 783-0857
jgreenbaum@lawyerscommittee.org
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
sfgold@lawyerscommittee.org
[†]Admitted in New York only. Practice limited to
matters before federal courts.

*Attorneys for Plaintiffs Beaumont Branch of the
NAACP and Jessica Daye*

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2022, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ Jeff Homrig

Jeff Homrig (Bar No. 24129988)

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Plaintiffs has made a good faith effort to comply with the meet and confer requirement in local rule CV-7(h), but that counsel for Defendants has acted in bad faith by failing to meet and confer. Counsel for Plaintiffs attempted to contact all counsel of record for Defendants via telephone and e-mail on Thursday December 22, 2022. Counsel for Defendants failed to respond. To date, counsel for Defendants has failed to respond to any of Plaintiffs' communications regarding compliance with the Court's TRO except for the single piece of correspondence discussed above, in which counsel for Defendants asserted that the Court's TRO was "void *ab initio*."

/s/ Jeff Homrig

Jeff Homrig (Bar No. 24129988)