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

BEAUMONT BRANCH OF THE NAACP and JESSICA DAYE, Plaintiffs, vs. JEFFERSON COUNTY, TEXAS and JEFFERSON COUNTY COMMISSIONERS COURT, ROXANNE ACOSTA-HELLBERG[1], 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)

RETRIEVED FROM DEMOCRACYDOCKET.COM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO 12(B)(1) AND 12(B)(6)

[1] Roxanne Acosta-Hellberg has succeeded Laurie Leister as Jefferson County Clerk and, pursuant to Federal Rule of Civil Procedure 25(d), is automatically substituted as a party in this case.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PERTINENT FACTS FROM THE AMENDED COMPLAINT 5

III. ARGUMENT 7

A. Defendants' 12(b)(1) Motion Should Be Denied 7

1. The Amended Complaint Establishes that Both Plaintiffs Have Standing 8

a. Plaintiff Jessica Daye Has Standing 9

i. Ms. Daye Suffered An Injury 9

ii. Defendants Caused Ms. Daye's Injury 12

iii. The Requested Relief Would Redress Ms. Daye's Injury 14

b. Beaumont NAACP Has Standing 15

i. Individual Beaumont NAACP Members Would Have Standing To Sue 15

ii. The Suit Is Germane To Beaumont NAACP's Purpose 16

iii. Individual Members Need Not Participate, Nor Would Their Participation Deprive This Court of Jurisdiction 17

2. Plaintiffs' Complaints Are Not Moot And Are Capable Of Repetition, Yet Evading Review 18

B. Defendants' 12(b)(6) Motion Should Be Denied 20

1. Plaintiffs Have Alleged A Cognizable Cause Of Action Under The Voting Rights Act 20

2. Plaintiff's Complaint States A Cognizable Claim Under 42 U.S.C. § 1983 21

a. Defendant Bowling's Conduct Constitutes A Municipal Policy 23

b. The County Clerk, Jefferson County, And Jefferson County Commissioners Court Ratified Defendant Bowling's Conduct 24

3. Defendants' Unclean Hands Argument Is Frivolous 26

IV. CONCLUSION 29

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Page(s)

CASES

Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.,
627 F.3d 547 (5th Cir. 2010) 17

Bd. of Comm'rs of Bryan Cnty. v. Brown,
520 U.S. 397 (1997) 22

Brackeen v. Haaland,
994 F.3d 249 (5th Cir. 2021), *cert granted on other grounds*, 142 S. Ct. 1205 (2022) 8, 15

Brooks v. Nacrelli,
331 F. Supp. 1350 (E.D. Pa. 1971) 21

Can. Hockey, L.L.C. v. Tex. A&M Univ. Athletic Dep't,
No. 20-20503, 2022 WL 445172 (5th Cir. Feb. 14, 2022) 20, 21, 24

City of Canton v. Harris,
489 U.S. 378 (1989) 22

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 22

Coliseum Square Ass'n Inc. v. Jackson,
465 F.3d 215 (5th Cir. 2006) 18, 19

Connick v. Thompson,
563 U.S. 51 (2011) 22, 23, 24

Cornerstone Christian Schs. v. Univ. Interscholastic League,
563 F.3d 127 (5th Cir. 2009) 17

Familias Unidas v. Briscoe,
619 F.2d 391 (5th Cir. 1980) 23

First Bank v. TZK Invs., LLC,
No. 21- 449, 2022 WL 1719406 (E.D. Tex. May 27, 2022) 28

Friends of the Earth, Inc. v. Laidlaw Env't Serves. (TOC), Inc.,
528 U.S. 167 (2000) 10

Gilead Sciences, Inc. v. Merck & Co., Inc.,
888 F.3d 1231 (Fed. Cir. 2018) 26, 28

RETRIEVED FROM DEMOCRACYDOCKET.COM

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 24

Gonzalez v. Kay,
577 F.3d 600 (5th Cir. 2009) 5

Hancock Cnty. Bd. of Sup'rs v. Ruhr,
487 F. App'x 189 (5th Cir. 2012) (unpublished).......... 16

Hunt v. Wash. State Apple Advert. Comm'n,
432 U.S. 333 (1977) 8, 16, 17

Keystone Driller Co. v. Gen. Excavator Co.,
290 U.S. 240 (1933) 28

Knox v. Service Emps. Int'l Union, Local 1000,
567 U.S. 298 (2012) 18

League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.,
No. 18-423, 2018 WL 3848404 (E.D. Va. Aug. 13, 2018) 20

Lormand v. US Unwired, Inc.,
565 F.3d 228 (5th Cir. 2009) 20

Louisiana State Conf. of NAACP v. Louisiana,
490 F. Supp. 3d 982 (M.D. La. 2020) 17

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 8, 12, 14

Monell v. New York City Dept. of Social Servs.,
436 U.S. 658 (1978) 22, 23

NAACP v. City of Kyle,
626 F.3d 233 (5th Cir. 2010) 16

National Coalition on Black Civic Participation v. Wohl ("*NCBCP*"),
512 F. Supp. 3d 500 (S.D.N.Y. 2021) 9, 10, 11, 18

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986) 14, 22

Peyton v. Rowe,
391 U.S. 54 (1968) 20

Physician Hosps. of Am. v. Sebelius,
691 F.3d 649 (5th Cir. 2012) 7

RETRIEVED FROM DEMOCRACYDOCKET.COM

R.J. Reynolds Tobacco Co. v. United States FDA,
No. 20-cv-176, 2022 WL 17489170 (E.D. Tex. Dec. 7, 2022) 8, 15

Reynolds v. Sims,
377 U.S. 533 (1964) 1, 16

Rogers v. McDorman,
521 F.3d 381 (5th Cir. 2008) 27

Save Our Cmty. v. United States EPA,
971 F.2d 1155 (5th Cir. 1992) 9

Sims v. City of Jasper,
543 F. Supp. 3d 428 (E.D. Tex. 2021) 24

Spokeo, Inc. v. Robins,
578 U.S. 330 (2016) 10

Steel Co. v. Citizens for a Better Env't.,
523 U.S. 83 (1998) 11, 14

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 16

Test Masters Educ. Servs., Inc. v. Singh,
428 F.3d 559 (5th Cir. 2005) 20

Tex. Dem. Party v. Abbott,
978 F.3d 168 (5th Cir. 2020) 13

Tex. Dem. Party v. Benkiser,
459 F.3d 582 (5th Cir. 2006) 15

United Food & Com. Workers Union Local 751 v. Brown Grp, Inc.,
517 U.S. 544 (1996) 8, 17

United States v. Beaty,
288 F.2d 653 (6th Cir. 1961) 10

United States v. Clark,
249 F. Supp. 720 (S.D. Ala. 1965) 11, 21

United States v. Edwards,
333 F.2d 575 (5th Cir. 1964) 21

United States v. McLeod,
385 F.2d 734 (5th Cir. 1967) 10

RETRIEVED FROM DEMOCRACYDOCKET.COM

United States v. Nguyen,
673 F.3d 1259 (9th Cir. 2012) 10

Uzuegbunam v. Preczewski,
141 S. Ct. 792 (2021) 8

Williams v. Correction Officer Priatno,
829 F.3d 118 (2d. Cir. 2016) 27

Williamson v. Tucker,
645 F.2d 404 (5th Cir. May 1981) 7

Young Conservatives of Tex. Found. v. Univ. of N. Tex.,
569 F. Supp. 3d 484 (E.D. Tex. Oct. 28, 2021) 11

STATUTES

42 U.S.C. § 1983 .... passim

52 U.S.C. § 10101 1

52 U.S.C. § 10307(b) .... passim

Tex. Elec. Code Ann. § 32.002 .... 19, 23

Tex. Elec. Code Ann. § 32.071 .... 6, 12, 23

Tex. Elec. Code Ann. § 32.075 .... 13, 23

Tex. Elec. Code Ann. § 62.0115(b)(2) 1, 13

Tex. Elec. Code Ann. § 63.0011 12

Tex. Elec. Code Ann. § 82.003 13

Tex. Elec. Code Ann. § 85.001 18

Voting Rights Act .... passim

RULES

Fed. R. Civ. P. 12(a)(1) 19

Fed. R. Civ. P. 12(b)(1) .... passim

Fed. R. Civ. P. 12(b)(6) 5, 11, 20

Fed. R. Civ. P. 12(b)(7) 14

RETRIEVED FROM DEMOCRACYDOCKET.COM

Fed. R. Civ. P. 25(d) 2

Fed. R. Civ. P. 52(a) 21

CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment XV, § 1 12

OTHER AUTHORITIES

H.R. Rep. No. 89-439 (1965) 20

Senate Bill 1 5

RETRIEVED FROM DEMOCRACYDOCKET.COM

I. INTRODUCTION

Plaintiffs Jessica Daye and the Beaumont Branch of the NAACP 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, 561-62 (1964); 52 U.S.C. § 10101; Tex. Elec. Code Ann. § 62.0115(b)(2). During early voting, Black voters in at least two precincts were singled out for harassment: when checking in—and even *after* checking in—they were confronted by poll workers who demanded they recite their addresses out loud; they were crowded by poll workers while voting, forced to mark their ballots under watchful eyes; and they were denied help navigating new polling machines. Black voters, and Black voters alone, were forced to endure these indignities. And some Black voters were coerced by these tactics into leaving their polling places without voting.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs brought this action and sought an immediate temporary restraining order to ensure that Black voters experience the same unfettered ability to vote that White voters do—in the November 8, 2022 General Election and in all future elections in Jefferson County. And the Court's issuance of a TRO, following a lengthy evidentiary hearing, appeared to be a step in the right direction of resolving this case in full. But rather than work with Plaintiffs to permanently put in place simple protections (as contained in the Court's TRO) to ensure that all voters are treated equally, Defendants filed this motion (Dkt. 40, "Mot.") setting forth a panoply of purported roadblocks to any relief whatsoever. Individually, each of Defendants' arguments is meritless. Collectively, they demonstrate the lengths to which Defendants will go to try to avoid any court oversight of the elections process in Jefferson County, and show why Plaintiffs' pursuit of permanent injunctive relief in this case is the only thing that will ensure election integrity in Jefferson County:

1. *Plaintiffs have standing to sue to prevent the intimidation and disenfranchisement of*

Black voters. Defendants first argue that there is no one who can even assert the claims in this case. *See generally* Mot. ¶¶ 5-18. But Ms. Daye—who witnessed an elderly Black woman being challenged by a White poll worker, felt intimidated, and left without voting rather than be subjected to the same treatment—unquestionably has standing to challenge this conduct under settled Fifth Circuit law. And the Beaumont NAACP—which stood in as a Plaintiff on behalf of members too afraid to protect their Constitutional rights by suing in their own names—similarly has standing to sue on behalf of its members who suffered from, or were deterred from voting by, these tactics. The law does not allow Jefferson County officials to inoculate their unlawful conduct through makeweight attacks on standing.

2. *Relief can be granted against the Defendants in this action*. Defendants also argue that, just as there are no real *plaintiffs* in this case, apparently there are no real *defendants* either. Defendants assert that this case should be dismissed for want of a policymaker who establishes rules for elections and poll workers. *See, e.g.*, Mot. ¶¶ 21-32. Lumping all Defendants together under Jefferson County for this analysis, the motion argues that the County acts only through the County Commissioners' Court, and that the County Commissioners' Court controls only the county purse strings. *See id.* ¶ 24. Taking the brief at face value, it seems that *no one* has any authority over elections in Jefferson County, and so no one can be sued. Of course, Plaintiffs' allegations (and the truth) are otherwise. Former Jefferson County Clerk Laurie Leister[2] had oversight over the November 2022 election, and indeed recommended that the County Commissioners' Court appoint Defendant Election Judge Bowling. And the Election Judge is a named Defendant in her official capacity, as are the County she serves and the Commissioners'

RETRIEVED FROM DEMOCRACYDOCKET.COM

---

[2] The newly-elected Jefferson County clerk, Roxanne Acosta-Hellberg, is being substituted in for Ms. Leister in her official capacity. *See* Fed. R. Civ. P. 25(d).

Court that appointed her. The policymakers with the power and the responsibility to halt the intimidation of Black voters in Jefferson County are named Defendants in this action.

3. *The claims are not moot—but very much relevant and alive*. In addition to claiming the absence of any real plaintiffs and defendants in this case, Defendants also assert that the action is moot because the November 2022 general election has passed. *See* Mot. ¶¶ 19-20. This is meritless, too. Jefferson County will have many elections in the future, and Defendants would not even agree to apply the rules set forth in the Court's TRO to these future elections—including the upcoming May 2023 Uniform Election. Indeed, Defendants refuted the validity of these rules altogether, declaring in correspondence that the Court's TRO was "void *ab initio*." Defendants' dismissive treatment of the Court's TRO and the basic rules it set forth reinforces that the rights of Black voters remain in jeopardy in future elections. Under settled law, Plaintiffs do not have to wait until Jefferson County officials intimidate and harass Black voters again to pursue real and permanent relief.

RETRIEVED FROM DEMOCRACYDOCKET.COM

4. *Plaintiffs are not to blame for failing to do more to protect themselves from County officials' actions.* Defendants' final set of arguments boil down to a remarkable set of assertions—all improperly based on allegations outside of the four corners of the complaint. First, Defendants argue that their actions are not egregious enough to amount to intimidation and disenfranchisement of Black voters in violation of the Constitution or the Voting Rights Acts. *See* Mot. ¶¶ 33-41. Second, Defendants argue that, in any event, *Black voters and poll workers are really the ones to blame* for not doing more to prevent the harassment and intimidation. *See id*.

As to the former, there can be no reasonable question that Plaintiffs' complaint adequately alleges harsh tactics that violate the Constitution and the Voting Rights Act. Plaintiff Jessica Daye heard and saw Black voters being harassed, felt intimidated, and left without voting. Numerous

other voters and poll workers witnessed the same conduct and its effect on Black voters. That, alone, adequately alleges intimidation and coercion in violation of the Constitution and the Voting Rights Act at the pleading stage. And, indeed, Ms. Leister testified during the TRO hearing that *she* would not feel comfortable reciting her address out loud in the polling place. Why then should Black voters feel comfortable, especially when they are the only ones being forced to do so?

As to the latter, it is astonishing for Defendants to claim that Black voters and poll workers are at fault here. Defendant Bowling was asked to stop her intimidating conduct and refused. Former County Clerk Leister was notified of the conduct and failed to stop it. Defendant Jefferson County Commissioners' Court was notified of the conduct twice, and twice refused to act. Indeed, this very case, along with a motion for TRO, was brought by Black voters to obtain relief from the only place left them: this Court. And now, there are even questions of Defendants' compliance with *this Court's* direct order.[3] Plaintiffs, Black voters, and the non-party poll workers Defendants point to are obviously not the wrongful actors here; Defendants are.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The well-pleaded factual allegations in the Amended Complaint show that the rights of Black voters in Jefferson County have been infringed, that Defendants engaged in or condoned the intimidating and coercive conduct, and that the conduct will continue in future elections. Plaintiffs have every right to bring this action to right that wrong and to ask this Court to prevent the harm from continuing in future elections. Plaintiffs thus respectfully request that the motion to dismiss be denied.

---

[3] As the Court knows, Plaintiffs recently filed a motion for order to show cause regarding Defendants' compliance with the TRO (Dkt. 42) because Defendants have refused to provide Plaintiffs with *any* information regarding compliance, and in fact recently stated that the Court's TRO was "void" from the start. Dkt. 32-3. If Defendants indeed refused to follow this Court's TRO—all in the hopes that Plaintiffs (and this Court) could do nothing about it until after the November 2022 election was over—the need for permanent injunctive relief and strict oversight of Defendants' actions and ongoing compliance will be more important than ever.

II. PERTINENT FACTS FROM THE AMENDED COMPLAINT

For a motion to dismiss under Rule 12(b)(6), all well-pleaded facts in the complaint must be accepted as true, and all factual inferences must be drawn in the plaintiff's favor. *See, e.g.*, *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). While Defendants also challenge subject matter jurisdiction under Rule 12(b)(1), their motion does not contest any of the following facts.

Jessica Daye is a registered voter in Jefferson County and has been since she was 18 years old. Members of Plaintiff Beaumont Branch of the NAACP ("Beaumont NAACP") live throughout Jefferson County. Ms. Daye and members of Beaumont NAACP have voted in Jefferson County in the past, including in the 2022 General Elections, and plan to do so again in the future. Dkt. 32 ("Compl.") ¶¶ 18, 20.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The John Paul Davis Community Center ("Community Center") is located in the North End of Beaumont, a predominantly Black neighborhood within Jefferson County, which is majority White. Because of its central location, its proximity to the Borden Chapel Missionary Baptist Church, and its communal atmosphere, the Community Center has traditionally been a preferred voting location for Black voters in the North End. The Theodore Johns Branch Library is located on the south side of Beaumont. Like the Community Center, it has traditionally been a preferred voting location for Black voters in Beaumont, including members of Beaumont NAACP, who live in that community. Compl. ¶¶ 18, 32, 33.

Early voting for the 2022 General Elections began on October 24, 2022. Beginning with the 2022 General Elections, there were several significant changes to the voting setup in Jefferson County, including new voting machines and new statewide election policies following the passage of Senate Bill 1 ("SB 1") in September 2021. Among other changes, SB 1 gave poll watchers greater freedom of movement within an election location. Compl. ¶¶ 35, 36.

In December 2021, shortly after the passage of SB 1 and the resignation of longtime County

Clerk Carolyn Guidry, Laurie Leister was appointed as the new County Clerk on an interim basis. Former County Clerk Leister is not experienced in election administration. Compl. ¶ 35.

On August 1, 2022, Defendant Mary Beth Bowling was appointed as a presiding judge for a one-year term. During early voting, Defendant Bowling served as the deputy early voting clerk at the Community Center. Under the Texas Election Code, Defendant Bowling was "in charge of and responsible for the management and conduct of the election" at the Community Center during early voting. Compl. ¶ 23 (quoting Tex. Elec. Code. Ann. § 32.071).

Throughout early voting, Pastor Airon Reynolds, Jr., the pastor of the Borden Chapel and a member of Plaintiff Beaumont NAACP, received numerous complaints from members of his congregation about their experience trying to vote at the Community Center. Members described: (i) White poll workers repeatedly asking, in aggressive tones, Black voters (but not White voters) to recite their addresses out loud within the earshot of other voters, poll workers, and poll watchers; (ii) White poll workers and White poll watchers following Black voters, and in some cases their Black voter assistants, around the polling place, including standing two feet behind a Black voter and assistant while the voter was voting; and (iii) White poll workers helping White voters scan their marked ballots but not similarly helping Black voters. Compl. ¶¶ 4, 40.

RETRIEVED FROM DEMOCRACYDOCKET.COM

On October 27, Pastor Reynolds reached out to County Judge Jeff Branick to alert him to the intimidating conduct taking place at the Community Center. Judge Branick told Pastor Reynolds that he (Judge Branick) had no supervisory authority over the poll workers. The next day, Pastor Reynolds went to the Community Center to meet with Defendant Bowling directly to request that she stop the intimidating conduct. Defendant Bowling refused. Thereafter, Pastor Reynolds reached out to then-County Clerk Leister to inform her of Defendant Bowling's intimidating conduct and to request that Ms. Leister, as Jefferson County Clerk, take action.

Former County Clerk Leister had a conversation with Defendant Bowling—a friendly one, in which both laughed—but did not stop the intimidating conduct. So, Pastor Reynolds finally presented the issues to Defendant Jefferson County Commissioners Court, where Judge Branick once again disclaimed any authority. Compl. ¶¶ 41-45.

Plaintiff Jessica Daye went to the Community Center to vote on November 2, 2022 during early voting because the Community Center is close to where her mother lives, and Ms. Daye cares for her mother on a daily basis. While waiting in line, she watched an elderly Black woman complete the check in process using the poll pad. Having completed the check-in process, the woman was ready to cast her vote. But before she could do so, another poll worker stopped her and asked her to recite her address aloud. This was an uneasy moment at the Community Center, as the poll worker appeared to be questioning the woman's integrity. After witnessing this incident, Ms. Daye was so alarmed and frustrated that she left and consequently did not vote during early voting. Compl. ¶¶ 54, 55.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Rebuffed at every turn by county officials who would not ensure that poll workers were acting in accordance with Constitutional and statutory mandates, Plaintiffs filed suit on November 7, 2022, the day before Election Day. This Court held an emergency hearing that night and issued a TRO, prohibiting certain conduct at the Community Center and ordering then-County Clerk Leister to send notice of the order to all affected poll workers. Compl. ¶ 7.

III. ARGUMENT

A. Defendants' 12(b)(1) Motion Should Be Denied

At the pleading stage, "the plaintiffs' burden is to establish a plausible set of facts establishing jurisdiction." *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012). Unless a defendant introduces evidence creating a factual dispute *relating to jurisdiction*, all factual allegations in the complaint are accepted as true. *See, e.g.*, *Williamson v. Tucker*, 645 F.2d

404, at 412-13 (5th Cir. May 1981). Here, Defendants make two jurisdictional challenges under Rule 12(b)(1): lack of standing and mootness. Standing "generally" looks at whether a plaintiff has a personal interest "at the outset," while mootness considers whether that personal interest exists "throughout the proceedings." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). Because both jurisdictional inquiries are satisfied in this case, the Court should deny Defendants' Rule 12(b)(1) motion.

1. The Amended Complaint Establishes that Both Plaintiffs Have Standing

For an individual plaintiff, standing has three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly…trace[able] to the challenged action of the defendant and not… th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

RETRIEVED FROM DEMOCRACYDOCKET.COM

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 & n.1 (1992) (citations omitted). An association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The first two components of this test are constitutional, while the "third prong is a prudential one." *United Food & Com. Workers Union Local 751 v. Brown Grp, Inc.*, 517 U.S. 544, 555 (1996). In a case involving multiple plaintiffs, only one plaintiff need have standing for the court to deny a motion to dismiss. *Brackeen v. Haaland*, 994 F.3d 249, 291 (5th Cir. 2021) (per curiam), *cert granted on other grounds*, 142 S. Ct. 1205 (2022); *R.J. Reynolds Tobacco Co. v. United States FDA*, No. 20-cv-176, 2022 WL 17489170, at *7-8 (E.D. Tex. Dec. 7, 2022).

a. Plaintiff Jessica Daye Has Standing

i. Ms. Daye Suffered An Injury

Ms. Daye went to the Community Center to vote during early voting. While in line, she watched an elderly Black woman complete the check-in process using the poll pad. But before the woman could cast her vote, another poll worker stopped her and demanded that she recite her address aloud in front of other poll workers, poll watchers, and voters. This was an uneasy moment at the Community Center, as the poll worker appeared to be questioning the woman's integrity. Ms. Daye was intimidated by the poll worker's conduct and, unwilling to subject herself to the same treatment, left the Community Center without voting. Compl. ¶¶ 54, 55. Defendants' motion does not dispute these facts.

RETRIEVED FROM DEMOCRACYDOCKET.COM

That Ms. Daye was subjected to conduct that both intimidated her and dissuaded her from casting her ballot is more than sufficient to establish the requisite injury, a test that the Fifth Circuit has described as having a "low threshold." *See Save Our Cmty. v. United States EPA*, 971 F.2d 1155, 1161 (5th Cir. 1992) (per curiam) (collecting cases). Other courts, under similar circumstances, have reached the same conclusion. For example, in *National Coalition on Black Civic Participation v. Wohl*, the plaintiffs alleged that defendants were responsible for robocalls targeting Black voters and conveying intimidating information regarding the use of personal information on mail-in ballots to, for example, track persons with outstanding warrants, assist debt collectors, and conduct mandatory vaccinations. 512 F. Supp. 3d 500, 505-06 (S.D.N.Y. 2021) ("*NCBCP*"). As a result of those calls, some plaintiffs alleged emotional harm while others changed their voting plans. *Id.* at 506-07. The court found that those harms satisfied the injury prong of the standing analysis. *Id.* at 515-16. The same result should follow here. As with the *NCBCP* plaintiffs, Ms. Daye has described "'concrete and particularized' harm[s]" suffered as a result of the intimidating conduct, including feelings of frustration and a change in her voting

plans. *See id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181-85 (2000)).

Defendants offer three arguments to support their contention that Ms. Daye's experience caused her no genuine injury; all fall short. First, citing *Spokeo, Inc. v. Robins*, Defendants compare the impact that the poll workers' conduct had on Ms. Daye with the impact felt by plaintiffs in other cases, and suggest that her experience somehow falls short. *See* Mot. ¶ 5 (citing 578 U.S. 330, 341 (2016)). But the cases Defendants cite (Mot. ¶ 6) compel the opposite conclusion. *See, e.g.*, *United States v. McLeod*, 385 F.2d 734, 740-41 (5th Cir. 1967) (finding intimidation where acts, viewed together, had a "chilling effect" on voter registration); *United States v. Beaty*, 288 F.2d 653, 654-57 (6th Cir. 1961) (per curiam) (focusing on Black voters' "right to be free from attempted threats, intimidation or coercion, for the purposes of interfering with their right to vote for candidates for federal offices"). Thus, those cases *support* standing here, even without considering the statutory cause of action provided in the Voting Rights Act and § 1983.[4] *See Spokeo*, 578 U.S. at 341 ("In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."). Of course, the Voting Rights Act is directly on point: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). Ms. Daye was actually intimidated, and the poll workers' intimidating conduct actually coerced her to leave

RETRIEVED FROM DEMOCRACYDOCKET.COM

[4] Worth noting, the *only* case Defendants cite where the conduct complained of occurred after enactment of the Voting Rights Act is *United States v. Nguyen*, 673 F.3d 1259 (9th Cir. 2012). That opinion dealt with a motion to suppress in a criminal trial for obstruction of justice. *Id.* at 1261. Defendants do not explain why that case, which dealt only tangentially with California election law, is relevant here.

without voting.[5] Compl. ¶ 54. She suffered exactly the injury the Voting Rights Act seeks to prevent.

Second, Defendants argue that "[Ms.] Daye has not been deprived of a constitutional right" because "being offended at how another person was allegedly treated does not rise to a §1983 cause of action[.]" Mot. ¶ 7. That effort to bootstrap Defendants' Rule 12(b)(6) motion to support their Rule 12(b)(1) argument is unavailing. As the Supreme Court has "firmly established," the "absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *see also Young Conservatives of Tex. Found. v. Univ. of N. Tex.*, 569 F. Supp. 3d 484, 491 n.2 (E.D. Tex. 2021) ("[C]onstitutional standing is a matter distinct from and anterior to the question of whether a plaintiff has a cause of action under a statute."), *appeal filed on other grounds*, *sub nom. Young Conservatives v. Smatresk*, No. 22-40225 (5th Cir. Apr. 12, 2022).[6]

RETRIEVED FROM DEMOCRACYDOCKET.COM

Third, Defendants argue that "[a]sking for a voter's address is a legal obligation by the poll worker." Mot. ¶ 7. Not true, at least not in the way that Defendants appear to contend. The Texas

---

[5] That, after being dissuaded from voting during the early voting period, Ms. Daye ultimately voted on Election Day does not change this analysis, as Defendants suggest. Mot. ¶ 8. The Voting Rights Act "do[es] not proscribe only threatening and intimidating language that successfully prevents a person from voting." *NCBCP*, 512 F. Supp. 3d at 516. Rather, it applies equally to attempts at intimidation. 52 U.S.C. § 10307(b) ("No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, ***or attempt to intimidate, threaten, or coerce any person*** for voting or attempting to vote." (emphasis added)). Defendants do not point to any authority to support their contention that Ms. Daye cannot have suffered an injury simply because she eventually voted. Indeed, the law holds otherwise. *United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala. 1965) (per curiam) ("The success or failure of intimidation, threats or coercion is immaterial, since 'attempts' are equally proscribed [by the Civil Rights Act]."). Thus, intimidating conduct is no less actionable if the voter eventually manages to vote. The overarching element of the cause is *intimidation* of someone trying to vote; Plaintiffs need not prove that they did not vote.

[6] And, as discussed below, the intimidation Ms. Daye suffered does in fact give rise to § 1983 claims.

Election Code requires that, "[b]efore a voter may be accepted for voting, an election officer shall ask the voter if the voter's residence address on the precinct list of registered voters is current and whether the voter has changed residence within the county . . . ." Tex. Elec. Code Ann. § 63.0011(a). No provision of that code requires poll workers to demand that any voter (let alone Black voters alone) recite their addresses aloud—before or after their credentials are verified. In fact, Former County Clerk Leister and Defendant Bowling testified that there are various ways—other than asking voters to state their addresses out loud—that poll workers can confirm a voter's address. *See* Dkt. 32-1 (Nov. 7, 2022 TRO Hr'g Tr.) at 54:10-55:24; 57:17-58:8; 58:23-79:16; 80:9-17. And Ms. Leister agreed that where multiple ways of verifying a voter's address are available, she "would want the polling workers at [Jefferson County] polling places to use methods that are less intimidating rather than methods that are more intimidating." *Id.* at 99:3-8.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Moreover, even if Texas law did allow poll workers to ask voters to state their address, the request cannot be done in an intimidating manner, regardless of intent. 52 U.S.C. § 10307(b) ("No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote."). And, of course, it could not be done in a discriminatory manner. *See* U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

ii. Defendants Caused Ms. Daye's Injury

Ms. Daye changed her voting plans because of intimidating conduct, and that conduct is "fairly trace[able]" to Defendants. *See Lujan*, 504 U.S. at 560 (alteration in original). For example, Defendant Bowling was "in charge of and responsible for the management and conduct of the election" at the Community Center. Compl. ¶ 23 (citing Tex. Elec. Code Ann. § 32.071). Those responsibilities included "preserv[ing] order and prevent[ing] breaches of the peace and violations

of th[e] code in the polling place." Tex. Elec. Code Ann. § 32.075(a). Her failure to carry out those mandates—indeed, her own violations of those mandates—along with the failures of the other Defendants to hold her responsible, caused Ms. Daye's injury. Thus, Defendants' violations are the type of conduct that would (and did) cause or contribute to Ms. Daye's injury. *See, e.g.*, *Tex. Dem. Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020). In *Abbott*, the dispute revolved around three registered Texas voters under 65 years old who wished to vote by mail to avoid contracting COVID-19. *Id.* at 178. The *Abbott* defendants argued that those plaintiffs lacked standing because their injury was caused by COVID-19, not the defendants. *Id.* The Fifth Circuit rejected that argument because the alleged injury was "the result of the combination of COVID-19 and Texas officials' continuing enforcement of Section 82.003 [of the Texas Election Code] as written." *Id.* Likewise, Ms. Daye's injury is the result of the combination of the actions of various poll workers under Defendant Bowling's command and Defendants' failure to enforce various provisions of the Texas Election Code, including § 62.0115(b)(2) ("[A] voter has the right to … vote in secret and free from intimidation[.]"), in addition to the violation of federal Constitutional and statutory law.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Defendants' motion does not seriously contest that the challenged conduct is fairly traceable to Defendants, other than to argue that "Daye has failed to show that a person acting under color of law and a party to this suit intimidated or threatened her or coerced her to prevent her from voting." Mot. ¶ 8. That argument is legally irrelevant for two reasons. First, whether an individual is acting "under color of law" bears on the § 1983 12(b)(6) analysis, not standing (and certainly not the Voting Rights Act, as Defendants appear to contest). *See* 52 U.S.C. § 10307 (b) ("No person, ***whether acting under color of law or otherwise***, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote.") (emphasis added). Second, Defendants provide no support for the premise that standing requires

a specific bad actor to be a party to the suit. *See, e.g.*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484-85 (1986) (finding municipal liability based on action of unnamed deputy sheriffs who were no longer parties to the suit). To the extent Defendants are arguing failure to join a necessary party, the procedural mechanism for doing so is Fed. R. Civ. P. 12(b)(7), not 12(b)(1).

iii. The Requested Relief Would Redress Ms. Daye's Injury

When a complaint challenges the legality of government action, and the plaintiff has been the object of the action, then it is presumed that a judgment preventing the action will redress her injury. *See Lujan*, 504 U.S. at 561-62. Similarly, where a plaintiff alleges "a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm." *Steel Co.*, 523 U.S. at 108. Both principles apply here, where Plaintiffs request narrow equitable relief that would redress Ms. Daye's injury and allow her to participate in the coming elections without experiencing the intimidation that caused her to leave the Community Center.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs seek injunctive and declaratory relief in view of Defendants' continuing failure to respond to a series of complaints about threatening conduct at polling locations in Jefferson County, including the Community Center and the Theodore Johns Branch Library. *See* Compl. ¶¶ 4, 40-44, 69-70. Instead of acting to ensure that Black voters are free to vote unmolested, Defendants have taken refuge within a labyrinth of rules whereby—if Defendants are to be believed—no elected official has unilateral authority to ensure that poll workers, including Defendant Bowling and those under her purview, abide by the Constitution.

Ignored at every turn, Plaintiffs approached this Court for relief, and absent its intervention, there is a substantial likelihood of future harm. That Defendants refuse to show compliance with this Court's TRO speaks volumes about the seriousness with which they treat these complaints. *See generally* Dkt. 42. That Defendants saw fit to thumb their noses at that Order—asserting without legal authority that the TRO was "void *ab initio*"—speaks to an even deeper problem that

has grave consequences for future elections, as does Defendants' refusal to agree to conduct future elections by the rules set forth in the Court's TRO. With elections on the horizon, including the May 2023 Uniform Election, the risk that Ms. Daye and other Black voters will again be subjected to intimidation as they try to exercise their right to vote is imminent. Defendants do not contest this prong of the standing analysis in their motion.

b. Beaumont NAACP Has Standing

i. Individual Beaumont NAACP Members Would Have Standing To Sue

Because Ms. Daye has standing for the reasons described above, the Court need not reach Beaumont NAACP's standing. *Brackeen*, 994 F.3d at 291; *R.J. Reynolds*, 2022 WL 1749170, at *7-*8. In any event, Beaumont NAACP, too, has standing. The first prong of the associational standing test requires that at least one member of the association satisfy the Article III elements and have standing to sue in his or her own right. *Tex. Dem. Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006). The Amended Complaint alleges that members of Plaintiff Beaumont NAACP have voted throughout Jefferson County, including at the Community Center and Theodore Johns Branch Library, in the past and will continue to attempt to do so in future elections. Compl. ¶ 19. Plaintiffs also alleged that members of the Beaumont NAACP were subjected to intimidating conduct at the Community Center and the Theodore Johns Branch Library. For example, Pastor Airon Reynolds, a member of Plaintiff Beaumont NAACP, felt intimidated when voting at the Community Center because of the poll workers' actions as he moved through the voting process. Compl. ¶¶ 40, 60. Pastor Reynolds suffered a concrete, particularized injury resulting from Defendants' intimidating conduct, and that injury would be redressed by the requested relief for the same reasons as discussed above with respect to Ms. Daye.

Defendants' only argument against the Beaumont NAACP's standing is that it "fails to

RETRIEVED FROM DEMOCRACYDOCKET.COM

specifically identify any member who has suffered harm or would have standing to sue in their own right." Mot. ¶ 10. That argument is wrong, factually and legally. Factually, Plaintiffs' Complaint establishes that Pastor Reynolds, who experienced similar intimidating conduct as Ms. Daye, has standing. Compl. ¶¶ 40, 60. Defendants' argument that Plaintiffs must specifically identify a member who has suffered harm at the pleading stage is also legally wrong. *See, e.g.*, *Hancock Cnty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) (unpublished) ("Yet appellees offer no authority for the proposition that an NAACP branch must identify a particular NAACP member *at the pleading stage*. We are aware of no precedent holding that an association must set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on a lack of associational standing."). Defendants' reliance on *City of Kyle* and *Summers* is misplaced. Mot. ¶ 10. *City of Kyle* did not hold that an organization must identify "a specific member" to assert standing on his behalf; it held that the alleged injury must be "concrete" and "imminent." *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010). And *Summers* recognized that the "requirement of naming the affected members" could be dispensed with "where *all* members of the organization are affected by the challenged activity." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009). That is precisely the case here, where the impact on any member's right to vote will impact every other member's "basic civil and political rights." *See, e.g.*, *Reynolds*, 377 U.S. at 562.

RETRIEVED FROM DEMOCRACYDOCKET.COM

ii. The Suit Is Germane to Beaumont NAACP's Purpose

The lawsuit is germane to the Beaumont NAACP's purpose of eliminating racial discrimination in the democratic process and enforcing federal laws and constitutional provisions securing voting rights. *See* Compl. at ¶¶ 14, 15; *Hancock*, 487 F. App'x at 195 ("Maintaining proportional districts, protecting the strength of votes, and safeguarding the fairness of elections are surely germane to the NAACP's expansive mission."); *Louisiana State Conf. of NAACP v.*

Louisiana, 490 F. Supp. 3d 982, 1012 (M.D. La. 2020) ("The interests the Louisiana NAACP seeks to protect are clearly germane to the organization's purpose, as Plaintiffs allege that its '[t]wo central goals ..[.] are to eliminate racial discrimination in the democratic process, and to enforce federal laws and constitutional provisions securing voting rights.'"). Defendants do not argue otherwise.

iii. Individual Members Need Not Participate, Nor Would Their Participation Deprive This Court of Jurisdiction

The third prong, which Defendants do not contest, looks to whether "the claim [or] the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. This prong is "a judicially self-imposed limi[t] on the exercise of federal jurisdiction, not a constitutional mandate." *Brown Grp.*, 517 U.S. at 557 (alteration in original). Ms. Daye, the only individual plaintiff, is not a member of the Beaumont NAACP. Thus, no individual member of the NAACP is participating in this suit. Additionally, courts assess this prong by examining both the relief requested and the claim asserted. *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 134 n.5 (5th Cir. 2009). In general, "an association's action for damages running solely to its members would be barred for want of the association's standing to sue." *Brown Grp.*, 517 U.S. at 546. However, when a party "seeks only equitable relief from … alleged violations," the Fifth Circuit has found associational standing to be proper, regardless of whether some individual members participate. *See, e.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 552-53 (5th Cir. 2010). Because Plaintiffs seek only equitable relief, associational standing is proper for this additional reason, regardless of whether some individual members participate.

RETRIEVED FROM DEMOCRACYDOCKET.COM

2. Plaintiffs' Complaints Are Not Moot And Are Capable Of Repetition, Yet Evading Review

Defendants' other jurisdictional challenge under Rule 12(b)(1) is that the complaint is moot

because the election is over. *See* Mot. ¶¶ 19, 20. A case is moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotations omitted). That is not the case here—Jefferson County conducts elections with regularity, and has several scheduled for 2023 and 2024. Relief here would protect Black voters by preventing the conduct seen in the November 8 elections from continuing in 2023, 2024, and beyond.

Even if the claims were otherwise moot (and they are not), there is an exception to the mootness doctrine when the alleged wrongs are "capable of repetition, yet evading review." This exception "applies where (1) the challenged action is too short to be fully litigated before it ceases and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Coliseum Square Ass'n Inc. v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006). As discussed below, both of these requirements are met here. *See, e.g.*, *NCBCP*, 512 F. Supp. 3d at 516 ("Defendants do not carry their burden to establish mootness here. Although they argue that because the 2020 national election has concluded the conduct at issue cannot recur, Defendants ignore that other elections will continue to be held and present new opportunities for Defendants to employ similar tactics.").

RETRIEVED FROM DEMOCRACYDOCKET.COM

With respect to the first prong, there is no question that the challenged conduct in any given election, which relates to in-person voting, is too short to be fully litigated before that election ceases. Early voting in Texas begins no earlier than the 17th day before an election day. *See* Tex. Elec. Code Ann. § 85.001(a). Even if misconduct begins on the first day of early voting, plaintiffs cannot fully litigate their case before Defendants even have to serve a responsive pleading. *See* Fed. R. Civ. P. 12(a)(1).

With respect to the second prong, Plaintiffs' Complaint alleges that Ms. Daye and members

of Plaintiff Beaumont NAACP plan to vote in future elections in Jefferson County. Compl. ¶¶ 18, 20. It also alleges that Jefferson County and its election officials a) allowed poll workers to intimidate Black voters in at least two precincts during early voting in the November 8 general election; b) have not shown that they complied with this Court's TRO; c) treated the TRO with disdain, dismissing it as "void" from its inception; and d) refused to agree to apply the basic rules set forth in the TRO to future elections. Compl. ¶¶ 4, 8-11. Absent intervention from the Court, there is a reasonable expectation—indeed, there is every reason to believe—that poll workers in Jefferson County will continue to intimidate Black voters in future elections.

Defendants' only argument to the contrary is that "there is no evidence that Defendant Bowling or any of the poll workers will work another election." Mot. ¶ 20. That argument is unavailing for four reasons. First, the test is whether "there is a reasonable expectation that the ***same complaining party*** will be subject to the same action again," not whether the same government officials will be committing the acts. *Jackson*, 465 F.3d at 246 (emphasis added). Second, Defendant Bowling is not the only named Defendant. It is undisputed, for example, that Defendant Jefferson County will hold elections in the future, and that Defendant Jefferson County Clerk (currently Ms. Hellberg) will preside over those elections. Third, with respect to Defendant Bowling, it is not mere conjecture that she will serve in a future election. She was appointed as a lead judge at the John Paul Davis Community Center, and that appointment is for a one-year term beginning August 1, 2022. Compl. ¶ 23 (citing Tex. Elec. Code Ann. § 32.002(b)). During that period there will be at least one more election in May 2023. *See id.* ¶ 75. Fourth, Defendant Bowling, like Ms. Hellberg, is sued only in her official capacity. Thus, whether she personally works another election is, ultimately, irrelevant.

Thus, because the alleged wrongs are capable of repetition, yet evading review, the Court

RETRIEVED FROM DEMOCRACYDOCKET.COM

should deny Defendants' mootness motion.

B. Defendants' 12(b)(6) Motion Should Be Denied

In the Fifth Circuit, "[m]otions to dismiss under Rule 12(b)(6) 'are viewed with disfavor and are rarely granted.' *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (quoting *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005)). That is because the facial plausibility standard requires courts to "accept all well-pled factual allegations as true, viewing them in the light most favorable to the plaintiff." *Can. Hockey, L.L.C. v. Tex. A&M Univ. Athletic Dep't*, No. 20-20503, 2022 WL 445172, at *3 (5th Cir. Feb. 14, 2022).

1. Plaintiffs Have Alleged A Cognizable Cause Of Action Under The Voting Rights Act

RETRIEVED FROM DEMOCRACYDOCKET.COM

Section 11(b) of the Voting Rights Act states, in relevant part that: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). The Voting Rights Act embodies Congress's goal of realizing, enforcing, and protecting the Fifteenth Amendment's right to vote. *See generally* H.R. Rep. No. 89-439 (1965). Courts typically interpret remedial pieces of legislation, like the Voting Rights Act, broadly so as to give proper effect to the legislative intent. *See, e.g.*, *Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (noting the "canon of construction that remedial statutes should be liberally construed").

Defendants do not, and cannot, seriously contest that Plaintiffs have made out a claim under the Voting Rights Act. Defendants allege that "Plaintiffs have failed to show any specifically identified voter that was deterred from voting based on being intimidated, threatened or coerced." Mot. ¶ 43. That is plainly wrong. Ms. Daye was deterred from voting during the Early Voting period because of the intimidating conduct she witnessed at the Community Center. Compl. at ¶ 54. No more is required at this stage. *See, e.g.*, *League of United Latin Am. Citizens - Richmond*

Region Council 4614 v. Pub. Int. Legal Found., No. 18-423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) (holding that allegations of conduct that "put [an individual] in fear of harassment and interference with their right to vote" is "intimidation sufficient to support [a] § 11(b) claim"). As discussed above, the fact that Ms. Daye eventually voted is irrelevant. *Cf. Clark*, 249 F. Supp. at 728 ("The success or failure of intimidation, threats or coercion is immaterial, since 'attempts' are equally proscribed [by the Civil Rights Act].").

Defendants' reliance on *Brooks v. Nacrelli* is thus misguided. Mot. ¶ 42 (citing 331 F. Supp. 1350, 1353 (E.D. Pa. 1971)). While those plaintiffs may have "failed to show that the challenged activities have, in fact, had an intimidating effect upon the voters of the City of Chester," the same cannot be said here—Ms. Daye left the Community Center without voting. *See id.* Defendants' reliance on *U.S. v. Edwards* is similarly misplaced. Mot. ¶ 42 (citing 333 F.2d 575, 578 (5th Cir. 1964)). That court did not "dismiss" any claims at the 12(b)(6) stage; it resolved a case under Rule 52(a) based on factual findings after an evidentiary hearing. *Edwards*, 333 F.2d at 578 ("[A] review of the record convinces us without question, that the facts found by the trial judge are supported by substantial evidence."). It is thus inapposite to the motion to dismiss stage, where factual disputes are resolved in favor of the plaintiffs. *See Can. Hockey*, 2022 WL 445172, at *3.

RETRIEVED FROM DEMOCRACYDOCKET.COM

2. Plaintiff's Complaint States A Cognizable Claim Under 42 U.S.C. § 1983

42 U.S.C. § 1983 provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress[.]

The Supreme Court has limited municipal liability under § 1983 to "deprivations of

federally protected rights caused by action taken 'pursuant to official municipal policy of some nature. . . .'" *Pembaur*, 475 U.S. at 471 (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978)). "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government entity is responsible under § 1983." *Monell*, 436 U.S. at 694. However, "it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur*, 475 U.S. at 480. In such circumstances, municipal liability "attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483. Whether a particular official has final policymaking authority is a question of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

RETRIEVED FROM DEMOCRACYDOCKET.COM

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). "To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Id.* (alteration in original) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of [her] action." *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 410 (1997). However, "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose

to retain that program." *Connick*, 563 U.S. at 61. Thus, a "pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 62 (citation omitted).

a. Defendant Bowling's Conduct Constitutes A Municipal Policy

Defendant Bowling, as presiding judge at the Community Center during early voting, was "in charge of and responsible for the management and conduct of the election" at the Community Center. Compl. ¶ 23 (citing Tex. Elec. Code Ann. § 32.071). Those responsibilities included "preserv[ing] order and prevent[ing] breaches of the peace and violations of th[e] code in the polling place." *Id.* ¶ 23 (citing Tex. Elec. Code Ann. § 32.075). No government official, not even the County Clerk, can independently remove Defendant Bowling following her appointment. *Id.* ¶ 24; *see also* Tex. Elec. Code Ann. § 32.002(g). Defendant Bowling thus "holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to [her] by state statute[.]" *See Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). "Thus, at least in those areas in which [she], alone, is the final authority or ultimate repository of county power, [her] official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983." *See id.* (quoting *Monell*, 436 U.S at 694).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Defendants' motion elides any analysis on that front, instead summarily "combin[ing]" Former County Clerk Leister and Defendant Bowling in their "analysis" for Defendant Jefferson County. Mot. ¶ 23. Defendants' only argument regarding Defendant Bowling is that demanding that Black voters recite their addresses out loud does not "rise to the level of a constitutional violation." *Id.* ¶ 32. That argument fails for two reasons. First, liability under § 1983 is not limited to Constitutional violations. *See* 42 U.S.C. § 1983 (". . .deprivation of any rights, privileges, or immunities secured by the Constitution ***and laws***. . ." (emphasis added)). A violation of the Voting

Rights Act can thus give rise to a § 1983 claim. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85 (2002) ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."). Second, and more importantly, Defendants' argument assumes the point. If Defendants' conduct did not invade a federally protected right, then of course there could be no liability under § 1983. However, Plaintiffs have alleged that Defendants contributed to intimidating voters, including Ms. Daye and members of the Beaumont Branch of the NAACP, in violation of the Voting Rights Act, and that such conduct, which targeted only Black voters, was undertaken in a discriminatory manner in violation of the Fourteenth and Fifteenth Amendments. *See, e.g.*, Compl. ¶¶ 4, 40-44, 54, 55. While Defendants contest those facts, factual disputes at the motion to dismiss stage are resolved in favor of the plaintiff, not the defendant. *See Can. Hockey*, 2022 WL 445172, at *3.

RETRIEVED FROM DEMOCRACYDOCKET.COM

b. The County Clerk, Jefferson County, And Jefferson County Commissioners Court Ratified Defendant Bowling's Conduct

The County Clerk (formerly Ms. Leister), Jefferson County Commissioners Court, and Jefferson County all effectively ratified Defendant Bowling's conduct by responding with deliberate indifference to a series of complaints regarding both her conduct at the Community Center and the conduct of other workers at the Community Center and other polling locations. *See* Compl. ¶¶ 4, 40-44, 54, 55, 69, 70. That "'policy of inaction' in light of notice that its program will cause constitutional violations 'is the functional equivalent of a decision by the city itself to violate the Constitution.'" *See Sims v. City of Jasper*, 543 F. Supp. 3d 428, 445 (E.D. Tex. 2021) (Truncale, J.) (quoting *Connick*, 563 U.S. at 61). When confronted with the complaints, Former County Clerk Leister responded by having an informal chat with Defendant Bowling, during which both women were seen smiling and laughing. Compl. ¶ 44. Nothing changed. And when Pastor Reynolds brought the complaints to Defendant Jefferson County Commissioners Court, he was

twice rebuffed by Judge Branick, who told Pastor Reynolds that the Commissioners Court had no jurisdiction. *Id.* ¶ 45. No Defendant took any steps to remedy the wrongful conduct. Plaintiffs' Complaint therefore supports a finding of municipal liability for this additional reason.

Defendants' primary argument to the contrary is that this was "not a widespread practice or custom" because the allegations are "limited to two polling location[s] and for, at most, two days." Mot. ¶ 32. Not so. Plaintiffs allege that the violations continued throughout the early voting period, which began on October 24, 2022 and ended on November 4, 2022. *See, e.g.*, Compl. ¶ 50. Plaintiffs allege that on the afternoon of October 26, White poll watchers at the Theodore Johns Branch Library stood so close to voters at the polling booth that they could watch the voters marking their ballots. *Id.* ¶ 70. Plaintiffs allege that Pastor Reynolds first reached out to County Judge Jeff Branick on October 27, after hearing complaints from poll workers and members of his congregation about Defendant Bowling's conduct at the Community Center. *Id.* ¶ 41. Plaintiffs allege that on October 31, Pastor Reynolds went to vote at the Community Center, where he witnessed the intimidating conduct for himself, including White poll workers eyeing him suspiciously and following him closely through the Community Center as he cast his ballot. *Id.* ¶ 60. Plaintiffs allege that Ms. Daye witnessed that same intimidating conduct at the Community Center on November 2. Plaintiffs' allegations are thus not limited to "at most, two days." Mot. ¶ 32. They detail intimidating conduct and acts of indifference throughout the early voting period. Defendants' argument thus, in essence, boils down to the fact that elections happen sporadically. That is no reason to dismiss the § 1983 claims against these Defendants. Similarly, Defendants' attempt to take refuge behind the fact that this intimidating conduct may have been "limited to two polling locations" ignores the fact that those two polling locations ***are two of the locations that principally serve the Black Community in Jefferson County***. Compl. ¶¶ 18, 33. That is precisely

RETRIEVED FROM DEMOCRACYDOCKET.COM

the point of Plaintiffs' Complaint.

3. Defendants' Unclean Hands Argument Is Frivolous

Defendants' final argument is that *Plaintiffs* are truly to blame for Defendants' conduct—and that if only Plaintiffs, Black poll workers (who are not party to this suit), and the Black voters being treated unequally had acted differently, and complained about the disparate and intimidating treatment, that this lawsuit could have been avoided. According to Defendants, Plaintiffs are thus estopped to bring this action under the doctrine of "unclean hands." In a portion of the relevant argument, straight from Defendants' brief (Mot. ¶¶ 33, 41), they argue:

> The unclean hands doctrine " 'closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant,' and requires that claimants 'have acted fairly and without fraud or deceit as to the controversy in issue.' " *Gilead Sciences, Inc. v. Merck & Co., Inc.*, 888 F.3d 1231, 1239 (Fed. Cir. 2018). "He who hath committed inequity, shall not have equity." Richard Francis, *Maxims of Equity* 5 (1727).
>
> …
>
> …Plaintiffs are complaining of matters that should have been addressed by the workers at the Community Center, through Bowling and/or Benard and persons with the same responsibilities at the Theodore Johns Library. If not resolved at those levels, they were obligated by their duties as election workers to have brought the complaint to Leister, the Election hotline or the political party chairs. None of that was done, instead they filed a federal lawsuit complaining of things that they themselves should have addressed through Bowling and/or Benard, Leister, the Election hotline and the Republican and Democrat party chairs. Plaintiffs should not receive equity when they themselves, who are precinct chairs, election judges and workers, failed to act in good faith by doing nothing to resolve these matters.

RETRIEVED FROM DEMOCRACYDOCKET.COM

In other words, Defendants argue that the Black voters are the ones truly at fault here—the ones who apparently acted with "fraud or deceit" as to the controversy in issue—and so the gates of the courthouse are closed to them.

As explained below, this argument—based on allegations outside of the pleadings—is improper at the motion to dismiss stage. Moreover, it is hard to imagine an argument more

frivolous and, frankly, offensive—especially in light of Defendants' actions prior to this case being filed and since.

First, Defendants' central argument—that "Plaintiffs should not receive equity when they themselves, who are precinct chairs, election judges and workers, failed to act in good faith by doing nothing to resolve these matters"—is nonsensical. Mot. ¶ 41. Plaintiff Jessica Daye[7] and the Beaumont NAACP are not County officials. Plaintiff Daye is a voter who was intimidated and disenfranchised by Defendants and Plaintiff Beaumont NAACP is comprised of voters who were similarly affected.

Second, Defendants fail to identify any wrongful action whatsoever. Unclean hands is an equitable defense based on "the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct." *Rogers v. McDorman*, 521 F.3d 381, 385 (5th Cir. 2008) (citation omitted). Defendants fail to establish, or even assert, any "wrongful conduct" by any Plaintiff. Defendants state elsewhere that "Daye did not report this [intimidating conduct] to Benard, the Democrat judge for the location, nor did she report this to Leister, the Election hotline or the Democrat party chair to address what she perceived as an issue." Mot. ¶ 36. But Ms. Daye was under no "obligat[ion]" (*Id.* ¶ 41) to report the intimidating conduct to Former County Clerk Leister, Defendant Bowling, or anyone else. Instead, she was intimidated and dismayed—and left the polling place. Defendants cite no legal support for the premise that an individual who witnesses intimidating conduct while attempting to exercise her right to vote must exhaust administrative remedies before coming to a court for relief. *Contra Williams v. Correction Officer Priatno*, 829 F.3d 118 (2d. Cir. 2016) (granting motion to dismiss where plaintiff had failed to exhaust administrative remedies under Prison Litigation Reform Act).

RETRIEVED FROM DEMOCRACYDOCKET.COM

---

[7] Ms. Daye is an elected precinct chair for the Democratic Party, not a County election official.

Third, the Amended Complaint is full of allegations that members of the Beaumont NACCP in fact did report the intimidating and harassing conduct—repeatedly—and were ignored or laughed down by the very Defendants now claiming that *more* reports of election workers' misconduct would have made any difference. Compl. ¶¶ 41-45. Defendants were fully aware of the conduct being challenged in this complaint, prior to it being filed. They simply ignored it, thinking they were untouchable because no Plaintiff would bring them to court. They were wrong.

Fourth, even if Defendants decide to pursue an unclean hands defense during discovery in this case (and Plaintiffs are more than ready to engage in extensive, full discovery of all of the actions and inactions occurring during the election, so that the Court may be presented with the full story in due course), it is not a colorable defense on a motion to dismiss. Unclean hands is a fact-intensive defense, and thus appropriately resolved with evidence, not at the pleading stage. *See, e.g.*, *First Bank v. TZK Invs., LLC*, No. 21- 449, 2022 WL 1719406, at *7 (E.D. Tex. May 27, 2022) (affirmative defense of unclean hands is "a highly factual inquiry" and thus "better determined by the jury"). Indeed, the only two cases that Defendants cite could hardly be further afield, substantively or procedurally. Each is a patent infringement case finding unclean hands as a matter of law after a jury trial. *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240 (1933); *Gilead Scis., Inc. v. Merck & Co., Inc.*, 888 F.3d 1231, 1239 (Fed. Cir. 2018).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Fifth, Defendants' actions after this complaint was filed cast their "unclean hands" argument in an even more nefarious light. If Defendants truly believe that Black voters and poll workers are to blame here for not complaining sooner—and that if they had, all would have been made right—it stands to reason that Defendants, once notified, would have responded promptly. Instead, Defendants' counsel has ignored nearly a *dozen* outreaches regarding steps taken to comply with the tailored relief set forth in the Court's TRO. In fact, the only time Defendants did

acknowledge Plaintiffs' request, they dismissed the Court's TRO as "void *ab initio*" and refused to engage with Plaintiffs on a set of remedial conduct that would be the permanent relief Plaintiffs seek in this case. Instead, Defendants filed this motion. That course of conduct underscores the lack of gravity Defendants attach to Plaintiffs' complaints and lays bare the simple truth that, absent intervention from this Court, Defendants are not going to help protect the rights of Black voters. Indeed, Defendants' "unclean hands" argument puts a voice to the same deeper issue motivating every single action Defendants have taken before and since this case was filed. In doing so, the argument shows just why Plaintiffs and the many other victims of Defendants' unlawful conduct need this case to proceed to full discovery and ultimate resolution.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Dated: January 3, 2023

/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 Weiner 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@lawyerscommitee.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

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I certify that on January 3, 2023 all counsel of record who are deemed to have consented to electronic service were served with a copy of this document via the Court's CM/ECF System according to the applicable Federal Rules of Civil Procedure.

/s/ Jeff Homrig
Jeff Homrig (Bar No. 24129988)

RETRIEVED FROM DEMOCRACYDOCKET.COM