

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

**BEAUMONT CHAPTER OF THE NAACP §
and JESSICA DAYE §**

VS. §

CASE NO. 1:22-CV-488

JEFFERSON COUNTY, TEXAS ET AL §

**DEFENDANTS’ REPLY TO PLAINTIFFS’ RESPONSE
TO THEIR MOTION TO DISMISS PURSUANT TO 12(B)(1) AND 12(B)(6)**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES **JEFFERSON COUNTY, TEXAS** **JEFFERSON COUNTY COMMISSIONERS COURT, LAURIE LEISTER**, in her official capacity as the **Jefferson County Clerk** and **MARY BETH BOWLING**, in her official capacity as **Presiding Judge of the John Paul Davis Community Center** and files this Reply to Plaintiffs’ Response to their FRCP 12(b)(1) and 12(b)(6) motion to dismiss and would respectfully show unto the Court the following:

I.

ARGUMENT & AUTHORITY

1. Plaintiffs’ response claims that black voters were “crowded by poll workers while voting, forced to mark their ballots under watchful eyes; and they were denied help navigating new polling machines.” See Doc. 43 at P.8. Defendants have no way of knowing who Plaintiffs are referring to. If referring to poll watchers, they can stand anywhere they want and cannot be denied free movement. Tex. Elec. Code Sec. 33.056. Leister, or the current county clerk, cannot prevent “a watcher from observing activity or procedure the person knows the watcher is entitled to observe, including by taking any action to obstruct the view of ta watcher of distance the

watcher from the activity or procedure to be observed in a manner that would make observation not reasonably effective.” *Id.* at 33.0361. Doing so is a crime. *Id.* A poll watcher also cannot interact with a voter so they would not be able to assist a voter with the polling machines. *Id.* at Sec. 33.058.

2. Plaintiffs may use the term poll worker and poll watcher interchangeably as their witnesses did in their declarations. Since names are not associated with the allegations, Defendants are forced to lump their argument under “poll worker”, which is unfair since the Texas Election Code has specific provisions for poll workers and specific provisions for poll watchers. Defendants are not waiving any arguments they may have if and when names are produced by Plaintiffs.

A. Intimidation

3. Plaintiffs’ claim intimidation by allegedly being asked to recite their address. Their response misses the entire issue in this matter. Is asking a voter for their address, as allowed by Texas law, intimidation? Plaintiffs claim only black voters were asked, but Jefferson County is a county-wide voting jurisdiction meaning a person from any city in Jefferson County can vote at any polling location anywhere within the county. Therefore, everyone would have to be asked to verify their address in order to receive the ballot specific to their city and precinct. *See* Exhibit 1 to Defendants’ 12(b)(6) motion at P.90, L.20- P.91, L.25. Texas law requires that every single voter’s address be verified. Tex. Elec. Code § 63.0011. Section 63.0011 specifically states,

(a) Before 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...

The statute specifically states the officer shall “ask” meaning a verbal request. While there may be many ways to do this, there is no direction within the statute on how to ask or how not to ask

a voter for their address. How the county clerk determines to fulfill her duty under Texas law is in her discretion. “When in a discretionary decision, such as here...was used; for the courts to fly in and substitute their judgment for that of an elected official would be said to undermine the very foundation of our political system.” *Harper v. Best*, 493 S.W.3d 105, 109 (Tex.App.—Waco 2016)(citing *Harper v. Taylor*, 490 S.W.2d 227, 229-230 (Tex.App.—Beaumont 1972, no writ).

4. Poll workers at these locations could not only be asking black voters for their addresses because if that were true, no non-blacks could vote since the poll worker wouldn't know which ballot to give them. Plaintiffs' argument lacks merit. Because a poll worker is mandated to verify every voter's address according to Texas law, doing such is not and cannot be intimidation. In addition, Plaintiffs have failed to show any authority that asking a voter's address in compliance with state law can rise to the level of intimidation, because there is none. Asking a voter to verify their address serves a legitimate and nondiscriminatory public purpose, i.e., getting the voter the correct ballot. In addition, there is no law that states that a voter's address is confidential.¹

5. Plaintiffs attempt to discount the legal authority below by claiming they actually support Plaintiff's position. It is not surprising that Plaintiffs use smoke and mirrors to only use a catch phrase out each case and ignore the facts that the court relied on to show intimidation. As previously stated, the traditionally recognized categories of voter intimidation cases are: *U.S. v. Tan Duc Nguyen*, 673 F.3d 1259 (9th Cir. 2012) (concluding that the wide distribution of a letter among Latino immigrants warning “that if they voted in the upcoming election their personal

¹ The Texas Election Code Sec. 1.005 and 13.004(c) allows for current, retired, former judges' address be made confidential, the current federal Marshall and current US Attorney as well. However, these sections are inapplicable to this case.

information would be collected” and could be provided to anti-immigration organizations constitutes sufficient evidence to find unlawful intimidation under California law); *U.S. v. McLeod*, 385 F.2d 734, 740-41 (5th Cir. 1967) (holding that a pattern of baseless arrests of Black individuals attending a voter-registration meeting was intimidating and coercive conduct given its “chilling effect” on voter registration); *U.S. v. Bruce*, 353 F.2d 474, 476-77 (5th Cir. 1965) (holding that a landowner's restriction of an insurance collector's access to the landowner's property due to the insurance collector's efforts to register voters constitutes unlawful intimidation); *U.S. v. Beaty*, 288 F.2d 653, 654-57 (6th Cir. 1961) (holding that the eviction of sharecroppers as punishment for voter registration constitutes unlawful intimidation). A more recent case is *Council on American-Islamic Relations—Minnesota v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 376 n.2 (D. Minn. 2020) where the court found voter intimidation by a company sending armed agents to polling places during a general election. In all these cases, there was a distinct and obvious threat of potential harm or actual harm. There is no such showing in the instant case. There can be no threat of potential harm or actual harm when the poll worker is following the law.

B. Daye and NAACP Lacks Standing to bring suit

6. As stated above, asking all voters for their address is to ensure they get the right ballot is not intimidation and therefore, Daye has suffered no injury “that is concrete, particularized, and actual or imminent...” Defendants cannot cause injury when following the law by verifying addresses of voters. If Plaintiffs get an order from this court ordering Defendants to not verify voter addresses, Defendants would be in violation of the law. While Plaintiffs argue there are many ways to verify addresses, Plaintiffs have not shown that verbally asking for the address is intimidation per se.

7. Plaintiffs claim that Defendants fail to dispute the facts alleged by Daye regarding the elderly black female voter. *See* Doc. 43 at P. 16. Plaintiffs have specifically omitted the names of these phantom voters solely so Defendants couldn't dispute their allegations. Defendants do dispute their allegations, but Defendants' legal arguments show that this case should be dismissed. Daye has suffered no injury.

8. Likewise, the NAACP also lacks standing. Plaintiffs' response gives conclusory statements that "members of the Beaumont NAACP were subjected to intimidating conduct..." *See* Doc. 43 at P.22. Plaintiffs has failed to identify any person in their pleadings, other than those who gave declarations. Those who claim to have witnessed intimidation, Daye, Benard, Campbell, Cooper and Roper all have declarations that fail to state they are members of the NAACP. Plaintiffs claim Reynolds, who claims to be a member of the NAACP, "experienced similar intimidating conduct as Ms. Daye..." *See* Doc. 43 at P.23. Nowhere does Reynolds ever state he was intimidated by being asked to verify his address. Plaintiffs cite to their complaint at paragraph 40 which relates to others telling Reynolds about their voting experience. *See* Doc. 32 at ¶40. Plaintiffs also contend that when Reynolds went in to vote "white poll workers suspiciously looked at him, watching every step he took." *Id.* at ¶60. Again, looking at someone is not intimidation. However, Plaintiffs fail to point out that Reynolds voted in the exact polling location that he had previously accosted Bowling just a day or two before. *See* Doc. 40-1 at P.59, L. 8-P.62, L.18 and P.63, L.2-15. It would be logical that poll workers would feel threatened or intimidated by him. However, Reynolds declaration confirms that he voted at the John Paul Davis Community Center with no issues.

9. Jefferson County has 252,235 residents.² The Beaumont NAACP branch has 600 members. *See* Doc. 8. That means only 0.2% of Jefferson County residents are members of the NAACP. That is an extremely small percentage, so small that the number is closer to zero than even half a percent. Plaintiffs generally conclude that “members of the Beaumont NAACP were subjected to intimidating conduct at the Community Center...” This claim is not only an assumption but also conclusory and not supported by any credible facts. Plaintiffs have failed to show any of its members voted at this location and were intentionally intimidated to prevent them from voting.

10. Let’s not forget that asking a voter to verify their address is required by Texas law. People who live anywhere in Jefferson County can vote at any polling location in Jefferson County. The poll workers have to know their address in order to give them the correct ballot. There is no law that prohibits a poll worker from asking for a voter’s address because it provides a legitimate government interest of giving a voter the correct ballot. Therefore, there is no injury. There is no injury to Ms. Daye and there is no injury to any unknown member of the Beaumont Chapter of the NAACP and therefore, no standing for the NAACP in this case.

C. Plaintiffs’ claims are Moot

11. Plaintiffs agree that a case is moot “only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. Service Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012). They claim their case is the exception because the “alleged wrongs are ‘capable of repetition, yet evading review.’” *See* Doc. 43 at P.25. Plaintiffs’ intimidation argument revolves around poll workers asking for the voter’s address. This is a circular argument. Texas law requires a voter’s address be verified. *See* Tex. Elec. Code § 63.0011.

² 2014 U.S. Census

Because Jefferson County voters can vote at any polling location within the county, the poll worker has to verify their address to give them the correct ballot. See Doc.40-1 at P.91, L.22-25. Plaintiffs' argument of "capable of repetition" is confusing and misplaced since Texas law requires the verification. Id. at P.99, L.20-25.

12. Plaintiffs must demonstrate continuing harm or a "real and immediate threat of repeated injury in the future." *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992). The threat of future harm must be "certainly impending"; mere "[a]llegations of possible future injury" do not suffice. *Clapper*, 568 U.S. at 409. "[C]ourts may not decide cases that since have become moot because there is no longer a live case or controversy." *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 449 (5th Cir. 2019). There is no controversy. Texas law requires poll workers to verify addresses and Jefferson County's county-wide voting requires a voter's address in order to give them the correct ballot. Therefore, there is no effective relief to Plaintiffs because there is no real and immediate threat of injury in the future.

D. 42 U.S.C. §1983

i. Laurie Leister, in her official capacity as the Jefferson County Clerk and Mary Beth Bowling, as presiding judge of the John Paul Davis Community Center

13. Without beating a dead horse, Plaintiffs entire response assumes that asking a voter for their address is intimidation. Voter intimidation is a threat with the goal to prevent a voter from voting. Here, Texas law requires a poll worker to "ask" a voter to confirm their address has not changed. Tex. Elect. Code §62.0011. Such a request has no goal to prevent a voter from voter. Likewise, with county-wide voting, a poll worker asks a voter for their address in order to give them the correct ballot. Again, this is to ensure the voter votes the correct ballot, not to

discourage voters from voting. Plaintiffs have pointed to no authority that asking a voter their address, in compliance with state law, is intimidation.

14. If Plaintiffs do not like Texas Election Code §62.0011, they need to address it in another avenue against the State of Texas and not these local government officials who are required to follow the law. Plaintiffs have failed to show that the county clerk or Bowling did anything wrong. Asking a voter for their address is required by law and required to provide the correct ballot to the voter. Plaintiffs have failed to show that asking a voter for their address is being done for the purpose of preventing certain voters from voting. For these reasons, Plaintiffs cannot show a violation under 52 U.S.C 10307 section 11(b) also known as the Voting Rights Act.

ii. Jefferson County, Texas and Jefferson County Commissioners' Court

15. Plaintiffs just completely overlook the law in regards to the power of Jefferson County through the Jefferson County Commissioners' Court. Its power comes from the Texas Constitution. TEX. CONST. art. V, §18. The Texas Constitution gives them the power over the purse of the county through the budget. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22 (Tex.2003) citing *Avery v. Midland County*, 406 S.W.2d 422, 426 (Tex.1966), *vacated on other grounds*, 390 U.S. 474, 485–86 (1968). The Commissioners' Court is not the Great and Powerful Oz. They have no authority over other elected officials in the county

16. The county clerk is also a constitutional position created by Article V, §20 of the Texas Constitution. The Texas Legislature determines the county clerk's duties. The Texas Legislature has given the county clerk the overall responsibility for holding elections. *See* Tex. Local Gov't Code §158.001, 291.007 and Tex. Gov't Code §601.006, 1471.016, 1471.018 and Tex. Elec. Code Secs. 1, 12, 13, 31, 32, 42, 51-52, 66-68, 81, 161, 172, 252, 254, 271, 277 and

Title 7. The Commissioners' Court has no such authority to act or oversee the duties of the county clerk in regards to elections and Plaintiffs have provided no authority to the contrary.

E. Unclean Hands

17. Plaintiffs allege that Defendants are blaming others. See Doc.43 at P.33. Defendants are pointing out that there were other poll works other than Bowling at the John Paul Davis Community Center. The Republican Party had workers and the Democrat Party had workers at this polling location. The Republican Party has a local chair as does the Democrat Party. The point is that Daye, who is an elected precinct chair, did not bring her concerns to anyone. Neither did Benard who was the Democrat alternate presiding judge, Campbell as a poll worker, Lowe as a poll worker, or Roper as a poll worker. Plaintiffs are coming before this Court asking for a permanent injunction ordering that Defendants cannot ask voters for their addresses. First, Texas law requires this of all voters, not just black voters, but of all voters. Second, poll workers have to know the voter's address to give them the correct ballot since Jefferson County allows a county voter to vote anywhere in the county. Poll workers have to ask all voters. If they only asked black voters for their address, as alleged by Plaintiffs, how do the white, Hispanic and other voters get their correct ballot? Plaintiffs have come into this Court seeking a permanent injunction for Defendants to not follow the law or to mandate that the county clerk change her interpretation of how she is to follow the law. This Court cannot substitute its decision on which method is the better method for the county clerk to follow. *Harper*, 493 S.W.3d at 109 (citing *Harper*, 490 S.W.2d at 229-230 (courts cannot substitute their judgment for that of an elected official)).

18. Federal law and Texas law is on the side of the Defendants and is clear and unambiguous. Plaintiffs' response alludes to the conclusion that Plaintiffs are using this suit as an avenue to

attempt to change Texas law. Plaintiffs are unhappy with Texas Election Code Sec. 63.0011 regarding verifying addresses and it appears they are unhappy with the new Texas law regarding poll watchers under Texas Election Code Sec. 33. Regardless, this lawsuit is not a proper tool to contest those provisions. In addition, asking the Court to order Leister, or the current county clerk, not to ask for addresses violates Texas law and asking the Court to substitute its judgment on how Leister, or the current county clerk, should ask for addresses is also improper.

V.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendants JEFFERSON COUNTY, TEXAS, JEFFERSON COUNTY COMMISSIONERS COURT, LAURIE LEISTER, in her official capacity, and MARY BETH BOWLING, in her official capacity pray that the Court grant their FRCP 12(b)(1) and 12(b)(6) motion and render judgment by dismissing plaintiffs' suit against them with prejudice and for any other and further relief, both in law and in equity, to which these Defendants may show themselves justly entitled.

Respectfully submitted

JEFFERSON COUNTY DISTRICT
ATTORNEY'S OFFICE

By: /s/ Kathleen M. Kennedy

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing *Reply to Plaintiffs' Response to their FRCP 12(b)(1) and 12(b)(6) Motion* has been forwarded to all counsel of record by E-FILE on this 11th day of January, 2023.

/s/ Kathleen M. Kennedy
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