

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

LAURA PRESSLEY, ROBERT BAGWELL,
TERESA SOLL, THOMAS L. KORKMAS,
and MADELON HIGHSMITH,

Plaintiffs,

v.

JANE NELSON, in her official capacity as the
Texas Secretary of State, CHRISTINA ADKINS,
in her official capacity as Director of the Elections
Division of the Texas Secretary of State,
BRIDGETTE ESCOBEDO, in her official
capacity as Williamson County Elections
Administrator; DESI ROBERTS, in his official
capacity as Bell County Elections Administrator,
and ANDREA WILSON, in her official capacity
as Llano County Elections Administrator,

Defendants.

Civil Action No. 1:24-cv-00318-DII

**PLAINTIFFS' RESPONSE TO DEFENDANT WILSON'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT
TO RULE 12(b)(1) AND 12(b)(6)**

Plaintiff Laura Pressley, Ph.D. (*pro se*), along with plaintiffs Robert Bagwell, Teresa Soll, Thomas L. Korkmas, and Madelon Highsmith, (by and through their undersigned counsel), file this their Response to Defendant Andera Wilson's Motion to Dismiss Plaintiffs' First Amended Complaint Pursuant to Rule 12(b)(1) and 12(b)(6), and allege as follows:

I. INTRODUCTION

1. Defendant Llano County Elections Administrator Andrea Wilson (referred to herein as "Ms. Wilson" or "Llano County") has filed a Rule 12(b)(1) and 12(b)(6) Motion to

Dismiss, claiming that this Court lacks subject matter jurisdiction and that Plaintiffs have failed to state a claim. As described in detail herein, Llano's County's motion must fail because it wholly misunderstands and/or misstates both the facts and the legal issues.

A. Standard of Review

2. Whether under 12(b)(1) or (b)(6), the Court should accept Plaintiffs' allegations as true, construe them in the light most favorable to Plaintiffs, and indulge all reasonable inferences in Plaintiffs' favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Given this standard of review, Llano County's arguments are particularly extraordinary.

B. Summary of Plaintiffs' Allegations

3. Plaintiffs incorporate all of the factual allegations contained in their First Amended Complaint as though set forth in full herein.

4. For purposes of Defendant Llano County's election administrator, Andrea Wilson's, motion to dismiss, Plaintiffs' material allegations may be generally summarized as follows:

- a) Ms. Wilson, as Llano County's election administrator, has the authority to determine ballot numbering in Llano County. Dkt. 32 ¶¶ 102-104.¹
- b) Llano County, based on authorization from the State Defendants contained in Election Advisory 2019-23², is utilizing unique identifier ballot tracking numbers through voting system software loaded directly onto its ballot marking device in its elections (in which Plaintiff Highsmith is a voter);

¹ In 2022, the Texas Attorney General issued Opinion No. KP-0422 related to the county authority responsible for choosing the ballot numbering method for ballots. Exhibit 1 p. 6.

² Plaintiffs' Amended Complaint, Dkt 32-58.

- c) State Defendants have authorized the use of unique identifier ballot tracking numbers placed on ballots through voting system software, along with numerous other “waivers” of state and federal election law, effectively rendering Texas ballot numbering laws meaningless, and Llano County, although not required to do so, has chosen to adopt the State Defendants’ illegal and unauthorized guidance;
- d) Plaintiff Highsmith, as an in-person voter, is forced to utilize a Texas ballot lacking consecutive numbering if she wishes to vote (unlike those who vote by mail), in Llano County;
- e) Plaintiff Highsmith, as an in-person voter, is forced to accept a ballot containing a random, computer-generated, unique identifier ballot tracking number generated by voting system software, in Llano County;
- f) The unique identifier ballot tracking number on Williamson County in-person ballots has been shown to enable more than 60,000 voters to be traced to their exact ballot, *i.e.*, the voter’s ballot is no longer secret, and Llano County also utilizes ballot tracking through voting system software on their ballot marking devices³;
- g) State Defendants have authorized the use of ballot tracking through voting system software and hardware, and Llano County has chosen to utilize such a system;
- h) Llano County Plaintiff Highsmith, as an in-person voter, must utilize ballot marking devices that assign a unique identifier to her ballot;
- i) Ms. Wilson, as Llano County election administrator, has consistently operated as though she has authority to provide for ballot numbering in Texas (*i.e.*, by officially waiving existing ballot numbering laws in Llano County and effectively applying other laws providing for computerized ballot numbering through voting system software) and continues to do so in elections occurring since the initiation of this litigation (Secretary of State April 2019 Mass Email in Dkt 32-7 pp. 5-6)

5. Accepting these allegations as true, and particularly in light of the evidence demonstrating that they are, in fact, true, Llano County’s arguments do not withstand scrutiny.

³ Plaintiffs attached evidence of this ballot secrecy breach in Williamson County to their First Amended Complaint in redacted form, with a request to present such evidence in its unredacted form to the Court *in camera*. Plaintiffs renew that request herein. Additionally, should the Court be inclined to grant any or all of the motions to dismiss, Plaintiffs request leave to file such evidence under seal for the Court’s consideration. Plaintiffs also have a motion for protective order pending.

II. THIS COURT HAS SUBJECT-MATTER JURISDICTION

A. Plaintiffs have standing because they have alleged particularized, redressable grievances and suffered actual injury.

6. As an initial matter, Llano County mischaracterizes Plaintiffs' claims as a general challenge to electronic voting systems. These mischaracterizations are fatal to Llano County's analysis.

7. Unlike the plaintiffs in *Andrade v. NAACP of Austin* and *Eubanks v. Nelson*, the main cases on which Llano County relies for its standing argument, Plaintiffs are NOT challenging the use of electronic voting systems. Rather, Plaintiffs are challenging the State Defendants' and Llano County's waiver of state and federal election laws based on improper and erroneous legal grounds, specifically, the illegal and unconstitutional waiver of the consecutively-numbered ballot requirement contained in Texas law and the illegal authorization of randomly generated unique identifying ballot numbers through voting system software that result in the breach of ballot secrecy and, by extension, the County Defendants' decisions to adopt the guidance of the State Defendants. Dkt. 32-27 pp. 5-7. This case is much more specific than the general voting system challenges in *Andrade* and *Eubanks*. Were Plaintiffs seeking an injunction against the use of electronic voting systems, *Andrade* and *Eubanks* would be relevant to this Court's analysis of the issues. Contrary to Llano County's mischaracterizations, however, Plaintiffs want the Llano County election administrator to cease wrongful interpretations of ballot numbering laws, stop waiving existing ballot numbering laws, stop utilizing ballot numbering methods outside the legislative process, and stop enabling the resulting breach of ballot secrecy, and for Llano County to stop adopting the State Defendants' improper legal interpretations. *Andrade*, *Eubanks*, and the other cases on which Llano County relies is simply inapposite.

8. Additionally, the injury Plaintiffs have suffered is more particularized than the injuries in Llano County's cited cases. While it is true that all in-person voters in the Defendant counties have been harmed, such a group is far more specific than simply the public at large. Plaintiff Highsmith is part of a specific class of citizens whose votes and ballots do not enjoy the same legal protections as other voters, namely citizens who vote by mail or who vote in counties that do not utilize computerized random ballot tracking numbers. Plaintiff Highsmith is not required to show that she is the *only* member of the harmed class – if such were the case, the courthouse doors would be all but locked. Rather, Plaintiff Highsmith alleges, and has demonstrated in the evidence attached to the First Amended Complaint, that she is a member of a distinct and particularized class of in-person voters in counties that utilizes illegal ballot numbering methods through voting system software. This class does not include all Texas voters, or even necessarily all in-person voters. As an illustration, an example of the unique ballot numbering at issue in Llano County was obtained from a candidate recount in Parker County in 2022. The ballot tracking through voting system software is used in Llano County with unique ballot tracking numbers in the upper right corner. *See* Exhibit 1.

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PRIMARY RUNOFF ELECTION
PARKER COUNTY, TEXAS
May 24, 2022 90000v1 Page 1 of 1

To cast your ballot, you must take this record to the separate scanning station and scan it.

	CHOICE	ORDER
Attorney General	KEN PAXTON	1
Commissioner of General Land Office	DARR BUCKINGHAM	2
Railroad Commissioner	WAYNE CHRISTIAN	1
State Representative, No. 60	MIKE OLCOTT	2

** END OF PAGE **

9. The Supreme Court found standing when voters brought a constitutional challenge “on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated.” *Baker v. Carr*, 369

U.S. 186, 204-05 (1962). Plaintiffs here are an even narrower class than that found to have standing in *Baker*.

10. Moreover, even a widely shared interest does not, on its own, defeat standing. As the Supreme Court noted in *Federal Election Comm'n v. Akins*:

[W]here a harm is concrete, though widely shared, the Court has found ‘injury in fact’...Thus the fact that a political forum may be more readily available where an injury is widely shared...does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an ‘injury in fact.’ This conclusion seems particularly obvious where (to use a hypothetical example) ...large numbers of voters suffer interference with voting rights conferred by law.

524 U.S. 11, 24 (1998) (internal citations omitted).

11. Plaintiffs’ claims are particularized and withstand a Rule 12(b)(1) challenge.

12. Furthermore, Plaintiffs’ First Amended Complaint clearly establishes the actual and/or imminent nature of their injuries. Plaintiffs have been required to utilize ballots with computerized random ballot tracking numbers printed *in situ* and without consecutively pre-numbered ballots. The secrecy of the Williamson County Plaintiffs’ ballots has already been violated, and Llano County utilizes ballot tracking through voting system software like that which caused the Williamson County breach. There is nothing conjectural or hypothetical about the harm Plaintiffs, including Plaintiff Highsmith, have suffered. The harm is actively occurring and will continue to occur in the future absent this Court’s exercise of jurisdiction.

13. Llano County contends that Plaintiffs’ alleged harm is merely conjectural, but this simply flies in the face of the detailed allegations and evidence contained in the First Amended Complaint. It is not *a possibility* that the secrecy of Plaintiffs’ ballots could be violated – **it has already happened, including by placing unique ballot identifiers on Ms. Highsmith’s ballots.** It is not *a possibility* that third parties *could* have access to Plaintiffs’ ballots – Plaintiffs have alleged, and the evidence shows, that the information needed to connect Plaintiffs to their exact

ballots in multiple elections is available to multiple third parties, including the public. Llano County utilizes ballot tracking through voting system software like Williamson County and is following the same illegal guidance promulgated in 2019 from the State Defendants. Dkt. 32-27 pp. 5-6.

14. Moreover, the State Defendants have publicly admitted to the actual and/or imminent nature of the injury. Defendant Christina Adkins acknowledged to the House Elections Committee Hearing on Oversight of Ballot Secrecy that a “very significant universe” of people have access to the publicly available election information needed to discern how voters voted.⁴ To view Ms. Adkins’ testimony, click on the image below.⁵



15. Unlike the electronic voting machine cases cited by Llano County, here the events of which Plaintiffs complain have already occurred and will recur. Llano County completely ignore this very clear distinction, which defeats their arguments.

16. Finally, while agencies such as the Secretary of State may have discretion in certain areas, those adversely affected by an agency’s decision “generally have standing to complain that

⁴ *Id.*

⁵ Excerpted testimony by Christina Adkins Texas House Elections Committee Hearing on June 12, 2024. <https://u.pcloud.link/publink/show?code=XZQtss0ZVDiXI145ND7167fiuDdlfBHAyNux> (last visited June 14, 2024).

the agency based its decision upon an improper legal ground.” *Federal Election Comm’n v. Akins*, 524 U.S. 11, 25 (1998). Here, Ms. Wilson has misinterpreted her authority to waive state ballot numbering laws, including Tex. Elec. Code Sections 52.062, 51.006, 51.007, 51.008, 51.010, 62.007 and 62.009, as described in the First Amended Complaint. The County Defendants, including Llano County, have chosen to follow the State Defendants’ wrongful guidance and waive ballot numbering laws, although not required to do so. The mass email promulgated by State Defendants in 2019, attached as Exhibit 2, permits the Llano County Elections Administrator the choice to a) utilize consecutively numbered ballots (Section 1.a), or b) number through the voting system software (Section 1.c). See excerpts below:

Guidelines for Compliance with Texas Law for Ballot Marking Devices, Ballot on Demand Systems.

1. **Ballot Numbering:** Section 52.062 of the Texas Election Code provides that ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number “1”. The purpose of this requirement is to track and account for the total number of ballots used in an election, how they were used, in what locations, and to account for the ballot stock that was unused. There are two ways that counties can meet this requirement.

- a. **Pre-printed numbers on blank ballot stock:** The simplest and easiest way to meet this requirement is to order your blank ballot stock with pre-printed numbers. The ballots shall be tracked, distributed, and retained just as you would with a traditional pre-printed full ballot in accordance with Sections 51.006, 51.007, 51.008. The remaining ballot stock cannot be used in a subsequent elections and must be retained with your precinct election records for the duration of the preservation period. With this system, you will continue to have your presiding judges fill out the [Ballot Register](#) and the original and duplicate forms will be returned in the applicable envelopes. We have

- c. **Hart Verity TouchWriter BMD and Print BOD system--** Each ballot that is printed via Verity TouchWriter or Verity Print has a unique identifier. This prevents the ballots from being read multiple times by a specific scanner. Each device lists the number of ballots printed for each election and for the lifetime of the device on the screen of the device itself. Polling place workers should record these numbers and compare them to the check-in roster at the end of the day to complete the Ballot Register. With this system, you will continue to have your presiding judges fill out the [Ballot Register](#) and the original and duplicate forms will be returned in the applicable envelopes. The ballots shall be tracked, distributed, and retained just as you would with a traditional pre-printed full ballot in accordance with Sections 51.006, 51.007, 51.008 **with the exception of notating the serial number of the ballot ranges.** In the alternative, you will document how much blank ballot stock is sent to each location and how much blank ballot stock

B. Llano County cannot avoid liability under the cloak of sovereign immunity.

17. While Plaintiffs certainly do not dispute that the State Defendants and Llano County have waived, violated, and ignored state law, the gravamen of the First Amended Complaint is that, as a result of these actions, the State Defendants and, subsequently, the County Defendants have deprived Plaintiffs of their rights under the First and Fourteenth Amendments. It happens that Defendants are violating state law while doing so, but Plaintiffs' allegations are not reliant on those state law violations. Rather, Plaintiffs' claims are based on the First and Fourteenth Amendments. As the Fifth Circuit has noted, "It is permissible under *Ex Parte Young* for a court to "command [] a state official to do nothing more than refrain from violating federal law." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 180 (5th Cir. 2020) (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255). Additionally, "insulation [from federal judicial review] is not carried over when state power is used as an instrument for circumventing a federally protected right." *Baker v. Carr*, 369 U.S. 186, 231 (1962). The Eleventh Amendment does not shield Llano County from liability in this case.

C. None of Plaintiffs' claims invoke the political question doctrine.

18. Next, Llano County would have the Court believe that it lacks jurisdiction because Plaintiffs' allegations fall solely within the purview of the Texas Legislature. Again, Llano County mischaracterizes the nature of this case.

19. It is not the electronic voting systems, in and of themselves, that are the problem, nor are Plaintiffs challenging policy decisions made by the legislative branch as it relates to the use of electronic voting systems in the conduct of Texas elections. To the contrary, Plaintiffs believe the other branches of government should honor the legislature's policy choices. What Llano County overlooks is the fact that the Texas legislature has NOT made a policy choice to

utilize random computerized ballot tracking numbers through voting system software, which would have been the legislature's prerogative to do. Llano County fails to recognize that both the Texas House and the Texas Senate rejected that exact policy change in both 2021 and 2023. Dkt. 32, paragraph 69⁶. Rather, the State Defendants and Llano County, based on improper legal grounds, have all made an unauthorized policy choice to permit such ballot tracking numbers instead of the consecutive numbers the legislature DID make the policy choice to authorize. For their part, County Defendants have wrongfully waived ballot numbering laws and erroneously relied on and acted upon the State Defendants' unauthorized policy choice.

20. In other words, the State Defendants and Llano County have usurped the role of the legislature while claiming that Plaintiffs have no right to challenge such a usurpation (one that directly harms Plaintiff Highsmith) because the policy decisions the State Defendants and Llano County made *were the role of the legislature*. The circularity of such an argument defies logic. While Llano County may indeed “[rely] upon election advisories and voting system certifications issued by the Secretary of State,” Llano County has chosen to do so (and concedes that such was “Llano County’s decision to rely”), where other counties such as Hood, Dallas, Ellis, and Jefferson, have not. Dkt. 32 ¶¶ 58, 100, 152, 154. Llano County cannot hide behind the wrongdoing of the State Defendants to avoid liability for its own unconstitutional and illegal choices and actions.

⁶ In 2021, Texas House Bill HB 3698 and Texas Senate Bill SB 1215 proposed modifying consecutive ballot numbering for electronic ballot voting systems, Tex. Elec. Code Sec. 124.062. Neither bill was granted a hearing in their respective legislative committees, and neither bill was re-introduced in the subsequent three Special Sessions of the 87th Legislature in 2021. Further, neither bill was re-introduced in the most recent Regular or Special Sessions of the 87th Legislature in 2023.

III. PLAINTIFFS HAVE STATED CLAIMS THAT WITHSTAND A RULE 12(B)(6) CHALLENGE

A. Plaintiffs have alleged procedural and substantive due process claims.

21. For the reasons already described in detail above, Plaintiffs have properly stated a procedural due process claim against Llano County. By usurping the give and take of both the Senate and House legislative processes of publicly introducing bills through the various lobbying resources utilized by Llano County, working with local Llano County House and Senate representatives, lobbying for such bills to be referred to committees, attending public committee meetings, public and expert testimony in committee hearings, floor actions, return to the originating committee, conference committee and governor's action⁷, the State Defendants and Llano County have illegally and without accountability waived, violated, and ignored ballot numbering laws that *were* passed through the legislative process of public input, debate, and scrutiny. Dkt. 32 ¶ 25, 86, 94. Although not required to, as noted *supra*, Llano County has chosen to adopt the State Defendants' unauthorized policy choices.

22. Additionally, the State Defendants and Llano County have violated due process by illegally utilizing unique ballot numbering through voting system software.

23. Llano County had a choice in selecting its ballot numbering system, and it chose illegally certified ballot numbering software and hardware that places a unique ballot identifier on in-person voters' ballots.

⁷ See "The Legislature Process in Texas" published by the Texas Legislative Council in 2022 at <https://tlc.texas.gov/docs/legref/legislativeprocess.pdf>. This document lays out the process for Senate bills and House bills. The Texas legislative process is governed by the Texas Constitution and applicable statutes and by the rules of procedure of the Senate and House of Representatives that are adopted at the beginning of a regular session.

24. The harms suffered by Plaintiffs are a direct result of Defendant Wilson's abject procedural due process failures. The Fifth Circuit has long recognized that "the due process clause of the fourteenth amendment to the United States Constitution protects against the disenfranchisement of a state electorate in violation of state election law." *Duncan v. Poythress*, 657 F.2d 691, 693 (5th Cir. 1981). Indeed,

[Federal courts have properly intervened when] the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed. Due process...is implicated in such a situation...In cases falling within such confines, we think that a federal judge need not be timid, but may and should do what common sense and justice require.

Id. at 703 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978)).

25. Like the plaintiffs in *Duncan*, Plaintiffs "ask for the election itself, as required by state law." *Id.* Plaintiffs have alleged procedural due process claims sufficient to withstand the Defendants' Rule 12(b)(1) challenge.

26. Similarly, Plaintiffs have alleged a substantive due process claim. While Llano County may believe that its blind reliance on illegal and unauthorized guidance from State Defendants, which is now known to have led to a ballot secrecy breach of unprecedented scale, is not egregious, recent events indicate otherwise.

27. There has been nothing but public outrage in response to the evidence and allegations in this lawsuit and to other ballot secrecy breaches in Texas.⁸ The House⁹ and Senate¹⁰ of the Texas Legislature both called emergency hearings to discuss breaches of ballot secrecy and the “algorithm” that was discovered by Dr. Pressley.

28. In response to the very public and recent legislative pressure arising from the Williamson County ballot breaches, which evidences the shock to the collective conscience, on June 24, 2024, the Secretary issued Election Advisory 2024-21, titled “Updated Ballot Numbering Requirements.” This new Advisory purports “to address updated requirements relating to the certification of electronic pollbook systems under Texas Election Code 31.014 and to the use of

⁸The Austin American Statesman – Texas Ballots Might Not Be So Secret as They Think, “And even if it’s only a relative handful of voters whose ballots are identified, the chilling effect could extend beyond them. Will people feel free to vote their conscience — or want to vote at all — if they fear there’s a chance of exposure and retaliation?” Last visited 7/3/2024 at <https://www.statesman.com/story/opinion/columns/2024/06/09/texans-ballots-might-not-be-as-secret-as-they-think-voter-security-elections/7399191007/>.

The Texan – Lawsuit Alleges Flaw in Texas Election Process Exposure of Voters Ballots. “The news has sent the Texas political landscape into a tailspin.” Last visited 7/3/2024 at https://thetexan.news/elections/2024/lawsuit-alleges-flaw-in-texas-election-process-exposure-of-voters-ballots/article_d8958096-187b-11ef-8ce3-bf962abd2e7d.html.

Creators by Erick Erickson – Someone Needs to Go to Jail. “This is a dangerous issue...Any person who engaged in illegal activity needs to go to jail and be an example of Texas taking the secret ballot seriously.” Last visited 7/3/2024 at <https://www.creators.com/read/erick-erickson/05/24/someone-needs-to-go-to-jail>.

CurrentRevolt – Exclusive: Hacked Ballot Proves Texas Elections In Crisis. “The fatal flaw in this specific breach is alleged to be the random numbers assigned to each ballot... This is a non-partisan issue. Both Republican *and* Democrat ballots are open to exposure.” Last visited 7/3/2024 at <https://www.currentrevolt.com/p/exclusive-hacked-ballot-proves-texas?r=1fucj3&triedRedirect=true>.

⁹ Texas House Elections Committee Hearing on June 12, 2024 regarding interim charge of Oversight of Ballot Secrecy with invited witnesses from the Texas Secretary of State, Hart InterCivic, Tx. Association of Elections Administrators, County and District Clerks Association of Texas, and Elections Systems and Software at https://tlchouse.granicus.com/MediaPlayer.php?view_id=78&clip_id=25259 (last visited June 14, 2024). Full testimony for Oversight of Ballot Secrecy at 00:59:00 – 2:20:20.

¹⁰ Texas Senate State Affairs Committee Hearing on May 29, 2024 regarding interim charge on election security with invited witnesses and public testimony. Full testimony last visited on 7/3/2024 at https://tlcsenate.granicus.com/MediaPlayer.php?clip_id=18508. Expert testimony at 2:31:00 - .5:18:24, public testimony at 12:06:10 – 13:00:00.

software methods of ballot numbering under Election Code 52.075.” Dkt. 46, p. 2 ¶ 3 and Dkt. 46-1, Appendix 4, on p. 17. Advisory 2024-21 from Dkt. 46-1 is included herein as Exhibit 1.

29. The Secretary’s new Advisory 2024-21 directs counties using electronic pollbooks that currently place a unique identifying number on each in-person voter’s ballot (ES&S counties using the ExpressLink Software on their pollbooks), including Bell County, that they “are now required to use ballot numbering methods that do not involve the use of the electronic pollbook system.” To date, Llano County has not officially announced their intentions moving forward, and their Motion does not reference any plans for the November 2024 or future elections. While Advisory 2024-21 is insufficient as a remedy for Llano County, its existence highlights both the magnitude of the public outrage regarding these ballot secrecy breaches and issues and the Defendants’ direct role in both causing and mitigating them. Until addressed by the Court, Llano County can choose to ignore the Secretary’s short-term guidance for eliminating ballot tracking through voting system software.

C. Plaintiffs have stated equal protection claims against the Defendants.

30. Texas law creates two classes of voter – those who vote by-mail and those who vote in-person at the polls. Dkt. 32 ¶ 24. Under the U.S. Constitution’s one-person, one-vote guarantee of equal protection, both of these voter classes in Texas are guaranteed equal protection of their ballot and to vote effectively and free from intimidation. State laws ensuring equal application of consecutive ballot numbering and other mandates guaranteeing a secret ballot are all laws that advance a state’s “compelling interests in preventing voter intimidation and election fraud” as noted in *Burson v. Freeman* 504 U.S. 191, 191-192 (1992) (holding that restricted zones around polling places serve to protect ballot secrecy by protecting the right to vote freely and effectively). “The right to vote is protected in more than the initial allocation of the franchise. Equal protection

applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). In cases such as this one, "the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process." *Hadley v. Junior College District*, 397 U.S. 50, 55 (1970).

31. Contrary to Llano County's contention (Dkt. 46 p. 18), Plaintiffs have alleged substantial differential treatment between voters who cast ballots by mail and voters who cast ballots in person. Plaintiff Highsmith, as an in-person voter, does not receive a consecutively-numbered ballot when she votes in Llano County, in violation of Texas law, and she is forced to utilize ballots with computerized unique identifiers placed on them by the ballot-marking device, resulting in the breach of ballot secrecy. Dkt. 32 ¶¶ 42, 52, 55, 59, 62, 107, 131, 152, 154, 161, 168, 176. Those who vote by mail receive a legally compliant ballot on which to cast their votes and are not subject to breach of secrecy. It is hard to envision how the treatment of these two classes of voters could be more disparate.

32. The Llano County Elections Administrator cannot override the Texas Constitution, particularly where it directs authority (in the form of a command) only to the Legislature to provide for ballot numbering, nor can an elections administrator simply override the U.S. Constitution's guarantees of equal protection for ballot secrecy and against ballot fraud for all its voters regardless of how they cast their ballots, whether in-person or by-mail. Dkt. 32 ¶¶ 101, 104. Casting a ballot protected from disclosure and fraud is the right of all Texas voters, not just those who cast ballots by mail, and any discrimination in this regard undermines the vote. "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for

classification of people in a way that unnecessarily abridges this right.” *Wesberry v. Sanders* 376 U.S. 1, 17 (1964); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Dkt. 32 ¶ 143.

D. Plaintiffs have stated a First Amendment claim against Defendants.

33. Finally, and for the same reasons stated above, Plaintiffs have clearly stated a valid First Amendment claim against Defendant Wilson. Defendant Wilson’s actions, as described herein, undermine, infringe upon, and abridge Plaintiff Highsmith’s right to vote freely, resulting in voter suppression, vote dilution, disenfranchisement, and debasement in violation of the First Amendment of the United States Constitution. Dkt. 32 ¶ 85 and Highsmith Declaration 32-62 ¶ 4.

34. The realistic danger is that Defendant Wilson’s actions have caused voter intimidation and the chilling and undermining of the free exercise of Plaintiff Highsmith’s votes, resulting in disenfranchisement and violating Plaintiff Highsmith’s First Amendment rights. These allegations are detailed extensively in Plaintiffs’ Amended Complaint (Dkt. 32 ¶161) and in each Plaintiff’s Declaration (Pressley 32-54 pp. 3-5, Bagwell 32-59 ¶¶ 6-7, Korkmas 32-61 ¶ 3, Highsmith 32-62 ¶ 4, Soll 32-60 ¶¶ 5-8). The harms, fears, and dangers detailed by each Plaintiff are real, individual, and personal in nature, and are not unexpected. Indeed, the Supreme Court has noted that “the failure of the law to secure secrecy open[s] the door to bribery and intimidation.” *Burson* at 201. A “secret ballot” is a venerable part of the American tradition. *Burson* at 124 (Justice Scalia concurring).

IV. THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY

35. State Defendants’ new Election Advisory 2024-21 helpfully illustrates the justiciable controversy present in this case.

36. State Defendants actually believe they have authority over ballot numbering methods in Texas and can usurp the appropriate legislative process, resulting in the

disenfranchisement of in-person voters. Plaintiffs' First Amended Complaint (Dkt. 32) outlines the illegal and constitutional errors surrounding the State Defendants' faulty interpretations and the dangerous consequences that have resulted.¹¹

37. The Fifth Circuit has already recognized the limited authority Section 52.075 grants to State Defendants, noting that "the Secretary has discretion to alter the...content of electronic ballots, but that discretion is cabined to encoding ballots (prepared by local officials) for compatibility with an electronic voting system." *Texas Alliance for Retired Americans v. Scott*, 28 F.4th 669, 673 (5th Cir. 2022). Dkt. 32 ¶ 99. State Defendants show no sign of heeding such limitation, and Bell County is blindly following their guidance.

38. Additionally, even if Advisory 2024-21 were a legal and effective remedy (which Plaintiffs do not concede¹²), the State Defendants and Llano County, based on their misunderstanding of the authority granted to them, can easily rescind Advisory 2024-21 or promulgate a new ballot numbering method completely outside legislative processes and devoid of oversight.

39. Further, County Defendants, including Llano County, can choose to implement guidance and processes promulgated by the State Defendants, although clearly erroneous and illegal.

¹¹ Ironically, Advisory 2024-21 admits that the electronic pollbooks and the voting machines are compatible **without** the computerized random unique numbering of ballots through voting system software, thus proving there is no necessity for invoking Section 52.075.

¹² The advisory is wholly insufficient because, among other things, it does not address counties, including Llano, that use the Hart InterCivic computerized ballot number tracking system through voting system software. Dkt. 32 ¶ 40, 52-56, 86.

V. CONCLUSION

40. The First and Fourteenth Amendment violations suffered by Plaintiffs as the result of Defendants' actions is one of the most epic and unprecedented failures of a state agency and county election administrators. State Defendants' and Llano County's dictatorial decisions and actions to waive and redefine ballot numbering laws in Texas and utilize ballot tracking through voting system software to place unique identifier numbers on in-person ballots, and County Defendants' reliance on same, has resulted in the actual breach of secrecy of not only Plaintiffs' ballots but more than 60,000 voters' ballots, something that has never been reported in our county's history.

41. This case raises fundamental questions regarding the absence of checks and balances for the State Defendants' and Llano County's decisions and actions and their threat to the legislature by intruding on the core and mandatory state constitutional function the legislature has to provide for ballot numbering laws in Texas.¹³ Equally concerning are the State and Llano County Defendants' failures of accountability to the people to ensure a secret ballot to prevent voter intimidation and disenfranchisement, as well as the County Defendants' unquestioning adoption of the State Defendants' illegal, erroneous, and unauthorized guidance. These issues implicate Plaintiffs' rights to equal protection and due process and their right to cast a secret ballot free from fear, intimidation, retaliation, and disenfranchisement. Through this case, Plaintiffs are requesting that the Court provide relief because their constitutional rights and those of others have been violated on such a massive scale.

¹³ Tex. Const. Art. VI Sec. 4.

PRAYER

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant Wilson's Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Rule 12(b)(1) and 12(b)(6) and grant to Plaintiffs all such other and further relief to which they may be entitled.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all parties herein by way of:

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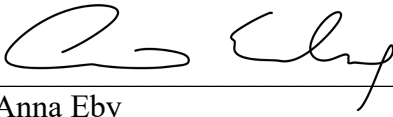
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