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-DAE

PLAINTIFFS' BRIEF ON MOOTNESS

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I. INTRODUCTION

1. Plaintiffs, in-person voters residing in Williamson, Bell, and Llano Counties, initiated this action in March 2024 against the Secretary of State (Secretary of State Defendants Jane Nelson and Christina Adkins will be referred to collectively herein as "State Defendants") and the Plaintiffs' respective election administrators (referred to collectively herein as "County Defendants"), seeking redress for constitutional violations committed by the State Defendants in, among other things, based on improper legal grounds, issuing election guidance and illegally certifying certain election equipment, and by the County Defendants, also operating on improper legal grounds, implementing such guidance and utilizing such illegally certified equipment in their elections, resulting in, among other injuries, the breaching of the secrecy of Plaintiffs' (and others') ballots in multiple elections.

2. The wrongful actions and inactions alleged by Plaintiffs affect only in-person voters in particular Texas counties, resulting in the denial of equal protection, due process, and free speech to those voters, including Plaintiffs.

3. Among other remedies, Plaintiffs have requested that their in-person ballots be consecutively numbered, as required by Texas law, and NOT be assigned a computer-generated unique identifier via voting system software and hardware (such as, in this case, by ballot tracking software on electronic pollbooks and on voting systems).

4. For the recently concluded November 2024 election, the State Defendants issued an election advisory addressing ballot-numbering methods using electronic pollbooks, and Williamson County and Bell County utilized consecutively numbered ballots. Accordingly, Williamson and Bell Counties now assert that all of Plaintiffs' claims are moot in their entirety.

5. Defendants' assertions of mootness lack both evidentiary and legal merit. Plaintiffs' claims are not moot for several reasons, as described in detail herein. Because a justiciable controversy exists between the parties, Plaintiffs should be permitted to move forward with their claims against all of the Defendants.

II. PLAINTIFFS' CLAIMS AGAINST STATE DEFENDANTS ARE NOT MOOT.

A. The Secretary of State's new Advisory 2024-21 is wholly insufficient.

6. The State Defendants voluntarily issued Election Advisory 2024-21 on June 24, 2024,[1] three months after this lawsuit was filed, and nearly five years after Plaintiffs first raised concerns regarding consecutive numbering of ballots.[2] While Advisory 2024-21 appears, on its surface, to address at least a portion of Plaintiffs' claims, an examination of the substance of the advisory shows that it is insufficient to address the merits of Plaintiffs' claims such as to render them moot.

1. Election Advisory 2024-21 is limited to ES&S counties and does not order compliance with ballot-numbering laws.

7. Although not explicitly stated, Advisory 2024-21 is directed to Texas counties that use ES&S voting systems, since only ES&S voting systems use the electronic pollbook to number ballots. Advisory 2024-21 communicates two changes to the State Defendants' in-person voting ballot marking device ballot numbering policy: (1) **prohibition** against generating "ballot numbers using electronic pollbooks" and (2) the **requirement "**to use ballot numbering methods that do not involve the use of the electronic pollbook system."[3]

[1] Dkt. 58, p. 13, June 24, 2024 Secretary of State Advisory 2024-21.
[2] Plaintiffs' First Amended Complaint, Dkt. 32, paragraph 138.
[3] Dkt. 58, p. 13, June 24, 2024 Secretary of State Advisory 2024-21.

8. While Advisory 2024-21 addresses counties using ES&S voting system software (ExpressLink) and hardware (Activation Card Printer) connected to electronic pollbooks,[4] it does not use the Secretary's authority to "order" compliance as it could have pursuant to Texas Election Code Section 31.005(c).

2. Election Advisory 2024-21 does not impact Llano County or other Hart InterCivic counties.

9. Advisory 2024-21 does not prohibit the placement of unique identifiers on voters' ballots in Llano and other counties that use Hart InterCivic voting systems (tellingly, Llano County has not alleged Plaintiffs' claims are moot), and it does not require those counties to consecutively number ballots and adhere to the other statutes that depend upon adherence to it.[5] More than 70 Texas counties use Hart InterCivic voting systems.[6] Because Hart InterCivic counties do not use electronic pollbooks to place unique identifier ballot numbers on in-person voters' ballots,[7] Advisory 2024-21 does not apply.

10. As evidence that Llano County did not change their ballot numbering practices for in-person voters for the November 2024 election, see the Declaration of Plaintiff Madelon Highsmith, attached hereto as Exhibit 1.

3. Election Advisory 2024-21 does not require counties to comply with consecutive ballot numbering laws.

11. Advisory 2024-21 does not require or order *all counties* to comply with all of Texas's consecutive ballot numbering laws. Nowhere in Advisory 2024-21 do the State Defendants advise or order counties to comply with Texas Election Code Sections 52.062 (consecutive numbering of in-person ballots), 51.006 (marking packages with ballot serial

[4] Dkt. 58, p. 13, Advisory 2024-21.
[5] Tex. Elec. Code Sections 52.062, 51.006, 51.007, 51.008, 62.007, and 62.009.
[6] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraphs 51-56 and footnote 18 documenting counties using Hart InterCivic voting systems.
[7] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraphs 40, 43, 52-54, 86, 100, 131, 148.

number *ranges*), 51.007 (documenting *range* of ballot serial numbers distributed to polls), 51.008 (documenting *ranges* of ballot serial numbers re-distributed to polls), 62.007 (requiring election officers required to verify ballot serial number *ranges*), and 62.009 (disarrange ballots for voter to select *their own* ballot number). The Advisory simply misses the mark regarding the substance of Plaintiffs' claims. The Advisory's omissions make clear that the State Defendants' constitutional violations are destined for repetition.

4. Election Advisory 2024-21 doubles down on the State Defendants' incorrect belief regarding their authority to determine ballot numbering methods in Texas.

12. According to the first paragraph of Advisory 2024-21, "The purpose of this advisory is to address updated requirements relating…to the use of *software methods of ballot numbering under Election Code 52.075*" (emphasis added).

> The purpose of this advisory is to address updated requirements relating to the certification of electronic pollbook systems under Texas Election Code 31.014 and to the use of software methods of ballot numbering under Election Code 52.075.

13. This language highlights the overarching dispute in this case: the State Defendants continue to operate on improper legal grounds and to believe that the general language of Section 52.075 gives them authority - above the Legislature - to determine ballot numbering in Texas, in direct contravention of Article VI, Section 4 of the Texas Constitution,[8] and all the consecutive ballot numbering laws enacted by the Texas Legislature.[9] This matters to this Court because the State Defendants' improper exercise of authority over ballot numbering results in ongoing constitutional violations against Plaintiffs as in-person voters.

14. Importantly, the State Defendants' incorrect belief that Section 52.075 gives them the authority to approve "software methods of ballot numbering" has the practical effect of

[8] Tex. Const. Art. VI, Sec. 4 specifies the "The Legislature shall provide for numbering of tickets…" The term "tickets" is equated to "ballots." *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex.1939). Dkt. 32, paragraph 88.
[9] Tex. Elec. Code Sections 52.062, 51.006, 51.007, 51.008, 62.007, and 62.009.

violating Plaintiffs' right to *personally* and *secretly* choose their in-person ballot number pursuant to Section 62.009 of the Texas Election Code. Because Texans who vote by mail are not impacted by the State Defendants' overreach, Plaintiffs are disparately treated, in violation of their constitutional rights to equal protection, due process, and free speech.

15. The issue of whether or not Section 52.075 of the Texas Election Code authorizes the State Defendants to waive Sections 52.062, 51.006, 51.007, 51.008, 62.007, 62.009, and 129.054 (among others), with the constitutional violations resulting therefrom, is one of the most important disagreements between the parties and remains a justiciable controversy regardless of Advisory 2024-21. Indeed, Advisory 2024-21 exacerbates the dispute, rather than mooting it.

16. The State Defendants' authorization of computerized random and unique identifier ballot numbering through voting system software ignores separation of powers, bypasses due process (including but not limited to the legislative process), and usurps and removes the process of checks and balances, ballot chain of custody, fraud detections, and ballot secrecy duly established by the Texas Legislature in Sections 51.006, 51.007, 51.008, 51.010, 62.007, and 62.009 of the Election Code, in violation of in-person voter rights and the guarantees of equal protection and due process provided by the First and Fourteenth Amendments.

17. The Supreme Court, in its recent opinion overruling *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), has made clear that agency interpretations of statutes "are *not* entitled to deference," regardless of a "long judicial tradition of according 'considerable weight' to Executive Branch interpretations."[10] Indeed, when the issue concerns the scope of an agency's own power, as it does here, this is "perhaps the occasion on which abdication in favor of the agency is *least* appropriate."[11] In *Loper*, the Supreme Court

[10] *Loper Bright Enterprises, et al. v. Raimondo*, 144 S.Ct. 2244, 2261, 2264 (2024) (emphasis in original).
[11] *Id.* at 2266 (emphasis in original).

was emphatic that it is the exclusive role of the courts, and not agencies within the Executive Branch, to decide the interpretation of a statute:

> It…makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible…agencies have no special competence in resolving statutory ambiguities. Courts do.[12]

In overruling *Chevron*, the Supreme Court held that "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[13] That is precisely the inquiry Plaintiffs request in this case, an inquiry that has not been rendered moot by any action of the State Defendants.

5. The State Defendants have not rescinded Election Advisory 2019-23 Section 13(b) or Defendant Adkins' April 2019 mass email, which conflict with new Election Advisory 2024-21.

18. The State Defendants' original offending October 2019 Advisory 2019-23, Section 13(b)[14] and Defendant Adkins' April 2019 mass email,[15] which both illegally authorized counties to waive consecutive ballot numbering and choose ballot numbering with "tracking through voting system software," are still active[16,17] and have not been repealed or rescinded by the State Defendants. This is not a mere technicality, and the State Defendants know better. In other constitutional voting litigation, the Texas Secretary of State has rescinded illegal election

[12] *Id*.
[13] *Id*. at 2273.
[14] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraphs 49, 86, 93, 100, 105, 108, 130, 134(i), 135, 151, and 169.
[15] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraph 86, regarding Adkins' April 2019 email on ballot numbering using voting system software, Dkt. 32-27, Hood County RQ0405KP Req. for AG Opinion. *See* Adkins' mass email on pp. 5-7.
[16] *See* Exhibit 2 – recent download of Texas Secretary of State Advisories currently active from 2014 through 2024. See p. 12 showing original Advisory 2019-23 is still active. Last visited on 12/16/2024 at https://www.sos.state.tx.us/elections/laws/election-division-advisories.shtml
[17] See Exhibit 3, recent download of original Advisory 2019-23 Section. See p. 3 showing Section 13(b) is still active. Last visited on 12/16/2024 at https://www.sos.state.tx.us/elections/laws/advisory2019-23.shtml#section13.

advisories[18,19] and replaced them with processes acceptable to the Court and the litigants.[20] Notably, State Defendants have not alleged that Plaintiffs' claims are moot.

19. The mere issuance of Advisory 2024-21 is inadequate to address, much less moot, Plaintiffs' claims. The State Defendants must, at a minimum, repeal Section 13(b) of Advisory 2019-23 and Defendant Adkins' April 2019 mass email to ensure consistency of the election guidance issued by the Secretary of State, prevent confusion, and guard against repetition of the constitutional violations Plaintiffs have suffered.[21]

20. In summary, Election Advisory 2024-21 is insufficient to address Plaintiffs' claims and does not moot this case because:

- Advisory 2024-21 does not apply to all County Defendants;
- There are no specific instructions to **all** counties to comply with consecutively numbered ballot laws;
- The advisory does not address, incorporate, or otherwise maintain consistency with other ballot-numbering statutes;
- The advisory is not an "order" pursuant to Tex. Elec. Code 31.005(c); and
- There is no repeal of original offending Advisory 2019-23 and Defendant Adkins' April 2019 mass email, which illegally authorized ballot tracking through voting system software in the first place.

21. These numerous omissions highlight the State Defendants' continued reliance on improper legal grounds and the technical implications of their incorrect legal interpretations. Though the constitutional violations and ballot secrecy breaches now before this Court may have been inadvertently created by the State Defendants, Advisory 2019-23 and the April mass email

[18] *See* Exhibit 5, the consent decree entered into by the parties, including the Texas Secretary of State, in the 2019 *Texas LULAC* litigation (publicly available at https://lrl.texas.gov/CurrentIssues/clips/resultsLinkClip.cfm?clipID=323556&headline=New%20emails%20say%20Abbott%20pushed%20for%20Texas%20voter%20probe%3B%20governor%20denies%20that&imagefile=19060503%2Epdf, last visited Dec. 18, 2024).

[19] Exhibit 2, p. 13 shows the offending Advisory 2019-02 from the *Texas LULAC* litigation was removed from the active list of Advisories on the Secretary's website.

[20] *See* Exhibit 4, one of the orders issued by Judge Biery in the *Texas LULAC* litigation. *Texas LULAC* provides an excellent framework for the resolution of Plaintiffs' constitutional complaints in this case, whether by agreement or by order of the Court, and illustrates why the measures taken by Defendants to date are inadequate.

[21] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraph 86, and Dkt. 32-27.

were nonetheless based on improper legal grounds and have resulted in constitutional violations and more than 60,000 in-person voters' names and votes being uniquely labeled, stored, and breached in Williamson County (at a minimum). But for County Defendants' reliance on the State Defendants' improper guidance and waiver of Sections 52.062, 51.007, 51.008, 51.009, 62.007, and 62.009 of the Election Code, these harms would not have occurred. An enforceable judgment by this Court or an enforceable consent decree, similar to that in *Texas LULAC*,[22] is necessary to permanently address the unconstitutional actions and poor legal discernment of the State Defendants and protect Plaintiffs and all in-person voters in Texas from such violations going forward.

6. Regardless of the sufficiency of Election Advisory 2024-21, the voluntary cessation doctrine prevents Plaintiffs' claims against the State Defendants from being rendered moot.

22. The Supreme Court has long recognized several exceptions to general mootness principles. One of these key exceptions (also characterized as an evidentiary presumption) is the voluntary cessation doctrine. A defendant's voluntary cessation of unlawful practices will usually not moot their opponents' challenge to those practices.[23]

23. Thus, a defendant cannot moot a case simply by ending its unlawful conduct after being sued.[24] Because litigants could defeat a lawsuit by temporarily ceasing their unlawful practices, with nothing to stop them from engaging in that original unlawful action after the court

[22] *See* Exhibits 4 and 5, respectively.
[23] *See*, e.g., *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598, 609 (2001); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287–89 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993); *Chi. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 305 n.14 (1986); *United States v. Generix Drug Corp*., 460 U.S. 453, 456 n.6 (1983); *City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S. 283, 289 (1982*); Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Allee v. Medrano*, 416 U.S. 802, 810 (1974).
[24] *See Already, LLC v. Nike, Inc*., 568 U.S. 85, 91 (2013).

dismissed the case, this exception to the mootness doctrine exists to prevent the litigant from "return[ing] to [its] old ways."[25]

24. As explained in detail in Subsection B below, the State Defendants have a pattern and practice of issuing incorrect election advisories and guidance, overstepping their authority in violation of the separation of powers doctrine, and ignoring the efforts of Plaintiffs (among others) to correct their improper legal interpretations and obtain consistency and constitutional compliance in the implementation of the Texas Election Code. Accordingly, even if Advisory 2024-21 were otherwise sufficient to moot Plaintiffs' claims (which it is not), the voluntary cessation doctrine clearly illustrates that the State Defendants' temporary cessation of their unlawful practices is intended only to avoid this litigation, not to adequately and permanently remedy the harm caused to Plaintiffs.

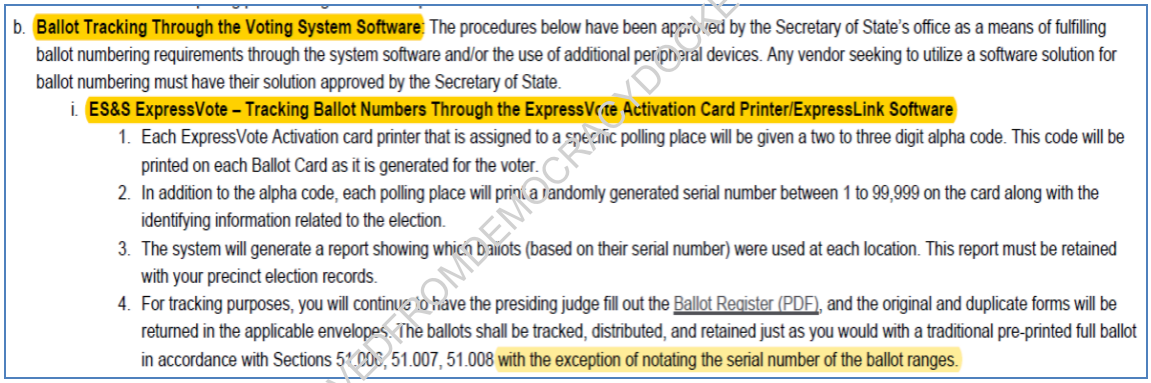
B. State Defendants have a pattern and practice of improper legal interpretation and overstepping their authority.

25. As discussed in detail in Plaintiffs' First Amended Complaint, the Texas Secretary of State's Election Division has a lengthy history of providing waivers of sections of the Texas Election Code related to in-person voters, all based on improper legal grounds and with intentional disregard for the concerns raised by Plaintiffs.[26,27,28] Indeed, the Texas Legislature enacted several amendments to the Election Code in 2021 to specifically prohibit such waivers by the Secretary of State.[29] Additionally, the 2021 Texas Legislature codified new

[25] *Allee*, 416 U.S. at 811 (quoting *Gray v. Sanders*, 372 U.S. 368, 376 (1963)). *See also*, *e.g.*, *Friends of the Earth*, 528 U.S. at 189 (same).
[26] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraphs 2, 29, 83-84, 123, 136-138, 154.
[27] *See* Pressley's Declaration #1, Dkt 32-1, pp. 4-6.
[28] *See* Dkt. 32-7, Pressley Letter to Sec. Nelson April 2023 presented to the Secretary by Dr. Pressley in a one-on-one meeting on April 13, 2023. Also, see Dkt. 32-8, Waiver Packet to Sec. Nelson April 2023 that was presented to the Secretary in that same meeting. Both documents were also presented to Defendant Adkins in a one-on-one meeting with Ms. Adkins and Dr. Pressley that also occurred on April 13, 2023.
[29] *See* Tex. Elec. Code Sections 127.306, 129.003(j), 129.054(c), and 276.019.

civil and criminal penalties for election officials who violate the Election Code.[30] Even after the codification of new prohibitions and remedies, the State Defendants have continued their pattern of waiving laws that expressly prohibit it.[31]

26. This litigation commenced in March 2024 following years of attempts to work with the Attorney General and the State Defendants[32] to correct the illegal ballot numbering waivers provided to counties through Election Advisory 2019-23 Section 13(b),[33] which illegally authorized voting system vendors, electronic pollbook vendors, and county election administrators to implement, "Ballot Tracking Through Voting System Software" numbering for in-person voters:[34,35]



b. **Ballot Tracking Through the Voting System Software**: The procedures below have been approved by the Secretary of State's office as a means of fulfilling ballot numbering requirements through the system software and/or the use of additional peripheral devices. Any vendor seeking to utilize a software solution for ballot numbering must have their solution approved by the Secretary of State.

i. **ES&S ExpressVote – Tracking Ballot Numbers Through the ExpressVote Activation Card Printer/ExpressLink Software**

1. Each ExpressVote Activation card printer that is assigned to a specific polling place will be given a two to three digit alpha code. This code will be printed on each Ballot Card as it is generated for the voter.
2. In addition to the alpha code, each polling place will print a randomly generated serial number between 1 to 99,999 on the card along with the identifying information related to the election.
3. The system will generate a report showing which ballots (based on their serial number) were used at each location. This report must be retained with your precinct election records.
4. For tracking purposes, you will continue to have the presiding judge fill out the Ballot Register (PDF), 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 51.003, 51.007, 51.008 with the exception of notating the serial number of the ballot ranges.

27. During that five year period, the State Defendants made no policy changes and refused to repeal Advisory 2019-23 Section 13(b)'s unconstitutional and illegal authorization to ignore consecutive ballot numbering and utilize randomized unique identifier ballot numbering methods via voting system software and hardware.[36]

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[30] *See* Tex. Elec. Code Sections 31.130, 33.061, and 33.0963.
[31] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraphs 134(ii) and (iii).
[32] *See* Dkt. 32-1, Pressley Declaration #1, pp. 2-6; Dkt. 32-7, Pressley Letter to Sec. Nelson April 2023; Dkt. 32-8 Waiver Packet to Sec. Nelson April 2023.
[33] *Id.*
[34] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraph 105.
[35] *See* Plaintiffs' First Amended Complaint, Dkt. 32, paragraph 138, footnote 8; paragraph 86, footnote 40; paragraphs 90, 105, 108, 130, 135, 151, 169; paragraph 105, footnote 45; paragraph 134(i), footnote 64.
[36] *Id.*

28. Almost a year prior to filing this lawsuit, Plaintiff Dr. Pressley met separately, one-on-one, with both State Defendants, Texas Secretary of State Jane Nelson and Elections Director Christina Adkins, to provide detailed information documenting a pattern and practice of election law waivers, year after year, for at least twenty-five sections of the Texas Election Code, including the waivers at issue in this case.[37]

29. The documentation provided to the State Defendants in Dkts. 32-7 and 32-8 showed a multitude of election law waivers that reveal a dangerous pattern and practice of years of improper legal interpretations and election guidance by the Secretary.[38] However, requests made in 2023 and 2024 for follow-up meetings with the State Defendants up were ignored, and the waivers remain in effect.

30. The pattern and practice of offending actions by the State Defendants over so many years, even after the Legislature codified new Election Code provisions to prevent them, is strong evidence for the need of an enforceable judgment (or consent decree) that permanently corrects the State Defendants' ongoing legal misinterpretations and enablement of constitutional violations with regard to Texas elections. Until these issues have been corrected, Plaintiffs' claims are not moot.

C. The State Defendants continue to waive certification requirements for ES&S ExpressLink and Activation Card printer.

31. As described in detail in Plaintiffs' First Amended Complaint, the ES&S ExpressLink and Activation Printer have been utilized by Williamson County (and other Texas counties) based on illegal certification by the State Defendants, as these components were never evaluated or certified by the Election Assistance Commission[39] or the Secretary of State's own

[37] *Id.*
[38] *Id.*
[39] Plaintiffs' First Amended Complaint, Dkt. 32, paragraph 128.

examiners.[40] Use of this uncertified equipment directly resulted in the breach of ballot secrecy that has resulted in Williamson County.

32. The State Defendants have not provided any evidence regarding the permanent resolution of this portion of Plaintiffs' claims. Specifically, there is no evidence that the ES&S ExpressLink and the Activation Card Printer have a) been decertified by the State Defendants because of ballot secrecy breaches in Texas, b) received software or hardware upgrades to preserve ballot secrecy (by, among other things, removing the ability to assign unique identifiers to ballots), c) been evaluated by the Election Assistance Commission, a testing lab, and Secretary of State and Attorney General examiners to preserve ballot secrecy, as required by law, and d) lawfully recertified by the State Defendants. The State Defendants' website shows no changes to certifications for the ES&S ExpressLink voting system software and Activation Card Printer since 2023.[41] As long as such capability remains and until it has been verified as non-existent through legal certification procedures, Plaintiffs' claims regarding the breach of ballot secrecy have not been remedied and, thus, not rendered moot.

33. Until such actions take place, the constitutional violations of which Plaintiffs complain – in particular, the breach of ballot secrecy – will recur, and Plaintiffs' claims regarding same cannot be moot.

D. The State Defendants continue to waive certification requirements for electronic pollbooks.

34. A fact issue exists regarding the technical capability of electronic pollbooks used by Williamson and Bell counties, among others, to assign unique identifier number to voters' ballots. The Secretary's "Texas Technical Testing Matrix for Electronic Pollbooks" defines

[40] Plaintiffs' First Amended Complaint, Dkt. 32, paragraph 127.
[41] *See* Exhibit 6, Secretary of State's website for Voting System Examination(s) and Status for Election Systems & Software, at https://www.sos.state.tx.us/elections/laws/ess_system.shtml, last visited on 12/17/2024, pp.1-2.

standards for which an independent NIST-certified testing laboratory would evaluate the technical capability of the software and hardware of electronic pollbooks, and the determination of such ballot numbering capabilities were not part of the changes included in Advisory 2024-21. In fact, those technical standards have not been updated since 2019.

35. While the State Defendants slightly modified the electronic pollbook "Functional Standards" to require that a "peripheral device must not assign a ballot number to those ballots,"[42] this modification was wholly insufficient to address Plaintiffs' claims. It is not enough for a peripheral device to not assign a ballot number. The peripheral device should not have the *capability* to assign a ballot number, as it is this capability that has enabled the breach of ballot secrecy.[43,44] As long as such capability remains, Plaintiffs' claims regarding the breach of ballot secrecy have not been remedied and, thus, not rendered moot.

36. Furthermore, there remains a dispute between the parties regarding the classification by the State Defendants of the ES&S ExpressLink voting system software and Activation Card Printer hardware installed and connected to the Williamson and Bell County electronic pollbooks as "peripheral devices." In fact, the ExpressLink software and Activation Card Printer are components of the ES&S EVS 6.3.0.0 system, as Plaintiffs' evidence shows, and, furthermore, are illegally connected to external networks, including the internet, in violation of the Election Assistance Commission's VVSG 1.0 federal standards and Texas Election Code Section 129.054(a) (which State Defendants are specifically prohibited from waiving).

[42] Dkt. 58, Exhibit C, p. 14-50 (emphasis added).
[43] Plaintiffs' First Amended Complaint, Dkt. 32, paragraphs 12-16 28, 47, 54, 58, 105 and image from Advisory 2019-23 Section 13(b), which explicitly states, "**Ballot Tracking Through Voting System Software…ES&S ExpressVote – Tracking Ballot Numbers Through the ExpressVote Activation Card Printer/Expresslink Software**", 108, 112.2, 116, 119-120, 130, 135, 161, 165-166, 168-169.
[44] Plaintiffs' First Amended Complaint, paragraph 115; Dr. Walter Daugherity's Declaration 32-53, paragraphs 7-15.

37. As long as these components are incorrectly classified and illegally connected to an external network, Plaintiffs' claims are not moot.

E. The State Defendants have not entered into a legally binding consent decree to cease all actions that breach ballot secrecy and violate Plaintiffs' constitutional rights.

38. Since the filing of this case nine months ago, and following five years of ignoring Plaintiffs' requests to rectify the constitutional violations at issue here, the State Defendants have taken minimal steps to address Plaintiffs' claims, and the actions they have taken demonstrate a continued misunderstanding of and/or disregard for the legal issues at the heart of this case. It is apparent that the State Defendants will not make permanent changes of their own accord to remedy the constitutional violations being suffered by in-person voters in Texas.

39. The present case was brought to secure federal guarantees of one-person one vote, ballot secrecy, and equal protection and due process for Plaintiffs, and others similarly situated in Texas, as in-person voters. Until Plaintiffs receive an enforceable judgment or legally binding consent decree, violations of the U.S. Constitution's First and Fourteenth Amendments will recur.

III. PLAINTIFFS' CLAIMS AGAINST COUNTY DEFENDANTS ARE NOT MOOT.

A. Williamson County and Bell County's voluntary changes to their ballot numbering procedures were limited to the November 2024 election and insufficient to moot Plaintiffs' claims.

40. Similar to the State Defendants' Advisory 2024-21, the actions taken by Williamson and Bell Counties applied only to the November 2024 election, showing no evidence of a permanent policy change.[45] Further, even if these actions were not, on their face, limited to the November 2024 election, neither Williamson nor Bell County has legally implemented a

[45] *See* Williamson County's Motion, Dkt. 58, p. 12 (Item 1) and Bell County's Motion, Dkt. 60-1, p. 1 (Item 1), both showing that the respective Election Boards for Williamson and Bell Counties met to procure supplies for the "November 2024 election." There is no evidence that these meetings approved anything for future elections.

permanent solution, as only election administrators have the authority to establish ballot numbering procedures for their respective counties.[46]

B. Llano County has not changed its ballot numbering practices.

41. Meanwhile, as discussed herein, Llano County made no changes to its ballot numbering practices for the November 2024 election and, like the other County Defendants, has offered no evidence of a permanent, sufficient, and legally binding policy change. As detailed in Plaintiff Highsmith's Declaration, nothing has changed in Llano County elections that could make Plaintiffs' claims moot.[47]

C. County Defendants have a pattern and practice of misinterpreting election law and abdicating legal responsibility to the State Defendants.

42. Similar to the State Defendants, County Defendants continue to misinterpret election law and to confuse who has the authority to determine ballot-numbering methods. The Election Code is clear that a county election administrator has the sole authority to determine the ballot-numbering methods for a county's elections.[48] Nevertheless, County Defendants have continued their historic practice of blindly relying on the State Defendants' incorrect legal guidance and justifying the actions that have harmed Plaintiffs by claiming such behavior was either approved or mandated by the State Defendants.

43. First, as described in detail *supra*, Advisory 2024-21 was insufficient to moot Plaintiffs' claims and, as such, even if Advisory 2024-21 had the effect of a legally binding order on Texas counties (which it does not), Williamson County and Bell County's blind reliance on it cannot moot Plaintiffs' claims against them.

[46] Tex. Elec. Code Sections 52.062, 51.006, 51.007, 51.008, 62.007, 62.009, and 129.054(a).
[47] *See* Exhibit A.
[48] *See* Tex. Elec. Code Sec. 52.062. *See also* Texas Attorney General 2022 Opinion No. KP-0422 ("[b]ecause the [Texas] statutes do not vest ballot-preparation or supervisory authority in any other entity, the elections administrator has sole authority to select the numbering.").

44. Next, regardless of the sufficiency of Advisory 2024-21 and of the County Defendants' actions with respect to the November 2024, a justiciable controversy remains regarding the legal authority and responsibility of the State and County Defendants with regard to the adoption and implementation of ballot-numbering methods. So long as this dispute exists, with its attendant confusion amongst the Defendants, the harms of which Plaintiffs complain are substantially likely to recur.

45. Plaintiffs challenge election guidance through the prior Advisory 2019-23 Section 13(b) and Defendant Adkins' 2019 mass email promulgated by the Secretary of State to the County Defendants[49] and the subsequent ballot numbering policies implemented by the County Defendants in response to the 2019 guidance (Dkt. 32 paragraphs 93, 105, 108, 130, 135, 151, 169). From the County Defendants' perspective, they are simply following the advisories of the State Defendants, which the County Defendants seem to believe they have no discretion to disregard even if those advisories are based on improper legal grounds. Indeed, Williamson County claims that Election Advisory 2024-21 is, in essence, non-challengeable by Elections Administrator Escobedo.[50] In other words, Williamson and Bell counties believe they are bound to follow the Secretary's erroneous guidance in Advisory 2024-21, which specifically claims that Section 52.075 gives them the authority to provide for and define ballot numbering methods in Texas, even though that guidance is based on improper legal grounds and violates Texas law.[51]

46. On the other hand, the State Defendants have taken the position that they simply render advice and guidance to counties, that they have not imposed any burden on the counties, and that it is the counties' responsibility to establish and implement their respective election

[49] Dkt. 32-26, p. 3 and Dkt. 32-27.
[50] *See* Dkt. 58, p. 5.
[51] *See* Tex. Const. Art. VI, Sec. 4; Tex. Elec. Code Sections 52.075, 51.006, 51.007, 51.008, 62.007, 62.009, 129.054(a), among others.

policies and procedures.[52] While this is belied by the fact that the Secretary of State IS statutorily authorized to issue orders in limited instances (*see* Tex. Elec. Code Sec. 31.005(b)), it is true that the State Defendants have only issued advisories, not orders, relevant to this case.

47. Because the Defendants cannot even agree amongst themselves as to where the ultimate authority and responsibility lie to remedy the wrongs of which Plaintiffs complain, this Court's involvement remains necessary, especially in light of the severe ballot secrecy breach that has impacted Plaintiffs and more than 60,000 other voters in Williamson County.

D. The voluntary cessation doctrine applies because County Defendants have presented no evidence of permanent policy changes.

48. Far from a "conclusive abandonment of the challenged policy" (Dkt. 58, p. 5), County Defendants have wholly failed to offer any competent evidence establishing the implementation of permanent policy changes that would moot Plaintiffs' claims. The cases cited in Williamson County's 12(b) motion to dismiss for mootness are instructive, as they perfectly highlight what is missing in this case.[53]

49. Here, County Defendants have offered no evidence demonstrating a permanent policy change or a "commitment" to this Court to make such a change, unlike the *Sossamon* and *Coalition* cases. Furthermore, outside of a court order, any decisions made today by County officials are not binding on any of their successors; therefore, Plaintiffs continue to have a personal stake and are not permanently protected, as the harm caused remains capable of repetition. The County has not presented evidence to make it "absolutely clear" to the Court that

[52] *See* Dkt. 46, p. 23.

[53] *See, e.g.*, *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009), aff'd, 131 S. Ct. 1651 (2011) (TDCJ director's affidavit explaining revision to policy in question); *Coalition of Airline Pilots Ass'n v. F.A.A.*, 370 F.3d 1184 (D.C. Cir. 2004) ("The agencies' commitment to draft new regulations…a commitment made both to this court and in the formal entry in the TSA rulemaking dockets…").

the alleged wrongful actions of violating and ignoring ballot numbering laws in Texas will not recur.[54]

50. Williamson County and Bell County's timing and actions appear to be an attempt at gamesmanship for the purpose of simply making this litigation go away. The Court may assess a defendant's motives by assessing whether the timing of cessation of the unlawful behavior is suspicious.[55]

51. Finally, none of the County Defendants' actions (or inactions in the case of Llano County) remedy the collateral damage that has occurred and is likely to recur. In addition to ballot secrecy breaches that cannot be undone, the data remains in the possession of the County Defendants' employees, vendors, and agents and is still vulnerable to access and misuse, whether or not it is protected from disclosure in response to public information requests.[56] This harm is real and ongoing, and none of the Defendants have done anything to remedy it.

E. County Defendants have not established how the unique identifier voter data will be permanently protected from disclosure or use, and the extent of the ballot secrecy breach must still be determined.

52. County Defendants have provided nothing to show how the unique identifier voter data at issue in this case will be permanently protected from disclosure or use, nor have Plaintiffs had the opportunity to determine the true extent of the ballot secrecy data breach, including to whom such data has been provided or otherwise made available.

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[54] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc*. at 189). *See also, e.g., Adar and Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) ("Voluntary cessation of challenged conduct moots a case, however, only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'") (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

[55] *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020) and *Texas v. Biden*, 20 F.4th 928, 963–64 (5th Cir. 2021) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation omitted)), rev'd and remanded on other grounds, 142 S. Ct. 2528 (2022).

[56] Dkt. 58, p. 5.

53. Until Plaintiffs understand the scope of the data breach and permanent corrective actions are ordered by the Court and/or consented to by the Defendants to stop the bleeding, voters are at continued risk of ballot secrecy breaches and harm, and the harm Plaintiffs have already suffered will continue to compound.

54. When Plaintiffs amend their Complaint pursuant to the Court's direction, they will include a request for either a final judgment or a consent decree that includes, at a minimum, the following relief:

- County Defendants, along with their agents and vendors (including, at a minimum, ES&S, Tenex, Votec, KnowInc, and Hart InterCivic), should reveal any and all entities and individuals that have or had access to voter ballot unique identifier data since the collection of such data was authorized in the Secretary's Advisory 2019-23 and Adkins' 2019 mass email.
- County Defendants, along with their agents and vendors, should consent to destroying all voting system software ballot unique identifier data that exists in their databases so no access can be made moving forward.
- County Defendants, along with their agents and vendors, must agree to not reveal, sell, copy, record, retain, or otherwise utilize any voter secrecy data moving forward.

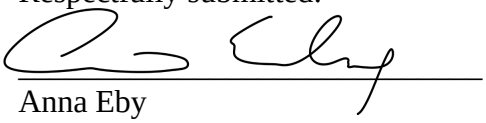
55. Absent the above remedies, it is clear that Plaintiffs' claims of federal and state constitutional violations are not moot and that the ongoing harm to in-person voters will continue.

CONCLUSION AND PRAYER

Because Plaintiffs' claims are not moot, and a justiciable controversy remains between the parties, Plaintiffs respectfully request that this case be permitted to move forward to discovery and, ultimately, to resolution.

Plaintiffs also request that the Court grant to them 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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on this 18th day of December, 2024, to-wit:

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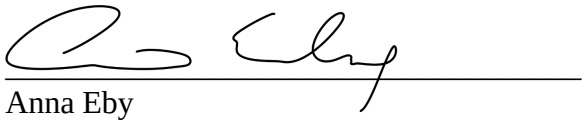

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