

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

KENNETH ZIMMERN, A Harris County
Registered Voter, WILLIAM SOMMER, A
Harris County Registered Voter, and CAROLINE
KANE, A Harris County Registered Voter,

Plaintiffs,

v.

Civil Action No. 4:24-cv-04439

JUDGE LINA HIDALGO, in her official
capacity as County Judge for Harris County, Texas
TENESHIA HUDSPETH, in her official
capacity as County Clerk for Harris County, Texas,

Defendants.

**PLAINTIFF'S AMENDED REPLY IN SUPPORT OF SUMMARY
JUDGMENT**

Plaintiffs urge the Court to conduct an in-person, oral hearing so counsel may demonstrate how a vote may be easily ascertained from public records created and maintained by Harris County.

INTRODUCTION

Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment does not oppose any argument or dispute a material fact. Instead, Harris County's response reinforces Plaintiffs' positions on law and facts. First, the County's response does not confront at all the Plaintiffs' position that voters have a First and Fourteenth Amendment political privacy right to a secret ballot. Second, The County does not deny that it collects and maintains data sufficient to determine a voter's vote. The central facts that give rise to Plaintiffs' claims remain undisputed: the election records system chosen and maintained by Harris County enables the identification of how certain voters voted, thereby compromising the constitutionally protected right to ballot secrecy.

While some voters enjoy a secret ballot, others do not. A public policy which protects some voters, but not all, is constitutionally infirm.

This case is about safeguarding the constitutional right to a secret ballot. Plaintiffs seek only what the law already should promise: that no voter's ballot may be easily traced back to them through government-maintained records. The undisputed evidence shows that Harris County's recordkeeping system includes (1) Cast Vote Records (CVRs) linked to polling locations and ballot styles, (2) electronic poll books that log voter check-in times, and (3) publicly available voting rosters. In combination, these records make it possible, particularly in small

precincts or low-turnout elections, to identify specific voters' ballots with extraordinary ease.¹

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¹ It is also possible to develop an algorithm which first utilizes the easily known ballots and then learns tens of thousands of more voters' votes. *See* Affidavit of Weible, ECF No. 33-2, at 5.

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Christina Worrell Adkins, Election Advisory No. 2024-20, Texas Secretary of
State, <https://www.sos.state.tx.us/elections/laws/advisory2024-20.shtml>. 2, 3

REPLY ARGUMENT

The County's response does not confront (either substantively or in passing) Plaintiffs' assertion of a constitutional right to a secret ballot. This is, of course, a legal question for the court to decide. It is at the heart of the dispute. Plaintiffs have fully briefed the Court on this issue. The County is silent.

Similarly, there is no real dispute over whether a voter's vote may be easily learned – both by private citizens and government officials. The County's response fails to create a genuine dispute of a material fact. The affidavit submitted by Defendant County Clerk Hudspeth does not contradict the Plaintiffs' summary judgment evidence which includes the interrogatory answers of the County and now, Defendant Hudspeth's affidavit. Her affidavit is enough to carry any burden that a voter's vote can easily be learned.

“It is not within the job duties of any election staff members employed by the Harris County Clerk's office to access election records, except as necessary to carry out duties imposed on my office by the Texas Election Code and other laws such as open records laws. To my knowledge, no member of the Harris County Clerk's Office election staff has ever accessed election records, or the data and information contained in those records, in order to learn how a voter voted. Any such access would be unauthorized.” ECF No. 36-1, at 3, ¶ 12.

What Defendant Hudspeth omits says it all. She does not say easily learning how a voter votes is impossible. She does not say government officials or the public cannot, through accessing records she is statutorily required to keep and make public, learn how a voter voted. She did not dare mention it has never happened,

because it is a well-publicized fact that it already has.² Even the Texas Secretary of State admits that the county collects and maintains data which allows voters' votes to be known. *See* Texas Secretary of State Election Advisory No. 2024 – 20 (June 6, 2024) (Exhibit 1).

I. UNDISPUTED FACTS SUPPORTING PLAINTIFFS' CLAIMS

The summary judgment record contains a detailed, consistent, and unrebutted account of how Harris County's election system enables vote traceability. The following material facts are supported by the Defendant Hudspeth's Affidavit, Defendants' verified responses to Plaintiffs' interrogatories, and Defendants' own pleadings and admissions. Critically, Defendants do not genuinely dispute these facts, nor do they offer any expert analysis or alternative evidence to undermine them. Attached as Exhibit 2 is an Affirmation from Barry Wernick which includes a step-by-step process of how to learn of Joseph Trahan's vote, with permission. Mr. Trahan's CVR is Exhibit 3.

² Natalia Contreras, et al., Texas Officials Compromised Ballot Secrecy As They Increased Election Transparency, The Texas Tribune, (May 29, 2024), <https://www.texastribune.org/2024/05/29/texas-ballot-compromised-election-security-transparency/>; Tommy Oliver, EXCLUSIVE: Hacked Ballot Proves Texas Elections in CRISIS, Current Revolt, (May 22, 2024), <https://www.currentrevolt.com/p/exclusive-hacked-ballot-proves-texas>; Current Revolt, Voter Ballot Belonging to Democrat Representative Identified, Current Revolt, (Jun 1, 2024), <https://www.currentrevolt.com/p/voter-ballot-belonging-to-democrat>.

A. Harris County’s Election System Produces and Discloses Records That Can Be Matched.

1. Electronic Poll Books Record the Time Each Voter Checks In.

- As Defendants admit in Interrogatory No. 3, the electronic poll books used at vote centers produce and store a timestamp showing when each voter is accepted to vote. This information is retained, stored and subject to open records requests to be publicly released. ECF No. 35, at 28.³ The Texas Secretary of State’s Advisory No. 2024 – 20, “Emergency Guidance on Voter Privacy,” June 6, 2024, recommends redacting the voter’s check-in time, but that information is known by the County and subject to open records request to enable the audit the election results. *See* Tex. Elec. Code § 1.102; Attorney General Opinion KP – 0463 (May 1, 2024).
- Defendant Hudspeth confirms in her affidavit (¶11) that “electronic poll books record information at the time that the voter checks in to vote.” ECF No. 36-1, at 3.

2. Cast Vote Records Contain Polling Location and Ballot Style Information.

³ If a voter’s time and location of voting is not obtained and recorded at the time of check-in, a voter could vote multiple times at multiple locations.

- Defendants admit in Interrogatory No. 6 that CVRs “list the polling location where a ballot was cast.” ECF No. 35-1, at 29.
- Defendant Hudspeth (¶9) also confirms that Harris County’s Hart Verity system generates CVRs, which record voters’ selections electronically and are linked to the polling place. ECF No. 36-1, at 3.
- Ballot styles are tied to a voter’s “Precinct or Precinct Sub.” *See* Defendants’ Answers to Interrogatory No. 5. ECF 35-1, at 29.

3. Voting Rosters Are Publicly Available and Identify Voters by Polling Location.

- Defendants concede that voting rosters listing voters’ names and their polling locations are publicly released after elections. *See Answer*, ECF 34 at 6.
- Hudspeth does not dispute that these rosters can be combined with other records to identify who voted and where. *See* Hudspeth Affidavit, ECF 36-1.

4. Low-Volume Voting Periods Enable Vote Reconstruction.

- The combination of check-in time (recorded), polling location (in CVRs and rosters), and ballot style (tied to geography) means that in small windows (e.g., early morning at a single location) individual

votes can often be matched to specific voters. *See* Wernick Affidavit, ECF 35-1, at 5 ¶¶ 7-9.

- Defendants offer no rebuttal evidence or expert analysis challenging this method of linkage.

5. The Secretary of State’ Advisory 2024 – 20 Admits Voters’ Ballots are Not Secret.

- “Recent events have highlighted how public information laws could impact a voter’s right to a secret ballot,” writes the Texas Secretary of State in her advisory 2024 – 20., Exhibit 1, p. 1. All the information the County is required by statute to collect is subject to open records requests. Tex. Elect. Code § 1.012.
- There is no question the County collects the data necessary to learn how a voter votes. So, Secretary Nelson advises, “If an election official receives a public information request for specific election records and/or ballot images and the county election official determines that producing the records in their original form could compromise a voter’s right to a secret ballot, the official should consider additional redactions in consultation with their county or district attorney and public information coordinator.” Exhibit 1, p. 2.

- Secretary Nelson further writes, “If a county election official decides that any of the above-referenced information should be redacted in response to a particular public information request, the official must obtain the requestor’s consent to redact such information or seek an open records ruling from the Attorney General authorizing the redactions in that specific circumstance.”

Exhibit 1, p. 3.

B. Clerk Hudspeth’s Office Maintains and Discloses All Election Records at Issue.

1. Clerk Hudspeth Is the Custodian of All Election Records at Issue.

- Both Hudspeth’s affidavit (¶3) and Texas Election Code § 66.001(1) establish that she is the general custodian of election records in Harris County, including ballots, printed vote records (PVRs), cast vote records (CVRs), electronic poll books, and voting rosters. ECF 36-1, at 1-2, ¶ 3.

2. All Staff in the Clerk’s Office Have Access to These Records.

- In Defendants’ Answers to Interrogatory No. 10, the County admits that every election staff member in the County Clerk’s Office has access to pollbooks, rosters, ballot images, and CVRs. They provide a list of over 200 individuals with such access. ECF 35-1, at 31-36.

- Defendant Hudspeth states in her affidavit (¶13) that “Elections staff in the Harris County Clerk’s Office do not have access to PVRs,” “printed vote record”) (ECF No. 36-1, at 3), but this statement directly contradicts the County’s Interrogatory Answer No. 10, which affirmatively states: “In the process of carrying out functions required by the Texas Election Code, all Harris County Clerk’s Office election staff have access to look at the pollbooks, voter rosters, ballot images and cast vote records.” ECF 35-1, at 31.

3. The County Has Conducted No Audit of Ballot Secrecy Risks.

- In the Defendants’ Answer to Interrogatory No. 8, Defendants admit that Harris County has never conducted any audit or assessment of whether the election records the County collects and produces can be used to trace ballots to individual voters. ECF No. 35-1, at 30.

4. The County Has Received a Voter Privacy Complaint.

- The County acknowledges in Interrogatory No. 9 that at least one complaint relating to ballot secrecy was received in May 2024 from a candidate concerned about vote traceability. No investigation or policy change followed the complaint. ECF 35-1, at 31. (“Defendants have not had any internal discussions related to concerns about ballot secrecy or the traceability of individual votes since September 1, 2023.”)

II. Defendant's Miscellaneous Arguments

Defendants advance several random arguments in opposition to summary judgment. None creates a genuine dispute of material fact, nor do they alter the factual conclusion that Harris County's election system enables the tracing of ballots to individual voters and treats voters unequally. This section addresses the three main arguments advanced in Defendants' response:

A. Judge Hidalgo Is a Proper Defendant Under § 1983.

Defendants contend that summary judgment must be denied as to Judge Hidalgo because she is not a final policymaker for the conduct at issue. Plaintiffs sue Judge Hidalgo in her official capacity as the chief executive officer of Harris County, pursuant to longstanding Fifth Circuit precedent holding that county officials sued in this capacity are stand-ins for the county itself. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Judge Hidalgo plays an active policymaking role in Harris County's election system because she and the Commissioners Court control voting system approvals. Plaintiffs do not allege that Judge Hidalgo directly administers elections or is personally liable, but that she is the final County policymaker responsible for selecting and maintaining the system that enables ballot traceability.

B. Plaintiffs Pleaded Proper § 1983 Claims

As the Fifth Circuit has recognized, the Civil Rights Act, 52 U.S.C. § 1983 requires a showing that “an official policy” caused the constitutional violation. *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010). Here, Plaintiffs challenge the County’s policies of collecting, storing, and disclosing election records in a manner that facilitates vote tracing. Plaintiffs are not required to show that a specific staff member connected a particular voter to a particular vote. Harris County adopted and used, as a matter of public policy, an election system that allows both the county government and the public to learn how a voter voted. Additionally, the election system protects the privacy of some voters, but not all, without a rational basis, evidencing a § 1983 unequal treatment claim. *Gibson v. Tex. Dep’t of Ins. – Div. of Workers’ Comp.*, 700 F.3d 227, 238 (5th Cir. 2012) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

C. Plaintiffs’ Evidence Is Admissible and Unrebutted

Defendants object to two declarations submitted by Plaintiffs, those of Barry Wernick and Rick Weible, but offer no contrary expert testimony, technical rebuttal, or independent factual analysis. Their objections are unavailing. The testimony of both Mr. Wernick and Mr. Weible is direct, clear, and based upon their personal knowledge and not contradicted.

1. Defendants Mischaracterize the Nature and Scope of the Expert Declarations

- Wernick and Weible describe how vote tracing is technically possible using election records that are publicly available or acknowledged by Defendants to exist.
- Both affiants explain the methodology and reasoning by which vote patterns can be de-anonymized under specific conditions, particularly in small precincts or short time windows.
- Defendants assert that these affiants are not qualified experts yet offer no Daubert motion or alternative analysis. Defendant Hudspeth is in a position to rebut their methodology but does not; she simply states that she does not authorize staff to conduct such tracing.

2. Defendants' Objections Are Procedural and Unsupported

- The affidavits are based on personal knowledge, and to the extent they rely on technical methods, they are admissible under Fed. R. Evid. 701 and 702.
- Defendants' own discovery responses confirm the accuracy of the data points relied on (e.g., CVR content, check-in times, and ballot styles). *See* Defendants' Answers to Interrogatories, ECF 35-1.

D. Even Isolated or Probabilistic Tracing Violates Ballot Secrecy

Defendants do not contest that in some cases, particularly during early morning voting, low-turnout periods, or precincts with few registered voters,

individuals' votes can be matched with high confidence. In such scenarios, the County's system functions in a manner inconsistent with the right of ballot secrecy.

Indeed, the ability to trace even a small percentage of ballots introduces serious risks and constitutional intrusions:

- **Chilling Effect:** Voters aware of the traceability may refrain from voting or alter their preferences.
- **Partisan Surveillance:** Election staff or observers may use these tools for inappropriate political or retaliatory purposes.
- **Erosion of Trust:** Public confidence in the integrity and privacy of elections is undermined.
- **Retribution, Coercion and Intimidation:** Job offers, college admission, housing and lending options, access to medical care – the list is unending – can be conditioned upon how a person votes.

The Fifth Circuit Court of Appeals has long held that the loss of First Amendment freedoms, even for a moment, “unquestionably constitute irreparable injury.” *Croft v. Gov. of Texas*, 562 F.3d 735, 745 (5th Cir. 2009) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

CONCLUSION

For the foregoing reasons, Plaintiffs request an in-person, oral hearing and pray this Court grant the Plaintiffs' Motion for Summary Judgment, the relief

requested in the Amended Complaint and any further relief to which Plaintiffs may be entitled.

Respectfully Submitted,

Attorneys for Plaintiffs,

Joseph M. Nixon
Texas Bar No: 15244300
Federal Bar No: 1319
Joseph M. Nixon
Public Interest Legal Foundation, Inc.
107 S. West Street, Ste 700
Alexandria, VA 22314
(713) 550 - 7635
jnixon@publicinterestlegal.org

J. Christian Adams
Virginia Bar No: 42543
Public Interest Legal Foundation
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 963-8611
adams@publicinterestlegal.org
admitted pro hoc

Samuel Swanson
District of Columbia Bar No: 90027583
Public Interest Legal Foundation, Inc.
107 S. West Street, suite 700
Alexandria, VA 22314
(703) 963-8611
sswanson@publicinterestlegal.org
admitted pro hoc

/s/ Joseph M. Nixon
Joseph M. Nixon
Public Interest Legal Foundation, Inc.

107 S. West Street, Ste 700
Alexandria, VA 22314
(703) 745-5870
jnixon@publicinterestlegal.org

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2025, a true and correct copy of the foregoing pleading was electronically filed using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Joseph M. Nixon
Joseph M. Nixon

Dated: August 7, 2025.

/s/ Joseph M. Nixon
Joseph M. Nixon
Public Interest Legal Foundation, Inc.
107 S. West Street, Ste 700
Alexandria, VA 22314
(703) 745-5870
jnixon@publicinterestlegal.org