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

KENNETH ZIMMERN; WILLIAM SOMMER; and CAROLINE KANE, *Plaintiffs,* v. JUDGE LINA HIDALGO, *in her official capacity as County Judge for Harris County, Texas*; and TENESHIA HUDSPETH, *in her official capacity as County Clerk for Harris County, Texas*, *Defendants.*	Case No. 4:24-cv-04439

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

I. Nature of the Case. Previous filings, including Defendants' motion to dismiss, ECF No. 8-1, and Defendants' response in opposition to Plaintiffs' motion for summary judgment, ECF No. 36, summarize this case. Plaintiffs bring claims under 42 U.S.C. § 1983 against Harris County Judge Lina Hidalgo ("Judge Hidalgo") and Harris County Clerk Teneshia Hudspeth ("Clerk Hudspeth")—in their official capacities only—for alleged violations of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiffs' claims arise from provisions of Texas law that require county clerks throughout the state to maintain and make accessible to the public certain election records. The Texas Legislature enacted these laws because it views public access to election records as necessary to ensure that elections are fair, transparent, and auditable. Plaintiffs allege that election records contain information that may make it possible for third parties to ascertain how certain voters voted.

II. Stage of the Proceeding. The Court has not ruled on Defendants' Rule 12(b)(1) and (6) motion to dismiss, ECF No. 8. The Court held a hearing concerning that motion on February 4, 2025 and a conference on February 28, 2025. At the latter, the Court permitted Plaintiffs to amend their complaint and the parties to serve interrogatories. ECF No. 32. Plaintiffs filed an amended complaint, ECF No. 33, Defendants filed an answer, ECF No. 34, and the parties exchanged interrogatories. Other motions pending before the Court include Plaintiffs' motion for summary judgment, ECF No. 35, and Defendants' motion to strike Plaintiffs' reply in support of their motion for summary judgment, or for leave to file a surreply and objections, ECF No. 39.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

I. A court must dismiss an action if it "determines at any time that is lacks subject-matter jurisdiction." Fed. R. Civ. P. 12(h)(3). Have Plaintiffs met their burden of establishing

subject-matter jurisdiction when their claims are: based on speculative and generalized injuries that are not fairly traceable to Defendants and not redressable by this Court; barred by the Eleventh Amendment; and moot, not ripe, and non-justiciable under the political question doctrine?

II. The same legal standard for motions to dismiss applies to Rule 12(c) motions for judgment on the pleadings. *See Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017). A plaintiff's claims must be legally viable and the complaint must contain sufficient well-pleaded facts to plausibly support those claims. *E.g.*, *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir. 2012). If a Rule 12(c) or 12(b) motion is considered as a Rule 56 motion for summary judgment, summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For an issue that the nonmoving party bears the burden of proof, the summary-judgment movant satisfies its initial burden by showing an absence of evidence to support an essential element of the nonmoving party's case and that judgment should be entered in the movant's favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Can Plaintiffs avoid dismissal, judgment on the pleadings, or alternatively summary judgment, when neither their amended complaint nor any evidence establishes essential elements of their claims and their legal theories not viable?

SUMMARY OF THE ARGUMENT

I. The Court should dismiss for lack of subject-matter jurisdiction. Plaintiffs lack standing because their asserted injuries are generalized grievances based on speculation, not fairly traceable to Defendants, and not redressable by this Court. Their claims are also barred by the Eleventh Amendment and mootness, ripeness, and political question doctrines.

II. The Court should grant Defendants' motion to dismiss and/or motion for judgment on the pleadings because Plaintiffs fail to plead essential elements of a § 1983 claim and fail to state viable First Amendment, due process, and equal protection claims. In the alternative, the Court should grant summary judgment because there is an absence of evidence to support the claims.

BACKGROUND

Texas law requires statutorily-designated custodians to preserve "election records" and make them available to the public for inspection following an election. TEX. ELEC. CODE § 1.012; *id.* § 66.058. Control of these records is entrusted to the "general custodian of election records," which, in this case, the Texas Election Code defines to be "the county clerk of each county." *Id.* § 66.001(1). The Texas Legislature enacted these provisions to prevent fraud, promote public trust, and ensure the auditability of elections. *Id.* § 1.0015.

Plaintiffs assert that election records within the custody of the Harris County Clerk contain pieces of information that, "when combined," may "allow county employees and the public to determine how some voters voted." ECF No. 35 at 6. By Plaintiffs' own admission, this alleged phenomenon affects "some, but not all, voters." *Id.* Indeed, Plaintiffs' theory is that elections records can only be used this way in highly unique circumstances: i.e., only if a voter is the only individual from a given precinct to vote at a particular polling place during a particular election period. ECF No. 33 at ¶ 51 (referring to affidavit of Barry Wernick as "explain[ing] . . . how voters' ballots are made known by this system implemented by the Defendants in Harris County"); Second Barry Wernick Aff., ECF No. 35-1 at ¶ 9 (stating that "matching ballots and ballot selections to voters in polling locations" is possible "where a voter is the only voter from a precinct to cast a ballot at a particular polling location during a particular voting period—either during Early Voting

or on election day."). Among other fatal defects in their case, Plaintiffs fail to show that they have suffered injury in this manner.

ARGUMENT

I. THE COURT SHOULD DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION.

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). The Court should dismiss this action because: (1) Plaintiffs lack Article III standing; (2) the Eleventh Amendment bars their claims; and (3) their claims are moot, not ripe, and barred by the political question doctrine.

Defendants have moved to dismiss on these grounds. ECF No. 8. Plaintiffs' amended complaint fails to materially alter their factual allegations or legal theories. The Court should apply that motion to the amended complaint and dismiss, and Defendants hereby incorporate the arguments in that motion. *See Rountree v. Dyson*, 892 F.3d 681, 683–84 (5th Cir. 2018) ("Defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending. Rather, if some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading." (cleaned up)); Fed R. Civ. P. 10(c) (adoption by reference). In any event, Rule 12(h)(3) dismissal is warranted for the following reasons.

A. Plaintiffs lack standing.

"Plaintiffs always have the burden to establish standing," *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017), and their claims must be dismissed if they do not, *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011). Article III standing requires a plaintiff to show injury-in-fact, causation, and redressability. *Croft v. Governor of Tex.*, 562 F.3d 735, 745 (5th Cir. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Each plaintiff

must establish standing "for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). Standing is evaluated according to "the manner and degree of evidence required at the successive stages of the litigation." *In re Deepwater Horizon,* 739 F.3d 790, 799–800 (5th Cir. 2014).

1. Plaintiff Zimmern lacks standing.

Zimmern alleges that he is "a qualified and registered voter in Harris County" and a licensed attorney, voted in the 2024 Republican Party primary and in the 2024 general election, and "is concerned about the negative effects of the lack of secrecy regarding his ballot and potentially facing retribution from anyone who could discover his ballot." ECF No. 33 at ¶ 20. The amended complaint says that Zimmern "does not want anyone, including the government, to know how he voted," that "[h]e has voted at early vote centers," and that he is concerned about retribution from "county and district clerks and the judges in whose courts he appears." *Id.*

a. Zimmern has not suffered injury-in-fact.

Zimmern does not allege that the secrecy of his own ballot has ever been, or is at imminent risk of being, impaired. None of his allegations indicate that he faces a substantial risk of having his vote ascertained. *See Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013) (a "threatened injury must be *certainly impending* to constitute injury in fact," and "allegations of *possible* future injury" are not sufficient (brackets and internal quotation marks omitted)).

Interrogatory responses and Plaintiffs' own motion for summary judgment confirm this. In response to Defendants' interrogatories, which asked Zimmern to identify all material facts supporting his "Article III standing to bring [his] claims against each Defendant," Zimmern merely copy-and-pasted the allegations from the amended complaint. Zimmern Interrog. Resp., Ex. A at 1–2 . Zimmern also responded that he relies on "all facts in the Affidavits by Barry Wernick, Rick

Weible, and each plaintiff," *id.*at 1, but nothing in those documents indicates that Zimmern's vote has been, will be, or can be ascertained. The affidavit Zimmern included in support of the motion for summary judgment also contains no facts to support his standing. ECF No. 35-1.

Having failed to allege an "actual or imminent" injury concerning the secrecy of his own ballot, Zimmern stakes his claim of injury on his subjective "concern[] about the negative effects" that might result from the sheer possibility that his vote might somehow be ascertained. Zimmern offers nothing to indicate that his fear is reasonable, and speculation does not satisfy the injury-in-fact requirement. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (injury must be "actual or imminent, not conjectural or hypothetical" (quoting *Lujan*, 504 U.S. at 560)); *Clapper*, 568 U.S. at 416 (rejecting contention that plaintiffs had standing based on "a reasonable fear of *future* harmful government conduct" (internal quotation marks and citation omitted)).

Zimmern also fails to show that his fear is "concrete and particularized." In the affidavit filed in support of his motion for summary judgment, Zimmern states that because he is an attorney, state judges are elected, and he is "an active voter," his "voting history" could "be used against" him, stating: "if my vote is leaked to an elected judge or an elected administrative official, such judge or elected official may resent my vote, and retaliate against me or my clients during proceedings." ECF No. 35-1 at 41 ¶ 4. Zimmern stacks speculation upon speculation: first, he speculates that his vote can or will be ascertainable but fails to show that he has or ever will vote in the highly unique circumstances that Plaintiffs' own theory requires for that to even be possible. Zimmern then speculates that someone will "leak" his vote to a judge or other official, and further speculates that a judge or official will then retaliate against him based on how he votes.

Zimmern's grievances are generalized and do not affect him "in a personal and individual way." *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560 n.1); *Lance v. Coffman*, 549 U.S.

437, 440–42 (2007). Plaintiffs Sommer and Kane make the same allegations. So could any voter. Zimmern's fear "is precisely the kind of undifferentiated, generalized grievance" that cannot support a claim of standing. *Lance*, 549 U.S. at 442; *Lujan*, 504 U.S. at 573–74; *Hollingsworth v. Perry*, 570 U.S. 693, 694 (2013).[1] Merely claiming that "the Constitution has been violated" is "not an injury sufficient to confer standing." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982).

b. Zimmern has not shown traceability or redressability.

Causation requires that the asserted injury be "fairly . . . trace[able] to the challenged action of the defendant" and cannot be "th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560–61. Redressability requires that it be "likely," as opposed to "speculative," that an injury will be "redressed by a favorable decision." *Id.* at 560–61 (citation omitted); *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014).

i. Judge Hidalgo.

Zimmern alleges that, as Harris County Judge, Judge Hidalgo is charged with the administration of federal and state election laws, including overseeing the election process within the county and ensuring compliance with state laws and regulations. ECF No. 33 ¶ 23. These unsupported, conclusory legal assertions "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. And they are wrong. Zimmern's claims are based entirely on actions allegedly taken by the custodian of election records, which is the county clerk. TEX. ELEC. CODE § 66.001(1). Judge Hidalgo does not have authority over the election records at issue in this case. Hudspeth Decl., ECF No. 36-1 ¶ 5 ("Neither the Harris County Judge nor the Harris County Commissioners

[1] *See also Lutostanski v. Brown*, 88 F.4th 582, 586–87 (5th Cir. 2023) (applying the generalized-grievance bar to hold that a group of voters did not have standing to sue county officials for alleged unlawful use of an uncertified electronic voting system); *Eubanks v. Nelson*, No. 23-10936, 2024 WL 1434449, at *2 (5th Cir. Apr. 3, 2024); *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 15 (Tex. 2011).

Court directs, or exercises any authority over, my office [the Harris County Clerk's Office] concerning election records, including my custodial duties over the election records at issue in this case. Those duties are solely the responsibility of my office."). To the extent that the county clerk's custodial duties over election records are subject to oversight by other officials, Texas law gives that authority to the Texas Secretary of State and the Texas Attorney General—not to Judge Hidalgo. TEX. ELEC. CODE §§ 31.001, 31.003, 31.005; 31.014; TEX. GOV'T CODE § 552.011; *id.* § 552.301; *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 613–14 (5th Cir. 2017) (alleged violation of Voting Rights Act was, "without question," fairly traceable to the Secretary of State who serves as the "chief election officer of the state"). Notably, Plaintiffs did not bring suit against those officials.

In response to an interrogatory asking him to state the material facts supporting his standing against Judge Hidalgo, Zimmern offered nothing to show that Judge Hidalgo plays any role in the maintenance or disclosure of the election records concerned in this case, or that she has even taken any action causing injury to Zimmern. Zimmern Interrog. Resp., Ex. A at 2.[2]

ii. Clerk Hudspeth.

Zimmern offers nothing tying Clerk Hudspeth to any injury suffered by him. When asked to state the material facts supporting his standing against Clerk Hudspeth, Zimmern responded that Clerk Hudspeth "is charged by Texas state statutes with the administration of federal and state

[2] At an earlier stage of this litigation, Plaintiffs made much of the fact that Harris County uses countywide voting, which the Harris County Commissioners Court approved in accordance with state law. Plaintiffs appear to have abandoned their direct attack on countywide voting. Nonetheless, it merits mention that Judge Hidalgo has just one of five votes on the Harris County Commissioners Court. So even if this Court took the extraordinary step of ordering Judge Hidalgo to vote to repeal countywide voting, it would be far from "likely" that redress of Plaintiffs' grievances would follow. Moreover, Plaintiffs' theory that election records can be used to match some voters to their votes does not require the use of countywide voting at all. So prohibiting countywide voting or requiring the combination of precinct election records would not prevent the hypothetical injury that Plaintiffs assert.

election laws," that she "is also the Chief Election Official for Harris County," and that her "office conducts . . . elections for Harris County." Zimmern Interrog. Resp., Ex. A at 2.

Zimmern fears that he will experience negative effects and retribution based on the sheer possibility that election records might contain information from which a member of the general public might ascertain how he voted. But Zimmern neither alleges nor proves that Clerk Hudspeth (or her employees) have, or will, parse information contained in various election records in order to ascertain how Zimmern voted, or that she will then publicize how Zimmern voted or exact retribution against him for how he voted. Any assertion that Clerk Hudspeth would do so lacks any basis in fact. Hudspeth Decl., ECF No. 36-1 ¶ 12 ("My office does not connect voters to votes, or attempt to do so."). It is also barred because "[c]ourts do not presume the government will break the law." *Hall v. Dixon*, No. 4:09-cv-2611, 2010 WL 3909515, at *12 (S.D. Tex. Sept. 30, 2010), *aff'd sub nom. Hall v. Smith*, 497 F. App'x 366 (5th Cir. 2012). That presumption makes sense. The business of government could not go on without it. Government employees necessarily have custody of records containing confidential information (e.g., driver license and Social Security numbers and medical records, along with voting records, *e.g.*, TEX. ELEC. CODE § 13.004). State law imposes duties to redact certain information from such records and enforces those duties via state law penalties. Zimmern's speculative grievances do not warrant creating a novel federal claim requiring a new presumption that public servants will flout state law. Zimmern's speculation that a member of the public might connect votes to voters does not establish traceability as to Clerk Hudspeth because the operative cause in those instances would lie in "the independent action of some third party not before the court." *See Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991).

Insofar as Zimmern alleges injury because of the sheer existence of election records containing certain information, or because those records must be made available for public

inspection, or because the redaction process might entail internal review of such records by government employees, his injury is traceable, not to Clerk Hudspeth, but to Texas state law and to the state officers charged with overseeing the implementation of those laws: the Texas Secretary of State and the Attorney General. *See OCA-Greater Houston*, 867 F.3d at 613–14; *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 399–400 (5th Cir. 2020) (indicating that even though "Texas's vote-by-mail statutes are administered, at least in in the first instance, by local election officials," claims were traceable to the Texas Secretary of State).

2. Plaintiff Sommer lacks standing.

Sommer's allegations are essentially the same as Zimmern's and also fail to establish standing. The evidence produced with Plaintiffs' motion for summary judgment and in the interrogatories exchanged by the parties confirms Sommer's lack of standing. Sommer Interrog. Resp., Ex. A at 1–2 (same boilerplate generalities); Sommer Aff., ECF No. 35-1 at 44–48.

3. Plaintiff Kane lacks standing.

Kane's allegations are largely identical to those made by Zimmern and Sommer and fail to establish her standing for the same reasons. *See* ECF No. 33 at ¶ 22. Kane alleges that she "voted in the 2024 Republican Primary and has had her ballot disclosed and made public." *Id.* But she offers no details: the amended complaint does not explain how her "ballot" was "disclosed" and "made public," and does not allege that it had anything to do with Defendants or with election records practices in Harris County. Nor does it allege that this is likely to occur again so as to warrant prospective, injunctive relief. Kane's interrogatory responses admit that the only evidence that her vote could be ascertained comes from Barry Wernick's use of election records to reveal her vote (which she states occurred around November 11, 2024—*after* the 2024 primary and general elections were over) and that Wernick is the only person whom she knows ascertained her

vote. Kane Interrog. Resp., Ex. A at 2–3. Kane cannot establish standing based on her unsuccessful candidacy during the 2024 election. *See* ECF No. 33 at ¶ 22 (alleging that she ran as the Republican candidate and lost to the Democratic candidate in the November 2024 election). Kane alleges that "[h]er primary ballot was made an issue in her campaign," *id.*, but does not allege how. She does not allege any facts relating to election records practices, and her interrogatory responses indicate that her vote was ascertained *after* the primary and general elections had occurred.

B. The Eleventh Amendment bars Plaintiffs' claims against Clerk Hudspeth.

Plaintiffs' claims against Clerk Hudspeth are barred by the Eleventh Amendment and must be dismissed.[3] "Generally, state sovereign immunity precludes suits against state officials in their official capacities." *Texas Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020). "The legal fiction of *Ex parte Young*" provides an exception that "permits federal courts to enjoin *prospective* unconstitutional conduct by 'individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature.'" *Mi Familia Vota v. Ogg*, 105 F.4th 313, 325 (5th Cir. 2024) (quoting *Ex parte Young*, 209 U.S. at 155–56). The *Ex parte Young* exception requires that the plaintiff: (1) "name individual state officials as defendants in their official capacities"; (2) "allege an ongoing violation of federal law"; and (3) seek relief "properly characterized as prospective." *Id.*

1. Clerk Hudspeth is a state official for purposes of Plaintiffs' claims.

Plaintiffs' claims against Clerk Hudspeth are based entirely on her duties as the custodian of election records for the 2024 primary and general elections—a designation made by the Texas Legislature through state statute. As explained above, her duties in this capacity are subject to

[3] Because Plaintiffs have failed to allege any connection at all between Judge Hidalgo and the complained-of conduct, any Eleventh Amendment argument as to Judge Hidalgo is unnecessary.

oversight by state officials—the Texas Secretary of State and the Texas Attorney General. Because the relief Plaintiffs seek in the case would necessarily "interfere with the [state's] public administration" of the Texas Election Code, their claims against Clerk Hudspeth are claims against the state itself and thus implicate the Eleventh Amendment. *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 286 (5th Cir. 2000). The office of county clerk is created by the Texas Constitution (not by the county), and the duties of the office are subject to laws passed by the Texas Legislature.

2. Plaintiffs have not established an ongoing violation of federal law.

Barry Wernick's affidavit refers to a single past request for election records from Harris County, made on September 30, 2024, that he claims allowed the ascertainment of certain voters' votes. ECF No. 35-1 at 16. But Plaintiffs offer no evidence that since that single instance Defendants have provided election records in the supposedly objectionable manner that enables vote ascertainment to occur. Plaintiffs' allegations regarding supposed noncompliance with Texas Secretary of State Advisory 2024-20, *e.g.*, *id.*, suggest at most a state law concern—not an ongoing violation of *federal* law.[4]

3. To the extent Plaintiffs seek relief that is not prospective, it is barred.

Insofar as any of the Plaintiffs seek damages (nominal or otherwise) against Clerk Hudspeth, such relief "is clearly impermissible under the *Ex Parte Young* exception and should be dismissed." *Ostrewich v. Hudspeth*, No. 4:19-CV-00715, 2021 WL 4170135, at *11 (S.D. Tex. Sept. 14, 2021), *report and recommendation adopted*, No. 4:19-CV-00715, 2021 WL 4480750

[4] Plaintiffs' invocation of the Texas Secretary of State Advisory 2024-20 does not even suggest a violation of *state* law. The plain terms of the advisory merely suggested that certain categories of information in election records be considered for potential redaction, repeatedly referred to them as "possible redactions." *See* https://www.sos.state.tx.us/elections/laws/advisory2024-20.shtml. As Plaintiffs admit, election records do not permit tracing votes to voters in the vast majority of cases. Thus, the redaction Plaintiffs seem to desire would require officials to determine which particular voters' votes can be traced back to them—thereby absurdly requiring county clerk employees to engage in the very conduct Plaintiffs object to.

(S.D. Tex. Sept. 30, 2021), *aff'd in part, rev'd in part sub nom. Ostrewich v. Tatum*, 72 F.4th 94 (5th Cir. 2023); *Arizonans for Official English*, 520 U.S. at 69 n.24 (The *Ex Parte Young* "doctrine, however, permits only prospective relief, not retrospective monetary awards."); *Connolly v. Roche*, No. 2:14-cv-00024 JWS, 2014 WL 12550553, at *3 (D. Ariz. July 30, 2014).

C. Plaintiffs' claims are moot, not ripe, and barred by the political-question doctrine.

1. Plaintiffs' claims are moot.

A claim is moot and not within this court's subject-matter jurisdiction if "the issues presented are no longer 'live,' or the parties lack a legally recognizable interest in the outcome.'" *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980) (citations omitted). A claim can be rendered moot if a defendant can show that it "has been resolved or if it has evanesced because of changed circumstances." *Am. Med. Ass'n v. Bowen*, 857 F.2d 267, 270 (5th Cir. 1988) (citations omitted). As Judge Hidalgo and Clerk Hudspeth are sued in their official capacity, they "bear[] a lighter burden to prove that challenged conduct will not recur" because "[g]overnment actors in their sovereign capacity and in exercise of their official duties, are accorded a presumption of good faith because they are public servants." *Moore v. Brown*, 868 F.3d 398, 406-407 (5th Cir. 2017).

As an initial matter, Plaintiffs offer no evidence to support their assertion that the "public" can currently "obtain ballots and see how voters voted." ECF No. 33 ¶¶ 42-60.[5] Kane is the only Plaintiff who claims that her vote was ever actually ascertained. Even if Kane had standing based on that allegation, the fact that her ballot for a past election has already been made public makes her claims for prospective injunctive and declaratory relief moot. She does not show that any such disclosure could or would recur. Kane would have to prove that, in a future election, she will vote

[5] Plaintiffs provide no evidence that Clerk Hudspeth's office currently or in the future will release potentially traceable information. *See Moore*, 868 F.3d at 407.

in the highly unique circumstances that Plaintiffs' own theory requires: that she will be the only voter from her precinct to vote at a particular polling place during a particular election period. She does not do this. Second, Kane does not demonstrate that, even if she voted in sufficiently unique circumstances, public access to election records in a future election will contain information allowing her vote to be ascertained.

2. Plaintiffs' claims are not ripe.

On Plaintiffs' own theory, a voter's vote is ascertainable only if the voter casts a vote in unique circumstances, i.e., the voter must be the only voter from a particular precinct who casts a vote at a specific polling place during a given election period. None of the Plaintiffs alleges or shows that they are likely to vote in such circumstances in the future, making any claims for prospective injunctive relief untenable due to lack of ripeness.

3. The political question doctrine bars Plaintiffs' claims.

A case that presents a political question is not within this Court's subject-matter jurisdiction. *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 948 (5th Cir. 2011). "[T]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution" to others. *Id.* (internal quotation marks and citations omitted). The Constitution's Elections Clause commits the determination of the time, place, and manner of conducting elections to the States. U.S. CONST. art. I, § 4. The Texas Legislature exercised its authority over the manner of conducting elections in Texas by (1) requiring the creation and maintenance of election records and (2) requiring that those records be made available for public inspection as part of the election process. The legislature balanced multiple competing considerations, including the need to "reduce the likelihood of fraud in the conduct of elections, protect the secrecy of the ballot, promote voter

access, and ensure that all legally cast ballots are counted." TEX. ELEC. CODE § 1.0015. Plaintiffs' claims inappropriately ask this Court to second-guess that complex policy judgment.

II. PLAINTIFFS FAIL TO ESTABLISH ESSENTIAL ELEMENTS OF A SECTION 1983 CLAIM.

Plaintiffs' failure to satisfy elements of a § 1983 claim against Defendants warrants dismissal, judgment on the pleadings under Rule 12(c), or alternatively summary judgment. To survive a motion to dismiss, a complaint must, on its face, state a claim for relief that is both "legally cognizable" and "plausible" based on the facts alleged. *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir. 2012) (en banc) (quoting *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010)); *Iqbal*, 556 U.S. at 678. The standard for a Rule 12(c) motion for judgment on the pleadings is the same. *See Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If summary judgment is sought on an issue for which the nonmoving party would bear the burden of proof at trial, the movant may satisfy its initial summary-judgment burden by showing that there is an absence of evidence to support an essential element of the nonmoving party's case and that, as a result, judgment should be entered in the movant's favor on the basis of purely legal considerations. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

A. Section 1983 does not provide a remedy for violations of Texas state law.

Section 1983 "does not create any substantive rights" but merely provides a remedy for violations of federal law. *Lafleur v. Texas Dep't of Health*, 126 F.3d 758, 759 (5th Cir. 1997) (per curiam). As explained below, Plaintiffs fail to present a viable federal law claims. To the extent Plaintiffs seek to advance state law claims, violations of the Texas constitution and other state law

claims "are not actionable under federal law; a plaintiff under [§] 1983 must show deprivation of a federal right." *Nesmith v. Taylor*, 715 F.2d 194, 195 (5th Cir. 1983).

B. Plaintiffs fail to show essential elements of a § 1983 claim.

Plaintiffs bring their § 1983 claims against Defendants in their official capacities, so they must be treated as claims against the government entity for which Defendants serve as officers. Assuming the Court does not dismiss the claims on any of the grounds already given, the only government entity that Plaintiffs can possibly be understood as seeking to sue is Harris County. To establish municipal liability against Harris County under § 1983, Plaintiffs must show: "(1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *McClelland v. Katy Indep. Sch. Dist*., 63 F.4th 996, 1011 (5th Cir. 2023); *see also Monell v. Department of Social Servs. of the City of New York,* 436 U.S. 658, 694 (1978).

1. Judge Hidalgo is not a policymaker for collection of election data under Texas law

Plaintiffs' allegation that Judge Hidalgo is "charged with the administration of federal and state election laws, including overseeing the election process within the county and ensuring compliance with state laws and regulations," ECF No. 33 at ¶ 23, is demonstrably wrong as explained above. The Texas Secretary of State and Attorney General are the appropriate policymakers. Plaintiffs' claims rest on objections to Texas Election laws that require collection of certain election data and that this information be made available to the public. These are legislative edicts, clarified by the Secretary of State in directives, explanations, and oversight. Judge Hidalgo has no role in collecting or maintaining election information and Plaintiffs have failed to show any policy attributable to Judge Hidalgo, or that she is the relevant policymaker. *See Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996) ("State law determines whether a particular

individual is a county or municipality final decision maker with respect to a certain sphere of activity."); *Hoyt v. City of El Paso*, 878 F. Supp. 2d 721, 743 (W.D. Tex. 2012) ("Simply stating that [a municipality] has enforcement power does not make it so.").

Plaintiffs' claims against Judge Hidalgo should also be dismissed because they are entirely duplicative of the claims against Clerk Hudspeth. Any relief against Harris County can be obtained though Clerk Hudspeth alone, and Judge Hidalgo's "presence in this suit [would be] unnecessary." *De Luna v. Hidalgo County*, No. CV M-10-268, 2011 WL 13282104, at *2–4 (S.D. Tex. June 24, 2011); *Johnson v. City of Houston*, 2010 WL 3909929, at *6 (S.D. Tex. Sept. 30, 2010) (Section 1983 official-capacity claims against police chief dismissed pursuant to Rule 12(b)(6) motion because city also named as defendant).[6]

2. Clerk Hudspeth is a state official for purposes of Section 1983 liability.

As argued above, Clerk Hudspeth is a state official for all purposes relevant to this suit, not a county official. Accordingly, the limits on § 1983 relief against states preclude the claims against Clerk Hudspeth.

3. Plaintiffs cannot establish elements of a Section 1983 claim against Clerk Hudspeth.

a. The official policy at issue is the Texas Election Code, which is promulgated by the Texas Legislature, not Clerk Hudspeth.

Clerk Hudspeth is not a policymaker for the statutes requiring her to collect, maintain, and make available to the public certain election records. Plaintiffs' suit rests entirely on their objections to Texas laws that require all 254 counties, and all other localities that administer elections, to collect certain election information in administering elections because "it is still possible for election officials to trace voters to ballots[.]" As Plaintiffs admit, "Texas statutes

[6] The Court need not even reach the issue of duplicative claims because Plaintiffs do not have standing to sue Judge Hidalgo, and they cannot establish the elements of a § 1983 claim against her.

require th[is] information […] to be collected and maintained by Harris County," rather than any policy attributable to Clerk Hudspeth. ECF No. 33 at ¶ 65. These statutes, contained in the Texas Election Code, are promulgated by the legislature, not Clerk Hudspeth or Harris County. Additionally, the Secretary of State, as the Chief Election Officer for the state of Texas, issues comprehensive directives and instructions regarding the procedures for administering elections, and, alongside the Attorney General, ensures compliance with Texas election laws. *See OCA-Greater Houston*, 867 F.3d at 613–14; *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 399–400 (5th Cir. 2020) (indicating that even though "Texas's vote-by-mail statutes are administered, at least in in the first instance, by local election officials," claims were traceable to the Texas Secretary of State).[7] Clerk Hudspeth is bound to comply with Texas statutes and Secretary of State directives.

Clerk Hudspeth's duty to collect election data under the law does not make her the legally authorized policymaker necessary for § 1983. Her actions in collecting and maintaining this data are entirely "constrained by policies not of [her] making." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Therefore, those policies, rather than Clerk Hudspeth's actions under them, are the act of the policymaker under § 1983. *Id.* Clerk Hudspeth dutifully administers Harris County elections in accordance with the Legislature and Secretary of State's policies. Clerk Hudspeth is not permitted to dictate what information is to be collected; that is a decision within the sole purview of the legislature. Nor, in most cases, is she able to dictate how that information is

[7] Under Texas law, "[t]he secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code. In performing this duty, the secretary shall prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code. The secretary shall distribute these materials to the appropriate state and local authorities having duties in the administration of these laws." Tex. Elec. Code § 31.003.

collected and stored—that is directed and monitored by the Secretary of State.[8] Therefore, her role in administering Harris County elections is constrained by the Texas legislature and Secretary of State's policies. *Bolton v. City of Dallas, Tex.*, 541 F.3d 545, 550 (5th Cir. 2008) ("The repeated references to the [official's] responsibility for 'administration' make clear that the position is executive rather than legislative; that is, state law alone does not give to [the official] the responsibility for making law or setting policy in any given area of a local government's business." (citations omitted)).

The office of county clerk is created by the Texas Constitution—not by Harris County—and the Constitution provides that the "duties, perquisites and fees of [that] office shall be prescribed by the Legislature." TEX. CONST. art. V, § 20; *Arnone v. Dallas Cnty.*, 29 F.4th 262, 268–69 (5th Cir. 2022) (concluding that the Dallas County district attorney acted as a state—not county—policymaker because the Texas Constitution "provides the Legislature—a state entity—with a direct role in regulating both the scope of [that position's] duties and compensation," and because "Texas statutory law also points towards the district attorney having acted on the state's behalf"). Plaintiffs do not demonstrate that Clerk Hudspeth undertook any action on behalf of Harris County in this case, let alone action rising to the level of an official policy.[9]

b. No policy attributable to Clerk Hudspeth is the moving force behind Plaintiffs' claims.

[8] See Texas Secretary of State, Electronic Voting System Procedures ("[p]ursuant to Section 122.001(c) of the Texas Election Code, the Office of the Secretary of State prescribes the following procedures for use of Electronic Voting Systems" including "Retention of Election Material."), https://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml#Section9.

[9] By way of contrast to the treatment of election records under the Election Code, Texas law makes elected officials the custodians and records management officers for records in their own offices. *See* TEX. LOCAL GOV'T CODE §§ 201.003(2); 201.003(14); 203.001; *see also* TEX. GOV'T CODE § 552.201(b).

Municipal liability under § 1983 requires Plaintiffs to show "that the municipal action was taken with the requisite degree of culpability" and that there was a "direct causal link between the municipal action and the deprivation of federal rights." *Valle*, 613 F.3d at 542 (citation omitted). Plaintiffs "must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Id.* "Deliberate indifference is a high standard—'a showing of simple or even heightened negligence will not suffice.'" *Id.* (citation omitted).

As the collection of election data is mandated by the legislature and Secretary of State's policies, Plaintiffs also fail the causation prong of municipal liability under § 1983. Any complained-of release of information is not indicative of Harris County policy, it is merely an "isolated action" which does not trigger municipal liability under § 1983. *See Davis v. Tarrant Cnty.*, 565 F.3d 214, 227 (5th Cir. 2009) ("[T]he unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." (internal quotation marks omitted)). Therefore, rather than complaining of an identifiable Harris County policy, Plaintiffs' complaint rests on objections to the legislature and Secretary of State's directives to collect and safeguard election data which is not a policy attributable to Clerk Hudspeth.

To satisfy § 1983's causation requirement, the *policy at issue* must be the "moving force" behind the violation. *Monell*, 436 U.S. at 694. Plaintiffs acknowledge that the Texas Election Code and Secretary of State's directives are the policies at issue in this case, as they require Clerk Hudspeth to collect and maintain election data. *See* ECF No. 33 at ¶ 65. Plaintiffs have not shown that any policy or practice by Clerk Hudspeth, other than complying with the law, is at issue in this case. Nor do Plaintiffs allege anything to support an inference of "deliberate indifference."

III. THE COURT SHOULD GRANT DEFENDANTS' MOTION BECAUSE PLAINTIFFS' CLAIMS ARE NOT LEGALLY VIABLE.

A. Plaintiffs' First Amendment claim fails as a matter of law.

Plaintiffs assert that Defendants have violated the First Amendment because "[b]y allowing the implementation of practices that compromise the secrecy of ballots, Defendants have created an environment in which voters are at risk of being coerced or intimidated based on their voting choices by private individuals or the government." Am. Complaint ¶ 83.

The First Amendment "prohibits only governmental abridgment of speech," not "private abridgement of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019) (emphasis in original). Plaintiffs neither allege nor provide any evidence that Defendants have coerced, intimidated, or retaliated against them based on their voting choices.[10] To the extent Plaintiffs' First Amendment claim is based on the idea that Defendants have somehow subjected them to "private abridgement of speech," they plainly seek to advance a "state-created danger" theory of liability under the cover of a First Amendment claim, their theory falls within the scope of the Fourteenth Amendment and fails for the reasons described below.

More broadly, Plaintiffs' First Amendment claim is legally untenable under existing caselaw. The Supreme Court's decision in *Doe v. Reed*, 561 U.S. 186 (2010), sets the parameters for assessing their claim. In *Doe*, which concerned the State of Washington's ability to make referendum petitions available under that state's public records act, the Supreme Court recognized that "[t]he [s]tate's interest in preserving the integrity of the electoral process is undoubtedly important" and "is particularly strong with respect to efforts to root out fraud, which not only may

[10] To the extent Plaintiffs assert that Defendants have created an environment in which "the government" will coerce or intimidate voters, they must bring a claim against the specific governmental coercion, intimidation, or retaliation to set forth a First Amendment claim. For example, a plaintiff may well have a First Amendment claim against a state official who takes retaliatory action based on public vote record of that individual, but the claim would be against that particular official and action.

produce fraudulent outcomes, but has a systemic effect as well" on trust in elections and government. *Id.* at 197. The court explained that "a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context . . . requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 186. Applying that standard, the court rejected the broad challenge to Washington's disclosure law, noting that the plaintiffs could not "prevail under the First Amendment" because they had not shown "a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 200.

Doe controls this case. Plaintiffs do not claim that Defendants release information that directly identifies how every voter votes, so the alleged conduct at issue here is even less intrusive than what was at issue in *Doe*. In addition, the state of Texas' interest in permitting the disclosure of election records to ensure auditability, transparency, and trust in elections and government is significant. And none of the Plaintiffs have alleged or demonstrated anything approaching a reasonable probability that their votes will be disclosed in the future or that they will face threats, harassment, or reprisals as a result. Their First Amendment claim should be rejected.[11]

B. Plaintiffs' Due Process claim fails as a matter of law.

Plaintiffs claim that Defendants violated their due process rights under the Fourteenth Amendment "by failing to ensure the secrecy of the ballot," thereby "creat[ing] an environment

[11] To support their argument that there is a federal constitutional right to a secret ballot, Plaintiffs cite *McIntyre v. Ohio Elections Comm'n*, for the dictum that "this tradition is perhaps best exemplified by the secret ballot, the hard won right to vote one's conscience without fear of retaliation." 514 U.S. 334, 343 (1995) (holding that Ohio's prohibition on distribution of anonymous campaign literature was an unconstitutional restriction on speech under the First Amendment). ECF No. 33 at ¶ 10. This dictum does not create a federal constitutional right to a secret ballot required by § 1983. Plaintiffs have failed to point to any caselaw establishing a right to a secret ballot under the United States Constitution or federal law in circumstances akin to those present in this case.

where individuals may be subjected to intimidation or retaliation" at the hands of others. This is a "state-created danger" theory. But "[t]he Due Process Clause of the Fourteenth Amendment does not, as a general matter, require the government to protect its citizens from the acts of private actors." *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 312 (5th Cir. 2002) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989)). Moreover, the Fifth Circuit "has never adopted a state-created danger exception to the sweeping 'no duty to protect' rule." *Fisher v. Moore*, 73 F.4th 367, 369 (5th Cir. 2023). And Plaintiffs fail to demonstrate any constitutionally-protected federal or state right that could form the basis of their due process claim.

C. Plaintiffs' Equal Protection claim fails as a matter of law.

Plaintiffs claim that the Equal Protection Clause is violated "through the unequal treatment of voters who vote at countywide election centers as opposed to those who vote on election day in their home precinct." But Plaintiffs do not allege the "purposeful discrimination" necessary to establish a disparate treatment claim. *Johnson v. Rodriguez*, 110 F.3d 299, 306–07 (5th Cir. 1997). A plaintiff must prove "the existence of purposeful discrimination," meaning that "the decisionmaker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *Id.* Here, there is no "identifiable group": the group of voters whose votes are susceptible to being ascertained may not even exist for any particular election; and when the group does exist, its membership arises from unique circumstances that cannot be predicted in advance. In addition, Plaintiffs fail to identify state action. The candidate is the collection and maintenance of the election records, which is mandated by Texas state law. But there is no allegation or proof that the Texas legislature imposed that requirement "at least in part because of, and not simply in spite of, the adverse impact." The evidence, supported by the legislative findings themselves, is clear that the purpose of the

disclosure requirement is to promote auditability, election transparency, and trust in election outcomes, which is a significant and legitimate government interest.

Plaintiffs assert that "[i]t is more difficult to ascertain the ballot of a voter who votes in their home precinct on election day," and that this "perpetuate[s] systemic inequalities within the electoral process." This is a disparate impact theory, which is not viable under the Equal Protection Clause. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272, (1979); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (Equal Protection Clause does not prohibit the government from taking actions which have an unintentional disparate impact); *Johnson*, 110 F.3d at 306–07 ("The Supreme Court has instructed us time and again . . . that disparate impact alone cannot suffice to state an Equal Protection violation").

CONCLUSION

For these reasons, the Court should grant Defendants' motion to dismiss, for judgment on the pleadings, or in the alternative for summary judgment.

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Respectfully submitted,

CHRISTIAN D. MENEFEE
HARRIS COUNTY ATTORNEY

JONATHAN G.C. FOMBONNE
DEPUTY COUNTY ATTORNEY AND FIRST ASSISTANT

SARAH J. UTLEY
MANAGING COUNSEL,
AFFIRMATIVE AND ENVIRONMENTAL

CHRISTOPHER GARZA
DIVISION DIRECTOR
AFFIRMATIVE & SPECIAL LITIGATION DIVISION

/s/ Edward D. Swidriski III
EDWARD D. SWIDRISKI III
Attorney-in-Charge
Senior Assistant County Attorney
Affirmative & Special Litigation Division
Texas Bar No. 24083929
SDTX Fed. Bar No. 3089960
1019 Congress Plaza, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5101
Facsimile: (713) 755-8924
Edward.Swidriski@harriscountytx.gov

ELEANOR MATHESON
Assistant County Attorney
Affirmative & Special Litigation Division
Texas Bar No. 24131490
SDTX Fed. Bar No. 3854524
Eleanor.Matheson@harriscountytx.gov

OFFICE OF THE HARRIS COUNTY ATTORNEY
1019 Congress Plaza, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5101
Facsimile: (713) 755-8924

ATTORNEYS FOR DEFENDANTS