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.	)	

RESPONSE AND MEMORANDUM IN OPPOSITION OF DEFENDAT'S RULE 12(b)(1) AND 12(b)(6) MOTION TO DISMISS

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NATURE AND STAGE OF PROCEEDING

The secrecy of the ballot—a cornerstone of democratic governance—does not exist in Harris County because of Defendants' policies. Plaintiffs ask the Court to address an issue of first impression, that is, whether the right to political privacy under the First Amendment includes a voter's right to a secret ballot. The court is also requested to address an obvious issue of equal protection in the unequal treatment between voters whose ballots are not secret and those voters who enjoy a secret ballot. This case involves fundamental constitutional principles, including the rights to political privacy, free expression, association, due process and equal protection.

Plaintiffs do not merely allege abstract grievances; they identify specific, ongoing practices that undermine the integrity of elections and violate personal constitutional protections. The injunctive and declaratory relief sought is narrowly tailored to address these violations and ensure compliance with the Constitution.

While the specific issue here is one of first impression – to some extent because of the outlandishness of a non-secret ballot – courts have broadly grappled with the issue of political privacy and found a liberty interest protected by the Constitution.[1] Political privacy, and the derivative preeminent privacy right of a secret ballot, is protected by the First Amendment. It is inseparable from "liberty" as guaranteed in the Fourteenth Amendment. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). In deciding that the right of association included the right to associate privately, the Supreme Court reasoned:

> It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. *See Gitlow v. New York*, 268 U.S. 652, 268 U.S. 666*; Palko v. Connecticut*, 302 U.S. 319, 302 U.S. 324; *Cantwell v. Connecticut*, 310 U.S. 296, 310 U.S. 303; *Staub v. City of Baxley*, 355 U.S. 313, 355 U.S. 321. Of course, it is immaterial whether

[1] Because of the importance of this issue, Plaintiffs brief the court on the First Amendment right to a secret ballot in this section and, again briefly, on pages 16-17.

> the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. *Id* at 461-462.

The First Amendment has protected associational privacy rights. The Supreme Court found repugnant to the First and Fourteenth Amendments an Alabama law which required the NAACP to disclose its donors. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs," the Supreme Court reasoned. *Id.* at 462. The Supreme Court went on to conclude that the Alabama statute requiring disclosure of donors was an unconstitutional infringement on the right to associate privately because it subjected the donors to retaliation and intimidation. "We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *Id.* at 466.

As the right to associate privately is protected, so is the right to speak anonymously. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). In determining that Mrs. McIntyre had the right to distribute anonymous pamphlets at a local government board meeting in violation of an Ohio statute requiring authorship disclosure, the Supreme Court held the disclosure statute did not pass exacting scrutiny because it was not tailored to protect an overriding state interest. *Id.* at 348.

In reaching its decision to protect anonymous speech, the Supreme Court provided historical context:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v California*, 362 U.S., at 64. Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in

> identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. *Id.* at 341-342.

The Court next discussed political speech and held that the First Amendment's "… freedom to publish anonymously extends beyond the literary realm," into the political realm. *Id.* at 342.

> Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. **This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscious without fear of retaliation**. *Id.* at 342-343 (emphasis added).

In protecting the right to anonymous speech, the Supreme Court has already characterized the right to a secret ballot as a "hard-won right" derived from the rights of speech and association under the First Amendment and is to be protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 342-343. While these challenged procedures may be ones of first impression for a court in deciding a motion to dismiss, whether or not a secret ballot enjoys protection under the Constitution is not a newfangled inquiry with the Supreme Court.

Speech and association mean nothing without the ultimate expression of those rights in the right to vote. Freedom of speech protects the expression of ideas designed to persuade others what to think about public policy, culminating in how people mark a ballot. The same is true regarding the right of association. Voters have the right to associate with other voters, candidates and policy positions at the ballot box. For what purpose do the rights of speech and association even exist except in the ultimate First Amendment expression by voting?

It stands to reason, therefore, that if the right to speak and associate privately is an indispensable liberty interest from the rights of free speech and association, the right to a secret ballot is indispensable from the right to vote. And, just as the Fourteenth Amendment protects the right of speech and association from unjustifiable state action, *Baker v Carr,* 369 U.S. 186, 208 (1961), so should the Fourteenth Amendment safeguard the right to a secret ballot regardless of which voting site the voter votes in Harris County.

Accordingly, plaintiffs have plausibly alleged that the ability to find how voters voted because the system used by Harris County defeats the right to a secret ballot and infringes upon the rights of speech. The county's justification of their chosen system that allows discovery of how voters voted requires exacting scrutiny. *McIntyre*, 514 U.S. at 342; *Buckley v. Valeo*, 421 U.S. 1, 29 (1976); *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409, 423 (5th Cir. 2014), The knowledge of a voter's ballot is a chilling infringement of the rights of speech and association unique to each voter. *See Burson v. Freeman*, 504 U.S. 191, 200-206 (1992). The Defendant's do not assert an articulable overriding state interest as to why they collect data which allows voters' choices to be discerned.

The voting system in Harris County has the same constitutional injury as if the Defendants put all voters' ballots on the Internet in a searchable database. The private ballots of voters are known to the county government and are subject to production to the public through open records requests. Tex. Gov't. Code § 552.201(b); Tex. Elec. Code § 66.001(1).

Plaintiffs have plausibly alleged that Defendants have violated plaintiffs' constitutional rights under the First and Fourteenth Amendments by collecting, maintaining and distributing identifiable voter information that can reveal how a voter voted. Defendants choose which voting system to use and the manner of the software's application. Tex. Elec. Code § 123.001 *et seq.*

Identifiable voting records are collected and possessed by county officials who create a mechanism through which individual voters' choices can be identified. Plaintiffs seek declaratory and injunctive relief under 42 U.S.C. § 1983 to address these ongoing constitutional violations.[2]

Defendants' initial response to the Complaint is a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting that Plaintiffs lack standing, that the claims present nonjusticiable political questions, and that the complaint fails to state a claim upon which relief can be granted. Plaintiffs have adequately pleaded facts establishing standing, justiciability, and plausible claims for relief under the Constitution and applicable federal statutes. As discussed in detail below, the Defendants' motions are without merit. Accordingly, the Court should deny the Defendants' motions to dismiss.

STANDARD OF REVIEW

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) will be granted only "if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A court relies on three factors to test whether the jurisdictional burden has been met: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). When a party challenges standing in a motion to the complaining party, the court must "accept as true all material allegations of the complaint and . . . construe the complaint in favor of the complaining party." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quotations omitted).

[2] Plaintiffs do not seek monetary damages beyond nominal damages of one dollar.

Similarly, under Rule 12(b)(6), a complaint "does not require detailed factual allegations," but it must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under this standard, a claim is facially plausible when the well-pleaded facts allow the court to reasonably infer the defendant is liable for the alleged conduct. *Id.* The court must accept the plaintiff's well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins., 509 F.3d 673, 675 (5th Cir. 2007)*. The court's analysis must remain focused on whether the plaintiff has stated a claim upon which relief can be granted, not on the plaintiff's likelihood of success. *Mann v. Adams Realty Co*., 556 F.2d 288, 293 (5th Cir. 1977). When the complaint includes factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the claim is facially plausible. *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (quoting *Iqbal,* 556 U.S. at 678).

SUMMARY OF THE ARGUMENT

As an initial matter, the Defendants have admitted in their memorandum that the voting system they chose and administer allows one to discover how a voter voted. They argue: "… a custodian who makes election records available for public inspection does not reveal how any voter voted and therefore does not violate any voter's right to a secure ballot. **It is the person who obtains the election records and the attempts to extract and match [pieces of information contained in those records] who takes the steps necessary to ascertain how a voter voted**." ECF 8-1, pp4-5 (emphasis added).

This admission supports the allegations in the Complaint, as unsettling as they sound at first glance, that one may discover how voters voted in Harris County. Regardless, at this stage the factual allegations in the Complaint must be taken as true, and the admission confirms the affidavit

of Mr. Wernick.[3] Plaintiffs adequately alleged facts establishing standing, presenting justiciable claims, and articulating constitutional violations. Defendants' arguments under Rules 12(b)(1) and 12(b)(6) fail on multiple grounds.[4]

First, Plaintiffs have standing to pursue their claims. The injuries alleged—violations of their right to a secret ballot and the consequential chilling effect on their political expression—are concrete, particularized to each voter, and actual.[5] Moreover, the threat of future disclosures, brought on by Harris County's failure to adhere to constitutional standards and systemic protocols, constitutes a specific imminent injury as to each individual voter. These injuries are traceable to Defendants' actions of collecting identifiable voter data, as well as the subsequent the release of unredacted voting records, and are redressable through injunctive and declaratory relief.

Second, Plaintiffs' claims do not present a nonjusticiable political question. Courts have long recognized their role in adjudicating disputes over the constitutionality of election practices. *See e.g., Baker v. Carr*, 369 US 186, 207-208 (1962); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966). Plaintiffs ask this Court to employ the quintessential judicial function of enforcing well-established rights under the First and Fourteenth Amendments. Resolving this case requires the application of legal principles, not the resolution of political questions. *See*

[3] Defendants ignore the affidavit attached to the complaint of Mr. Rick Weible who declared that he could, based upon the data publicly available, create an algorithm which would allow almost all voters' ballots to be learned.

[4] That voters' ballots are not secret in Texas is well-known and well-reported. It is not an urban legend. As pleaded, the Texas Secretary of State issued advisory No: 2024-20 instructing counties to redact certain identifiable information from open records requests regarding poll books and ballots. Counties can only redact that which they collect, meaning the counties collect and maintain identifiable voter information. This does not stop government officials from looking up how voters voted. Publication of that information in response to an open records request in an additional violation. *See NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 460 (1958)* ("…for it is only after the initial exertion of state power …that private action takes hold.")

[5] The Supreme Court in *Burson v Freeman*, 504 U.S. 191, 200-206 (1992) details the problems of intimidation, bribery, coercion and fraud in America before the adoption of the secret ballot.

Reynolds v. Sims, 377 U.S. 533, 354 (1964) (Denial of a constitutionally protected right demands judicial protection.) [6]

Third, Defendants' Rule 12(b)(1) arguments lack merit. Plaintiffs have standing to bring their claims because they have suffered individualized concrete injuries that are directly attributable to Defendants' conduct. *See Reynolds v Sims,* 377 U.S at 555. (The right to vote is personal.) Plaintiffs have also adequately stated claims upon which relief can be granted under Rule 12(b)(6). Plaintiffs allege that Defendants' practices violate the First Amendment by chilling their rights of political expression and association. The collection, maintenance and subsequent public disclosure of voting records creates the risks of retaliation, coercion, and social ostracism, thereby violating the "liberty" interests of speech and association protected under the First Amendment. *See NAACP,* 357 U.S. at 449.

Fourth, Defendants' invocation of Eleventh Amendment immunity is misplaced. Plaintiffs seek prospective relief against Defendants in their official capacities to address ongoing constitutional violations. Under *Ex parte Young*, such claims fall squarely within the exception of Eleventh Amendment immunity. *Ex parte Young*, 209 U.S. 123 (1908). Plaintiffs do not seek retroactive relief or monetary damages from the Defendants, but injunctive and declaratory relief to prevent future harm. *See Tex. Dem. Party v. Abbott*, 961 F.3d 389, 399 (5th Cir. 2020).

Finally, the Defendants vaguely assert that a compelling state interest of election transparency and accountability overrides a voter's right to a secret ballot. ECF 8-1 p. 17. The County's approach to election transparency is at odds with the constitutional rights of voters and,

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[6] Plaintiffs neither challenge the policy choices underlying Texas election law or demand the Defendants apply a specific policy solution; rather they seek enforcement of guarantees under the United States Constitution and a declaration by the court that the current choices of the Defendants violate the rights to political privacy and equal protection of the Plaintiffs. Redaction of traceable information is not a solution. The civil rights violations lie in the collection and maintenance of traceable information by the Defendants.

therefore, requires exacting scrutiny. This is a factual defense implicating narrow tailoring, not one that can support a motion to dismiss at this stage.

ARGUMENT

I. The Court Should Deny Defendants' Rule 12(b)(1) Motion.

A. Plaintiffs Have Standing.

Each voter has a unique, concrete and particularized injury by having their political privacy violated. *See Baker,* at 208. If there is a constitutional right to a secret ballot, that right is specific to every voter and, consequently, each plaintiff has standing to assert a violation of that right and redress their injury. *Baker*, at 208 (Citing *Marbury v. Madison*, 5 U.S. 137, 163) ("A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution … 'The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury.'"). In *Gray v Sanders*, 372 U.S. 368 (1965), the Supreme Court definitively stated that "… any person whose right to vote is impaired, had standing to sue." *Id.* at 375. It is the Defendants' collection of individual voters' identifiable information which is the violation of the constitutional right to political privacy of which the Plaintiffs complain.[7] Undeniably, the Defendants collect and maintain that information. The constitutional violation occurs at the time of collection. *See NAACP,* 357 U.S. at 463.

i. Zimmern Has Concrete and Unique Injuries.

Plaintiff Kenneth Zimmern, an attorney and registered voter in Harris County, has plausibly alleged a concrete and particularized injury-in-fact sufficient to establish standing. In addition to the County's collection and maintenance of identifiable voter information, Zimmern's

[7] The Affidavit of Mr. Wernick identifies many Harris County voters whose ballots are easily learned. The list includes state judges, elected officials, and community and religious leaders. So far, over 30,000 voters' voters are known.

injury arises from the credible threat that his voting choices could be publicly disclosed due to Defendants' inadequate safeguards for ballot secrecy. Zimmern's fear of professional or social retaliation based on his voting preferences is neither speculative nor hypothetical. Complaint ¶ 15. A judge he appears before could look up whether Zimmern voted for that judge. Such fears are heightened in contentious political climates, where voters can face reputational harm, ostracism, or even threats of violence based on their perceived political affiliations. Regardless of whether Zimmern's ballot has been publicly disclosed, it remains searchable and easily known to county officials. This is more than sufficient to prove an injury-in-fact. *See Clapper v. Amnesty International USA*, 568 U.S. 398 (2013).

Zimmern's allegations align with an established precedent recognizing that violations of constitutional rights constitute a concrete injury. *Baker,* at 208-209. Zimmern's allegations of a chilled willingness to participate in future elections due to the lack of ballot secrecy further underscore the immediacy of the harm. *See Lutostanski v. Brown,* 88 F.4th 582, 586 (5th Cir. 2023) ("Concrete injuries include constitutional harms."). Otherwise, a lawyer-voter may be chilled from voting for state judicial candidates and cast an under ballot because of the ability to look up judicial candidate votes.

ii. Plaintiff William Sommer Also Shows Standing.

Plaintiff William Sommer, a registered voter and election worker in Harris County, has likewise demonstrated standing based on the injuries he has alleged. Sommer's primary injury stems from his decision to abstain from voting in a primary election due to the reasonable fear that his ballot choices would not remain private. Complaint ¶ 16. This chilling effect on his participation in the democratic process constitutes a concrete and particularized injury-in-fact. *Speech First, Inc. v. Fenves,* 979 F.3d 319, 331 (5th Cir. 2020). As an election judge, Sommer

knew his ballot was not secret. Sommer's abstention from voting is directly attributable to Defendants' failure to implement adequate safeguards to ensure ballot secrecy.

Moreover, Sommer's familiarity with Harris County's election systems gives him firsthand knowledge of the deficiencies that allow for the identification of individual voters' ballots. Sommer's abstention is not a speculative or generalized grievance; it is a direct response to the systemic flaws described in the complaint. Nor are Sommer's injuries self-inflicted as the Defendants' motion suggests. As with Zimmern, Sommer's injuries are fairly traceable to Defendants' conduct and are redressable through the relief sought in this litigation.

iii. Plaintiff Kane Similarly Has Standing.

Plaintiff Caroline Kane, a former congressional candidate and registered voter in Harris County, has standing. Unlike Zimmern and Sommer, Kane has already experienced the public exposure of how she voted following the 2024 Republican Primary. Complaint ¶ 17. This incident resulted in direct harm to Kane's rights to political privacy and free expression. By allowing the identification of her specific ballot choices, Defendants subjected Kane to reputational risks and undermined her ability to freely participate in the electoral process without fear of retaliation or coercion.

The harm Kane suffered is concrete, particularized, and directly tied to the systemic deficiencies in Harris County's election practices. The complaint and accompanying affidavits explain how the County's failure to redact sensitive voter information enabled the identification of Kane's ballot. This public disclosure has had both immediate and ongoing consequences, including the chilling of Kane's willingness to participate in future elections and her ability to freely express her political preferences.

Kane's injury is fairly traceable to Defendants' actions. As election officials responsible for the choice and administration of Harris County's elections systems, Defendants directly contributed to the harm Kane experienced by failing to implement adequate safeguards for ballot secrecy. Their inaction in the face of known risks—highlighted in the Texas Secretary of State's Election Advisory No. 2024-20—further underscores their responsibility for the constitutional violations Kane endured.[8]

B. All Three Plaintiffs Plausibly Allege Causation and Redressability.

The Plaintiffs also satisfy the causation and redressability prongs of standing, as required under Article III of the U.S. Constitution. The causation prong is met when the injury is "fairly traceable to the challenged action of the defendant" *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). Plaintiffs' injuries stem directly from Defendants' practices of collecting and maintaining private voter data, creating and preserving various other administrative records, as well as the public disclosure of unredacted voting records and the failure to implement adequate safeguards to protect ballot secrecy. Defendants' roles as County Judge and County Clerk place them in positions of authority over the administration of elections and the release of voting records, making them directly responsible for the harm alleged. Tex. Elec. Code § 123.001 et seq; Tex. Gov't Code § 552.201(b); Tex. Elec. Code § 66.001(1).

The redressability prong is satisfied when the requested relief is likely to remedy the plaintiff's injury. *Lujan,* 504 U.S. at 560. Plaintiffs seek injunctive relief requiring Defendants to adopt measures that ensure ballot secrecy, such as adopting protocols to protect voters' secret ballots. Implementing these measures would directly address Plaintiffs' concerns, preventing future disclosures of voting records and restoring their confidence in the electoral process.

[8] Election Advisory 2024-20 is only an "advisory." It is not a legally enforceable directive or mandate and carries no force of law. County officials are free to ignore it as Harris County did in responding to open records requests in October 2024.

C. The Eleventh Amendment Does Not Bar Plaintiffs' Claims.

Defendants argue that Plaintiffs' claims are barred by the Eleventh Amendment, but this argument is flat wrong. The Eleventh Amendment generally protects states and state officials acting in their official capacities from being sued in federal court without consent. However, the doctrine established in *Ex parte Young* provides a well-recognized exception to Eleventh Amendment immunity. *Ex parte Young*, 209 U.S. 123 (1908). Plaintiffs' claims here fall squarely within the *Ex parte Young* exception.

Under *Ex parte Young*, a plaintiff may seek prospective injunctive relief against state officials to prevent ongoing violations of federal law. *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020). The *Ex parte Young* doctrine has three requirements: "(1) a plaintiff must name individual state officials as defendants in their official capacities; (2) the plaintiff must allege an ongoing violation of federal law; and (3) the relief sought must be properly characterized as prospective." *Mi Familia Vota v. Ogg*, 105 F.4th 313, 325 (5th Cir. 2024) (citing *Green Valley Special Util. Dist. V. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020). In this case, Plaintiffs allege that Defendants, in their official capacities as county election officials are engaged in ongoing constitutional violations by failing to implement safeguards that ensure ballot secrecy. Plaintiffs do not seek monetary damages or retroactive relief; rather, they seek declaratory and injunctive relief to compel Defendants to adopt measures that protect the constitutional rights of voters in Harris County.

The Fifth Circuit has repeatedly upheld the applicability of the *Ex parte Young* doctrine in cases involving prospective relief to address ongoing violations of federal rights. *See e.g. Mi Familia Vota,* 105 F.4th at 325. The relief sought by Plaintiffs—mandatory procedural safeguards for ballot secrecy—is narrowly tailored to end ongoing constitutional violations.

These remedies are precisely the type of prospective relief contemplated under the third requirement of *Ex parte Young*. *See e.g*. *Mi Familia Vota,* 105 F.4th at 325.

D. Plaintiffs' Claims Are Not Moot.

Defendants argue that Plaintiffs' claims are moot, presumably on the basis that the alleged harm has already occurred or that the County may possibly redact identifiable voter information in the future. This argument is misplaced. The County still collects and maintains identifiable voter information. How a voter voted can still be discovered. Plaintiffs' claims seek redress of ongoing and systemic violations of constitutional rights and the relief sought would prevent future harm.

The mootness doctrine applies only when the issues presented are no longer "live" or when the parties lack a legally cognizable interest in the outcome. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 379 (1980). In this case, Plaintiffs allege ongoing violations of their constitutional rights because how a voter voted can still be discovered. These violations are not speculative or hypothetical; they are real and current.

Worse for the Defendants in the election context, the Supreme Court has recognized an exception to the mootness doctrine for cases involving issues that are "capable of repetition, yet evading review." *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 462 (2007). This exception applies when (1) the challenged action is too short in duration to be fully litigated before it ceases, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Id*. Both criteria are satisfied here. Election cycles are inherently time-sensitive, and the harm caused by inadequate ballot privacy measures arises with each election. Plaintiffs, as active voters and participants in the democratic process, are reasonably likely to encounter the same unconstitutional practices in future elections.

Moreover, the relief sought by Plaintiffs—prospective injunctive measures to ensure ballot secrecy—would directly address the ongoing nature of the harm. The absence of adequate safeguards creates a persistent risk that voters' choices will be disclosed, chilling their willingness to participate in elections. This chilling effect constitutes an ongoing injury that remains "live" and actionable. *U.S. Parole Comm'n*, at 397.

Defendants' argument that hypothetical future changes to election practices could render Plaintiffs' claims moot is speculative at best. Courts have consistently held that voluntary cessation of unconstitutional conduct does not moot a case unless there is clear evidence that the offending behavior will not recur. *Id* at 397. Defendants have offered no assurances or evidence that they will adopt systemic software and hardware changes to safeguard ballot secrecy in the future. Absent such assurances, Plaintiffs retain a legally cognizable interest in securing relief to prevent ongoing and future violations.

II. The Court Should Deny Defendants' Rule 12(b)(6) Motion.

A. Plaintiffs Allege All the Essential Elements of a § 1983 Claim.

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege (1) the deprivation of a right secured by the Constitution or laws of the United States, and (2) that the deprivation was caused by a person acting under color of state law. 42 U.S.C. § 1983. *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010). Plaintiffs' complaint satisfies both elements.

First, Plaintiffs allege that Defendants' practices of collecting, maintaining and distributing identifiable voter information violate constitutional rights of speech, association and political privacy guaranteed by the First and Fourteenth Amendments. Plaintiffs assert that Defendants' failure to protect the secrecy of the ballot infringes upon their rights to political privacy, free expression, association, equal protection, and due process. These five separate

Constitutional claims are supported by detailed factual allegations demonstrating how Defendants' conduct has harmed Plaintiffs.

Second, Defendants were acting under the color of state law in their official capacities as election officials. The administration of elections and the management of voting records are core governmental functions performed by county officials acting under the authority of state law. Tex. Elec. Code § 123.001 *et seq*. Defendants' actions and omissions, including the collection, maintenance and release of voting records and the failure to adopt adequate safeguards, were undertaken as part of their official duties. This satisfies the second element of a § 1983 claim.

Courts have consistently recognized that § 1983 provides a cause of action for constitutional violations arising from election practices. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964). Plaintiffs' allegations are well-pleaded and establish a plausible basis for relief under 42 U.S.C. § 1983.

B. Plaintiffs Allege a First Amendment Claim.

The First Amendment protects the rights to free expression, political association, and privacy in political choices. *McIntyre,* 514 U.S. at 342 (recognizing the right of anonymous speech); *NAACP,* 357 U.S. at 462. (recognizing the constitutional right to privacy in political association).[9] Plaintiffs allege that Defendants' practices eradicate privacy and chill their willingness to participate in the democratic process. First Amendment rights of speech, association and political privacy are violated.

Making matters worse, the collection and maintenance of identifiable voter information and ballot choices and the subsequent public disclosure of voting records creates a substantial risk

[9] Plaintiffs' re-urge the argument set out on pages 1-3 in the Nature and Stage of Proceedings *intra.*

of harm and injury including intimidation, bribery, retaliation, coercion, and social ostracism.[10] *See Burson v, Freeman*, 504 U.S. 191, 200-206 (1992). This chilling effect on political participation is a recognized harm under First Amendment jurisprudence. *NAACP,* 357 U.S. at 462. Plaintiffs' allegations demonstrate that the lack of ballot secrecy deters them from voting and expressing their political preferences freely.

In *Burson*, the Supreme Court detailed the problems burdened by voters before ballots were secret. *Burson v. Freeman,* 504 U.S. 191, 200-206 (1992). The *viva voce* method of voting invited bribery and intimidation. *Id.* at 200. The subsequent method of printing ballots by candidates or parties was no better. "Approaching the polling place under this system was akin to entering an open auction place." *Id.* at 202. The adoption of the secret ballot brought widely praised reforms. *Id.* at 203-305. The Supreme Court quoted the observations of W. Ivins, "The Electoral System of the State of New York," Proceedings of the 29th Annual Meeting of the New York Bar Association 316 (1906):

> We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end. In earlier times, our polling places were frequently, to quote the litany, "scenes of battle, murder, and sudden death." This also has come to an end, and until night-fall, when the jubilation begins, our election days are now as peaceful as our Sabbaths.

While elections in 2024 hardly resemble the Sabbath of 1906, privacy brings a measure of tranquility. The Defendants' system of voting now invites a modern version of the mayhem that once characterized public votes.

[10] The opportunity of malevolent mischief created by government and/or public knowledge of voters' ballots is both well documented in the past and limitless. Job opportunities, promotions, school admissions, loan and mortgage decisions, medical care queues and an endless list of decisions, could all be affected by how a person or their family voted.

C. Plaintiffs Allege Equal Protection and Due Process claims.

Plaintiffs also allege violations of the Fourteenth Amendment's Equal Protection and Due Process Clauses. The Harris County voting system treats voters differently based on where they vote. Voters in regular election day precincts enjoy a secret ballot; Voters at county voting centers do not. Furthermore, the failure to ensure the secrecy of ballots deprives Plaintiffs of their due process rights. *See Croft v. Gov. of Texas*, 562 F.3d 735, 745 (5th Cir, 2009) ("The loss of First Amendment freedoms for even minimal periods of time unquestionably constitute irreparable injury," citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Rule 12(b)(6) requires the Court to accept Plaintiffs' allegations as true and to construe them in the light most favorable to Plaintiffs. Under this standard, Plaintiffs have more than met their burden. The complaint provides detailed factual allegations, supported by affidavits, demonstrating the real and imminent harm caused by Defendants' practices. These allegations plausibly state claims for relief under the First and Fourteenth Amendments.

i. Equal Protection

The Equal Protection Clause requires that similarly situated individuals be treated equally under the law. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667-668 (1966) ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be meticulously scrutinized," citing *Reynolds v. Sims*, 377 U.S. 533, 561-562). Here, voters are not treated equally. Voters who vote in one location enjoy a secret ballot while voters who vote in a vote center do not have a secret ballot.

Voters who cast ballots in one location cannot be fundamentally treated differently than voters who cast ballots in a different location. *See generally Bush v. Gore*, 531 U.S. 98, 104

(2000) (Equal Protection requires the recount of all counties, not just a chosen few); *Harper*, 383 U.S. at 667-668. Plaintiffs plausibly allege that Defendants' practices fail to meet this standard and result in unequal treatment of similarly situated voters.

ii. Due Process

Due process protects against government actions that arbitrarily or egregiously violate fundamental rights. *Harper*, 383 U.S. at 667-668. Plaintiffs allege that the secrecy of the ballot is a fundamental right integral to the democratic process. Defendants' conduct, which requires voters to relinquish their right to political privacy to vote, constitutes an egregious violation of this right. *See, e.g. Harper,* 383 U.S. at 666-668 (invalidating Virginia's poll tax); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (invalidating Texas prohibition on U.S. military to vote); *Louisiana v. U.S.*, 380 U.S. 145, 152-153 (1965) (invalidating Louisiana's "interpretation law" because it places arbitrary power in the hands of the county clerk); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (invalidating Georgia's homesite and occupation requirement to vote). The denial of the right to vote unless a voter abandons their right to a secret ballot is constitutionally abhorrent. This is an arbitrary and capricious act in violation of voters' due process rights enveloped in the system of voting adopted by the Defendants.

CONCLUSION

Plaintiffs have adequately pleaded facts establishing standing, justiciability, and plausible claim for relief. The choice of a voting system which inherently violates the right to a secret ballot belongs to the Defendants. Tex Elec. Code § 123.001 *et seq*. The Defendants' motion to dismiss misses the point in the complaint that it is the Defendants who choose to collect, maintain and publish the information necessary to learn a voter's ballot. Regardless of whether

certain information is redacted from publication, the County still knows how a voter voted, thereby violating a voter's right to political privacy. [11]

For the foregoing reasons, this Court should deny the Defendants' Motion to Dismiss.

Dated: January 13, 2025.

Respectfully Submitted,

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[11] The collection by the government of First Amendment protected information is also a civil rights violation. *NAACP v. Ala*. ex *rel* Patterson, 357 U.S. 449, 468 (1958).

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2025, I electronically filed the foregoing using the Court's ECF system, which will serve this response on all parties.

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