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.

PLAINTIFFS' RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

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

CASE STATUS

During the Pre-Motion conference, the court determined that this case is best decided by cross-motions for summary judgement. ECF No. 32. To that end, the court asked Plaintiffs to amend the Complaint and ordered the Defendants to answer the Amended Complaint. The Court also allowed each side to submit ten interrogatories to the other side. *Id*. The Plaintiffs amended their complaint. ECF No. 33. After receiving the Defendants' interrogatory answers, Plaintiffs filed a Motion for Summary Judgment, ECF No. 35, to which the Defendants responded ECF No. 36, and to which the Plaintiffs replied. ECF. No 37. Plaintiffs timely filed an Amended Reply. ECF No. 38. Defendants have now filed a Motion to Dismiss, for Judgment on the Pleadings, or in the alternative for Summary Judgment. ECF No. 41. Plaintiffs file this Response and Memorandum to those motions. ECF No. 42.

Defendants' motions are a re-urging of matters previously brought before the court. Accordingly, Plaintiffs incorporate by reference as if set out in full their Response to Defendants' Motions to Dismiss, ECF No. 11, Advisory to the Court, ECF No. 26, Supplemental Letter Brief, ECF No. 29, Plaintiffs Motion for Summary Judgment, ECF No. 35, Reply, ECF No. 37, Amended Reply, ECF No. 38, and the evidence and affidavits attached to those pleadings.

Harris County's motions reinforce Plaintiffs' positions on law and facts. The County does not deny that it collects and maintains sufficient data to determine a voter's vote. The central facts that give rise to Plaintiffs' claims remain undisputed: the election records system chosen and maintained by Harris County enables the identification of how certain voters voted, thereby compromising the constitutionally protected right to ballot secrecy.

Also, while some voters enjoy a secret ballot, others do not. A public policy which protects the rights of some voters, but not others, is constitutionally problematic. Equal protection under the law is denied.

This case is about safeguarding the constitutional right to a secret ballot for all voters – not just some. Plaintiffs seek only what the law already should promise: that no voter's ballot may be easily traced back to them through government-maintained records. The undisputed evidence establishes that Harris County's recordkeeping system includes public availability of (1) Cast Vote Records (CVRs) linked to polling locations and ballot styles, (2) electronic poll books that log voter check-in times, and (3) voting rosters. In combination, these records make it possible, particularly in small precincts or low-turnout elections, to identify specific voters' ballots with extraordinary ease.[1]

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

TABLE OF CONTENTS

CASE STATUS ii

TABLE OF CONTENTS iv

INDEX OF AUTHORITIES vii

ARGUMENT IN RESPONSE 1

I. ALL VOTERS HAVE A RIGHT TO A SECRET BALLOT 2

II. PLAINTIFFS HAVE STANDING TO PROTECT THEIR RIGHT TO A SECRET BALLOT 9

A. Plaintiffs Have Standing 9

1. Plaintiff Kenneth Zimmern Has Concrete and Unique Injuries 10

2. Plaintiff William Sommer Has Standing 11

3. Plaintiff Caroline Kane Has Standing 12

B. Plaintiffs Allege and Prove Causation and Redressability 13

III. UNDISPUTED FACTS SUPPORT PLAINTIFFS' CLAIMS 14

A. Harris County's Election System Produces and Discloses Records That Can Be Matched 15

1. Electronic Poll Books Record the Time Each Voter Checks In 15

2. Cast Vote Records Contain Polling Location and Ballot Style Information 16

3. Voting Rosters Are Publicly Available and Identify Voters by Polling Location 16

4. Low-Volume Voting Periods Enable Vote Reconstruction 17

5. The Secretary of State' Advisory 2024 – 20 Admits Voters' Ballots are Not Secret 17

B. Harris County Maintains and Discloses All Election Records at Issue 18

1. Clerk Hudspeth Is the Custodian of All Election Records at Issue 18

2. All Staff in the Clerk's Office Have Access to These Records 18

3. The County Has Conducted No Audit of Ballot Secrecy Risks 19

4. The County Has Received a Voter Privacy Complaint 19

5. Plaintiffs' Injuries are On-going 20

IV. DEFENDANTS' MISCELLANEOUS ARGUMENTS 20

A. Judge Hidalgo Is a Proper Defendant Under § 1983 21

B. Plaintiffs Pleaded Proper § 1983 Claims 21

C. Plaintiffs' Evidence Is Admissible and Unrebutted 22

1. Defendants Mischaracterize the Nature and Scope of the Expert Declarations 22

2. Defendants' Objections Are Procedural and Unsupported 23

D. Even Isolated or Probabilistic Tracing Violates Ballot Secrecy 23

V. PLAINTIFFS DO NOT RAISE A POLITICAL QUESTION 24

CONCLUSION 25

INDEX OF AUTHORITIES

Cases

44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) 6
Ams. for Prosperity Found. v. Bonta, 594 U.S. 595(2021) 4, 7, 8
Baker v Carr, 369 U.S. 186 (1961).....7, 9, 11, 24
Buckley v. Valeo, 421 U.S. 1 (1976).....7
Burson v. Freeman, 504 U.S. 191 (1992)..... 7-8
Cantwell v. Connecticut, 310 U.S. 296 (1940).....3
Catholic Leadership Coalition of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014) 7
City of Ladue v. Gilleo, 512 U.S. 43 (1994).....5
Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330 (5th Cir. 2001) 5
Croft v. Gov. of Tex., 562 F.3d 735 (5th Cir. 2009) 24
Elrod v. Burns, 427 U.S. 347 (1976) 24
Gibson v. Tex. Dep't of Ins. – Div. of Workers' Comp., 700 F.3d 227 (5th Cir. 2012) 22
Gitlow v. New York, 286 U.S. 652 (1925) 3, 6, 7
Gray v Sanders, 372 U.S. 368 (1965).....9
Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 24
Kentucky v. Graham, 473 U.S. 159 (1985).....21
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 13, 14
Lutostanski v. Brown, 88 F.4th 582 (5th Cir. 2023) 10
Marbury v. Madison, 5 U.S. 137 (1803).....9
McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 4-6, 7
NAACP v. Ala. ex rel. Patterson, 357 U.S. 449 (1958).....3-4, 9, 10-11
NAACP v. Button, 371 U.S. 415, 433 (1963) 4
Palko v. Connecticut, 302 U.S. 319 (1937) 3
Reynolds v. Sims, 377 U.S. 533, 554 (1964).....24
Speech First, Inc. v. Fenves, 979 F.3d 319, 331 (5th Cir. 2020).....11

Staub v. City of Baxley, 355 U.S. 313 (1957) 3
Talley v. California, 362 U.S. (1960) 5
Valle v. City of Houston, 613 F.3d 536 (5th Cir. 2010).....21
Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000).....22

Statues and Rules

42 U.S.C. § 1983 8
52 U.S.C § 1983 21
Tex. Elect. Code § 1.012.....15, 17
Tex. Elect. Code § 66.001(1) 8, 13, 17
Tex. Elec. Code § 123.001 *et seq*.....8, 14
Tex. Gov't. Code § 552.201(b).....8, 13
Fed. R. Evid. 701 23
Fed. R. Evid. 702 23

Other Authorities

Texas Att'y Gen Op. No. KP – 0463 (May 1, 2024).....15

Natalia Contreras, et al., Texas Officials Compromised Ballot Secrecy As They Increased Election Transparency, The Texas Tribune, (May 29, 2024), https://www.texastribune.org/2024/05/29/texas-ballot-compromised-election-security-transparency/ 1

Tommy Oliver, EXCLUSIVE: Hacked Ballot Proves Texas Elections in CRISIS, Current Revolt, (May 22, 2024), https://www.currentrevolt.com/p/exclusive-hacked-ballot-proves-texas; Current Revolt, Voter Ballot Belonging to Democrat Representative Identified, Current Revolt, (Jun 1, 2024), https://www.currentrevolt.com/p/voter-ballot-belonging-to-democrat 1-2

ARGUMENT IN RESPONSE

There is no real dispute over whether a voter's particular cast ballot may be publicly examined – both by private citizens and government officials. The County's motions and responses fail to create a genuine dispute of a material fact. The affidavit submitted by Defendant County Clerk Hudspeth does not contradict the Plaintiffs' summary judgment evidence – it supports it. Her affidavit is enough to carry the Plaintiffs' burden that a voter's vote can be easily examined:

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

What Defendant Hudspeth omits says everything. She does not say easily examining how a voter votes is impossible. She does not say government officials or the public cannot, through accessing records she is statutorily required to keep and make public, examine how a voter voted. She did not dare mention that votes have never been made public, because it is a well-reported reality that it already has.[2]

[2] Natalia Contreras, et al., Texas Officials Compromised Ballot Secrecy As They Increased Election Transparency, The Texas Tribune, (May 29, 2024), https://www.texastribune.org/2024/05/29/texas-ballot-compromised-election-security-transparency/; Tommy Oliver, EXCLUSIVE: Hacked Ballot Proves Texas

Even the Texas Secretary of State admits that the county collects and maintains data which allows voters' votes to be known. *See* Texas Secretary of State Election Advisory No. 2024 – 20 (June 6, 2024) ECF No. 38-1.

The facts are not in dispute. Questions of fundamental constitutional principles, including the rights to political privacy, free expression, association, due process and equal protection, are ripe for this court to decide.

I. ALL VOTERS HAVE A RIGHT TO A SECRET BALLOT

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.

Plaintiffs do not allege mere abstract grievances; they identify specific, ongoing practices that undermine the integrity of elections and violate personal

---

Elections in CRISIS, Current Revolt, (May 22, 2024), https://www.currentrevolt.com/p/exclusive-hacked-ballot-proves-texas; Current Revolt, Voter Ballot Belonging to Democrat Representative Identified, Current Revolt, (June 1, 2024), https://www.currentrevolt.com/p/voter-ballot-belonging-to-democrat.

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. Political privacy, and the derivative privacy right of a secret ballot, is protected by the First Amendment. It is inseparable from "liberty" as guaranteed in the Fourteenth Amendment. *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 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 protects 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.

Recently even, the Supreme Court found privacy rights flowing from the associational protections in the First Amendment. In *Ams. for Prosperity Found. v. Bonta*, the Court reaffirmed the right to associate privately and stated:

> When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, "[b]ecause First Amendment freedoms need breathing space to survive."

594 U.S. 595, 618-19 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

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.[3] While these challenged procedures may be ones of first impression for a court in deciding a motion for summary judgment, 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?

---

[3] *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 489, n.1 (1996) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("Although the text of the First Amendment states that 'Congress shall make no law … abridging the freedom of speech, or of the press,' the Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment."); *see also Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 344 n.8 (5th Cir. 2001).

It stands to reason, therefore, that if the right to speak and associate privately is an indispensable fundamental 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. *See Gitlow v. New York*, 286 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.")

Accordingly, Plaintiffs have plausibly alleged and now proven that the system used by Harris County defeats the right to a secret ballot and infringes upon the rights of speech. The county's justification for their chosen system that allows discovery of how voters voted requires exacting scrutiny. *Ams. for Prosperity Found.*, 594 U.S. at 613; *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, 200-06

(1992); *see also Ams. for Prosperity Found.* 594 U.S. at 618 ("The risk of a chilling effect on association is enough."). The Defendants do not assert an articulable overriding state interest as to why they collect data which allows voters' choices to be discerned.

If the right to a secret ballot is not constitutionally protected, then it would be lawful for Harris County to post all voters' votes online, and worse. Under the current system, 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). Public disclosure of votes is shocking but would be lawful unless this Court recognizes the constitutional right to a secret ballot.

Plaintiffs have plausibly alleged and now proven 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.

II. PLAINTIFFS HAVE STANDING TO PROTECT THEIR RIGHT TO A SECRET BALLOT.

A. Plaintiffs Have Standing.

Each voter has a unique, concrete, and particularized injury when their political privacy is violated. *See Baker*, 369 U.S. 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*, 369 U.S. at 208 (citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803)) ("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." 372 U.S. 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. Undeniably, the Defendants collect and maintain that information. The Constitutional violation occurs at the time of collection. *See NAACP*, 357 U.S. at 463.

1. Plaintiff Kenneth 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 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; ECF No. 35-1 at 41-42.

Any 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 NAACP*, 357 U.S. at 462-63 (finding "it [is] apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and

dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure").

Zimmern's allegations align with established precedent recognizing that violations of constitutional rights constitute a concrete injury. *Baker*, 369 U.S. 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 not vote because of the ability to look up judicial candidate votes.

2. Plaintiff William Sommer Has 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; ECF No. 35-1 at 44-48. 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.

3. Plaintiff Caroline Kane 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; ECF 35-1 at 51-52. 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.

B. Plaintiffs Allege and Prove 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 defendant's allegedly unlawful conduct" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (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). Both Defendants are sued in their official capacity. ECF 33.

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 new protocols while maintaining the ease of voting in Harris County would directly address Plaintiffs' concerns, preventing future disclosures of voting records and restoring confidence in the electoral process.

III. UNDISPUTED FACTS SUPPORT PLAINTIFFS' CLAIMS

The summary judgment record contains a detailed, consistent, and unrebutted account of how Harris County's election system enables vote traceability. The following material facts are supported by Defendant Hudspeth's Affidavit, Defendants' verified responses to Plaintiffs' interrogatories, and Defendants' own pleadings and admissions. Critically, Defendants do not genuinely dispute these

facts, nor do they offer any expert analysis or alternative evidence to undermine them. Attached as Exhibit 2 to the Amended Reply, ECF No. 38-2, is an Affirmation from Barry Wernick which includes a step-by-step process of how to learn Joseph Trahan's vote, with permission from Mr. Trahan. ECF 38-3. Mr. Trahan's CVR is ECF No, 38-4.

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

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

- As Defendants admit in Interrogatory No. 3, the electronic poll books used at vote centers produce and store a timestamp showing when each voter is accepted to vote. This information is retained, stored and subject to open records requests to be publicly released. ECF No. 35, at 28.[4] The Texas Secretary of State's Advisory No. 2024 – 20, "Emergency Guidance on Voter Privacy," June 6, 2024, recommends redacting the voter's check-in time, but that information is known by the County and subject to open records request to enable the audit the election results. *See* Tex. Elec. Code § 1.102; Attorney General Opinion KP – 0463 (May 1, 2024).

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

- Defendant Hudspeth confirms in her affidavit (¶11) that "electronic poll books record information at the time that the voter checks in to vote." ECF No. 36-1, at 3.

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

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

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

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

4. Low-Volume Voting Periods Enable Vote Reconstruction.

- The combination of check-in time (recorded), polling location (in CVRs and rosters), and ballot style (tied to geography) means that in small windows (e.g., early morning at a single location) individual votes can often be matched to specific voters. *See* Wernick Affidavit, ECF 35-1, at 5 ¶¶ 7-9.
- Defendants offer no rebuttal evidence or expert analysis challenging this method of linkage.

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

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

right to a secret ballot, the official should consider additional redactions in consultation with their county or district attorney and public information coordinator." Exhibit 1, p. 2.

- Secretary Nelson further writes, "If a county election official decides that any of the above-referenced information should be redacted in response to a particular public information request, the official must obtain the requestor's consent to redact such information or seek an open records ruling from the Attorney General authorizing the redactions in that specific circumstance." Exhibit 1, p. 3.

B. Harris County Maintains and Discloses All Election Records at Issue.

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

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

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

- In Defendants' Answers to Interrogatory No. 10, the County admits that every election staff member in the County Clerk's Office has access to

pollbooks, rosters, ballot images, and CVRs. They provide a list of over 200 individuals with such access. ECF 35-1, at 31-36.

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

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

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

4. The County Has Received a Voter Privacy Complaint.

- The County acknowledges in Interrogatory No. 9 that at least one complaint relating to ballot secrecy was received in May 2024 from a candidate concerned about vote traceability. No investigation or policy change followed the complaint. ECF 35-1, at 31. ("Defendants have not

had any internal discussions related to concerns about ballot secrecy or the traceability of individual votes since September 1, 2023.")

5. Plaintiffs' Injuries are On-going.

- Harris County admits in its Answer that ballot secrecy will be an ongoing issue through at least 2026. ECF. No. 34 at 6, paragraph 32. "Defendants admit only so much of paragraph 32 as alleges that it is currently expected that countywide polling locations will be used in Harris County in 2025 and 2026. In all other respects, the allegations in paragraph 32 are denied because Defendants lack knowledge or information sufficient to form a belief about the occurrence of future events." *Id*.

IV. DEFENDANTS' MISCELLANEOUS ARGUMENTS

Defendants advance several random legal arguments in support of their motions and in opposition to Plaintiffs' Motion for Summary Judgment. None creates a genuine dispute of material fact, nor do they alter the fact that Harris County's election system enables the tracing of ballots to individual voters and treats voters unequally. This section addresses the three main arguments advanced by the Defendants:

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

Defendants contend that summary judgment must be denied as to Judge Hidalgo because she is not a final policymaker for the conduct at issue.

Plaintiffs sue Judge Hidalgo in her official capacity as the chief executive officer of Harris County, ECF No. 33, pursuant to longstanding Fifth Circuit precedent holding that county officials sued in this capacity are stand-ins for the county itself. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Judge Hidalgo plays an active policymaking role in Harris County's election system because the Commissioners Court and she control voting system approvals. Plaintiffs do not allege that Judge Hidalgo directly administers elections or is personally liable, but that she is the final County policymaker responsible for selecting and maintaining the system that enables ballot traceability. ECF No. 33.

B. Plaintiffs Pleaded Proper § 1983 Claims

As the Fifth Circuit has recognized, the Civil Rights Act, 52 U.S.C. § 1983 requires a showing that "an official policy" caused the constitutional violation. *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010). Here, Plaintiffs challenge the County's policies of collecting, storing, and disclosing election records in a manner that facilitates vote tracing. Plaintiffs are not required to show that a specific staff member connected a particular voter to a particular vote. Harris County adopted

and used, as a matter of policy, an election system that allows both the county government and the public to learn how a voter voted. Additionally, the election system protects the privacy of some voters, but not all, without a rational basis, evidencing a § 1983 unequal treatment claim. *Gibson v. Tex. Dep't of Ins. – Div. of Workers' Comp*., 700 F.3d 227, 238 (5th Cir. 2012) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

C. Plaintiffs' Evidence Is Admissible and Unrebutted

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

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

- Wernick and Weible describe how vote tracing is technically possible using election records that are publicly available or acknowledged by Defendants to exist.
- Both affiants explain the methodology and reasoning by which vote patterns can be de-anonymized under specific conditions, particularly in small precincts or short time windows.

- Defendants assert that these affiants are not qualified experts yet offer no Daubert motion or alternative analysis. Defendant Hudspeth is in a position to rebut their methodology but does not; she simply states that she does not authorize staff to conduct such tracing.

2. Defendants' Objections Are Procedural and Unsupported

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

D. Even Isolated or Probabilistic Tracing Violates Ballot Secrecy

Defendants do not contest that in some cases, particularly during early morning voting, low-turnout periods, or precincts with few registered voters, individuals' votes can be matched with high confidence. In such scenarios, the County's system functions in a manner inconsistent with the right of ballot secrecy.

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

- **Chilling Effect**: Voters aware of the traceability may refrain from voting or alter their preferences.

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

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

V. PLAINTIFFS DO NOT RAISE A POLITICAL QUESTION.

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*, 369 U.S. at 207-208 (1962); *Harper v. Va. 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 Reynolds v. Sims*, 377 U.S.

533, 554 (1964) (explaining that denial of a constitutionally protected right demands judicial protection)

CONCLUSION

For the foregoing reasons, Plaintiffs request an in-person, oral hearing and pray this Court grant the Plaintiffs' Motion for Summary Judgment, the relief requested in the Amended Complaint, deny Defendants' motions to dismiss and for summary judgment, and grant Plaintiffs any further relief to which Plaintiffs may be entitled.

Respectfully Submitted,

Attorneys for Plaintiffs,

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

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2025, a true and correct copy of the foregoing pleading was electronically filed using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Joseph M. Nixon
Joseph M. Nixon

Dated: November 14, 2025.

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

jnixon@publicinterestlegal.org