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**PER CURIAM OPINION, U.S. COURT OF
APPEALS FOR THE FIFTH CIRCUIT
(APRIL 3, 2024)**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRAVIS WAYNE EUBANKS, A VOTER OF BEXAR COUNTY, TEXAS; LINDSEY GREMONT, A VOTER OF TRAVIS COUNTY, TEXAS; KRISTEN PLAISANCE, A VOTER OF MONTGOMERY COUNTY, TEXAS; JASON SCOTT BUSTER, A VOTER OF BEXAR COUNTY, TEXAS; ALEXANDRA CAMPO, A VOTER OF WILLIAMSON COUNTY, TEXAS; JAMES L. CLARK, A VOTER OF HAYS COUNTY, TEXAS; JUAN CARLOS ARIAS, A VOTER AND CANDIDATE OF HARRIS COUNTY, TEXAS; JOSE CHRISTINE SILVESTER, A VOTER OF COMAL COUNTY, TEXAS; TOMMIE DICKINSON, A VOTER OF ATASCOSA COUNTY, TEXAS; ROBERT JAMES BROOKS, JR., A VOTER OF TRAVIS COUNTY, TEXAS; ALANA S. PHILLIPS, A VOTER OF DENTON COUNTY, TEXAS; AMBER CLOY, A VOTER OF TARRANT COUNTY, TEXAS; SHERON JENNIFER LIPPER, A VOTER OF DALLAS COUNTY, TEXAS; LYNN DAVENPORT, A VOTER AND CANDIDATE OF DALLAS COUNTY, TEXAS; LESTER RAND,

Plaintiffs-Appellants,

ANNE STONE; ALLYSON RASKIN

Appellants,

JANE NELSON, TEXAS SECRETARY OF STATE;
JOHN B. SCOTT, IN HIS INDIVIDUAL CAPACITY
AND IN HIS OFFICIAL CAPACITY AS THE
TEXAS SECRETARY OF STATE; JOSE "JOE" A.
ESPARZA, IN HIS INDIVIDUAL CAPACITY AND
IN HIS OFFICIAL CAPACITY AS DEPUTY
SECRETARY OF STATE; RUTH R. HUGHS, IN
HER INDIVIDUAL CAPACITY AND IN HER
OFFICIAL CAPACITY AS 113 TEXAS SECRETARY
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AND OFFICIAL CAPACITY AS THE DIRECTOR
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COUNTY JUDGE; RODNEY ELLIS, HARRIS
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HARRIS COUNTY COMMISSIONER; TOM S. RAMSEY, HARRIS COUNTY COMMISSIONER; ISABEL LONGORIA, HARRIS COUNTY ELECTIONS ADMINISTRATOR; JENNIFER DOINOFF, HAYS COUNTY ELECTIONS ADMINISTRATOR; RUBEN BECERRA, HAYS COUNTY COMMISSIONER'S COURT JUDGE; DEBBIE INGALSBE, HAYS COUNTY COMMISSIONER COURT; MARK JONES, HAYS COUNTY COMMISSIONER COURT; LON SHELL, HAYS COUNTY COMMISSIONER COURT; WALT SMITH, HAYS COUNTY COMMISSIONER COURT; RON MASSINGILL, HOOD COUNTY JUDGE AND HEAD OF THE HOOD COUNTY ELECTIONS COMMISSION; MICHELE CAREW, ELECTIONS ADMINISTRATOR OF HOOD COUNTY; PAT DEEN, PARKER COUNTY JUDGE AND HEAD OF PARKER COUNTY ELECTIONS COMMISSION; CRICKETT MILLER, ELECTIONS ADMINISTRATOR OF PARKER COUNTY; GEORGE CONLEY, PARKER COUNTY COMMISSIONER; CRAIG PEACOCK, PARKER COUNTY COMMISSIONER; LARRY WALDEN, PARKER COUNTY COMMISSIONER; STEVE DUGAN, PARKER COUNTY COMMISSIONER; HEIDER GARCIA, TARRANT COUNTY ELECTIONS ADMINISTRATOR; R. JACK CAGLE, HARRIS COUNTY COMMISSIONER; ROY CHARLES BROOKS, TARRANT COUNTY COMMISSIONER; DEVAN ALLEN, TARRANT COUNTY COMMISSIONER; GARY FICKES, TARRANT COUNTY COMMISSIONER; ANDREW STEVEN BROWN, TRAVIS COUNTY JUDGE; DANA DEBEAUVOIR, FORMER TRAVIS COUNTY CLERK; REBECCA GUERRERO, TRAVIS COUNTY

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KEOUGH, MONTGOMERY COUNTY JUDGE;
SARAH ECKHARDT, FORMER TRAVIS COUNTY
JUDGE, CURRENT STATE SENATOR D-14; B.
GLEN WHITLEY, TARRANT COUNTY JUDGE;
CYNTHIA JAQUA, COMAL COUNTY ELECTIONS
COORDINATOR; CLIFFORD TATUM,

Defendants-Appellees.

App.5a

No. 23-10936

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-576

Before: SMITH, HAYNES, and DOUGLAS,
Circuit Judges.

PER CURIAM*

A large group of pro se Plaintiffs sued dozens of state and county officials in Texas challenging the use of electronic voting machines. The district court dismissed on the basis that Plaintiffs lack standing. For the reasons that follow, we AFFIRM.¹

I. Background

Over twenty pro se Plaintiffs collectively sued over sixty Defendants, all of whom are state and county officials in Texas. Plaintiffs characterize their 163-page lawsuit as “a civil rights action for declaratory and injunctive relief to prohibit the use of electronic voting equipment and systems (machines) in the State of Texas.” They seek an order requiring the use of “hand-marked paper ballots that can be cast with anonymity . . . and hand-counted by residents of the state of Texas . . . instead of with machines.”

Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (6). The district

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

¹ Because we affirm the dismissal for lack of standing, we need not address Plaintiffs’ additional arguments.

court accepted the findings, conclusions, and recommendations of the magistrate judge to the extent the magistrate judge recommended dismissal for lack of standing under Rule 12(b)(1). But the district court sustained Plaintiffs' objection to the magistrate judge's recommendation of a dismissal *with* prejudice and instead dismissed the lawsuit without prejudice. Plaintiffs timely appealed.

II. Standard of Review

We review *de novo* the grant of a motion to dismiss, applying the same standards as the district court. *LeClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005). "When a motion to dismiss for lack of jurisdiction is filed in conjunction with other Rule 12 motions, [we] consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (*per curiam*). On a Rule 12(b)(1) motion to dismiss, the party asserting jurisdiction bears the burden of proving that jurisdiction exists. *Id.*

III. Discussion

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* (internal quotation marks and citation omitted). To establish standing, Plaintiffs "must show (i) that [they] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant[s]; and (iii) that the injury would likely be redressed

by judicial relief.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

Plaintiffs contend that they have individually “experienced their own unique injury as a result of the noncompliant, uncertified electronic voting equipment and systems.”² In a section of their second amended complaint titled “Standing,” Plaintiffs list two injuries that allegedly confer standing. The first injury is “that their votes were not counted as intended and diluted.” The second is that “the release of combined private and personal information to [the Department of Homeland Security] and CIS Security³ and their third-party partners, that appears in Texas’ voter data; has been and will continue to be released.”

We addressed a substantially similar pro se challenge to electronic voting systems in *Lutostanski v. Brown*, 88 F.4th 582 (5th Cir. 2023) (summarizing plaintiffs’ alleged injuries as: “(A) their votes were ‘illegalized’ by the defendants and not counted, and (B) their personal information was unlawfully disclosed”). We held that “[n]either injury is sufficient for Article III standing.” *Id.* at 586.

² Plaintiff Travis Wayne Eubanks, who filed a separate appellate brief, addresses standing only minimally. To the extent his standing arguments differ from the other Plaintiffs’ standing arguments, they were neither presented to the district court nor included in the second amended complaint, so we need not consider them. *See Collins v. Dall. Leadership Found.*, 77 F.4th 327, 330 n.2 (5th Cir. 2023) (“[E]ven a pro se appellant cannot raise new theories for relief for the first time on appeal.” (italics omitted)).

³ Plaintiffs do not further identify this entity.

Like the plaintiffs in *Lutostanski*, Plaintiffs here do not allege that their votes have or will be treated differently from other votes, but that all voters across the state who use electronic voting machines are at risk of having their votes not counted as intended. *Id.* (concluding that a substantially similar alleged injury does not confer standing). Such an injury does not confer standing because a plaintiff who raises only a “generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quotation omitted). Nor does Plaintiffs’ allegation that the electronic voting machines at issue are illegal. *See id.* at 442 (stating that broad allegations that the law “has not been followed” are “precisely the kind of undifferentiated, generalized grievance about the conduct of the government that we have refused to countenance in the past”); *Lutostanski*, 88 F.4th at 586 (quoting same).

Plaintiffs’ second theory of standing, which stems from the alleged disclosure of their personal information, fares no better. The “Standing” section of their second amended complaint states:

Plaintiffs have information and belief that the release of combined private and personal information to [the Department of Homeland Security] and CIS Security and their third-party partners, that appears in Texas’ voter data; has been and will continue to be released. Exposing Plaintiffs to intimidation

or harassment for merely exercising their right to vote, and will cause apprehension in their exercise of First Amendment rights including the right to vote and freedom of association. Plaintiffs believe that the release of their private and personal combination of information make them easy to identify and thus susceptible to harassment.

Like Plaintiffs' first alleged injury, this alleged injury constitutes an "undifferentiated, generalized grievance" that is not particular to them. *See Lance*, 549 U.S. at 442. It is also too "speculative" to provide a basis for standing. *See Clapper*, 568 U.S. at 409; *cf. Lutostanski*, 88 F.4th 587. The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (internal quotation marks, citation, and alteration omitted).

Finally, Plaintiffs argue that because several Plaintiffs ran for office and one is currently holding office, they have standing on that basis. The district court rejected this theory of standing because allegations of candidate-specific injuries "appear[] nowhere" in Plaintiffs' second amended complaint. On appeal, Plaintiffs do not explain how the district court erred on this point, cite to allegations in their second amended complaint to refute the district court's conclusion, or direct us to any relevant caselaw to support their position. We therefore hold that Plaintiffs have forfeited this argument by failing to adequately brief it. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 n.1 (5th Cir. 2021) (explaining the numerous ways a party can forfeit an argument by failing to adequately

brief it, including “failure to address the district court’s analysis and explain how it erred,” “failure to offer record citations,” and “failure to offer any supporting argument or citation to authority” (internal quotation marks and citations omitted); *see also Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021) (holding plaintiffs forfeited candidate-standing argument by failing to meaningfully brief it).⁴

IV. Conclusion

In sum, Plaintiffs have failed to demonstrate standing. Accordingly, we AFFIRM the district court’s order dismissing the lawsuit without prejudice.

⁴ “Although we liberally construe briefs of pro se litigants and apply less stringent standards to parties proceeding pro se than to parties represented by counsel, pro se parties must still brief the issues and reasonably comply with the standards of [Federal] Rule [of Appellate Procedure] 28.” *Grant v. Ceullar*, 59 F.3d 523, 524 (5th Cir. 1995) (per curiam).

**JUDGMENT, U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT
(APRIL 3, 2024)**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRAVIS WAYNE EUBANKS, A VOTER OF BEXAR COUNTY, TEXAS; LINDSEY GREMONT, A VOTER OF TRAVIS COUNTY, TEXAS; KRISTEN PLAISANCE, A VOTER OF MONTGOMERY COUNTY, TEXAS; JASON SCOTT BUSTER, A VOTER OF BEXAR COUNTY, TEXAS; ALEXANDRA CAMPO, A VOTER OF WILLIAMSON COUNTY, TEXAS; JAMES L. CLARK, A VOTER OF HAYS COUNTY, TEXAS; JUAN CARLOS ARIAS, A VOTER AND CANDIDATE OF HARRIS COUNTY, TEXAS; JOSE CHRISTINE SILVESTER, A VOTER OF COMAL COUNTY, TEXAS; TOMMIE DICKINSON, A VOTER OF ATASCOSA COUNTY, TEXAS; ROBERT JAMES BROOKS, JR., A VOTER OF TRAVIS COUNTY, TEXAS; ALANA S. PHILLIPS, A VOTER OF DENTON COUNTY, TEXAS; AMBER CLOY, A VOTER OF TARRANT COUNTY, TEXAS; SHERON JENNIFER LIPPER, A VOTER OF DALLAS COUNTY, TEXAS; LYNN DAVENPORT, A VOTER AND CANDIDATE OF DALLAS COUNTY, TEXAS; LESTER RAND,

Plaintiffs-Appellants,

ANNE STONE; ALLYSON RASKIN

Appellants,

v.

JANE NELSON, TEXAS SECRETARY OF STATE;
JOHN B. SCOTT, IN HIS INDIVIDUAL CAPACITY
AND IN HIS OFFICIAL CAPACITY AS THE
TEXAS SECRETARY OF STATE; JOSE "JOE" A.
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EDMONDSON, DENTON COUNTY
COMMISSIONER; LINA HIDALGO, HARRIS
COUNTY JUDGE; RODNEY ELLIS, HARRIS
COUNTY COMMISSIONER; ADRIAN GARCIA,

App.13a

HARRIS COUNTY COMMISSIONER; TOM S. RAMSEY, HARRIS COUNTY COMMISSIONER; ISABEL LONGORIA, HARRIS COUNTY ELECTIONS ADMINISTRATOR; JENNIFER DOINOFF, HAYS COUNTY ELECTIONS ADMINISTRATOR; RUBEN BECERRA, HAYS COUNTY COMMISSIONER'S COURT JUDGE; DEBBIE INGALSBE, HAYS COUNTY COMMISSIONER COURT; MARK JONES, HAYS COUNTY COMMISSIONER COURT; LON SHELL, HAYS COUNTY COMMISSIONER COURT; WALT SMITH, HAYS COUNTY COMMISSIONER COURT; RON MASSINGILL, HOOD COUNTY JUDGE AND HEAD OF THE HOOD COUNTY ELECTIONS COMMISSION; MICHELE CAREW, ELECTIONS ADMINISTRATOR OF HOOD COUNTY; PAT DEEN, PARKER COUNTY JUDGE AND HEAD OF PARKER COUNTY ELECTIONS COMMISSION; CRICKETT MILLER, ELECTIONS ADMINISTRATOR OF PARKER COUNTY; GEORGE CONLEY, PARKER COUNTY COMMISSIONER; CRAIG PEACOCK, PARKER COUNTY COMMISSIONER; LARRY WALDEN, PARKER COUNTY COMMISSIONER; STEVE DUGAN, PARKER COUNTY COMMISSIONER; HEIDER GARCIA, TARRANT COUNTY ELECTIONS ADMINISTRATOR; R. JACK CAGLE, HARRIS COUNTY COMMISSIONER; ROY CHARLES BROOKS, TARRANT COUNTY COMMISSIONER; DEVAN ALLEN, TARRANT COUNTY COMMISSIONER; GARY FICKES, TARRANT COUNTY COMMISSIONER; ANDREW STEVEN BROWN, TRAVIS COUNTY JUDGE; DANA DEBEAUVOIR, FORMER TRAVIS COUNTY CLERK; REBECCA GUERRERO, TRAVIS COUNTY

App.14a

CLERK; BILL GRAVELL, WILLIAMSON COUNTY
JUDGE; CHRISTOPHER DAVIS, WILLIAMSON
COUNTY ELECTIONS ADMINISTRATOR; TERRY
COOK, WILLIAMSON COUNTY COMMISSIONER;
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COORDINATOR; CLIFFORD TATUM,

Defendants-Appellees.

App.15a

No. 23-10936

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CV-576

Before: SMITH, HAYNES, and DOUGLAS,
Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *See* Fed. R. App. P. 41(b). The court may shorten or extend the time by order. *See* 5th Cir. R. 41 I.O.P.

App.16a

**ORDER ACCEPTING FINDINGS,
CONCLUSIONS, AND RECOMMENDATIONS
OF THE MAGISTRATE JUDGE, U.S. DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
TEXAS, FORT WORTH DIVISION
(AUGUST 14, 2023)**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KYLE STRONG IN, ET AL.,

Plaintiffs,

v.

JOHN B. SCOTT, ET AL.,

Defendants.

No. 4:22-cv-0576-P

Before: Mark T. PITTMAN,
United States District Judge.

**ORDER ACCEPTING FINDINGS,
CONCLUSIONS, AND RECOMMENDATIONS OF
THE UNITED STATES MAGISTRATE JUDGE**

United States Magistrate Judge Jeffrey L. Cureton issued Findings, Conclusions, and a Recommendation ("FCR") regarding Defendants' Joint Motion to Dismiss. ECF No. 269. The FCR recommends that the Court

dismiss this case with prejudice. *Id.* at 7. Plaintiffs then filed a timely Objection to the FCR. ECF No. 270.

For the reasons stated below, the Court **OVER-RULES IN PART** Plaintiffs' Objections (ECF No. 270), **AFFIRMS IN PART**, and **ADOPTS IN PART** the reasoning in the Magistrate Judge's FCR (ECF No. 269), and **GRANTS** the Motion to Dismiss. ECF No. 239.

BACKGROUND

In July 2022, pro-se Plaintiffs, a collection of concerned citizens, filed a complaint against almost every election official in the state of Texas. ECF No. 1. Plaintiffs allege that the continued and ubiquitous use of electronic voting systems represents a systemic, ongoing, and imminent harm that will continue to destabilize the foundation of free government. Plaintiffs seek to enjoin the State of Texas from the continued use of these systems.

Defendants collectively move to dismiss under Federal Rule of Civil Procedure 12(b). They argue that the case should be dismissed for several reasons. *First*, because Plaintiffs lack standing on multiple bases; *second*, because Defendants' decision to use electronic voting systems is a non-justiciable political question; *third*, because Plaintiffs' due process and equal protection claims fail; *fourth*, because none of Plaintiffs' federal statutory claims possess a private right of action; *fifth*, because Plaintiffs' state criminal law claims fail since the criminal statutes do not provide a private cause of action; *sixth*, because the Texas Constitution's due-course-of-law and open-courts provisions do not provide relief for Plaintiffs; and *seventh*, that Plaintiffs' claim for declaratory relief fails to

establish the existence of an underlying judicially remediable right.

The Magistrate Judge recommends dismissal, and Plaintiffs timely objected. The Court thus conducts a review of the FCR.

LEGAL STANDARD

A magistrate judge's FCR is reviewed *de novo* if a party timely objects. Fed. R. Civ. P. 72(b)(3). And the district court may accept, reject, or modify the recommendations or findings in whole or in part. *Id.* But a party objecting to the FCR must "file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). This means an objection must be "sufficiently specific to put the district court on notice of the urged error." *Williams v. K&B Equip. Co.*, 724 F.2d 508, 511 (5th Cir. 1984). But where an objection to the FCR is only general, the Court reviews the objected conclusion for plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

To be specific, an objection must identify the specific finding or recommendation to which the objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. *United States v. Mathis*, 458 F. Supp. 3d 559, 564 (E.D. Tex. 2020). If the objecting party fails to assert specific objections, the district court need not consider frivolous, conclusory, or general objections. *Battle v. U.S. Parole Comm n*, 834 F.3d 419, 421 (5th Cir. 1987).

ANALYSIS

The United States Magistrate Judge recommends dismissal because “Plaintiffs do not have standing to sue, and, thus, the Court lacks subject matter jurisdiction over the case.” See ECF No. 269 at 7. Thus, Defendants’ remaining arguments were not considered. *Id.*

Plaintiffs made four objections. *First*, Plaintiffs objected to the Magistrate Judge’s assessment of the facts. ECF No. 270 at 3. *Second*, Plaintiffs disagreed with the resulting conclusion on standing. *Id.* *Third*, Plaintiffs objected to the “Magistrate’s finding no private right of action.” *Id.* And *fourth*, Plaintiffs objected to the Magistrate Judge’s “recommendation to dismiss.” *Id.* Because this case’s primary and dispositive issue is standing, the Court will first address Plaintiffs’ first and third objections. The Court then addresses Plaintiffs’ remaining objections in turn.

A. Article III Standing

The core of federal jurisdiction is Article III’s case-or-controversy requirement, which requires a plaintiff to have standing to sue. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). To establish standing, a plaintiff must show that: (1) he suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury was likely caused by the defendant; and (3) the injury would likely be redressed by judicial relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury is particularized when it “affect[s] the plaintiff in a personal and individual way.” *Spokeo*, 578 U.S. at 339. And it is concrete when it is “real” and not abstract. *Id.* at 340. A plaintiff

bears the burden of establishing standing by alleging facts that prove each of its elements. *Id.* at 338-39.

“Congress’s creation of a . . . cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III.” *Trans Union, LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). A plaintiff does not automatically satisfy the injury-in-fact requirement just because a statute provides a private right of action. *Spokeo*, 578 U. S. at 341. “Article III standing requires a concrete injury even in the context of a statutory violation.” *Id.*

Courts have routinely dismissed grievances of concerned citizens that are undifferentiated and common to all members of the public. *See, e.g., Lance v. Coffman*, 549 U.S. 437, 440-41 (2007); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (holding that plaintiffs lacked standing because they failed to show injury to “a particular right of their own, as distinguished from the public’s interest in the administration of the law”); *Ex parte Levitt*, 302 U.S. 633 (1937); *Fairchild v. Hughes*, 258 U.S. 126, 126 (1922) (“The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court.”)

The Magistrate Judge concluded that Plaintiffs’ alleged injuries are not sufficiently concrete to establish standing. The Magistrate Judge concluded that Plaintiffs’ alleged injury is “generally of speculative voting system vulnerabilities on a national scale” and determined that Plaintiffs “do not allege sufficient, non-conclusory allegations to establish that Defendants’ voting machines have or will be infiltrated.” ECF No. 269 at 6. And even if they were concrete, the Magistrate

Judge concluded that the injuries are too general to establish particularity. *Id.* “Plaintiffs’ generalized grievances—if they were legitimate—would be shared by the public at large.” *Id.* Thus, the Magistrate Judge concluded that Plaintiffs cannot maintain this suit without a concrete injury to a particular right of their own.

1. Objection to the “assessment of the facts.”

Plaintiffs generally objected to “several of the Magistrates’ findings, conclusions, and recommendations misrepresenting of the facts outlined in the above ‘Facts of the Case.’” ECF No. 270 at 1. Specifically, Plaintiffs contend that the Magistrate has not addressed the “true facts of the case.” *Id.* Since this objection lacks a connection to any particular finding or conclusion of the Magistrate, the Court reviews this portion of the Magistrate Judge’s FCR for plain error. *Douglass*, 79 F.3d at 1429.¹

The FCR’s assessment of facts does not deviate from those established in the record. Nor does the Court see anything in Plaintiffs’ objection to assert how these particular facts change the FCR’s characterization or disposition of the case. The general objection that the facts stated by the Magistrate were not recited word-for-word from Plaintiffs voluminous

¹ “The rule created in *Douglass* does not ordinarily apply to pro-se litigants, except where the magistrate judge’s recommendation explicitly states that a failure to specifically object will forfeit *de novo* review.” *Strongin v. Scott*, No. 4:22-CV-0576-P, 2023 WL 3775065, at *1 (N.D. Tex. June 2, 2023) (Pittman, J.). That is the case here.

complaint is does not overcome a plain-error review. Plaintiffs first objection is OVERRULED.

2. Objection to the conclusion that Plaintiffs lack standing.

Plaintiffs also object to the Magistrate Judge's conclusion that the "Court lacks subject matter jurisdiction of Plaintiffs' claim due to lack of standing related to 'speculative generalized grievances.'" ECF No. 270 at 1. Plaintiffs offer five recitations from the record to refute that their grievances are speculative or general:

- "(1) Plaintiffs were and will continue to be injured due to the actions of Defendants conducting elections using Electronic Voting Systems (EVS) in the state of Texas that lacked, and continue to lack, lawful certification from an accredited laboratory in violation of state law. (Tex. Elec §§ 81.60, 81.61 (ECF No. 231 at 13-30)) This caused illegal ballots to be cast and counted through which Plaintiffs' votes were negated and personally identifiable information (PII) compromised. Plaintiffs claim violations of state law and U.S. Constitution." ECF No. 231 at 144-148.
- "(2) EVS(s) utilized in the state of Texas have multiple certification violations that make the EVS(s) ineligible for use in any form of the voting process by Defendants coercing Plaintiffs to cast and have their illegal ballots counted." ECF No. 231 at 31-63.

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- “(3) Defendants in the case are authorized to administer and supervise elections at the state and county level in the state of Texas, including verification of EVS certification and protection of PII.” ECF No. 231 at 13-30, 144-150; ECF No. 196-2.
- “(4) Defendants are sued in BOTH their official and individual capacities (ECF No. 231 at ii—iii), as they are county and state officials that have the sole authority of state and federal elections however Defendants have been “elected” on uncertified EVS (ECF No. 231 at 13-63). Plaintiffs question if County Defendants are indeed acting under the color of law as duly elected officials or in their individual capacity due to lack of proper legal ballots cast and counted.” *Id.*
- “(5) Plaintiffs have information and claim that their combined private and personal information, collected and stored electronically at local and state levels via Texas’ voter rolls, has been shared and released to DHS, CIS Security, several federal agency partners, and DHS third-party privately owned partners in violation of Plaintiff Constitutional rights.” ECF No. 231 at 8-9; ECF No. 196-2.

Upon closely reviewing each portion of the record, the Court concludes that they do not pass muster to establish standing.

As to Plaintiffs first alleged injury, the Court is left with an unsubstantiated allegation that Plaintiffs’ personally identifiable information was given to a federal agency, along with that of every other voter in

Texas, and that there is a possible risk of future harassment. ECF No. 270 at 1. While Plaintiffs allege that their personal information was disseminated to the Department of Homeland Security, ECF No. 231 at 8, they do not justify why this alone is an injury. Since this allegation stems from the alleged transfer of voter rolls, it also implicates every single registered voter in Texas. This is a generalized injury insufficient to establish standing. *Fairchild* 258 U.S. at 126 (1922).

As for future harassment, the threat of future harm must be “certainly impending;” mere “[a]llegations of possible future injury” do not suffice. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013). Plaintiffs provide no basis to show their “future harassment” is “certainly impending.” Thus, standing based on a future injury is also foreclosed.

Moreover, Plaintiffs’ grievances with the continued use of these systems and the program’s administration are either too speculative or entirely generalized. In their 163-page Amended Complaint, Plaintiffs’ allegations in support of their theories of injury are exclusively hypothetical and show no concrete connection to them or the vote they allege is in grave peril. Once again, the Court agrees with the Magistrate Judge’s assessment that “Plaintiffs generalized grievances—were they legitimate—would be shared by the public at large.” ECF No. 269 at 6. Here Plaintiffs raise a generally available grievance about the governments voting systems that everybody in Texas is subject to. Without further individual injury, this does not state an Article III case or controversy. *Lujan*, 504 U.S. at 573-74.

Thus, Plaintiffs’ second objection is OVERRULED.

B. Objections based on “unlawful election.”

Plaintiffs further objected to the Magistrate Judge’s conclusion on standing, arguing that the FCR ignores that the group of plaintiffs includes candidates who were “unlawfully elected.”² This allegation appears nowhere in the Plaintiffs’ Amended Complaint. *See* ECF No. 231. Further, Plaintiffs generally object that the Magistrate Judge confused the standing inquiry for the merits but do not identify any specific finding or conclusion beyond the general conclusion that they lack standing.

This Court finds no plain error in the Magistrate Judge’s conclusion, and Plaintiffs’ third objection is OVERRULED.

C. Objections based on the lack of a private right of action.

Plaintiffs object to the Magistrate’s “finding of no private right of action” and cite to “magistrate’s fifth point on page 5.” ECF No. 270 at 13. But the Court assumes that Plaintiffs refer to page 2 of the FCR

² The Fifth Circuit has concluded that standing for political candidates remains unsettled and, even where it has been assumed for the sake of argument, they would only have standing to challenge the election in which they participated, and as plaintiffs themselves assert, the issue by then is “incurabl[e].” ECF No. 270 at 12. Plaintiffs rely on *Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011) to support their argument that candidates have “competitive standing,” ECF 270 at 11, but this is insufficient to overcome Fifth Circuit precedent holding that “standing in federal court is determined *entirely* by Article III and depends in no degree on whether standing exists under state law.” *Abraugh v. Altimus*, 26 F.4th 298, 303 (5th Cir. 2022) (emphasis in original).

because that is the only place where the Magistrate Judge enumerates a fifth point. ECF No. 269 at 2 (“(5) all of Plaintiffs’ federal statutory-based claims fail because, *inter alia*, there is no private cause or right of action and no cognizable claim is pled”) (reciting the grounds asserted by Defendants in their motion to dismiss). The Magistrate Judge is merely reciting the procedural history of the action and the grounds on which Defendants are seeking dismissal, not endorsing Defendants’ contention that Plaintiffs lack a private right of action.

Therefore, Plaintiffs’ fourth objection on this ground is OVERRULED.

D. Objections to the recommendation to dismiss with prejudice.

Plaintiffs’ final objection is to the Magistrate Judge’s recommendation to dismiss the complaint with prejudice. *See* ECF No. 270 at 16-17. Here, the pro-se Plaintiffs are correct.

While the Magistrate Judge analyzed the dismissal under a normal standard, the FCR erred because this is a dismissal under Rule 12(b)(1) where the Court does not have subject-matter jurisdiction. Because “A dismissal with prejudice is a final judgment on the merits. . . . to dismiss with prejudice under Rule 12(b)(1) is to disclaim jurisdiction and then exercise it.” *Cox, Cox, Filo, Camel & Wilson, LLC v. Sasol N. Am., Inc.*, 544 F. App’x 455,456-57 (5th Cir. 2013). As a result, Fifth Circuit precedent “does not sanction [this] practice.” *Id.* A dismissal with prejudice here would claim that there is no case or controversy and then turn around to resolve the controversy completely.

As such, Pro-se Plaintiffs' objection to dismissal with prejudice is thus SUSTAINED, and their case will thus be dismissed without prejudice instead.

CONCLUSION

Here, Plaintiffs' bare allegations that the law has not been followed is "precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance in the past." *Lance*, 549 U.S. at 442. The Court concludes—in line with the Magistrate Judge's findings—that Plaintiffs have failed to establish standing.

Having considered the Magistrate Judge's FCR, Plaintiffs' Objections, and the applicable law, the Court OVERRULES IN PART Plaintiffs' Objections, ADOPTS IN PART the reasoning in the Magistrate Judge's FCR, and GRANTS the Motion to Dismiss. ECF No. 239. As such, Plaintiffs' claims are DISMISSED without prejudice.

SO ORDERED on this 14th day of August 2023.

/s/Mark T. Pittman
Unites States District Judge

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**FINDINGS, CONCLUSIONS, AND
RECOMMENDATION,
U.S. MAGISTRATE JUDGE
(JUNE 12, 2023)**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KYLE STRONG IN, ET AL.,

Plaintiffs,

v.

JOHN B. SCOTT, ET AL.,

Defendants.

Civil Action No. 4:22-cv-0576-P

Before: Jeffrey L. CURETON,
United States Magistrate Judge.

**FINDINGS, CONCLUSIONS, AND
RECOMMENDATION OF THE UNITED
STATES MAGISTRATE JUDGE REGARDING
DEFENDANTS' JOINT MOTION TO DISMISS
PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12(B)**

Pending before the Court is Defendants' Joint Motion to Dismiss Pursuant to Federal Rule of Civil Procedure ("Rule") 12(b) ("Motion to Dismiss") [doc.

239], filed December 22, 2022. Having carefully reviewed the motion, response, reply, other relevant filings, and the applicable law, the Court makes the following findings, conclusions, and recommendation.

I. Relevant background

This case was originally filed on July 6, 2022 by over twenty pro-se Plaintiffs against over sixty Defendants, all officials ranging from the state to the county level that allegedly have some control over various election laws or processes. In their Second Amended Complaint [doc. 231], filed on November 15, 2022 and over 160 pages long, Plaintiffs seek, *inter alia*, “an Order that the Defendants adhere to the constitutionally protected process of collecting and counting votes that ensures integrity and transparency.” (Plaintiffs’ Second Amended Complaint (“Pls.’ Sec. Am. Compl.”) at 8.) Plaintiff allege that the potential vulnerability of electronic voting machines creates a risk that votes may be improperly counted, diluting the vote. (Pls.’ Sec. Am. Compl. at 8.) Plaintiffs seek to “require hand-marked paper ballots that can be cast with anonymity, following all Texas state election laws, and hand-counted by residents of the state of Texas, as Texas Election law allows . . . , instead of with machines.” (Pls.’ Sec. Am. Compl. at 8.) Plaintiffs seek relief against Defendants for, *inter ali*, the following: (1) violation of procedural due process; (2) violation of substantive due process; (3) deprivation of civil rights; (4) deprivation of constitutional rights; (5) voting rights violations; and (6) declaratory judgment. (Pls.’ Sec. Am. Compl. at 153-58.)

In their Motion to Dismiss, Defendants argue that the case should be dismissed for, *inter alia*, the

following reasons: (1) the Court lacks subject matter jurisdiction over Plaintiffs' claims because Plaintiffs lack an injury-in-fact and the alleged harm is not redressable; (2) Plaintiffs' claims against the Secretary of State ("SOS") Defendants in their individual capacities are not redressable because declaratory and injunctive relief is unavailable from a state official in their individual capacity; (3) Defendants' decision to use electronic voting systems is a non justiciable political question; (4) Plaintiffs' due process and equal protection claims fail because Defendants' use of electronic voting systems is a reasonable non-discriminatory restriction of Plaintiffs' voting rights; (5) all of Plaintiffs' federal statutory-based claims fail because, *inter alia*, there is no private cause or right of action and no cognizable claim is pled; (6) Plaintiffs' state law claims alleging violations of criminal statutes fail as the criminal statutes do not provide a private cause of action; (7) the Texas Constitution's due course of law and open courts provisions do not provide relief for Plaintiffs; and (8) Plaintiffs' claim for declaratory relief should be dismissed because Plaintiffs have not established the existence of an underlying judicially remediable right. (Defendants' Brief in Support of Motion to Dismiss ("Defs.' Br.") at 15-54.)

II. Legal Standard and Analysis

Federal courts are courts of limited jurisdiction, and, without jurisdiction conferred by the

United States Constitution or statute, they lack the power to adjudicate claims. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). The "burden of establishing federal

jurisdiction rests on the party seeking the federal forum.” *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). A court must dismiss an action if it determines that it lacks jurisdiction over the subject matter. *See* Fed. R. Civ. P. 12(h)(3). The district court may dismiss a case for lack of subject matter jurisdiction based on: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplement by undisputed facts plus the court’s resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

In their motion to dismiss, Defendants first argues that the Court lacks subject matter jurisdiction over Plaintiffs’ claims because Plaintiffs lack standing to bring the case. (Defs.’ Br. at 15-27.) Defendants claim that Plaintiffs do not have standing to bring this suit because they have raised only “speculative generalized grievances that—were they legitimate—would be shared by the public at large.” (Defs.’ Br. at 17.) Defendants assert that Plaintiffs do not have an injury-in-fact because they do not have an actual or imminent concrete injury nor a particularized injury and any alleged injury will not be redressed by a favorable decision. (Defs.’ Br. at 17-26.) Defendants, *inter alia*, state:

10. Plaintiffs complain generally of speculative voting system vulnerabilities on a national scale. Plaintiffs do not sufficiently allege a concrete injury. Plaintiffs do not allege sufficient facts to establish that Defendants’ voting machines have or will be infiltrated. Plaintiffs rely on conclusory allegations made by others *via* affidavits, and essentially conclude that because these other people

conclude that some voting machines in the United States are vulnerable to attacks by foreign state actors (*e.g.*, China, Iran, and Russia), all voting machines are vulnerable to attack. The highly conjectural and hypothetical nature of Plaintiffs' alleged injury-in-facts is apparent throughout the Complaint[.] . . .

11. Neither Plaintiffs' vague conclusions about the alleged general vulnerability of voting machines, nor their assertions about Defendants' electronic voting systems establish, or even plausibly suggest, that Plaintiffs suffered or will suffer a concrete injury due to Defendants' actions of using electronic voting systems.

. . . .

13. As voters, Plaintiffs claim an interest 'in protecting the quality, accuracy, and effectiveness of [their] individual votes to ensure our representative servants are lawfully elected by the consent of the governed for the protection against tyranny and for healthy maintenance of our Republican form of government afforded to us by our ancestors and for the benefit of our successors.'
14. A complaint of an injury that is common to all members of the public does not allege a particularized injury. . . .

. . . .

16. Here, Plaintiffs' complaints are no more than a generalized grievance about the govern-

ment; claiming only harm to their interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits them than it does the public at large. . . .

17. Plaintiffs do not at any point allege harm specifically suffered by any of the Plaintiffs; none of them have alleged a deprivation of their right to vote in any election in the Counties represented by the Defendants. Because virtually any other voter in the State of Texas could raise similar election integrity concerns, Plaintiffs' purported injury of the nullification of the right to vote does not state a concrete and particularized injury.

. . . .

29. In this case, Plaintiffs have not alleged and cannot show that machine counting is less accurate than paper ballot counting. Several courts have confronted the reality that there is not a perfect voting system. . . .

(Defs.' Br. at 18-26 (internal citations and emphasis omitted))

"Article III of the Constitution limits federal 'Judicial Power,' that is, federal-court jurisdiction, to 'Cases' and 'Controversies.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980). "One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "The standing inquiry focuses on whether the plaintiff is the proper party to bring [the] suit." *Id.* Standing has both constitutional and prudential

components. *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013). To establish standing, a plaintiff must plead (1) an injury in fact, (2) that is fairly traceable to Defendant’s conduct, and (3) that a favorable federal court decision is likely to redress. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The plaintiff, as the party invoking federal jurisdiction, “bears the burden of establishing these elements.” *Lujan*, 504 U.S. at 561. “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice” to establish standing because “we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” *Id.* (quoting *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 889 (1990)). “[I]f the plaintiff does not carry his burden ‘clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute,’ then dismissal for lack of standing is appropriate.” *Hotze v. Burwell*, 784 F.3d 984, 993 (5th Cir. 2015) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)). A Plaintiff must show the following to establish standing: (1) an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;¹ (2) that the injury is “fairly traceable” to the challenged

¹ “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Defenders of Wildlife*, 504 U.S. at 560). A “particularized” injury “affect[s] the plaintiff in a personal and individual way.” *Spokeo*, 578 U.S. at 339. “A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist.” *Id.* at 340.

action of Defendant; and (3) that “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl Servs (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

In their motion to dismiss, Defendants argue, *inter alia*, that the Court lacks subject-matter jurisdiction to hear the case because Plaintiffs have not established standing to sue as they have raised only speculative generalized grievances about elections in multiple counties that affect the public at large as opposed to particularized injuries. After reviewing Plaintiffs’ amended complaint, the Court finds and concludes that Plaintiffs do not have standing to pursue their claims and the Court, thus, lacks subject matter jurisdiction to hear the case for the reasons set forth by Defendants. Specifically, the Court notes that Plaintiffs complain generally of speculative voting system vulnerabilities on a national scale and do not allege sufficient, non-conclusory allegations to establish that Defendants’ voting machines have or will be infiltrated. Moreover, Plaintiffs’ generalized grievances—were they legitimate—would be shared by the public at large.

In addition, the Court notes that U.S. Magistrate Judge Irma Ramirez recently issued a Findings, Conclusions, and Recommendation in *Raskin v. Jenkins*, No. 3:22-CV-2012-E-BH, 2022 WL 19355739 (N.D. Tex. Nov. 2, 2022), recommending that a motion to dismiss be granted in a similar case because Plaintiff did not have standing to sue, and, thus, the Court lacked subject matter jurisdiction to hear the case.² In

² Judge Ada Brown adopted Judge Ramirez’s Findings, Conclu-

Raskin, Plaintiff, a voter registered in Dallas County, Texas, originally sued several Defendants in state court, alleging, as in this case, that they knowingly administered elections with voting system equipment that was not properly certified, unreliable, and vulnerable to the hacking and unauthorized access in violation of state and federal election laws. The case was then removed by Defendants to federal court, where Judge Ramirez recommended it be dismissed. The Court notes that the majority of Plaintiff's Second Amended Complaint in this case is virtually identical to Plaintiff's 55-page state-court filed petition in the *Raskin* case, which also included a 490-page appendix.³ The only real differences between the complaint in this case and the state-court petition in *Raskin* are the addition of some alleged inconsequential factual allegations in this case and the specific factual allegations against the counties listed as Defendants in each of the cases. Thus, the Court also adopts Judge Ramirez's

sions, and Recommendation on April 4, 2023. *See Raskin v. Jenkins*, No. 3:22-CV-2012-E-BH, 2023 WL 2777417 (N.D. Tex. Apr. 4, 2023). Because the motion to dismiss in *Raskin* addressed Plaintiffs' original state-filed petition, Judge Ramirez gave the *pro se* Plaintiffs time to file an Amended Complaint, which Plaintiffs did on November 11, 2022. In this case, however, Plaintiff filed an Amended Complaint on July 25, 2022 and their Second Amended Complaint (the currently live pleading before the Court) on November 15, 2022. Consequently, the Court will not give the *pro-se* Plaintiffs another opportunity to file another amended complaint and finds that any such amendment would be futile as Plaintiffs have had full opportunity to plead their "best case." *See Young v. City of College Station*, No. H-21-2033, 2022 WL 2292880, at *2-4 (S.D. Tex. June 23, 2022) (finding that, because Plaintiff had been provided several opportunities to plead factual allegations supporting his claims, "Plaintiff has pleaded his best case and that any additional leave to amend would be futile").

analysis in *Raskin, supra*, in recommending that Defendants' Motion to Dismiss be granted because Plaintiffs lack standing, and, thus, the Court lacks subject matter jurisdiction over the case.

**NOTICE OF RIGHT TO OBJECT TO
PROPOSED FINDINGS, CONCLUSIONS AND
RECOMMENDATION AND CONSEQUENCES
OF FAILURE TO OBJECT**

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions and recommendation within fourteen (14) days after the party has been served with a copy of this document. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusions and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636 (b)(1). Failure to file, by the date stated above, a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual findings and legal conclusions accepted by the United States District Judge. *See Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996), *modified by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending time to file objections to 14 days).

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ORDER

Under 28 U.S.C. § 636, it is hereby ORDERED that each party is granted until June 26, 2023 to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, the response shall be filed within seven (7) days of the filing date of the objections.

SIGNED June 12, 2023.

/s/Jeffrey L. Cureton
United States Magistrate Judge

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**ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS,
U.S. DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION
(JANUARY 13, 2023)**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LINDSEY GREMONT ET AL.,

Plaintiffs,

v.

JOHN B. SCOTT, ET AL.,

Defendants.

No. 4:22-cv-00576-P

Before: Mark T. PITTMAN,
United States District Judge.

ORDER

Before the Court is Defendants' Motion to Dismiss the Second Amended Complaint with Prejudice ("Motion"). ECF No. 239. Having considered the filing, the Court hereby REFERS this Motion and related motions (ECF No. 131) to the same to United States

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Magistrate Judge Jeffrey Cureton. *See* 28 U.S.C. § 636(b).

All papers filed hereafter referring to the Motion shall include the following notation under the case-number: “(Relates to the Motions Referred to Magistrate Judge Cureton).”

SO ORDERED on this 13th day of January 2023.

/s/Mark T. Pittman
Unites States District Judge

**ORDER, U.S. DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION GRANTING
PLAINTIFFS' MOTION FOR LEAVE TO
FILE SECOND AMENDED COMPLAINT
(NOVEMBER 15, 2022)**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LINDSEY GREMONT ET AL.,

Plaintiffs,

v.

JOHN B. SCOTT, ET AL.,

Defendants.

No. 4:22-cv-00576-P

Before: Mark T. PITTMAN,
United States District Judge.

ORDER

Before the Court is Plaintiffs' Motion for Leave to File Second Amended Complaint ("Motion"). ECF No. 196. Having considered the Motion, the Court finds that it should be and hereby is GRANTED.

Therefore, the Clerk of the Court is INSTRUCTED to file Plaintiff's First Amended Complaint, attached

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to the Motion (ECF No. 196-1), as a separate docket entry.

As a result of the amended complaint, the Court further ORDERS that Defendants' Motions to Dismiss (ECF Nos. 15, 78, 79, 83, 115, 122, 130, 135, 156, 159, 160, 163, 187, 194) are DENIED as moot.

SO ORDERED on this 15th day of November, 2022.

/s/Mark T. Pittman
Unites States District Judge

**RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS**

U.S. Const., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const, amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const, amend. IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const., amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Elec. Stat. § 11.002. Qualified Voter.

(a) In this code, “qualified voter” means a person who: ...

(6) is a registered voter.

Tex. Elec. Stat. § 121.003.

Definitions. In this title:

(1) “Voting system” means a method of casting and processing votes that is designed to function wholly or partly by use of mechanical, electromechanical, or electronic apparatus and includes the procedures for casting and processing votes and the programs, operating manuals, tabulating cards, printouts, and other software necessary for the system’s operation.

(2) “Electronic voting system” means a voting system in which the ballots are automatically counted and the results automatically tabulated by use of electronically operated apparatus.

(3) “Voting machine” means an apparatus on which voters cast their votes, that records each vote, and that furnishes a total of the number of votes cast for the candidates and for and against the measures.

(4) “Voting system equipment” means any kind of mechanical, electromechanical, or electronic apparatus for use in a voting system.

(5) “Automatic tabulating equipment” means equipment, other than a voting machine, that compiles

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vote totals by ballot sorting, ballot reading, ballot scanning, or electronic data processing.

(6) "Public counter" means a registering device that cumulatively records the number of voters casting votes on a voting machine and that is constructed and installed on the machine in a way that provides an unobstructed view of the recorded number.

(7) "Protective counter" means a registering device that permanently records the cumulative number of times that a voting machine has been operated and that is installed in the machine in a way that prevents resetting the device.

(8) "Registering counter" means a registering device on a voting machine that records the votes cast for a particular candidate or for or against a particular measure.

(9) "Electronic system ballot" means a ballot designed for use with an electronic voting system.

(10) "Punch-card ballot" means an electronic system ballot in the form of a tabulating card.

(11) "Voting system ballot" means a ballot designed for use with a voting system.

(12) "Direct recording electronic voting machine" or "DRE" means a voting machine that is designed to allow a direct vote on the machine by the manual touch of a screen, monitor, or other device and that records the individual votes and vote totals electronically.

(13) "Ballot marking device" means a voting system with an electronic interface that allows a voter to mark a paper ballot.

Tex. Elec. Stat. § 122.031

Approval of System and Equipment Required

(a) Before a voting system or voting system equipment may be used in an election, the system and a unit of the equipment must be approved by the secretary of state as provided by this subchapter.

(b) The secretary of state may seek a temporary restraining order or a writ of injunction obtained through the attorney general to prevent the use of any part of a voting system or voting system equipment that has not been approved.

(c) A person commits an offense if the person executes a contract to sell, lease, or otherwise provide a voting system or voting system equipment that the person knows has not been approved. An offense under this subsection is a Class A misdemeanor.

(d) This section does not prohibit a person from exhibiting a voting system or unit of voting system equipment that has not been approved.

Tex. Elec. Stat. § 122.061

Approval of Modified Design Required

Before a voting system or voting system equipment that is modified in design after its approval may be used in an election, the modified design must be approved by the secretary of state as provided by this subchapter.

Tex. Elec. Stat. § 13.002

Application Required

(a) A person desiring to register to vote must submit an application to the registrar of the county in which the person resides. Except as provided by Sub-

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section (e), an application must be submitted by personal delivery, by mail, or by telephonic facsimile machine in accordance with Sections 13.143(d) and (d-2).

(b) A registration application must be in writing and signed by the applicant.

(c) A registration application must include:

- (1) the applicant's first name, middle name, if any, last name, and former name, if any;
- (2) the month, day, and year of the applicant's birth;
- (3) a statement that the applicant is a United States citizen;
- (4) a statement that the applicant is a resident of the county;
- (5) a statement that the applicant has not been determined by a final judgment of a court exercising probate jurisdiction to be:
 - (A) totally mentally incapacitated; or
 - (B) partially mentally incapacitated without the right to vote;
- (6) a statement that the applicant has not been finally convicted of a felony or that the applicant is a felon eligible for registration under Section 13.001;
- (7) the applicant's residence address or, if the residence has no address, the address at which the applicant receives mail and a concise description of the location of the applicant's residence;
- (8) the following information:

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- (A) the applicant's Texas driver's license number or the number of a personal identification card issued by the Department of Public Safety;
 - (B) if the applicant has not been issued a number described by Paragraph (A), the last four digits of the applicant's social security number; or
 - (C) a statement by the applicant that the applicant has not been issued a number described by Paragraph (A) or (B);
- (9) if the application is made by an agent, a statement of the agent's relationship to the applicant; and
- (10) the city and county in which the applicant formerly resided.
- (c-1) The information required under Subsections (c)(3), (4), (5), (6), and (8) must be supplied by the person desiring to register to vote.

Tex. Elec. Stat. § 18.061

Statewide Computerized Voter Registration List

(a) The secretary of state shall implement and maintain a statewide computerized voter registration list that serves as the single system for storing and managing the official list of registered voters in the state.

(b) The statewide computerized voter registration list must:

- (1) contain the name and registration information of each voter registered in the state;

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- (2) assign a unique identifier to each registered voter; and
- (3) be available to any county election official in the state through immediate electronic access.

Tex. Elec. Stat. § 18.066
Availability of Statewide Computerized Voter Registration List Information

(a) The secretary of state shall furnish information in the statewide computerized voter registration list to any person on request not later than the 15th day after the date the request is received.

(b) Information furnished under this section may not include:

- (1) a voter's social security number; or
- (2) the residence address of a voter whose residence address is confidential under Section 13.004.

(c) The secretary shall furnish the information in the form and order in which it is stored or if practicable in any other form or order requested.

(d) To receive information under this section, a person must submit an affidavit to the secretary stating that the person will not use the information obtained in connection with advertising or promoting commercial products or services.

(e) The secretary may prescribe a schedule of fees for furnishing information under this section. A fee may not exceed the actual expense incurred in reproducing the information requested.

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(f) The secretary shall use fees collected under this section to defray expenses incurred in the furnishing of the information.

Tex. Elec. Stat. § 18.069
Voting History.

Not later than the 30th day after the date of the primary, runoff primary, or general election or any special election ordered by the governor, the general custodian of election records shall electronically submit to the secretary of state the record of each voter participating in the election. The record must include a notation of whether the voter voted on election day, voted early by personal appearance, voted early by mail under Chapter 86, or voted early by mail under Chapter 101.

Tex. Elec. Stat. § 273.081
Injunction

A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.

**SECOND AMENDED COMPLAINT,
U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
(NOVEMBER 15, 2022)**

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS**

No. 4:22-cv-00576-P-BJ

SECOND AMENDED COMPLAINT

**KYLE STRONGIN, a voter of Hood County, Texas;
LINDSEY GREMONT, a voter of Travis County,
Texas; CHRISTINE KOEPKE, a voter of Bexar
County, Texas; AMANDA EUBANKS, a voter of
Bexar County, Texas; TRAVIS WAYNE EUBANKS,
a voter of Bexar County, Texas; KRISTEN
PLAISANCE, a voter of Montgomery County, Texas;
KAREN RENE TOWELL, a voter of Hood County,
Texas; JASON SCOTT BUSTER, a voter of Bexar
County, Texas; ALEXANDRA CAMPO, a voter of
Williamson County, Texas; JAMES L. CLARK, a
voter of Hays County, Texas; SONJA ZIELSDORF, a
voter of Williamson County, Texas BEVERLY FOLEY,
a voter of Denton County, Texas JUAN CARLOS
ARIAS, a voter and candidate of Harris County,
Texas JOSE CHRISTINE SILVESTER, a voter of
Comal County, Texas; TOMMIE DICKINSON, a
voter of Atascosa County, Texas; ROBERT JAMES
BROOKS JR., a voter of Travis County, Texas; ALANA
S. PHILLIPS, a voter of Denton County, Texas;
JENNIFER B. EDWARDS, a voter and Precinct
Chair of Parker County, Texas; AUBREY BRANDON**

RHYMES, a voter of Collin County, Texas; LESTER RAND, a voter of Collin County, Texas; AMBER CLOY, a voter of Tarrant County, Texas; JENNIFER WILLIAMS, a voter of Parker County, Texas; SHERON JENNIFER LIPPER, a voter of Dallas County, Texas LYNN DAVENPORT, a voter and candidate of Dallas County, Texas

Plaintiffs,

v.

SECRETARY OF STATE OF TEXAS. JOHN B. SCOTT, in his individual capacity and in his official capacity as the TEXAS SECRETARY OF STATE; and DEPUTY SECRETARY OF STATE. JOSE A. "JOE" ESPARZA, in his individual capacity and in his official capacity. 113 TEXAS SECRETARY OF STATE RUTH R. HUGHS, in her individual capacity and in her official capacity. KEITH INGRAM, in his individual and official capacity as the Director of the Elections Division; JACQUELYN CALLANEN, Bexar County Elections Administrator; NELSON WOLFF, Bexar County Judge and head of the Bexar County Elections Commission; REBECA CLAY-FLORES, Bexar County Commissioner; JUSTIN RODRIGUEZ, Bexar County Commissioner; MARIALYN BARNARD, Bexar County Commissioner; TOMMY CALVERT, Bexar County Commissioner; BOBBIE KOEPP, Comal County Clerk; CYNTHIA JAQUA, Comal County Elections Coordinator; FRANK PHILLIPS, Denton County Elections Administrator; ANDY EADS, Denton County Judge; RYAN WILLIAMS, Denton County Commissioner; RON MARCHANT, Denton County Commissioner; BOBBIE J. MITCHELL, Denton

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County Commissioner; CRAIG PEACOCK, Parker County Commissioner; LARRY WALDEN, Parker County Commissioner; STEVE DUGAN, Parker County Commissioner; HEIDER GARCIA, Tarrant County Elections Administrator; ROY CHARLES BROOKS, Tarrant County Commissioner; DEVAN ALLEN, Tarrant County Commissioner; GARY FICKES, Tarrant County Commissioner; J.D. JOHNSON, Tarrant County Commissioner; ANDREW STEVEN BROWN, Travis County Judge; DANA DEBEAUVOIR, Former Travis County Clerk; REBECCA GUERRERO, Travis County Clerk; BILL GRAVELL, Williamson County Judge; CHRISTOPHER DAVIS, Williamson County Elections Administrator; TERRY COOK, Williamson County Commissioner; CYNTHIA LONG, Williamson County Commissioner; VALERIE COVEY, Williamson County Commissioner; DIANNE EDMONDSON, Denton County Commissioner; LINA HIDALGO, Harris County Judge; RODNEY ELLIS, Harris County Commissioner; ADRIAN GARCIA, Harris County Commissioner; TOM S. RAMSEY, Harris County Commissioner; R. JACK CAGLE, Harris County Commissioner; ISABEL LONGORIA, Harris County Former Elections Administrator; JENNIFER DOINOFF, Hays County Elections Administrator; RUBEN BECERRA, Hays County Commissioner's Court Judge; DEBBIE INGALSBE Hays County Commissioner Court; MARK JONES Hays County Commissioner Court; LON SHELL Hays County Commissioner Court; WALT SMITH Hays County Commissioner Court; RON MASSINGILL, Hood County Judge and head of the Hood County Elections Commission; MICHELE CAREW, Former

Elections Administrator of Hood County; PAT DEEN, Parker County Judge and head of the Parker County Elections Commission; CRICKETT MILLER, Elections Administrator of Parker County; GEORGE CONLEY, Parker County Commissioner; RUSS BOLES, Williamson County Commissioner; SUZIE HARVEY, Montgomery County Elections Administrator, CHARLIE RILEY, Montgomery County Commissioner; Commissioner; County Commissioner; JAMES NOACK, Montgomery County JAMES NOACK, Montgomery County JAMES NOACK, Montgomery County Commissioner; Commissioner; Commissioner; Commissioner; CHERYL WILLIAMS, Collin County Commissioner; DARRELL HALE, Collin County Commissioner; DUNCAN WEBB, Collin County Commissioner; BRUCE SHERBET, Collin County Elections Administrator; B. GLEN WHITLEY, Tarrant County Judge; SARAH ECKHARDT, Former Travis County Judge, Current State Senator D-14; MARK KEOUGH, Montgomery County Judge; all in their individual and official capacities

Defendants.

No. 4:22-cv-00576-P-BJ

{ Internal Table of Contents and
Authorities Omitted }

II. PARTIES TO THE PROCEEDINGS

Plaintiff(s), pro se, hereby file and serve this Complaint against Defendants John B. Scott, Jose A “Joe” Esparza, Ruth R. Hughs, Keith Ingram; Jacq-

uelyn Callanen, Nelson Wolff, Rebeca Clay-Flores, Justin Rodriguez, Marialyn Barnard, Tommy Calvert, Bobbie Koepf, Cynthia Jaqua, Frank Phillips, Andy Eads, Ryan Williams, Ron Marchant, Bobbie Mitchell, Diane Edmondson, Jennifer Doinoff, Ruben Becerra, Debbie Ingalsbe, Mark Jones, Lon Shell, Walt Smith, Ron Massingill, Michele Carew, Pat Deen, Crickett Miller, George Conley, Craig Peacock, Larry Walden, Steve Dugan, Heider Garcia, Roy Charles Brooks, Devan Allen, Gary Fickes, J.D. Johnson, Andrew Steven Brown*, Dana Debeauvoir, Rebecca Guerrero, Bill Gravell, Christopher Davis, Terry Cook, Cynthia Long, Valerie Covey, Russ Boles, Suzie Harvey, Robert C. Walker, Charlie Riley, James Noack, James Metts, Lina Hidalgo, Rodney Ellis, Adrian Garcia, Tom S. Ramsey, R. Jack Cagle, Isabel Longoria, Chris Hill, Susan Fletcher, Cheryl Williams, Darrell Hale, Duncan Webb, Bruce Sherbet, Sarah Eckhardt, Mark Keough, and B. Glen Whitley. In support of the claims set forth herein, Plaintiff(s) allege and aver facts as follows: Defendants knowingly and willfully:

- a. neglected to uphold the Constitution
- b. had foreknowledge of the events unfolding
- c. chose to perpetrate unconstitutional measures by violating election laws
- d. all of which constitutes breach of contract through the violations of their Oaths of Office (TEX. CONST. art. 16 § 1, 5 U.S.C. § 3331, 5 U.S.C. § 3333, 5 U.S.C. § 7311) * Andrew Steven Brown allegedly does not have an oath of office on file (TEX. PEN. CODE § 37.11)

1. As a result of the above-mentioned actions of the Defendants, the quality, accuracy and effect-

iveness of the Plaintiff(s)' expression of their will, intent and consent of their vote(s) were impaired and are entitled to remedy under the U.S. Constitution Guarantee Clause.¹ "The elective mode of obtaining rulers is the characteristic policy of republican government."

2. Plaintiff(s) have a vested interest in protecting the quality, accuracy, and effectiveness of our individual votes to ensure our representative servants are lawfully elected by the consent of the governed for the protection against tyranny and for healthy maintenance of our Republican form of government afforded to us by our ancestors and for the benefit of our successors.²

3. Plaintiff(s) seek an Order that the Defendants adhere to the constitutionally protected process of collecting and counting votes that ensures integrity and transparency. This is to require hand-marked paper ballots that can be cast with anonymity, following all Texas state election laws, and hand-counted by residents of the state of Texas, as Texas Election law allows (TEX. CONST. art. VI § 4 and TEX. ELEC. CODE Ch. 65), instead of with machines (TEX. ELEC. CODE Title 8 and Sec. 43.007.) Additionally, Plaintiff(s) seek redress for the abuse and devastation of our Constitutional rights and protections by our elected officials.

¹ https://avalon.law.yale.edu/18th_century/fed57.asp The Federalist No. 57

² *Declaration of Independence and Preamble to the United States Constitution*

III. STANDING

Each Plaintiff has experienced their own unique injury as a result of the noncompliant, uncertified electronic voting equipment and systems. Thus, Plaintiffs have information and belief that their votes were not counted as intended and diluted. Plaintiffs' have constitutional right to have votes counted as intended without manipulation or dilution. Plaintiffs have information and belief that the release of combined private and personal information to DHS and CIS Security and their third-party partners, that appears in Texas' voter data; has been and will continue to be released. Exposing Plaintiffs to intimidation or harassment for merely exercising their right to vote, and will cause apprehension in their exercise of First Amendment rights including the right to vote and freedom of association. Plaintiffs believe that the release of their private and personal combination of information make them easy to identify and thus susceptible to harassment.

IV. JURISDICTION AND VENUE

5.4. Plaintiff(s) bring this cause of action under original federal jurisdiction 42:1983cv Civil Rights Act - Civil Action for Deprivation of Rights, 42:1983vp Violation of Due Process and Equal Protection, 42:1985 Conspiracy to interfere with civil rights, 42:1986 Neglect of Duty, 42:1983dp Civil Right Denial of Due Process, 5:552pa Right to Privacy, 52 U.S.C. § 10101 (42:1971) Voting Rights Law, 52:20510 Civil enforcement and private right of action, 52:20105 Enforcement, 28:1331dp Violation of Due Process (federal question), 28:2201 Creation of Remedy, 28:1331vc Violation Constitutional Rights (federal question), and cause of

action recognized in *Ex parte Young*, 209 U.S. 123 (1908) as well as its progeny to challenge government officers during an “ongoing violation of federal law and [to] seek[] prospective relief” under the equity jurisdiction conferred on federal district courts by the Judiciary Act of 1789.

6.5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 because this action seeks to protect civil rights under the Fourteenth Amendment to the United States Constitution.

7.6. This Court has subject matter jurisdiction pursuant to 52 U.S.C. § 20510 because Plaintiffs have provided written notice to the chief election officer of this state regarding violation of this chapter and the violation was not corrected within the allotted time frame upon receipt of notice by aggrieved Plaintiffs.

8.7. This Court has subject matter jurisdiction pursuant to 52 U.S.C. § 20105 as Plaintiffs notified the chief election officer and political subdivisions of noncompliance and period of 45 days since notification has lapsed.

9.8. This Court has supplemental jurisdiction over Plaintiffs’ claims under 28 U.S.C. § 1367.

10.9. This Court has authority to grant declaratory relief based on 28 U.S.C. §§ 2201, 2202, and Rule 57 of the FRCP.

11.10. This Court has jurisdiction to grant injunctive relief based on 28 U.S.C. § 1343(a)(3) authority to do so under Federal Rule of Civil Procedure 65.

12.11. This Court has jurisdiction to award nominal and compensatory damages under 28 U.S.C. § 1343 (a)(4).

13.12. This Court has jurisdiction to grant declaratory relief under 28 U.S.C. § 2201 in a case of actual controversy in which any court of the United States, upon the filing of appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

14.13. There exists an actual and justiciable controversy between Plaintiff(s) and Defendant(s) requiring resolution by this Court.

15.14. Plaintiff(s) have no adequate remedy at law.

16.15. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District and in which any defendant is subject to the court's person jurisdiction with respect to such action.

17.16. This Court has personal jurisdiction over all Defendants because all defendants reside and are domiciled in the State of Texas. Requiring Defendants to litigate these in the United States District Court for the Northern District of Texas-Fort Worth does not offend traditional notions of fair play and substantial justice and is permitted by the Due Process Clause of the United States Constitution.

V. RULE 47 DISCLOSURE

18. Plaintiff(s) seek only non-monetary relief.

VI. RULE 501

19. Plaintiff(s) reside under the laws enacted by the Texas state legislatures and actions by Defendants referenced below are violations of said laws.

VII. RULE 15(A)(31)

21. Plaintiff(s) seek to amend with leave of this Court.

VIII. CONSTITUTIONAL QUESTIONS

21.22. The specific questions brought before this court are:

- a. If the electronic voting systems are not lawfully certified in compliance with voting system standards, does it impede the Plaintiff(s)' lawful vote in elections? TEX. CONST. art 6 § 4, US CONST. amend XIV.
- b. If the electronic voting systems and their various devices are not lawfully certified, does it cause the Plaintiff(s) to cast illegal ballots? 52 U.S.C. § 10307(a), Due Process Clause.
- c. Since Texas officials presented uncertified voting systems as certified, did they abridge the Plaintiff(s)' federally protected right to vote, as well as affronted TEX. PEN. CODE § 37.03, § 37.09, § 37.10, 18 U.S.C. § 245
- d. Would it dilute the expressed intent and effectiveness of the Plaintiff(s)' voice if the electronic voting systems and their various devices are vulnerable to hacking, tampering, and algorithmic preprogramming? TEX. CONST. art 6 § 4, Right to Vote Clause.
- e. If the electronic voting systems are – by design – unreliable mechanisms for accurately collecting, retaining, and communicating the expression of the Plaintiff(s)' vote, is it acceptable

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to injure the Plaintiff(s)' voice and will under the Constitutional premise of the consent of the governed.? Declaration of Independence, Guarantee Clause.

- f. Were Constitutionally protected free and fair elections negatively impacted by Texas officials' modification of election laws? TEX. ELEC. CODE § 276.019 and TEX. CONST. art 1 § 28.
- g. If the acting representative servants were unlawfully elected as a result of unreliable, unlawful, vote collection devices are they acting in their official capacity? TEX. CONST. art I § 19 and § 29.
- h. Would they not then be impersonating public servants? TEX. PEN. CODE § 37.11.
- i. The "elected" officials within the Texas courts prevented a fair hearing of cases involving the election. Where can Plaintiff(s) find an objective perspective without being denied redress of grievances? TEX. CONST. art I § 3, § 13 § 27, and US CONST. amend I.
- j. What is the Constitutional remedy for the usurpation of the Plaintiff(s)' role as the underlying governmental authority, and for forcing the Plaintiff(s) to participate in their own servitude through fraudulent policies, systems, and measures? TEX. CONST. art I § 29, US CONST. amend XIII § 1 and US CONST. amend X.

IX. INTRODUCTION

22.23. Plaintiff(s) have performed all necessary conditions precedent to bring this suit.

23.24. This is a civil rights action for declaratory and injunctive relief to prohibit the use of electronic voting equipment and systems (machines) in the State of Texas in the upcoming 2022 elections held on November 8, 2022.

24.25. Plaintiffs have a constitutional and statutory right to have their ballots, and all ballots cast together with theirs, counted accurately and transparently, so that only legal votes determine the winners of offices.

25.26. Electronic voting equipment and systems cannot be deemed reliably secure and do not meet the constitutional and statutory mandates guaranteed. The use of untested, unverified, and uncertified electronic voting equipment and systems violates the rights of Plaintiffs and office seekers, and undermines the public's confidence in the validity of election results.

21.27. By requiring Plaintiffs to "register" to vote on a system that is monitored unlawfully by federal agencies and "partners" providing access to private and personal information as defined by Tex. Elec. Code § 13.004, non-legislative actors, Defendants, have and will continue to violate the rights of Plaintiffs under the Constitution of the United States.

22.28. The United States and Texas Constitutions protect our First, Fourth and Fourteenth Amendment rights, including the right to petition the government to seek resolution for grievances.

23.29. We the voters of the sovereign state of Texas have addressed both houses of the Texas State Legislatures, school boards across the state, district attorneys' offices, city councils, county commissioners, judges, Governor Abbott, Attorney General Paxton, Texas Secretary of State Office, filed suits in district and federal courts including the Texas Supreme Court and have found no relief. Plaintiff(s) have been called conspiracy theorists, labeled domestic terrorists by the DOJ and Attorney General Merrick Garland. Yet "We" remain undaunted in our quest to seek redress for the violations of our rights.

24.30. Plaintiffs have not received justice in the matter of the 2020 election and have been forced to utilize the same uncertified, internet connected voting machines for the November 2, 2021, election and beyond.

"In my humble opinion, those who come to engage in debates of consequence, and who challenge accepted wisdom, should expect to be treated badly. Nonetheless, they must stand undaunted. That is required. And that should be expected. For it is bravery that is required to secure freedom."

—Clarence Thomas

26.31. We come before this court with the acquired knowledge that we are free solely on paper. We attempted to exercise our constitutional rights to duly elect state and federal officials, but our rights have been deprived due to lack of integrity and accountability. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most

basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964).

27.32. Lawful elections are the backbone of our local, state and federal government. The right to vote is protected by the Equal Protection Clause and the Due Process Clause alongside the 1st and 15th Amendment, which guarantee we are not be denied the right to cast our ballots by malicious and/or conspiring actors. *U.S. CONST. amend. XIV, § 1, cl. 3-4*. Because “the right to vote is personal,” *Reynolds*, 377 U.S. at 561-62. “[e]very voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted.”

28.33. Justice Thomas wrote in his Dissent regarding *The State of Texas v. Pennsylvania*:

“Here, we have the opportunity to do so almost two years before the next federal election cycle. Our refusal to do so by hearing these cases is befuddling. One wonders what this Court waits for. We failed to settle this dispute before the election, and thus provide clear rules. Now we again fail to provide clear rules for future elections. The decision to leave election law hidden beneath a shroud of doubt is baffling. By doing nothing, we invite further confusion and erosion of voter confidence. Our fellow citizens deserve better and expect more of us. I respectfully dissent.”³

29.34. Plaintiff(s) believe we deserve better, and we expect more from our elected and appointed officials

in the judicial, executive, and legislative branches. The time has come, as Justice Thomas inquired of the court, to address the legal failures outlined in this suit.

X. FACTUAL ALLEGATIONS

A. Accreditation Failures

30.35. The Help America Vote Act of 2002 (HAVA)³ was passed by the United States Congress to address improvements to voting systems and voter access following the 2000 election hanging chads.⁴

31.36. HAVA creates mandatory minimum standards for states to follow for several areas of election administration.⁵

32.37. HAVA law provides funding to help states meet new standards, replace, and purchase new voting systems, and improve election administration such as security.

33.38. HAVA established the Election Assistance Commission (EAC) to assist states in HAVA compliance and to distribute HAVA funds.

34.39. EAC is also charged with regulating and creating voting system guidelines and operating

³ https://www.eac.gov/about_the_eac/help_america_vote_act.aspx (Last visited 5/20/22)

⁴ See U.S.C. § 20922

⁵ https://www.eac.gov/sites/default/files/eac_assets/1/6/HAVA41.PDF (Last visited 5/20/22)

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/managing the first federally run voting system certification program.⁶

35.40. HAVA provided directives to the National Institute of Standards and Technology (NIST) to assist the EAC in its accreditation of voting system testing laboratories (VSTL).^{7 8}

When the NIST evaluates laboratories to assess whether they can be accredited or not, the NIST relies on the National Voluntary Laboratory Accreditation Program (NVLAP) to determine competency. An on-site review of the lab is to take place and the lab is to demonstrate competency in performing multiple tasks in a voting system review.⁹

36.41. EAC and NIST work together assessing laboratories to evaluate whether they can be accredited. The NIST relies on the NVLAP to determine competency.

37.42. EAC developed the EAC's Voting System Test Laboratory Accreditation Program. The procedural requirements of this program are contained in:

⁶ See 52 U.S.C. § 20962, 20971

⁷ See 42 U.S.C. § 15371(b)

⁸ <https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl> (Last visited 5/20/22)

⁹ <https://www.thegatewaypundit.com/2022/05/exclusive-based-thorough-review-election-regulations-not-single-voting-system-testing-lab-used-2020-election-accredited-based-law-part/> (Last visited 5/20/22)

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- a. EAC's Voting System Test Laboratory Accreditation Program Manual¹⁰
- b. EAC's Voting System Test Laboratory Program Manual (OMB 3265-0018)¹¹

38.43. Pro V&V and SLI Compliance, per the EAC, were the only two accredited VSTLs during elections from 2020 to present.

39.44. VSTLs are responsible for the examination of the use of Commercial Off-The-Shelf (COTS) components as well as the examination of other applications, software, and components deemed to be proprietary.¹²

40.45. Voting System Test Laboratory Program Manual ver. 2.0 effective May 31, 2015, page 38, Sec 3.6.1. Certificate of Accreditation: A Certificate of Accreditation shall be issued to each laboratory by vote of the Commissioners. The certificate shall be signed by the CHAIR of the Commission and state:

3.6.1. Certificate of Accreditation. A Certificate of Accreditation shall be issue to each laboratory accredited by the vote of the Commission. The certificate shall be signed by the Chair of the Commission and state.

3.6.1.1. The name of the VSTL;

¹⁰ https://www.eac.gov/sites/default/files/eac_assets/1/28/VSTL_Manual%207%208%2015%20FINAL.pdf (Last visited 5/20/22)

¹¹ https://www.eac.gov/sites/default/files/eac_assets/1/6/Cert_Manual_7_8_15_FINAL.pdf (Last visited 5/20/22)

¹² https://www.eac.gov/sites/default/files/EAC_FACT_SHEET_Testing_and_Certification_Program.pdf (Last visited 5/20/22)

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3.6.1.2. The scope of the accreditation, by stating the Federal standard or standards to which the VSTL is competent to test;

3.6.1.3. The effective date of the certification, which shall not exceed a period of two (2) years; and

3.6.1.4 The technical standards to which the laboratory was accredited.

41.46. “The effective date of the certification, which shall not exceed a period of two (2) years”

42.47. So, not just the date is important but the signature on the Lab Certification of Accreditation is very crucial.

43.48. Commission Chairman only serves one (1) year, but their signature is good on these certificates for two (2) years.

44.49. Both Donald Palmer AND Benjamin Hovland were appointed by President Trump and confirmed in the senate on Feb. 4, 2019, as EAC Commissioners but not Chairman.¹³

¹³ <https://www.eac.gov/news/2019/02/06/commissioners-hovland-palmer-sworn-restore-quorum-eac> (Last visited 5/20/22)

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Note title of press release:



Media

NEWS COMMISSIONERS HOVLAND, PALMER SWORN IN TO RESTORE QUORUM AT EAC

Transcription:

NEWS COMMISSIONERS HOVLAND, PALMER SWORN IN TO RESTORE QUORUM AT EAC

45.50. Donald Palmer was elected Commission Chairman Feb. 24, 2021.¹⁴

46.51. Benjamin Hovland was appointed Commission Chairman Feb. 2020.¹⁵

47.52. Neither of the above could be valid signatures on the Laboratory Certificates of Accreditation since none were issued in 2020. Quorum according to the EAC was not restored until appointment of Palmer and Hovland on February 4, 2019.

¹⁴ <https://www.eac.gov/news/2021/02/24/donald-palmer-begins-term-eac-chairman> Last visited 5/20/22

¹⁵ <https://www.eac.gov/news/2020/02/27/benjamin-hovland-begins-term-eac-chairman> Last visited 5/20/22

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48.53. Christy McCormick was elected as Commission Chairwoman on Feb. 24, 2019.¹⁶

49.54. For the 2020 General Election, Christy McCormick's signature should be on ALL EAC Laboratory Certificates of Accreditation.

50.55. According to a list of the state's own requirements posted on the EAC's website and the U.S. Election Assistance Commission Voting System Testing and Certification Program, the State of Texas participates as set forth:¹⁷

TEXAS

State Participation: Requires federal certification. TX requires that its voting systems meet the current FEC standards as well as state requirements.

Applicable Statute(s): "A voting system may not be used in an election unless the system: (3) operates safely, efficiently, and accurately and complies with the error rate standards of the voting system standards adopted by the Federal Election Commission..." TX Elec Code § 122.01 (2019)

Applicable Regulation(s): "For any voting machine ... to be certified for use in Texas elections, the system shall have been certified, if applicable, by means of a qualified testing by a Nationally Recognized Test

¹⁶ <https://www.eac.gov/news/2019/02/22/mccormick-elected-new-eac-chairwoman> Last visited 5/20/22

¹⁷ https://www.eac.gov/sites/default/files/TestingCertification/State_Requirements_for_Certification09042020.pdf Last visited 5/20/22

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Laboratory (NTRL) and shall meet or exceed the minimum requirements set forth in the Performance and Test Standards for Punch Card, Mark Sense, and Direct Recording Electronic Voting Systems, or in any successor voluntary standard document developed and promulgated by the FEC.” 1 TX Admin. Code § 81.61 (2019)

State Certification Process: The Secretary of State accepts applications to examine and certify voting systems and appoints four people to examine the voting system. While the Attorney General appoints two people as examiners. Each examiner inspects the voting system and submits a report to the Secretary of State. The Secretary of State will conduct a public hearing to provide interested persons an opportunity to express their views for or against the approval of the voting system. Following the public hearing, the Secretary of State shall prepare a written report stating why the voting system was approved or denied. 1 TX Admin. Code § 81.61 (2019)

Note: Texas requires EAC certification as a baseline and conducts an additional examination. The statute doesn't clearly state that but this is information that the Texas SOS has provided.

51.56. The manual also states that VSTLs must renew their accreditation in a timely manner.

3.8. Expiration and Renewal of Accreditation. A grant of accreditation is valid for a period not to exceed two years. A VSTL's accreditation expires on the date annotated on the Certificate of Accreditation. VSTLs in good standing shall renew their accreditation by submitting an application package to the Program Director, consistent with the procedures of

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Section 3.4 of this Chapter, no earlier than 60 days before the accreditation expiration date and no later than 30 days before that date. Laboratories that timely file the renewal application package shall retain their accreditation while the review and processing of their application is pending. VSTLs in good standing shall also retain their accreditation should circumstances leave the EAC without a quorum to conduct the vote required under Section 3.5.5

52.57. The EAC issued the modifications to the manual regarding 3.8 on July 23, 2021¹⁸ without proper action under 52 U.S.C. § 551 *et seq.*, HAVA, 52 U.S.C. § 20901 *et seq.*, and Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 § 1-15. Modifications shall be reviewed and commented on by the EAC Board of Advisors and the EAC Standards Board or the requirement by HAVA and the APA guidelines of any modifications shall be provided to the public for notice and comment prior to approval. 52 U.S.C. § 20962, APA 5 U.S.C. § 551 *et seq.*

- a. HAVA prohibits the EAC from voting to adopt final guidelines until it has given both the Board of Advisors and the Standards Board 90 days to review and comment on the proposed guidelines and has “tak[en] into consideration” their comment process and recommendations. *Id.* § 20962(d)(1)-(2).
- b. HAVA additionally requires a public notice and comment process that includes publication of the proposed guidelines in the

¹⁸ https://www.eac.gov/sites/default/files/2021-07/NOC%2021.01_VSTL%20Accreditation%20Status_1.pdf (Last visited 5/20/22)

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Federal Register, opportunity for public comment on the proposed guidelines, and opportunity for a public hearing on the record. *Id.* § 20962(a)(1)-(3).

53.58. SLI Compliance Certification Issued January 10, 2018, Effective January 10, 2021. (Exceeding, more than two (2) years – Should be signed by Chair of Commission)¹⁹



Transcription
United States Election Assistance Commission
Certificate of Accreditation
SLI Compliance, Division of Gaming Laboratories International, LLC
Wheat Ridge, Colorado

¹⁹ https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI_Compliance_Certificate_of_Accreditation011018.pdf (Last visited 5/20/22)

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is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2002 Voting Systems Standards, the Voluntary Voting Systems Guidelines versions 1.0 and 1.1 under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. SLI Compliance is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22

Effective Through January 10, 2021

/s/ Brian Newby, Date: 1/10/18, Executive Director,
U.S. Election Assistance Commission

EAC Lab Code: 0701

54.59. ProV&V - EAC Certification, Issued February 24, 2015, Effective Through February 24, 2017.²⁰
(Should be signed by Chair of Commission)

²⁰ https://www.eac.gov/sites/default/files/voting_system_test_lab/files/Pro_VandV_accreditation_certificate_2015.pdf (Last visited 5/20/22)

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Transcription

United States Election Assistance Commission

Pro V&V, Inc.
Huntsville, Alabama

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 Voluntary Voting Systems Guidelines under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. Pro V&V is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Effective through: February 24, 2017

/s/ Jed Miller Date: 2/24/15

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Acting Executive Director, U.S. Election Assistance Commission

EAC Lab Code: 1501

Certificate of Accreditation

55.60. SLI Compliance Certification Original Issued February 28, 2007, Dated February 1, 2021. (Exceeding, more than two (2) years – Should be signed Chair of Commission)²¹



Transcription of Comments to SLI Certificate
VSTL Program Manual v.2.0 page 38
3.6.1 Certificate of Accreditation: The certificate SHALL be signed by the Chair of the Commission and state

²¹ https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI%20Certificate%20of%20Accreditation%202021.pdf
(Last visited 5/20/22)

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3.6.1.3. The effective date of the certification, which SHALL not exceed a period of over two years

_____ Should be signed by EAC Chairman NOT Executive Director

c) continuing review by National Institute of Standards and Technology

2) Approval by Commission regard for revocation

The accreditation of a laboratory for the purpose of may this section may not be revoked unless the revocation is approved by a vote of the Commission

56.61. ProV&V EAC Certification, Original Issued February 24, 2015, Dated February 21, 2021. (Exceeding, more than two (2) years – Should be signed by Chair of Commission)²²



²² https://www.eac.gov/sites/default/files/voting_system_test_lab/files/Pro%20V%26V%20Accreditation%20Certificate.pdf
(Last visited 5/20/22)

**Transcription of Comments
to Pro V&V Certificate**

VSTL Program Manual v.2.0 page 38

3.6.1 Certificate of Accreditation: The certificate SHALL be signed by the Chair of the Commission and state

3.6.1.3. The effective date of the certification, which SHALL not exceed a period of over two years

_____ Should be signed by EAC Chairman NOT Executive Director

c) continuing review by National Institute of Standards and Technology

2) Approval by Commission regard for revocation

The accreditation of a laboratory for the purpose of may this section may not be revoked unless the revocation is approved by a vote of the Commission

57.62. Taking into consideration just the certificates issued in 2021; the Certificates of Accreditation have multiple issues with them indicating they are still NOT in compliance with laws and guidelines set by HAVA and the state of Texas. (*Emphasis added*)

58.63. The accreditations are not signed by the Chair of the Commission but by the EAC Executive Director, Mona Harrington. The Chair is Thomas Hicks. Mona Harrington has never even been a commissioner.

EAC's Commissioners

Thomas Hicks and Christy McCormick were sworn in January 13, 2015 as EAC commissioners following their nomination by President Barack H. Obama and

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unanimous confirmation by the U.S. Senate. Benjamin Hovland and Donald Palmer were sworn in on February 4, 2019 as EAC commissioners following their nomination by President Donald Trump and unanimous confirmation by the U.S. Senate

Commissioner Benjamin W. Hovland, Chairman

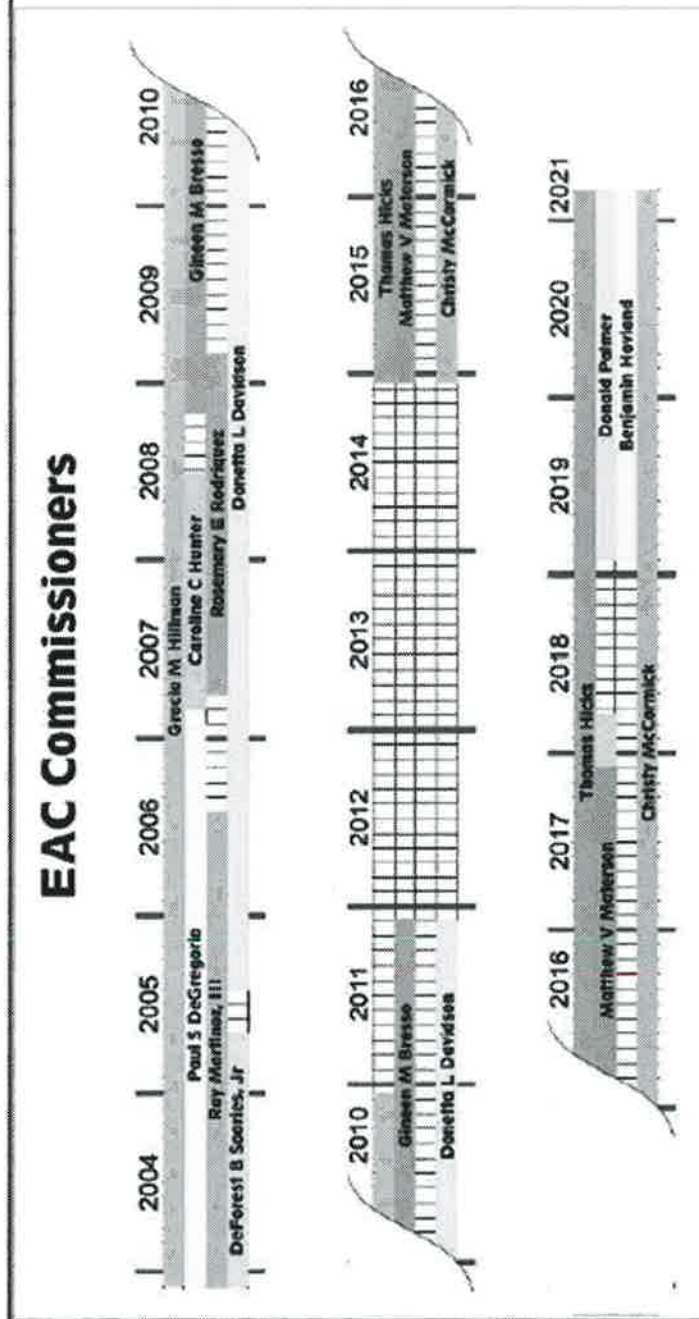
Commissioner Christy McCormick, Vice Chair

Commissioner Thomas Hicks

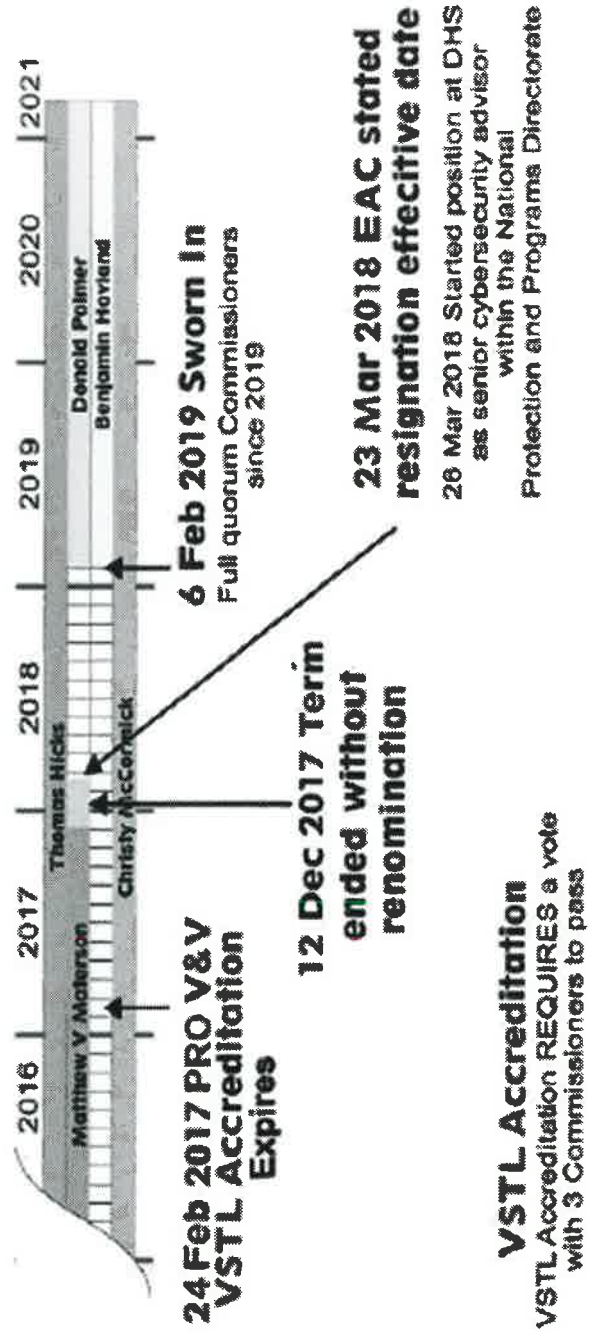
Commissioner Donald L. Palmer

59.64. A vote for a VSTL's reaccreditation is taken by the EAC and shall be passed by a vote of (3) three commissioners. The EAC did not meet quorum for the year of 2018 due to only having (2) commissioners. Until Hovland and Palmer were nominated; no quorum was met until February of 2019 in which Christy McCormick's signature would be required.

60.65. This means that no VSTLs were properly accredited for the 2020 Presidential election on November 3, 2020 and continue to be unaccredited due to lack of compliance.



EAC Commissioners



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61.66. EAC provided the following for SLI Compliance²³ and Pro V&V²⁴ dated January 21, 2021, stating Covid-19 circumstances which was not in accordance to VSTL Version 2.0 Section 3.8. ("PRE" Covid-19 pandemic)

62.67. Reaccreditation should have been properly issued in 2017 and 2018 respectively prior to Covid 19. The Covid excuse falls flat and crosses over to dishonesty.

63.68. During quorum, the EAC is required to vote on reaccreditation. There was no quorum for a year prior to 2019.

64.69. Accreditation would not have been possible in order to be in accordance with HAVA of 2002 Section 231(b) and the Voluntary Voting System Guidelines in clear violation of law. Quorum would have and needed to be held well before any real or perceived complications due to COVID-19.



U.S. ELECTION ASSISTANCE COMMISSION
633 3rd St. NW, Suite 200
Washington, DC 20001

FROM: Jerome Lovato, Voting System Testing
and Certification Director

²³ https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI_Compliance_Accreditation_Renewal_delay_memo_012721.pdf (Last visited 5/20/22)

²⁴ https://www.eac.gov/sites/default/files/voting_system_test_lab/files/Pro_VandV_Accreditation_Renewal_delay_memo_012721.pdf (Last visited 5/20/22)

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SUBJECT: SLI Compliance EAC VSTL Accreditation

DATE: 1/27/2021

SLI Compliance, a division of Gaming Laboratories International, LLC (SLI) has completed all requirements to remain in good standing with the EAC's Testing and Certification program per section 3.8 of the Voting System Test Laboratory Manual, version 2.0:

Expiration and Renewal of Accreditation. A grant of accreditation is valid for a period not to exceed two years. A VSTL's accreditation expires on the date annotated on the Certificate of Accreditation. VSTLs in good standing shall renew their accreditation by submitting an application package to the Program Director, consistent with the procedures of Section 3.4 of this Chapter, no earlier than 60 days before the accreditation expiration date and no later than 30 days before that date. Laboratories that timely file the renewal application package shall retain their accreditation while the review and processing of their application is pending. VSTLs in good standing shall also retain their accreditation should circumstances leave the EAC without a quorum to conduct the vote required under Section 3.5.5.

Due to the outstanding circumstances posed by COVID-19, the renewal process for EAC laboratories has been delayed for an extended period. While this process continues, SLI retains its EAC VSTL accreditation



U.S. ELECTION ASSISTANCE COMMISSION
633 3rd St. NW, Suite 200
Washington, DC 20001

FROM: Jerome Lovato, Voting System Testing and Certification Director

SUBJECT: Pro V&V EAC VSTL Accreditation

DATE: 1/27/2021

Pro V&V has completed all requirements to remain in good standing with the EAC's Testing and Certification program per section 3.8 of the Voting System Test Laboratory Manual, version 2.0:

Expiration and Renewal of Accreditation. A grant of accreditation is valid for a period not to exceed two years. A VSTL's accreditation expires on the date annotated on the Certificate of Accreditation. VSTLs in good standing shall renew their accreditation by submitting an application package to the Program Director, consistent with the procedures of Section 3.4 of this Chapter, no earlier than 60 days before the accreditation expiration date and no later than 30 days before that date. Laboratories that timely file the renewal application package shall retain their accreditation while the review and processing of their application is pending. VSTLs in good standing shall also retain their accreditation should circumstances leave the EAC without a quorum to conduct the vote required under Section 3.5.5.

Due to the outstanding circumstances posed by COVID-19, the renewal process for EAC laboratories has been delayed for an extended period. While this process continues, Pro V&V retains its EAC VSTL accreditation

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65.70. EAC again provided on its website July 22, 2021 on both Pro V&V²⁵ and SLI Compliance²⁶ VSTL accreditation pages yet another excuse regarding the lack of proper and legal accreditations.

¹ Pro V&V was accredited by the EAC on February 24, 2015. Federal law provides that EAC accreditation of a voting system test laboratory cannot be revoked unless the EAC Commissioners vote to revoke the accreditation: “The accreditation of a laboratory for purposes of this section may not be revoked unless the revocation is approved by a vote of the Commission.” 52 U.S. Code § 20971(c)(2). The EAC has never voted to revoke the accreditation of Pro V&V. Pro V&V has undergone continuing accreditation assessments and had new accreditation certificate issued on February 1, 2021.

66.71. “3.6.1.3. The effective date of the certification, which shall not exceed a period of two (2) years.” To revoke is the process of “taking away”. The accreditation was not “taken away”. The regulation clearly states that the accreditation is for (2) two-year periods only. The EAC’s use of this section is disingenuous.

67.72. 52 U.S. Code § 20971(c)(2) is not applicable to 3.6.1.3 and the effective date of the accreditation as the accreditation EXCEEDED the period of two (2) years. The statute does not refer to continued

²⁵ <https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/pro-vv> (Last visited 5/20/22)

²⁶ <https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/sli-compliance-division-gaming-laboratories> (Last visited 5/20/22)

accreditation due to any failure of action by the private laboratories and or the EAC Program Director. This is erroneous reasoning at best, fraud at worst. Pro V&V and SLI Compliance were not accredited laboratories in accordance with HAVA of 2002 § 231(b). The EAC is not a legislative body and cannot create or establish law but must abide by HAVA of 2002. This is an overreach of power by disregarding the law set forth by HAVA of 2002 Section 231(b) and the federal legislative body.

68.73. Note that the same document provides another excuse as to why the VSTLs are not properly accredited. Accordingly, the “Accardi” decision requires that even governmental officials must follow agency regulations and guidelines. By the EAC’s own admission of “administrative error”; the foundation of the rule of law under the Accardi doctrine; the EAC did not observe their own rules and guidelines, therefore violating the laws set by HAVA affording a domino effect of substantive restraints and violations of protected persons (class) from arbitrary or capricious treatment thus violating Plaintiffs’ voting rights.

Due to administrative error during 2017-2019, the EAC did not issue an updated certificate to Pro V&V causing confusion with some people concerning their good standing status. Even though the EAC failed to reissue the certificate, Pro V&V’s audit was completed in 2018 and again in early 2021 as the scheduled audit of Pro V&V in 2020 was postponed due to COVID-19 travel restrictions. Despite the challenges outlined above, throughout this period, Pro V&V and SLI Compliance remained in good standing with the requirements of our program and retained their accreditation. In addition, the EAC has placed appropriate

procedures and qualified staff to oversee this aspect of the program ensuring the continued quality monitoring of the Testing and Certification program is robust and in place.

25.74. Following the elections of 2016, Senator Ron Wyden sent a letter²⁷ to Traci Mapps, Director of Operations for SLI Compliance, specifically asking if the company had implemented the best practices described in the National Institute of Standard and Technology (NIST) 2015 VVSG 1.1.

26.75. According to the “General Information on Texas Voting System Certification Process” found on the SoS’ website²⁸

a.c. “The Secretary of State requires new systems and modifications to previously-certified systems be qualified by the Election Assistance Commission (EAC), with 2002 Voting System Standards/guidelines (VSSG) or newer, prior to being submitted for examination.”

b.d. “The vendor applying for certification must complete and deliver application forms (Form 100²⁹, Form 101³⁰, and if applicable, Form 100 Schedule A), user operating and maintenance

²⁷ <https://www.wyden.senate.gov/imo/media/doc/wyden-sli-compliance-election-cybersecurity-letter.pdf> (Last visited 5/20/22)

²⁸ <https://www.sos.state.tx.us/elections/laws/generalinfo.shtml> (Last visited 5/20/22)

²⁹ <https://www.sos.texas.gov/elections/forms/form100.pdf#search=form%20100> (Last visited 5/20/22)

³⁰ <https://www.sos.texas.gov/elections/forms/form101.pdf#search=form%20101> (Last visited 5/20/22)

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manuals, training material, final report(s) from an independent testing laboratory accredited by the EAC, a change log detailing changes from any previously-certified system or component, and application fee(s), to the Secretary of State no later than 45 days prior to examination.”

Materials Checklist (Indicate materials submitted with an “X”)	
7 copies of the following (5 copies in electronic format and 2 hard copies):	
	Completed application Forms 100 and Form 101
	If applicable, attach Form 100 - Schedule A, listing recommendations/issues made from previous Texas examination. List how they have been corrected or addressed. If they have not, explain why.
	If component has been modified, include log detailing changes from the previously Texas certified version
	Nationally accredited voting system test laboratory reports of all tests (including summary) conducted on items submitted
	Operating Manual(s)
	Maintenance Manual(s)
	Training Manual(s)
	Technical Specifications
	Operational Specifications

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	List all COTS hardware/software used with the system and their version numbers – If listed in a nationally accredited test laboratory reports, state where
	List all configurations that will be marketed and sold in Texas - indicate if the optical scan will be used as a precinct count, central count, or both
	Provide complete step-by-step installation instructions for all software installs and configurations specific to Texas
	List of other election jurisdictions where system is in use or has been in use

69.76. According to “*The Certification Procedures for Electronic Pollbooks*,” certification involves “Technical examination by a NIST-certified testing laboratory.” However, which laboratories perform this type of testing, as well as their findings, are not listed on the SoS’s website and remain in question.³¹

70.77. Not only must voting systems in Texas be EAC certified by an accredited VSTL . . . they must also be examined and approved for use by the Secretary of State and the Attorney General.³²

- a. Before a voting system or voting system equipment may be used in an election, the system and a unit of the equipment must be

³¹ <https://www.sos.state.tx.us/elections/laws/generalinfo.shtml>
(Last visited 5/23/22)

³² See Tex. Elec § 122.03, Tex. Admin. §§ 81.60, 81.61

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approved by the secretary of state as provided by this subchapter.

- b. The secretary of state may seek a temporary restraining order, or a writ of injunction obtained through the attorney general, to prevent the use of any part of a voting system or voting system equipment that has not been approved.
- c. A person commits an offense if the person executes a contract to sell, lease, or otherwise provide a voting system or voting system equipment that the person knows has not been approved. An offense under this subsection is a Class A misdemeanor.

71.78. “Accreditation is the independent evaluation of conformity assessment bodies against recognized standards to carry out specific activities to ensure their impartiality and competence. Through the application of national and international standards, government, procurers and consumers can have confidence in the calibration and test results, inspection reports and certifications provided.”³³

72.79. Accreditation and certification are used in many aspects of our society. For example, universities and colleges are accredited by private agencies known as an accrediting agency or accreditor. The Department of Education administers and approves these accreditors under CFR Title 34, § 602.³⁴ Accreditation for the pri-

³³ <https://ilac.org/about-ilac>

³⁴ <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-VI/part-602>

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vate accreditors is for five years; accreditors must reapply for renewal two years before accreditation lapses.

73.80. There are currently over 60 accreditors approved for accrediting our nation's colleges and universities³⁵. The Harvard University of Institutional Research website explains:

74.81. Accreditation is a voluntary, peer review process. It serves 4 main purposes: (1) to assure quality to the public, (2) to ease student transfer between institutions by signaling quality, (3) provides institutions with access to federal financial aid, and (4) certifies a graduate's credentials to employers.

75.82. An "accredited" university meets the Standards for Accreditation established by an accrediting agency. The Standards ensure that an institution has appropriate and clear goals, sufficient resources to achieve them, is fulfilling its objectives, and will continue to do so.

76.83. The process provides colleges and universities with an opportunity for reflection, honest assessment of strengths and weaknesses, along with a chance to develop strategies for continued improvement.³⁶

77.84. Both accredited and non-accredited colleges and universities accept money, deliver a product (courses) and then award certificates and diplomas to

³⁵ <https://www2.ed.gov/admins/finaid/accred/accreditor-federal-recognition-process-steps.pdf>

³⁶ <https://oir.harvard.edu/faq/what-accreditation-why-should-university-be-accredited>

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attendees and graduates to document course and program completion. Imagine the public response if colleges and universities turn out to not be accredited due to an accreditor's lack of credentials. This would inspire demands for action loudly across the country, as should the lack of VSTL accreditation.

78.85. ES&S EVS 6.1.1.0 was only "certified" by the Election Assistance Commission (EAC) on July 27, 2020, by Pro V&V which did so with an expired EAC accreditation and was not certified to do the examination at the time³⁷.

79.86. On August 21, 2020, Election Systems & Software ("ES&S" or the "Vendor") presented the EVS 6.1.1.0 system for examination and certification by the Texas Secretary of State³⁸.

80.87. Travis county officials have confirmed that Election Systems & Software's EVS 6.1.1.0 system was used to conduct the November 3, 2020, elections.

81.88. On December 9, 2020, pursuant to TEX ELEC § 122.0371 of the Texas Election Code, the Office held a public hearing, by telephone, for interested persons to express views for or against the certification of the EVS 6.1.1.0 system³⁹.

³⁷ https://files.tttexas.com/case/TX_SOS_Election_Violation_References_See_ES&S_EVS6110_Certificate_and_Scope_of_Conformance

³⁸ https://files.tttexas.com/case/TX_SOS_Election_Violation_References_See_EVS_6.1.1.0_system_examination_and_certification

³⁹ https://files.tttexas.com/case/TX_SOS_Election_Violation_References_See_ESS_EVS_6.1.1.0.Certification_Order

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82.89. On January 8, 2021, The Secretary of State's office, pursuant to Section 122.039, wrote and filed their official report certifying Election Systems & Software's EVS 6.1.1.0 system for use in Texas elections⁴⁰.

83.90. ES&S EVS 6.1.1.0 was NOT CERTIFIED for use in any election prior to the state certification on January 8, 2021.

“Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”—Antonin Scalia, From 1995 speech at Stanford University

<https://time.com/4220735/antonin-scalia-dead-quotes-opinions/>

B. Election System & Software (ES&S) Voting System

84.91. Election System and Software (ES&S) Voting System is one of two voting systems utilized in the state of Texas.

85.92. “Election Assistance Commission Investigated ES&S Voting Systems” is an article published by WhoWhatWhy.org on March 8, 2021, containing documents obtained from the SoS that provides a detailed timeline of events leading up to the SoS certifying ES&S software/systems for Texas use in the 2020 election and currently in use-that were not legally certified by the EAC and had alarming issues.⁴¹

⁴⁰ https://files.tttexas.com/case/TX_SOS_Election_Violation_References See ESS EVS 6.1.1.0.Certification Order

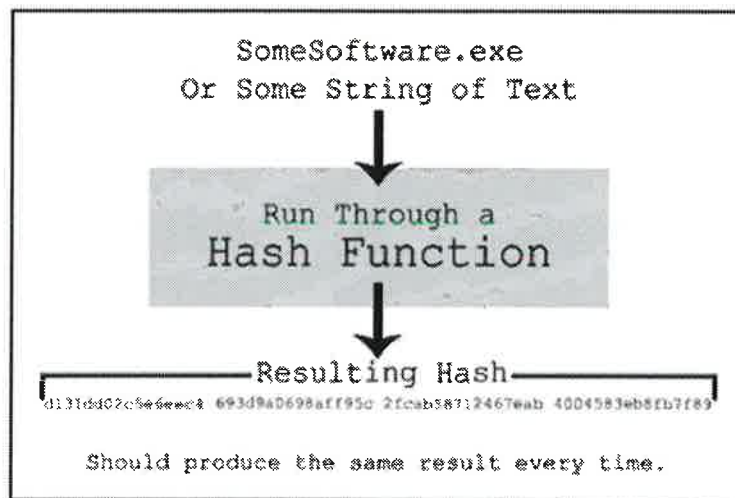
⁴¹ <https://whowhatwhy.org/politics/elections/election->

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86.93. 40 days before the 2020 election, the EAC quietly investigated concerns that ES&S's software installation and validation methods could have left touch-screen voting systems in up to 19 states vulnerable to installation of malicious or otherwise unapproved software.

87.94. The investigation arose from a discovery by the Texas SoS voting machine examiners that ES&S had used an uncertified USB stick method to install updates to software for versions of ExpressVote touch-screen.

88.95. Software installed with this method did not match the software certified by the EAC and failed hash-validation testing (a mathematical algorithm that maps data generated from an installed copy, and then compares that data to the algorithm of the software certified by the EAC).



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Transcription:

SomeSoftware.Exe
Or Some String of Text

Run through a Hash Function

Resulting Hash

Adadlf08324adfada0d8g0ad8g0adgadgad

Should produce the same result every time

89.96. ES&S told Texas that the discrepancy was caused by a single benign image called “sysload.bmp”.

90.97. Brain Mechler, Texas examiner states that this left the system vulnerable to an “insider threat”.

91.98. September 23, 2020, more than a month of interoffice communications, Texas reported the issue to the EAC.

92.99. The EAC opened an investigation which expanded to include up to 18 other states and up to 35 versions of ExpressVote.

93.100. The EAC never reported or referenced publicly the issue nor the investigation.

94.101. October 13, 2020, the EAC sent an email to officials in the affected states implying that it had resolved the issue by approving ES&S’s stick-installation method as a “de minimis”⁴² engineering change order.

⁴² De minimis meant a change to a certified voting system’s hardware, software, TDP, or date that does not materially alter the system’s reliability, functionality, capability, or operation

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95.102. The EAC said they thought it had minimal effect and said its decision was based on the advice of SLI Compliance and Pro V&V.

96.103. The lab report shows only 19 versions out of the 35 affected versions were forensically analyzed for the stick method.

97.104. The EAC forwarded to state officials and gave instructions for jurisdictions to distinguish between expected/benign mismatches and unexpected, possibly malicious ones.⁴³

98.105. The EAC did not post the “engineering change order” to their website until February 11, 2021, which left the issue widely unnoticed and out of the public eye.

99.106. Initially, the website stated that the change order was approved on February 11, 2021, and that it applied to 35 ExpressVote versions; 16 more than the labs had analyzed before the 2020 election.

100.107. The EAC quickly changed the website to reflect that the change order was instead granted in October for 19 systems.⁴⁴

101.108. Other concerns arose from Texas Examiners regarding ES&S hash-verification scripts for election-management systems.

- a. Included a bug that caused it to incorrectly report a match under certain circumstances

⁴³ <https://drive.google.com/file/d/1S7vvc6veOyblDkVMDc1paTRR072H3Mf4/view> Last visited 06/7/22

⁴⁴ <https://drive.google.com/file/d/1Yr5bs9iyaKWis2MS-iQzlyTuNfu7xCVH/view> Last visited 06/7/22

- b. ES&S conduction hash-validation tests itself as opposed to having the jurisdiction; “fox guarding the henhouse” situation.⁴⁵

102.109. Despite these concerns, Texas certified ES&S’s new systems.⁴⁶

103.110. The EAC has failed to publish the results of its investigation and or respond adequately to questions, which has not been transparent.⁴⁷

104.111. ES&S’s procedures and coding practices warrant further scrutiny which travails and illustrates the risk associated with using touch-screens to do what a voter could easily do with a pen, mark paper ballots.

HASH MISMATCH DUE TO UNCERTIFIED INSTALLATION METHOD

105.112. Brian Mechler’s, Texas examiner, report for ES&S system version EVS 6.0.3.0 stated that when the examiners asked to run the ExpressVote hash-validation process on the system in August of 2020, ES&S disclosed that it had two methods for that version.⁴⁸

⁴⁵ <https://www.sos.texas.gov/elections/laws/advisory2019-23.shtml> See Election Advisory No. 2019-23, Sec. 13

⁴⁶ <https://www.sos.texas.gov/elections/forms/sysexam/ess-evs-6110-certification-order.pdf> Last visited 06/07/22

⁴⁷ <https://whowhatwhy.org/politics/elections/election-assistance-commission-investigated-ess-voting-systems/> Last visited 06/07/22

⁴⁸ https://drive.google.com/file/d/1u5RM5PA29qU8mR_9qrAXRrDXHFRdL1bT/view See 5.1 Last visited 06/07/22

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- a.e. “Full Inno burn” method matched ES&S’s EAC-certified software thus passed the hash-validation test.
- b.f. USB stick method did not match the EAC-certified software due to what ES&S described as a single benign file called “sysload.bmp” thus resulting in in a hash-mismatch report which Mechler’s report called a “Hash Verification Failure”.
- c.g. Mechler further reported, “The fact that the failure occurs on only one file is of no comfort because it still opens a vulnerability to an insider threat”.

106.113. Keith Ingram the director of elections sent a letter to ES&S advising that “our examiner noted that this issue could create a potential security vulnerability as a proper software validation could not occur”.⁴⁹

107.114. Sometime in early September, ES&S representative Susan Parmer told Chuck Pinney, an attorney for the SoS, that the voting system test lab knew about the stick-installation method and hash discrepancy when it tested EVS 6.0.2.0 and 6.0.3.0 for EAC certification and “considers it a match if this the only file that comes up as a mismatch during verification” and acknowledged that it was not documented.⁵⁰

⁴⁹ <https://drive.google.com/file/d/1oDq5-ykF7Qs20sw6sB6qRfpVj3dyAOZv/view> Last visited 06/07/22

⁵⁰ https://drive.google.com/file/d/1ZvcJ0hCJxvFuzWE5-MORibG_k-vmVQPg/view Last visited 06/07/22

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108.115. Mechler sent an email to Pinney, stating that it was “troubling” that they were being “asked to take ES&S at their word” and that the EAC test labs said “this is fine” expressing concern that ES&S may actually have hidden its stick-installation method and resulting hash discrepancy during the prior examination and certification of a third system 6.0.2.0 as “it does not appear in any of the examiners’ reports. Either this issue was not disclosed or exposed during that exam or there is some nuance that I failed to understand”.

109.116. Mechler continues by adding that “bmp files can be used to exploit systems”. He also expressed concern that jurisdictions had no mechanism to verify whether hash discrepancies resulting from stick installations were due to the expected bmp file mismatch or an unexpected one:

110.117. Susan Parmer finishes her response by claiming, “Any other modification to that file would also produce a mis-match and be flagged by the export process, providing the information needed to verify the file and detect an external attack.”

111.118. Mechler’s response to Parmer’s email; “But that is not true. There is already a mis-match and if customers are being told to ignore it, there is nothing to be flagged.”⁵¹

⁵¹ <https://drive.RooRle.com/file/d/1Yr5bs9iyaKWis2MS-iQzlyTuNfu7xCVH/view> Last visited 06/07/22

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112.119. Another Texas examiner, Tom Watson, agreed with Mechler's original assessment via email to the SoS attorney.⁵²

113.120. Mechler responded with stronger verbiage.

"It's a gift-wrapped opportunity to an insider threat, however unlikely. Under the current guidance from ES&S, an insider now knows specifically which file is not being inspected. It's similar to a bank robber knowing that the camera covering teller #3 is broken."

114.121. As noted, in September; ES&S admitted that the stick-installation method "was not presented to the EAC as part of certification".⁵³

115.122. A draft letter approved by the SoS on September 29, 2020, written by Executive Director of the EAC, Mona Harrington suggests that ES&S may have misrepresented what the VSTL knew and said about the issue:⁵⁴

"The ES&S representative performing the installation during the examination used a method that was not tested by an EAC-accredited voting system test laboratory (VSTL) or certified by the EAC to install the software. When questioned by the Texas SOS representatives, the representative claimed

⁵² *Id.*

⁵³ <https://drive.google.com/file/d/1oDq5-ykF7Qs20sw6sB6qRfpVj3dyAOZv/view> Last visited 06/07/22

⁵⁴ https://drive.google.com/file/d/1iINJS_3VDjl5vRZAShXfVExce2sYBuDT/view Last visited 06/07/22

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that the installation method was reviewed /approved by the lab as part of their certification. Both SLI (VSTL for EVS 6.0.2.0) and Pro V&V (VSTL for EVS 6.0.3.0) deny that they had reviewed this installation method as part of certification testing.”

116.123. On September 15, 2020, Christina Adkins, the legal director for the SoS, learned the uncertified installation method had been used in the field after all and sent an email to Parmer of ES&S stating that “Essentially what you’ve told us . . . is that there are Texas customers who received software upgrades that failed the hash validation process, and that . . . you did not inform our office . . . This is very concerning and *raises doubts about our ability to trust your team to report and address these issues with us*”⁵⁵(*Emphasis added*)

117.124. Parmer tried to sway Adkins that the hash-mismatch “did not fail” and therefore was “never . . . an issue to report”. Her reasoning for the mismatch caused by a single benign file was prior knowledge by ES&S for the discrepancy and was “expected”.

“The hash validation process . . . did not fail. On the contrary, the software did exactly what we expected it to do when a sick update is used on an ExpressVote 1.0 and verified the SYSLOAD.BMP file was not present. This was the expected result, and, as such, is considered a match . . . There has never been

⁵⁵ <https://drive.google.com/file/d/1X--u10N85CsFvIFdM2O2SbBtKIJ-1NG2/view> Last visited 06/07/22

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an issue to report and it is disheartening to think you team would doubt our integrity in this matter.”

118.125. This reasoning was unacceptable to Adkins.⁵⁶

“The only thing that the jurisdiction has to go on here is your word that this mismatch is the expected result. They have no way of knowing whether the mismatch occurred because it is the expected mismatch, or because the mismatched file was somehow altered or manipulated. The hash verification process does not distinguish between “expected” mismatches and malicious mismatches, it simply identifies that a mismatch occurred . . . Regardless of whether ES&S considers this to be a successful hash verification and a successful match, our office does not consider that verification process to be successful under those conditions.”

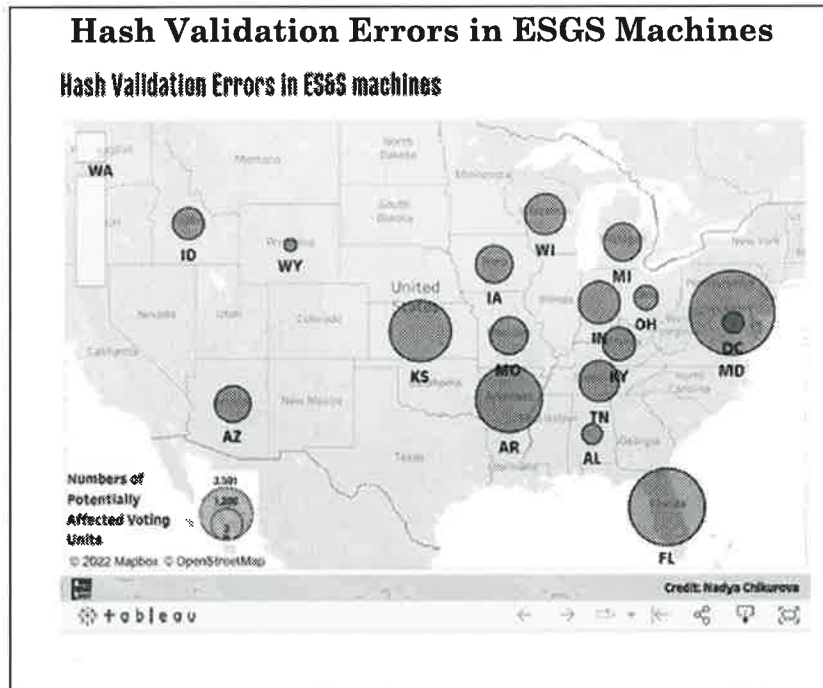
119.126. October 1, 2020, Harrington, of the EAC, sent a letter to state election directors stating that, “Initially, we were under the impression that only EVS 6.0.2.0 systems in Texas were impacted. We [are] requesting information from ES&S to better understand the scope and to date have received information that the states listed in Table 1 have at least one jurisdiction that may be affected.”⁵⁷

⁵⁶ https://drive.google.com/file/d/1uYujvUxdJ_pzKozqH9fW_RllHcxxtPD/view Last visited 06/07/22

⁵⁷ <https://drive.google.com/file/d/11BFFOoa--Fmc2o0HtQAXkKvpKACrmtHx/view> Last visited 06/07/22

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- a. Alabama (105 units potentially affected)
- b. Arkansas (2072 units potentially affected)
- c. Arizona (496 units potentially affected)
- d. Washington, DC (102 units potentially affected)
- e. Florida (2893 units potentially affected)
- f. Iowa (532 units potentially affected)
- g. Idaho (346 units potentially affected)
- h. Indiana (731 units potentially affected)
- i. Kansas (1742 units potentially affected)
- j. Kentucky (400 units potentially affected)
- k. Maryland (3501 units potentially affected)
- l. Michigan (548 units potentially affected)
- m. Missouri (538 units potentially affected)
- n. Ohio (168 units potentially affected)
- o. Tennessee (671 units potentially affected)
- p. Washington (3 units potentially affected)
- q. Wisconsin (667 units potentially affected)
- r. Wyoming (20 units potentially affected)



120.127. The letter further states “Table 2 displays all affected EVS voting systems” in which 35 different EVS systems are listed.

121.128. October 7, 2020, Harrington emailed state officials with talking points in case of injuries. They stated as a remedial measure, the EAC had asked ES&S to submit all information and affected versions for forensic testing by VSTLs (SLI and Pro V&V) to see if they would qualify as a minor change.

122.129. Harrington again emailed state officials a week later declaring both labs had completed all the testing ahead of schedule and approved the stick-installation method as a “de minimis” change.⁵⁸

⁵⁸ <https://drive.google.com/file/d/1S7vvc6veOyb1DkVMDc1pa>

123.130. Harrington followed up a few days later with a change-order approval from the EAC.

124.131. Buried in the SLI's report on page 18 is an instruction for jurisdictions using the stick-installation method. SLI states that in the event of a hash mismatch . . . "the jurisdiction must . . . verify that the sysload.bmp files' hash codes . . . match the corresponding hash codes listed in Table 1. If the hash match, installation may continue. If the hashes don't match, the jurisdiction must follow ES&S's recommendations and perform a Production Image installation on the device."⁵⁹

125.132. Harrington did forward the lab reports in her email on October 15, 2020, but only stated "As promised, attached are the final lab reports" and nothing about the instructions for jurisdictions.⁶⁰

126.133. The day before she stated that the labs had approved the "de minimis" finding and the EAC had concurred and that she would be "sending the reports, nothing beyond that".

127.134. State officials were left to find the buried instructions provided from SLI and in turn specify these instructions to the jurisdictions.

128.135. ES&S's uncertified installation method and resulting hash discrepancy were effectively buried.

TRR072H3Mf4/view Last visited 7/22/2022

⁵⁹ https://drive.RooRle.com/file/d/IRZ_bHE3xLI8oBobirvnFRJiP89VeOhaq/ view Last visited 06/07/22

⁶⁰ *Id.*

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129.136. The EAC did not post the change order to its website until February 2021.

130.137. The SoS extending the deadline for examiners to submit reports for the system where the issue came up until after the election and gave ES&S permission to “withdraw” its certification request for the system.

131.138. Withdrawing its certification provided the SoS Office the avenue to NOT have to publish these reports on their website. SoS’s office told the examiners that, in light of the withdrawal, the attorney general’s examiners need not submit their reports to the SoS at all. None of the reports had to say whether the examiners would have recommended the certification of these systems.

132.139. Per the SoS’s request; ES&S did not use a full Inno burn installation on all Texas counties that ES&S had stated were impacted by the mismatch issue (stick installation).

133.140. November 8, 2020, after the 2020 election, Adkins emailed Mechler scheduling a “meeting with ES&S in December to discuss the scope of this (stick installation and hash mismatch) issue as it appears to have affected more systems than they initially disclosed to us.”⁶¹

134.141. Mechler wrote in his report on November 19, 2020, “it is unclear at this time whether there are more affected systems in Texas than initially disclosed by ES&S”.

⁶¹ https://drive.google.com/file/d/1wElBD_-bQJ8ZnlIdSlQi3cvodjIGX7Ta/view Last visited 06/07/22

BUG IN ES&S HASH VERIFICATION SCRIPT

135.142. Mechler's report explains that the hash-validation method included a bug in ES&S's hash-verification script as two USB thumb drives were required to complete and needed to match.

a.h. One with the export date being verified

b.i. One with the scripts and hash file

136.143. Mechler neglected to include in his report to add the hash file for the certified version of the software, yet the software still reported as a match.⁶²

"While working through the [hash validation] process, I initially overlooked the instruction to add the trusted hash file to the scripting media. Despite the missing trusted hash file, the verification script erroneously reported that the exported hashes matched the trusted [certified] hashes."⁶³

"In my opinion, this bug (in addition to the overall process) indicates that ES&S has not developed their hash verification with sufficient care, quality assurance, and concern for usability."

137.144. Note that date of this email, November 19, 2020, after the November 3, 2020 general election. How many versions were affected and why only one

⁶² https://drive.google.com/file/d/1u5RM5PA29qU8mR_9qrAXRrDXHFRdL1bT/view Last visited 06/07/22

⁶³ This means that even though no hash comparisons were made, the verification implies a good result.

version was re-certified as de minimus change, Plaintiffs or the public still do not know.

“The Pro V & V report that lists a whole slew of affected versions, but SLI report only identifies 6.0.30 as affected. Do we know for which versions of ES&S is seeking EAC approval of the ECO?”⁶⁴

ES&S CONDUCTING ITS OWN HASH VALIDATION TESTS

138.145. Parmer of ES&S mentioned in an email to Pinney that ES&S technicians were conducting the hash-validation tests themselves not the jurisdictions conducting them.

139.146. This posed a red flag as the purpose of the hash validations is to ensure the vendor is not giving the customers something different than what is certified by the EAC and the SoS's office.

140.147. As Adkins explained to Parmer in an email; “If the hash validation process is performed by the same vendor technician who performed the installation, then that validation process loses one of its major purposes, which is to keep the vendor honest.”⁶⁵

141.148. One SoS examiner, Brandon Hurley to Adkins via email states “It is the ultimate “fox watching the henhouse” scenario. It is them [ES&S] self-certifying systems for use”.

⁶⁴ *Id.*

⁶⁵ <https://drive.google.com/file/d/1X--u10N85CsFvIFdM2O2SbBtKIJ-1NG2/view> Last visited 06/07/22

142.149. “Jurisdictions should always perform this process themselves,” Mechler wrote in his reports. “To have the vendor [ES&S] perform a required component of acceptance testing creates, at best, a conflict of interest.”⁶⁶

143.150. Mechler further confirms that the jurisdictions would not know if the Election Management System (EMS) would have no trace of being altered after the first installation via ES&S’s procedure.⁶⁷

5.3 Lack of Traceability in Procedure for EMS Hash Verification

The hash verification document for the EMS host(s) describes a procedure where the user creates a set of “golden” hashes immediately after installation [4]. Subsequent checks are only verified against this “golden” set. This procedure, as written, only verifies that the EMS has not been altered since the first installation; it is not traceable to the hashes generated by the EAC. ES&S should document a procedure that jurisdictions can use to verify EMS hashes against those created by the EAC.

144.151. Freedom to Tinker reported⁶⁸ one ES&S contract in Collin County, Texas expressly requires

⁶⁶ https://drive.google.com/file/d/1u5RM5PA29qU8mR_9qrAXRrDXHFRdL1bT/view See Sec. 5.1, second paragraph - Last visited 07/22/2022

⁶⁷ *Id.*

⁶⁸ <https://freedom-to-tinker.com/2021/03/05/voting-machine-hashcode-testing-unsurprisingly-insecure-and-surprisingly-insecure/> Last visited 06/07/22

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the customer to use ES&S for hash-validation testing.⁶⁹ Below is the provision:

145.152. General Terms 7(b)

Exclusive Remedies/Disclaimer. IN THE EVENT OF A BREACH OF SUBSECTION 7(a), ES&S' OBLIGATIONS, AS DESCRIBED IN SUCH SUBSECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. ES&S EXPRESSLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, WHICH ARE NOT SPECIFICALLY SET FORTH IN THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. FURTHER, IN THE EVENT CUSTOMER DECLINES ES&S' INSTALLATION AND ACCEPTANCE TESTING SERVICES OR IN ANY WAY AT ANY TIME ALTERS, MODIFIES OR CHANGES ANY EQUIPMENT, SOFTWARE, THIRD PARTY ITEMS AND/OR NETWORK (COLLECTIVELY "SYSTEM") CONFIGURATIONS WHICH HAVE BEEN PREVIOUSLY INSTALLED BY ES&S OR WHICH ARE OTHERWISE REQUIRED IN ACCORDANCE WITH THE CERTIFIED VOTING SYSTEM CONFIGURATION, ALL WARRANTIES OTHERWISE PROVIDED HEREUNDER WITH RESPECT TO THE SYSTEM PURCHASED, LEASED, RENTED AND/OR LICENSED UNDER THIS AGREEMENT SHALL BE VOID AND OF NO FURTHER FORCE AND EFFECT.

⁶⁹ https://eagenda.collincountytx.gov/docs/2020/CC/20200601_2483/48428_2018-241%20Contract.pdf Last visited 06/07/22

App.111a

146.153. Eddie Perez, an election technology expert with ONSET Institute calls this type of contract provision unconscionable.⁷⁰

147.154.



Edward Perez
@eddie1perez

Replying to @SLEGreenhalgh @EACgov and @jennycobri

I find the issue of acceptance testing far more maddening. I have known for yrs that ES&S often does "acceptance testing" for customers (totally inappropriate) & has the gall to "charge" customers for the "service" (unacceptably mercenary); but voiding warranty is unconscionable.

8:29 AM · Mar 5, 2021 · Twitter for iPhone

148.155.



Edward Perez
@eddie1perez

Forcing customers to permit the vendor to do acceptance testing is like buying a new home and before the closing the seller says, "You don't need a final walk-through. Just trust me."

And then "voiding the warranty" if they don't agree?
Unethical strong-arming at its worst.

9:00 AM · Mar 5, 2021 · Twitter for iPhone

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⁷⁰ <https://twitter.com/eddie1perez/status/1367844687541854211?s=20> Last visited 06/07/22

⁷¹ <https://twitter.com/eddie1perez/status/1367852481766653960?s=20> Last visited 07/22/2022

TEXAS CERTIFIES 6.1.1.0 DESPITE HASH VALIDATION CONCERNS

149.156. The Tex. Elec Code states that a “voting system may not be used in an election unless the system . . . is safe from fraudulent or unauthorized manipulation.”⁷²

150.157. Mechler’s assertion that “the hash verification process has been a growing issue of concern over the past few certification exams”⁷³; he and other examiners still recommended certifying EVS 6.1.1.0.⁷⁴

151.158. Ironically, Texas Attorney General Ken Paxton publicly assailed Dominion voting but ignored our own state’s use of ES&S.

EAC ORDERS ES&S TO CORRECT MISLEADING CLAIMS

152.159. The Federal Election Assistance Commission (EAC) rebuked ES&S over marketing materials that the EAC says deceptively implied the company’s voting machines are EAC-certified.⁷⁵

153.160. The EAC admonished ES&S over their promotional literature and statements on its website for falsely that the equipment they sell with

⁷² See Tex. Elec Code § 122.001(a)(4)

⁷³ <https://www.sos.texas.gov/elections/forms/sysexam/brian-mechler-ESS-exam-report-EVS6110-aug.pdf#search=evs%206.1.1.0> (Sec. 8 Conclusions) Last visited 06/07/22

⁷⁴ <https://www.sos.texas.gov/elections/forms/sysexam/ess-evs-6110-certification-order.pdf> Last visited 06/07/22

⁷⁵ <https://www.politico.com/news/2020/08/13/election-voting-machine-misleading-claims-394891> Last visited 07/23/22

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embedded modems have been sanctioned by the EAC under its testing and certification program.

154.161. The equipment in question is the DS200 precinct voting system tabulator. And other ES&S tabulation systems.

155.162. Steve Pearson, Sr. Vice President, Certification contacted Jerome Lovato the Director of Voting Systems Testing and Certification for ES&S in which the EAC alleges that “certain misrepresentations in its DS200 marketing materials with respect to the DS200 being ‘fully certified and compliant with EAC guidelines’ while also listing the use of a modem in the DS200 as an option for customers.”⁷⁶

156.163. Some state laws require voting machines used in their jurisdictions to be certified by the EAC such as Texas. That means that if jurisdictions in those states are using the noncertified systems, it could potentially put election officials in violation of their state law.

157.164. The ES&S DS200 precinct-based optical-scan machines, which come in two versions. One has an optional modem for transmitting results after an election.

158.165. The dispute is the in 2009 ES&S’s DS200 without the modem was EAC certified under the EAC’s testing and certification program. The DS200 with modem/network capability has never been EAC certified.⁷⁷

⁷⁶ <https://www.politico.com/f/?id=00000173-e9b5-d0bf-a17b-fdbfc0290000> See page 8

⁷⁷ https://www.eac.Rov/sites/default/files/eac_assets/1/28/Cert%

App.114a

159.166. Per the Testing and Certification Program Manual by the EAC; “Any action by the Manufacturer to suggest EAC endorsement of its product or organization is strictly prohibited and may result in a Manufacturer’s suspension or other action pursuant to Federal civil and criminal law.”⁷⁸

160.167. ES&S submitted a DS200 system with modem and network capability to the EAC for testing and certification but before the lab created protocol for the evaluating the modem and network capability; ES&S withdrew those parts of the system from the testing plan. The remainder of the system was tested and certified in 2013.

161.168. “The certification of individual components or modifications shall not be independently represented by a Mark of Certification,” the EAC’s certification manual says. The rules also require that a company’s user manuals “warn purchasers that any changes or modifications to the system not tested and certified by the EAC will void the EAC certification of the voting system.”⁷⁹

162.169. A manufacturer can only label a system EAC-certified only if the whole system is certified.

163.170. A lawyer for Free Speech for People and the National Election Defense Coalition sent a letter the EAC providing marketing and literature in regards to the misrepresentation of the ES&S’s

20Manual%207%208%2015%20FINAL.pdf

⁷⁸ *Id.*

⁷⁹ *Id.* See 5.15.1

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DS200.⁸⁰ Which garnered the EAC to open a probe⁸¹ into the complaints.

164.171. By the misrepresenting the certification status of this DS200 tabulator in its marketing literature, ES&S violated Sec. 5.14 and 5.15.1 and failed to inform prospective customer that adding a modem to the regular DS200 would void its certification as the DS200 with the added modem was never certified to begin with.

165.172. Nonetheless, ES&S agreed to remove all references to the optional modems from all its marketing documents but the EAC on March 20 with a follow-up letter indicated this was insufficient remedy. It instructed the company to recall all misleading marketing literature already in circulation and to directly notify all current and prospective customers who received the “misrepresented information” the added modem was not EAC certified. ES&S had 15 days to comply.

166.173. “Failure to comply will result in the EAC publicly announcing that the voting system no longer complies with its original certification and could include initiating decertification actions and/or suspension of manufacturer registration,” wrote Jerome

⁸⁰ <https://freespeechforpeople.org/wp-content/uploads/2020/01/EAC.ESS-Letter-re-modems-with-Attachments-01.07.20.pdf>
Last visited 07/23/22

⁸¹ <https://subscriber.politicopro.com/article/2020/01/es-s-misled-customers-about-scanners-certification-status-activists-say-3975593> Last visited 07/23/22

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Lovato, director of the EAC's testing and certification program.⁸²

167.174. ES&S did not identify the 89 customers, saying it could not release information about customers without their permission.

168.175. "This is not the first time that ES&S has faced accusations of making fabricated or misleading assertions about its voting machines. In 2018, the company denied to The New York Times⁸³ that it had ever installed remote-access software on any of its election management systems."⁸⁴

169.176. Sen. Ron Wyden (D-Ore.) pressed ES&S about the matter and the company admitted it had installed the software on systems in at least 300 election jurisdictions. At this time; Bexar County and Collin County are two of the jurisdictions that have been identified as having remote access to their EMS.⁸⁵

170.177. Although, ES&S insist along with its customers that none of the voting systems ever connect to the internet, researchers have found more than

⁸² <https://freespeechforpeople.org/wp-content/uploads/2020/01/EAC.ESS-Letter-re-modems-with-Attachments-01.07.20.pdf>
Last visited 07/23/22

⁸³ <https://www.nytimes.com/2018/02/21/magazine/the-myth-of-the-hacker-proof-voting-machine.html> Last visited 07/23/22

⁸⁴ <https://www.politico.com/news/2020/08/13/election-voting-machine-misleading-claims-394891> Last visited 07/23/22

⁸⁵ https://files.ttttexas.com/case/TX_SOS_Election_Violation_References See Bexar County ES&S Contract and Collin County ES&S Contract

three dozen ES&S systems connected to the internet as published by Vice in August of 2019.⁸⁶

171.178. “In some cases, [the vendor was] in charge [of installing the systems] and there was no oversight. Election officials were publicly saying that their systems were never connected to the internet because they didn’t know differently.”⁸⁷

172.179. “Although ES&S has said the modems are secured and would prevent anyone from using them to hack the voting machines, the modem configurations have never undergone a security assessment by an EAC-approved lab to measure those claims.”⁸⁸

C.1. Hart InterCivic Verity

173.180. There is no universal definition of “paper ballot” which enables vendors and their surrogates to characterize “machine-marked paper printouts from ballot marking devices” (BMD) as “paper ballots”.

174.181. The machine-marked ballot is then counted on a separate scanner.

175.182. Most independent cybersecurity election experts caution against putting these insecure BMDs

⁸⁶ <https://www.vice.com/en/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials> Last visited 07/23/22

⁸⁷ Id.

⁸⁸ <https://www.politico.com/news/2020/08/13/election-voting-machine-misleading-claims-394891> Last visited 07/23/22

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between voters and their ballots and instead recommend hand-marked paper ballots as primary voting system.⁸⁹

176.183. Currently “hybrid” systems that combine both a BMD and a scanner into a single unit are more controversial.

177.184. Verity Touch Writer DUO are daisy chain configurations comprised of a Verity controller device, a proprietary cord, connecting up to twelve BMD devices.⁹⁰

178.185. The software application, Verity Relay, is a remote transmission software application that receives election data transmissions sent by Verity Scan device (tabulator) unit that scans, Verity Touch Duo scanner firmware and digital scanner devices that are equipped with the Relay modem accessory. Per the contract obtained through PIA requests, it appears that Tarrant County purchased this capability.⁹¹

179.186. Two manufacturers of the voting machines utilized in Texas, ES&S and Hart, testified before the House Administration Committee, that some tabulators have wireless modem capabilities.⁹²

⁸⁹ <https://whowhatwhy.org/politics/elections/philly-ignores-cybersecurity-and-disability-access-in-voting-system-selection/>
Last visited 06/21/22

⁹⁰ <https://www.eac.gov/sites/default/files/votingsystem/files/Hart%20Intercivic%20Verity%20Voting%202.4%20EAC%20Certification%20Test%20Report%20v1.1.pdf> See page 21 Last visited 06/21/22

⁹¹

⁹² <https://www.nbcnews.com/politics/elections/online-vulnerable->

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180.187. Several aspects/components of Hart Inter-Civic's Verity Voting are concerning when in close proximity to the internet.

181.188. One known county contract of the Hart InterCivic tabulators indicates that (9) nine of the add-on modems were purchased.

- a. Per Hart contract, a modem kit is required for electronic transmission from Verity Scan.
{ Non Legible Image removed }
- b. On August 1, 2019, the SoS Office sent a letter of approval for the above contract, which contained the add-on modems, to Heider Garcia. (Relay Modem Kit).
- c. The Relay Modem Kit is listed as required by Hart in order for the ENR to function but is not a listed component on the SoS examination or on the certification.

182.189. Brandon Hurley, an SOS appointed examiner, pointed out the connectivity capabilities of this make and version of voting system in his examination report.⁹³

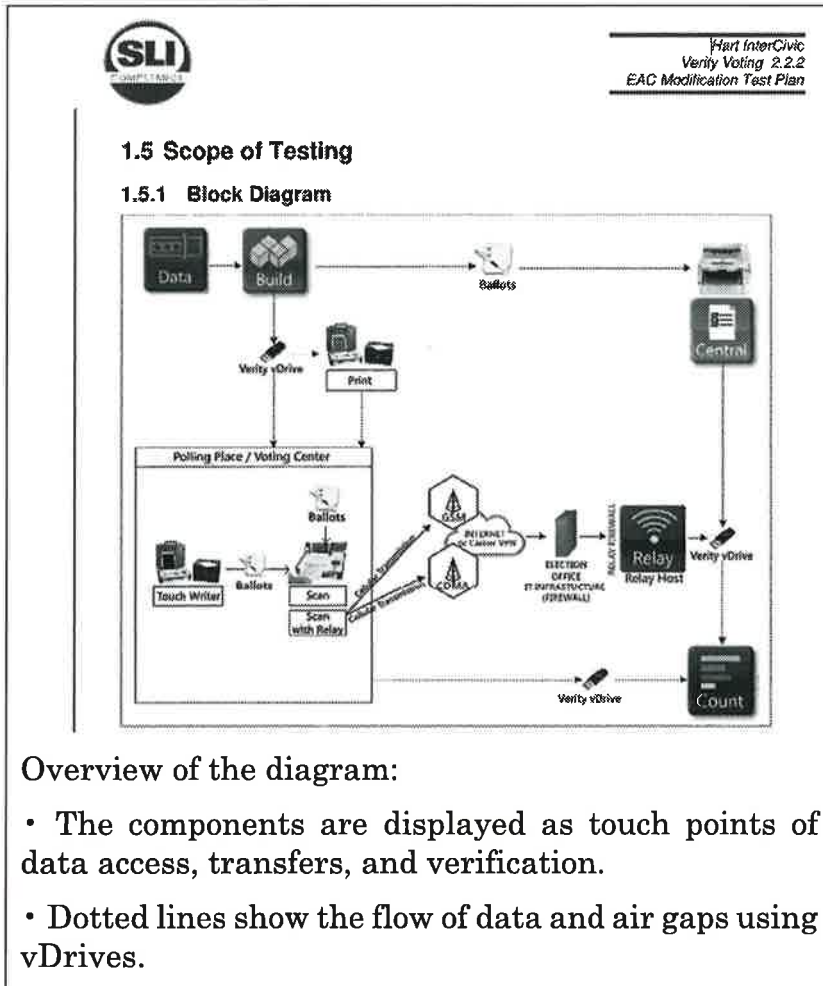
183.190. The exact component that allows this was not identified in Hurley's report, however, the visuals of Verity Voting, as well as several item descriptions in SLI Compliance's testing report could

experts-find-nearly-three-dozen-u-s-voting-n1112436 Last visited 06/21/22

⁹³ <https://www.sos.texas.gov/elections/forms/syseexam/brandon-hurley-hart-2.4.pdf>

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be points of vulnerability given the lack of compliance with VVSG.^{94, 95}



Overview of the diagram:

- The components are displayed as touch points of data access, transfers, and verification.
- Dotted lines show the flow of data and air gaps using vDrives.

⁹⁴ https://www.eac.gov/sites/default/files/voting_system/files/Hart%20Intercivic%20Verity%20Voting%202.4%20EAC%20Certification%20Test%20Report%20v1.1.pdf Last visited 06/21/22
See 1.6.1 Block Diagram

⁹⁵ *Id.*

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- Verity Print is a ballot production device that provides unmarked printed ballots.
- Verity Touch Writer and Verity Scan (Verity Voting devices) may be installed in Polling Places.
- Verity Key (not shown) is a USB device that is required for user access into components to load election elections, use features, and generate reports. Feature access depends on the roles applied to user accounts.
- Verity Relay is a transmission option within the Verity Voting system.

184.191. “Air-gapping” measures that are intended to prevent internet/network access have several experts presenting testimonies and demonstrations that contradict “air-gapping” as fail safe.

185.192. “Most traditional air gaps involve what is popularly known as a “sneakernet,” a physical method of transferring data, e.g., a Wi-Fi dongle or USB port.”⁹⁶

At this point, human nature takes over. Even well-intentioned users will accidentally leave doors unlocked or USB ports unguarded. They may get lazy and neglect to follow security procedures. One worrisome example of this risk occurs on merchant ships and naval vessels, whose mechanical control and navigation systems are air-gapped because, well, they’re on a ship and generally not connected to the Internet (though even that

⁹⁶ <https://www.rubrik.com/insights/what-is-an-air-gap-and-why-is-it-important> Last visited 06/21/22

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is starting to change.) Once a ship is docked, however, a malicious actor can gain access to the ship and use a USB stick to insert malware into the system. When a ship undergoes maintenance, and hundreds of semi- or non-vetted workers are aboard the vessel while the regular crew is away, it's easy to see how an air gap will fall apart.

2.5 Materials

Items identified in the table reflect materials required to perform hardware, software, telecommunications, security, accuracy and integrated system tests in a manner that reflects real world use and needs.

The following test materials are required for the performance of testing including, as applicable, test ballot layout and generation materials, test ballot sheets, test ballot cards and control cards, standard and optional output data report formats, and any other materials used in testing.

- Ballots & Blank Ballot grade paper
- Thumb Drives
- USB Dongle
- Ballot marking pens
- Printer paper rolls⁹⁷

⁹⁷ https://www.eac.gov/sites/default/files/voting_system/files/Hart%20Intercivic%20Verity%20Voting%202.4%20EA Last visited 06/21/22

186.193. Further, Brandon Hurley noted an *over vote* issue “ bring up a warning when more than one candidate can be voted for in a specific race. However, when you make your selection to continue, there is an automatic de-selection of another candidate chosen rather than allowing the voter to decide who gets deselected led to a voter confusion casting of an unintended vote without voter’s knowledge.”⁹⁸

HART INTERCIVIC BALLOT ISSUES

187.194. Hood County District Attorney Matthew Mills contacted the Attorney General, Ken Paxton, requesting clarification of ballot numbering issues associated with the use of Hart InterCivic voting systems.

188.195. Mills pointed out the following issues with electronic voting systems, specifically Hart’s hybrid voting system.⁹⁹

- a.j. Questions arising about compliance with election code.¹⁰⁰
- b.k. Who has the authority to select the method for numbering ballots?

⁹⁸ https://www.eac.gov/sites/default/files/voting_system/files/Hart%20Intercivic%20Verity%20Voting%202.4%20EAC%20Certification%20Test%20Report%20v1.1.pdf See 2.5 page 21

⁹⁹ https://katychristianmagazine.com/wp-content/uploads/2021/12/Request-for-Opinion-on-Ballot-Numbering_RQ-0405-KP_status-Borgelt-letter.pdf Last visited 06/24/22

¹⁰⁰ See Tex. Elec Code § 520.62

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189.196. Texas Secretary of State legal director of the elections division informed election administrators of two ways to comply.¹⁰¹

a.l. First method: Pre-print numbers on blank ballot stock, email deems “simplest and easiest way”

b.m. Second method: The voting machine to generate random numbers on blank ballots.

190.197. Mills poses (3) three questions regarding the ballot numbering issues with Hart.¹⁰²

The relevant language in § 52.062 is the following: “[t]he ballots prepared by each authority responsible for having the official ballot prepared.” Does this indicate that using pre-printed numbers on blank ballot stock is the only legal way to comply with the statute? Or does the machine generation method also comply with the numbering requirement?

a.n. A memorandum from a staff attorney, Chuck Pinney, to the Director of Elections, Keith Ingram, dated May 18, 2020, states machine-generated numbering on the Hart Verity 2.4 system complies with Texas ballot numbering requirements.

b.o. According to Elec. Code Ann § 31.032 the election commission has the authority to appoint an election administrator as well as

¹⁰¹ <https://www.sos.texas.gov/elections/forms/syseexam/chuck-pinney-hart-2.4.pdf> See page 3 Last visited 06/22/22

¹⁰² https://katychristianmagazine.com/wp-content/uploads/2021/12/Request-for-Opinion-on-Ballot-Numbering_RQ-0405-KP_status-Borgelt-letter.pdf See page 12 Last visited 06/22/22

suspend or terminate the administrator under § 31.037. Under § 31.039, the commissioners court maintains authority over various budgetary issues including salary and staffing.

- i. A 1988 Tex. Att’y Gen. Op. No. LO-88-62 (1988)¹⁰³ the AG’s office opined that election administrators should be “largely independent of both the commissioners court and election commission.” Essentially, stating that the elections commission does not possess the authority to suspend an elections administrator.
- ii. Senate Bill 12333 in 2011 may render the AG opinion moot which gave new authority to elections commissions to suspend elections administrators.
- iii. In 1997, the San Antonio Court of Appeals provided a different conclusion in *Krier v. Navarro*, 952 S.W.2d 25 the elections administrator was greatly restricted in the exercise of his duties from “. . . selecting polling places and early voting sites, issuing orders calling for elections, adopting a voting system, selecting election judges and phone bank clerks . . . leasing voting systems . . . The evidence presented establishes that the governmental functions performed by Navarro were not exercised ‘largely independent of the control of others.’ *Id*

¹⁰³ <https://www2.texasattorneygeneral.gov/opinions/opinions/47mattox/lo/1988/pdf/lo1988062.pdf> Last visited 06/22/22

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Assuming the reasoning in *Krier* is correct, is the method of ballot numbering akin to “adopting a voting system,” which is controlled by the commission court? Or has the commissioners court already determined the voting system by purchasing voting equipment, and the elections administrator may then determine which method of ballot numbering is appropriate?

Chapter 52 of the election code contains various provisions for the preparation of ballots. Under § 52.001, ballots are for the “ vote in an election. “ parentheses emphases added parentheses does the suggestion in the director’s advisory that the jurisdictions may conduct subsequent elections with ballot members stating higher than “1” comply with § 52.062? Or should ballots begin with a number “1” for each election?

c.p. On October 23, 2019, Keith Ingram of the Texas Secretary of State office published Election Advisory 2019-23. Sec. 13(1)(a)(iv) (1)¹⁰⁴, the director suggests that jurisdictions *MAY* start with the number “1” and then start subsequent elections with ballots with much higher starting numbers. (*Emphasis added*) See below Election Advisory 2019-23 reads as follows:

iv. The jurisdiction can pre-number the ballots and split them into batches for each election, with each batch beginning with a number that ends in the number “1”. Those batches must be no smaller than units of 100, though a jurisdiction could batch in larger units if needed (1000, 10,000, etc.).

¹⁰⁴ <https://www.sos.state.tx.us/elections/laws/advisory2019-23.shtml> Last visited 06/22/22

1. Example: For the November election, the jurisdiction could use ballots 1-1500, and for the May election that jurisdiction could then use ballots 1501-2400, and for the following November election the jurisdiction could use ballots 2401-4200, etc.

191.198. Is the Director of Elections advising jurisdictions to ignore Tex. Elec Code § 52.001?

192.199. Matthew Mills, Hood County Attorney; raises three very specific questions concerning the numbering of the ballots in which Hart InterCivic voting systems does not comply in accordance with Tex. Elec Code.¹⁰⁵

193.200. In response to Mill's request for an opinion regarding numbering of the ballots; Roger B. Borgelt, Borgelt Law, provided an opinion to the Attorney General's office on July 29, 2021.¹⁰⁶

194.201. The Texas legislature is constitutionally required to provide for ballot numbering in Texas.¹⁰⁷

195.202. The Texas legislature passed the consecutive ballot number statute 35 years ago¹⁰⁸ and provides integrity of the ballot by detecting counterfeited, missing or duplicate ballots.

¹⁰⁵ See Tex. Elec Code § 52.062, § 52.006, § 51.007, § 51.008, § 51.10, § 62.007 and § 62.009

¹⁰⁶ https://katychristianmagazine.com/wp-content/uploads/2021/12/Request-for-Opinion-on-Ballot-Numbering_RQ-0405-KP_status-Borgelt-letter.pdf See page 3 Last visited 06/22/22

¹⁰⁷ See Tex. Con. Article 6 Sec. 4

¹⁰⁸ See Tex. Elec Code § 52.062

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196.203. Tex. Elec Code § 52.062 requiring consecutive ballot numbering consecutively beginning with number "1", is referenced in (6) six other Election Code provisions thereby making it an established mandatory procedure.

a.q. § 51.006. PREPARING BALLOTS FOR DISTRIBUTION

"The authority responsible for distributing election supplies shall package and seal each set of ballots before their distribution and shall mark the package with the number of ballots enclosed and the range of the ballot serial numbers . . ."

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.47; Acts 1991, 72nd Leg., ch. 554, Sec. 18, eff. Sept. 1, 1991.

b.r. § 51.007. RECORD OF BALLOT DISTRIBUTION

- (a) As soon as practicable after the ballots are packaged for distribution, the authority responsible for distributing election supplies shall prepare a record of the number of ballots and the range of serial numbers on the ballots to be distributed to each presiding judge and the early voting clerk.
- (b) The authority shall preserve the record for the period for preserving the precinct election records.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, Sec. 2.48;

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Acts 1991, 72nd Leg., ch. 554, Sec. 19, eff. Sept. 1, 1991.

c.s. § 51.008. SUPPLEMENTING DISTRIBUTED BALLOTS

- (a) The authority responsible for distributing election supplies shall retain a reserve of ballots to supplement the distributed ballots and on election day may reallocate previously distributed ballots among the polling places.
- (b) The authority shall enter on the record of ballot distribution the number of ballots reserved and the number of ballots distributed from the reserve to each polling place. The range of serial numbers on the ballots shall be included in the record.
- (c) If distributed ballots are reallocated, the authority shall indicate the reallocation on the record of ballot distribution and shall issue a receipt to each presiding election judge showing the number of ballots and the range of serial numbers on the ballots taken from the judge's polling place for redistribution. Each presiding judge shall indicate on the ballot register any reallocation of ballots affecting that polling place.
- (d) The authority shall retain the undistributed reserve for the period for preserving the precinct election records.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

d.t. § 51.010. FAILURE TO DISTRIBUTE OR DELIVER SUPPLIES

- (a) A person commits an offense if the person is responsible for distributing election supplies for an election and intentionally fails to distribute any of the supplies by the deadline prescribed by Section 51.004(b).
- (b) A person commits an offense if the person is entrusted with the delivery of election supplies for use at polling places and intentionally fails to deliver any of the supplies within the time specified by the person who entrusted the delivery to the person.
- (c) An offense under this section is a Class C misdemeanor.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.
Amended by Acts 1997, 75th Leg., ch. 864, Sec. 46, eff. Sept. 1, 1997.

e.u. § 62.007. EXAMINING BALLOTS

- (a) An election officer shall unseal the ballot package, remove the ballots, and examine them to determine whether they are properly numbered and printed.
- (b) An unnumbered or otherwise defectively printed ballot shall be placed in ballot box no. 4.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

f.v. § 62.009. DISARRANGING BALLOTS FOR VOTERS' SELECTION

- (a) As needed for voting, an election officer shall disarrange a supply of the ballots so that they are in random numerical order.
- (b) The disarranged ballots shall be placed face down on a table in a manner preventing an election officer or other person from ascertaining the number of a ballot selected by a voter.
- (c) The provisional ballots shall be placed separately from the regular ballots.

Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Amended by Acts 1997, 75th Leg., ch. 1078, Sec. 6, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 1315, Sec. 22, eff. Jan. 1, 2004.

197.204. As noted above in Election Advisory 2019-23, the SoS notates that jurisdiction using ES&S and Hart InterCivic systems does not comply with § 52.062.¹⁰⁹

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

1. Each ExpressVote Activation card printer that is assigned to a specific polling place will be given a two to three digit alpha code. This code will be printed on each Ballot Card as it is generated for the voter.

¹⁰⁹ <https://www.sos.state.tx.us/elections/laws/advisory2019-23.shtml> Last visited 06/22/22

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2. In addition to the alpha code, each polling place will print a randomly generated serial number between 1 to 99,999 on the card along with the identifying information related to the election.

3. The system will generate a report showing which ballots (based on their serial number) were used at each location. This report must be retained with your precinct election records.

4. For tracking purposes, you will continue to have the presiding judge fill out the Ballot Register (PDF), and the original and duplicate forms will be returned in the applicable envelopes. The ballots shall be tracked, distributed, and retained just as you would with a traditional pre-printed full ballot in accordance with Sections 51.006, 51.007, 51.008 with the exception of notating the serial number of the ballot ranges.

198.205. Randomized ballot numbering procedures will cause jurisdictions to violate several election codes.¹¹⁰

199.206. In the same advisory¹¹¹ the SoS Office does not advise how jurisdictions will comply with the following Tex. Elec Codes:

a.w. § 51.010 – how will officials distribute serial numbered range records to polls.

b.x. § 62.007 - how officials at polls determine if ballots are properly numbered.

¹¹⁰ See Tex. Elec Code § 52.062, 51.006, 51.008

¹¹¹ <https://www.sos.state.tx.us/elections/laws/advisory2019-23.shtml> Last visited 06/22/22

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c.y. § 62.009 – how will election judges place numbered ballots face down.

200.207. Allowing voting machines to generate random text values on ballots will cause confusion and violate several Tex. Elec Code statues, which are punishable by law.¹¹²

201.208. The SoS is provided the authority to prescribe “operating procedures” related to voting systems. The Tex. Elec Code does not provide the SoS the authority to advise to ignore any sections of the Election Code as law and procedure are not the same.

202.209. There is no authority that grants the SoS defendants to *interpret* Tex. Elec Code for the following:

a.z. Advising to jurisdictions to ignore Tex. Elec Code § 52.062.

b.aa. The Legislative Branch did not provide the SoS the authority to ignore Tex. Election code nor to advise to jurisdiction to do the same in violation of Tex. Con. Art. 6 Sec. 4. in regards to numbering of the tickets/ballots.

c.bb. Hinders jurisdictions’ ability to “detect and punish fraud and preserve the purity of the ballot box as randomized ballot numbers prevent election judges from recording, validating, and tracking the official ballot serial number ranges they were in possession of, personally distributed, and retained at

¹¹² See Tex. Elec Code § 51.010(c), § 51.007(b), 51.008 (d) and 13 TAC § 7.125(a)(10) and Tex. Penal Code § 37.10(3)

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their polling locations, again violating Tex. Con. Art. 6, Sec 4.”¹¹³

203.210. The Election Code specifically assigns the SoS duties¹¹⁴ to ensure uniform compliance but does NOT provide the SoS with “discretion” to advise any jurisdictions to ignore or refuse to comply with the Election Code.¹¹⁵

204.211. The SoS Defendants and County Officials disregard for Tex. Elec Code in their guidance to jurisdictions violates the Separation of Powers clause of Art. 2 Sec. 1 of the Texas Constitution.

205.212. The Texas Constitution provides that only the Legislature can suspend laws – not the SoS, a member of the Executive Branch.

206.213. These actions are in contradiction to the Election Code and how it is to be interpreted and applied for uniformity across the state of Texas for all voting systems.¹¹⁶

207.214. By suspending laws and authorizing exceptions to the Election Code, the SoS Defendants have and continue to unlawfully modify election law.¹¹⁷

¹¹³ https://katychristianmagazine.com/wp-content/uploads/2021/12/Request-for-Opinion-on-Ballot-Numbering_RQ-0405-KP_status-Borgelt-letter.pdf Last visited 06/22/22

¹¹⁴ See Elec. Code § 31.003

¹¹⁵ See Elec. Code § 52.062, § 51.010(c), § 51.007(b), 51.008 (d)

¹¹⁶ See Tex. Elec Code § 122.032

¹¹⁷ See Tex. Elec Code § 276.019. UNLAWFUL ALTERING OF ELECTION PROCEDURES - A public official or election official may not create, alter, modify, waive, or suspend any election

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208.215. The Legislature provided a very clear and specific mandate: prepare and distribute detailed and comprehensive written directives and instructions that comply with the Election Code to state and local election authorities.¹¹⁸

209.216. The SoS Defendants' and County Officials' defiance of Election Code knowingly caused the Plaintiff(s), registered voters of Texas; to cast a vote

a.cc. under false pretense¹¹⁹

b.dd. prevent a cast of a legal vote in which Plaintiff(s) are eligible to vote.¹²⁰

c.ee. Cause the ballot not to reflect the intent of the Plaintiff(s)/voter¹²¹

d.ff. Defendants committed the offense while acting in the capacity of an elected official.¹²²

210.217. Randomized ballot numbering generated by Hart InterCivic Verity 2.4 results in multiple election law violations, the Texas Constitution, and the Texas Penal Code.

standard, practice, or procedure mandated by law or rule in a manner not expressly authorized by this code.

¹¹⁸ See Elec. Code § 31.003

¹¹⁹ See Tex. Elec Code 2763.013(1)

¹²⁰ See Tex. Elec Code 2763.013(2)

¹²¹ See Tex. Elec Code 2736.013(6)

¹²² See Tex. Elec Code 2763.013(b)(1)

HART INTERCIVIC ESLATE

211.218. During the 2018 midterms a number of “straight-ticket” voters complained that Hart’s eSlate system had switched their choices to the opposite party.¹²³

212.219. Others reported that the Hart eSlate machines appear to remove any selection for the U.S. Senate.¹²⁴

213.220. In 2008, the Texas Democratic Party sued then-Secretary of State Roger Williams over a similar straight ticket voting error affecting the same Hart eSlate machine.¹²⁵

214.221. April 30, 2009, the SoS’s office certified Hart eSlate Voting System Version 6.2.1. for use in Texas elections without the required EAC certification.¹²⁶

215.222. California Secretary of State Debra Bowen released results of the state’s review of the voting systems used in the state.¹²⁷

¹²³ <https://techcrunch.com/2018/10/26/texas-voting-machines-changing-votes-hart-eslate/> Last visited 06/21/22

¹²⁴ <https://www.houstonchronicle.com/news/politics/texas/article/Voting-machine-errors-changed-some-Texans-13339298.php>
Last visited 06/21/22

¹²⁵ <https://www.austinchronicle.com/news/2008-08-08/658341/>
Last visited 06/21/22

¹²⁶ <https://www.sos.state.tx.us/elections/forms/sysexam/hart621.cert.pdf> Last visited 06/23/22

¹²⁷ <https://www.wired.com/2007/07/ca-releases-res/> Last visited 06/23/22

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- a.gg. Red Team led by UC Davis computer scientist Mathew Bishop, tasked with examining security vulnerabilities found that Hart InterCivic could be compromised. Many of the attacks could be mitigated but *not all*. (*Emphasis added*)
- b.hh. Red Team also noted that they did not have enough time to fully examine the systems and were confident that further examination would reveal additional security vulnerabilities in the voting system.
- c.ii. Samples of the kinds of attacks the team was able to conduct on the Hart InterCivic System:

1. Election Management System. The testers did not test the windows systems in which the Hart elections Management software was installed because Hart does not configure the operating system or a provide a default configuration. Hart software security setting provide a restricted. Hart defined environment that the testers bypassed. Allowing them to run the Hart software in a standard Windows environment. They also found an undisclosed account on the Hart software that an attackers who penetrated the host operating system could exploit to gain unauthorized access to the Hart election management database.

2. eScan. The testers were able to overwrite the eScan firmware. The team also accessed menus that should have been locked with passwords. Other attacks allowed the team to alter vote totals: these attacks used ordinary objects. The team, in cooperation with the source review team, was able to issue administrative commands to the eScan.

3. JBC. The team developed a surreptitious device that caused the JBC to authorize access codes without poll worker intervention. The team verified that the mobile ballot box (MBB) card can be altered during an election. The team also found that post - election safeguards to prevent the altered data on a tampered MBB card from being counted can be easily bypassed.

4. eState. The testers were able to remotely capture the audio from a voting session on an eState with audio enabled, thereby providing an attack that violates voter privacy.

The team was also able to force an eState to produce multiple barcodes after printing "BALLOT ACCEPTED" on the VVPAT records. This could cause a county that used bar code readers to read the VVPAT to produce erroneous vote totals.

216.223. Brandon Hurley, an SoS examiner, notes on his examination report dated February 19, 2008, "... January 18, 2008, all of the appointed Examiners gather with Hart officials for remainder of the inspection and testing of the 6.2.1 System. . . . The examiner and the Hart officials held a lengthy discussion concerning past published issues and issues in other states that have come up with the Hart Inter-Civic 6.2.1 System and its predecessors. In particular, a previous "decertification" by the California Secretary of State was discussed . . . Hart officials represented that California immediately recertified the system after it was decertified."¹²⁸

¹²⁸ <https://www.sos.texas.gov/elections/forms/sysexam/brandonhurley.pdf#search=hart%206.2.1> Last visited 06/23/22

217.224. Hurley further noted: “. . . recommendation is conditioned on satisfactory answers being provided by Hart to the Secretary of State’s office in response to the list provided to Hart on February 6, 2006. The answers to these questions are due from Hart on February 22, 2008. If any of the questions or additional issues, then I would suspend this recommendation pending the resolution of such issues.”

218.225. Tom Watson an SoS examiner notates on his examination report the following:

219.226. “Tally, Rally, and SERVVO employ the “secure desktop” feature which is supposed to prevent access to the operating system by the operator during the election processing. A flaw in the “secure desktop” was discovered during the Tally examination. The standard Windows file dialog is used to select a file when exporting VR data . . . This is a significant flaw because it allows an operator to delete files or launch a program that could manipulate the data files.”

220.227. “. . . but there is a security issue. The file dialog flaw is significant and must be corrected.”

221.228. Stephen Berger prepared a report for the SoS on Hart InterCivic Voting System Version 6.2.1 in which he recommended that this system NOT be certified until Hart InterCivic addressed the issues he cited below.¹²⁹

a.jj. Conditions of Certification

- i. “All files installed with the system must be filed with the NIST NSRL. Hart Inter-

¹²⁹ <https://www.sos.texas.gov/elections/forms/syseexam/stephenberger621.pdf#search=hart%206.2.1> Last visited 06/23/22

Civic's response is egregiously deficient. To support incoming inspection of new systems a list of all files installed is need so that the new system can be verified as having only the system as certified. Pre and post election checks to confirm that software has not been changed or tampered with are recommended. To do this, local jurisdictions must have HASH codes of all static files. Further, to avoid the system having a single point vulnerability the non-static files, that change with use, should be evaluated by an entity other than the vendor. Why non-static files change should be understood by state and local authorities. Election officials should make their own independent determination that files that change with use and are not included in pre and post-election checks are appropriate and do not represent a security vulnerability."

ii. "In response to the question:

"Beyond the files installed with the Hart software, what other files in the operating system and elsewhere do the applications in the Hart 6.2.1 system use?"

Hart responded:

"Like most Windows based software, System 6.2.1's HVS applications make broad use of Windows resources, including hundreds of DLLs and other executable files. Hart would be happy to provide information on the identification of each of these individual files and there respective purpose and char-

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acteristics (e.g. why does its HASH code value change from one day to the next or one install to the next), but the information was not required during the original ITA and NASED certification testing, nor during subsequent”

“In its response Hart illustrates the importance of this point. The Hart software makes “broad use of Windows resources, including hundreds of DLLs and other executable files”. Each of those files represents a potential vulnerability, an opportunity to introduce malicious code into the system. For that very reason it is essential that the information be available to verify these files both in the certification process and pre and post election. Past deficiencies are no reason to propagate a vulnerability into the future. Being able to confirm that the software certified at the national and state level is identical to that installed and used in elections is one of the most significant improvements to total election system security that can be made. Implementing such checks requires not modification or recertification of a voting system, unlike many changes. The tools to verify HASH codes are readily available and do not require extensive training to use. It is hard to imagine why a change that is this beneficial is being resisted.”

iii. In its response on the HASH code issue Hart InterCivic states:

“These criteria have been imposed on Hart HASH code submissions by arrangements

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agreed between Hart and NIST in the absence of other specific authoritative requirements for vendor reference files.”

“This statement is inaccurate and misleading. This examiner has met personally and had multiple telephone conversations with NIST NSRL staff. NIST NSRL will HASH and post any files a vendor gives them to post.”

iv. “Although the Hart InterCivic system is NASED certified it fails to meet some requirements for NASED certification dealing with operating system configuration. A secure configuration of the operating systems provided must be provided with instructions on how to check the configuration. To assure that the system is adequately secure Hart must specify an operating system configuration, with adequate safeguards to assure that the Hart applications will only run in a secure configuration of the operating system. The configuration should be consistent with industry practice as represented in the NIST security configuration checklist for its operating system, Windows 2000 Professional?”

a. In its response to questions about the Hart InterCivic recommended configuration the company stated:

“Setup and configuration of HVS application computers is accomplished only by qualified Hart technical personnel and includes all Windows updates as of the date of the install.”