

No. D-1-GN-17-003451

LEAGUE OF WOMEN VOTERS OF TEXAS,  
TEXAS STATE CONFERENCE OF THE  
NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE  
(NAACP) and RUTHANN GEER,

*Plaintiffs,*

vs.

ROLANDO PABLOS, Secretary of State For the  
State of Texas, and KEITH INGRAM, Director,  
Texas Elections Division of the Secretary of State,

*Defendants.*

§ IN THE DISTRICT COURT  
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§ TRAVIS COUNTY, TEXAS  
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§ 98<sup>th</sup> JUDICIAL DISTRICT

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR  
TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

This lawsuit, and by extension Plaintiffs’ application, seeks to prevent the Texas Secretary of State and Texas Elections Division from disclosing information from the State’s computerized voter registration files in response to the unprecedented request for voter data from the Presidential Advisory Commission on Election Integrity (the “PACEI” or “Commission”). Such disclosure would violate State law and would irreparably harm millions of registered Texas voters, including Plaintiffs, and should be enjoined for at least two reasons:

*First,* Defendants’ provision of the data requested by the Commission would undermine, and run afoul of, the State’s carefully-crafted regulation of voter data. Texas law strictly proscribes how individuals or entities who request voter data may use that data, even requiring that individuals requesting voter data sign an affidavit agreeing that they will not use the data for prohibited purposes. However, the Commission has publicly stated its intention to turn over voter data, and even if it does not do so voluntarily, the Commission remains subject to numerous federal

disclosure requirements, which may compel such production. Thus, even if the Commission itself could agree not to use the voter data for purposes prohibited by Texas law, the Commission cannot guarantee that the data will be adequately protected once it receives it, and the Defendants cannot turn the data over to the Commission as a result.

*Second*, the Defendants have not demonstrated that the Commission has appreciable data security protocols. Defendants cannot turn a blind eye to the substantial threat that the Commission will be the target of hacking attempts by turning over sensitive data on Texas voters. To give force to state law requirements in this unique circumstance, Texas must seek additional assurances from the Commission before the data is turned over.

*Third*, at the very least, the Defendants cannot provide birthdates, which enjoy special privacy protection under Texas law.

Defendants' release of this data without sufficient safeguards will cause irreparable harm to Plaintiffs. Therefore, Plaintiffs respectfully request that this Court issue a temporary restraining order enjoining Defendants from providing voter data to the Commission to allow this Court and the parties appropriate time to fashion a plan for data release that will protect the privacy rights established under Texas law.

## **BACKGROUND**

In the aftermath of his unsubstantiated claim that “millions of people . . . voted illegally” in the 2016 presidential election<sup>1</sup>, President Donald Trump signed Executive Order No. 13,799, which established the Commission. On June 28, 2017, the newly instituted Commission sent letters to all 50 states (and the District of Columbia), including Texas, seeking a wide range of information pertaining to each state's voters, including name, address, demographic information,

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<sup>1</sup> Donald Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 12:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664?lang=en>

partial social security numbers, party affiliations, criminal felony convictions, registration and voting histories, and more. In doing so, the Commission unambiguously stated that any information sent to it would become public.

Weeks later, the Commission sent a second request on July 26, 2017, which this time stated that the Commission purported to protect “any personally identifiable information,” and did not intend to publicize the data it received. The Commission’s letter did not address—and the Commission has not since addressed—its requirements under the record-keeping and disclosure requirements of the Federal Advisory Committee Act (“FACA”), 5 U.S.C. App. 2, *et seq.*, which, as relevant here, requires that “the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by” the Commission “shall be available for public inspection” 5 U.S.C. App. 2 § 10(b).

The voter data sought by the Commission is not widely available in Texas, but instead may be released only under certain circumstances and conditions imposed by Texas’s voting laws. Tex. Elec. Code § 18.066. Individuals and entities seeking large-scale voter information are only permitted to access certain data contained in Texas’s computerized voter registration files and only upon certain conditions, including that they pay a fee and execute a notarized affidavit with the Elections Division of the Secretary of State’s Office (“Elections Division”) stating that they will not use the data in certain enumerated, proscribed ways. *See* Tex. Elec. Code § 18.066. In particular, the affidavit from the requesting party must state “that the person will not use the information obtained in connection with advertising or promoting commercial products or services.” Tex. Elec. Code § 18.066(d).

On June 30, 2017, Defendant Secretary of State Rolando Pablos (the “Secretary of State” or “Secretary”) issued a statement, indicating that his office would provide the commission with

certain voter information, including the full names of all registrants (including middle names or initials), addresses of most registrants, dates of birth, voting history from 2006 onward, active/inactive status and whether a voter's registration has been canceled, voting method (absentee, provisional, early), the party primaries that the voter participated in, and the registration effective date.

Plaintiffs promptly filed a Petition for Declaratory Relief on July 20, 2017. On August 18, 2017, Defendants answered, providing a general denial of Plaintiffs' claims.

On September 7, 2017, the Commission provided Defendants with a request for voter data from the entirety of State, including "active," "suspense," and "cancelled" voters. On information and belief, Plaintiffs understand that, absent relief from the Court, Defendants intend to respond to the Commission's request and provide Texas voters' data by September 22, 2017.

#### ARGUMENT

To obtain a temporary injunction, an applicant must establish three elements: "(1) a cause of action against the defendant; (2) a probable right to the relief sought and (3) a probable, imminent and irreparable injury in the interim.", *Texas Health and Human Services Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 629 (Tex. App. 2013), citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). *See, e.g., Comed Med. Sys., Co. v. AADCO Imaging, LLC*, 2015 WL 869455, No 03-14-00593-CV, at \*3 (Tex. App. 2015); *Seghers v. Kormanik*, 2013 WL 3336845, No 03-13-00104, at \*3 (Tex. App. 2013). Because Plaintiffs here can prove each of these elements, this Court should issue a temporary injunction prohibiting Defendants from releasing sensitive voter information to the Commission in contravention of Texas law.

#### **I. PLAINTIFFS HAVE A CAUSE OF ACTION AGAINST DEFENDANTS.**

Plaintiffs have pled two independent causes of action against Defendants based on Defendants' imminent violation of Texas law:

1. Plaintiffs have alleged that Defendants intend to release sensitive voter information to the Commission in violation of the Texas Elections Code. The Elections Code expressly safeguards against the use of voter information for commercial purposes. *See* Tex. Elec. Code §§ 18.066-67.
2. Plaintiffs have alleged that Defendants intend to release information regarding voters' birth dates to the Commission in violation of the Texas Government Code.

Plaintiffs have standing to bring these claims:

Organizational Plaintiffs. The League of Women Voters of Texas and the Texas State Conference of the National Association for the Advancement of Colored People have standing to bring these claims on behalf of their members and themselves. Both organizations have members who will be directly harmed by the release of Voter List information to the Commission in the absence of credible safeguards against the public disclosure of this information. Compl. ¶¶ 23, 27. The Voter List contains personal information regarding Texas voters' identities, which may be used to solicit, harass, or otherwise infringe upon the privacy of Texas voters, including these organizations' members.

In addition, the release of this information will make it substantially more difficult for these organizations to engage in voter-registration and get-out-the-vote activities, which they regularly perform in support of their civic-engagement mission. Voters and prospective voters will be more reluctant to participate in elections or register to vote in the future if they understand that Defendants are willing to provide information on the Voter List to entities like the Commission that may be required to make such information public. Thus, the public disclosure of such personal information will chill these organizations' members' as well as other voters' and prospective voters' exercise of First Amendment rights, including the right to vote and freedom of association.

Individual Plaintiff. Plaintiff Ruthann Greer also has standing to bring these claims. Ms. Geer is a resident of Burleson, Texas, a registered voter, and a regular participant in Texas elections. Defendants' intended release of her personal information from the Voter List to the Commission without adequate safeguards will infringe on Ms. Geer's privacy rights. Furthermore, the public disclosure of such personal information could expose Ms. Geer to intimidation or harassment for merely exercising her right to vote, and may chill her exercise of First Amendment rights including the right to vote and freedom of association.

## II. PLAINTIFFS HAVE A PROBABLE RIGHT TO THE RELIEF SOUGHT

Plaintiffs have a probable right to relief on these causes of action. In order to establish a probable right to relief, an applicant "must plead a cause of action and present some evidence that tends to sustain it, meaning that [t]he evidence must be sufficient to raise a bona fide issue as to the applicant's right to ultimate relief." *Regal Entm't Grp. v. iPic-Gold Class Entm't, LLC*, 507 S.W.3d 337, 345 (Tex. App. 2016) (internal quotation marks and citation omitted) (alteration in original). An applicant need *not* establish that "it will prevail at trial." *Id.*

Voter Birthdate Information. Plaintiffs have a probability of obtaining relief on their claim that Defendants cannot provide voter birth dates to the Commission. Texas courts have recognized a "nontrivial privacy interest" in birth dates. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App. May 22, 2015) (concluding that "public citizens have a privacy interest in their birth dates"), *review denied* (Sept. 4, 2015); *Tex. Comptroller of Pub. Accounts v. Att'y Gen. of Tex.*, 354 S.W.3d 336, 346-48 (Tex. 2010) (holding that disclosure of state employee birth dates constituted a "clearly unwarranted invasion of personal privacy"); *see also* Tex. Att'y Gen. Op. OR2017-06026 (2017) ("Based on *Texas Comptroller*, the court of appeals [in *City of Dallas*] concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy

...”); see also *Tex. State Employees Union v. Tex. Dep’t of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (acknowledging that “the Texas Constitution protects personal privacy from unreasonable intrusion” and that “[t]his right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means”). In acknowledging the privacy interest held by a citizen with regard to his or her birthdate, courts have recognized the derivative harm arising from the release of information, including the threat that the disclosure of birth dates, along with other information, could be used for identity theft. Specifically, the Texas Supreme Court acknowledged in *Texas Comptroller* that the disclosure of “[birth] dates, when combined with name and place of birth, can reveal social security numbers.” 354 S.W.3d at 345.

Notwithstanding these warnings, Defendants have represented that they intend to provide voter birthdates as part of the response to the Commission’s request. But Texas law prohibits such disclosure, and Defendants have not identified any countervailing law or compelling interest that requires such imposition on the privacy interests of Texas citizens. As a result, Plaintiffs have a high probability of success on their birthdate claim.

Non-Birthdate Voter Information. Plaintiffs also have a high probability of succeeding on their claim regarding non-birthdate voter information. The Commission’s unique and unprecedented request, as well as its role as a federal commission subject to disclosure requirements, make it impossible for the Commission to plausibly guarantee compliance with Texas’s prohibitions and protections regarding the use of voter data. See *Tex. Elec. Code* §§ 8.066-67.

As set forth above, Texas law provides that individuals or entities may obtain voter files only after executing a notarized affidavit with the Elections Division stating that they “will not use the information obtained in connection with advertising or promoting commercial products or services.” Tex. Elec. Code § 18.066(d). While a representative of the Commission has executed the Secretary of State’s form, the very nature of the Commission—an advisory committee of the federal government covered under FACA—calls into serious question the Commission’s ability to prevent the voter information from being disclosed to the public and subsequently used for illicit purposes. Thus, even to the extent that the Commission has—contrary to the position it took in its initial letter to the States—announced that it does not intend to publicize personally identifying voter information, there is still a serious risk that the Commission may be compelled to do so under federal law.

The public dissemination of voter data by the Commission, without regard for the requirements of Texas law, will undermine Texas’s use restrictions and harm Texas voters. Once the Voter List is made public by the Commission, neither the Commission nor the Defendants can effectively monitor or police the use of voter information. It is therefore impossible for the Commission (or its representative) to guarantee that Texas’s use restrictions will be honored once voter information is publicly dispersed. In particular, neither the Defendants nor the Commission can guarantee that individuals or entities who seek or receive Texas’s voter data from the Commission will be subject to the use limitations imposed by Texas law. Thus, by turning the Voter List or its information over to the Commission, the Defendants would be sanctioning the disclosure of information regarding millions of Texans to private firms, who could use such data without limitation and to the detriment of the privacy and associational rights of Texas voters, including Plaintiffs and their members.



The Defendants cannot escape their obligations to Texas voters', including Plaintiffs, by asserting that it need only concern itself with what the Commission intends to do, as the requesting party. That is, even if the Commission could swear that it will not itself use the voter data to advertise or promote commercial products or services, if the Defendants know or have reason to know that provision of the data to the Commission may allow *others* to use the voter data for commercial purposes, the Defendants need not and cannot provide voter data consistent with Texas law. Any other interpretation would make a mockery of the State's carefully circumscribed rules regarding voter data. *See Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 31 S.W.3d 631, 640 (Tex. App. 2000) ("Interpretations [of statutes] that would produce absurd results are to be avoided.").

Finally, on information and belief, Defendants have neither sought nor received any assurances that the Commission will undertake adequate security measures to protect the Voter List from unintended release. Given the unique nature of the Commission and the substantial threat that its database (which proposes to compile voter data information from dozens of states) will be at risk of cyber attacks, Defendants cannot turn a blind eye on grounds that it is treating the Commission like any other requester. *See* Rajesh De, Joshua Geltzer, and Matthew Olson, *Trump's voter fraud commission must protect data from hackers*, The Hill, Aug. 24, 2017, <http://thehill.com/blog/pundits-blog/the-administration/347860-trumps-voter-fraud-commission-must-protect-sensitive> (opinion piece by national security experts observing that the "ingestion and aggregation of this massive amount of massively sensitive data poses its own threat," and urging the implementation of specific cybersecurity practices); Michael Chertoff, *Trump's voter data request poses an unnoticed danger*, Wash. Post, July 5, 2017, <https://www.washingtonpost.com/opinions/trumps-voter-data-request-poses-an-unnoticed->

[danger--to-national-security/2017/07/05/470efce0-60c9-11e7-8adc-](https://www.washingtonpost.com/news/energy-environment/wp/2017/07/05/470efce0-60c9-11e7-8adc-)

[fea80e32bf47\\_story.html?utm\\_term=.25b166cf9f6b](https://www.washingtonpost.com/news/energy-environment/wp/2017/07/05/470efce0-60c9-11e7-8adc-fea80e32bf47_story.html?utm_term=.25b166cf9f6b) (opinion piece by former Homeland Security Secretary noting the “security risk of assembling so much... data in one place” and urging the implementation of measures to protect that data). Such threat is plainly sufficient to raise a bona fide issue as to Plaintiffs ultimate right to relief.

### **III. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY WITHOUT INJUNCTIVE RELIEF**

Finally, Plaintiffs will suffer irreparable injury if this Court does not grant injunctive relief. “An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by a certain pecuniary standard.” *Butnaru*, 84 S.W.3d at 204. Here, damages are both insufficient to remediate the injury threatened by Defendants’ imminent violation of Texas law and they are also impossible to measure by any monetary standard.

*First*, the direct injury caused by Defendants’ disclosure of the Voter List is irreparable. Defendants’ unlawful disclosure of voter information will chill Plaintiffs’ First Amendment rights, violate their privacy, and impede their efforts to encourage voting. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547 (1976) (plurality opinion); *see also Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1965) (holding that “chilling effect upon the exercise of First Amendment rights” supports finding of irreparable injury); *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 365 (Tex. Civ. App. 1979) (observing that “any significant denigration of First Amendment rights inflicts irreparable injury”). “Similarly the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief.” *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d

328, 338 (5th Cir. 1981);<sup>2</sup> *see also Dunbar v. Google, Inc.*, No. 5:10-CV-194-DF, 2011 WL 12906350, at \*4 (E.D. Tex. May 25, 2011) (stating that “by its very nature, the exposure caused by a privacy invasion cannot be reversed with monetary damages”); *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 WL 1940159, at \*6 (Tex. App. Aug. 11, 2005) (upholding finding of irreparable injury in lawsuit for invasion of privacy, where defendant threatened to continue distributing images of plaintiff absent court order). Furthermore, as a general matter, “[s]overeign immunity protects the State, its agencies, and its officials from lawsuits for damages.” *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006). And “[f]or purposes of injunctive relief, no adequate remedy at law exists...if the defendant is incapable of responding in damages.” *Haq v. Am.'s Favorite Chicken Co.*, 921 S.W.2d 728, 730 (Tex. App. 1996), writ dismissed w.o.j. (July 8, 1996). *Second*, the derivative injury caused by Defendants’ disclosure is impossible to measure. As stated above, courts have recognized the derivative harm arising from the release of information, including the threat that the disclosure of birth dates, along with other information, could be used for identity theft. Specifically, the Texas Supreme Court acknowledged in *Texas Comptroller* that the disclosure of “[birth] dates, when combined with name and place of birth, can reveal social security numbers.” 354 S.W.3d at 345. Measuring the pecuniary harm of the disclosure itself, as opposed to the subsequent theft, will likely be impossible. Consequently, damages will not properly remediate Plaintiffs’ injury. *See Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 578 (Tex. App. 2000) (holding that, for purposes of the irreparable harm standard, “[a]n award of damages may be deficient if the nature of the Doctors’ losses makes damages difficult to calculate”).

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<sup>2</sup> *Deerfield* involved the federal constitutional right to privacy, but the logic of the Court’s assertion that a privacy violation “cannot be undone by monetary relief” applies equally to Plaintiffs’ state law privacy claims.

*Finally*, the injury caused by Defendants' disclosure of the Voter List to the Commission is irreversible. FACA requires that the Commission make public any voter data "made available to" it. 5 U.S.C. App. 2 § 10(b). Once the Commission makes this data public, it cannot make it private again, nor can Defendants or the Commission guarantee that individuals or entities who seek or receive Texas's voter data from the Commission will be subject to the use limitations imposed by Texas law.

#### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for a temporary restraining order and temporary injunction.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this instrument was delivered to the following party on this 21<sup>st</sup> day of September, 2017, in accordance with the Texas Rules of Civil Procedure:

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