

CAUSE 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, §

IN THE DISTRICT COURT OF §
§
§
§
§
TRAVIS COUNTY, TEXAS §

v. §

ROLANDO PABLOS, Secretary of State §
for the State of Texas, and KEITH §
INGRAM, Director, Texas Elections §
Division of the Secretary of State, §
Defendants. §

98TH JUDICIAL DISTRICT §

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ REQUEST FOR
TEMPORARY RESTRAINING ORDER**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants, Rolando Pablos, Secretary of State for the State of Texas, and Keith Ingram, Director, Texas Elections Division of the Secretary of State (collectively, “Defendants”) ask the court to deny Plaintiffs’ request for a temporary restraining order (“TRO”), as Plaintiffs have not and cannot demonstrate entitlement to the relief they request.

INTRODUCTION

Plaintiffs seek a TRO¹ to prevent the Secretary of State (“SOS”) from producing public voter information in response to a request from the Presidential Advisory Committee of Public Election Integrity (the “Commission”). Plaintiffs contend that SOS’s production would violate section

¹ Plaintiff’s motion seeks a TRO and/or a temporary injunction. Since only the TRO has been set for hearing, Defendants only respond to the portion of the motion seeking a TRO. Defendants reserve the right to respond to Plaintiffs’ application for a temporary injunction should it be set for hearing.

18.066 of the Election Code and section 552.101 of the Public Information Act. As shown in Defendants' Plea to the Jurisdiction, the Court lacks jurisdiction of the lawsuit because Plaintiffs' claims are barred by sovereign immunity. Specifically, to bring a claim of any waiver of or exception to sovereign immunity, Plaintiffs have to plead and prove a violation of an actual statutory provision. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636 (Tex. 2012) ("the Legislature has waived immunity only for those suits where the plaintiff actually alleges a violation of the TCHRA by pleading facts that state a claim thereunder"); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) ("To fall within this *ultra vires* exception, a suit...must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act."). Plaintiffs have not and cannot meet that burden here as the SOS has undisputedly complied with section 18.066's requirements. As a result, the Court should deny Plaintiffs' request for a TRO because they have not shown their entitlement to the extraordinary remedy of emergency injunctive relief.

ARGUMENT

Plaintiffs are not entitled to a TRO because they have not brought a cause of action within the Court's jurisdiction.² The Court lacks jurisdiction over their claims for three main reasons.

First, Plaintiffs' suit fails to invoke the Court's jurisdiction because they have not identified a waiver of immunity within the Court's jurisdiction—as to any claim regarding birthdate information or the Public Information Act. It is well-established that State Defendants—like the SOS and its employees in their official capacities—are protected by sovereign immunity from suit

² Defendants' arguments here overlap with their arguments presented in Defendants' Plea to the Jurisdiction. Thus to avoid undue repetition, Defendants incorporate by reference the arguments and evidence contained in Defendants' Plea to the Jurisdiction.

and liability. *See General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). Therefore, to proceed in a suit against Defendants, Plaintiffs must identify a cause of action in which the Legislature has expressly and unambiguously waived the State's immunity. *Id.* Here, it is undisputed that the Legislature *has not* waived the State's immunity to allow plaintiffs to bring this suit under the Public Information Act. *See Beacon Nat'l Ins. Co. v. Monterey*, 86 S.W.3d 260, 266 (Tex. App.—Austin 2002, no pet.) (UDJA does not establish subject matter jurisdiction); TEX. GOV'T CODE § 552.3215 (waiving the State's sovereign immunity only for civil actions brought by the Attorney General or Travis County District Attorney).

Second, Plaintiffs cannot maintain a claim under the *limited* waiver of immunity in section 273.081 of the Election Code or through an ultra vires claim because it is undisputed that Defendants complied with section 18.066's statutory provisions. To proceed on an ultra vires claim, Plaintiff must plead and prove that Defendants have acted outside of their legal authority. Here, since section 18.066 is the more specific and later-enacted statute, it controls the production over any the Public Information Act. As shown in the Plea to the Jurisdiction, it is undisputed that Defendants have complied with all of section 18.066's requirements—including receiving an affidavit and payment of fees. *See* Defendants' Plea to the Jurisdiction at Ex. A-2. Plaintiffs remaining allegations regarding birthdate information and "other assurances" cannot form the basis of an ultra vires claim because they simply do not constitute actions required by the relevant law. *See* TEX. ELEC. CODE § 18.066. Likewise, any claim premised on birthdate information or "other assurance" does not fall within the limited waiver of immunity in section 273.081 because it does not constitute an Election Code violation. *Id.*

Third, to the extent Plaintiffs allege a violation of the Public Information Act, their claims also are jurisdictionally barred by the redundant remedies doctrine. "Under the redundant remedies

doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels.” *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 79 (Tex. 2015). Here, section 552.3215 of the Public Information Act provides a statutory scheme and remedies for Complainants to obtain declaratory and injunctive relief for alleged violations of the Act. Through this section, the Legislature provided for a limited waiver of the State’s immunity from suit to allow the Travis County District Attorney or the Texas Attorney General to sue State agencies on behalf of a Complainant in a civil action. TEX. GOV’T CODE § 552.3215. It provides for the recovery of attorney’s fees and costs for actions brought under section 552.3215. TEX. GOV’T CODE § 552.323. In total, this is essentially the same relief that Plaintiffs request through their UDJA claims in this suit. Therefore, Plaintiffs “already ha[ve] a statutory channel by which to obtain the relief that [they] seek[.]” and its redundant ultra vires brought under the UDJA are not justiciable.” *McLane Co., Inc. v. Tex. Alcoholic Beverage Comm’n*, 514 S.W.3d 871, 877 (Tex. App.—Austin 2017, pet. denied).

For the above-stated reasons, Plaintiffs are not entitled to the relief they seek.

CONCLUSION AND PRAYER

Defendants, Rolando Pablos, Secretary of State for the State of Texas, and Keith Ingram, Director, Texas Elections Division of the Secretary of State ask the court to deny Plaintiffs’ request in its entirety, and dismiss Plaintiffs’ lawsuit with prejudice.

Date: September 29, 2017

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR

Deputy First Assistant Attorney General

JAMES E. DAVIS

Deputy Attorney General for Civil Litigation

ANGELA V. COLMENERO

Chief, General Litigation Division

/s/ Esteban S.M. Soto

ESTEBAN S.M. SOTO

State Bar No. 24052284

Assistant Attorney General

Office of the Attorney General

General Litigation Division

P.O. Box 12548, Capitol Station

Austin, Texas 78711-2548

Phone: (512) 463-2120

Fax: (512) 320-0667

esteban.soto@oag.texas.gov

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing documents has been served on this the 29th day of September, 2017 on the following:

Charles W. McGarry
Texas Bar No. 13610650
701 Commerce Street, Suite 400
Dallas, Texas 75202
(214) 748-0800
(214) 748-9449 fax
cmcgarry@ix.netcom.com

Myrna Pérez, Esq.
Douglas Keith, Esq.
Brennan Center for Justice
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310 phone
(212) 463-7308 fax
myrna.perez@nyu.edu
wendy.weiser@nyu.edu
douglas.keith@nyu.edu
(Pending admission pro hac vice)

Daniel T. Donovan, Esq.
Susan M. Davies, Esq.
Michael A. Glick, Esq.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000 phone
(202) 879-5200 fax
daniel.donovan@kirkland.com
susan.davies@kirkland.com
michael.glick@kirkland.com
(Pending admission pro hac vice)
ATTORNEYS FOR PLAINTIFFS

/s/ Esteban Soto
ESTEBAN SOTO