

CAUSE NO. D-1-GN-12-002923

MICHAEL L. MOORE, JAMES § IN THE DISTRICT COURT
E. YOUNG, ROBERT E. BROWN, JR., §
and ANDREW DYLAN WOOD, §
Plaintiffs, §
v. § OF TRAVIS COUNTY, TEXAS
TINA MORTON, TRAVIS COUNTY §
VOTING REGISTRAR, AND HOPE §
ANDRADE, SECRETARY OF STATE §
OF TEXAS, in their official capacities. §
Defendants § 261ST JUDICIAL DISTRICT

**DEFENDANT ANDRADE’S NOTICE OF WITHDRAWAL,
PLEA TO THE JURISDICTION, AND MOTION TO DISSOLVE THE TEMPORARY
RESTRAINING ORDER**

Defendant Hope Andrade, Secretary of State of Texas, in her official capacity, files this Notice of Withdrawal of her Notice of Filing of a Notice of Removal, Plea to the Jurisdiction, and Motion to Dissolve Temporary Restraining Order, and would respectfully show as follows:

BACKGROUND

1. This matter concerns the integrity of voter registration in Texas. By their suit, Plaintiffs seek to enjoin Defendants from enforcing state statutes that ensure deceased individuals are removed from county voter registration lists. *See, e.g., Original Petition ¶ 22* (seeking to enjoin enforcement of TEX. ELEC. CODE §§ 16.001; 18.068).
2. To maintain the integrity of voter registration, Texas has long had in place statutes that mandate a voter’s registration should be cancelled by a county registrar when it is determined that a voter is deceased. *See, e.g., TEX. ELEC. CODE § 16.001*. Among other things, a registered voter may ultimately be determined to be deceased when the

Secretary of State receives—pursuant to statutory mandate—notice of a death certificate or probated will/estate, or receives data relating to deceased residents of the state that is maintained by either the Bureau of Vital Statistics or the United States Social Security Administration. *See id.*

3. The Secretary of State has a process whereby it works with county registrars to determine if a voter registration should be cancelled because of data relating to deceased residents it receives pursuant to § 16.001(d). First, if a record in the data relating to deceased residents matches the full Social Security number, date of birth, and last name of a registered voter, that is considered a “strong” match and will result in the Secretary of State notifying the appropriate county registrar that the voter’s registration should be cancelled pursuant to TEX. ELEC. CODE § 16.031(b)(4). These “strong” match cancellations are not at issue in this lawsuit.
4. However, if a record in the data relating to deceased residents matches either the last four digits of a registered voter’s Social Security number and their birth date along with one other matching name component, or the full Social Security number and date of birth, or their first name, last name and date of birth, that is considered a “weak” match. It is these “weak” matches that Plaintiffs have put at issue in this suit.
5. A “weak” match may trigger the detailed and reasonable notice procedure set forth in TEX. ELEC. CODE § 16.033. Section 16.033 applies to situations in which a registrar has any *reason to believe* a voter may no longer be eligible to vote. *Id.*
6. Section 16.033 requires that a county registrar use “lawful means to investigate whether a registered voter is currently eligible for registration in the county.” *Id.* § 16.033(a). If the registrar has reason to believe a voter is not eligible—such as when an aforementioned

“weak” match is returned that indicates a registered voter may be deceased—the registrar is authorized by Texas law to send a notice to that identified voter that informs the voter that his or her registration status is under investigation. *Id.* § 16.033(b).

7. County voter registrars may also use locally available information to make an initial attempt to determine if a “weak” match is alive or deceased. When no determination can be made, section 16.033 mandates further that the notices sent to voters include a request that the voter provide information to the registrar to verify their eligibility, and include a “warning” to the voter that his or her registration is subject to cancellation for failing to respond to the notice. *Id.* § 16.033(c). Section 16.033 further provides, among other things, that the registrar cancel the voter’s registration if “no reply is received from the voter on or before the 30th day after the date the notice is mailed to the voter.” *Id.* § 16.033(d).
8. It is the use of the voter notification process set forth in TEX. ELEC. CODE § 16.033 for “weak” matches that is at issue in this suit. *See generally Original Petition.* More specifically, Plaintiffs challenge county registrars’ recent use of this authorized voter notification process with respect to “weak” matches identified when the Secretary of State recently cross-referenced its Texas voter registration records with data relating to deceased residents of the state maintained and provided by United States Social Security Administration, as the Secretary of State is required to do pursuant to TEX. ELEC. CODE § 16.001(d).
9. Although Plaintiffs’ petition is far from clear, it appears Plaintiffs seek by this suit to wholly bar the Secretary of State, as well as all county registrars, from using the reasonable and lawful notice procedures clearly set forth in TEX. ELEC. CODE § 16.033

when it is discovered that a voter registered in Texas has the same birth date and Social Security number (in part or in whole) as a deceased person.

10. Indeed, if Plaintiffs are granted the unjustified injunctive relief they seek, the Secretary of State, as well as all county registrars, would be prohibited from considering the “weak” matches discussed above to simply be a “reason to believe” a registered voter may be deceased, thereby triggering the notice procedures in TEX. ELEC. CODE § 16.033.

11. There is simply no legal basis for awarding the relief Plaintiffs seek, and issuance of the requested injunction would serve only to undermine the state’s efforts to ensure the integrity of the voter rolls in Texas.

ARGUMENT & AUTHORITIES

A. Plea to the Jurisdiction Standard of Review

12. A plea to the jurisdiction contests the trial court’s authority to determine the subject matter of the cause of action. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). Whether a trial court has subject matter jurisdiction is a question of law. *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007). The plaintiff bears the burden of demonstrating that its claims made fall within the court’s jurisdiction. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). When the pleadings affirmatively demonstrate an incurable jurisdictional defect, however, a plea to the jurisdiction must be granted. *Id.*

B. Plaintiffs cannot maintain a claim under Section 5 of the Voting Rights Act in this Court, because exclusive jurisdiction lies with the federal court.

13. Plaintiffs invoke Section 5 of the Voting Rights Act (VRA), 42 U.S.C. § 1973c, in an effort to thwart the enforcement of a voter registration statute that was duly pre-cleared by the Department of Justice. *Original Petition* ¶ 7. However, the federal court has

exclusive jurisdiction over such claims. *Ortiz v. Thompson*, 604 S.W.2d 443, 446 (Tex. Civ. App.—Waco 1980, no writ); *see also Bond v. White*, 508 F.2d 1397, 1400 (5th Cir. 1975) (private suits under Section 5 “*must* be heard on the merits by a three-judge [federal] district court,” as set forth in 42 U.S.C. § 1973c) (emphasis added).

14. Because exclusive jurisdiction to award affirmative relief under Section 5 of the VRA lies with a three-judge panel in the federal court, this Court lacks subject-matter jurisdiction over Plaintiffs’ Section 5 claim. *See id.* (with respect to plaintiff’s claim brought under 42 U.S.C. § 1973c, holding state trial court “had no jurisdiction to enforce the Federal Voting Rights Act”). Accordingly, Plaintiffs’ Section 5 claim should be dismissed immediately and can form no basis for any relief in this suit.

15. Because Plaintiffs’ Section 5 claim is properly resolved simply by immediate dismissal of the claim by this Court, Defendant Andrade hereby withdraws her previously filed Notice of Filing of Notice of Removal. Defendant Andrade did not file a Notice of Removal in the federal court.

C. Plaintiffs fail to plead a valid Administrative Procedures Act (APA) claim.

16. Plaintiffs also invoke Texas Government Code § 2001.038, part of the Texas APA, as a basis for their suit. However, that provision cannot furnish jurisdiction over this matter. The statute Plaintiffs invoke allows for the challenge to the “validity” or “applicability” of a “rule” if “it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.” TEX. GOV’T CODE § 2001.038(a). Here, Plaintiffs simply do not complain about the “validity” or “applicability” of a “rule.”

17. Rather, Plaintiffs' alleged injury arises from county registrars' use of the reasonable notice procedures clearly set forth in a valid, duly enacted Texas statute, TEX. ELEC. CODE § 16.033. Indeed, the entirety of Plaintiffs' alleged injury arises from notices lawfully sent out by county registrars pursuant to § 16.033. *See, e.g., Original Petition ¶ 20.* A statute such as § 16.033 is clearly not a "rule" within the meaning of the APA; therefore, Plaintiffs have failed to plead a valid rule challenge under § 2001.038 and their APA claim should be dismissed. *See, e.g., Combs v. City of Webster*, 311 S.W.3d 85, 101 (Tex. App.—Austin 2009, pet. denied) ("To attack the validity or applicability of a rule, there must first be a rule.").
18. In any event, Plaintiffs' APA claim must be dismissed against the named Defendants because a § 2001.038 claim must be brought against an agency, not an agency official. *See* TEX. GOV'T CODE § 2001.038(d).

D. Plaintiffs' suit must be dismissed because they lack standing to maintain any claims against Defendants.

19. It is well settled that standing is a necessary component of subject-matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex.2000); *Texas Ass'n of Business v. Texas Air Control Bd.* 852 S.W.2d 440, 444 (Tex. 1993) ("An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury . . . Texas courts . . . have no jurisdiction to render such opinions.").
20. In the context of suits seeking declaratory and injunctive relief, such as the instant matter, this Austin Court of Appeals has explained:

Actions for declaratory relief require the existence of a real controversy between the parties that will actually be resolved by the declaration sought. In order to challenge a statute, the plaintiff must suffer some actual or threatened injury

under the statute Courts may not make declarations on matters based upon speculative, hypothetical, or contingent situations. A trial court also lacks jurisdiction to enjoin conjectural or speculative events under the injunction statute.

Limon v. State, 947 S.W.2d 620, 624 (Tex. App.—Austin 1997, no writ) (internal citations omitted). A plaintiff must demonstrate he possesses standing to bring a claim by alleging facts that affirmatively demonstrate the court’s jurisdiction to hear the cause. *Texas Ass’n of Business*, 852 S.W.2d at 446.

21. Here, each and every Plaintiff lacks standing because each has failed to plead facts that demonstrate they have been actually injured by Defendants. Plaintiffs allege they received notices pursuant to TEX. ELEC. CODE § 16.033. *See Original Petition* ¶ 9. Plaintiffs wholly fail to explain how the mere receipt of these statutorily authorized notices has resulted in any injury to them. Pursuant to the plain terms of § 16.033, each voter who receives such a notice is simply asked to provide the relevant county registrar with information demonstrating the voter remains eligible to vote. No Plaintiff has plead any facts from which it could be found that he is unable to provide such information, nor has any Plaintiff cited any law that would support a holding that being asked to provide information to verify eligibility results in a legally cognizable injury that furnishes standing to sue in this Court.

22. In the absence of any cognizable injury, the Plaintiffs named here lack standing and this entire suit should be dismissed.

E. The Temporary Restraining Order should be dissolved.

23. Because, for the reasons stated above, the Court lacks subject-matter jurisdiction over this suit, it lacked authority to enter a Temporary Restraining Order. Accordingly, Defendant Andrade respectfully requests that the order be dissolved.

CONCLUSION

For the reasons stated above, Defendant Andrade respectfully requests that the Court GRANT the Plea to the Jurisdiction and DISMISS this suit.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been filed electronically with the Court and sent via electronic mail and U.S. Mail on September 21, 2012, to:

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