

NO. D-1-GN-23-008370

TRAVIS WAYNE EUBANKS,	§	IN THE DISTRICT COURT OF
AMANDA MARIE EUBANKS,	§	
JARRETT WOODWARD,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
JANE NELSON, Texas Secretary	§	
of State,	§	
<i>Defendant.</i>	§	345TH JUDICIAL DISTRICT

**SECRETARY OF STATE JANE NELSON'S
PLEA TO THE JURISDICTION**

Jane Nelson, in her official capacity as Secretary of State for the State of Texas (hereinafter, “the Secretary”), files this Plea to the Jurisdiction. In support thereof, the Secretary respectfully offers the following:

I. BACKGROUND

On November 7, 2023, Texas held an election on 14 proposed amendments to the Texas Constitution. Texas voters subsequently approved 13 of the proposed amendments: Propositions 1–12, and Proposition 14. On November 27, 2023, Governor Greg Abbott signed a statement of final count vote for all 14 propositions. The official canvass was held for those propositions on December 4, 2023. Tex. Elec. Code § 67.013. At that time, the Governor certified the final vote tabulations, *id.* § 67.013(d), and declared the official results of the election in a proclamation, Tex. Const. art. XVII, § 1(c). The approved amendments have therefore “become a part of th[e] Constitution.” *Id.*

On November 20, 2023, Plaintiffs purported to file an election contest under Chapter 233 of the Texas Election Code regarding: Proposition 1, which protects the right to engage in farming, ranching, timber production, horticulture, and wildlife management; Proposition 3, which prohibits the imposition of an individual wealth or net worth tax; Proposition 4, which increases the mandatory homestead exemption for school district property taxation from \$40,000 to \$100,000, among other items; Proposition 11, which authorizes the legislature to permit conservation and reclamation districts in El Paso County to issue certain bonds; Proposition 12, which abolishes the office of county treasurer in Galveston County; Proposition 13, which increases the mandatory retirement age for state justices and judges; and Proposition 14, which creates the centennial parks conservation fund. They contend that electronic voting systems used throughout the State of Texas do not meet the requirements for certification and are therefore substandard, thereby rendering all votes illegal. *See generally* Voters’ Orig. Pet. Plaintiffs further allege that Title 8 of the Texas Election Code is unconstitutional because Article VI, § 4 of the Texas Constitution requires a preservation of the purity of the ballot box that electronic voting systems and secret ballots cannot satisfy. *Id.* at ¶¶ 59–67. They seek relief in the form of a declaration that the constitutional amendment election as to Propositions 1, 3, 4, 11, 12, 13, and 14 is void and that Texas Election Code Title 8 is unconstitutional under the Texas Constitution. *Id.* at ¶¶ 74–75.

To bring an election contest against a constitutional amendment election, “[t]he contestant’s petition must be filed and service of citation on the secretary of

state must be obtained before the final official canvass is completed.” Tex. Elec. Code § 233.014(b). If the contestant succeeds in doing that, then “[t]he declaration of the official result of a contested election may not be made until the contest is finally determined.” *Id.* § 233.014(c). A “citation,” in turn, “must command the contestee to answer by the specified deadline,” *id.* § 233.007(b), which for this statewide election is “10 a.m. of the 20th day after the date of service of citation,” *id.* § 233.007(a)(2).

Plaintiffs here, however, never served a citation in compliance with Section 233.007 of the Texas Election Code. In a document sent to the Secretary of State on November 21, 2023, Plaintiffs directed the Secretary to respond by “10:00 A.M. on the Monday next following the expiration of twenty days after you were served” (*i.e.*, December 18, 2023).¹ But the deadline specified in the Election Code is “10 a.m. of the 20th day after the date of service of citation” (*i.e.*, December 11, 2023). Because Plaintiffs did *not* “command the [Secretary] to answer by the specified deadline,” *id.* § 233.007(b), “service of citation on the secretary of state [was *not*] obtained before the final official canvass [wa]s completed” on December 4, 2023, *id.* § 233.014(b). Since the Governor has declared the official results of the election in a proclamation, Plaintiffs’ purported effort to void the election on a constitutional amendment that is now “a part of th[e] Constitution” is moot. And “[courts] do not have power to decide moot cases, whether they ‘involve a matter of public concern’ or not.” *Morath v. Lewis*, 601 S.W.3d 785, 789 (Tex. 2020).

For the reasons set forth herein, the Court must grant the Secretary’s plea and

¹ The citation and executed service have been filed with this Court.

dismiss this case for lack of jurisdiction. First, this Court has no jurisdiction over a “contest” that was never properly served on the Secretary. Second, Plaintiffs lack standing because any injury cannot be redressed. Third, Plaintiffs’ claims have been rendered moot by the Governor’s declaration of the official results of the election. Finally, Plaintiffs have failed to plead a valid election contest to invoke the Court’s jurisdiction.

II. STANDARD OF REVIEW

A plea to the jurisdiction challenges a court’s authority to determine the subject matter of the controversy. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). Subject matter jurisdiction cannot be presumed and cannot be waived. *Cont’l Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 449 n.2 (Tex. 1996). While a plea to the jurisdiction typically challenges “whether the plaintiff has alleged facts that affirmatively demonstrate the court’s jurisdiction to hear the case,” a plea to the jurisdiction can also “properly challenge the existence of those very jurisdictional facts.” *Mission Consolidated Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012) (emphasis in original). “In those cases, the court can consider evidence as necessary to resolve any dispute over those facts, even if that evidence implicates both the subject-matter jurisdiction of the court and the merits of the case.” *Id.* (internal citations omitted). The party bringing suit bears the burden of alleging facts affirmatively showing that the trial court has subject-matter jurisdiction. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Tex. Dep’t of Crim. Justice v. Miller*, 48 S.W.3d 201, 203 (Tex. App—Houston [1st Dist.] 1999), *rev’d on*

other grounds, 51 S.W.3d 583, 589 (Tex. 2001)). “If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend.” *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

III. ARGUMENT AND AUTHORITIES

A. The Court has no jurisdiction over this “contest” because the Secretary was not properly served.

“Proper citation and return of service are crucial to establishing personal jurisdiction.” *TAC Americas, Inc. v. Boothe*, 94 S.W.3d 315, 318–19 (Tex. App.—Austin 2002, no pet.). Strict compliance is required when statutes use the mandatory term “must.” *In re Triantaphyllis*, 68 S.W.3d 861, 868 (Tex. App.—Houston [14th Dist.] 2002, no pet.). “If the record does not show strict compliance with the rules governing citation, the service is invalid” *Mansell v. Ins. Co. of the W.*, 203 S.W.3d 499, 501 (Tex. App.—Houston [14th Dist.] 2006, no pet.). “Strict compliance” is interpreted to mean literal compliance with the rules governing issuance, service, and return of citation. *Medeles v. Nunez*, 923 S.W.2d 659, 662 (Tex. App.—Houston [1st Dist.] 1996, writ denied), *overruled on other grounds by Barker CATV Const., Inc. v. Ampro, Inc.*, 989 S.W.2d 789 (Tex. App.—Houston [1st Dist.] 1999, no pet.). “Failure to affirmatively show strict compliance with the rules of civil procedure renders the attempted service of process invalid and of no effect.” *Garcia v. Ennis*, 554 S.W.3d 209, 213–14 (Tex. App.—Fort Worth 2018, no pet.).

As already explained, Plaintiffs served the Secretary with a citation that fails to command her to answer by the deadline specified in Tex. Elec. Code § 233.007(a)(2).

Instead, the document Plaintiffs served contains language indicating that an answer is due “by 10:00 A.M. on the Monday next following the expiration of twenty days” after service. To commence “a contest of an election on a proposed constitutional amendment,” *id.* § 233.014(a), a “citation must be obtained before the final official canvass is completed,” *id.* § 233.014(b). “Election contests are creatures of statute, and the power of a trial court to consider such contests exists only to the extent authorized by statute.” *Nichols v. Seei*, 97 S.W.3d 882, 883 (Tex. App.—Dallas 2003, no pet.).

This defect cannot be cured because any subsequent filing attempting to comply with § 233.007 would be untimely, for service was required “before the final official canvass is completed.” Tex. Elec. Code § 233.014(b). “The ‘canvass of election returns’ refers to the opening and examination of returns and the compiling of a summarized statement of the several returns, showing the result of the election within the territorial unit composed of the smaller units from which the returns are made.” 31B Tex. Jur. 3d Elections § 364. “‘Local canvass’ means the canvass of the precinct election returns.” Tex. Elec. Code § 1.005(11). “‘Final canvass’ means the canvass from which the official result of an election is determined.” *Id.* § 1.005(5). The final canvass was completed at 11:30 AM on December 4, 2023. Therefore, Plaintiffs can no longer timely serve the Secretary in compliance with Tex. Elec. Code § 233.014(b), and this Court lacks jurisdiction over their claims.

B. Plaintiffs lack standing because this Court cannot redress their alleged injury.

Even if Plaintiffs had properly served the Secretary, their claims must be dismissed because they have failed to establish standing to pursue these claims. “Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable.” *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). “A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it.” *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). “Texas’s standing test parallels the federal test for Article III standing: a plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (citations and internal quotations omitted).

1. Plaintiffs have asserted no more than a generalized grievance

Plaintiffs have not suffered a cognizable injury. Standing “require[s] an actual, not merely hypothetical or generalized grievance.” *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001). Although Tex. Elec. Code § 233.002 defines who can qualify to be a contestant—i.e., “qualified voters of the territory covered by an election on a measure”—it does not automatically confer standing; standing is not presumed and must still be sufficiently pled. *See id.*; accord *Hotze v. White*, No. 01-08-00016-CV, 2010 WL 1493115, at *6 (Tex. App.—Houston [1st Dist.] Apr. 15, 2010, pet. denied) (“For a plaintiff to challenge the results of the election, court decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at

large.” (quoting *Brown*, 53 S.W.3d at 302)). While the Texas Election Code provides that “[a]ny question relating to the validity or outcome of a constitutional amendment election may be raised in an election contest,” Tex. Elec. Code § 233.014(g), it may not be true that “the fact that any question may be raised necessarily implies that any person may raise it.” *Hardy v. Hannah*, 849 S.W.2d 355, 357 (Tex. App.—Austin 1992, writ denied), *disapproved of on other grounds by Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015).

The Texas Supreme Court has held that voters do not have standing to bring claims concerning the certification of voting systems by the Secretary of State under the Texas Constitution or the Texas Election Code, as they amount to nothing more than generalized grievances. *See Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14-18 (Tex. 2011). To be sure, the Court permitted plaintiffs to sue about alleged equal protection violations flowing from perceived defects in the voting system. *Id.* at 6-11. But it prohibited general challenges to those systems that were not similarly keyed to particularized harm to a subset of the public—because that plaintiff is “su[ing] solely as [a] citizen[] . . . insist[ing] that the government follow the law.” *Id.* at 8. Here, like in *Andrade*, Plaintiffs have failed to demonstrate that they have sustained any particularized harm distinct from that experience by all other members of the public. *Id.* at 17. In fact, Plaintiffs have failed to plead any harm at all. *See generally*, Voters’ Orig. Pet. “A desire to have the government act in conformance to the law is not enough,” and like in *Andrade*, “the voters assert no concrete, particularized harm to justify their claims here.” *Andrade*, 345 S.W.3d at 18.

2. Plaintiffs have no injury that can be redressed by this Court

Any cognizable injury is incapable of being redressed by this Court. To establish standing, a plaintiff must show the asserted injury is capable of being redressed by a court. *See Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012). As discussed in Section C, below, this Court cannot redress the Plaintiffs' injuries because this dispute is already moot. *See, e.g., Tex. Dep't of Aging & Disability Servs. v. DeLong*, 441 S.W.3d 538, 542 (Tex. App.—El Paso 2014); *Suarez v. Silvas*, 2022 WL 379965, at *7 (Tex. App.—San Antonio 2022). Plaintiffs purport to contest the election process used for then-proposed constitutional amendments in order to prevent Proposition 6 from becoming part of the Texas Constitution. But that has already happened. Neither this Court nor any other may void that election in the past by wielding some kind of *nunc pro tunc* power to remove language from the Texas Constitution, because an election contest filed “before the final official canvass is completed” is “the exclusive method for adjudicating such questions.” Tex. Elec. Code 233.014(b), (g); *cf. Blum v. Lanier*, 997 S.W.2d 259, 262-63 (Tex. 1999). Accordingly, Plaintiffs lack standing to assert the claims before this Court, and this suit must be dismissed.

C. Any challenge to amendments that are already part of the Texas Constitution is moot.

Plaintiffs sought to contest the election of then-proposed amendments to the Texas Constitution by preventing the votes on those amendments from being canvassed. But the final canvass has already occurred, and the 13 voter-approved amendments have already become part of the Constitution as a result of the

Governor’s declaration. This Court will never see a simpler example of mootness. *See, e.g., Marshall v. Hous. Auth. of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006) (controversy was mooted where plaintiff’s “lease expired” during litigation). “Because courts lack subject-matter jurisdiction to decide a moot controversy, [this court] must dismiss a case that is moot for want of jurisdiction.” *DFPS v. New Jersey*, 644 S.W.3d 189, 192 (Tex. 2022); *see Alsobrook v. MTGLCQ Investors, LP*, 656 S.W.3d 394, 935 (Tex. 2022) (per curiam) (where intervening events rendered case moot, appellate court “should have vacated the trial court’s judgment and dismissed the entire case for lack of subject matter jurisdiction”).

D. Plaintiffs have failed to plead a valid election contest

Plaintiffs have failed to plead a valid election contest sufficient to invoke the court’s jurisdiction because they have not alleged that the outcome of the election would be any different even assuming the claimed irregularities did occur. “The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome . . .” Tex. Elec. Code Ann. § 221.003. “The burden of proving illegality in an election contest is on the contestant who must prove that illegal votes were cast in the election being contested and that a different and correct result would have been reached by not counting the illegal votes.” *Green v. Reyes*, 836 S.W.2d 203, 208 (Tex. App.—Houston [14th Dist.] 1992, no writ). A contestant “must prove not only that voting irregularities occurred but also that they did in fact materially affect the results of the election.” *Chumney v. Craig*, 805 S.W.2d 864, 870 (Tex. App.—Waco 1991, writ

denied). “It must be shown that a ‘different result would have been reached by counting or not counting certain specified votes or irregularities were such as to render it impossible to determine the will of the majority of the voters participating.” *Goodman v. Wise*, 620 S.W.2d 857, 859 (Tex. App.—Corpus Christi 1981, writ ref’d n.r.e.) (quoting *Ware v. Crystal City Indep. Sch. Dist.*, 489 S.W.2d 190 (Tex. Civ. App. San Antonio 1973, writ dism’d)).

Plaintiffs have alleged that “all votes counted using illegally certified, substandard voting systems were illegal votes and not to be counted.” Voters’ Orig. Pet. At ¶ 17. But vitally missing from Plaintiffs’ allegations is any assertion that those allegedly illegal votes materially affected the results of the election and that the result would have been different had those votes not been counted. Without even an allegation of fact that the results of the election would have been different, Plaintiffs have failed to plead a valid election contest and have not invoked the jurisdiction of the Court.

IV. PRAYER

For the foregoing reasons, the Secretary respectfully requests that this Court grant her Plea to the Jurisdiction and dismiss Plaintiffs’ claims in their entirety.

Respectfully submitted.

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2023, a true and correct copy of the foregoing instrument has been served via the Court's electronic filing manager on:

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Chief

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Filing Description: SECRETARY OF STATE JANE NELSON'S PLEA TO THE JURISDICTION

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