

No. 17-0052

In the Supreme Court of Texas

LAURA PRESSLEY,
Petitioner,

v.

GREGORIO (GREG) CASAR,
Respondent.

On Petition for Review
from the Third Court of Appeals, Austin, Texas
No. 03-15-00368-CV

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL KEN PAXTON IN SUPPORT OF THE PETITIONER

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Interest of Amici Curiae

A six-member committee must examine a voting system before the system can be approved for use under Chapter 122 of the Election Code. The Office of the Attorney General appoints two members to the committee and issues reports concerning whether voting systems comply with State requirements—namely, the Constitution’s and the Election Code’s mandates to prevent fraud. By its membership on the committee, the Office of the Attorney General is interested in whether voting systems must number tickets (in addition to paper ballots) under the Constitution.

Argument

The Constitution specifies that “[i]n all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box[.]” Tex. Const. art. VI, § 4. Similarly, the Election Code requires that voting systems be “safe from fraudulent or unauthorized manipulation.” *Id.* § 122.001(a)(4). To accomplish this, the Code creates a variety of standards voting systems must satisfy before the Secretary of State may approve them for use in Texas elections. Tex. Elec. Code §§ 122.001–.099. The Code further provides for a six-person committee to examine voting systems and make written reports as directed by the Secretary of State. *Id.* § 122.035(a), 122.036. Under the Secretary’s direction, examiners of the committee must consider whether a voting system “meets

the applicable standards outlined in the Texas Election Code and the Texas Administrative Code.” 1 T.A.C. § 81.60(8), (9). The Constitution does not expressly address voting systems, nor does the Election Code directly address the numbering of tickets for voting systems. Thus, it is of significant importance to examiners whether the current requirements of the Texas Election Code fully satisfy the requirements of the Constitution regarding the numbering of tickets.

The Election Code often treats paper ballots and voting systems (which includes direct recording electronic voting machines (DREs)) differently. For numbering, the Code requires that paper ballots “shall be numbered consecutively beginning with the number ‘1.’” *Id.* § 52.062. By contrast, the Election Code only requires that voting machines have “a public counter.” *Id.* § 122.033(3).

This requirement has roots in practices and legal precedents of the 1930s. In 1930, the Legislature first authorized the use of voting machines. Act of February 18, 1930, 41st Leg., 4th C.S., ch. 33, 1930 Tex. Gen. Laws 60. In 1939, the Court confronted the issue of whether a voting machine (specifically, a lever machine) with a public counter complied with the constitutional requirement to “number a ticket.” *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939). The Court held:

It will be noted that the word ‘ticket’ is used. It is provided that the tickets shall be numbered. Of course, the word ‘ticket,’ as here used, means the same as the word ‘ballot.’ The ballot must be numbered. If we understand this record, the election officers kept a poll list which showed the name and number of each voter.

When the voter registered his vote on the machine, it (the machine) recorded the number of the ballot. To our minds, this meets the requirement of the Constitution. As we understand this machine, it is not possible from the record made by it to determine, in an election contest, how each voter voted. Be that as it may, the Constitution contains no such requirement. The Constitution simply requires that the ticket shall be numbered. The machine does that.

*Id.*¹ Distilling this ruling yields the following conclusions:

- Numbering of tickets means numbering of ballots.
- Lever machines cannot record how each voter voted.
- Therefore, a counter that increased when the voter cast their vote sufficed to number a ballot.

The Court's conclusion could be interpreted as excusing compliance with the constitutional requirement to number ballots because the lever machine could not comply; it's also possible the Court recognized that the poll list and the counter of the lever machine, when considered together, satisfied the constitutional requirement.

In 2011, the Court discussed an issue very similar to the one in this case. In *Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011), the NAACP sued the Secretary of State over her approval of the Hart eSlate, the same DRE at issue in this appeal. Specifically, the plaintiffs contended that the eSlate's lack of a paper ballot violated the constitutional requirement to number ballots. *Id.* at 15. The Court said that “[a]lthough *the eSlate numbers ballots*, the voters

¹ In 1949, the Legislature began ensuring ballot secrecy by ending any method to link a voter to their ballot. Act of May 30, 1949, 51st Leg., R.S. ch. 239, 1949 Tex. Gen. Laws 615.

contend that failing to require a paper ballot undermines the framers’ intent in drafting the numbering requirement—a requirement they claim was intended to secure the integrity of the election process.” *Id.* (emphasis added). The Court held that the complaint of a lack of a paper ballot was a generalized grievance all citizens shared and was therefore not a cognizable claim. *Id.* But the focus of *Andrade* was on the DRE’s inability to print paper ballots, not on whether it numbers ballots. Without explaining how the DRE numbered ballots, the Court seems to have applied *Wood*’s reasoning for lever machines to DREs.²

Two important factors differentiate this appeal from *Wood* and *Andrade*: (1) evidence in this case indicates the DREs such as the eSlate can be programmed to number a ballot,³ and (2) as configured in Travis County, the eSlate does not actually number a ballot.⁴

As addressed above, the Court, in *Wood*, could have either excused voting machines from the constitutional requirement to number ballots, because

² Briefing to the Court from the Secretary cited *Wood* for the proposition that “the numbered-ticket requirement is limited to a requirement that election officers keep a poll list which shows the name and number of each voter, and that the election machine record when each voter has voted.” Pet. Br. on the Merits, *Andrade v. NAACP of Austin*, No. 09-0420, at 41–42 (Tex. 2009). The Court’s comment that the eSlate “number ballots” could be read to conclude that, under *Wood*, the public counter combined with the poll list of numbered voters means that the eSlate suffices for numbering a ballot.

³ See Reply in Support of Petition for Review, *Pressley v. Casar*, No. 17-0052 (Tex. Sept. 12, 2017) at Ex. F.

⁴ Appendix E to the Petition for Review contains evidence of 3,937 unnumbered cast vote records that were printed and manually counted from DREs but lack an identifying number.

lever machines cannot number ballots (only record votes and display how many votes were recorded), or it could have been recognizing that the combination of a counter and a poll list meet the constitutional mandate for numbered ballots. And, although the Court came close in *Andrade*, it did not reach that question or the one presented in this appeal: whether a DRE that is capable of numbering ballots must do so.

Conclusion

The question of whether unnumbered ballots cast using a DRE machine may lawfully be considered in a manual recount impacts what voting machines may be approved in Texas and is worthy of the Court's review.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 1694 words, excluding the portions of the brief exempted by Rule 9.4(i)(1), according to the word count of the word-processing software used to prepare this brief. Pursuant to T.R.A.P. 11(c), there are no fees paid or to be paid for preparing this brief.

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CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the court and served electronically on September 19, 2017, on all parties of record.

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