No. 20-50683

In the United States Court of Appeals for the Fifth Circuit

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Defendant-Appellant,

v.

TEXAS DEMOCRATIC PARTY, DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, EMILY GILBY, TERRELL BLODGETT,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

RESPONSE TO PLAINTIFFS-APPELLEES' EMERGENCY MOTION FOR SUMMARY AFFIRMANCE

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

MATTHEW H. FREDERICK
Deputy Solicitor General
matthew.frederick@oag.texas.gov

Counsel for Defendant-Appellant

Certificate of Interested Persons

No. 20-50683

Ruth Hughs, in her official capacity as Texas Secretary of State,

Defendant-Appellant,

v.

Texas Democratic Party, Democratic Senatorial Campaign Committee, Democratic Congressional Campaign Committee, Emily Gilby, Terrell Blodgett,

Plaintiffs-Appellees.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellant, as a governmental party, need not furnish a certificate of interested persons.

/s/ Matthew H. Frederick
Matthew H. Frederick
Counsel of Record for
Defendant-Appellant

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Introduction

The Court should deny Plaintiffs' motion for summary affirmance because the Secretary's appeal raises important issues that remain unsettled despite arising frequently in this Circuit. This is one of three related appeals regarding the scope of *Ex parte Young*'s exception to sovereign immunity as applied to the Texas Secretary of State. All three cases warrant careful consideration after full briefing and argument.

In the first appeal, the Secretary has filed a petition for rehearing en banc. *See* Petition for Rehearing En Banc, *Lewis v. Hughs*, No. 20-50654 (5th Cir. Sept. 8, 2020). Recognizing the serious issues raised in that petition, the Court has requested a response. *See* Court Directive, *Lewis v. Hughs*, No. 20-50654 (Sept. 8, 2020). The Court also denied the plaintiffs' motion for an expedited ruling on the petition. *See* Order, *Lewis v. Hughs*, No. 20-50654 (5th Cir. Sept. 11, 2020).

In the second appeal, a motions panel denied the plaintiffs' motion to summarily affirm because the appeal "presents an important question that has not been resolved by our court: whether and to what extent *Ex parte Young*'s exception to sovereign immunity permits plaintiffs to sue the Secretary in an as-applied challenge to a law enforced by local officials." *Tex. Democratic Party v. Hughs*, No. 20-50667, 2020 WL 5406369, at*1 (5th Cir. Sept. 9, 2020) (per curiam). On the merits, the Court characterized the Secretary's appeal as "far from frivolous." *Id.* The Court also identified a second reason to deny the motion for summary affirmance: *Lewis*, the first appeal, "is now pending before our court for *en banc* reconsideration." *Id.* Refusing "to prejudge the outcome of that reconsideration," the Court decided that "[t]he

openness of the question alone is sufficient reason to deny plaintiffs' requested relief." *Id.*

The Court should follow the same approach here. The Secretary respectfully requests that the Court deny Plaintiffs' motion.

BACKGROUND

Texas legislators passed HB 1888 to solve a problem in Texas elections: the selective harvesting of targeted votes by local officials. Some local officials improperly sought to influence the vote by strategically establishing polling places in particular locations for limited times.

HB 1888 prevents local officials from engaging in selective vote-harvesting by requiring early-voting polling places to be open throughout the early-voting period. *See* Tex. Elec. Code § 85.064 (requiring "each temporary branch polling place" to be open "the days that voting is required to be conducted at the main early voting polling place," in most cases for at least eight hours per day). Thus, the times and locations of early voting polling places will be clearer to all voters, not just those favored by certain local officials. Under HB 1888, when a voter sees an early-voting polling place, he can be confident that it will still be there if he returns later to cast his ballot. The law also increases opportunities to vote by increasing the amount of time that polling places remain open.

The Texas Legislature accomplished these goals by issuing instructions to local election officials, not the Secretary of State. Under Texas law, local officials determine the location of voting sites. *See* Tex. Elec. Code § 85.061 (providing that a county clerk's branch offices shall be permanent branch polling places unless the

commissioners court provides otherwise); *id.* § 85.062(a) (providing that "one or more early voting polling places other than the main early voting polling place may be established by . . . the commissioners court" or "the governing body of the political subdivision"). Indeed, Plaintiffs concede as much. *See* First Amended Complaint ¶ 37 (Nov. 26, 2019), ECF No. 18 (discussing how "counties" determine "early voting locations").

Local officials also operate early voting sites. *See* Tex. Elec. Code § 61.002. They implement HB 1888 by ensuring that polling places are open at appropriate hours. *See id.* § 85.064. Local officials have independent legal obligations to comply with HB 1888, regardless of any action or inaction by the Secretary of State.

The Secretary does not supervise local officials' compliance with HB 1888, and she is not empowered to ensure or prevent such compliance. To the extent local officials do not comply with HB 1888, their actions may be reviewable in an election contest. *See* Tex. Elec. Code § 221.003(a) (requiring the tribunal "to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because . . . (2) an election officer . . . (C) engaged in other fraud or illegal conduct or made a mistake"). But that is a private cause of action brought by the losing candidate, not an enforcement action brought by the Secretary of State. *See id.* § 232.002 ("Any candidate in an election may contest the election.").

Although the Election Code charges the Secretary of State with "obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of this code," *id.* § 31.003, it does not grant her the power to coerce local officials. Instead, it authorizes the Secretary of State to "assist and advise all election authorities with

regard to the application, operation, and interpretation of this code." *Id.* § 31.004(a). Thus, the Secretary "maintain[s] an informational service for answering inquiries of election authorities relating to the administration of the election laws or the performance of their duties." *Id.* § 31.004(b). The Secretary has authority to issue non-binding orders to correct conduct "that impedes the free exercise of a citizen's voting rights," *id.* § 31.005(b), but that does not include the power to coerce local officials. "That the Secretary must resort to judicial process if the [local officials] fail to perform their duties underscores her lack of authority over them." *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377, at *11 (11th Cir. Sept. 3, 2020). Moreover, section 31.005 does not authorize an order requiring general compliance with HB 1888, much less an order preventing local officials from enforcing HB 1888.

HB 1888 went into effect on September 1, 2019, and Plaintiffs filed suit in October 2019. *See* Complaint (Oct. 30, 2019), ECF No. 1. Plaintiffs argued that they would be injured if the local officials in their counties responded to HB 1888 by establishing fewer early voting polling places. *See id.* ¶ 6 (alleging that "several counties . . . have indicated that they will also be forced to offer significantly reduced early voting opportunities in the upcoming 2020 elections").

The Secretary moved to dismiss based on sovereign immunity. *See* Motion to Dismiss (Dec. 10, 2019), ECF No. 21. Highlighting her limited role under state law, she emphasized that any injury depended on the actions of local officials. *See id.* at 2-7. In an order partially denying her motion to dismiss, the district court ruled that the Secretary was not immune. *See* Order on Motion to Dismiss (Aug. 11, 2020), ECF No. 107. The Secretary appealed. *See* ECF No. 108.

ARGUMENT

I. Summary Affirmance Is Inappropriate Because the Secretary's Appeal Presents Unsettled Questions.

Summary disposition is appropriate "where time is truly of the essence" because "important public policy issues are involved or . . . where rights delayed are rights denied," or when the position of the party seeking summary disposition is "clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Neither circumstance exists here. This appeal presents an important question that this Court has recognized as unresolved. *See Tex. Democratic Party v. Hughs*, 2020 WL 5406369, at *1. Summary affirmance is therefore inappropriate.

A. This Court has recognized that the degree of connection to enforcement required by *Ex parte Young* is unsettled.

In *Ex parte Young*, 209 U.S. 123, 157 (1908), the Supreme Court recognized an exception to the general rule that "state sovereign immunity precludes suits against state officials in their official capacities." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) ("*TDP*") (citing *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019)). *Ex parte Young* "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). *Ex parte Young* allows plaintiffs to avoid sovereign immunity in "suits for prospective . . . relief against state officials acting in violation of *federal* law." *TDP*, 961 F.3d at 401 (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004)).

To overcome sovereign immunity under *Ex parte Young*, a plaintiff must establish that the state official (1) has "some connection" to enforcement of the challenged state law and (2) has "taken some step to enforce" it. *TDP*, 961 F.3d at 400-01. Under the first requirement—"some connection" to enforcement—"it is not enough that the official have a '*general* duty to see that the laws of the state are implemented.'" *Id.* (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). Under the second, "a mere connection to a law's enforcement is not sufficient—the state officials must have taken some step to enforce." *Id.* at 401.

But both steps in the *Ex parte Young* analysis raise unsettled questions. In *Okpalobi v. Foster*, a plurality of the en banc Court concluded that *Ex parte Young* requires plaintiffs to show that a state official is "specially charged with the duty to enforce the statute" and is "threatening to exercise that duty." 244 F.3d 405, 414 (5th Cir. 2001) (en banc) (plurality op.); *see also id.* at 416 (concluding that the defendant state official must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty"). Some panels, however, "have recognized that this definition of 'connection' . . . may not be binding precedent." *City of Austin*, 943 F.3d at 999. As a result, "[w]hat constitutes a sufficient 'connection to [ ] enforcement' is not clear from our jurisprudence." *Id.* The Court confirmed in *TDP* that "[t]he precise scope of the 'some connection' requirement is still unsettled." 961 F.3d at 400.

Similarly, the need to show some step toward enforcement raises another question: "how big a step?" *Id.* at 401. Noting that "enforcement" has been described as "compulsion or constraint," *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010), and

"'a demonstrated willingness to exercise' one's enforcement duty," *TDP*, 961 F.3d at 401, the Court concluded that "the bare minimum appears to be 'some scintilla' of affirmative action by the state official." *Id.* (quoting *City of Austin*, 943 F.3d at 1002). But it explained that "the line evades precision." *Id.*

B. The Secretary does not enforce HB 1888.

HB 1888 operates by regulating the days and hours that local election officials must keep early voting polling places open. It is therefore no surprise that Plaintiffs fail to identify any enforcement action the Secretary could take, much less one she has demonstrated a willingness to take.

Instead, Plaintiffs cite the Secretary's title, "chief election officer," Mot. 10 (quoting Tex. Elec. Code § 31.001(a)). But that title is not "a delegation of authority to care for any breakdown in the election process." *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (Reavley, J.). The Secretary does not oversee the local officials who *do* enforce the challenged provisions. Local officials do not report to the Secretary, and they are not bound by the Secretary's advice. *In re Stalder*, 540 S.W.3d 215, 218 n.9 (Tex. App.—Hous. [1st Dist.] 2018, no pet.) (expressing doubt that "assistance and advice" provided by the Secretary binds a local party chair); *Ballas v. Symm*, 351 F. Supp. 876, 888 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974) (observing that "the Secretary's opinions are unenforceable at law and are not binding").

This Court has never analyzed the state court precedents that control the scope of the Secretary's state-law authority. That is reason enough to conclude that the Secretary presents a substantial question on appeal. The disconnect between federal

precedent and state precedent on this issue supports certification of the question to the Supreme Court of Texas. *See* Tex. R. App. P. 58.1. Only that Court can fully and finally resolve the question of the Secretary's enforcement authority under state law.

Even if this Court disagreed with the Secretary's interpretation of her state-law authority, that would not support summary affirmance. The Secretary understands state law to provide that she *cannot* coerce local officials in these circumstances. As a result, she is not "likely to do [so] here." *City of Austin*, 943 F.3d at 1002. A State official who believes that she does not have certain power cannot be said to have "a demonstrated willingness to exercise that" power. *Morris*, 739 F.3d at 746.

C. This Court has already rejected Plaintiffs' arguments for summary affirmance.

Nevertheless, Plaintiffs argue that this appeal is controlled by *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), and *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). Mot. 9–12. This Court rejected that precise argument when it denied the motion for summary affirmance in *Texas Democratic Party v. Hughs*, 2020 WL 5406369, at *1 ("We did not resolve this question in *OCA* . . . . Nor did we resolve it in *Tex. Democratic Party* . . . .").

The Court was right to deny Plaintiffs' motion in the related case. *TDP* granted a stay pending appeal because the state officials showed a likelihood of success on the merits. 961 F.3d at 403-12. To the extent it considered the Secretary's sovereign immunity, the Court said only that "our precedent *suggests* that the Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to support standing," which "in turn, *suggests* that *Young* is

satisfied as to the Secretary of State." *Id.* at 401 (citing *OCA-Greater Hous.*, 867 F.3d at 613) (emphases added).

But *OCA-Greater Houston* does not support the district court's ruling, much less resolve any unsettled questions of sovereign immunity. There, the Court pointedly declined to address sovereign immunity because it held that the State's immunity was validly abrogated by the Voting Rights Act. *Id.* at 614 ("Sovereign immunity has no role to play here."). The Court concluded only that "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" *Id.* at 613 (quoting Tex. Elec. Code § 31.001(a)). That holding does not inform the question of sovereign immunity. Since the plaintiffs were able to proceed directly against the State, there was no reason to consider whether the Secretary had the necessary connection to enforcement under *Ex parte Young*.[1]

The suggestion that *OCA-Greater Houston* controls this case also contrasts sharply with this Court's more recent sovereign-immunity precedent, which analyzes the defendant's state-law authority with greater specificity than *OCA*'s standing analysis, and which requires more than the mere possibility of enforcement. *See In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (holding that sovereign immunity

[1] Nor did the Court have to explain how the plaintiff's injury was redressable by the Secretary of State. And it didn't. *OCA-Greater Houston* held only that the plaintiff in that case had standing to bring a facial challenge against the State *and* the Secretary. It did not purport to hold that plaintiffs always have standing to challenge election laws by suing *only* the Secretary. To the extent it did, the Secretary preserves her argument that the case was wrongly decided.

barred claims because "the Governor lacks the required enforcement connection to" an executive order and any enforcement role for the Attorney General was speculative); *City of Austin*, 943 F.3d at 1002 (holding that sovereign immunity barred a suit because the plaintiff had "no evidence that the Attorney General may 'similarly bring a proceeding' to enforce § 250.007"). *OCA*'s standing analysis does not inform the sovereign-immunity question presented here because the Court did not examine the Secretary's connection to enforcement, and it did not even consider whether she had taken "some step to enforce." *TDP*, 961 F.3d at 401.

Plaintiffs also suggest that this issue was resolved in a fifty-year-old district court opinion that did not even consider sovereign immunity. *See* Mot. 13 (citing *Tolpo v. Bullock*, 356 F. Supp. 712 (E.D. Tex. 1972), *aff'd* 410 U.S. 919 (1973)). The district court's opinion in *Tolpo* does not constitute precedent on that issue. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). In any event, *Tolpo* cuts against Plaintiffs' argument because the Secretary had a direct role in the enforcement of the challenged statute in that case, and he had enforced it against the plaintiff. *See* 356 F. Supp. at 713 (noting that the Secretary "refused . . . to place [the plaintiff] on the ballot"). Here, by contrast, the only alleged connection between the Secretary and the challenged provisions appears to be Plaintiffs' mistaken theory that the Secretary can coerce local officials into following her guidance. And on that point, *Tolpo* supports the Secretary. It explains that local party officials administering a primary election disregarded the Secretary's instructions regarding the plaintiff's eligibility.

See id. Even if *Tolpo* helped Plaintiffs, it would have only a "limited precedential effect" because the Supreme Court affirmed summarily rather than issue a reasoned opinion. *Anderson v. Celebrezze*, 460 U.S. 780, 784 (1983); *see also Jacobson*, 2020 WL 5289377, at *23 ("The Supreme Court has cautioned that we must not overread its summary affirmances.").

Finally, in a notice of supplemental authority, Plaintiffs cite the new merits decision in *Texas Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917 (5th Cir. Sept. 10, 2020) ("*TDP II*"). *See* 28(j) Letter, No. 20-50683 (Sept. 11, 2020). That decision shows that the questions presented here remain unsettled. The opinion in *TDP II* collapsed *Ex parte Young*'s requirements into a single inquiry, reasoning that as "chief election officer of the state, the Secretary is charged at least in part with enforcement of the Texas Election Code," so "there exists a scintilla of enforcement." 2020 WL 5422917, at *6 (quoting *City of Austin*, 943 F.3d at 1002). It did not identify any step toward enforcement by the Secretary—not even a step that she *could* take. But even when a state officer has the undisputed power to enforce a statute through litigation, this Court still asks whether he is likely to do so against the plaintiff. *See City of Austin*, 943 F.3d at 1002; *cf. In re Abbott*, 956 F.3d at 709. The opinion in *TDP II* does not address that question at all. That conflicts directly with prior panel opinions, confirming that the application of *Ex parte Young* remains uncertain and unsuited to summary disposition.

II. There Is No Need to Rush This Case.

Even Plaintiffs' motion for summary affirmance recognized that it is now too late for the federal courts to act. Plaintiffs requested a ruling "by September 14" so

that they could seek injunctive relief "in time for early voting." Mot. 4. That date has passed, but it would have been too late in any event. Local officials were supposed to give "notice of the election, including the location of each polling place . . . not later than the 60th day before election day." Tex. Elec. Code § 4.008(a). That was Friday, September 4—four days before Plaintiffs filed their motion for summary affirmance.

Even if Plaintiffs could overcome that statutory deadline, federal courts cannot grant injunctive relief this close to an election. The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). In *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), the Court relied on "considerations specific to election cases" to caution against federal court interference with impending state elections. It explained that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5. HB 1888 is supposed to provide certainty to voters. It allows them to rely on announced polling locations and trust that early voting polling places will remain open throughout the early voting period. At this point, a federal injunction would upset that reliance. Because Plaintiffs cannot secure injunctive relief so close to the election, there is no need to rush this appeal.

Conclusion

The Court should deny Plaintiffs' motion to summarily affirm.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General

/s/ Matthew H. Frederick
Matthew H. Frederick
Deputy Solicitor General
matthew.frederick@oag.texas.gov

Counsel for Defendant-Appellant

Certificate of Service

On September 18, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Matthew H. Frederick
Matthew H. Frederick

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3,487 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Matthew H. Frederick
Matthew H. Frederick