No. 20-50683

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EMILY GILBY, TEXAS DEMOCRATIC PARTY, DSCC, DCCC, TERRELL BLODGETT,

Plaintiffs–Appellees,

v.

RUTH HUGHS,
in her official capacity as the Texas Secretary of State,

Defendant–Appellant.

On Appeal from the United States District Court
for the Western District of Texas
Civil Action No. 1:19-cv-01063

PLAINTIFFS-APPELLEES' EMERGENCY MOTION FOR SUMMARY AFFIRMANCE

Marc E. Elias
John M. Geise
Alexi M. Velez*
Jyoti Jasrasaria*
PERKINS COIE LLP
700 Thirteenth St. NW, Ste. 800
Washington, D.C. 20005-3960

Renea Hicks
Attorney at Law
LAW OFFICE OF MAX RENEA HICKS
P.O. Box 303187
Austin, Texas 78703-0504
(512) 480-8231
rhicks@renea-hicks.com

Kevin J. Hamilton*
Amanda J. Beane*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
khamilton@perkinscoie.com

Counsel for Plaintiffs-Appellees Gilby, Texas Democratic Party, DSCC, and DCCC

Chad W. Dunn
TX State Bar No. 24036507
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

Counsel for Plaintiff-Appellee Texas Democratic Party

Counsel for Plaintiff-Appellee Terrell Blodgett

**5th Cir. Admission Pending*

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellees

1. Emily Gilby

2. Terrell Blodgett
3. Texas Democratic Party
4. DSCC
5. DCCC

Counsel for Plaintiffs-Appellees

Marc E. Elias
John M. Geise
Alexi M. Velez
Jyoti Jasrasaria
PERKINS COIE LLP
700 Thirteenth St. NW, Ste. 800
Washington, D.C. 20005-3960

Kevin J. Hamilton
Amanda J. Beane
PERKINS COIE LLP
1201 Third Ave., Ste. 4900
Seattle, WA 98101-3099

Counsel for Plaintiffs-Appellees Gilby, Texas Democratic Party, DSCC, and DCCC

Chad W. Dunn
TX State Bar No. 24036507
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

Counsel for Plaintiff-Appellee Texas Democratic Party

Renea Hicks
Attorney at Law
LAW OFFICE OF MAX RENEA HICKS
P.O. Box 303187
Austin, Texas 78703-0504
(512) 480-8231
rhicks@renea-hicks.com

Counsel for Plaintiff-Appellee Terrell Blodgett

Defendant-Appellant

1. Texas Secretary of State

Counsel for Defendant-Appellant

Patrick K. Sweeten
Todd Lawrence Disher
Matthew H. Frederick
William T. Thompson
Eric A. Hudson
Kathleen T. Hunker
Michael R. Abrams
Dominique G. Stafford
Office of the Attorney General
P.O. Box 12548 (MC-009)
Austin, TX 78711-2548
Telephone: (512) 936-1414
Facsimile: (512) 936-0545

/s/ John M. Geise

John M. Geise
PERKINS COIE LLP
700 Thirteenth St. NW, Ste. 800
Washington, D.C. 20005-3960
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
khamilton@perkinscoie.com

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STATEMENT OF EMERGENCY

Emergency and summary relief is urgently needed to ensure that the Secretary's baseless appeal on a claim of "immunity" that has been repeatedly rejected by this Court, including in an order granting summary affirmance in another (related) elections case just four days ago, *see* Ex. 7, *Lewis v. Hughs*, No. 20-50654 (5th Cir. Sept. 4, 2020), does not irrevocably foreclose the opportunity for timely, meaningful relief for Plaintiffs.

This is a case about the accessibility of in-person voting in a state that broadly forbids voting by mail, and which has historically struggled with extraordinarily long lines on election day, including earlier this year. Prior to Texas House Bill 1888 (2019) ("HB 1888"), Texas law permitted the use "mobile" or "temporary" polling places, giving elections officials an important tool to ensure that segments of the population that historically have had difficulty accessing the franchise could vote. Mobile voting was also highly cost effective, and in 2018 its widespread use helped facilitate a huge surge in the number of Texans who cast a ballot, including significant increased participation by young voters.

When HB 1888 went into effect on September 1, 2019, it mandated that early voting may only be offered at locations that are open for the entire duration of the early voting period, and in most cases, for at least eight hours per day. This destroyed the ability to use mobile voting to serve the vulnerable voting populations that the practice previously

successfully enfranchised. As a result, many of those voters will be impeded in attempting to exercise their right to vote and, for some, it will mean that they are unable to vote at all.

Plaintiffs filed their challenge just one month after the law went into effect. Ex. 1. The Secretary thereafter moved to dismiss this case on several grounds, including her claim that she is shielded here by sovereign immunity. Ex. 5, Sec'y's Mot. to Dismiss Gilby Complaint; Ex. 6, Sec'y's Mot. to Dismiss Blodgett Complaint.

From the outset, Plaintiffs made clear that relief was necessary before the November 2020 election, which at the time was more than a year away. The parties agreed to, and the district court ordered, an expedited discovery schedule with a plan to schedule trial on the merits in June of 2020. *See* Ex. 8, Dec. 27, 2019 Joint Scheduling Request at 2-3; *see also* Ex. 20, Dec 30, 2019 Scheduling Order.[1]

However, on July 30, 2020, due to COVID-19 pandemic and the fact that scheduling a trial had become extremely difficult, Plaintiffs moved for a preliminary injunction. Ex. 10, Plaintiffs' Opposed Application for Preliminary Injunction. Approximately three weeks after that motion was filed, the district court issued an order denying the Secretary's motion to dismiss, rejecting (among other arguments) the Secretary's

[1] Despite the pandemic, the Parties have completed discovery but for the Secretary's refusal to comply with an Order granting a motion to compel. *See* Ex. 9, July 7, 2020 Order Granting Pls' Mot. to Compel.

claim that she is subject to sovereign immunity. Ex. 5, Sec'y's Mot. to Dismiss Gilby Complaint; Ex. 6, Sec'y's Mot. to Dismiss Blodgett Complaint; Ex. 12, Order on Mot. to Dismiss at 5 ("Hughs fails to acknowledge, however, that the circuit has already determined that she is the proper defendant in this case."). The Secretary then filed the instant notice of appeal—which raises just the sovereign immunity issue—and took the position that the district court was divested of jurisdiction. Ex. 13, Sec'y's Notice of Appeal.

As a result, the case is currently at a standstill. Early voting is scheduled to begin on October 13. *See* Ex. 16, Procl. of Governor Regarding Early Voting. Thus, the Secretary's meritless—and repeatedly rejected—claim of "immunity" threatens to foreclose even the district court's timely consideration of meaningful relief. The identical argument has been *rejected* by courts in numerous similar cases, including two months ago by a motions panel of *this* Court in *Texas Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020) ("*TDP*"), and then again, *just four days ago*, when this Court summarily affirmed a substantively identical denial of the Secretary's assertion of sovereign immunity in *Lewis v. Hughs*.

The Secretary herself marked *Lewis v. Hughs* as a related case to this one. Thus, the same outcome is necessarily appropriate here. Moreover, while this appeal has been pending, the Secretary has continued to exercise her broad enforcement authority regarding the

Texas Election Code, while simultaneously disclaiming that authority in filings before this Court and the Texas district courts. *See* Ex. 22, Notice of Supp. Authority. As this Court properly recognized when it issued the order granting summary affirmance in *Lewis v. Hughs*, the Secretary cannot have it both ways and the question as to whether the Secretary has "some enforcement authority" regarding these laws is now firmly settled. *See* Ex. 7, *Lewis*, No. 20-50654 ("[W]e are convinced that no substantial question exists in this matter with respect to whether the Texas Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to satisfy *Ex parte Young*'s 'some connection' requirement.") (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). This Court reached the same result in *Texas Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020) ("TDP"). And the same is true here.

To ensure that this matter is swiftly decided, Plaintiffs respectfully propose that the Secretary be required to respond to this motion by September 10, and Plaintiffs file any reply by no later than September 11. Plaintiffs also respectfully request a decision by September 14, which leaves very little time to complete briefing and for the district court to issue an order in time for early voting.

Should this appeal languish, the Secretary will have been successful in running the clock on Plaintiffs' preliminary injunction motion, on a complaint that has been pending for almost a year, setting

dangerous precedent inviting defendants to procedurally hamstring time-sensitive efforts at the last minute, in order to enjoin unconstitutional conduct. This Court should decline to implicitly sanction the Secretary's gamesmanship and resolve this matter based on this emergency motion for summary affirmance.

INTRODUCTION

Plaintiffs' motion for preliminary injunction is indefinitely suspended because of the Secretary's interlocutory appeal of the order denying her motion to dismiss. *See* Ex. 13 at 1; *see also* Ex. 15 at 2. The sole issue on appeal is whether the Secretary has "some scintilla" of a connection to the Texas election laws at issue sufficient to satisfy the *Ex parte Young* exception to sovereign immunity. This is not an open issue: it has been addressed by this Court and deemed settled by district courts. Moreover, the Secretary's role in Texas elections—both in practice and as prescribed by the Texas Election Code—makes inarguable that she has more than the minimum connection necessary to thwart immunity.

BACKGROUND

I. Plaintiffs challenge Texas's newly-enacted prohibition on "temporary" or "mobile" early voting locations, on the basis that the prohibition will make it harder to vote in the November election.

Texas has closed more polling places than any other state. Ex. 18 at 17, Sept. 2019 Report on Polling Place Closures. In less than a decade, Texas has closed more than 750 polling places statewide. *Id.* HB 1888 is

the latest tactic to reduce opportunities for in-person voting throughout the state.

Indeed, HB 1888 was designed to cut opportunities for on-campus early voting, an opportunity that had helped pull Texas up and out of decades of abysmal youth turnout rates. *See* Ex. 10 at 25-26. As a collateral consequence of HB 1888's goal of suppressing the youth vote, elderly voters, disabled voters, and voters living in rural parts of the state will now suffer similar burdens on their right to vote. *Id.* at 2.

HB 1888 was unconstitutional before COVID-19 took hold, but the global pandemic only underscores HB 1888's devastating impact on the right to vote, given that sufficient numbers of in-person polling places are now also necessary to: avoid overcrowding; militate against the need to wait in hours-long lines to cast a ballot in person; and to avoid imposing longer travel times in order to cast a ballot in person when the cost of voting in person also carries with it the risk of exposure to a highly contagious and sometimes deadly disease.

HB 1888 reduces access to the franchise and increases the burden on voters and local election officials who, because of HB 1888's prohibition on temporary early voting locations, are now forced to utilize their finite elections resources less efficiently and in service of fewer voters.

II. The Secretary's dilatory interlocutory appeal is foreclosed by well settled law.

Consistent with decades of voting rights jurisprudence in Texas and this Circuit, Plaintiffs named the Secretary, who serves as Texas's chief elections official, in her official capacity, as the Defendant in this action. The Secretary filed a motion to dismiss in December of 2019, and, along with other arguments—none of which were meritorious or deprive the district court of jurisdiction to the extent they are even being appealed at all, which is unclear—asserted that sovereign immunity barred the case against her. *See* Exs. 5 & 6; *see also* Ex. 13.

When the district court denied the Secretary's Motion to Dismiss last month, the Secretary sought to appeal that Order and thereby put the brakes on any hope of relief before the November election. But as this Court reiterated regarding a substantively identical appeal by the Secretary in voting rights case four days ago, which the Secretary herself has indicated is related to this appeal, there is "no substantial question . . . with respect to whether the Texas Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code . . . to satisfy *Ex parte Young*'s 'some connection' requirement." Ex. 7, *Lewis*, No. 20-50654 (quoting *Ex parte Young*, 209 U.S. at 157). The same is true here.

LEGAL STANDARD

Federal Rule of Appellate Procedure 2 allows this Court "to expedite its decision" by "suspend[ing] any provision of [the Appellate] rules" and "summarily dispos[ing] of the appeal." *Groendyke v. Transp., Inc. v.*

Davis, 406 F.2d 1158, 1161 (5th Cir. 1969). This is appropriate where "time is truly of the essence," including "situations where important public policy issues are involved or those where rights delayed are rights denied." *Id.* at 1162.

ARGUMENT

I. Summary affirmance of the district court's order is warranted based on this Court's precedent.

Seemingly, the Secretary's sole argument on appeal—that sovereign immunity bars this case because the *Ex parte Young* exception does not apply—is, as the district court found, "a nonstarter." Ex. 12 at 2.[2] To avoid a default outcome on the merits of Plaintiffs' preliminary injunction motion and not implicitly sanction frivolous appeals, this Court should summarily dispose of this appeal, and quickly.

The district court was correct to conclude that sovereign immunity does not bar Plaintiffs' case against the Secretary because the *Ex parte Young* exception applies here. That exception "allows private parties to bring suits for injunctive or declaratory relief against individual state officials acting in violation of federal law" whenever a "state official, by virtue of his office," has "some connection with the enforcement of the [challenged] act . . . ." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir.

[2] To the extent that the Secretary intends to appeal any other aspect of the district court's order, which she has not made clear, she has never asserted that any such arguments deprive the district court of jurisdiction.

2019) ("*Austin*") (quotation marks omitted)). The Secretary's position that she—as the State's chief election officer—does not have the requisite connection to the Texas Election Code to satisfy *Ex parte Young* is devoid of factual and legal support. The Secretary's argument (a) is foreclosed by this Court's precedent, (b) has been—consistent with this Court's precedent—uniformly and without confusion rejected by courts that have considered it time and again, and (c) runs contrary to the facts established during discovery here.

Fifth Circuit caselaw renders this interlocutory appeal futile. Indeed, *four days ago*, this Court summarily affirmed a substantively identical decision in a related case, noting that "we are convinced that no substantial question exists in this matter with respect to whether the Texas Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to satisfy *Ex parte Young*'s 'some connection' requirement." Ex. 7, *Lewis*, No. 20-50654 (quoting *Ex parte Young*, 209 U.S. at 157). This related case, which this the Secretary has acknowledged to raise identical issues on appeal as those raised in *Lewis*, demands the same result.

And the *Lewis* decision was hardly unexpected. A motions panel of this Court previewed the Secretary's precise argument just two months ago when it considered a stay of a preliminary injunction pending appeal in another case that also concerns voting laws in Texas. *TDP*, 961 F.3d at 401. The panel gave no credence to the Secretary's sovereign immunity

argument, noting that the Secretary "bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to . . . . suggest[] that *Young* is satisfied," based on Fifth Circuit's precedent. *Id.* at 401. Though the panel noted that, "[t]he precise scope of the 'some connection' requirement is still unsettled," the "bare minimum"—that there be "'some scintilla' of [enforcement] by the state official"—is indeed satisfied in such a case. *Id.* at 400 (quoting *Austin*, 943 F.3d at 1002).

The Secretary's argument that she lacks even the smallest scintilla of a connection to enforcement of HB 1888 to satisfy *Ex parte Young* is therefore meritless. "Panels in this circuit have defined 'enforcement' as 'typically involv[ing] compulsion or constraint.'" *Austin*, 943 F.3d at 1000 (citing cases). The Secretary—as Texas's "chief election officer" under Texas Elec. Code § 31.001—constrains local election officials' use of mobile polling locations, and she is compelled to enforce HB 1888. Texas Election Code § 31.003 unequivocally states that the Secretary "shall obtain and maintain uniformity in the application, operation, and interpretation of" Texas's election laws, including by "prepar[ing] detailed and comprehensive written directives and instructions relating to and based on this code and the election laws outside this code," which include HB 1888. The word "shall" makes clear that the Secretary's duties are mandatory. *See Valdez v. Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001). Moreover, the Secretary has power under § 31.005(a)-(b) to "take appropriate action to protect" voting rights "from abuse by the authorities

administering the state's electoral processes," which includes "order[ing] the person to correct the offending conduct." The Secretary's broad enforcement authority under these statutes is sufficient for this Court to summarily affirm the district court's ruling rejecting her sovereign immunity argument. Ex. 12 at 5-6.

Only two months ago, in *TDP*, this Court pointed directly to those statutory provisions and its past precedent when it gave no credence to the same argument that the Secretary makes here. 961 F.3d at 399-401. The motions panel based its reasoning on *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017)—a case concerning standing—given the "significant overlap" between standing and *Ex parte Young* analyses. *TDP*, 961 F.3d at 401 (quoting *Air Evac EMS, Inc. v. Tex., Dep't of Ins.*, 851 F.3d 507, 520 (5th Cir. 2017)). In *OCA-Greater Houston*, this Court held that the "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.'" 867 F.3d at 613 (quoting Tex. Elec. Code § 31.001(a)).

The *OCA-Greater Houston* holding similarly supports the district court's ruling here. This Court has repeatedly stated that its "caselaw shows that a finding of standing tends toward a finding that the *Young* exception applies to the state official(s) in question." *Austin*, 943 F.3d at 1002. "That is, because it's been determined that an official can act, and there's a significant possibility that he or she will act to harm a plaintiff,

the official has engaged in enough 'compulsion or constraint' to apply the *Young* exception." *Id.* It defies logic to suggest that the Secretary could redress injury caused by Texas's election statutes without having "some scintilla" of a connection to those statutes' implementation and enforcement.

Even beyond the Secretary's clear enforcement authority under Tex. Elec. Code §§ 31.001 and 31.005(a)-(b)—which is sufficient to reject the Secretary's sovereign immunity argument outright—the Secretary's own public resources confirm that she takes "actions that constrain[] the [P]laintiffs," *Austin*, 943 F.3d at 1001, and confirm her connection HB 1888. In fact, the Secretary has issued at least one Election Advisory regarding the implementation of HB 1888, providing more than sufficient evidence of the likelihood of her enforcement. *See* Ex. 19.

The district court rightly rejected the Secretary's attempt to distance herself from her statutory duties based on the fact that local election officials, not her personally, determine the early-voting polling locations and that it is enforced through election contests filed by losing candidates. *See* Ex. 12 at 5. Under this Court's precedent, the Secretary need not directly enforce the challenged laws; rather, "actions that constrain[] the plaintiffs"—as detailed above—are "sufficient to apply the *Young* exception." *Austin*, 943 F.3d at 1001.

To be sure, the Secretary's role in the enforcement of election laws and administration of elections is hardly new. For decades this Circuit

has allowed similar suits against the Secretary. *See, e.g. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (concerning volunteer deputy registrars); *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006) (concerning whether party officer can declare candidate ineligible); *Texas Indep. Party v. Kirk*, 84 F.3d 178 (5th Cir. 1996) (concerning declaration of intent to run for office). Nearly fifty years ago, in a decision affirmed by the Supreme Court, a federal court in the Eastern District of Texas found that the Secretary is "responsible for the enforcement of the Texas election laws." *Tolpo v. Bullock*, 356 F. Supp. 712, 713 (E.D. Tex. 1972), *aff'd*, 410 U.S. 919 (1973) ("Defendant, Bob Bullock, is the Secretary of State of Texas, responsible for the enforcement of the Texas election laws."). Because little has changed regarding the Secretary's broad enforcement authority, this Court should summarily affirm the order denying immunity below.

CONCLUSION

Plaintiffs' complaint, this Court's precedent, and the Secretary's own election resources all foreclose the argument that she does not have "some scintilla" of a connection to the enforcement the Texas Election Code, including HB 1888. Because it is well-settled that enforcement of a challenged law provides a "connection" sufficient to warrant the *Ex parte Young* exception to immunity, this Court should summarily affirm the District Court's denial of the Secretary's motion to dismiss on sovereign

immunity grounds, as it did mere days ago in the related case *Lewis v. Hughs*, No. 20-50654 (5th Cir. Sept. 4, 2020).

DATED: September 8, 2020

/s/John M. Geise
John M. Geise

Marc E. Elias
John M. Geise
Alexi M. Velez*
Jyoti Jasrasaria*
PERKINS COIE LLP
700 Thirteenth St. NW, Ste. 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6338
Facsimile: (202) 654-9996

Kevin J. Hamilton*
Amanda J. Beane*
PERKINS COIE LLP
1201 Third Ave., Ste. 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000

Counsel for Plaintiffs-Appellees Gilby, Texas Democratic Party, DSCC, and DCCC

Chad W. Dunn
TX State Bar No. 24036507
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

Counsel for Plaintiff-Appellee Texas Democratic Party

Renea Hicks
Attorney at Law
Texas Bar No. 09580400
LAW OFFICE OF MAX RENEA HICKS
P.O. Box 303187
Austin, Texas 78703-0504
(512) 480-8231
rhicks@renea-hicks.com

Counsel for Plaintiff-Appellee Terrell Blodgett

**5th Cir. Admission Pending*

CERTIFICATE OF SERVICE

On September 8, 2020, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) no privacy redactions were required under 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 and is free of viruses.

/s/ John M. Geise
John M. Geise

Counsel for Plaintiffs-Appellees Gilby, Texas Democratic Party, DSCC, and DCCC

CERTIFICATE OF CONFERENCE

On September 4, 2020, counsel for Plaintiffs-Appellees contacted counsel for Defendant-Appellant regarding this motion and the emergency relief requested herein.

/s/ John M. Geise
John M. Geise

Counsel for Plaintiffs-Appellees Gilby, Texas Democratic Party, DSCC, and DCCC

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3,171 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type-style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

/s/ John M. Geise
John M. Geise

Counsel for Plaintiffs-Appellees Gilby, Texas Democratic Party, DSCC, and DCCC

CERTIFICATE OF COMPLIANCE WITH RULE 27.3

I certify the following motion complies with Fifth Circuit Rule 27.3:

- Before filing, counsel for Plaintiffs-Appellees contacted the Clerk's Office and opposing counsel to advise them of Appellees' intent to file this motion.

- The facts stated herein supporting emergency consideration of this motion are true and complete.

- The Court's review of this motion is requested by September 14, 2020.

- True and correct copies of relevant documents are attached as Exhibits to this motion, filed separately.

- This motion is being served at the same time it is being filed.

/s/ John M. Geise
John M. Geise

Counsel for Plaintiffs-Appellees Gilby, Texas Democratic Party, DSCC, and DCCC