

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMILY GILBY; TEXAS DEMOCRATIC
PARTY; DSCC; DCCC,

Plaintiffs,

v.

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

Defendant.

CIVIL ACTION NO. 1:19-cv-01063

THE TEXAS SECRETARY OF STATE’S UNOPPOSED MOTION TO CONSOLIDATE

During its 2019 Regular Session, the Texas Legislature enacted House Bill 1888, which prevents local officials from engaging in selective vote harvesting and requires 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” for, in most cases, at least eight hours per day). Recently, two groups of plaintiffs filed separate lawsuits challenging the constitutionality of HB 1888. These cases raise nearly identical legal issues and, in the interests of judicial economy and efficiency of the parties, should be consolidated. Plaintiffs in both cases do not oppose consolidation.

BACKGROUND

On November 26, 2019, Plaintiffs Emily Gilby, the Texas Democratic Party, DSCC, and DCCC filed their first amended complaint against Secretary of State Ruth Hughs, asserting that HB 1888 (1) imposes an undue burden on the right to vote, ECF No. 18 ¶¶ 38–45, (2) violates the Equal Protection Clause, *id.* ¶¶ 46–51, and (3) violates the Twenty-Sixth Amendment, *id.* ¶¶ 52–57.

That same day, Plaintiffs Terrell Blodgett, the Texas Young Democrats, and the Texas College Democrats sued Secretary Hughs. *See* Original Compl., *Blodgett v. Hughs*, No. 1:19-cv-01154 (W.D. Tex. Nov. 26, 2019), ECF No. 1 (“Blodgett Compl.”). Like the *Gilby* Plaintiffs, the *Blodgett* Plaintiffs contend that HB 1888 (1) imposes an undue burden on the right to vote, Blodgett Compl. ¶¶ 25–26, (2) violates the Equal Protection Clause, *id.* ¶¶ 27–28, and (3) violates the Twenty-Sixth Amendment, *id.* ¶¶ 29–30. The only substantive difference between the two lawsuits is that the *Blodgett* Plaintiffs also allege that HB 1888 violates Title II of the Americans with Disabilities Act. *See id.* ¶¶ 31–32.

Both cases are pending in the Western District of Texas before the Honorable Lee Yeakel. Secretary Hughs filed a motion to dismiss the *Gilby* Plaintiffs’ claims on December 10, 2019, and filed a largely identical motion to dismiss the *Blodgett* Plaintiffs’ claims on December 17, 2019. Because of their substantial overlap and nearly identical procedural postures, the Secretary asks the Court to consolidate the *Blodgett* case with the *Gilby* case.

ARGUMENT

Federal Rule of Civil Procedure 42(a)(2) permits the Court to consolidate actions that involve a common question of law or fact. “Trial judges are urged to make good use of Rule 42(a),” *Dupont v. S. Pac. Co.*, 366 F.2d 193, 195 (5th Cir. 1966), in order to “expedite trial and eliminate unnecessary repetition and confusion,” *Miller v. U.S. Postal Serv.*, 729 F.2d 1033, 1036 (5th Cir. 1984) (citing *In re Air Crash Disaster*, 549 F.2d 1006, 1013 (5th Cir. 1977)).

“Actions that involve the same parties are apt candidates for consolidation.” *Hanson v. District of Columbia*, 257 F.R.D. 19, 21 (D.D.C. 2009) (citing 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2384 (3d ed. 2017)). But “[i]dentity of the parties is not a prerequisite. To the contrary, cases may be consolidated even where certain defendants are named in only one of the Complaints or where . . . the plaintiffs are different but are asserting identical questions of law.” *Nat’l Ass’n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 770 F. Supp. 2d 283, 286 (D.D.C. 2011); *see*

also *Utah v. U.S. Dep't of Interior*, 45 F. Supp. 2d 1279, 1281 (D. Utah 1999) (ordering consolidation of cases brought by different plaintiffs against the same defendant because they presented the same issues of law and fact). “Consolidation does not so completely merge the two cases as to deprive a party of any substantial rights that he may have had if the actions had proceeded separately, for the two suits retain their separate identities and each requires the entry of a separate judgment.” *Miller*, 729 F.2d at 1036.

The *Gilby* and *Blodgett* cases should be consolidated because the legal issues substantially overlap, and consolidation will avoid duplicative litigation. Both cases hinge on the overarching question of (1) whether Plaintiffs can overcome Secretary Hughs’s immunity from suit; (2) whether Plaintiffs have standing to assert their claims; and (3) whether HB 1888 violates the Constitution. Because the legal issues raised in the respective lawsuits are essentially identical, it makes little sense to proceed with separate cases to address them. The fact that the *Blodgett* Plaintiffs also assert an ADA claim does not preclude consolidation because the cases unquestionably involve multiple common questions of law and fact. *See, e.g., Sampson v. Schenck*, 2013 WL 486879, at *5 (D. Neb. Feb. 6, 2013) (consolidating cases even though plaintiffs argued that they were advancing different theories of liability, reasoning that the “cases clearly present common issues of law and fact, the cases involve the same defendants, nearly identical causes of action, and relate to the same time period and events.”). Both cases are also in the preliminary stages, and thus, no party will be prejudiced by the consolidation. *See Hanson*, 257 F.R.D. at 22 (consolidating cases that were “still in their nascent stages” and rejecting argument that one group of plaintiffs would be unfairly prejudiced). Indeed, Plaintiffs in the two cases do not oppose consolidation.

Moreover, the minor differences between some of the named parties does not diminish the support or need for consolidation. *See Needbasedapps LLC v. Robbins Research Intern., Inc.*, 926 F. Supp. 2d 907, 913 (W.D. Tex.—San Antonio Division, Feb. 20, 2013) (explaining in the context of the first-

to-file rule that “[t]he rule does not require that the claims or even the parties be identical,” but the “‘crucial inquiry’ for the court . . . is whether there is ‘substantial overlap’ between the two actions.” (quoting *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997)). Because the issues in *Gilby* and *Blodgett* overlap and the differences between the named parties are minor and immaterial—indeed, Secretary Hughs is named as a defendant in both cases—the Court should consolidate the cases, making *Gilby* the lead case. *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999) (“The Fifth Circuit adheres to the general rule, that the court in which an action is first filed is the appropriate court to determine whether subsequently filed cases involving substantially similar issues should proceed.” (citation, quotation marks and alteration omitted)).

CONCLUSION

Secretary Hughs asks this Court to consolidate the *Gilby* and *Blodgett* cases to decide the same legal issues in what is essentially the same case. Because the *Gilby* case was first-filed, the interests of justice and judicial economy warrant consolidating *Blodgett* with this case. Therefore, Secretary Hughs respectfully requests that the Court consolidate the *Blodgett* case with this matter.

Date: December 18, 2019

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Respectfully submitted.

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CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for Plaintiffs in *Gilby, et al., v. Hughs*, and *Blodgett, et al. v. Hughs*, on December 17, 2019. The *Blodgett* Plaintiffs do not oppose consolidation. Counsel for the Secretary has conferred with counsel for the plaintiffs in *Emily Gilby, et al. v. Ruth Hughs*, No. 1:19-cv-01063. They have no objection to the consolidation of this matter with *Terrell Blodgett, et al. v. Ruth R. Hughs*, No. 1:19-cv-01154, but emphasized in doing so their position that they have separate and distinct interests than the plaintiff's in *Blodgett* and may have differing positions on various issues as the litigation proceeds. Thus, if the consolidation motion is granted, they respectfully request the opportunity to brief issues separately, as they arise throughout the litigation, and without sharing page limitations with the *Blodgett* plaintiffs.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on December 18, 2019, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
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