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

EMILY GILBY, *et al.*, *Plaintiffs*, v. RUTH R. HUGHS, in her official capacity as Texas Secretary of State, *Defendant*.	
TERRELL BLODGETT, *et al.*, *Plaintiffs*, v. RUTH R. HUGHS, in her official capacity as Texas Secretary of State, *Defendant*.	Civil Action No. 1:19cv01063-LY

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Terrell Blodgett, Texas Young Democrats ("TYD" or "Young Democrats"), and Texas College Democrats ("TCD" or "College Democrats") (collectively, "Blodgett Plaintiffs") respond as follows in opposition to the Texas Secretary of State's Motion to Dismiss, ECF No. 5 ("SOS Motion").[1]

[1] The motion was originally docketed in No. 1:19cv01154-LY, which has since been consolidated into No. 1:19cv01063-LY. ECF No. 6 (Order of Dec. 30, 2019). This response collectively refers to the original set of plaintiffs in the latter case as the Gilby Plaintiffs and to their response opposing the Secretary's motion to dismiss, ECF No. 28, as the Gilby Response.

I. THE CONSTITUTIONAL CLAIMS ARE VIABLE AND SHOULD NOT BE DISMISSED.

The Gilby Plaintiffs and the Blodgett Plaintiffs raise the same three sets of constitutional claims under the First, Fourteenth, and Twenty-Sixth Amendments. *Compare Gilby* First Amended Complaint ¶¶ 38-57 (ECF No. 18) *with* Blodgett Original Complaint ¶¶ 25-30.[2] The substantive constitutional issues, as well as the standard of review and such associated issues as standing and the appropriateness of the Secretary as the defendant, have already been addressed in the Gilby Response.

A. Rule 10(c) Incorporation By Reference of Gilby Response

To lessen repetition, the Blodgett Plaintiffs hereby incorporate by reference under Rule 10(c) of the Federal Rules of Civil Procedure the Gilby Response, the Geise Declaration, and the four exhibits (A-D) included with the declaration. Taken together, these incorporated filings fully cover the reasons why the SOS Motion should be denied. The Secretary is properly the defendant. The Blodgett Plaintiffs have standing to raise the constitutional challenges (about which more below in Part I.B). And the three constitutional challenges are adequately pleaded and viable.

The Gilby Response explains why the Secretary's proffered interpretation of *City of Austin v. Paxton* is wrong, failing to seriously call into question the proposition that the proper defendant here is the Secretary. Gilby Response at 7-9. *Paxton* has since been published at 943 F.3d 993.

[2] This complaint was docketed as ECF No. 1 in the pre-consolidation *Blodgett* case.

B. The Blodgett Plaintiffs Have Standing.

All of the Blodgett Plaintiffs satisfy the pleading requirements for standing to press forward with their claims. As alleged by all of them, for the upcoming 2020 election cycle and continuing into the future, the Blodgett Plaintiffs will "continue to have their ability to vote discriminatorily abridged" as long as House Bill 1888 is on the books. Blodgett Orig. Complaint ¶ 24.

But, as pointed out by the Gilby Plaintiffs, the case is to proceed even if only one of them establishes standing. Gilby Response at 10. The Fifth Circuit has only very recently re-emphasized this principle. *See Texas v. United States*, 2019 WL 6888446 (5th Cir. Dec. 18, 2019), at *8 ("[o]nly one plaintiff need succeed [in establishing standing] because 'one party with standing is sufficient to satisfy Article III's case-or-controversy requirement'").

1. Mr. Blodgett Has Standing.

The Secretary's challenge to Mr. Blodgett's standing fails for the same reasons its challenge to Ms. Gilby's standing fails. *See* Gilby Response at 10-12 (discussing Ms. Gilby's standing). Mr. Blodgett has alleged a non-speculative injury-in-fact from the passage and Secretary-directed implementation of House Bill 1888. After an unbroken three-quarters of a century of voting by personal appearance, Mr. Blodgett missed voting in November 2019 after House Bill 1888's elimination of the use of temporary polling places. Blodgett Orig. Complaint ¶¶ 16-18. Due to House Bill 1888, the mobile voting location that had previously been available at the senior living facility, Westminster, where he lives now was no longer available and, in combination

with his disability, the absence has caused him to miss voting. Blodgett Orig. Complaint ¶¶ 18-20.

The Secretary attacks Mr. Blodgett's standing by arguing that it is entirely speculative whether he will be unable to vote at an early polling location at Westminster in future elections. Secretary Motion at 8. But this argument fails because his claim of injury in future voting efforts due to the absence of a polling location at Westminster is not speculative. House Bill 1888 means that it would be illegal for Westminster to be served with a temporary mobile voting place in the upcoming elections. Blodgett Orig. Complaint ¶¶ 2, 12, 18. And the County Clerk of Travis County, who serves as the election administrator, has already explained that it is "likely" that there will be no early voting location at Westminster during the 2020 election—unless House Bill 1888 is enjoined. Gilby Resp. Ex. B (Declaration of Dana DeBeauvoir) ¶ 17. "Likely" is a far cry from "speculative." Mr. Blodgett has established through the pleading stage that he is injured in fact by House Bill 1888's ban on temporary early voting locations and will continue to be as long as it is enforceable.

2. The Young Democrats And The College Democrats Have Standing.

The Young Democrats and the College Democrats have pleaded facts sufficient to establish their standing, both organizationally and associationally, to challenge House Bill 1888's constitutionality.

The Young Democrats is a statewide, 21-chapter organization whose mission includes electoral work to encourage and further actions to increase and enhance voter turnout, particularly among its college members. Blodgett Orig. Complaint ¶ 7. Its

membership includes registered Texas voters who live on or near college campuses in the Austin area, but have limited transportation options. *Id*. House Bill 1888 disadvantages TYD and its members by impeding their efforts to expand the electoral franchise. *Id*. ¶ 21. It did this in the November 2019 election, *id*. ¶ 22, and is "likely" to do so again at Austin-area college campuses, DeBeauvoir Decl. ¶ 17.

The College Democrats are in the same situation as the Young Democrats as far as the standing argument is concerned. With more than 1,000 members in its 20+ on-campus chapters across the state, its mission includes training and developing leaders to organize their college campuses and the college community more broadly speaking. Blodgett Orig. Complaint ¶ 8. A key part of this effort is to "encourage and further state and local government actions to increase and enhance voter turnout," particularly among its members *Id*. As it does with the TYD's aims, House Bill 1888 impedes the TCD's ability to further its mission in enhancing voter participation and will continue to do so in the future. *Id*. ¶¶ 21, 23; DeBeauvoir Decl. ¶ 17.

Both as organizations and associationally as to their members, the Young Democrats and the College Democrats face continuing injury from House Bill 1888's strictures as long as it is enforceable. Blodgett Orig. Complaint ¶ 24. As already explained by the Gilby Plaintiffs, this suffices under Article III for both types of standing. *See* Gilby Resp. at 12-16.[3]

[3] The argument of the Gilby Plaintiffs refuting the Secretary's § 1983 argument, Gilby Resp. at 16-20, needs no further elaboration.

II. MR. BLODGETT'S CLAIM UNDER THE AMERICANS WITH DISABILITIES ACT SHOULD NOT BE DISMISSED.

A. The ADA Claim Should Not Be Dismissed Because Of The Related § 1983 Claim.

The Secretary is wrong in her one-sentence footnote argument, Secretary Motion at 19 n.6, that the Americans With Disabilities Act claim by Mr. Blodgett[4] should be dismissed because it is asserted under 42 U.S.C. § 1983. The cited authority, *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407 (5th Cir. 2004), does not support the argument that Mr. Blodgett's ADA Title II claim is improperly asserted. Mr. Blodgett is not seeking monetary relief. Rather, he seeks prospective relief under the ADA. Blodgett Orig. Complaint ¶ 33.b. *McCarthy* specifically holds that the ADA allows state officials to be sued in their official capacities for prospective relief under Title II. 381 F.3d at 413-14. That is precisely what Mr. Blodgett has done, and it is properly done.

If the Secretary's argument is that the Title II-based ADA claim is superfluous, the argument is of no moment in any event, but it also is not supported by case authority. Mr. Blodgett alleges a Title II claim, with our without a § 1983 underpinning. Blodgett Orig. Complaint ¶¶ 4, 31-32. Title II of the ADA provides a private right of action. *Frame v. City of Arlington*, 657 F.3d 215, 221 (5th Cir. 2011), *cert. denied*, 565 U.S. 1200 (2012). Besides, the question of whether a § 1983 claim can be added under the ADA to an ADA cause of action is not pertinent unless the "*only* alleged deprivation" is of rights created under the ADA. *Holbrook v. City of Alpharetta*, 112 F.3d

[4] Mr. Blodgett is the only one of the Blodgett Plaintiffs making the ADA claim.

1522, 1531 (11th Cir. 1997) (emphasis added). The ADA, of course, is not the only legal deprivation alleged here by Mr. Blodgett.

B. Mr. Blodgett has stated a claim under the ADA.

The Secretary's argument on the ADA is really not that no ADA claim is asserted in the complaint. Rather, it is that Mr. Blodgett will not be able to prove the ADA violation he has alleged. This is not an argument that can support dismissal under the standards governing Rule 12(b)(6) motions, and accordingly it should be denied.

The authority the Secretary herself cites, *Hale v. King*, 642 F.3d 492 (5th Cir. 2011), requires a Title II plaintiff to allege that he has a qualifying disability, that he is being denied the benefits of services, programs, or activities for which the sued public entity is responsible (or is otherwise discriminated against by the public entity), and that the discrimination is by reason of the person's disability. *Id*. at 499. Mr. Blodgett has precisely met this minimum pleading requirement in his allegations. Blodgett Orig. Complaint ¶¶ 6, 15, 19-20, and 32. It does not appear that the Secretary offers an argument to the contrary.

The Secretary does posit, without any supporting authority whatever, that if Mr. Blodgett is able to vote early by mail, that suffices to defeat his ADA claim. Secretary Mot. at 20. This unsupported argument fails. Mr. Blodgett has alleged that voting *in person* is, and has long been, a critical element of his participation in the democratic process. *See, e.g.*, Blodgett Orig. Complaint ¶¶ 16, 19-20. The argument is that, through House Bill 1888, this kind of in-person voting participation has been purposely thwarted. As far as any authority is concerned, it is no defense to an ADA

claim that this kind of purposeful discrimination is insufficiently discriminatory to be a violation on its own.

Similarly—and again without any supportive ADA statutory or case law authority—that Secretary argues that other accommodations suffice to "make up" for the discriminatory impairment Mr. Blodgett complains of. Secretary Motion at 20. But this argument, if it is to be countenanced at all, only comes into play in the "proof" phases of this case. It has no place in the pleading phase, and the Court should reject it by denying the ADA part of the Secretary's Motion (as well as the constitutional part).

CONCLUSION

For the foregoing reasons, the Court should deny the Secretary's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing, filed on December 31, 2019, was served the same day on all counsel of record via the Court's electronic mail service.

/s/ Renea Hicks
Max Renea Hicks