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

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC; TERRELL BLODGETT; TEXAS YOUNG DEMOCRATS; TEXAS COLLEGE DEMOCRATS,

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 REPLY IN SUPPORT OF HER MOTION TO DISMISS THE BLODGETT PLAINTIFFS' COMPLAINT

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INTRODUCTION

Plaintiffs' complaint should be dismissed. *See* Defendant's Motion to Dismiss ("MTD"), Civil Action No. 1:19-cv-01154, ECF 5. Plaintiffs do not plausibly allege standing or a violation of the Americans with Disabilities Act ("ADA"). Their Response in Opposition ("Resp."), ECF 34, only doubles down on fatally-flawed theories.[1]

ARGUMENT

I. The Blodgett Plaintiffs Lack Standing to Challenge HB 1888

The Secretary previously argued that no plaintiff plausibly alleged standing. MTD at 5–10. Plaintiffs' Response does not undermine those arguments.

A. Blodgett Lacks Standing

Blodgett does not have standing because he has not plausibly alleged that he will be unable to vote at his residence in 2020. MTD at 7–8. In response, Plaintiffs claim "the absence of a polling place" from Blodgett's residence "is not speculative" because "it would be illegal for [Blodgett's residence] to be served with a temporary mobile voting place in the upcoming elections." Resp. at 4. Plaintiffs misstate the law. HB 1888 requires that "each temporary branch polling place . . . remain open" for a minimum number of hours. Tex. Elec. Code § 85.064(b). It does not prohibit local officials from putting a polling place at Blodgett's residence.

Plaintiffs also point to the Travis County Clerk's assertion that it is "likely" there will not be an early voting location at Blodgett's residence unless HB 1888 is enjoined. Resp. at 4. As an initial matter, this "evidence" is not properly before the Court. Plaintiffs' complaint does not allege anything

[1] The Blodgett Plaintiffs incorporated by reference the Gilby Plaintiffs' response to the Secretary's motion to dismiss the Gilby Plaintiffs' complaint. Resp. at 2. To avoid duplicative briefing, the Secretary likewise incorporates her reply to the Gilby Plaintiffs' response. *See* ECF 33. She does not waive any of the arguments raised in her motion to dismiss the Blodgett Plaintiffs' complaint.

about the Travis County Clerk or Travis County's future decisions regarding polling places. "[A]n opposition to a motion to dismiss is not the place for a party to raise new factual allegations . . . ." *Sartin v. EKF Diagnostics, Inc.*, No. 2:16-cv-1816, 2016 WL 3598297, at *4 (E.D. La. July 5, 2016) (dismissing for lack of standing after refusing to consider facts not contained in the complaint). Moreover, the declaration Plaintiffs cite, at most, makes assertions regarding Travis County's intentions as of the date of the declaration, not as of "the time the complaint [wa]s filed." *Pluet v. Frasier*, 355 F.3d 381, 386 n.3 (5th Cir. 2004); *compare* ECF 29-3, 5 (dated December 20, 2019), *with* Compl. (dated November 26, 2019).

Even if the declaration were relevant at this stage, it merely asserts that "Travis County likely will not be able to place an early voting location at [Blodgett's] senior living facility during the 2020 General Election." ECF 29-3, 5. It provides no facts justifying that conclusion. The declaration does not state that the relevant local officials have already decided where to establish early voting locations, and it does not explain which factors inform those local decisions.

In any event, "likely" is not the relevant standard. Resp. at 4. The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted).

For these reasons, Blodgett lacks standing.

B. The Texas Young Democrats and the Texas College Democrats Also Lack Standing

The Secretary's motion to dismiss argued that the Texas Young Democrats and Texas College Democrats cannot establish associational standing because they have not "identif[ied] members who have suffered the requisite harm." MTD at 8. Plaintiffs do not remedy that failing in their Response. Instead, they rely on generalized allegations of harm without reference to any specific individual members. Resp. at 4–5. But in *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009), the Supreme Court "required plaintiffs claiming an organizational standing to identify members who have suffered

the requisite harm." The dissent would have "accept[ed] the organization's self-description of the activities of its members" and then determined whether "there is a statistical probability that some of those members are threatened with concrete injury." *Id.* at 497. The majority rejected that approach because the "requirement of naming the affected members has never been dispensed with in light of statistical probabilities." *Id.* at 498–99. Even when "it is certainly possible—perhaps even likely—that one" member would have standing, "that speculation does not suffice." *Id.* at 499.

Similarly, in *NAACP v. City of Kyle*, the Fifth Circuit found no associational standing because the NAACP had not established that "a specific member of the NAACP has been" injured. 626 F.3d 233, 237 (5th Cir. 2010). "[E]vidence suggesting, in the abstract, that some minority members may be" injured was "insufficient." *Id.*

Plaintiffs do not allege that Blodgett is a member of either organization, nor is there any indicia of his membership in either organization. Because Plaintiffs do not identify any other member of their organizations with standing, the Texas Young Democrats and the Texas College Democrats lack associational standing to assert their claims.

Even if the organizational plaintiffs had identified individual members, they still would not be able to establish standing. Just as Blodgett does not plausibly allege the future locations of Travis County polling places, neither do the Texas Young Democrats or the Texas College Democrats plausibly allege the future locations of polling places in any county. *See supra* Part I.A; Reply to Gilby Plaintiffs (ECF 33) at 4–5.

Nor do Plaintiffs have organizational standing. MTD at 9–10. Plaintiffs focus on their efforts "to increase and enhance voter turnout," Resp. at 4–5, but an "abstract social interest in maximizing voter turnout . . . . cannot confer Article III standing." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014). Regardless, Plaintiffs do not plausibly allege that HB 1888 prevents them from pursuing that interest. MTD at 10.

Moreover, Plaintiffs do not explain how they can satisfy the *City of Kyle* requirements for organizational standing. They have neither alleged that their reactions to HB 1888 "differ from [their] routine [political] activities" nor "identified any specific projects" allegedly put on hold. MTD at 10 (quoting *City of Kyle*, 626 F.3d at 238). Plaintiffs offer no substantive response to this point. Plaintiffs bear the burden of establishing organizational standing, and they have failed to do so.

II. HB 1888 Does Not Violate the ADA

Blodgett attempts to bring his ADA claim "through 42 U.S.C. § 1983." Compl. ¶ 4; *id.* at 11. But "a plaintiff may not maintain a section 1983 action in lieu of—or in addition to—a Rehabilitation Act or ADA cause of action if the only alleged deprivation is of the [plaintiff's] rights created by the Rehabilitation Act and the ADA." *Lollar v. Baker*, 196 F.3d 603, 610 (5th Cir. 1999) (quoting *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1531 (11th Cir. 1997)); *see also Doe v. Eanes Indep. Sch. Dist.*, No. 1:19-cv-538-LY, 2019 WL 5693767, at *4 (W.D. Tex. Nov. 4, 2019) (report recommending dismissal of a § 1983 claim alleging a violation of Title II of the ADA); MTD at 19 n.6.

In response, Plaintiffs focus on the type of relief Blodgett seeks, Resp. at 6, but that is irrelevant because § 1983 does not provide a cause of action at all. Similarly, Plaintiffs rely on their claims, in other counts, that HB 1888 is unconstitutional. Resp. at 6–7. But those claims do not affect Blodgett's ADA claim (Count IV), in which "the only alleged deprivation is of [Blodgett's] rights created by . . . the ADA." *Lollar*, 196 F.3d at 610. Whether Blodgett can use a private cause of action created by the ADA itself is a separate question, one not presented by a complaint that expressly and exclusively relies on § 1983. *See Stassart v. Lakeside Joint Sch. Dist.*, No. 5:09-cv-1131, 2009 WL 3188244, at *11 (N.D. Cal. Sept. 29, 2009) (dismissing an ADA claim because the ADA did not provide a proper cause of action and noting that the plaintiff should amend her complaint if she wanted "to rely upon other statutes, such as . . . § 1983").

Moreover, Blodgett has not plausibly alleged that he faces disability-based discrimination. HB

1888 is a neutral law of general applicability. No one disputes that it applies equally to all relevant polling places. Thus, the bare assertion that HB 1888 "was enacted with the intent, and has the effect, of making access to voting facilities inaccessible and unusable by Plaintiff Blodgett" is not a plausible factual allegation. Compl. ¶ 32; *see Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("These bare assertions . . . amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim . . . .").

Plaintiffs' claim of discrimination is even less plausible in light of the numerous and robust accommodations available to voters with disabilities. As the Secretary noted in her motion, older voters and voters with disabilities can vote by mail, which makes the locations of polling places irrelevant. MTD at 20. (This is also why Blodgett has not been "excluded from participation in" voting. 42 U.S.C. § 12132.)

Plaintiffs do not disagree that Blodgett can vote by mail. Instead, they argue that he wants to vote "*in person*." Resp. at 7. But as the Secretary already briefed, a plaintiff does not have the categorical right to his preferred method of voting. MTD at 7–8; *see McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 810–11 (1969); *Veasey v. Abbott*, 830 F.3d 216, 307 (5th Cir. 2016) (Jones, J., concurring in part).

But even if Blodgett had a right to vote by his preferred method, he still would not have plausibly alleged a violation of the ADA. Texas law requires polling places to provide various accommodations to voters with disabilities, including those voters who cannot enter a polling place. MTD at 20. Indeed, local officials must "provide[] a practical and effective means for voters with physical disabilities to cast a secret ballot." Tex. Elec. Code § 61.012(a)(2). Neither the Complaint nor the Response explains why these accommodations would not work for Blodgett.

To the extent Plaintiffs argue these accommodations are not adequate, they have not presented a realistic alternative. There may be home-bound Texans who want to vote in person, despite the vote-

by-mail option. But local officials cannot establish polling places in the residences of all such voters. Even the repeal of HB 1888 would not change that. The ADA does not require local officials to establish polling places in the residences of each voter with a disability, especially given the option to vote by mail. In any event, Plaintiffs have not even alleged that Blodgett's "disability and its consequential limitations were known by" the Secretary, the Legislature, or any other state entity. *Windham v. Harris Cty.*, 875 F.3d 229, 236 (5th Cir. 2017) (noting such knowledge is "[a] critical component of a Title II claim for failure to accommodate").

In short, Blodgett does not allege that anyone treats him differently because of his disability. He remains legally permitted to vote by all methods open to similarly situated Texans. He does not dispute he is able to vote through at least one of those methods, and he does not explain why the others would not work. His ADA claim can succeed only if federal law requires polling places in the residence of any disabled voter who prefers to vote in person. That would be absurd.

CONCLUSION

For these reasons and those briefed in conjunction with the Secretary's motion to dismiss the Gilby Plaintiffs' claims, the Secretary respectfully requests that the Court dismiss the Blodgett Plaintiffs' complaint.

Date: January 7, 2020

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy Attorney General for Legal Counsel

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN
Associate Deputy for Special Litigation

TODD LAWRENCE DISHER
Deputy Chief, Special Litigation Unit

MATTHEW H. FREDERICK
Deputy Solicitor General

WILLIAM T. THOMPSON
Special Counsel for Civil Litigation

MICHAEL R. ABRAMS
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-076)
Austin, Texas 78711-2548
Tel.: (512) 936-1414
Fax: (512) 936-0545
patrick.sweeten@oag.texas.gov
todd.disher@oag.texas.gov
matthew.frederick@oag.texas.gov
will.thompson@oag.texas.gov
michael.abrams@oag.texas.gov

COUNSEL FOR THE TEXAS SECRETARY OF STATE

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on January 7, 2020, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN