UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC, DCCC, AND TERRELL BLODGETT Plaintiffs, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, Defendant.	Civil Action Case No. 1:19-cv-01063-LY

Plaintiffs' Opposition to the Secretary of State's Motion to Abstain or Postpone

The recent state court order in *Texas Democratic Party v. DeBeauvoir*, D-1-GN-20-001610 (Tex. Dist. [Travis] Mar. 20, 2019), does not justify either abstention or delay in this case.[1] The order enjoins the Travis County Clerk from rejecting absentee ballots and absentee ballot requests from those voters who request one based on disability due to fear for their health during the ongoing COVID-19 pandemic, while preventing the state of Texas from prohibiting other county clerks from similarly accepting such ballot requests.

By sharp contrast, in *this* case Plaintiffs challenge the elimination of temporary early in-person voting locations (a/k/a "mobile voting" locations) as both burdensome and discriminatory—claims that are neither resolved or even fairly implicated by *DeBeauvoir*. Regardless of the availability of vote by mail, a substantial number of voters will nevertheless need or want to vote in person in November.

[1] A copy of the state court's order is attached hereto as Exhibit A.

This much was proven by the recent experience in Wisconsin's primary election, where despite having broad access to mail voting (Wisconsin, unlike Texas, does not require voters to have an "excuse" to vote absentee), thousands still voted in person, many of who had no choice but to do so. The stark lesson from the Wisconsin experience is that states must be prepared to offer *both* accessible mail voting *and* sufficient in-person voting to accommodate voters, lest their citizens suffer severe injury, not just to their voting rights, but to their health. If anything, the unprecedented pandemic that the nation is currently experiencing only underscores the necessity that mobile voting be an accessible means of early voting. Without it, more voters will have to crowd into fewer polling places, resulting in longer and longer lines, and a greater threat to their fundamental rights and public health writ large—all likely to be exacerbated if, as happened in Wisconsin, poll workers themselves become ill or refuse to appear on election day to staff polling places.

Abstention is therefore far from justified, especially given that the Supreme Court and Fifth Circuit have been clear that abstention in voting rights cases should only be granted in extraordinary circumstances. For the same reasons, any delay of this case would be inappropriate and risk serious injury to not only Plaintiffs' rights, but the rights of thousands of Texans. To the contrary, the issue at play in *DeBeauvoir* heightens the importance of moving this case to resolution expeditiously. Knowing in advance the full gamut of election administration options that can be brought into play to handle the unprecedented situation to be faced in the November election is critical to making the process work in the most difficult circumstances imaginable. The Secretary's Motion should be denied.

I. Legal Standard

Abstention under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), is "a narrow, judicially created exception to the general grant of federal jurisdiction," *BT Inv. Managers, Inc. v. Lewis*, 559 F.2d 950, 953-54 (5th Cir. 1977), and is an entirely discretionary doctrine. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727-28 (1996) (explaining federal courts' power to abstain "derives from the discretion historically enjoyed by courts of equity"); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) ("The abstention doctrine is not an automatic rule . . . ; it rather involves a discretionary exercise . . . .").

In the Fifth Circuit, abstention requires "(1) a federal constitutional challenge to state action and (2) an unclear issue of state law that, if resolved, would make it unnecessary for [the court] to rule on the federal constitutional question." *Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009). The court must "take into consideration the nature of the controversy and the particular right sought to be enforced," *Edwards v. Sammons*, 437 F.2d 1240, 1243 (5th Cir. 1971), undertaking "a broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication." *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981). The Supreme Court has held that abstention is generally *inappropriate* when "the nature of the constitutional deprivation" at issue is the fundamental right to vote. *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). The Fifth Circuit has accordingly (and repeatedly) recognized that "the delay which follows from abstention is not to be countenanced in cases involving such a strong national interest as the right to vote, " *Edwards*, 437 F.2d at 1244, and has warned that a federal court should be "reluctant to abstain" when, as here, voting rights are at stake. *Duncan*, 657 F.2d at 697.

II. Background

Plaintiffs allege that H.B. 1888—which effectively bans mobile and temporary early voting locations which had been used in counties throughout Texas to provide equal access to early voting to Texas citizens, including students, the disabled, and the elderly—burdens the right to vote in violation of the First and Fourteenth Amendments, violates equal protection under the Fourteenth Amendment, and is also unconstitutional under the Twenty-Sixth Amendment. Plaintiffs filed their case in November 2019 in order to ensure resolution well in advance of the General Election, and the State agreed to expedited discovery and trial.

In the wake of the COVID-19 pandemic and the state shelter in place orders, *DeBeauvoir* was filed by the TDP and other plaintiffs on April 15, 2020, in Travis County District Court, alleging that they were injured by a lack of clarity and uniformity in the application of state law in regard to mail-in absentee ballots during the pandemic. The challenge arose from specific provisions in the Texas Election Code that limit voters' access to vote by mail-in absentee ballot unless they have one of several statutorily delineated excuses for doing so. *See, e.g.*, Tex. Elec. Code § 82.003 (permitting mail-in absentee voting by voters over 65); *id.* § 82.001 (same for voters who will be absent from county on Election Day); *id.* § 82.004 (same for otherwise eligible voters confined in jail). Among the reasons that a voter may give for voting mail-in absentee is that they have a sickness or physical condition preventing them from appearing to vote in person without a likelihood of needing personal assistance or injuring their health. *Id.* § 82.002. The plaintiffs in *DeBeauvoir* sought an injunction holding that this exception permits mail-in voting by those who want to practice social distancing due to the ongoing COVID-19 pandemic.

On April 17, the state court issued an injunction in *DeBeauvoir* mandating that: (1) the Travis County Clerk's Office accept mail-in absentee ballot applications and ballots from

"registered voters who use the disability category of eligibility [to vote by mail] as a result of the COVID-19 pandemic," Ex. A at 4; (2) the Travis County Clerk's Office and the State refrain from preventing other counties from accepting mail-in absentee ballot applications and ballots for similar reasons or from preventing voters in other counties from utilizing mail-in ballots for similar reasons, *id*. at 4-5; and (3) the State publish guidance of the court's order on agency websites and circulate a copy of the order to every election official in Texas. *Id.* at 5.

The State indicated almost immediately that it not only intended to appeal the order, but that it believes its appeal automatically supersedes the order. In fact, the State has made public statements threatening *prosecution* of organizations that assist people in seeking to register to vote by mail under the disability provision as well as voters who do the same—regardless of what the *DeBeauvoir* order requires. *See, e.g.*, Attorney General of Texas, Press Release, AG Paxton: Voting by Mail Based on Disability Reserved for Texans With Actual Illness or Medical Problems (Apr. 15, 2020), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-voting-mail-because-disability-must-be-reserved-texans-suffering-actual-illness-or-medical. Thus, it is clear the State intends to try to limit who can vote by mail during this pandemic and that it has no intention to dispense with in-person voting. To the contrary, the State appears entirely intent on the November election taking place as usual, despite the current unprecedented health crisis, with eligibility to vote by mail being limited to those over 65 and a small group of others, and the vast majority of Texans voting in person at the polls either on Election Day or during the early voting period.

III. Argument

A. The Court should not abstain from deciding this important voting rights case

Resolution of *DeBeauvoir* will not render a decision in this case unnecessary or even meaningfully modify the issues to be decided. *See Moore,* 591 F.3d at 745. The heart of the Secretary's argument is that if Plaintiffs can vote by mail, they "cannot complain about the supposed effect HB 1888 allegedly imposes on in-person early voting." Mot. at 2. But this is both factually and legally wrong.

First, the scope of the injunction that the trial court issued in *DeBeauvoir* does not resolve *this* case in any way, shape, or form. At best, and assuming that the State's attempt to reverse it on appeal prove unsuccessful, the order would provide more voters in Texas the opportunity to vote by mail in November—something that Plaintiffs submit Texas should be required to do, particularly in light of the current pandemic. But even if the order remains intact, that does not mean that there will be no need for in-person voting in Texas in general, or for mobile voting specifically. To the contrary, as the recent experience in Wisconsin demonstrated, even where mail voting is widely available—and, in Wisconsin, *any* voter has the right to request and vote an absentee ballot, WIS. STAT. § 6.20—a substantial number of voters will still need or want to vote in-person, and the state must be prepared and able to serve them safely. To offer a couple of real-world examples, a voter may not receive an absentee ballot in a timely fashion and hence still need to vote in person due to issues with coronavirus-related postal delays,[2] or due to an influx of

[2] *See, e.g.*, Rick Rouan, *Mail Delays During Coronavirus Outbreak Hurting Ohio Election, Secretary of State Frank LaRose Says*, THE COLUMBUS DISPATCH (Apr. 23, 2020), https://www.dispatch.com/news/20200423/mail-delays-during-coronavirus-outbreak-hurting-ohio-election--secretary-of-state-frank-larose-says

absentee requests resulting in significant backlogs for county officials.[3] These types of issues seem particularly likely to occur in Texas, which does not have a history of substantial use of absentee voting. *See*, Texas Secretary of State, Early Voting - November 2, 2018, https://www.sos.texas.gov/elections/earlyvoting/2018_/nov2.shtml (showing only 3.02% of all voters in the 30 Texas counties with the largest number of registered voters voted early by mail).

The enactment of H.B. 1888 stripped from the State's and counties' repertoire a crucial tool for ensuring that those who need or want to vote in-person can do so safely. If anything, the current pandemic makes it all the more critical that this tool be restored, so that voters are not forced to decide between exercising their right to the franchise and risking their or their family's lives, by having to cast their ballots in over-crowded and completely insufficient in-person polling places. The ability to offer mobile voting where it is needed, and needed most, will likely be one of Texas's most efficient and effective means of keeping its poll workers and voters' safe and protecting the right to vote in November—provided that the State does not succeed in its efforts in this litigation to keep elections officials so restrained.[4]

Second, the Secretary's argument ignores the scope of this case and the applicable law. In fact, the Fifth Circuit has previously *rejected* the Secretary's suggestion that the availability of

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[3] *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016, 2020 WL 1672702, at *2 (U.S. Apr. 6, 2020) (Ginsburg, J., dissenting) (noting elections officials in Wisconsin's primary were deluged with approximately one million more absentee ballot requests than in 2016 and that this influx of absentee ballot requests "heavily burdened election officials, resulting in a severe backlog of ballots requested but not promptly mailed to voters.")

[4] It is also worth noting that *DeBeauvoir* order only applies during the COVID-19 pandemic, which may impact upcoming elections but presumably will end at some point. *See* Ex. A at 4-5. H.B. 1888, however, will be the law of the land going forward unless the Court enjoins it. And Plaintiffs' claims are not limited to the constitutionality of H.B. 1888 during the course of the pandemic. To the contrary, Plaintiffs' maintain H.B. 1888 is unconstitutional even during more ordinary times. *See* First Am. Compl., ECF No. 18, ¶¶ 38-57.

mail-in voting operates as some sort of a constitutional substitute or equivalent of in-person voting, finding that while mail-in voting represents "an important bridge for many who would otherwise have difficulty appearing in person. . . . we conclude that it is not the equivalent of in-person voting for those who are able and want to vote in person." *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016) (en banc). Even apart from *Veasey*, the state court's order in *DeBeauvoir* does not, as a legal matter, eliminate these Plaintiffs' arguments concerning the burdens imposed by H.B. 1888, which must be specifically analyzed under the *Anderson-Burdick* test.[5] *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding when deciding a challenge to a state election law the court must weigh the character and magnitude of the injury against the precise interests put forward by the State as justification for the burden imposed). And the ability to vote by mail, standing alone, does not resolve Plaintiffs' burden arguments. *See, e.g.*, *DNC v. Hobbs*, 948 F.3d 989, 1006 (9th Cir. 2020) (crediting testimony that "returning early mail ballots presents special challenges for communities that lack easy access to outgoing mail services," including "the elderly, homebound, and disabled voters; socioeconomically disadvantaged voters who lack reliable transportation; voters who have trouble finding time to return mail because they work multiple jobs or lack childcare services; and voters who are unfamiliar with the voting process").

The Secretary also ignores that Plaintiffs assert a claim alleging unconstitutional discrimination under the Twenty-Sixth Amendment, ECF No. 18 ¶¶ 52-57, a claim alleging disparate treatment under the Equal Protection Clause of the Fourteenth Amendment, *id.* ¶¶ 46-51, and a claim that H.B. 1888 violates Title II of the Americans with Disabilities Act. Compl.,

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[5] *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802 (1969), cited by the Secretary (*see, e.g.*, Mot. at 2, ECF No. 21 at 15-16, ECF No. 35 at 5) does not hold otherwise. *McDonald* does not stand for the proposition that the ability to vote by mail renders every impediment on in-person voting constitutionally acceptable, it merely held that a specific state law regarding absentee ballots was constitutional.

Blodgett v. Hughs, No.1:19-cv-1154 (W.D. Tex. 2019), ECF No. 1 ¶¶ 31-32. The fact that vote by mail may ultimately be more available this year than in years past (and whether the state actually ends up being able to undo Judge Sulak's order remains to be seen) also does not resolve or even touch on these separate discrimination and disparate treatment claims, nor does the Secretary claim that *DeBeauvoir* implicates them in any way. Even if the ultimate resolution in *DeBeauvoir* has any bearing on Plaintiffs' claim regarding H.B. 1888's burdens on their right to vote (it does not), the Secretary makes no argument that the case has any potential impact on the three other claims Plaintiffs bring in this litigation.

Finally, while the Secretary's arguments do not pass muster in any case, the Supreme Court has made clear that abstention in voting rights cases should be rarely granted. In *Harman*, which involved allegations of a burden on the right to vote caused by the requirement that voters pay a poll tax, the Supreme Court held that the lower court did not abuse its discretion in refusing to abstain "just eight months before the 1964 general elections," given "the nature of the constitutional deprivation" at issue. 380 U.S. at 537. The Fifth Circuit has repeatedly relied on *Harman* to similarly find abstention uniquely inappropriate in the voting rights context. *See, e.g.*, *Duncan*, 657 F.2d at 699 ("At issue in this case is nothing less than the fundamental right to vote. The delay inherent in abstention is least tolerable where, as here, fundamental constitutional rights enjoyed by a broad class of citizens would be suspended while adjudication begins in state court."); *Edwards*, 437 F.2d at 1244 (holding "the delay which follows from abstention is not to be countenanced in cases involving such a strong national interest as the right to vote" and lower court abused its discretion in abstaining in voting rights case).

B. This case is also not appropriate for postponement

As an alternative to abstention, the Secretary suggests that this Court otherwise postpone ruling on Plaintiffs' claims in order to be "prudent," providing no better justification for delay than abstention. Mot. at 4.[6] But for the same reasons discussed above, delay is also not justified. As noted, if the state is unable to undo the order in *DeBeauvoir* and therefore, during the pandemic, there will be expanded mail-voting access, that may provide more opportunities for voters to access the franchise but will not eliminate the crucial need for accessible and safe in-person voting even in the immediate future, nor will it otherwise resolve the issues in this case. *See Veasey*, 830 F.3d at 255; *see also supra* Section III.A. Delay will make it much more difficult, if not impossible, for Plaintiffs to be afforded relief in time for the General Election. The parties have proceeded on an expedited schedule since this case's inception with an eye towards resolution in sufficient time for the November election, and there is no reason to alter that course now. In truth, the Secretary's effort to play the issue in this case against the different issue in *DeBeauvoir* heightens the need for expeditious disposition of this case.

IV. Conclusion

For the reasons stated herein, Plaintiffs request that the Court deny the Secretary's Motion to Abstain or Postpone and proceed to set a trial date for this case.

Dated April 24, 2020

Respectfully submitted,

/s/ Kevin J. Hamilton
Kevin J. Hamilton

[6] The two out-of-Circuit insurance cases the Secretary cites in support of this request are entirely inapposite to the voting rights claims at issue here. *See Federated Rural Elec. Ins. Corp. v. Ark. Elec. Cooperatives, Inc.*, 48 F.3d 294, 295 (8th Cir. 1995) (delaying decision over whether insurer or insured is required to pay environmental cleanup costs); *Ann Arbor Tr. Co. v. N. Am. Co. for Life & Health Ins.*, 527 F.2d 526, 527 (6th Cir. 1975) (delaying decision concerning interpretation of suicide provisions in life insurance policies).

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