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

PLAINTIFFS' RESPONSE TO DEFENDANT'S "ADVISORY" REGARDING INTERLOCUTORY APPEAL AND REQUEST FOR ORDER CONFIRMING THIS COURT'S CONTINUING JURISDICTION

Following this Court's denial of the Texas Secretary of State's motion to dismiss this lawsuit, the Secretary filed a frivolous interlocutory appeal in the Fifth Circuit, and thereafter wrongly claimed in her Notice of Appeal that, "[b]ecause the Secretary asserted sovereign immunity against all claims asserted by the plaintiffs, this notice of appeal divests this Court of jurisdiction during the pendency of the appeal," and further decreed that, as a result, "proceedings in this Court, including all discovery matters, are suspended pending resolution of the appeal." ECF No. 108.

Contrary to the Secretary's assertions, binding case law holds that this Court maintains jurisdiction over this case while the State's interlocutory appeal is pending, and that the Secretary is *not* entitled to an "automatic" stay. Indeed, the Secretary is not even entitled to a discretionary stay pending the resolution of her interlocutory appeal (which she has not moved for in any event), because her appeal is frivolous and clearly intended to delay the proceedings to Plaintiffs' severe prejudice. Instead, Plaintiffs are entitled to have their time-sensitive motion for preliminary

injunction heard and decided *before* they suffer irreparable injury. Because this case turns on a constitutional challenge to a prohibition on temporary or mobile *early voting* locations—as Plaintiffs have repeatedly made clear to the Secretary since the filing of this litigation in November 2019—they need relief by no later than early September, that is, *within a matter of weeks*, to avoid irreparable harm in the upcoming election.

For the reasons discussed below, Plaintiffs respectfully request that the Court deny the Secretary's attempt to use a frivolous interlocutory appeal to run the clock on Plaintiffs' pending motion. Instead, the Court should issue an order finding the appeal frivolous and dilatory, thus clarifying that the Court maintains jurisdiction. This in turn would necessarily require the Secretary to promptly comply with her continued discovery obligations as ordered by this Court in its July 10, 2020 Order Granting Plaintiffs' Motion to Compel (ECF No. 96) and that Plaintiffs' motion for preliminary injunction will proceed on the briefing schedule set by the Local Rules.[1]

ARGUMENT

Contrary to the State's unsupported assertions, an interlocutory appeal does *not* automatically divest a trial court of jurisdiction in the Fifth Circuit. *See Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981); *Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011) (quoting and summarizing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). One of the reasons that the mere filing of an interlocutory appeal does not automatically divest a trial court of jurisdiction is that the interlocutory appeal may be frivolous, and "an automatic stay would allow litigants to delay resolution of the matter by filing frivolous appeals." *Weingarten*

[1] The deadline for the Secretary's response to Plaintiffs' Application for Injunctive Relief is August 28, 2020, fourteen days from Court's Order Granting Plaintiffs' Motion for Leave to Exceed Page Limits. ECF No. 104. In continuing to exercise jurisdiction over this matter despite the pendency of the Secretary's frivolous interlocutory appeal, Plaintiffs' respectfully request that the Court consider and decide Plaintiffs' Application whether the Secretary responds or not.

Reality Inv'rs, 661 F.3d at 908 (quoting *Griggs*, 459 U.S. 56).

Instead, binding Fifth Circuit precedent makes clear that a district court may retain jurisdiction in instances that might otherwise result in an automatic stay, if the district court certifies in writing that the appeal is frivolous *or* dilatory. *See United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir.) (en banc), *cert. denied*, 447 U.S. 926 (1980) (holding that an appeal from the denial of a frivolous double jeopardy motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous); *see also BancPass, Incorporated v. Highway Toll Administration, L.L.C.*, 863 F.3d 391, 400 (5th Cir. 2017) (reaffirming the rule set forth in *Dunbar*, that a district court may certify to the court of appeals that an interlocutory appeal of the denial of a motion is frivolous and then proceed with trial rather than relinquish jurisdiction, and explicitly applying same to hold that a district court is "permitted to maintain jurisdiction over an interlocutory appeal of *an immunity denial* after certifying that the appeal is frivolous or dilatory.") (emphasis added). Indeed, as the Fifth Circuit recognized in *BancPass*, every federal circuit to reach the issue has come out the same way. *See id.* at 399 (citing *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989); *Chuman v. Wright*, 960 F.2d 104, 104–105 (9th Cir. 1992); *Yates v. City of Cleveland*, 941 F.2d 444, 448–49 (6th Cir. 1991); *Stewart v. Donges*, 915 F.2d 572, 576–77 (10th Cir. 1990)). Indeed, "[t]he point of [this] procedure . . . is to prevent a defendant from disrupting the district court's trial schedule by filing a frivolous appeal." *BancPass*, 863 F.3d 399 (quoting *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995)).

This is true even in cases involving the precise issue the Secretary appealed here—whether she is entitled to sovereign immunity. *See Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004) ("[T]he concern about frivolous appeals is equally applicable to appeals from the denial by a district court of entitlement of a government official to immunity.").

This latest appeal, like the several virtually-identical appeals that the Secretary has filed this month in other voting rights cases where other judges have also denied the Secretary's motions to dismiss on sovereign immunity grounds, is the very definition of frivolous.[2] It raises no colorable legal issues and is unabashedly dilatory. *See United States v. Bayly*, No. C.R. H-03-363, 2008 WL 89624, at *7 (S.D. Tex. Jan. 7, 2008), *aff'd sub nom. United States v. Brown*, 571 F.3d 492 (5th Cir. 2009) ("The Fifth Circuit bas instructed that courts should apply the literal meaning of the term 'frivolous' when determining whether to stay the case pending interlocutory appeal, bearing in mind that the frivolousness inquiry is intended to prevent dilatory claims, not colorable ones." (citing *United States v. Kalish*, 690 F.2d 1144, 1154 (5th Cir.1982))). "Either the court of appeals or the district court may declare that the appeal is frivolous, and if it is the district court may carry on with the case." *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). Accordingly, the Secretary's interlocutory appeal does not automatically divest this Court of jurisdiction or stay these proceedings, and this Court may (and, respectfully, should) declare the appeal frivolous and carry on with this case.

1. The Secretary's interlocutory appeal does not raise a colorable issue of law and is therefore frivolous.

The Secretary's interlocutory appeal challenging this Court's determination that the Secretary has "some connection" to the laws at issue sufficient to warrant the *Ex Parte Young* exception to sovereign immunity is legally baseless. Indeed, as discussed in detail below, Supreme Court and Fifth Circuit precedent clearly foreclose her argument. But the Secretary is aware that her argument has no merit; her sole purpose in making it is to cause delay that would prevent Plaintiffs from obtaining relief. *See infra* section 2.

[2] *See e.g., Lewis et al. v. Hughs*, 5:20-cv-00577-OLG at ECF No. 33 (W.D. TX. Aug. 10, 2020); *Texas Democratic Party v. Hughs*, 5:20-cv-0008-OLG at ECF No. 36 (W.D. TX. Aug. 14, 2020).

"*Ex parte Young* requires defendants have 'some connection' to the state law's enforcement and threaten to exercise that authority." *Air Evac EMS, Inc. v. Texas, Dep' t of Ins., Div. of Workers Comp.*, 851 F.3d 507, 517 (5th Cir. 2017) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). The Supreme Court has characterized this as a '"straightforward inquiry' and specifically rejected an approach that would go beyond a threshold analysis." *Id.* at 517 (quoting *Idaho v. Coeur d 'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). That inquiry looks at whether the defendant has enforcement authority over the laws being challenged. *See id.* Plaintiffs' Complaint, which alleges the only facts relevant at this stage of litigation, adequately alleges that authority.[3] *See, e.g.*, Amended Complaint, ¶ 24 (ECF No. 18); *Blodgett v. Hughs*, 1:19-cv-01154 at ECF No. 1, ¶¶ 9, 14 (Nov. 26, 2019).

The Secretary's role in the administration of elections and the enforcement of election laws is hardly novel or new. Almost fifty years ago, in a decision ultimately affirmed by the U.S. Supreme Court, a federal court in the Eastern District of Texas concluded that the Texas Secretary of State 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."). This year alone, the Fifth Circuit has reiterated that same conclusion. *See Tex. Democratic Party v.*

[3] Plaintiffs' allegations must be taken on their face for the purposes of an interlocutory appeal. *See Carroll v. Ellington*, 800 F.3d 154, 167 (5th Cir. 2015) (appellate courts 'jurisdiction to review denials of immunity at motion to dismiss and motion for summary judgment stages limited to reviewing "purely legal questions"); *see also Cutler v. Stephen J•. Austin State Univ.*, 767 F.3d 462, 467-68 (5th Cir. 2014) ("We have jurisdiction over denials of qualified immunity only to the extent that the district court's order turns on an issue of law." (internal quotations omitted)); *cf Clark-Dietz & Assocs.-Engineers, inc. v. Basic Const. Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (finding no jurisdiction for interlocutory appeal because "one of the questions is particularly difficult and most appear to be merely fact-review questions " and "even those questions that are legal may be foreclosed by the fact findings of the district court"); *McAuslin v. Grinnell Corp.*, No. CIV.A.97-775, 2000 WL 1251966, at *1 (E.D. La. Sept. 5, 2000) (finding that district court cannot certify issue for interlocutory review if it involves question of fact).

Abbott, 961 F.3d 389, 401 (5th Cir. 2020), *cert. denied*, 2020 WL 3478784 (U.S. June 26, 2020); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017).

Accordingly, this Court correctly applied the law in denying the Secretary's Motion to Dismiss, in which she raised "the defense of state sovereign immunity, arguing that Plaintiffs have not complied with the strictures of the *Ex parte Young* exception to sovereign immunity because she supposedly—as Secretary of State—'has no connection' with the challenged election law." Order on Motion to Dismiss at 6 (ECF No. 107). The Court properly rejected this argument "based upon Hughs's improper assertion that the Secretary of State does not enforce Texas election law." *Id.* This was far from a surprise: The Court also rejected the identical argument last month in *Miller v. Hughs*, No. I: 19-CV-1071-LY, 2020 WL 4187911, at *4 (W.D. Tex. July 10, 2020). The State's insistence on this oft-rejected proposition is as remarkable as it is utterly unfounded.

Plaintiffs' complaint and federal court precedent foreclose the argument that the Secretary somehow does not enforce the Texas Election Code, including H.B. 1888. And it is well-settled that enforcement of a challenged law supplies a "connection" sufficient to warrant the *Ex Parte Young* exception to qualified immunity. The Secretary's interlocutory appeal—which is based entirely on the argument that she is not sufficiently connected to the Texas Election Code and, therefore, HB 1888—is therefore not colorable.

2. The Secretary's interlocutory appeal is unabashedly dilatory.

Beyond its legal insufficiency, the Secretary appears to have filed her interlocutory appeal for purposes of obtaining a self-help delay after the Court denied her motion to dismiss. According to the Secretary, her baseless interlocutory appeal prevents this Court from any authority to decide Plaintiffs' time-sensitive motion to avoid irreparable injury ahead of the November election. She makes this assertion despite repeated insistences that the Court should not grant any relief in

advance of deciding her Motion to Dismiss. Effectively, she argues that raising a sovereign immunity defense—even in instances such as this one where binding precedent makes clear that the *Ex parte Young* exception applies—forecloses any possibility of preliminary equitable relief in avoidance of an imminent injury. Thankfully, that is not the case. *See BancPass*, 863 F.3d at 400 (holding that a district court is "permitted to maintain jurisdiction over an interlocutory appeal of *an immunity denial* after certifying that the appeal is frivolous or dilatory") (emphasis added).

In plainly seeking only to delay, the Secretary also apparently hopes to circumvent this Court's Order granting Plaintiffs' Motion to Compel, ECF No. 96, which entitled Plaintiffs to documents that the Secretary had improperly withheld and to continue the Federal Rule of Civil Procedure 30(b)(6) deposition of the Secretary's designee, which the Secretary has refused to abide.

This Court should make clear that it retains jurisdiction, so that the Secretary's gamesmanship does not run the clock on Plaintiffs' preliminary injunction motion in her blatant and unjustified attempt to block Plaintiffs from obtaining relief before early voting locations for the November election must be decided—in what is now only a matter of weeks.[4]

[4] As Plaintiffs have consistently noted, counties begin considering their early voting locations in mid-August, "to ensure the orderly identification of polling places and preparation for the 2020 General Election." ECF No. 30; see also Motion to Determine Case on Papers or, in the Alternative, for a Remote Trial, ECF No. 29, at 1, n.1. ("The Travis County elections administrator testified that she submits polling place recommendations to Travis County Commissioners' Court for approval 30 to 40 days before the election" and that "[s]he begins evaluating sites before that time."); Declaration of Dana DeBeauvoir, ECF No. 29-3, at ¶ 8 ("My office typically begins evaluating potential sites and identifying early voting locations approximately three months before the commencement of early voting in an election. For this reason, knowing whether we will be permitted to designate any temporary early voting locations for the 2020 General Election by early August 2020 would be the optimum timing for allowing my office to perform its task of selecting voting locations.").

CONCLUSION

In short, the Secretary's appeal and her claim that the Court has no power to act during its pendency is part and parcel of her delay strategy. In this case, Plaintiffs seek relief in advance of the 2020 general election. Moreover, because their claims challenge H.B. 1888's prohibition on temporary or mobile *early voting* locations, which the counties must select and finalize by early September at the latest, for preliminary injunctive relief to be effective it would need to be granted *within the next several weeks*. Plaintiffs will suffer irreparable injury in the absence of such relief. Having failed in her attempts to dismiss the case, the Secretary now resorts to a tactic to try to prevent the Court from acting at all. But the State's appeal is baseless as a matter of law and this Court has jurisdiction that it can and should exercise to decide Plaintiffs' pending application for a preliminary injunction, especially given that the window for effective relief will close soon.

Plaintiffs therefore respectfully request that the Court issue an order certifying that: (1) the Secretary's appeal is frivolous and dilatory in its design; (2) this Court maintains jurisdiction over this case; and (3) the Secretary must still (and promptly) comply with this Court's Order Granting Plaintiffs' Motion to Compel (ECF No. 96). Plaintiffs are available for a status conference at the Court's earliest convenience to discuss the Secretary's continued refusal to comply with this Court's Order Granting Plaintiffs' Motion to Compel (ECF No. 96), the scheduling of a hearing on Plaintiffs' pending application for preliminary injunctive relief should the Court feel that such a hearing is necessary, and any other issues presented by the Secretary's Notice should the Court wish to hear from the parties.

Dated this 18th day of August, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 18, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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