IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO 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 NO. 1:19-cv-01063

SECRETARY HUGHS'S RESPONSE TO PLAINTIFFS' FILING REGARDING INTERLOCUTORY APPEAL

On August 14, 2020, Secretary Hughs filed a notice of appeal of this Court's denial of her motion to dismiss based on sovereign immunity. *See* ECF 108. That notice cited binding precedent holding that a notice of appeal divests the district court of jurisdiction. Plaintiffs have now filed a "response" in which they request "an order finding the appeal frivolous and dilatory." ECF 109 at 2. The Secretary's appeal is not frivolous or dilatory. The Court should deny Plaintiffs' request.

BACKGROUND

Plaintiffs challenge HB 1888 through this lawsuit against the Secretary. *See* ECF 18; ECF 1 in No. 1:19-cv-1154. Moving to dismiss under Rules 12(b)(1) and 12(b)(6), the Secretary argued in part that sovereign immunity bars Plaintiffs' claims because the Secretary does not enforce HB 1888. *See* ECF 21; ECF 5 in No. 1:19-cv-1154.

On August 11, 2020, the Court issued an order granting in part and denying in part the Secretary's motion and rejecting Secretary Hughs' arguments as to sovereign immunity. *See* ECF 107. Secretary Hughs filed a Notice of Interlocutory Appeal on August 14, 2020. *See* ECF 108.

ARGUMENT

Plaintiffs advance two erroneous arguments. First, they argue that the Court has not been divested of jurisdiction. Second, they argue the Court should regain jurisdiction by certifying that the Secretary's appeal is "frivolous and dilatory." Plaintiffs are wrong on both counts. Binding precedent supports the Secretary.

I. This Court Has Been Divested of Jurisdiction

The filing of the notice of appeal acts to immediately divest this Court of jurisdiction to proceed against the Secretary. *See Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985) (holding that immunity from suit "is effectively lost if a case is erroneously permitted to go to trial"); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). "A non-frivolous notice of interlocutory appeal following a district court's denial of a defendant's immunity defense divests the district court of jurisdiction to proceed against that defendant." *Williams v. Brooks*, 996 F.2d 728, 729–30 (5th Cir. 1993) (per curiam); *see also Wooten v. Roach*, 964 F.3d 395, 412 (5th Cir. 2020). Because Secretary Hughs has asserted that she is immune from all of Plaintiffs' claims, the entirety of this matter is now before the Fifth Circuit for review.

Resisting this precedent, Plaintiffs cite inapposite cases. First, Plaintiffs cite *Taylor v. Sterrett*, which holds that "where an appeal is allowed from an interlocutory order, the district court may still proceed with matters not involved in the appeal." 640 F.2d 663, 668 (5th Cir. Unit A 1981). That is no help to Plaintiffs here because here there are no "matters not involved in the appeal." When an "immunity defense" relates to all claims against a defendant, as it does in this case, it "divests the district court of jurisdiction to proceed against that defendant." *Williams*, 996 F.2d at 730. Because there is only one defendant in this case, there are no matters separate from the appeal.

Second, Plaintiffs cite *Weingarten Realty Investors v. Miller*, but that case supports the Secretary. 661 F.3d 904 (5th Cir. 2011). There, the Fifth Circuit expressly recognized that "a district court cannot proceed past [immunity] issues when there are interlocutory appeals" about those issues, including "appeals regarding double jeopardy, *sovereign immunity*, and qualified immunity." *Id.* at 908 (emphasis added). The appellants in *Weingarten* tried to analogize between sovereign immunity and arbitrability. The Fifth Circuit rejected the analogy because arbitrability is "distinguishable," but it agreed that an interlocutory appeal regarding sovereign immunity deprives the district court of jurisdiction. *Id.* at 909. It approved "the majority viewpoint accurately recogniz[ing] that certain legal issues—double jeopardy, *sovereign immunity*, and qualified immunity—call for a broader reading of the *Griggs* jurisdictional transfer." *Id.* (emphasis added). The Court emphasized that sovereign immunity, unlike arbitrability, is a "protection[] conferred by the Constitution" and "entitles a party to be free from the burden of litigation." *Id.*

In the end, Plaintiffs cite no authority contradicting this well-established rule: "Once a notice of appeal on an appealable issue such as qualified immunity is filed, the status quo is that the district court has lost jurisdiction to proceed." *Stewart v. Donges*, 915 F.2d 572, 577 (10th Cir. 1990); *accord Williams*, 996 F.2d at 730 (explaining that "'[t]he divestiture of jurisdiction occasioned by the filing of a timely notice of appeal is especially significant when the appeal is an interlocutory one' on an immunity issue" (quoting *Stewart*, 915 F.2d at 575)). As a result, it would be improper for the parties to keep filing documents in this Court.[1]

II. The Secretary's Appeal Is Not Frivolous and Dilatory

Plaintiffs argue that the Court should take an "affirmative step" to "regain jurisdiction."

[1] In accordance with Fifth Circuit precedent, the Secretary respectfully informs the Court the she does not intend to file a response to Plaintiffs' pending motion for preliminary injunction so long as the appeal divests this Court of jurisdiction. *See Wooten*, 964 F.3d at 403 (holding that filing an amended complaint was beyond the district court's jurisdiction during an appeal).

Stewart, 915 F.2d at 577–78. They ask this Court to certify that the Secretary's appeal is "frivolous and dilatory." The Secretary believes that she is likely to prevail on appeal, but even if she were not, that would not make her appeal frivolous or dilatory. It is a good-faith attempt to resolve an important legal issue. Interlocutory appeals from the denial of an immunity defense are quite common in this circuit, and there is nothing nefarious about using that procedure in this case.

A. The Secretary's Appeal Is Far from Frivolous

Plaintiffs bear a heavy burden in trying to demonstrate frivolousness. *See United States v. Dunbar*, 611 F.2d 985, 988 (5th Cir. 1980) (en banc) (citing *Coppedge v. United States*, 369 U.S. 438, 443–45 (1962)). Because the Secretary has a right to take an interlocutory appeal, "the burden of showing that that right has been abused through the prosecution of frivolous litigation should, at all times, be on the party making the suggestion of frivolity." *Coppedge*, 369 U.S. at 447–48.

In this case, the Secretary's appeal is not frivolous because she "makes a rational argument on the law or facts." *Id.* at 448. Plaintiffs cannot show that the appeal "is so lacking in merit that the court [of appeals] would dismiss the case on [Plaintiffs'] motion." *Id.* Plaintiffs have not even sought (or suggested they will seek) such a dismissal from the court of appeals.

Frivolousness requires a court to conclude that "nothing can be said on the other side." *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 399 (5th Cir. 2017). An appeal is frivolous only when "[t]here can be no doubt, absolutely no doubt, that [an argument] was totally devoid of merit," *Dunbar*, 611 F.2d at 987, or when it "involves legal points that are not arguable on their merits." *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1161 (5th Cir. 1985).

An appeal is "not frivolous" even if a court ultimately finds it "meritless." *Valley Ranch Dev. Co. v. FDIC*, 960 F.2d 550, 557 (5th Cir. 1992). Even where a claim of immunity is not supported by existing precedent, but requires "extending immunity" into a new area, the appeal is not frivolous. *San Filippo v. U.S. Tr. Co. of N.Y., Inc.*, 737 F.2d 246, 255 (2d Cir. 1984); *see also* Fed. R. Civ. P. 11(b)(2)

(allowing "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). Plaintiffs' own cases recognize that arguments with "some possible validity"—including "good-faith argument[s] for the extension, modification or reversal of existing law"—are not included within "the literal meaning of the term 'frivolous.'" *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).

Here, the Secretary's appeal cannot be frivolous because it presents a critically important question that has not been resolved by the Fifth Circuit: whether, and if so to what extent, *Ex parte Young*'s exception to sovereign immunity permits a lawsuit against the Texas Secretary of State challenging a law enforced by local officials when the law's effects vary across local jurisdictions based on local decisions. The Fifth Circuit did not consider that question in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). There, the Court reached a conclusion about standing to bring a facial challenge under the Voting Rights Act: "The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" *Id.* at 613. The Court pointedly declined to address sovereign immunity, however, because it concluded that the State's immunity had been validly abrogated by the Voting Rights Act. *See id.* at 614 ("Sovereign immunity has no role to play here.").

The Fifth Circuit recognized, but did not resolve, this open question of sovereign immunity when it granted a stay pending appeal in *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). There, the Court explained that the exception to sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908), permits suit against state officials only if they "have 'some connection' to the state law's enforcement." 961.F.3d at 400 (quoting *Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 517 (5th Cir. 2017)). But the Court expressly noted that "[t]he precise scope of the 'some connection' requirement is still unsettled." *Id.* at 400; *see also id.* at 400 n.21 (commenting that "[o]ur decisions are

not a model of clarity on what 'constitutes a sufficient connection to enforcement'" (quoting *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019))). The Court considered it settled "that it is not enough that the official have a '*general* duty to see that the laws of the state are implemented,'" *id.* at 400–01 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)), and that "a mere connection to a law's enforcement is not sufficient—the state officials must have taken some step to enforce," *id.* at 401. Yet the Court found no settled answer to the question of "how big a step" toward enforcement is sufficient. *Id.* at 401. Referring to *OCA-Greater Houston*, the Court stated only that "our precedent *suggests* that the Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to support standing," which "in turn, *suggests* that *Young* is satisfied as to the Secretary of State." *Id.* at 401 (citing *OCA-Greater Houston*, 867 F.3d at 613) (emphasis added).

Plaintiffs argue that this issue was decisively resolved in a fifty-year-old district court opinion that did not even consider sovereign immunity. *See* ECF 109 at 5 (citing *Tolpo v. Bullock*, 356 F. Supp. 712 (E.D. Tex. 1972)). If *Tolpo* truly controlled this case, Plaintiffs would have cited it in their previous briefing, rather than raising it for the first time now. *See generally* ECF 28; ECF 34. *Tolpo*'s failure to discuss sovereign immunity precludes it from constituting precedent on that issue. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). In any event, *Tolpo* cannot support Plaintiffs because in that case the Secretary seemingly had a relevant connection to the enforcement of the law at issue. *See* 356 F. Supp. at 713 (noting that the Secretary "refused . . . to place [the plaintiff] on the ballot"). Here, by contrast, the only alleged connection between the Secretary and HB 1888 appears to be Plaintiffs' mistaken theory that the Secretary can coerce local officials into following her guidance. And on that point, *Tolpo* supports the Secretary. It explains that local partisan officials administering a primary election disregarded the

Secretary's instructions regarding the plaintiff's eligibility. *See id.* Even if *Tolpo* helped Plaintiffs, it would have only a "limited precedential effect" because the Supreme Court affirmed summarily rather than issue a reasoned opinion. *Anderson v. Celebrezze*, 460 U.S. 780, 784 (1983); *see also Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1222 (11th Cir. 2020) (W. Pryor, J., concurring) ("The Supreme Court has cautioned that we must not overread its summary affirmances.").

Finally, Plaintiffs emphasize that the Court rejected the Secretary's immunity defense. *See* ECF 109 at 6. Of course, that is tautologically true in every interlocutory appeal from the denial of an immunity defense. That the Court disagrees with an argument does not make it frivolous, as the Fifth Circuit has repeatedly held. *See Valley Ranch Dev. Co.*, 960 F.2d at 557; *Sturgeon*, 778 F.2d at 1161. In fact, the Court's previous consideration of the Secretary's immunity defense demonstrates that her argument is not frivolous. In *Miller v. Hughs*, the Court held a hearing on the Secretary's motion to dismiss, specifically asked about sovereign immunity, and then issued a reasoned opinion analyzing the Secretary's argument. *See* No. 1:19-cv-1071, ECF 76 at 7; No. 1:19-cv-1071, Hearing Tr. at 8:7–13, Mar. 24, 2020. If the Court had considered the Secretary's argument frivolous, none of that would have been necessary.

Given the admitted lack of clarity in Fifth Circuit precedent regarding the application of *Ex parte Young*, the Secretary has more than a colorable basis to appeal this Court's order denying her motion to dismiss based on sovereign immunity. Assuming for purposes of argument that *OCA-Greater Houston* was correctly decided, the Secretary maintains that its reasoning does not control in this lawsuit. In the unlikely event that a panel of the Fifth Circuit might disagree with the Secretary's position on plenary review, the question of *OCA-Greater Houston*'s application to this case—and the validity of *OCA-Greater Houston* itself—would be ripe for review by the *en banc* Court. And to the extent *OCA-Greater Houston* is held to control the application of *Ex parte Young* to the Secretary, it would stand in sharp contrast to the Fifth Circuit's more recent *Ex parte Young* precedent, which analyzes the

defendant's state-law authority in much more specificity. *See In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (holding that sovereign immunity barred claims because "the Governor lacks the required enforcement connection to" an executive order and any enforcement role for the Attorney General was speculative); *City of Austin*, 943 F.3d at 1002 (holding that sovereign immunity barred a suit because the plaintiff had "no evidence that the Attorney General may 'similarly bring a proceeding' to enforce § 250.007").

B. The Secretary's Appeal Is Not Dilatory

Plaintiffs argue that the Secretary's appeal is "dilatory," but they point to nothing more than the routine consequences of allowing interlocutory appeals. ECF 109 at 6. Absent certification, interlocutory appeals from the denial of immunity defenses always deprive the district court of jurisdiction. In that limited sense, there is always some unavoidable delay in district court proceedings. That is not an unforeseen injustice. It is a necessary result of ensuring that a defendant does not lose the benefit of immunity during the pendency of an appeal. If an interlocutory appeal did not prevent district court proceedings, it would not protect a defendant's "entitlement to be free from the burdens of time-consuming pre-trial matters and the trial process itself." *Williams*, 996 F.2d at 730 n.2.

A court assessing dilatoriness asks whether the defendant has delayed raising an immunity defense in a way that waives or forfeits the right to an interlocutory appeal. *See BancPass*, 863 F.3d at 400 (explaining that a district court had not certified an appeal as dilatory even though the defendant "wait[ed] to advance the absolute immunity defense until summary judgment" and "announc[ed] its intention to appeal only two days before docket call").

The Secretary has not been dilatory at all. She raised her sovereign immunity defense at the first opportunity, in motions to dismiss for lack of jurisdiction. *See* ECF 21; ECF 5 in No. 1:19-cv-1154. The Secretary filed her notice of appeal three days after the Court partially denied her motions. *See* ECF 108. That is well within the thirty-day time limit, *see* Fed. R. App. P. 4(a)(1)(A), and it is

unusually quick considering the need to receive permission from the Office of the Solicitor General.

Moreover, this is the Secretary's first (and presumably only) interlocutory appeal about immunity. The Supreme Court has expressly approved defendants taking multiple such appeals, despite concerns that "a second appeal would tend to have the illegitimate purpose of delaying the proceedings." *Behrens v. Pelletier*, 516 U.S. 299, 310 (1996). If multiple interlocutory appeals are allowed (and they are), then surely this appeal, taken at the earliest opportunity, cannot be considered dilatory.

Courts must be reluctant to find appeals dilatory. "The Supreme Court has previously noted how this policy [allowing interlocutory appeals for denial of immunity] outweighs the need to prevent dilatory tactics by defendants, particularly given other options that remain open for preventing delay." *Conner v. Travis Cty.*, 209 F.3d 794, 801 (5th Cir. 2000) (reversing an award of sanctions for taking an interlocutory appeal). The Fifth Circuit held there was no "support for [a] district court's finding of undue delay" where a defendant "filed the motion [for summary judgment raising immunity] within the time allowed by the court and then promptly appealed," even though the defendant "could have filed its motion earlier." *Id.* Here, the Secretary could not have raised her argument earlier. She moved to dismiss and promptly filed a notice of appeal when the Court partially denied those motions.

Finally, the Secretary's appeal cannot be dilatory because her argument is at least colorable (and correct). The Fifth Circuit distinguishes between appeals that are "dilatory" and those that are "colorable." *United States v. Kalish*, 690 F.2d 1144, 1154 (5th Cir. 1982) ("Dunbar was intended to prevent dilatory claims, not colorable ones."); *Bayly*, 2008 WL 89624, at *7 ("[T]he frivolousness inquiry is intended to prevent dilatory claims, not colorable ones."). A colorable appeal is not dilatory.

C. There Is No Reason to Retain Jurisdiction

Even if the Secretary's appeal were frivolous or dilatory (and it is not), that would not end the matter. The Fifth Circuit has emphasized that the rule allowing a district court to certify an appeal as frivolous "is a permissive one: the district court may keep jurisdiction, but is not required to do so."

BancPass, 863 F.3d at 400. When considering such a certification, the district court's power "must be used with restraint." *Id.* (agreeing with the Seventh Circuit). Here, there is no need for proceedings to continue immediately.

Plaintiffs claim they face "irreparable injury" if this Court is divested of jurisdiction. ECF 109 at 2. That is not true, but even if it were, that would not weigh in favor of retaining jurisdiction. If Plaintiffs believe they are entitled to an injunction pending appeal, they can seek that relief from the Fifth Circuit. *See* Fed. R. App. P. 8(a). Indeed, one of these Plaintiffs and their counsel have done so in other litigation about ballot order. *See* Emergency Mot. for Inj. Pending Appeal, *Mecinas v. Hobbs*, No. 20-16301, ECF 2-1 (9th Cir. July 10, 2020).

Moreover, Plaintiffs' argument assumes that the Court was planning to decide this case in the next few weeks. On Plaintiffs' own theory, they face no prejudice from the Secretary's interlocutory appeal unless the Court otherwise would have issued injunctive relief "*within a matter of weeks*." ECF 109 at 2. Of course, that is mere speculation as the parties do not know how the Court plans to schedule its matters, but the motions still pending, including Plaintiffs' Motion to Determine Case by Papers or, in the Alternative, for a Remote Trial, suggest the Court may not have been planning to fully resolve this case on Plaintiffs' timetable anyway. *See* ECF 92.

CONCLUSION

This Court has been divested of jurisdiction, and there is no basis for this Court to regain jurisdiction pending the Fifth Circuit's resolution of the Secretary's appeal. Plaintiffs' request should be denied.

Date: August 19, 2020

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on August 19, 2020, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
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