IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JESSIE GLORIA; LUIS BOTELLO-FAZ; NICOLAS MACRI; PAT GRANT; JENNIFER RAMOS; and ISAIAH RODRIGUEZ,

Plaintiffs,

v.

RUTH HUGHS, in her official capacity as the Texas Secretary of State,

Defendant.

CIVIL ACTION NO. 5:20-cv-00527-OLG

THE TEXAS SECRETARY OF STATE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

INTRODUCTION

The Court wisely stayed this case pending the Fifth Circuit's merits decision in *Texas Democratic Party v. Abbott (TDP)*, No. 20-50407. Plaintiffs provide no reason to reconsider that decision. Proceeding with a Twenty-Sixth Amendment challenge to Section 82.003—while the Fifth Circuit and possibly the Supreme Court also consider a Twenty-Sixth Amendment challenge to Section 82.003—would be a waste of time and effort, for both the Court and the parties.

STANDARD OF REVIEW

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Staying proceedings "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254–55; *see Nelson v. Grooms*, 307 F.2d 76, 78 (5th Cir. 1962).

"Although the 'Motion to Reconsider' is found nowhere in the Federal Rules of Civil Procedure, it has become one of the more popular indoor courthouse sports at the district court level." *Krim v. pcOrder.com, Inc.*, 212 F.R.D. 329, 331 (W.D. Tex. 2002) (quoting *Louisiana v. Sprint Commc'ns Co.*, 899 F. Supp. 282, 284 (M.D. La. 1995)). District courts have the power to reconsider interlocutory orders, *see* Fed. R. Civ. P. 54(b), but "[a] motion for reconsideration should only be granted in extraordinary circumstances." *In re Goff*, 579 F. App'x 240, 245 (5th Cir. 2014).

When "considering a motion for reconsideration," "[t]his Court utilizes the standards of Federal Rule of Civil Procedure 59 to inform its analysis." *Iniekpo v. Avstar Int'l Corp.*, No. 5:07-cv-879, 2010 WL 1190810, at *1 (W.D. Tex. Mar. 25, 2010). Thus, the Court asks whether there has been "(1) an intervening change in controlling law; (2) new evidence not previously available; (3) the need to correct a clear or manifest error of law or fact or to prevent manifest injustice." *Id.* As movants, Plaintiffs bear the burden of showing reconsideration is warranted. *See Shimon v. Sewerage & Water Bd.*

of New Orleans, No. 2:05-cv-1392, 2008 WL 638623, at *2 (E.D. La. Mar. 5, 2008).

ARGUMENT

I. The Court Was Right to Stay This Case

Plaintiffs do not dispute that this Court had the power to stay this case pending the Fifth Circuit's *TDP* decision. *See Landis*, 299 U.S. at 254; *Nelson*, 307 F.2d at 78. This Court correctly decided to "stay[] this case pending a decision on the merits by the Fifth Circuit and the outcome of any appeal thereof." ECF 14. As the Court explained, "[t]he issue in this case . . . . is also being addressed in" *TDP*. *Id.* Numerous courts have recognized that "[a] motion to stay also may be justified when a similar action is pending in another court." 5C Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 1360 (3d ed.) (collecting cases). And it was prudent do to so here: When the Fifth Circuit issues its decision, it will likely resolve this case as well.

Plaintiffs argue this Court was wrong to conclude "that the merits of the *TDP* plaintiffs' Twenty-Sixth Amendment claim 'will be' addressed by a merits panel." ECF 15 at 4 (quoting ECF 14). But the Fifth Circuit's opinion says otherwise. Though the State continues to believe *TDP* should be dismissed for want of jurisdiction, the Fifth Circuit panel analyzed the merits of the Twenty-Sixth Amendment claim at length precisely because it predicted that the merits panel would have to reach that issue. *See TDP*, No. 20-50407, 2020 WL 2982937, at *13–14 (5th Cir. June 4, 2020). If the Court had thought that the merits panel would dispose of the case on a non-merits ground, it would have granted the stay on that basis. But it expressly declined to do so. *See id.* at *4–8. This Court should rely on the Fifth Circuit's prediction of what the Fifth Circuit will do, not Plaintiffs' speculation.

Plaintiffs also try to distinguish the merits of the as-applied Twenty-Sixth Amendment claim in *TDP* from the merits of their facial Twenty-Sixth Amendment claim in this case. For purposes of the stay, it is a distinction without a difference. If the Fifth Circuit rejects the as-applied claim in *TDP*, it will necessarily foreclose Plaintiffs' facial claim here: As the Supreme Court has explained, "[a] facial

challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, if Section 82.003 is valid as-applied in *TDP*, it cannot be facially unconstitutional. If, on the other hand, the Fifth Circuit affirms the injunction in *TDP*, the Plaintiffs here would have no need for immediate relief. The *TDP* injunction would seemingly apply to them just as it applies to the plaintiffs in that case. *See Tex. Democratic Party v. Abbott*, No. 5:20-cv-438, 2020 WL 2541971, at *6 (W.D. Tex. May 19, 2020) (issuing an injunction applicable to "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19"). Thus, regardless of whether the *TDP* plaintiffs will win or lose their case, there is no need for this case to proceed at this time.

Even if the Fifth Circuit decides *TDP* on a non-merits ground, it would still affect this case. For example, Plaintiffs highlight the possibility that "the doctrine announced in *Purcell v. Gonzalez*, 549 U.S. 1 (2006)," prohibits the *TDP* injunction because it was issued "shortly before an election." ECF 15 at 6. If the Fifth Circuit reaches that conclusion, its reasoning will apply with equal force in this case. By necessity, any injunction in this case would be issued even closer to the relevant election deadlines than the *TDP* injunction was.

II. Plaintiffs' Delay in Bringing This Suit Does Not Justify Lifting the Stay

Plaintiffs argue that the resolution of *TDP* "will almost certainly come too late for Plaintiffs in *this* action." ECF 15 at 3. Plaintiffs apparently want "to file a motion for summary judgment seeking permanent relief in time for the November election." *Id.*

Plaintiffs' desire to file a premature motion for summary judgment does not justify lifting the stay. This case is at a very early stage. The Secretary was served last month and filed her motion to dismiss a couple of weeks ago. *See* ECF 13. Plaintiffs have not yet responded. As the Court's order already explained, if the stay were lifted, the next step would be to finish briefing the motion to dismiss.

See ECF 14.

Then, the parties would turn to discovery. Discovery has not yet started, much less already ended. Discovery begins when "the parties have conferred as required by Rule 26(f)," which the parties here have not yet done. Fed. R. Civ. P. 26(d)(1). "Granting summary judgment not just before discovery has been completed, but before it has even begun on this issue, would be premature." *George v. Go Frac, LLC*, No. 5:15-cv-943, 2016 WL 94146, at *3 (W.D. Tex. Jan. 7, 2016). Granting summary judgment when "discovery was never allowed to begin" is reversible error. *Murrell v. Bennett*, 615 F.2d 306, 310 (5th Cir. 1980).

That general rule is particularly applicable here. If the Court denied the Secretary's motion to dismiss, discovery would be necessary. The Secretary would likely plead affirmative defenses, including laches. For those defenses, the Secretary's "proof must come largely, if not entirely, from" Plaintiffs, making pre-discovery summary judgment especially improper. *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 354 (5th Cir. 1989). Even for issues on which Plaintiffs bear the burden of proof, such as standing, Plaintiffs' "credibility [will be] very much at issue," and discovery will be needed. *Id.* at 355. Of course, the Secretary will need to depose Plaintiffs' expert and fact witnesses. "Without discovery," the Secretary would be "substantially handicapped in any attack on the facts asserted by" Plaintiffs. *Id.*

Because any motion for summary judgment would be premature, Plaintiffs' desire to file such a motion cannot justify lifting the stay.

Plaintiffs complain that they will experience hardship without a final judgment before the November election. If so, it is their own fault. Plaintiffs could have filed this suit much earlier. Plaintiffs did not serve this lawsuit until May 13, 2020. *See* ECF 12. Texas first authorized older voters to vote by mail in 1975. *See In re State of Texas*, No. 20-0394, 2020 WL 2759629, at *8 (Tex. May 27, 2020). That law has stood for forty-five years. The problems created by such delay should not surprise anyone, much less Plaintiffs' counsel—lawyers from the "Political Law Group" at Perkins Coie—who

are well aware of how long these cases take. In other cases seeking to affect the November 2020 election, Plaintiffs' counsel began litigation back in 2019. *See, e.g.*, *Gilby v. Hughs*, No. 1:19-cv-1063 (W.D. Tex. Oct. 30, 2019); *Miller v. Hughs*, No. 1:19-cv-1071 (W.D. Tex. Nov. 1, 2019).

There is no reason Plaintiffs could not have filed this case much earlier.[1]

III. Plaintiffs' Merits Arguments Are Both Irrelevant and Wrong

Plaintiffs contend that the Fifth Circuit's published opinion in *TDP* is not binding precedent. *See* ECF 15 at 1–3. That argument is irrelevant to their motion for reconsideration. Regardless of whether the merits panel adheres to the motions panel's opinion in *TDP*, the court is likely to create binding precedent that resolves this case as well.

In any event, Plaintiffs are wrong to suggest that the Fifth Circuit's published opinion creates no binding precedent. *See Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 411 (5th Cir. 2006) ("Published panel opinions are ordinarily binding on subsequent panels."). That the published opinion in *TDP* decided a motion rather than a full appeal does not affect its precedential force. *See Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015) ("[A] motions panel's published opinion binds future panels the same as does a merits panel's published opinion."); *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (per curiam) ("[P]ublished three-judge orders issued under § 2244(b) are binding precedent in our circuit."). Courts in this Circuit often treat a motions panel's published opinions as binding precedent. *See, e.g.*, *Sanchez v. Brown*, No. 3:20-cv-832, 2020 WL 2615931, at *18 (N.D. Tex. May 22, 2020) (following a motions panel's decision in *In re Abbott*, 956 F.3d 696 (5th Cir. 2020); *Bhattarai v. Fitch*, No. 3:19-cv-560, 2020 WL 1821253, at *2 (S.D. Miss. Apr. 10, 2020) (following a motions panel's decision in *In re Gee*, 941 F.3d 153 (5th Cir. 2019)).

[1] Plaintiffs insist that their claims do not depend on "the context of the pandemic," ECF 15 at 2, so recent events concerning COVID-19 should be irrelevant. But even if they were relevant, Governor Abbott declared a state of emergency regarding COVID-19 on March 13, 2020. Having waited two months to serve their complaint, Plaintiffs should not now be allowed to claim crisis.

Plaintiffs' contrary argument rests on inapposite cases considering unpublished and unreasoned orders. A motions panel's one-word decision could not create binding precedent because "the motions panel did not assign any reasons for its decision in an opinion." *Northshore Devel., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988). Similarly, a motions panel's one-sentence denial of mandamus relief obviously could not bind a later merits panel considering a full appeal. *See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 n.26 (5th Cir. 1998) (noting "[t]he order was without opinion").

Plaintiffs also include a lengthy critique of the Fifth Circuit's reasoning in *TDP*. *See* ECF 15 at 8–10. Plaintiffs' criticism is unpersuasive for the reasons explained in the Secretary's motion to dismiss this case, *see* ECF 13, and the defendants' briefing in *TDP*.

IV. The Stay Order Properly Considers Supreme Court Review

Finally, Plaintiffs complain that the "stay order suspends these proceedings not just until the Fifth Circuit issues a decision on the merits, but until *all* appeals of that merits decision are exhausted." ECF 15 at 10. This Court reasonably predicted that one of the *TDP* parties would likely seek Supreme Court review. Indeed, less than a week after this Court's stay order, the *TDP* plaintiffs filed a petition for a writ of certiorari before judgment and an application to vacate the Fifth Circuit's stay in *TDP*. *See TDP v. Abbott*, No. 19A1055 (U.S. June 16, 2020). In it, the *TDP* plaintiffs refute virtually every statement that Plaintiffs make regarding the scope of their litigation, the likelihood that the Fifth Circuit will rule on the merits, and the binding effect of the motions panel's decision. The State will file a brief in opposition to that petition in due course, but for now, waiting for authoritative guidance will serve judicial efficiency, regardless of whether that guidance comes from the Fifth Circuit or the Supreme Court.

CONCLUSION

The Secretary respectfully requests that the Court deny Plaintiffs' motion for reconsideration.

Date: June 18, 2020

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 June 18, 2020, and that all counsel of record were served by CM/ECF.

/s/William T. Thompson
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