UNITED STATES DISTRICT COURT
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 Texas Secretary of State Defendant.	Civil Action Case No. 5:20-cv-00527-OLG

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

The only way to ensure Plaintiffs are not denied justice as a result of the schedule in a separate case brought by different parties that have largely argued different issues (and that is likely to be decided in a way that does *not* dictate the outcome of this case), is to lift the stay and permit the parties to move expeditiously to dispositive briefing. In opposition, the Secretary ignores both the posture of the Twenty-Sixth Amendment question in *Texas Democratic Party v. Abbott* ("*TDP*"), as well as her own arguments (made first to the Fifth Circuit and now the Supreme Court, in a filing submitted to that Court earlier this week) that the question was not properly before the *TDP* court to begin with. Thus, based on arguments that the Secretary herself has affirmatively and repeatedly made, once it decides the *TDP* appeal on the merits (whenever that may be) the Fifth Circuit may very well decline to address the Twenty-Sixth Amendment at all. By then, it will be too late for Plaintiffs to obtain relief on their single, straightforward legal claim in advance of the November election. Plaintiffs respectfully request that the Court lift the stay.

ARGUMENT

This Court issued the stay here based on its expectation that a merits panel will address the Twenty-Sixth Amendment claim in the *TDP* appeal, *see* ECF No. 14 at 1, but it very well may not. The merits panel may agree, for example, with the Secretary's argument that the *TDP* court did not have the Twenty-Sixth Amendment claim properly before it when it issued the injunction. *See* ECF No. 15 at 5, 6. Or, it may conclude that, because *TDP* sought relief before the primary, which was looming when the district court ruled, it should have declined to act because of the *Purcell* doctrine. *Id*. at 6. Both of these outcomes would have no impact on Plaintiffs' claim here.

The Secretary asserts that *Purcell* would also foreclose Plaintiffs' request for relief here, ECF No. 17 at 3, but ignores that will *only* be the case *if the stay remains in place*. *Purcell* stands

for the principle that when a significant change is made *on the eve of* an election that may cause extensive voter confusion, a federal court may stay its hand in issuing relief. ECF No. 15 at 6. There is no basis for extending that doctrine to Plaintiffs' claims here and now, with the election still months away. Moreover, recent reports indicate that Texas's scorched earth strategy surrounding access to mail-in voting has caused significant voter confusion and fear even among voters who are likely eligible to vote by mail under Texas's narrow interpretation of the law.[1] Thus, a ruling in favor of Plaintiffs here would help *alleviate* voter confusion, by making it clear that Texas cannot discriminate based on age in bestowing access to voting.[2]

While Plaintiffs disagree with the Secretary's contention that the motions panel in *TDP* analyzed the Twenty-Sixth Amendment claim, "at length," ECF No. 17 at 2, it is really beside the point. The Fifth Circuit has been abundantly clear: a motions panel's decision has no precedential effect, not for this Court and not for the merits panel that ultimately decides a case. All of the authority upon which the Secretary relies to argue to the contrary are from *other circuits*. The Secretary's attempt to argue that this Court should announce a brand-new rule that, in this Circuit, motions panel opinions are precedential when they are *lengthy*, *see* ECF No. 17 at 5-6, gives the Fifth Circuit too little credit. If it meant to apply one rule to short opinions and another to longer ones, it could have said so. Instead, it has consistently maintained a straightforward rule that motions panel decisions are not binding, and for good reason. *See* ECF No. 15 at 2-3 (discussing

[1] *See* Alexa Ura, *Coronavirus fears postponed a Texas election. Now it will go forward with even greater risk for some voters*, The Texas Tribune (June 22, 2020), https://www.texastribune.org/2020/06/22/coronavirus-postponed-texas-election-now-theres-even-greater-risk-some/ (describing confusion of 63-year old diabetic Dallas voter with heart issues who is unsure whether she qualifies under disability exception to vote by mail).

[2] In contrast, because briefing in the *TDP* appeal will not close until August, even if the motions panel affirms, its order may come too late to be effective. Proceeding to summary judgment now will give Plaintiffs at least some chance to obtain relief in time for the November election.

cases recognizing motions panels decide issues on extremely compressed timeframes, without benefit of full briefing, argument, or time for fulsome consideration of issues or record).

The Secretary also ignores that the panel's opinion was long because it was actually *three* opinions: each judge wrote separately and at length, for the most part about issues *other than* the Twenty-Sixth Amendment. On that question specifically, there was no consensus. Nor was the majority opinion's treatment of the claim extensive, by any measure. As Plaintiffs previously noted, Judge Smith simply opined the claim would likely fail on the basis of *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), a case applying the *Fourteenth Amendment* that was decided *two years before* the Twenty-Sixth Amendment's ratification. *TDP v. Abbott*, 961 F. 3d 389, at *18 (5th Cir. 2020).[3] Judge Smith appeared unaware of the multitude of decisions applying the Twenty-Sixth Amendment in its own right. *See, e.g.*, ECF No. 15 at 7-9 (discussing just a few of those cases). Although he joined in the majority, Judge Ho recognized it makes far more sense to analyze it under standards used to consider the Fifteenth Amendment (whose language it parallels). *TDP*, 961 F.3d at *40 (Ho, J., concurring). If one applies that analysis here, it is impossible to come to any conclusion other than that Texas's age-based restriction plainly violates the Twenty-Sixth Amendment. Indeed, even Judge Smith acknowledged that the law "facially discriminates on the basis of age." *Id.* at *16. The third judge on the panel did not address the Twenty-Sixth Amendment at all. Judge Costa opined that the district court should have abstained from ruling on the motion, at least until the Texas Supreme Court had spoken on the question of the scope of the Texas law at issue. *Id.* at *43 (Costa, J., concurring).

In other words, even the three judges on the motions panel could not reach a consensus about how (or whether) the Twenty-Sixth Amendment issue should be decided. This makes the

[3] This brief cites the pagination of the slip opinion.

Secretary's assertion that "[t]his Court should rely on the Fifth Circuit's prediction of what the Fifth Circuit will do, not Plaintiff's speculation," ECF No. 17 at 2, nonsensical. The panel provided three diametrically different predictions for the case's direction, including one (by Judge Costa) that would avoid the merits of Plaintiffs' claim and another (by Judge Ho) that would find the law violates the Twenty-Sixth Amendment, but require further briefing on the appropriate remedy.[4] Plaintiffs should not be denied their opportunity to obtain timely relief, particularly where the motions panel's decision was so fractured and there are multiple paths by which the *only* question at issue in *this* case may be *avoided* by the Fifth Circuit on the merits.

Contrary to the Secretary's assertion, it would not be "premature" for Plaintiffs to seek summary judgment. Plaintiffs are under 65 and barred from voting early by mail in Texas's elections without an excuse, in contrast to their fellow voters who are over 65. This presents a simple legal question: is such a restriction, which prohibits access to a means of voting on account of the voter's age, constitutional under the Twenty-Sixth Amendment? Plaintiffs need only be under 65 and registered or eligible to register to vote in Texas to have standing. These are hardly questions that require extensive discovery or legitimately raise "credibility" questions (as the Secretary claims). The Secretary's indication she intends to raise the defense of laches is also not well founded: multiple courts have found that it is not appropriate in cases such as this, which seek future relief. *See, e.g.*, *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1005 & n.32 (5th Cir. 1981); *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343, 2015 WL 8773509, at *5 (W.D. Tex. Dec. 14, 2015). Moreover, several of the Plaintiffs only recently came of voting age. Even if this Court were to read the doctrine expansively, laches cannot possibly be applied as to them. *See League of*

[4] Should the Court lift the stay, Plaintiffs would explain that there are multiple reasons why the appropriate remedy would be to order that persons under 65 may vote by mail without an excuse.

Women Voters of Fla. v. Detzner, 314 F. Supp. 3d 1205, 1224 n.20 (N.D. Fla. 2018) (dismissing argument that plaintiffs brought claims too late where voters recently came of age); *cf. Crookston v. Johnston*, 841 F. 3d 396, 397-99 (6th Cir. 2016) (noting delay in filing action challenging election laws may be reasonable where plaintiff had "just become eligible to vote").

Finally, the Secretary notes that one of the parties in *TDP* has filed for Supreme Court review, but that only further proves Plaintiffs' point. It is exceedingly unlikely the Supreme Court will take up a decision which a merits panel of the Fifth Circuit has not yet considered; indeed, the Secretary herself made this argument to the Supreme Court earlier this week. *See TDP v. Abbott*, No. 19A1055, Respondents' Opp. to App. To Vacate 5th Cir. Stay of Prelim. Inj. (U.S. June 22, 2020), at 9-10 (attached as Exhibit 1). And, at the same time the Secretary is arguing this Court should avoid the merits because (at least when she addressees this Court) she insists the Fifth Circuit *will* reach the merits in *TDP*, she is arguing to the Supreme Court that the district court should not have reached the merits at all (and, by extension, that the questions are not properly before the higher courts on appeal). For example, the Secretary argued to the Supreme Court that Judge Costa was correct that the district court should have abstained, *see id*. at 13-14, and that the *TDP* plaintiffs should have been precluded entirely from bringing their claims because of a prior state court case they filed, *id*. at 14.[5] The Court should not allow the Secretary to have it both ways.

CONCLUSION

Plaintiffs respectfully request that the Court reconsider its order staying these proceedings and issue a briefing schedule for the parties to proceed to summary judgment.

[5] It is also worth noting that the Secretary is actively opposing a quick resolution of the *TDP* appeal. *See* Ex. 1 at 2-3 (opposing stay and emphasizing petitioners have not sought expedited review from the Fifth Circuit). The Secretary lays the blame at the *TDP* plaintiffs' feet, but of course the Secretary, too, could seek expedition of the Circuit's review.

Dated: June 25, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 25, 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.

/s/ John M. Geise
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