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

LINDA JANN LEWIS, MADISON LEE, ELLEN SWEETS, BENNY ALEXANDER, GEORGE MORGAN, VOTO LATINO, TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND TEXAS ALLIANCE FOR RETIRED AMERICANS,

Plaintiffs,

v.

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

Defendant.

Civil Action No. 5:20-cv-00577-OLG

Related to *Gloria et al. v. Hughs et al.*, No. 5:20-cv-00527

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. The Secretary then announced that she would refuse to engage in any further discovery because she claims that her frivolous appeal automatically divests this Court of jurisdiction—and thus, she argues, proceedings have been "automatically stayed"—while her interlocutory appeal remains pending. This is patently wrong. To the contrary, binding case law holds that this Court maintains jurisdiction over this case while the State's interlocutory appeal is pending. Moreover, the Secretary's appeal, which is frivolous and clearly intended to delay the proceedings to Plaintiffs' severe prejudice, does *not* automatically stay the proceedings. Plaintiffs are entitled to have their time-sensitive motion for preliminary injunction heard and decided *before* they suffer irreparable injury in November.

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' motion, and issue an order clarifying that Court maintains jurisdiction and that the Parties must proceed with and timely complete discovery in accordance with the scheduling order previously issued by the Court.

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 Reality Inv'rs*, 661 F.3d at 908 (quoting *Griggs*, 459 U.S. 56). 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."); *Licea v. Curacao Drydock Co.*, 870 F. Supp. 2d 1360, 1368 (S.D. Fla. 2012) (denying stay during interlocutory appeal because "the Country of Curacao and the Kingdom of the Netherlands' appeal of a denial of sovereign immunity is frivolous because the Court has yet to resolve the question of immunity in the first instance").

And this appeal is the very definition of frivolous. 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 has 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 divest this Court of jurisdiction or stay the proceedings.

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

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, the issue raised in the appeal is foreclosed by Supreme Court and Fifth Circuit precedent and was again decided against the Secretary by a federal court in this very district as recently as *yesterday*. The Secretary's 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.

"*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.[1] *See, e.g.*, Complaint ¶ 26. If that were not sufficient, and it is, the Secretary herself makes clear that she enforces the Texas Election Code, and each of Plaintiffs' claims in this litigation challenge various statutes in the Texas Election Code. A cursory glance at the Secretary's own election resources confirms her connection to the Challenged Provisions and to the administration of elections in the context of the pandemic.[2]

The Secretary's role in the administration of elections and the enforcement of election laws is hardly novel or new. Nearly 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 repeatedly reiterated that conclusion. *See Tex. Democratic Party v. 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).

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[1] 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 F. 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 itself cannot certify issue for interlocutory review if it involves question of fact).

[2] *See, e.g.*, Texas Secretary of State Ballot Board Handbook, https://www.sos.state.tx.us/elections/forms/ballot-board-handbook.pdf; Director of Elections Keith Ingram, Election Advisory No. 2020-14, https://www.sos.texas.gov/elections/laws/advisory2020-14.shtml; Request for Postage-Paid Voter Registration Form, https://webservices.sos.state.tx.us/vrrequest/index.asp.

Indeed, the Secretary's role in elections was confirmed again just yesterday in this very district. *See Gilby v. Hughes*, Order on Motion to Dismiss at 6, Case No. 1:19-CV-1063-LY (W.D. Tex. Aug. 11, 2020). In *Gilby*, the plaintiffs named the Secretary as a defendant in their challenge to Texas rules regarding mobile voting. As she did in this case, the Secretary 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." *Id.* The Court rejected this argument in no uncertain terms, finding it "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. 1:19-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, federal court precedent, and the Secretary's own election resources all foreclose the argument that the Secretary somehow does not enforce the Texas Election Code, including the Challenged Provisions. And it is well-settled that enforcement of a challenged law provides 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—is therefore not colorable.[3]

[3] The Secretary fails to explain why the distinction between facial and as-applied challenges matters in this context. In fact, the distinction is irrelevant. To illustrate, the Fifth Circuit conducts its *Ex Parte Young* analysis in *Air Evac EMS, Inc.*, 851 F.3d at 519, a case bringing an as-applied challenge, by looking at the defendant's role in enforcing the challenged laws as proscribed by the statute.

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—filed in the middle of a discovery period that she requested in an effort to cause further delay—prevents this Court from considering Plaintiffs' time-sensitive motion to avoid irreparable injury ahead of the November elections. 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 November.

Notably, the Secretary filled the first few weeks of the discovery period with her own depositions of adverse witnesses, including the depositions of all but one of the Plaintiffs. Most of *Plaintiffs' depositions* of adverse witnesses have yet to occur, as the Secretary has delayed them as long as possible. For example, the Secretary delayed scheduling the Texas Election Division's Rule 30(b)(6) deposition until August 14, eleven days after Plaintiffs originally sought to take that deposition. And now the Secretary refuses to proceed with *any* further depositions of State-controlled witnesses or discovery.

Moreover, Plaintiffs' have already responded to the Secretary's interrogatories and produced hundreds of documents in response to the Secretary's discovery requests. But the Secretary has not done so, and instead has simply objected to Plaintiffs' discovery requests. Thus, if the Secretary's interlocutory appeal stays the proceedings before this Court, then she will not have only been successful in using discovery as a tool for delay, she will also have received the added benefit of having taken discovery of Plaintiffs and Plaintiffs' witnesses, and refusing to engage in discovery at precisely the point at which the Secretary is required to respond to Plaintiffs'

written discovery requests and make Plaintiffs' adverse witnesses available for depositions. This is intentionally dilatory conduct and it should not be permitted.

CONCLUSION

In short, the State's appeal—and its claim that the Court has no power to act during its pendency—is part and parcel of the State's delay strategy. In this case, Plaintiffs seek relief in advance of the 2020 general election. They will suffer irreparable injury in the absence of such relief. Having failed in its attempts to dismiss the case, the Secretary now resorts to the tack that the Court cannot act 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 give Plaintiffs the opportunity to be heard on their pending preliminary injunction motion.

Plaintiffs respectfully request that the Court issue an order clarifying that the Parties must continue with discovery because the Court maintains jurisdiction over this case. Plaintiffs are available for a status conference at the Court's earliest convenience to discuss the status of ongoing discovery and any other issues presented by the Secretary's Advisory should the Court wish to hear from the parties.

Dated: August 12, 2020

Respectfully submitted,

/s/ *Kevin J. Hamilton*

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**Pro hac vice applications pending*

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on August 12, 2020, and that all counsel of record were served by CM/ECF.

/s/ *Kevin J. Hamilton*