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 OF 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

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

On August 7, 2020, Secretary Hughs filed a notice of appeal of this Court's denial of her motion to dismiss based on sovereign immunity. *See* ECF 32. She also filed an advisory citing binding precedent holding that a notice of appeal divests the district court of jurisdiction. *See* ECF 33. Plaintiffs have now requested "an order clarifying that [the] Court maintains jurisdiction." ECF 35 at 2. The Secretary's appeal is not frivolous or dilatory. The Court should deny Plaintiffs' request.

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 raises no colorable argument and that the appeal is dilatory. Plaintiffs are wrong on both counts. Binding precedent supports the Secretary.

I. This Court Has Been Divested of Jurisdiction

The Secretary's advisory cited binding precedent to show that "[t]he filing of the notice of appeal acts to immediately divest this Court of jurisdiction to proceed against the Secretary." ECF 33 at 2 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Wooten v. Roach*, 964 F.3d 395, 412 (5th Cir. 2020); *Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993) (per curiam)).

Resisting this precedent, Plaintiffs cite inapposite cases. *See* ECF 35 at 2. 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

In substance, Plaintiffs argue that the Court should take an "affirmative step" to "regain jurisdiction" by certifying that the Secretary's appeal is frivolous and dilatory. *Stewart*, 915 F.2d at 577–78. 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.

[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).

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 raising an as-applied challenge to a provision of the Election Code that is enforced by local officials." ECF 33 at 2. Plaintiffs argue that the Fifth Circuit has already resolved that issue, *see* ECF 35 at 4, but the

Secretary's advisory already explained why those cases are distinguishable and the issue remains unresolved, *see* ECF 33 at 2–3.

Plaintiffs also argue that this issue was decisively resolved in a fifty-year-old district court opinion that did not even consider sovereign immunity. *See* ECF 35 at 4 (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 19. *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 the challenged provisions 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 another judge in the Western District rejected the Secretary's argument for sovereign immunity in other cases. *See* ECF 35 at 5. Of course, it is tautologically true in every appeal that a judge has rejected the argument being raised. 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. The Court's opinion described and analyzed the Secretary's sovereign immunity argument at some length. *See* ECF 31 at 6–7, 14–17. If the Court had considered the Secretary's argument frivolous, that would not have been necessary.

Moreover, part of the Secretary's sovereign immunity defense rests on *Larson v. Domestic & Foreign Commerce Corp.*, which explained that sovereign immunity bars a claim "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." 337 U.S. 682, 691 n.11 (1949). Although the Court rejected that argument, *see* ECF 31 at 16–17, the *en banc* Fifth Circuit has since explained that whether *Larson* prohibits "all positive injunctions under *Young* is an unsettled question that has roused significant debate." *Green Valley Special Util. Dist. v. City of Schertz*, No. 18-51092, 2020 WL 4557844, at *7 n.21 (5th Cir. Aug. 7, 2020) (en banc). Of course, the Secretary's appeal regarding an "unsettled question that has aroused significant debate" cannot be frivolous.

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 v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (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 35 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, including discovery. 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 a motion to dismiss for lack of jurisdiction. *See* ECF 17. The Secretary filed her notice of appeal ten days after the Court denied her motion. *See* ECF 32. 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 denied that motion.

Plaintiffs complain that pausing discovery lopsidedly favors the Secretary because "[m]ost of *Plaintiffs' depositions* of adverse witnesses have yet to occur." ECF 35 at 6. But the timing of the notice of appeal was determined by the timing of the Court's order denying the Secretary's motion to dismiss. The Secretary had no control over when the Court would issue that order. In any event, the Secretary has not received any inappropriate "benefit [from] having taken discovery" because information obtained in discovery will not affect the interlocutory appeal on sovereign immunity. ECF 35 at 6. Additionally, Plaintiffs fail to mention that the Secretary has yet to depose three of Plaintiffs' four experts, one of their third-party declarants, and one of the organizational plaintiffs. Discovery for either party, even in the limited context of Plaintiffs' motion for preliminary injunction, is far from

complete.

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 35 at 7. 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 court of appeals. *See* Fed. R. App. P. 8(a). Indeed, one of these Plaintiffs and their counsel have done so in other litigation challenging an election law. *See* Emergency Mot. for Inj. Pending Appeal, *Mecinas v. Hobbs*, No. 20-16301, ECF 2-1 (9th Cir. July 10, 2020).

CONCLUSION

The filing of the Secretary's notice of appeal divested the Court of jurisdiction in this matter, 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.

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