

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY;)
GILBERTO HINOJOSA, Chair of the)
Texas Democratic Party; JOSEPH)
DANIEL CASCINO; and SHANDA)
MARIE SHANSING,)

Plaintiffs,)

v.)

5:20-cv-00438-FB

GREG ABBOTT, Governor of Texas;)
RUTH HUGHS, Texas Secretary of)
State; DANA DEBEAUVOIR, Travis)
County Clerk; and JACQUELYN F.)
CALLANEN, Bexar County Elections)
Administrator,)

Defendants.)

DEFENDANT BEXAR COUNTY ELECTIONS ADMINISTRATOR
JACQUE CALLANEN’S RESPONSE TO PLAINTIFFS’
MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes Defendant Bexar County Elections Administrator Jacque Callanen,¹ and files this Response to Plaintiffs’ Motion for Preliminary Injunction (docket no. 9):

PROCEDURAL BACKGROUND

1. On March 20 and April 7, 2020, Plaintiffs initiated parallel state and federal court litigation regarding the effect of the ongoing COVID-19 pandemic on voter eligibility to vote by mail under

¹ Plaintiffs have named Jacque Callanen as a Defendant in this matter in her official capacity as the Elections Administrator of Bexar County. In so doing, any claims they have asserted against her are asserted against Bexar County. *Rosas v. Bexar Cty.*, No. 5:14-CV-1082-DAE, 2015 WL 1955406, at *3 (W.D. Tex. Apr. 29, 2015).

Chapter 82 of the Texas Elections Code during the elections scheduled to occur during the summer and fall of 2020. In the state court litigation—in which Bexar County and Administrator Callanen are not named as defendants—Plaintiffs sought a declaration “that Tex. Elec. Code § 82.002 allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease.” Orig. Pet. at ¶ 19, D-1-GN-20-001610 (201st Dist. Ct. Travis County).

2. On April 17, 2020, the 201st Judicial District Court of Travis County, Judge Tim Sulak presiding, entered a Preliminary Injunction Order finding that an absence of COVID-19 immunity is a “physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health” within the meaning of Section 82.002 of the Elections Code, and enjoining the State of Texas and Travis County Clerk Dana DeBeauvoir “from issuing guidance or otherwise taking actions that would prevent Counties from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic for all elections affected by the pandemic for the reason that the ballots were submitted based on the disability category[.]” Docket no. 10-4 at 4-5. The State’s appeal of that order is currently pending before the Fourteenth Court of Appeals, and the State of Texas has separately filed a petition in the Texas Supreme Court seeking a writ of mandamus to compel the Elections Administrators in Cameron, Dallas, and El Paso Counties and the County Clerks of Harris and Travis Counties to administer the 2020 elections in accordance with the narrower interpretation of Chapter 82 set forth by the Attorney General in unofficial guidance and in the state court litigation.

3. In this case, Plaintiffs seek a declaration that, unless voters concerned about contracting COVID-19 are permitted to vote by mail, the elections conditions created by the COVID-19 pandemic would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 and the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments. Docket no. 9 at ¶¶ 79-103. Plaintiffs also allege that Attorney General Ken Paxton—who is not a named party in this litigation—acted in furtherance of a conspiracy to suppress voting, in violation of 42 U.S.C. § 1985, by publishing a letter expressing his office’s opinion that fear of contracting COVID-19 does not qualify a voter to vote by mail and stating that “third parties [who] advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, . . . could [be] subject . . . to criminal sanctions imposed by Election Code section 84.0041.” Docket nos. 9 at ¶¶ 47-49, 104-10; 10-2 at 5-6. Plaintiffs seek an order prohibiting Defendants from “deny[ing] a mail in ballot to any Texas voter that applies for a mail-in ballot because of the risk of transmission of COVID-19” and that prohibits “Defendants, including General Paxton . . . from issuing threats to or seeking criminal prosecution of voters and others advising voters on mail ballot eligibility based on the risk of transmission of COVID-19.” Docket no. 10-5 at 2.

4. The State Defendants oppose this relief, contending principally that the *Pullman* abstention doctrine applies, docket no. 39 at 16-18; that the *Ex Parte Young* exception to sovereign immunity does not permit Plaintiffs’ claims against the State Defendants because the State Defendants “do not enforce Texas Election Code Section 82.002 or 82.003[.]” *id.* at 19-23; and that Plaintiffs cannot show a likelihood of success on the merits, *id.* at 26-37.

LEGAL STANDARDS

5. A party seeking preliminary injunctive relief under Rule 65 of the Federal Rules of Civil Procedure must establish:

Texas Democratic Party et al. v. Greg Abbott et al.

Defendant Jacque Callanen’s Response to Plaintiffs’ Motion for Preliminary Injunction

5:20-cv-00438-FB

Page 3 of 11

(1) a substantial likelihood that they will prevail on the merits; (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted; (3) their substantial injury outweighs the threatened harm to the party to be enjoined; and (4) granting the preliminary injunction will not disserve the public interest.

Voting for Am., Inc. v. Steen, 732 F.3d 382, 386 (5th Cir. 2013). A preliminary injunction is an “extraordinary remedy” that should be reserved for applicants who have “clearly carried the burden of persuasion on all four requirements.” *Steen*, 732 F.3d at 386 (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012)).

6. In assessing the constitutionality of state election rules that burden voters’ exercise of their constitutional rights, Courts

must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’

Steen, 732 F.3d at 387-88 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). “Reasonable, nondiscriminatory restrictions” of voters’ constitutional rights may generally be justified by the state’s “important regulatory interests”; state rules that severely burden those rights are permissible only if “narrowly drawn to advance a state interest of compelling importance.” *Steen*, 732 F.3d at 388 (there is ultimately “no ‘litmus-paper test’” to relieve Courts from the “hard judgments” necessary to weigh the plaintiffs’ injury against the state’s interest).

ANALYSIS

7. Defendant Bexar County Elections Administrator Jacque Callanen takes no position regarding the State Defendant’s arguments regarding abstention and standing, or on the merit of

Plaintiffs' claims against the State Defendants. Defendant Callanen files this Response to briefly raise three issues specific to Bexar County.

A. In Administering Elections, Defendant Callanen Complies with the Guidance of the Secretary of State

8. First, the State Defendants contend that the *Ex Parte Young* exception to sovereign immunity does not apply here because the State Defendants lack authority to enforce the Texas Elections Code. Although the State Defendants now claim to lack authority to make interpretations of the Elections Code that are binding on local elections officials, Defendant Callanen and other local elections officials regard the guidance of the Secretary of State as controlling, and comply with that guidance when carrying out their duties. As the State Defendants acknowledge, the Elections Code itself empowers the Secretary of State to “obtain and maintain uniformity in the application, operation, and interpretation of [the Elections] code and of the election laws[,]” and tasks her with “prepar[ing] detailed and comprehensive written directives and instructions relating to and based on this code and the election laws” to guide elections administrators, county clerks, and other local officials tasked with administering elections. Tex. Elec. Code § 31.003. Attorney General Paxton has previously opined that “[t]he Texas Secretary of State is the entity tasked with administering and applying section 82.002.” Tex. Attn’y Gen. Op. No. KP-009 (2015).

9. At the same time that they disclaim the authority to compel local elections officials to comply with their interpretations of the Elections Code in this case, the State Defendants are also separately pursuing a mandamus action in the Texas Supreme Court to do exactly that: To compel local elections officials in Cameron, Dallas, El Paso, Harris, and Travis Counties to administer the Elections Code as interpreted by the Attorney General. Defendant Callanen is not named as a Respondent in that proceeding, but intends in this election, and in all elections, to carry out her

duties in accordance with the requirements of the Elections Code as construed in the interpretations and guidance provided by the Secretary of State—including any guidance issued as a result of the Court’s Orders in this case.

B. Plaintiffs Cannot Show They are Likely to Prevail as to Any Claim Against Administrator Callanen—Because They Have Not Asserted Any Claim Against Her

10. Plaintiffs have not identified any manner in which the Bexar County Elections Administrator has burdened their right to vote, nor have Plaintiffs alleged that she or Bexar County have undertaken any act, policy, or practice that infringes upon any federally protected right. Rather, Plaintiffs complain of the interpretation of Chapter 82 of the Elections Code advanced by various state officials, principally Attorney General Ken Paxton. Because Plaintiffs have not asserted any claim against Administrator Callanen, and do not allege that she has burdened their exercise of their right to vote, they cannot show that they are likely to succeed as to any claim against her, and they are therefore not entitled to the “extraordinary remedy” of a preliminary injunction against her. *Steen*, 732 F.3d at 386.

11. The primary burden on voting during the 2020 election cycle identified by Plaintiffs is the COVID-19 pandemic—an event that was not caused by any action of any state or local official, and whose attendant burdens therefore require no justification by any state interest. Whether the State Defendants have interpreted Chapter 82 of the Elections Code in a manner that unreasonably burdens Plaintiffs’ rights is a separate question. Regardless of the Court’s conclusion regarding this question, state law places the responsibility for that interpretation with the Secretary of State, who is tasked with “obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of [the Elections] code and of the election laws[,]” and with “prepar[ing] detailed and comprehensive written directives and instructions relating to and based on this code and the

election laws” to guide elections administrators, county clerks, and other local officials tasked with administering elections. Tex. Elec. Code § 31.003. The role of elections administrators and county clerks such as Defendant Callanen is not to interpret the provisions of the Elections Code but to administer elections in accordance with interpretations of the Elections Code provided by the Secretary of State.

12. On April 2, 2020, the Secretary of State issued guidance to local elections administrators that advised them to prepare for a higher volume of vote-by-mail applications than usual but did not indicate whether voters would be eligible to vote by mail solely to avoid the risk of coronavirus exposure presented by voting in person. Docket nos. 1-3 at 3; 9 at ¶¶ 26-31. After being named as a Defendant in the related state court litigation, the Secretary of State initially declined to take any position regarding the interpretation of Chapter 82—preferring to leave that interpretation to county and local officials—and was dismissed from the case. Days later, the State of Texas, through the Attorney General’s Office, filed a Petition in Intervention to rejoin the litigation, citing the state’s “strong interest in the efficient administration of its elections and in consistent application of its election laws across its 254 counties.” Docket no. 1-2 at 6. The Attorney General’s Office went on to oppose Plaintiffs’ request for preliminary injunctive relief in the state court case, and to affirmatively assert that fear of contracting COVID-19 is insufficient to qualify a voter to submit their ballot by mail.

13. Lacking clear guidance from the Secretary of State, the Bexar County Commissioners Court requested that the Bexar County Criminal District Attorney’s Office render an opinion regarding the interpretation of Section 82.002 within the context of the COVID-19 pandemic. That opinion, which was presented to the Bexar County Commissioners Court on May 14, concluded—as did Judge Sulak in the state court proceedings—that the absence of immunity against COVID-

19 is a “physical condition” within the meaning of Section 82.002, and that this condition presents a likelihood of injuring a voter’s health during in-person voting by placing them at risk of exposure to an ongoing, potentially fatal pandemic against which, unlike other conditions, there is no herd immunity. Exhibit A.

14. However, the ultimate and controlling determination of who is eligible to vote by mail during the COVID-19 pandemic must come from the Secretary of State and the courts, not from local officials. Plaintiffs have not alleged that Bexar County or Administrator Callanen have misinterpreted or misapplied state law or infringed upon any federally protected right. Plaintiffs are therefore not entitled to injunctive relief against Bexar County or any County official.

C. Enjoining Local Elections Officials Is Not Necessary to Provide Effective Statewide Relief

15. Presumably, Elections Administrator Callanen and Travis County Clerk DeBeauvoir have been included as Defendants in this case for the practical purpose of ensuring that they have notice of any relief afforded by this Court so that they may administer elections in their counties in accordance with this Court’s orders. Nevertheless, these practical considerations cannot substitute for the requirement that a party seeking the extraordinary remedy of binding another party to a preliminary injunction must first establish that they are likely to prevail on a legally cognizable claim against the party to be bound. Moreover, it is unnecessary: Under existing state law, Administrator Callanen and other local elections administrators and county clerks administer elections—including processing requests to vote by mail—in accordance with the Secretary of State’s guidance interpreting the Elections Code. Regardless of whether local elections administrators are named as Defendants or are subject to any preliminary injunction that may be entered by this Court, they administer elections on the local level in accordance with the

interpretations of the Elections Code supplied by the Secretary of State—including any revision or withdrawal of those instructions that may be ordered by this Court. Indeed, the preliminary injunction order entered by the state court in the related case included only a single county-level elections official—Travis County Clerk Dana DeBeauvoir—but nonetheless provided effective relief across local jurisdictions statewide because it enjoined the State “from issuing guidance . . . that would prohibit individuals from submitting mail ballots based on the disability category of eligibility or that would suggest that individuals may be subject to penalty solely for doing so” and required the state to “circulate a copy of this Court’s Order to the Election Official(s) in every Texas County.” Docket no. 10-4 at 6.

16. More fundamentally, focusing any remedy the Court finds appropriate on the manner in which state and local elections officials process applications to vote by mail or mail ballots would be misguided. Local elections officials such as Defendant Callanen evaluate the facial sufficiency of applications to vote by mail—but the application form, which was developed by the Secretary of State, does not permit voters to describe or even identify the basis of their eligibility to vote by mail under Section 82.002 beyond checking a box marked “disability.” The Election Code does not authorize local elections officials to investigate or adjudicate the sufficiency of a voter’s claim of eligibility to vote by mail, but provides that the local elections administrator “shall provide an official ballot to the applicant as provided by this chapter” unless it is facially evident from the application that the voter is not eligible. Tex. Elec. Code § 86.001. Should this Court determine that preliminary injunctive relief is warranted, it may afford that relief on a uniform, statewide basis by enjoining the Secretary of State. Since neither local nor state officials are in a position to detect the basis for any particular application to vote by mail, any such relief presumably would

be focused on the public guidance that is issued to voters regarding who is eligible to apply, not to the manner in which local officials process those applications.

CONCLUSION

17. Defendant Bexar County Elections Administrator Jacque Callanen is not the subject of any claim asserted by Plaintiff or any wrongful act alleged in Plaintiff's Original or First Amended Complaint. Entry of preliminary injunctive relief against her—which requires that Plaintiff show they are likely to prevail on the merits of a claim against her—is therefore not appropriate.

WHEREFORE, PREMISES CONSIDERED, Defendant Bexar County Elections Administrator Jacque Callanen prays that this Court decline to enter preliminary injunctive relief against her or Bexar County.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify on the 14th day of May, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which provided electronic service upon all parties.

/s/ Robert Green
ROBERT D. GREEN