No. 20-50407

In the United States Court of Appeals for the Fifth Circuit

TEXAS DEMOCRATIC PARTY, GILBERT HINOJOSA, CHAIR OF THE TEXAS DEMOCRATIC PARTY, JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, AND BRENDA LI GARCIA,

Plaintiffs-Appellees

v.

GREG ABBOTT, GOVERNOR OF TEXAS, RUTH HUGHS, TEXAS SECRETARY OF STATE, KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Kyle.Hawkins@oag.texas.gov

LANORA C. PETTIT
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Defendants-Appellants

Reply in Support of Stay Pending Appeal

Texas officials are working diligently to ensure the safety of in-person voting. That is their station; indeed, this Court has repeatedly affirmed that States have the primary responsibility to address the public-policy challenges presented by the COVID-19 pandemic. *E.g.*, *In re Abbott*, 954 F.3d 772, 795 (5th Cir. 2020) (*Abbott I*); *see also Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020); *In re Abbott*, 2020 WL 1866010 (5th Cir. Apr. 13, 2020) (*Abbott II*). And both this Court and the Supreme Court have repeatedly affirmed that States are responsible for administering elections. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *Justice v. Hosemann*, 771 F.3d 285, 301 n.14 (5th Cir. 2014); *Harris v. Samuels*, 440 F.2d 748, 752–53 (5th Cir. 1971). The district court has set aside these well-established presumptions, ignored the limits on its own jurisdiction, and committed the type of "[u]surpation of judicial power," *In re Abbott*, 954 F.3d at 782, this Court routinely rejects. *See also id.* at 792 (district court may not "substitute[] its *ipse dixit* for the [State's] reasoned judgment."). Its preliminary injunction cannot survive appeal.

Plaintiffs' brief in opposition to a stay merely confirms as much. It barely discusses the injunction's overbroad terms. It does not defend the district court's lack of legal reasoning. And it all but concedes Plaintiffs' claims are barred by jurisdictional defects.

Instead, Plaintiffs focus on the equities, arguing at length that a stay will create "confusion." But to the extent anyone is confused, the blame lies squarely with *Plaintiffs*. The Texas Legislature decided that those with a "disability" may vote by mail. Tex. Elec. Code § 82.002. Plaintiffs filed two actions—one in state court, and the other one in the district court below—to override that legislative choice, claiming that "disability" means a generalized fear of or lack of immunity to disease. They won a temporary injunction in a state trial court, but Defendants immediately stayed that injunction by filing a notice of appeal 30 minutes later. Undeterred, Plaintiffs wrongly claimed final victory and demanded that county election officials and voters bend to their will. They treat a superseded state trial court's temporary injunction as definitive resolution and accuse anyone who disagrees of creating confusion.

In the end, Plaintiffs oppose a stay because it will impede their efforts to procure a judicial rewrite of Texas election law weeks before an election. That is no reason to deny Defendants' motion. The Court should grant a stay pending appeal.

ARGUMENT

I. Defendants Are Likely to Succeed on Appeal.

Plaintiffs' opposition confirms Defendants are likely to prevail in this appeal for multiple reasons. Indeed, Plaintiffs effectively concede at least *two* fatal jurisdictional defects in the trial court's order.

A. Plaintiffs cannot explain how the adequacy of a State's precautions to allow voters to exercise the franchise during a pandemic presents anything other than a nonjusticiable political question. Plaintiffs correctly note that "'The dominant

consideration in any political question inquiry is whether there is . . . a situation where [the court] will lack judicially discoverable and manageable standards for resolving' the case." Resp. 25 (quoting *Saldano v. O'Connell*, 322 F.3d 365, 369 (5th Cir. 2003)). Instead of offering a standard, though, they claim (at 25) that the State waived the political-question doctrine by not raising it first in the trial court. But the political-question doctrine is jurisdictional and cannot be waived. *See Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 948 (5th Cir. 2011). Indeed, the Supreme Court recently raised the issue for the first time *after* merits briefing. Order of April 27, 2020, *Trump v. Mazars*, No. 19-715 (U.S.).

The course of this litigation demonstrates why no manageable standard exists to resolve whether the State has done enough to protect voters from this pandemic. For example, in the state trial court, Plaintiffs proffered expert testimony that in-person voting was unacceptably risky because the virus could be transmitted by touching contaminated surfaces such as election equipment. Ex. M at 77, 85. But just Wednesday, the Center for Disease Control updated its guidance to state that COVID-19 is "not spread easily" through touching contaminated surfaces. CDC, *How COVID-19 spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited May 21, 2020). Applying the *Anderson/Burdick* balancing test under such ever-changing circumstances—as Plaintiffs' brief asks the Court to do—would simply substitute the Court's view of appropriate precautions for that of state policymakers. *See Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092, at *1, *3 (N.D. Ga. May 14, 2020) (citing *Jacobson*

v. Fla. Sec'y of State, No. 19-14552, 2020 WL 2049076, at *18 (11th Cir. Apr. 29, 2020) (William Pryor, J., concurring)).

B. Plaintiffs' response also demonstrates why their claims are barred by sovereign immunity. Plaintiffs acknowledge (at 26) that the only relevant exception to sovereign immunity is *Ex Parte Young*. Plaintiffs' claims fall outside the *Ex Parte Young* exception for at least two reasons.

First, in discussing the confusion of voters that would result if this Court were to grant a stay, Plaintiffs demonstrate that much of their complaint is really about the consistent application of state law. As this Court recently reiterated, however, a district court lacks jurisdiction where "its injunction would 'promote compliance' with [the State's] own policies." *Valentine*, 965 F.3d at 802. Indeed, the Supreme Court's decision in "*Pennhurst* [*State School & Hospital v. Halderman*, 465 U.S. 89 (1984)] plainly prohibits such an injunction." *Id.*

Second, as this Court has also recently reiterated, "for a state official to have the requisite 'connection' to apply the *Young* exception, the official must have 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (plurality op.)). But Plaintiffs offer no proof of such "demonstrated willingness." As to the Secretary of State, Plaintiffs point (at 26) only to her general duties to "ensure uniformity in election administration." That is not enough to invoke *Ex Parte Young*, as this Court held recently in *City of Austin*. *See* 943 F.3d at 999-1000 (citing *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)).

And the Governor has no enforcement power at all over the mail-in-ballot provisions of the Election Code. *See* Tex. Elec. Code § 86.001 (placing enforcement authority on early voting clerks). Respondents argue (at 26) only that he has *suspended* some portions of that Code under his emergency powers. *See* ROA.529, 958. That power offers nothing relevant to *Ex Parte Young*. While the Attorney General has the power to prosecute election fraud, Plaintiffs point to no "demonstrated willingness" to enforce the law against Plaintiffs under the confused circumstances Plaintiffs have created here. *City of Austin*, 943 F.3d at 1000 (collecting cases requiring actual enforcement).

C. Those jurisdictional defects are reason enough to grant a stay pending appeal because they show that the preliminary injunction is likely to fail before the Court even reaches the merits. In any event, the preliminary injunction survive cannot review on the merits. For one thing, the district court had a clear duty to abstain, yet refused to do. Instead, it purported to issue a binding instruction on the meaning of section 82.002 approximately 20 hours before the Texas Supreme Court held oral argument on that exact issue. That was impermissible. *See* Mot. For Stay Pending Appeal 7-9. Plaintiffs' repeated incantation of the trial court's discretion ignores that this Court reviews the district court's exercise of that discretion quite closely. *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., of State Bar of Tex.*, 283 F.3d 650, 652 (5th Cir. 2002) (acknowledging that abstention not the ordinary abuse of discretion standard). And on that type of examination, the district court's refusal to abstain was an abuse of discretion, as this Court confirmed in *Moore v. Tangipahoa Par. Sch. Bd.*, 507 Fed. App'x 389, 393 (5th Cir. 2013) (per curiam) (issuing stay

pending appeal where district court failed to apply *Pullman* abstention). *See also* 17A Wright & Miller, Fed. Prac. & Proc. Juris. § 4241 (3d ed.).

For another, the district court's application of the Twenty-Sixth Amendment and Equal Protection Clause ignores the nature of rational-basis review. *See* Mot. for Stay Pending Appeal 12-15. Its void-for-vagueness holding misunderstands the law and has no application in this civil context. *Id.* at 15-16. Its "voter intimidation" conclusion is baseless. *Id.* at 16-17. And the district court wrongly believed that the First Amendment protects the right to encourage illegal voter fraud while ignoring the effect of its overbroad injunction on the rights of defendants to speak about state law and prosecute crime. *Id.* at 17-18. Plaintiffs' response to these many defects simply rehashes the district court's impermissible reasoning that Defendants have already rebutted.[1]

II. Plaintiffs' Response Confirms That the Remaining Factors Favor a Stay.

Plaintiffs' focus on the chaos they have caused only underscores why the other *Nken* factors favor a stay. Plaintiffs have effectively admitted that the confusion caused by their litigation impedes the function of Texas's election laws. Resp. at 9.

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[1] Plaintiffs attack Defendants' reliance on *McDonald v. Bd of Elec. Comm'rs of Chi.*, 394 U.S. 802 (1969), claiming it is outdated. But *McDonald* remains good law, and no subsequent Supreme Court decision has abrogated its holding. *Cf. Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) ("[W]e decline to announce for the Supreme Court that it has overruled one of its decisions.") (citing *Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("[L]ower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")).

The district court's order now purports to prohibit state officials from trying to resolve that confusion. Assuming such clarification counts as "enforcement" within the meaning of this Court's jurisprudence, such an injunction is irreparably harmful: "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (alterations omitted) (Roberts, C.J. in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, J., in chambers)).

Moreover, as a matter of law, "[b]ecause the State is the appealing party, its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). Plaintiffs cite no authority for the notion that because *they* have created confusion ahead of an election, the public interest favors their cause. To the contrary, their primary authority "STAY[ED] the district court's judgment pending appeal" precisely because of "the extremely fast-approaching election date." *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (emphasis in original). Defendants ask only that the Court do the same here. Indeed, as set out in Defendants' motion, this Court has now made it standard practice to stay district court orders that, like this one, decide for state officials how to manage public policy during a pandemic. *Abbott I*, 954 F.3d at 795; *Valentine*, 956 F.3d at 801.

III. The Blame for Any Confusion Lies with Plaintiffs.

If Plaintiffs will be harmed by a stay pending appeal, that harm is entirely of their own making. The first third of Plaintiffs' response is devoted to the confusion caused by their own conduct. Plaintiffs acknowledge (at 9) that the confusion arises from the

status of a Travis County district court injunction that was entered on April 17.[2] As Defendants have explained, however, that injunction was stayed 30 minutes after it was entered when the State perfected its appeal. *Compare* Ex. F (3:39 PM) *with* Ex. G (4:09 PM); *see also* Texas Civil Prac. & Rem. Code § 6.001(b); Tex. R. App. P. 29.1(b). Far from disputing this, Plaintiffs point (at 9) to a separate injunction issued on May 14, which was itself stayed within 31.5 hours. *Compare* Ex. J (5/14/2020 11:36 A.M.) *with* Ex. B.[3]

That is, in total, Texas state courts have permitted universal mail-in ballots for less than 36 hours. To the extent that there has been "information available to voters and election officials during the past *two months*," Resp. at 9 (emphasis in original), it has been based on Plaintiffs' own repeated erroneous statements that their exceedingly brief trial-court victory remained in effect.[4] Plaintiffs cite—and Defendants are

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[2] Plaintiffs assert (at 9) that the injunction was entered on April 15. This is false. On April 15, the trial court indicated that it would grant an injunction, but that it had "concern[s] … as to the language that is being proposed and whether or not it meets with my approval and it is consistent with the findings." Exhibit M at 183. The actual injunction entered on April 17. Exhibit F.

[3] Though there is no timestamp on Exhibit B, it was served to parties at 7:08 PM CT on May 15.

[4] *See*, *e.g.*, Ex. L at 9 (asserting voter intimidation because "Attorney General Paxton made clear that the executive branch of the state government would not be bound by the state district court's ruling"); Michael King, *Paxton Threatens Election Officials With Prosecution*, Austin Chronicle, May 4, 2020, https://www.austinchronicle.com/daily/news/2020-05-04/paxton-threatens-election-officials-with-prosecution/ ("Dunn also rejected Paxton's assertion that District Judge Sulak's order is 'stayed' pending appeal."); Tessa Weinberg, *Paxton warns local officials against encouraging vote-by-mail due to coronavirus fears*, Fort Worth Star

aware of—no authority that allows a party to defeat an otherwise proper request for a stay in federal court because that party *ignored* a stay in state court.

Conclusion

The Court should stay the district court's injunction pending appeal.

Respectfully submitted.

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Kyle.Hawkins@oag.texas.gov
Solicitor General

Lanora C. Pettit
Assistant Solicitor General
Lanora.pettit@oag.texas.gov

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Appellants

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant Attorney General

Telegram, May 1, 2020, https://www.star-telegram.com/news/politics-government/article242443406.html (substantively same).

Certificate of Service

On May 22, 2020, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,296 words, excluding the parts of the motion exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins