

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

**DANA DEBEAUVOIR'S RESPONSE TO APPELLANT'S EMERGENCY
MOTION FOR STAY PENDING APPEAL AND TEMPORARY
ADMINISTRATIVE STAY**

Travis County Clerk Dana DeBeauvoir is a named Defendant in the underlying lawsuit, *Texas Democratic Party, et al v. Greg Abbott, et al.* She appeared at the hearing on the Motion for Preliminary Injunction made the subject of this interlocutory appeal. The State does not include her in the style of this appeal; however, DeBeauvoir files this short response to oppose a stay of the Honorable U.S. District Court Judge Fred Biery's Order issued May, 19, 2020.

Exhibit A

As this Court is aware, Travis County District Judge Tim Sulak issued an order more than one month ago concluding that an individual with a lack of established immunity to COVID-19 can claim “disability”¹ as grounds for an application for a mail-in ballot under Section 82.002 of the Texas Election Code because a lack of established immunity to the novel coronavirus is a physical condition making a voter unlikely to be able to appear in person to vote without the likelihood of injuring their health. *See* Tex. Elec. Code § 82.002(a) (defining “disability” as “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.”).

Since then, applications for mail-in ballots for “disability” and other reasons have been completed and submitted to Texas’ local election officials. At oral argument yesterday before the Texas Supreme Court on a Petition for Mandamus,² the State asserted that if an application is submitted with “disability” marked, the early voting clerk cannot go behind the four-corners of the application and investigate that assertion and should issue the mail-in ballot. *See*

¹ As the Attorney General concluded in a letter opinion, “Texas Election Code defines “disability” less restrictively than other commonly understood meanings of the term. *See, e.g.,* Tex. Att’y Gen. Op. KP-0009 (March 9, 2015) (“Election Code section 82.002 makes no reference to a determination of disability made by any state governmental entity or federal agency. . . . Nor does it condition or limit eligibility based on any such determination.”).

² *In re State of Texas*, Cause No. 20-0394 (seeking to mandamus several Texas local election officials, including DeBeauvoir, from accepting certain applications for mail-in ballots related to “disability” on the basis of lack of immunity to Covid-19).

<https://www.youtube.com/watch?v=llwD8A6k1Qg>, Recording of Oral Argument, at 4:45 & 15:20. The public confusion caused by the back and forth issuance of trial court orders³ and stays of those orders by appellate courts, including asking the Fifth Circuit to stay the federal judge's order, interferes with this process that has been in place for over one month, with only six weeks remaining until the July 14, 2020, election. Entering a stay, pending resolution of appeal, will create further voter confusion and instability as well as an additional strain on election officials who have a duty to process and respond to each application and provide ballots by certain statutory deadlines.

Additionally, staying the Court's order would only further delay the answer to the issues presented. The State proposes allowing that appeal process to run its course. Not only is this inconsistent with the position the State took at the Texas Supreme Court by filing Petitions of Mandamus directly to that Court asking for immediate relief rather than waiting for the state appeal process to continue,⁴ it will only delay reaching the conclusion the Texas voters need. With the elections imminent, election administrators need time to properly prepare to run an election

³ It is telling that the only courts that have conducted evidentiary hearings regarding interpretation of Section 82.002 have both found that lack of immunity to Covid-19 is a physical condition that makes a voter eligible to vote by mail under Texas' election laws.

⁴ See *In re State of Texas*, Cause No. 20-0401 (petition for mandamus against Texas' 14th Court of Appeals for entering an order that permits State District Court Judge Sulak's order to remain in effect) and *In re State of Texas*, Cause No. 20-0394 (petition for mandamus against several local election officials to reject applications to vote by mail based on lack of immunity to Covid-19).

under circumstances that have never before been experienced in history. Voters need to know their legal options, and they should not have to choose between risking their health and exercising their fundamental right to vote. For all of these reasons, Travis County Clerk Dana DeBeauvoir requests the Court deny the Motion to Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2020, I electronically submitted the foregoing with the Clerk of Court for filing using the CM/ECF system, which will send notification of such filing to the following:

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CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 738 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 using Microsoft Word (the same program used to calculate the word count).

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