UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI; DSCC; DCCC, *Plaintiffs-Appellees*, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, *Defendant-Appellant*.	No. 20-40643

MOTION FOR RECONSIDERATION OR MODIFICATION OF SANCTIONS ORDER ON BEHALF OF MARC E. ELIAS, BRUCE V. SPIVA, SKYLER M. HOWTON, LALITHA D. MADDURI, DANIEL C. OSHER, AND STEPHANIE I. COMMAND

s/Paul D. Clement
PAUL D. CLEMENT
Counsel of Record
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Movants Marc E. Elias, Bruce V. Spiva, Skyler M. Howton, Lalitha D. Madduri, Daniel C. Osher, and Stephanie I. Command

March 25, 2021

CERTIFICATE OF INTERESTED PERSONS

1. No. 20-40643, *Texas Alliance for Retires Americans, et al. v. Hughs*

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case:

Plaintiffs-Appellees

a. Texas Alliance for Retired Americans
b. Sylvia Bruni
c. DSCC
d. DCCC

Other Parties

a. Texas Democratic Party
b. Jessica Tiedt

The following attorneys have appeared on behalf of Plaintiffs-Appellees either before this Court or in the District Court:

Marc E. Elias
Bruce V. Spiva
Lalitha D. Madduri
Daniel C. Osher
Stephanie I. Command
Emily R. Brailey
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 800
Washington, D.C. 20005-3960

Skyler M. Howton
PERKINS COIE LLP
500 North Akard Street
Suite 3300
Dallas, TX 75201-3347

Defendant-Appellant

a. Ruth Hughs, Texas Secretary of State

The following attorneys have appeared on behalf of Defendant-Appellant either before this Court or in the District Court:

Ken Paxton
Jeffrey C. Mateer
Ryan L. Bangert
Patrick K. Sweeten
Todd Lawrence Disher
William T. Thompson
Matthew H. Frederick
Kyle D. Hawkins
Judd Stone
OFFICE OF THE TEXAS
ATTORNEY GENERAL
P.O. Box 12548 (MC-009)
Austin, Texas 78711-2548

Individuals Subject to the March 11 Sanctions Order

a. Marc E. Elias
b. Bruce V. Spiva
c. Skyler M. Howton
d. Lalitha D. Madduri
e. Daniel C. Osher
f. Stephanie I. Command

The following attorneys are appearing before this Court solely on behalf of the Movants, i.e., Individuals Subject to the March 11 Sanctions Order, and not Plaintiffs-Appellees:

Paul D. Clement
Matthew D. Rowen
KIRKLAND & ELLIS LLP
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 389-5000

/s/ Paul D. Clement
Paul D. Clement

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule

Treatises

Other Authorities

INTRODUCTION[1]

This motion does not seek reconsideration of this Court's denial of Plaintiffs' motion to supplement the record or the grant of the motion to strike. It seeks reconsideration or modification only of the portion of this Court's March 11, 2021 Order imposing sanctions (the "Sanctions Order"), and it is filed only on behalf of the sanctioned attorneys: namely, Marc Elias, Bruce Spiva, Skyler Howton, Lalitha Madduri, Daniel Osher, and Stephanie Command (collectively, "Movants").

Movants sincerely apologize for the misunderstandings and mistakes that precipitated the Sanctions Order. Movants' litigation decisions were not intended to conceal the denial of the initial motion to supplement the record, but reflected good-faith misunderstandings about the full impact of the earlier denial and the proper vehicle for allowing the merits panel to address the supplementation issue. The rules governing those questions were far from clear, and several authorities supported Movants' interpretation of the ambiguities that the Sanctions Order has now clarified.

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[1] Movants understand this Court's rules to require that this filing be styled a motion for reconsideration because, *inter alia*, the monetary sanction has not yet been reduced to a sum certain. *See Cruz v. Fulton*, 714 F.App'x 393, 394 (5th Cir. 2018); *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir. 1998). In the event that is incorrect, Movants respectfully request that their motion be construed as a petition for rehearing and rehearing en banc.

Respectfully, Movants submit that appellate courts generally reserve sanctions for egregious misconduct and the disregard of clearly established rules, rather than sanctioning good-faith mistakes based on misunderstandings about complicated and ambiguous rules of appellate practice. As a result, if the Sanctions Order stands, it will have (and, indeed, already has had) outsized collateral consequences on each of the affected attorneys. Movants affirm that they heard and understand the Court's lesson, apologize for disappointing the Court, and respectfully ask the Court to reconsider the Sanctions Order.

BACKGROUND

On September 25, 2020, the district court granted Plaintiffs' request for a preliminary injunction. ROA.1661-1704. Defendant promptly moved this Court to stay that injunction pending appeal and to grant an administrative stay. Doc. #00515581091. In that motion, Defendant argued that although "the district court found" that Plaintiffs had "standing" sufficient for a preliminary injunction, it did so "based entirely on the allegations in Plaintiffs' complaint," which she argued "was erroneous" (because "the preliminary-injunction context" "requires 'evidence in the record'") and dispositive (because "the record contains no evidence to support Plaintiffs' standing"). *Id.* at 8 (citations omitted). A Motions Panel of this Court (Clement, Elrod, and Haynes, JJ.) entered an administrative stay on September 28, 2020. Doc. #00515583262 at 1-2.

The Motions Panel ordered Plaintiffs to respond to Defendant's stay motion by the next day (*i.e.*, September 29, 2020). *Id.* at 2. Plaintiffs did so. Doc. #00515583344. Alongside their opposition, Plaintiffs filed a motion to supplement the record, requesting leave to file three declarations designed to substantiate Plaintiffs' standing allegations and thus answer Defendant's concern about a lack of record evidence. Doc. #00515583497 at 1-2.

On September 30, 2020, Defendant filed a reply, and the Motions Panel issued a per curiam opinion staying the preliminary injunction pending appeal, largely based on the *Purcell* principle disfavoring injunctive relief in the run up to an election. Doc. #00515585161. The Motions Panel noted "some concerns" about Plaintiffs' standing and the district court's application of an insufficiently demanding standard for showing the "standing required to maintain a preliminary injunction." *Id.* at 4-5 n.1. The Motions Panel clarified, however, that it was not resolving the standing issue, but deferring it to the "merits panel." *Id.*

Earlier that same day (September 30, 2020), and before Defendant filed any separate response to Plaintiffs' motion to supplement, the Motions Panel denied the motion in a succinct single-sentence, single-Judge order that did not specify the particular ground for the denial. Doc. #00515584027.

The case then proceeded with briefing directed to the merits panel.[2] Defendant filed her opening brief on January 11, 2021, which renewed the argument that the record before the district court did not support standing. Doc. #00515702648. Plaintiffs filed their response brief on February 10, 2021. Doc. #00515741373. Alongside their response brief, in an effort to respond to Defendant's renewed lack-of-evidence-for-standing argument and to avoid a remand on that issue, Plaintiffs filed a three-page motion to supplement the record, requesting leave to file the same three declarations they had attached to their earlier unsuccessful motion filed during the stay proceedings. Doc. #00515741367. This new motion was substantially similar to that earlier motion, but did not advert to the earlier motion or the denial of that earlier motion, or seek reconsideration of that denial. *See id.* at 1-3.

Two days later, Defendant's counsel sent Movants an email indicating that Defendant viewed the motion as an improper and untimely reconsideration motion and would be filing a motion for sanctions that day. *See* Doc. #00515761093, Exh. 1. Defendant's counsel did not suggest they would withhold their sanctions motion if Plaintiffs amended their motion to advert to the earlier denial. *Id.*

[2] In the interim, Plaintiffs filed a motion to dismiss the appeal of the preliminary injunction as moot, Doc. #00515643282, which Defendant opposed, Doc. #00515655540. The Motions Panel entered a per curiam order carrying the motion to dismiss with the case. Doc. #00515657414.

Defendant then filed a combined "Brief in Opposition to Appellees' Motion to Supplement" and "Motion to Strike, and to Sanction Appellees' Counsel." Doc. #00515744518. As to the former, Defendant argued that Plaintiffs' February 10 motion to supplement should be denied because it amounted to an untimely effort to seek reconsideration of the September 30 single-judge order denying their earlier motion to supplement, which was law of the case, and was otherwise unavailing. *Id.* at 2-7. As to the latter, Defendant argued that Movants were "unreasonable and vexatious" in filing the February 10 motion because that motion "'presents no explanation why' the Court's September order 'w[as] incorrect'" and does "not even mention that they previously filed an identical and unsuccessful motion to supplement." *Id.* at 7-9 (alteration in original; citations omitted). Defendant asked the Court to order Movants "to pay the 'costs, expenses, and attorneys' fees' the Secretary 'incurred because of such conduct'" and "to inform every court before which they are admitted (including *pro hac vice*) that they were found to have violated their duty of candor" and "to do the same when filing a motion or brief in any court within the Fifth Circuit" "for the next two years." *Id.* at 9, 12-13.

Plaintiffs filed a reply in support of their motion to supplement, Doc. #00515750981, and a separate opposition to Defendant's sanctions motion. Doc. #00515752942. In their opposition, Plaintiffs noted that, during the pre-motion conference on Plaintiffs' motion to supplement, Defendant's counsel did not suggest

that they believed the motion would be sanctionable. *Id.* at 3. Plaintiffs also noted that "at no point prior to filing the present motion for sanctions did the Secretary request that Plaintiffs withdraw or amend their Motion," and that Defendant had not provided Plaintiffs "an opportunity for correction." *Id*. at 7.

Defendant filed a reply in support of her sanctions motion on March 1, 2021, continuing to argue for sanctions, disputing Plaintiffs' description of their sanctions discussion, and attaching the parties' pre-motion correspondence relating to sanctions. Doc. #00515761093; *see id.* Exh. 1.

On March 11, 2021, the Motions Panel entered a per curiam order denying Plaintiffs' motion to supplement the record, granting Defendant's "motion to strike portions of Appellees' brief that improperly reference non-record material," and granting Defendant's motion to sanction Movants, albeit with Judge Haynes noting she would deny the sanctions motion. Doc. #00515777153 at 1-2 & n.*. The Court concluded that Movants' "failure to disclose the earlier denial of their motion" was "inexplicable" and "violated their duty of candor to the court," *id.* at 2, and that their decision not to "withdraw[] their motion" immediately after being informed that Defendant intended to move for sanctions "multiplied the proceedings unreasonably and vexatiously." *Id.* at 2-3. The Court ordered each of "[t]he attorneys listed on the February 10, 2021 motion to supplement the record" to pay "(i) the reasonable attorney's fees and court costs incurred by Appellant with respect to Appellees'

duplicative February 10, 2021 motion, to be determined by this court following the filing of an affidavit by Appellant and any response by Appellees, and (ii) double costs." *Id.* at 3 (citing, *inter alia*, 28 U.S.C. §1927); *see also* CA5 Docket Entry, Mar. 11, 2021 (listing the attorneys subject to the sanctions order). The Court encouraged review of the rules concerning the duty of candor to the court and continued legal education directed to that duty. Doc. #00515777153 at 3. Finally, the Court noted that "[f]urther violations of this court's rules may subject the attorneys to further sanctions under this court's inherent powers." *Id.*

SUMMARY OF ARGUMENT

Based on a full understanding of this Court's view of the dispositive effect of the denial of the first motion to supplement and the proper mechanism for seeking its reconsideration, it is clear that Movants misunderstood the impact of that denial and the proper procedural remedy for avoiding foreclosure of that issue. Movants sincerely apologize for those mistakes, and want to emphasize that they never intended to mislead the Court by failing to advert to the earlier denial.

In light of those realities, Movants respectfully request that the Court reconsider its Sanctions Order. Courts—and appellate courts in particular—generally reserve sanctions for the most serious misconduct and circumstances where the governing rules are sufficiently clear that no reasonable lawyer could make the same mistake in good faith. And precisely because appellate sanctions

orders are reserved for the most serious misconduct, such awards carry outsized stigma for the lawyers involved.

The root cause of the error here was Movants' failure to appreciate the full effect of the Motions Panel's denial of the initial motion to supplement and to understand that, if they wanted to preserve the possibility of the merits panel considering the affidavits, Movants needed to seek reconsideration of that denial within 14 days. If Movants had understood that they needed to file a prompt motion for reconsideration, they would necessarily have adverted to the order they sought to have reconsidered. Regrettably, they misperceived that order to be tied to the stay proceedings and did not view it as foreclosing a motion to supplement the record in conjunction with the merits panel's consideration of the standing dispute. To be sure, this Court has now made clear that the earlier denial was dispositive, and Movants fully recognize their obligation to advert to dispositive rulings. Movants' misunderstanding was a product of a genuine mistake on a difficult question with conflicting authority, *see infra*, not bad faith. And while Movants now understand that they picked the wrong vehicle to ask the merits panel to consider the question of supplementing the record, that too was a good-faith mistake stemming from a failure to appreciate the full effect of the earlier denial and the limited procedural avenue for seeking its reconsideration.

The difference between the errors here and the gross misconduct that typically triggers appellate sanctions gives the Court's Sanctions Order a stigmatizing effect that may be greater than intended. This is true of all Movants, but especially when it comes to the more junior lawyers among them. All Movants will need to disclose the Sanctions Order on countless motions for admission and pro hac vice motions for years to come. Reconsidering the Sanctions Order, moreover, will not avoid meaningful consequences for the Movants. The Sanctions Order has already been the subject of a press release by Defendant's counsel and national media discussion. The Order has clarified the law and had its intended deterrent effect; this Court can rest assured of that. Accordingly, Movants respectfully suggest that a reconsideration of the Sanctions Order would be appropriate.

ARGUMENT

I. Appellate Sanctions Are Generally Reserved For Egregious Misconduct.

Courts have ample power to punish lawyer misconduct, but as this Court has repeatedly recognized, "the imposition of sanctions under the court's inherent power is powerful medicine that should be administered with great restraint." *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F.App'x 899, 906 (5th Cir. 2010). "A court should invoke its inherent power to award attorney's fees only when it finds that 'fraud has been practiced upon it, or that the very temple of justice has been defiled.'" *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1005 (5th Cir. 1995) (quoting *Chambers*

v. NASCO, Inc., 501 U.S. 32, 46 (1991)). "Because of the punitive nature of §1927 sanctions," the threshold for imposing them is also high. *Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998). They are limited to cases "of bad faith, improper motive, or reckless disregard of the duty owed to the court." *Conner v. Travis Cnty.*, 209 F.3d 794, 799 (5th Cir. 2000) (quoting *Edwards*, 153 F.3d at 246).

Consistent with these principles, cases imposing sanctions, especially on appeal, are few and far between, and are generally reserved for serious misconduct or the violation of clearly established rules. *See, e.g.*, *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 872 (5th Cir. 2014) ("Section 1927 sanctions should be employed 'only in instances evidencing a serious and standard disregard for the orderly process of justice….'" (quoting *FDIC v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1994))). This Court, in particular, has declined to impose sanctions even for serious errors of judgment. *See*, *e.g.*, *Sun Coast Res., Inc. v. Conrad*, 958 F.3d 396 (5th Cir. 2020) (frivolous appeal); *Union Pump*, 404 F.App'x at 906 (wiping disks in violation of a protective order).

Appellate sanctions for violating the duty of candor by omitting relevant precedents or facts about the case are particularly infrequent. While courts occasionally impose sanctions for an unjustified failure to cite binding *case law* that forecloses a lawyer's arguments or renders an appeal frivolous, *see, e.g.*, *Katris v. INS*, 562 F.2d 866, 869-70 (2d Cir. 1977) (sanctioning attorney who omitted binding

adverse authority simply because the "decisions were adverse to his position here and that he did not agree with them"), they more often merely admonish lawyers for such omissions, *see, e.g.*, *United States v. City of Jackson*, 359 F.3d 727, 732 n.9 (5th Cir. 2004) (expressing displeasure with, but not sanctioning, attorney whose brief failed to mention a "critical aspect" of a key case); *Thompson v. Duke*, 940 F.2d 192, 194-98 (7th Cir. 1991) (reversing sanctions against attorney who was "imprudent and unprofessional" in failing to mention non-dispositive adverse case).

Decisions imposing sanctions for failing to disclose *prior rulings in the same case and other facts reflected on the docket* are rarer still. In fact, our search did not identify a prior case where a federal appellate court itself imposed sanctions for such an omission,[3] and only one case upholding a district court's imposition of sanctions for such an omission. *See Blackwell v. Dep't of Offender Rehab.*, 807 F.2d 914 (11th Cir. 1987) (per curiam). In *Blackwell*, the lawyer did not disclose in his motion for attorneys' fees that the parties' settlement (that the same district court judge had approved) contained an express release of all claims for attorneys' fees, and the attorney offered no theory why the settlement and prior court order did not preclude his motion. *Id.* at 915-16. More typically, sanctions for such omissions are either denied outright or reversed on appeal as an abuse of discretion. *See, e.g.*, *MAO-*

[3] We also found no opinions of federal appellate courts imposing sanctions on similar facts under Model Rule 3.3, on which this Court relied in the Sanctions Order.

MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co., 935 F.3d 573, 584 (7th Cir. 2019) (reversing duty-of-candor sanctions given "the absence of either affirmative representations or material omissions in the response," while noting that counsel "should have brought" the relevant "supporting materials" to the district court's attention); *Level 3 Commc'ns, LLC v. United States*, 724 F.App'x 931, 936 (Fed. Cir. 2018) (reversing duty-of-candor sanctions after government attorney's omission left district court with the misimpression that a critical project would not be performed, because the attorney's conduct did not evince "the conscious doing of wrong"); *In re Plaza-Martínez*, 747 F.3d 10, 11-14 (1st Cir. 2014) (reversing duty-of-candor sanctions while acknowledging that district court was not unreasonable in thinking "the appellant had been indulging in gamesmanship").

This Court has not previously imposed—or even upheld under a deferential review standard—duty-of-candor sanctions based only on omissions. Instead, the few previous instances in which this Court has imposed or upheld duty-of-candor sanctions involved unequivocal sins of commission that lacked any colorable justification.[4] The cases cited in the Sanctions Order fit that mold. In *Automation*

[4] *See, e.g.*, *In re Ray*, 951 F.3d 650, 651-55 (5th Cir. 2020) (affirming sanctions against attorney whose "fraud, misrepresentation, and misconduct" reflected "an attorney completely devoid of an ethical or moral sense of right and wrong"); *U.S. ex rel. Holmes v. Northrop Grumman Corp.*, 642 F.App'x 373, 375-78 (5th Cir. 2016) (affirming sanctions against attorney who filed a *qui tam* action using documents

Support, Inc. v. Humble Design, L.L.C., 982 F.3d 392, 395 (5th Cir. 2020), the attorney had repeatedly "inundated the district court and our court with rounds of frivolous filings" attempting to overturn a three-year old ruling. In *Engra, Inc. v. Gabel*, 958 F.2d 643, 645 (5th Cir. 1992) (per curiam), the lawyer tried to intervene against the interests of his own bankrupt client months after a bankruptcy court definitively resolved the contingency fee interest he sought to protect through intervention. And in *Renobato v. Merrill Lynch & Co.*, 153 F.App'x 925, 928 (5th Cir. 2005), the court noted that counsel's "somewhat exuberant filing strategy" normally would *not* give rise to sanctions but for a case-long "pattern of behavior" that "include[ed] his delinquency, his violation of the district court's cease-and-desist order, and his repetitive and rambling filings."

More generally, sanctions imposed directly by appellate courts are rare for sound practical reasons. Unlike trial courts that oversee proceedings that can last for years with frequent counsel appearances that allow the presiding judge to provide warnings and assess a pattern of misconduct, appellate courts generally interact with lawyers only episodically and typically observe lawyers in action only once. Appellate sanctions imposed by motions panels are rarer still given that they typically handle preliminary motions only until a merits panel is assigned and never

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covered by a protective order the attorney himself had procured in a separate-but-related pending case).

see the lawyers in person. For these reasons, sanctions imposed by appellate courts are generally reserved for egregious misconduct and the repeated violation of well-established rules.

II. The Mistakes Made Here Do Not Rise To The Same Level And Stem From Good-Faith Misunderstanding About The Effect Of A Motions-Panel Denial.

The mistakes underlying the sanctions imposed here are materially different from the types of misconduct found sanctionable in the cases cited above and more generally. To be sure, simply offering "cit[ations to] … cases where more egregious appellate conduct was sanctioned" does not excuse errors or defeat sanctions. *Coghlan v. Starkey*, 852 F.2d 806, 808 (5th Cir. 1988). But the conduct here is more comparable to that in the cases where sanctions were withheld or reversed. The mistakes are the product of good-faith misunderstandings, not willful disregard of professional responsibilities.

The root cause of the errors here was the Movants' failure to appreciate the full effect of the Motions Panel's denial of the first motion to supplement the record and the available means to seek reconsideration of that denial by a merits panel. The Sanctions Order now makes clear that the denial of the first motion to supplement is a definitive ruling that is law of the case and could only be revisited based on a timely motion for reconsideration directed to the Motions Panel (with a suggestion that the reconsideration motion be held for the merits panel). If Movants had

understood the need for such a prompt reconsideration motion, they would have necessarily adverted to the adverse order they sought to have reconsidered, and failing to do so would indeed be inexplicable. But if that earlier denial was (mis)understood to be a ruling that governed only the stay proceedings and did not bind the merits panel, then the failure to advert to the earlier ruling becomes understandable for what it was—a regrettable but good-faith mistake.

And until the Sanctions Order, the effect of the prior denial was open to reasonable debate. That the denial 1) was issued by a motions panel, 2) via a single-judge order, and 3) on the same day the standing issue was deferred to a merits panel all contributed to reasonable doubt on this score. The Federal Rules of Appellate Procedure provide that "[t]he court may review the action of a single judge." Fed. R. App. P. 27(c). A leading treatise interprets that statement to "indicate[] that a single appellate judge's decision *does not establish law of the case* that binds the court of appeals." 16AA Wright & Miller, *Federal Practice & Procedure Jurisdiction* §3973.3 (5th ed. Oct. 2020 update) (emphasis added). This Court has previously suggested a similar rule. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 176, 194 (5th Cir. 2020) ("[U]nder our circuit's procedures, opinions and orders of a panel with initial responsibility for resolving motions filed in an appeal are not binding on the later panel that is assigned the appeal for resolution.").

There is even authority in the specific context of motions to supplement the record that supports the view that a motions-panel-stage denial of such a motion does not preclude the merits panel from granting an identical motion to supplement the record: The *Federal Court Appellate Manual* states that a "merits panel may allow you to supplement" the record even "after a motion panel has denied" "your initial request to supplement the record on appeal." David G. Knibb, *Federal Court Appellate Manual* §28:18 (7th ed. Mar. 2021 update). That approach is consistent with the realities that a merits panel can always re-examine standing, which must be present at every juncture of the case, *see K.P. v. LeBlanc*, 729 F.3d 427, 438 (5th Cir. 2013), and that lawyers have a "continuing obligation in all cases to notify the Court of events that may impact th[e] Court's jurisdiction," *Sutuc v. Attorney Gen.*, 643 F.App'x 174, 174 (3d Cir. 2016).

We have not found any previous Fifth Circuit decisions rejecting this approach. In contrast, several cases suggest that motions-panel-stage rulings relating to jurisdiction do not bind merits panels. *See, e.g.*, *W. Elec. Co. v. Milgo Elec. Corp.*, 568 F.2d 1203, 1206 & n.6 (5th Cir. 1978); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (5th Cir. 2020) (Higginbotham, J., concurring); *see also* Wright & Miller §3973.3 ("The least-sticky types of motion-panel ruling[s] are those concerning subject-matter jurisdiction."). While most of the latter authorities deal with denials of motions to dismiss, they underscore the ambiguities surrounding the

issue and contribute to the reasonableness of Movants' good-faith, albeit mistaken, conclusion that the Motions Panel's denial of a motion to supplement did not preclude the filing of an identical motion in conjunction with merits briefing or render such a motion untimely.

It now appears to be settled by the Sanctions Order both that the Motions Panel denial was law of the case and that the only proper course for preserving the possibility of having the merits panel reconsider that ruling was to file a timely reconsideration motion before the Motions Panel accompanied by a request to hold the reconsideration motion in abeyance for the merits panel.[5] But neither of those things was clearly established at the time Movants filed the second motion to supplement. And given that ambiguity, the failure to mention the denial was a good-faith mistake, not an effort to conceal a previous ruling with obvious dispositive force.

Movants understand that the Sanctions Order reflects concerns not just with failing to advert to the previous denial, but with filing the duplicative and untimely motion and failing to withdraw it when confronted by Defendant. But all those errors stem from a failure to appreciate the dispositive effect of the Motions Panel's earlier denial via a single-judge order. That misunderstanding led Movants to believe that

[5] Perhaps we are mistaken about the availability of even that route for review, but that only underscores the difficulty of the issues.

the second motion to supplement was timely and not hopelessly duplicative, and thus that it did not need to be withdrawn.

In all events, making a duplicative filing based on a misunderstanding of the law is not the stuff of sanctions, as this Court made clear in *Ayala v. Enerco Group*, 569 F.App'x 241 (5th Cir. 2014). *Ayala* held that "[t]he district court abused its discretion in imposing sanctions" where counsel had filed an unnecessary and duplicative second lawsuit but had a colorable basis to believe that the second suit was not foreclosed. *Id.* at 251. In so holding, the Court explained that "[w]hile counsel's justifications for filing the second … action may lack merit, that 'is not a sufficient basis for awarding sanctions.'" *Id.* (citation omitted). Indeed, this Court has often deemed the imposition of sanctions to be a step too far even in cases involving serious misconduct. For instance, in *Sun Coast*, the litigant brought a meritless appeal premised on a frivolous argument that it had forfeited twice, falsely asserted that it had preserved the argument by citing a certain case when it had actually cited a *different* case of the same name, and later filed a "remarkable" motion asserting that this Court "would be guilty of 'cafeteria justice'" if the Court decided the case without holding oral argument. 958 F.3d at 397-98. Despite all that, the Court unanimously held that it was "time for grace, not punishment," and denied the opposing party's motion for sanctions. *Id.*

Finally, it bears emphasis that Movants did not omit reference to the earlier motion to supplement the record and its denial as part of a benighted effort to prevent this Court from learning of an order available to all on the docket. Indeed, given Defendant's zealous advocacy, the chance that this Court would not "learn" of an order entered just a few months earlier in the same appeal is exactly nil. These circumstances make clear that Movants' failure to advert to that order was nothing more than a failure to recognize the order's significance, rather than a scheme to conceal it from the Court. The failure to flag the order is both regrettable and sincerely regretted, but it is not the kind of conduct that merits a severe sanction.

III. Reconsideration Or Modification Of The Sanctions Order Is Warranted.

Sun Coast is not alone in emphasizing the importance of "grace" when it comes to attorney mistakes. That same impulse underlies the numerous decisions that reverse trial-court sanctions, even under an abuse-of-discretion standard, while acknowledging the errors. *See supra*; *cf. In re Shipley*, 135 S.Ct. 1589, 1589-90 (2015) (mem.) (declining to impose sanctions after a motion to show cause, but reminding attorney and the bar of their obligations); *S.O. v. Hinds Cnty. Sch. Dist.*, 794 F.App'x 427 (5th Cir. Feb. 18, 2020) (mem.) (per curiam) (withdrawing opinion that raised potential for sanctions after counsel apologized in the rehearing petition).

The Sanctions Order stopped short of imposing the full sanctions Defendant requested. For example, Defendant requested an order that Movants notify every

court in which they are admitted that they had been sanctioned and preface every material filing within this Circuit for the next two years with a reference to the sanctions. This Court did not go that far. But the stigmatizing effect of a well-publicized sanctions order has nearly the same effect.

As the cases discussed above underscore, appellate sanctions have traditionally been reserved for egregious misconduct. As a result, the imposition of appellate sanctions cannot help but have an outsized stigmatizing effect. As this Court has long recognized, "one's professional reputation is a lawyer's most important and valuable asset." *Montalto v. Miss. Dep't of Corr.*, 938 F.3d 649, 651 (5th Cir. 2019) (quoting *Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997)). And "[i]n this day and age," "sanctions are a badge of reprobation that can haunt an attorney throughout his or her career. They can have ramifications that go far beyond the particular case." *Plaza-Martínez*, 747 F.3d at 14.

The Sanctions Order was premised on the need "to deter future violations." Doc. #00515777153 at 3. But as even Defendant has admitted, "courts need not impose monetary sanctions if some other approach will perform a[] … deterrent function[].'" Doc. #00515761093 at 15 (quoting *Jennings v. Joshua Indep. Sch. Dist.*, 948 F.2d 194, 199 (5th Cir. 1991)). The Court's Sanctions Order has already had a powerful deterrent effect. It has been the subject of a press release, *see* Press Release, Office of the Att'y Gen. of Tex., *AG Paxton: Fifth Circuit Issues Sanctions*

Against Perkins Coie (Mar. 12, 2021), https://bit.ly/3944Arw, and significant attention from news outlets across the country, *see, e.g.*, *Perkins Coie in the Dock*, Wall St. J. (Mar. 16, 2021), https://on.wsj.com/2NzEViG; Dylan Jackson, *Fifth Circuit Sanctions Democratic Election Lawyer Marc Elias in Texas Voting Case*, The Am. Lawyer (Mar. 15, 2021), https://bit.ly/3tzJOaS; Erik Larson, *Top Democratic Election Lawyer Sanctioned in Suit Against Texas*, Bloomberg (Mar. 12, 2021), https://bloom.bg/3s8x9v9. To the extent this Court intended its Sanctions Order to serve as a public admonishment, it can rest assured that it has accomplished that function. The issuance of the Order, even if reconsidered in light of the facts and authorities set forth herein, adequately serves to "chastise" and "admonish" Movants, *e.g.*, *In re Rodriguez*, 891 F.3d 576, 577 (5th Cir. 2018), and "to deter future violations," Doc. #00515777153 at 3, without imposing the long-term professional consequences and stigma associated with sanctions.

The impact of the Sanctions Order is particularly severe on the most junior lawyers among Movants, including Movants Howton, Madduri, Osher, and Command. Not only may it limit their abilities to attract clients or seek certain future opportunities, junior lawyers are also more likely to apply for admission to additional bars and/or to apply for new legal jobs. If and when they do so, they will be ethically required to disclose the Sanctions Order, which may close certain doors to them even though they were not in a position to make the ultimate determinations

about what to file and whether to advert to the earlier denial. In light of all the circumstances, including the authority underscoring both the rarity of appellate sanctions and the ambiguity concerning the effect of the earlier denial (and proper avenue for reconsideration), Movants respectfully request that the Court reconsider its Sanctions Order.

CONCLUSION

The Sanctions Order has precipitated a painful chapter in Movants' professional careers. The Sanctions Order highlighting Movants' error and faulting Movants for that error has been well-publicized. Movants sincerely apologize and reiterate that they never intended to mislead the Court, but respectfully suggest that the deterrent effect this Court intended can be accomplished—indeed, has been accomplished—without imposing sanctions.

Respectfully submitted,

s/Paul D. Clement
PAUL D. CLEMENT
Counsel of Record
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Movants Marc E. Elias, Bruce V. Spiva, Skyler M. Howton, Lalitha D. Madduri, Daniel C. Osher, and Stephanie I. Command

March 25, 2021

CERTIFICATE OF COMPLIANCE

I certify that:

1) This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 5,198 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.2.

2) This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

3) Any required privacy redactions have been made pursuant to Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper submission, and the motion has been scanned for viruses using Windows Defender and is free of viruses.

March 25, 2021

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF CONFERENCE

I certify 1) that Movants notified counsel for Defendant of their intention to file the Motion for Reconsideration, and 2) that counsel for Defendant informed Movants that Defendant will oppose and will file an opposition.

March 25, 2021

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I did so with the express permission of Paul D. Clement, counsel of record for Movants in this matter. I certify that all participants in this case, including Movants, are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

s/Bruce V. Spiva
Bruce V. Spiva