

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

May 7, 2021

Lyle W. Cayce
Clerk

No. 20-50683

TEXAS DEMOCRATIC PARTY; DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE; DEMOCRATIC CONGRESSIONAL
CAMPAIGN COMMITTEE; EMILY GILBY; TERRELL BLODGETT,

Plaintiffs—Appellees,

versus

RUTH HUGHS, *in her official capacity as the Texas Secretary of State,*

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-1063

Before HAYNES, GRAVES, and WILLETT, *Circuit Judges.*

DON R. WILLETT, *Circuit Judge:*

Various voters and political organizations sued the Texas Secretary of State seeking to enjoin the enforcement of HB 1888, a state law that bars counties from operating mobile or pop-up early voting locations. The district court denied the Secretary's sovereign immunity defense. We reverse.

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I

Texas law generally requires counties to conduct early voting at their main county branch offices.¹ Counties may also conduct early voting at other locations.² The state statutes classify early voting locations at the main county branch offices as “permanent branch” polling places, while other early voting locations are called “temporary branch” polling places.³

In 2019, the Texas Legislature passed HB 1888, which requires a county’s “temporary branch” early voting locations to be open for at least 8 hours a day on the same days that the county’s main “permanent branch” polling place is open, unless the region holding the election has fewer than 1,000 registered voters.⁴ As the Secretary explained in an Election Advisory to county officials, HB 1888 banned mobile or pop-up early voting sites.⁵

Before HB 1888, many counties offered pop-up early voting sites near college campuses and senior living facilities. For example, Tarrant County offered temporary early voting locations at the University of Texas at Arlington and Texas Christian University, Williamson County offered one at Southwestern University, and Travis County offered them at Huston-Tillotson University, St. Edward’s University, and Austin Community College. Travis County also set up a pop-up early voting location near the Westminster senior living facility in Austin. After HB 1888, counties curtailed the use of temporary early voting locations. For the 2019 elections,

¹ TEX. ELEC. CODE § 85.061.

² *Id.* § 85.062.

³ *Id.* §§ 85.061(c), 85.062(g).

⁴ 2019 Tex. Sess. Law Serv. ch. 1085 (West) (codified at TEX. ELEC. CODE § 85.064).

⁵ Tex. Sec’y of State, Election Advisory No. 2019-20 (Oct. 9, 2019).

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Travis County did not offer early voting at the three campuses mentioned above or at the Westminster senior living facility.

In Fall 2019, the Texas Democratic Party, the Democratic Senatorial Campaign Committee, the Democratic Congressional Campaign Committee, the Texas Young Democrats, the Texas College Democrats, Southwestern University student Emily Gilby, and Westminster resident Terrell Blodgett sued the Secretary of State, alleging that HB 1888 violates the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Twenty-Sixth Amendment, and the Americans with Disabilities Act. They sought declaratory relief and an injunction prohibiting the Secretary from implementing or enforcing HB 1888.

The Secretary moved to dismiss on the grounds that sovereign immunity barred the suit, that Plaintiffs lacked standing, and that Plaintiffs failed to state a claim. The district court dismissed the ADA claim but denied the motion in all other respects. The Secretary timely appealed from the denial of sovereign immunity.

II

The plaintiffs asserted subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343, and we always have jurisdiction to determine our own jurisdiction.⁶ We have appellate jurisdiction over this interlocutory appeal

⁶ See *Brownback v. King*, 141 S. Ct. 740, 750 (2021).

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under 28 U.S.C. § 1291 and the collateral-order doctrine.⁷ We review the sovereign immunity determination de novo.⁸

III

The sole issue on appeal is whether this case may proceed under the *Ex parte Young* exception to state sovereign immunity.⁹ *Ex parte Young* allows a federal court to enjoin a state official from enforcing state laws that conflict with federal law.¹⁰ To be sued under *Ex parte Young*, the state official must “have ‘some connection’ to the state law’s enforcement and threaten to exercise that authority.”¹¹

Applying our precedents in this area is no easy task. We have not outlined a clear test for when a state official is sufficiently connected to the enforcement of a state law so as to be a proper defendant under *Ex parte Young*.¹² But we are not writing on a blank slate: A previous panel held that the Secretary lacks a sufficient connection to the enforcement of Texas’s early voting statutes. In *Mi Familia Vota v. Abbott*, voters sued the Governor and the Secretary of State over early voting protocols during the COVID-19 pandemic.¹³ Relevant here, they challenged the application and enforcement

⁷ *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993).

⁸ *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019).

⁹ 209 U.S. 123 (1908).

¹⁰ *Air Evac EMS, Inc. v. Tex. Dep’t of Ins.*, 851 F.3d 507, 515–16 (5th Cir. 2017).

¹¹ *Id.* at 517 (quoting *Ex parte Young*, 209 U.S. at 157).

¹² *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (“This circuit has not spoken with conviction about all relevant details of the ‘connection’ requirement.”); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (“The precise scope of the ‘some connection’ requirement is still unsettled . . .”); *City of Austin*, 943 F.3d at 999 (“What constitutes a sufficient ‘connection to [] enforcement’ is not clear from our jurisprudence.”).

¹³ 977 F.3d 461, 463–66 (5th Cir. 2020).

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of Texas Election Code § 85.062, which governs the establishment of temporary branch early voting locations, and § 85.063, which governs the days and hours of voting at permanent branch early voting locations.¹⁴ The panel concluded that the Secretary “has no connection to the enforcement of . . . Texas Election Code §§ 85.062–85.063” because local officials are responsible for administering and enforcing those statutes.¹⁵ Indeed, by statute, a local official (typically the county clerk or city secretary) serves as the “early voting clerk” responsible for conducting the early voting in each election.¹⁶ And the local governing body of the political subdivision (typically the county commissioner’s court) is tasked with establishing temporary branch polling places.¹⁷ The Secretary plays no role.¹⁸

Mi Familia Vota controls here. If the Secretary has no connection to the enforcement of § 85.062 or § 85.063, then it follows that she has no connection to the enforcement of HB 1888, as codified in the neighboring § 85.064, which governs the days and hours of voting at temporary branch locations.

Because the Secretary is not sufficiently connected to the enforcement of HB 1888, we need not consider her argument that Plaintiffs are seeking improper relief under *Ex parte Young*.

¹⁴ *Id.* at 465–66.

¹⁵ *Id.* at 468.

¹⁶ §§ 83.001, 83.002, 83.005.

¹⁷ § 85.062(a)

¹⁸ The record in this case confirms what the statutes already make clear. In her declaration, the Travis County Clerk attested that she is “responsible for planning and implementing elections within the County, which includes planning for and designating early voting locations throughout the County, subject to approval of all such locations by the Travis County Commissioner’s Court” and that “[i]n Texas, the counties are responsible for the costs of running an early voting program.”

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IV

We REVERSE the district court's denial of sovereign immunity and REMAND from this interlocutory appeal with instructions to dismiss.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 07, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 20-50683 TX Democratic Party v. Hughs
USDC No. 1:19-CV-1063
USDC No. 1:19-CV-1154

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

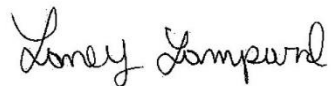
Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Appellees pay to Appellant the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Laney L. Lampard, Deputy Clerk

Enclosure(s)

Ms. Amanda Beane
Mr. Todd Lawrence Disher
Mr. Chad Wilson Dunn
Mr. Marc Erik Elias
Mr. Matthew Hamilton Frederick
Mr. John Michael Geise
Mr. Kevin J. Hamilton
Mr. Renea Hicks
Ms. Jyoti Jasrasaria
Mr. Uzoma Nkem Nkwonta
Mr. Judd Edward Stone II
Mr. Patrick K. Sweeten
Mr. William Thomas Thompson
Mr. Alexi Machek Velez