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

REPLY IN SUPPORT OF 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

April 12, 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 the Party-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

Other Authorities

INTRODUCTION

Defendant's opposition confirms that the rules governing the underlying appellate procedural questions were far from clear, and that what happened here is far different from the misconduct that typically generates appellate sanctions. Defendant never confronts the authorities suggesting that decisions of motions panels on non-dispositive procedural motions are not definitive. Indeed, Defendant omits any mention of the federal practice manual indicating there is no law-of-the-case bar in the specific context of motions to supplement the record. *See* Reconsideration.Motion.16 (citing *Federal Court of Appeals Manual*). Instead, Defendant insists that whatever the right answer to the law-of-case question, it was still error for Movants to fail to advert to the prior denial. But confusion over the effect of the prior denial cannot be so easily dismissed. If Movants had understood—as the Court clarified in its March 11 ruling—that the earlier denial was law of the case, and the proper procedural mechanism was to seek reconsideration, Movants' reconsideration motion would have necessarily adverted to the earlier denial.

If anything, Defendant only clouds the issue by suggesting that Movants could have renewed their supplementation request in the merits briefing itself. If Defendant is correct, then Movants were neither late nor duplicative in seeking to re-open the record on standing; they simply picked the wrong vehicle and, by failing to appreciate that they needed to seek reconsideration, failed to advert to the earlier

denial. That omission was not part of an effort to conceal from the Court an order listed on the docket in this very case; such an effort would have been obviously hopeless and futile. Rather, it was a good-faith mistake that bears little resemblance to the misconduct that appellate courts typically sanction.

Defendant argues that bad faith is unnecessary to sanction local-rule violations. But while this Court may have the power to impose sanctions for good-faith violations of ambiguous rules despite conflicting authority, that has not been its practice. Instead, this Court has traditionally reserved sanctions for bad faith and serious misconduct. As a result, sanctions carry an outsized effect. Even Defendant now seems to concede that sanctions against the more junior lawyers may merit reconsideration, despite previously seeking more extensive sanctions against all Movants. Respectfully, given the conceded difficulty of the underlying procedural questions, reconsideration for all Movants would be appropriate.

Finally, Defendant questions the sincerity of Movants' apology. But the centerpiece of her argument is a complaint about a "press release" issued by Movants' law firm. To be clear, there was only one press release in this case and it was issued by the Attorney General. That press release had its intended effect and generated both national coverage and numerous press inquiries. Those inquiries were answered with a statement by Movants' law firm, not a dueling press release. Lest there be any doubt, Movants sincerely apologize for their errors, but

respectfully submit that those errors were made in good faith and that this Court's Sanctions Order should be reconsidered.

ARGUMENT

I. Sanctions Are Generally Reserved For Bad Faith And Serious Misconduct.

Before this case, this Court had never imposed, or even upheld on appeal, duty-of-candor sanctions based only on omissions—let alone omissions of orders appearing on the Court's docket in the same case. *See* Reconsideration.Motion.10-11. Defendant does not contest that point. Defendant likewise does not dispute that "Section 1927 sanctions should be employed 'only in instances evidencing a serious and standard disregard for the orderly process of justice,'" *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 872 (5th Cir. 2014) (citation omitted), or that "the imposition of sanctions under the court's inherent power … should be administered with great restraint," *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F.App'x 899, 906 (5th Cir. 2010). Nor does Defendant dispute the ample cited authorities in which federal appellate courts—including this one—declined to impose sanctions, or reversed sanctions orders, based on acts and omissions significantly less justifiable than the conduct here. *See* Reconsideration.Motion.11-12.

Defendant nonetheless contends that this Court has the power to impose sanctions even for a bare omission and absent bad faith. *See* Opposition.2.

Defendant is certainly correct that this Court's powers are vast. But "the imposition of sanctions … is powerful medicine," *Union Pump*, 404 F.App'x at 906, which is why this Court has traditionally reserved them for bad faith and serious misconduct. *See*, *e.g.*, *Sun Coast Res., Inc. v. Conrad*, 958 F.3d 396 (5th Cir. 2020); *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1005 (5th Cir. 1995).

Defendant cites *In re Moity*, 320 F.App'x 244 (5th Cir. 2009) (per curiam), but that case only illustrates the type of conduct that is typically sanctioned and the differences here. *In re Moity* involved an attorney who "failed to comply with the initial punishment" imposed by a state-court judge "and had to be brought before the state judge a second time" as a result. *Id.* at 249. Things then went from bad to worse in federal court. At a federal-court "contempt hearing" prompted by the attorney's improper conduct towards "a judicial law clerk during a telephone conversation" and "impugning the integrity of two federal judges in a prior brief," the attorney made multiple "misrepresentations to the court." *Id.* at 245. In particular, the attorney "failed to indicate that there were two hearings" in state court, not just one, "the second necessitated by his failure to comply with the initial penalties." *Id.* at 249. Coupled with those misrepresentations, "[t]hese and other omissions left the impression at the [federal] hearing that the state judge had levied a sanction, that Moity learned his lesson and complied, and that the matter was

settled"—when, in reality, exactly the opposite happened. *Id.* No authority even arguably supported those actions.

On appeal, this Court understandably affirmed the district court's sanctions order. But the blatant misrepresentations and omissions about proceedings in a separate court system, combined with abusive conduct toward federal judges and a law clerk, illustrate the kind of misconduct that leads to the relatively rare event of federal-court sanctions. The good-faith mistakes here are different in kind and give the Sanctions Order a disproportionate effect. As the authorities cited in Movants' opening brief underscore, circumstances like these do not warrant an exercise of the Court's power to sanction. *See Sun Coast*, 958 F.3d at 397-98.

II. Defendant Only Confirms That Neither The Effect Of The Prior Denial Nor The Proper Vehicle For Renewing The Request To The Merits Panel Was Clear.

Defendant's opposition underscores that the procedural questions Movants faced in asking the merits panel to supplement the record were difficult, and the answers far from clear.

First, Defendant fails to address the multiple authorities Movants cited supporting the view that a motions-panel-stage denial of a motion to supplement the record does not preclude the merits panel from granting an identical motion to supplement the record. *See* Reconsideration.Motion.16. Nor does Defendant dispute 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), such as facts that rebut a lack-of-standing argument raised on appeal. And Defendant studiously avoids taking a position on "the application of the law-of-the-case doctrine to a one-judge order," Opposition.6, but confusion concerning the law-of-the-case status of the earlier denial is the root cause of the error here. If the single-judge denial was clearly law of the case, then Movants would have moved for its reconsideration and necessarily adverted to it; one cannot seek reconsideration of a decision without mentioning it. But if the order were not law of the case, then a request for reconsideration would not be strictly necessary, and the merits panel could consider the issue *de novo*. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (rulings at preliminary-injunction stage are not law of the case and thus "are not binding at trial on the merits"); *Keenan v. Donaldson, Lufkin & Jenrette, Inc.*, 575 F.3d 483, 487 (5th Cir. 2009) (concluding that prior ruling was "not 'law of the case' in this appeal," and resolving "the merits" afresh). While Movants understand with the benefit of hindsight that they should have adverted to the prior denial, the failure to do so has a different character if the earlier denial is not law of the case, which is how they understood it in real time.

Second, Defendant suggests that Movants could have "ask[ed] the merits panel to reconsider the earlier denial" of their initial motion to supplement in "their appellees' brief." Opposition.1. If that is correct, then the circumstances

surrounding Movants' noncompliant filing are even less egregious. Movants filed their merits brief and motion to supplement simultaneously and in conjunction with one another. If Movants would have been in compliance by including the supplementation request *in* their merits brief rather than in a separate motion filed *alongside* it, as Defendant now suggests, then the problem is not the timing of their renewed effort to supplement the record or the cost of responding to it, but that Movants chose the wrong procedural vehicle based on a misunderstanding of what belongs in a merits brief versus a separate motion. Put another way, Defendant essentially concedes that it is not improper to renew a request to supplement the record before the merits panel, despite a previous denial by a motions panel, and is agnostic on whether the previous denial is law of the case. Under those circumstances, the choice of the wrong vehicle and the failure to advert to the prior denial, while regrettable and regretted, do not rise to the level of sanctionable misconduct.

Third, Defendant's complaint that Movants did not make an earlier admission of error or withdraw their motion when Defendant first objected is similarly answered by the difficulty and ambiguity surrounding these procedural issues. If it had been clearly settled at the time Movants filed the second motion to supplement the record that the prior denial was law of the case and the only proper procedural mechanism was a timely motion for reconsideration, then Movants' declination to

confess error and withdraw their motion would reflect recalcitrance. But Defendant herself is agnostic on these questions and *affirmatively suggests* that Movants had an alternative avenue to renew their motion—months after the earlier denial—via the merits briefing. In light of those circumstances, Movants' declination to confess error reflects that they were merely on the losing side of a good-faith dispute about a difficult and esoteric question of appellate practice.

III. This Court Should Reconsider Sanctions As To All Movants.

Defendant does not dispute that, because this Court typically reserves appellate sanctions for serious and serial misconduct, imposing appellate sanctions for the conduct here will carry an outsized stigmatizing effect on the affected attorneys. *See* Reconsideration.Motion.19-22. But at least as to the senior lawyers, Defendant argues that such a stigmatizing effect should be welcomed, lest "'parties to other lawsuits … feel freer than … they should feel to flout other' rules in other cases." Opposition.18 (first ellipsis added) (quoting *Chilcutt v. United States*, 4 F.3d 1313, 1325 (5th Cir. 1993)). But there is a critical difference between getting complicated questions wrong and flouting clearly established rules. Courts generally refrain from imposing sanctions in the former situation and even exercise "grace" in the latter context. *Sun Coast*, 958 F.3d at 397-98; *see also S.O. v. Hinds Cnty. Sch. Dist.*, 794 F.App'x 427 (5th Cir. Feb. 18, 2020) (mem.) (per curiam).

Defendant doubts the timing and sincerity of Movants' apology. As to timing, once this Court settled the procedural questions in its March 11 order, Movants filed a timely motion to reconsider and offered a sincere apology. As already noted, the absence of an earlier confession of error was a product of a good-faith dispute about complicated and ambiguous rules, not recalcitrance. As to sincerity, Defendant principally contends that Movants' law firm was less apologetic when it "issued a press release." Opposition.2. But, as noted, only one side to this dispute issued a press release in response to this Court's sanctions order. *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; Reconsideration.Motion.20-21. That press release had its intended effect of generating substantial national coverage and prompting numerous press inquiries of Movants and their law firm. In response, Movants themselves said nothing, preferring to communicate directly to the Court via a reconsideration motion that prominently included a sincere apology. And Movants' law firm's response to the press inquiries generated by Defendant's counsel's press release did not show a "lack of concern about the behavior of [Movants]," or "announc[e]" that Movants "had done nothing wrong." Opposition.18, 2. It merely noted that the firm "supports our attorneys" and "disagree[s] with the … order of sanctions." Erik Larson, *Top Democratic Election Lawyer Sanctioned in Suit Against Texas*, Bloomberg (Mar. 12, 2021),

https://bloom.bg/3s8x9v9; Opposition.17-18. In short, there is nothing insincere about Movants' apology, and reconsidering the Sanctions Order in light of that apology would avoid the outsized impact of a sanctions order typically reserved for serious misconduct.[1]

Indeed, even Defendant "agrees that relief from sanctions may be warranted with respect to the associates (Madduri, Osher, and Command)." Opposition.19; *accord* Opposition.12 ("[T]his Court might understandably decide to relieve the associates of sanctions."). Movants welcome that acknowledgement and agree that the Sanctions Order is most harmful to those three attorneys, but they respectfully disagree with Defendant that this Court's reconsideration should end there. While Ms. Howton has a different title, she is not significantly more senior than the associates, and she acted under the direction of the partners in filing the relevant pleadings (as she does in all aspects of her practice).[2] And like the associates, Ms. Howton is likely to apply for admission to additional bars and/or jobs—acts that will

[1] Defendant once again raises what she incorrectly perceives to be instances of misconduct by Movants in other cases. Movants disagree with Defendant's characterizations. But, in all events, Defendant's felt-need to reference actions in other cases highlights that the conduct here is well outside the heartland of sanctionable misconduct.

[2] Ms. Howton's title is "counsel," not "of-counsel." Opposition.19. While the terms sound similar, "counsel" is what Movants' firm calls senior associates, while "of counsel" is the title for former partners who have taken on decreased roles. Like associates, counsel operate under the direction and supervision of the firm's partners.

ethically require her to disclose the Sanctions Order, even though she was not in a position to make the ultimate determinations about what to file and what to advert to in the filing(s).

In any event, Movants respectfully request that this Court's reconsideration extend to all the affected attorneys and all the sanctions imposed. The root cause of the errors here was not bad faith or what would have been an obviously futile effort to conceal an adverse order on the electronic docket in the same case, but a failure to fully understand the effect of the prior denial and the proper mechanism for renewing the issue for the merits panel. Movants take full responsibility for that error. By emphasizing that the question was complex, Movants intend not to diminish either their error or their apology, but to clarify the good faith underlying both. Given the wide gap between the facts here and the cases in which this Court has issued its rarely-invoked powers to sanction, and in light of Movants' sincere apology, Movants respectfully ask the Court to reconsider its order.

CONCLUSION

Movants respectfully request that the Court reconsider the Sanctions Order.

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

April 12, 2021

CERTIFICATE OF COMPLIANCE

I certify that:

1) This reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 2,599 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.2.

2) This reply 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.

April 12, 2021

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 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