No. 20-40643

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS ALLIANCE FOR RETIRED AMERICANS; SYLVIA BRUNI; DSCC; and DCCC,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas
(No. 5:20-cv-00128)

PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL AS MOOT

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CERTIFICATE OF INTERESTED PERSONS

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

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. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees

a. Texas Alliance for Retired Americans: no parent corporation or stock
b. Sylvia Bruni
c. DSCC: no parent corporation or stock
d. DCCC: no parent corporation or stock

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:

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Defendant-Appellant

a. Ruth Hughs, Texas Secretary of State

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MOTION TO DISMISS APPEAL AS MOOT

The preliminary injunction from which this appeal arises expired at 7:00 p.m. on November 3, 2020. This appeal is now moot, and this Court lacks jurisdiction. The Court should dismiss this appeal.

This action challenges HB 25's elimination of the straight-ticket voting (STV) option, which had been a hallmark of Texas elections for the last century. On August 12, 2020, Plaintiffs moved for a preliminary injunction, arguing that the increase in polling-place lines that eliminating the STV option would cause, particularly in the midst of the ongoing COVID-19 pandemic, would be unlawful. *See Tex. All. for Retired Ams. v. Hughs*, No. 5:20-cv-128 (S.D. Tex. Aug. 12, 2020), ECF No. 6 at 1. Plaintiffs' motion focused on the difficulties election administrators faced in the November 2020 general election, which would be exacerbated by HB 25. They explained that "while under normal circumstances counties might be able to mitigate HB 25's harms, the ongoing pandemic prevents them from doing so during the upcoming general election." *Id.* at 13. For example, ballots for the November 2020 general election would be longer than usual due to the Governor's March 2020 proclamation allowing municipalities to delay their spring elections until November. *Id.* The need to maintain social distancing also limited county election officials' ability to increase the number of voting booths within polling places, and in many instances it required using fewer machines than in prior elections. *Id.* at 10-11.

Venues were also less likely to allow counties to operate polling places at their locations. *Id.* at 11-12. And fear of contracting the virus was causing a statewide poll-worker shortage. *Id.* at 12-13.

The district court agreed. In an order issued on September 25, the district court found HB 25 would force voters to wait in longer polling-place lines, which would "increas[e] their exposure to a deadly virus," unjustifiably burdening their "right to vote." *Tex. All. for Retired Ams. v. Hughs*, --- F. Supp. 3d ---, 2020 WL 5747088, at *17 (S.D. Tex. Sept. 25, 2020). This was particularly true because "Texas ha[d] done little to address the[] logistical challenges" election administrators faced with respect to the November 2020 election. *Id.* at *6. While the court acknowledged that "we are nearing the election," the public's countervailing "interest in exercising the 'fundamental political right' to vote" required the court to "react to burdens imposed on Constitutional rights, especially during this public health crisis." *Id.* at *16. The court thus preliminary enjoined HB 25's implementation, which is the subject of this appeal. On October 26, the district court made a "clerical correction[]" to its order granting the preliminary injunction. *Farmhand, Inc. v. Anel Eng'g Indus., Inc.*, 693 F.2d 1140, 1145 (5th Cir. 1982). The court clarified that its preliminary injunction "applie[d] only to in-person voting during the November 2020 general election." *Tex. All. for Retired Ams. v. Hughs*, No. 5:20-cv-128 (S.D. Tex. Oct. 26, 2020), ECF No. 49.

The district court's preliminary injunction expired when voting in the November 2020 general election ended at 7:00 p.m. on November 3. *See* Tex. Elec. Code § 41.031(b). Because the Secretary is no longer enjoined from implementing HB 25, this Court is "no longer capable of providing meaningful relief" to the Secretary and thus "has no constitutional authority to resolve the issues [this appeal] presents." *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 425 (5th Cir. 2013). As a result, this appeal must be dismissed as moot.

The Court should reject any request by the Secretary to vacate the district court's preliminary injunction order. While it is normal practice for a court to vacate a district court's *judgment* when an appeal becomes moot, "[i]n the case of interlocutory appeals, [] 'the usual practice is just to dismiss the appeal as moot and not vacate the order appealed from.'" *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020) (quoting *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1122 (11th Cir. 1995)); *see also Mitchell v. Wall*, 808 F.3d 1174, 1176 (7th Cir. 2015) (same); *In re Tax Refund Litig.*, 915 F.2d 58, 59 (2d Cir. 1990) (per curiam) (same). In this context, courts distinguish between judgments and interlocutory orders because the purpose of vacatur is "to prevent the district court's unreviewed decision from having a *preclusive* effect in subsequent litigation between the parties." *Mitchell*, 808 F.3d at 1176 (emphasis added). "But because a preliminary injunction has no preclusive effect on the district

court's deciding whether to issue a permanent injunction, . . . 'orders vacating the underlying order should not typically issue with respect to preliminary injunctions that become moot on appeal.'" *Id.* (quoting *Orion Sales, Inc. v. Emerson Radio Corp.*, 148 F.3d 840, 843 (7th Cir. 1998)).

Here, the order below has no preclusive effect. And the decision of whether to vacate the order below cannot involve any "judicial estimates regarding the[] merits" of that order. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 28 (1994). As a result, vacatur of the order below would be inappropriate.

In sum, because the preliminary injunction below has expired, this appeal is moot and must be dismissed. And because the order below has no preclusive effect, there is no basis for vacatur.

Dated: November 18, 2020

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

Counsel for Appellees conferred with counsel for Appellant regarding this motion. Appellant's counsel stated that Appellant opposes this motion and intends to file a response.

/s/ Skyler M. Howton
Skyler M. Howton

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because this document contains 884 words, excluding parts exempted by Rule 32(f).

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/s/ Skyler M. Howton
Skyler M. Howton

CERTIFICATE OF SERVICE

On November 18, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13.

/s/ Skyler M. Howton
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