

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION**

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

Plaintiffs,

v.

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

Defendant.

CIVIL ACTION NO. 5:20-cv-128

ADVISORY REGARDING MOTION FOR CLARIFICATION

On October 23, 2020, Plaintiffs filed an opposed motion for clarification in this Court. *See* ECF 48. This Court granted that motion the next business day, October 26. *See* ECF 49.¹ Defendant respectfully advises the Court that it lacks jurisdiction to continue proceedings in this case and that it should not clarify its injunction while it is being considered on appeal.

Defendant asserted sovereign immunity in her motion to dismiss. *See* ECF 26 at 17–21. This Court rejected that argument when it partially denied Defendant’s motion to dismiss and granted Plaintiffs’ motion for a preliminary injunction. *See* ECF 43 at 18–19. Defendant appealed. *See* ECF 44. The Fifth Circuit stayed the preliminary injunction and issued a briefing schedule. *See Tex. Alliance for Retired Ams. v. Hughs*, 976 F.3d 564 (5th Cir. 2020) (per curiam); Briefing Notice, No. 20-40643 (5th Cir. Oct. 1, 2020).

¹ Under the local rules, Defendant’s response was not due until November 13. *See* S.D. Tex. Local R. 7.3 (providing that “[o]pposed motions will be submitted to the judge 21 days from filing”); *id.* 7.4 (providing that “[r]esponses to motions . . . [m]ust be filed by the submission day”).

The filing of the notice of appeal divested this Court of jurisdiction. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”).

First, Defendant’s appeal is based, in part, on the collateral-order doctrine. *See* 28 U.S.C. § 1291; *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993); *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 284–85 (5th Cir. 2000). “A non-frivolous notice of interlocutory appeal following a district court’s denial of a defendant’s immunity defense divests the district court of jurisdiction to proceed against that defendant.” *Williams v. Brooks*, 996 F.2d 728, 729–30 (5th Cir. 1993) (per curiam); *see also Wooten v. Roach*, 964 F.3d 395, 412 (5th Cir. 2020). Plaintiffs’ motion did not address this issue.

Second, Defendant’s appeal is also based on 28 U.S.C. § 1292(a)(1), which allows appeals from “[i]nterlocutory orders . . . granting . . . injunctions.” “An interlocutory appeal ordinarily suspends the power of the district court to modify the order subject to appeal.” 16A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3949.1 (5th ed.). That is the case here.

Finally, the notice of appeal divesting this Court of jurisdiction prevents clarification of an injunction just as it prevents modification of an injunction. *See United States v. Lucero*, 755 F. App’x 384, 385–86 (5th Cir. 2018) (per curiam) (holding that an order “purporting to clarify” a judgment was issued without jurisdiction because a notice of appeal had already transferred jurisdiction to the appellate court); *Richardson v. Tex. Sec’y of State*, No. 20-50774 (5th Cir. Sept. 16, 2020) (“It is questionable whether, during the pendency of this appeal, the district court even has jurisdiction to . . . clarify . . . its order.”).

There are good reasons for this rule. “The parties to an appeal are entitled to have a stable set of conclusions of law on which they can rely in preparing their briefs.” *Ced’s Inc. v. EPA*, 745 F.2d

1092, 1095 (7th Cir. 1984); *see also Pro Sales, Inc. v. Texaco, U.S.A., Div. of Texaco, Inc.*, 792 F.2d 1394, 1396 n.1 (9th Cir. 1986). “The key point is that once jurisdiction passes to the court of appeals, the district court generally lacks power to act with respect to matters encompassed within the appeal, and actions taken by the district court in violation of this principle are null and void.” 16A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3949.1 (5th ed.) (footnote omitted); *see also Lucero*, 755 F. App’x at 386. In fact, the Fifth Circuit recently struck a similar order clarifying a district court’s preliminary injunction. *Richardson*, No. 20-50774 (5th Cir. Sept. 16, 2020).

Plaintiffs argue there is an exception to the rule against modifying an order subject to appeal whenever clarification “would ‘aid [] the appeal.’” Mot. 2 (quoting *Farmhand, Inc. v. Anel Eng’g Indus., Inc.*, 693 F.2d 1140, 1145 (5th Cir. 1982)). But the exception is not so broad. The Fifth Circuit’s explanation of what kinds of orders aid an appeal is telling. “The district court maintains jurisdiction as to matters . . . in aid of the appeal, *as by making clerical corrections.*” *Farmhand*, 693 F.2d at 1145 (emphasis added). Plaintiffs’ motion did not seek a mere “clerical correction[].” *Id.* In any event, “the powers of the district court over an injunction pending appeal should be limited to maintaining the status quo and ought not to extend to the point that the district court can divest the court of appeals from jurisdiction while the issue is before us on appeal.” *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989). Plaintiffs did not argue that an order from this Court was necessary to maintain the status quo. Nor could they have. The Fifth Circuit’s stay suffices to maintain the status quo. *See Tex. Alliance for Retired Ams.*, 976 F.3d at 568. The relief requested in Plaintiffs’ motion was therefore unauthorized and unnecessary.

Date: November 3, 2020

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2020, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

/s/ Todd Lawrence Disher
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