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September 17, 2021

BY CM/ECF

Office of the Clerk
U.S. Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Hotze v. Hudspeth,* No. 20-20574 (5th Cir.)
USDC No. 4:20-CV-3709

Dear Clerk of the Court,

On behalf of Plaintiffs-Appellants, this letter brief responds to the Order by this Court dated September 8, 2021, directing the parties to address whether the recently enacted Texas Senate Bill 1 ("SB 1") renders this appeal moot. SB 1 was enacted this summer during the second special legislative session in Texas.

SB 1 has not taken effect, and will not become effective any earlier than December 2, 2021, which is subsequent to the upcoming November elections.[1] Harris County, Texas, whose voting procedures are in dispute in this case, is conducting elections on November 2, 2021, and the issues in this case need to be

[1] https://capitol.texas.gov/BillLookup/Actions.aspx?LegSess=872&Bill=SB1 (viewed Sept. 17, 2021).

resolved for this upcoming election.[2] Thus even if SB 1 were not subjected to numerous legal challenges, this new legislation will still have no effect on the November elections this year and thus this appeal is not moot.

Indeed, the Harris County elections office expressly declares on its own website, as currently viewable by the public:

> **In-Person Drive-thru voting** is available to anyone who chooses to utilize it, without eligibility stipulations.
>
> **Is it legal for Harris County to offer In Person Drive-thru voting in the November 2021 election?**
>
> Yes, until the law goes into effect on December 2, 2021, it is still legal to offer this method of voting for our November 2, 2021 elections.[3]

Hence by their own admission Harris County election officials plan to use drive-thru voting procedures through November, which are the subject of this lawsuit. The controversy at issue in this lawsuit remains live – indeed, remains red hot – at least through the upcoming November elections.

Mootness does not exist for an additional compelling reason. Five (5) lawsuits have already been filed to block enforcement of SB 1 before it ever goes into effect.[4] If history be a guide, then one of the federal district or state court

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[2] https://harrisvotes.com/ (viewed Sept. 17, 2021).
[3] https://www.harrisvotes.com/FAQ/SB1FAQ (viewed Sept. 17, 2021).
[4] https://www.texastribune.org/2021/09/01/texas-voting-bill-greg-abbott/ (viewed Sept. 17, 2021).

judges (the lawsuits were filed in both judiciaries) may very well enjoin this new law, at least during the consideration of that litigation which may last years. The practical effect will be for the existing election law at issue in this case to remain in effect through the primary season of next year, and perhaps through the general elections in November 2022 too.

As often happens when there are numerous simultaneous challenges to new legislation, a trial court issues a stay of enforcement of the new law pending further litigation which may ensue for a long time. The practical effect of the long-running stay is to nullify the law. While such a stay, if entered in federal court, may be appealed to this Court (and ultimately to the U.S. Supreme Court), the outcome of such an appeal is far from known at this time and thus cannot provide the basis for any finding of mootness here and now.

The bottom line is that the new law, SB 1, is not in effect and will not be in effect for the November elections of this year. In addition, in light of the five lawsuits filed against SB 1, there is a substantial likelihood that one of the five already-filed lawsuits will result in a stay order against SB 1, which could very well prevent its enforcement through the elections of next year.

Finally, the enforcement of SB 1 is unknown and could not support a finding of mootness even if all of the lawsuits against it were unsuccessful in temporarily

blocking it. The provision quoted by this Court in its Order requesting this supplemental brief may not be followed throughout Harris County, just as the existing election law provision (Section 64.009) was not and is not being adhered to. Courts review actions by public officials, not abstract interpretations of new laws which may never go into effect. "If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). The mere passage in a special legislative session of a new law which has not yet gone into effect, and which may never be enforced, does not render moot the controversy before this Court about ongoing unlawful drive-thru voting.

Defendants-Appellees are allied with groups challenging the new law, and thus cannot credibly argue that the new law against which they are suing renders moot the resolution of this litigation about ongoing conduct. The position of their side is that the new law, SB 1, is unconstitutional. If the allies of Appellees are successful in blocking the new law, then the existing law will continue to be in effect and thus there will not be any mootness based on the new law.

Ultimately, mere speculation about potential enforcement in the future of a new law, which is already subject to five (5) pending legal challenges as to its constitutionality, does not render this existing controversy moot. When potential

enforcement of the new law cannot even occur until after the upcoming elections at issue in this case, any argument of mootness based on the new legislation is particular misplaced here. Speculation about the future cannot create mootness, and instead such speculation actually negates an argument of mootness. "The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

Conclusion

SB 1, which cannot become effective until after the upcoming elections in November, and which may never become effective due to five lawsuits against it and the possibility it will not be enforced, does not render this appeal moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, I electronically filed the foregoing letter with the Clerk of this Court by using the appellate CM/ECF system, and understand that service on all parties of record will be accomplished through the appellate CM/ECF system.

/s/ Andrew L. Schlafly
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