IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC; and TERRELL BLODGETT,

Plaintiffs,

v.

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

Defendant.

CIVIL ACTION NO. 1:19-cv-01063

THE TEXAS SECRETARY OF STATE'S REPLY IN SUPPORT OF HER MOTION TO ABSTAIN OR POSTPONE

Plaintiffs' wide-ranging effort to supplant the Texas Election Code grows by the day. The Secretary's motion to abstain or postpone explained how the state-court injunction expanding vote-by-mail eligibility in *Texas Democratic Party v. DeBeauvoir* would significantly affect this case. *See* ECF 56. Since then, TDP has moved for another preliminary injunction to expand vote-by-mail eligibility in *Texas Democratic Party v. Abbott*, 5:20-cv-438, ECF 10 (W.D. Tex. Apr. 29, 2020). And a Democratic voter, represented by some of the same lawyers representing TDP here, filed a new lawsuit similarly seeking to expand eligibility for voting by mail. *See Gloria v. Hughs*, No. 5:20-cv-527, ECF 1 (W.D. Tex. Apr. 29, 2020).

These new developments confirm that abstention or postponement is appropriate. Plaintiffs' response acknowledges the uncertainty about the vote-by-mail rules that will apply going forward. With undisputed uncertainty about an important question affecting the relative ease of voting, proceeding with Plaintiffs' claims would be improper and impractical.

I. The Court Should Abstain

The Supreme Court has "establishe[d] two prerequisites for *Pullman* abstention: (1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980).

Plaintiffs do not dispute that the first prerequisite is satisfied. On the contrary, they agree that eligibility for vote-by-mail is unsettled. *See* ECF 74 at 9 ("whether the state actually ends up being able to undo Judge Sulak's order remains to be seen"). For the second prerequisite, Plaintiffs concede that the state-court injunction in *DeBeauvoir* "may provide more opportunities for voters to access the franchise." ECF 74 at 10. Thus, Plaintiffs do not contest that the state-court resolution of vote-by-mail eligibility is uncertain and that the resolution of that question "may provide more opportunities for voters to access the franchise." *Id.*

The only dispute is whether there is "a possibility that the" resolution of that uncertainty "will moot or present in a different posture the federal constitutional questions raised" in this case. *Palmer*, 617 F.2d at 428. Plaintiffs attempt to alter that standard by suggesting that the resolution of the state-law question must "make it unnecessary for [the court] to rule on the federal constitutional question." ECF 74 at 3 (quoting *Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009)). But the very next sentence of that case makes clear that a federal court should abstain if the state-law question could "substantially modify the federal constitutional question." *Moore*, 591 F.3d at 745 (quotation omitted). That is consistent with the Fifth Circuit's longstanding rule that abstention is appropriate when resolving the state-law question could put the federal claims "in a different posture" or "materially change the nature of the problem." *Palmer*, 617 F.2d at 428, 431 (quotation omitted); *see also Brooks v. Walker Cty. Hosp. Dist.*, 688 F.2d 334, 338 (5th Cir. 1982) (abstaining because "clarification of" state law "may have a considerable impact on the posture and ultimate resolution of . . . federal issues").

The availability of vote-by-mail "substantially modif[ies]" Plaintiffs' claims. *Moore*, 591 F.3d at 745. As an initial matter, a voter who can vote by mail cannot complain about the unavailability of other methods of voting. *See* ECF 56 at 2. But even if such a claim is not completely foreclosed, the availability of voting by mail is surely relevant to "the character and magnitude of the asserted injury." *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

Plaintiffs' counterintuitive theory—that whether an individual can vote by mail is irrelevant to a voting rights claim—calls into question the laws of the twenty-one States that conduct or permit "all-mail elections."[1] But Plaintiffs go beyond that. Even when voting is available by mail, Plaintiffs apparently believe that the Constitution requires not only in-person voting, but also in-person early voting at mobile polling places. *See* ECF 74 at 6–7. That radical theory would doom the laws of at least ten States that will not offer in-person early voting in 2020: Alabama, Connecticut, Delaware, Kentucky, Mississippi, Missouri, New Hampshire, Pennsylvania, Rhode Island, and South Carolina.[2] With so many States relying on different mixes of voting options, Plaintiffs cannot be right that the availability of one option is irrelevant to alleged burdens on another option.

Plaintiffs cite *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), but that case supports the Secretary. The Fifth Circuit recognized that voting by mail "represents an important bridge for many who would otherwise have difficulty appearing in person." *Id.* at 255. If a voter is able to avoid the "difficulty" of "appearing in person" by mailing a ballot, that voter would not have a claim to

[1] National Conference of State Legislatures, All-Mail Elections (aka Vote-By-Mail) (Mar. 24, 2020), https://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx (last viewed Apr. 30, 2020) (listing five "States that conduct all elections by mail," three "States that permit counties to opt into conducting all elections by mail," eight "States that permit some elections to be conducted by mail," and five "States that permit certain jurisdictions or portions of a jurisdiction to be designated as all-mail based on population").

[2] National Conference of State Legislatures, State Laws Governing Early Voting (Aug. 2, 2019), https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx (last viewed Apr. 30, 2020).

challenge in-person voting requirements.

To be sure, "in the circumstances presented by" *Veasey*, "[t]he district court did not clearly err in finding that mail-in voting [wa]s not an acceptable substitute for in-person voting" for particular plaintiffs facing unusual difficulties. *See id.* at 254–56 (analyzing the evidence concerning whether particular voters would be able to obtain identification or vote by mail). That the district court had to assess whether "mail-in voting for specific subsets of Texas voters [would] sufficiently mitigate the burdens imposed by" the challenged law demonstrates the importance of *DeBeauvoir* to this case. *Id.* at 256. Whether a voter like Plaintiff Gilby is eligible to vote by mail will significantly affect the evidence presented and the Court's analysis of Plaintiffs' claims.

Plaintiffs also argue abstention is inappropriate because this is a voting-rights case. *See* ECF 74 at 9. On the contrary, binding precedent "confirm[s] that traditional abstention principles apply to civil rights cases." *Romero v. Coldwell*, 455 F.2d 1163, 1167 (5th Cir. 1972) (abstaining in a one-man, one-vote case). Thus, it is no surprise the Fifth Circuit frequently abstains in cases challenging election laws. *See, e.g.*, *Justice v. Hosemann*, 771 F.3d 285, 301 n.14 (5th Cir. 2014); *Moore*, 591 F.3d at 745–46.

Plaintiffs rely heavily on *Harman* and *Edwards*, *see* ECF 74 at 3, 9, but as the Fifth Circuit has previously explained, those cases rested on findings that there were no relevant ambiguities in state law. *Harman* concluded "there was no reason to abstain because the state statutes involved were clear and unambiguous in all material respects and did not eliminate the need for constitutional decision." *Romero*, 455 F.2d at 1166. *Edwards* "carefully pointed out that it was not altogether clear that the federal constitution question would be avoided by a construction of the charter and statutes in the state court. *Id.* Contrary to Plaintiffs' characterization, "the Supreme Court has not refrained from ordering abstention when a controversy involves a sensitive right and also presents a traditional ground for abstention." *Id.* Thus, "traditional abstention principles apply to civil rights cases." *Id.* at 1167; *see also Harris v. Samuels*, 440 F.2d 748, 752–53 (5th Cir. 1971) (abstaining under *Pullman* in a voting rights

case); *NAACP Phila. Branch v. Ridge*, 2:00-cv-2855, 2000 WL 1146619, at *7 (E.D. Pa. Aug. 14, 2000) (distinguishing *Harman* and abstaining in a voting rights case).

Finally, Plaintiffs claim that mobile voting would reduce spread of COVID-19. *See* ECF 74 at 7. That is a matter best addressed by elected officials and public health experts, and it is not at issue in this case or this motion. Regardless, Plaintiffs' theory is suspect. Plaintiffs complain about the potential absence of mobile polling places from senior living facilities, but Louisiana plans "to relocate any polling stations currently located at senior centers to further reduce the risk of coronavirus among the most vulnerable."[3] Moreover, moving mobile polling places throughout a county (along with the associated workers and equipment) would seem to increase opportunities for community spread.

II. The Court Should Postpone Ruling on Plaintiffs' Claims

If the Court is disinclined to formally abstain, it should nonetheless postpone ruling on Plaintiffs' claims until there is more certainty about how voting will be conducted. *See* ECF 56 at 4.

Plaintiffs do not deny the Court has this power. Instead, they suggest postponement is inappropriate in voting rights cases. *See* ECF 74 at 10 & n.6. The Supreme Court has specifically approved postponement in voting rights cases, even in circumstances that made abstention inappropriate. In *Lucas v. Forty-Fourth General Assembly of State of Colorado*, a voting rights case, the Supreme Court commended the district court for "wisely refrain[ing] from acting at all until a case pending in the Colorado Supreme Court was decided." 377 U.S. 713, 716 n.2 (1964). Once it had the benefit of the Colorado court's ruling, the federal court "correctly held that, under the circumstances, it was not required to abstain" in deference to further state-court litigation. *Id.* at 716 n.3.

In this case, the Court should do likewise. It can postpone consideration of Plaintiffs' claims

[3] Joseph O'Sullivan, *In Age of Coronavirus and Social Distancing, States Looking to Washington's Vote-by-Mail System*, SEATTLE TIMES (Apr. 5, 2020), https://www.seattletimes.com/seattle-news/politics/holding-elections-amid-coronavirus-states-look-to-washingtons-vote-by-mail-system/ (last viewed Apr. 30, 2020) (discussing comments from the Louisiana Secretary of State).

until the state-court litigation has progressed. If developments in *DeBeauvoir* ever suggest this Court should alter its approach, it can.

Moreover, even if *DeBeauvoir* standing alone did not provide sufficient reason for postponement, the new federal litigation does. Plaintiffs and their counsel are now involved in at least three cases seeking to alter Texas's rules for voting by mail. Relief in any of those cases could significantly affect the analysis of their claims in this case. Unless the Court waits for those cases to proceed, the resources spent litigating Plaintiffs' claims in this case could be wasted.

Finally, Plaintiffs suggest their claims must be decided "in time for the General Election," *see* ECF 74 at 10, but much of their argument rests on concerns regarding far-off elections, not the 2020 election. Conceding the effect of the state-court injunction "during the COVID-19 pandemic, which may impact upcoming elections," Plaintiffs stress that it will not affect their claims "during more ordinary times," after the pandemic "end[s]." *Id.* at 7 n.4; *see also id.* at 10 (distinguishing issues "in the immediate future" from issues going forward). Even if *DeBeauvoir* does not affect far-off elections, that is no reason to maintain "an expedited schedule" in this case. ECF 74 at 10. First, the new federal litigation addresses those elections. *See Gloria*, No. 5:20-cv-527, ECF 1 ¶ 3 (arguing "the Absentee Ballot Age Restriction would be unconstitutional under any event," including after the pandemic has subsided); *Tex. Democratic Party*, 5:20-cv-438, ECF 10 at 14 n.8 (preserving the argument that a Texas statute is unconstitutional "even when not under pandemic circumstances"). Second, even if the Court will eventually need to resolve Plaintiffs' claims regarding far-off elections, it need not do so now, especially when the court has so many other time-sensitive cases.

CONCLUSION

The Secretary respectfully requests that the Court grant her motion to abstain or postpone.

Date: May 1, 2020

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 1, 2020, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
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