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

RACHEL MILLER; TEXAS DEMOCRATIC PARTY; DNC SERVICES CORP., d/b/a DEMOCRATIC NATIONAL COMMITTEE; DSCC; and DCCC,

Plaintiffs,

v.

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

Defendant.

CIVIL ACTION NO. 1:19-cv-01071

THE TEXAS SECRETARY OF STATE'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION

The Court correctly concluded that Plaintiffs lack standing to challenge the Ballot Order Statute and that Plaintiffs' claims raise nonjusticiable political questions. *See* Order on Motion to Dismiss, ECF 76, at 7–14. This Court followed persuasive precedent considering the same claims from the same plaintiffs. *See Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193 (11th Cir. 2020); *Mecinas v. Hobbs*, 2020 WL 3472552 (D. Ariz. June 25, 2020). Plaintiffs have not demonstrated any error, let alone a manifest error of law, that warrants reconsideration of the Court's order. Plaintiffs' motion for reconsideration should be denied.

STANDARD OF REVIEW

"Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); *see also Cabral v. Brennan*, 853 F.3d 763, 766 (5th Cir. 2017) (holding that the standard for reconsidering a final judgment is "more exacting than the one" for reconsidering an interlocutory order). As movants, Plaintiffs bear the burden of "clearly establish[ing] . . . a manifest error of law or fact." *Simon v. United States*, 891 F.2d

1154, 1159 (5th Cir. 1990). A "'[m]anifest error' is one that is plain and indisputable, and that amounts to a complete disregard of the controlling law or an obvious mistake or departure from the truth." *Berezowsky v. Rendon Ojeda*, 652 F. App'x 249, 251 (5th Cir. 2016) (quotations omitted).

ARGUMENT

Plaintiffs' motion for reconsideration is limited in scope: they do not assert that there has been an intervening change in controlling law or new evidence not previously available to them. Instead, they argue that the Court manifestly erred in its legal analysis. Motion for Reconsideration ("Mot."), ECF 78 at 1. The Court dismissed this case based on two independent grounds: Plaintiffs' lack of standing and the nonjusticiable nature of the political question presented by Plaintiffs' claims. Plaintiffs must clearly prove that the Court manifestly erred on both of those two issues for this case to proceed. Plaintiffs cannot meet their burden on either issue, let alone on both.

A. Plaintiffs do not have competitive standing.

First, Plaintiffs contend that they have "competitive standing" to assert their claims. Mot. at 2–4. They argue that *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), stands for the proposition "that political parties have competitive standing to challenge election laws that threaten their electoral prospects by systemically favoring another party over them." Mot. at 2. As an initial matter, "[a] motion for reconsideration may not be used to . . . introduce new arguments." *LeClerc v. Webb*, 419 F.3d 405, 412 n.13 (5th Cir. 2005). Plaintiffs' response to the motion to dismiss never mentioned "competitive standing." *See generally* ECF 36. It cited *Benkiser* only for unrelated propositions regarding associational standing. *See id.* at 15–16. Plaintiffs "forfeited" this "[a]rgument[] in favor of standing." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 542 (5th Cir. 2019).

In any event, *Benkiser*'s holding was far more limited than Plaintiffs claim. First, nowhere did *Benkiser* use the term "competitive standing"; instead, *Benkiser* concluded that a political party has direct standing to bring claims in certain limited circumstances. 459 F.3d at 586. In *Benkiser*, the Fifth

Circuit found that the Texas Democratic Party could challenge the Republican Party of Texas's removal and replacement of an ineligible candidate for a Congressional seat. *Id.* Having to contend against a new candidate in a Congressional race, especially in a late stage in the process, would require the Texas Democratic Party "to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." *Id.* (citation omitted). And the party's "threatened loss of political power . . . likely would be redressed by a favorable decision, which would preclude a Republican replacement candidate." *Id.* at 587.

Benkiser is thus cabined to the context of a specific race in which a party's candidate was allegedly harmed by an ineligible candidate appearing on the same ballot. Plaintiffs cite no authority in the Fifth Circuit interpreting *Benkiser* to allow plaintiffs to challenge any law that allegedly provides a general partisan advantage or disadvantage. Moreover, several courts have recognized *Benkiser*'s narrow applicability, *see, e.g.*, *Townley v. Miller*, 722 F.3d 1128, 1136 (9th Cir. 2013), with one court describing "competitive standing" as a "very limited theory" and noting that it requires a plaintiff to allege "that another candidate has been impermissibly placed on the ballot." *Mecinas*, 2020 WL 3472552, at *11-12 (finding plaintiffs lacked standing to challenge Arizona's ballot order statute).

Plaintiffs have not alleged, nor could they, that the Ballot Order Statute has caused any candidate to be wrongfully placed on the ballot. Instead, Plaintiffs' asserted injuries are based on "generalized partisan preferences," which "federal courts are not responsible for vindicating." *Jacobson*, 957 F.3d at 1204 (citation omitted, cleaned up). For these reasons, the Court did not err, let alone clearly and manifestly so, in concluding that Plaintiffs lack direct standing to challenge the Ballot Order Statute.

The Court has already considered *Benkiser* in its analysis of Plaintiffs' standing, and it cited the case in support of its dismissal. *See* Order at 11. Doing so was not a manifest error of law.

B. Plaintiffs did not allege a specific diversion of resources.

Next, Plaintiffs seek reconsideration of the Court's holding that they lack organizational standing, which requires a showing that they "diverted significant resources to counteract the defendant's conduct." *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). The Court has already correctly concluded that Plaintiffs' failure to allege "that the diversion of resources concretely and 'perceptibly impaired' [their] ability to carry out their purpose" meant they could not establish organizational standing. Order at 11. At no stage in this case did Plaintiffs plausibly allege that their reactions to the Ballot Order Statute "differ from [their] routine [political] activities," nor did they identify "any specific projects" put on hold as a result of the Ballot Order Statute. *City of Kyle*, 626 F.3d at 238. The Court did not impose a heightened burden at the Rule 12 stage, *contra* Mot. at 5; instead, the Court simply applied well-settled standing principles. *See City of Kyle*, 626 F.3d at 238. The Court has already rejected Plaintiffs' arguments to the contrary, and Plaintiffs cannot meet their burden to prove that doing so was a manifest error of law.

Moreover, Plaintiffs' supposed diversion of resources does not support standing for another reason. "[W]hile changing one's campaign plans or strategies in response to an allegedly injurious law can itself be a sufficient injury to confer standing, the change in plans must still be in response to a reasonably certain injury imposed by the challenged law." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). A diversion of resources does not suffice unless the plaintiff "would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). That is because a plaintiff "cannot manufacture standing by choosing to make expenditures based on" an alleged harm that is not itself an injury in fact. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). "[A] self-inflicted budgetary choice . . . cannot qualify as an injury in fact." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017) (quoting *Am. Soc'y for Prevention*

of Cruelty to Animals v. Feld Entm't, Inc., 659 F.3d 13, 25 (D.C. Cir. 2011). Here, Plaintiffs did not plausibly allege that their diversion of resources was necessary to avoid a different injury in fact. Their motion for reconsideration provides no argument to the contrary. *See* ECF 78 at 45.

C. Plaintiffs lack associational standing.

Third, Plaintiffs contend that they have associational standing because the Ballot Order Statute causes the candidates they support to "start[] every election with a built-in disadvantage based on ballot position." Mot. at 5. The Court has already rightly rejected that argument. The Court noted that "Committee Plaintiffs' allegations merely suggest, in the abstract, that some members may have been harmed by the statute in previous elections and may be harmed in the 2020 general election." Order at 10. They failed to allege "that a specific member" would be injured." *Id.* "Such allegations are insufficient for associational standing because the alleged injury is neither concrete nor imminent." *Id.* at 10–11. The Court's prior holding is consistent with the analysis of the Eleventh Circuit, which confirmed that "the average measure of partisan advantage on which the organizations rely tells us nothing about whether ballot order has affected or will affect any particular candidate in any particular election." *Jacobson*, 957 F.3d at 1206. In their motion for reconsideration, Plaintiffs do not address that aspect of the Court's holding, let alone explain how their allegations demonstrate a concrete, imminent injury resulting from the Ballot Order Statute. They thus have not established that their members, or any candidates they support, have suffered an injury that can establish Article III standing. And they have not shown why the Court committed a manifest error of law in so holding.

D. This case presents a nonjusticiable political question.

Lastly, Plaintiffs argue that their claims can be adjudicated under a "judicially manageable standard" and thus do not raise a nonjusticiable political questions. *See* Mot. at 8. Even though the Court disagreed and refused to adjudicate what a "fair" ballot ordering scheme would be in the absence of such standards, Order at 13, Plaintiffs still do not offer the Court any help on that point. Tellingly

absent from Plaintiffs' motion for reconsideration—just as it was absent from their response to the Secretary's motion to dismiss—is any discussion of what those standards would be. Courts cannot determine whether the Ballot Order Statute goes too far without defining a "fair" baseline. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019). Does fairness require that no votes be affected by ballot order? That no candidate receives a net benefit from ballot order? That no party receives a net benefit from ballot order? That each candidate or party have an equal chance of receiving any benefit from ballot order? To complicate matters, Plaintiffs seem to concede that minor parties and independent candidates can be denied not only any benefit from ballot order but also any chance of receiving any benefit from ballot order. *See* Complaint, ECF 1 at 9 n.3.

The Secretary asserted in her motion to dismiss that Plaintiffs have not put forward any "legal standards discernible in the Constitution for" answering these questions. Motion to Dismiss, ECF 33 at 16 (quoting *Rucho*, 139 S. Ct. at 2500). Plaintiffs still have not done so, and accordingly, the Court correctly concluded that the claims they present are nonjusticiable. *See also Mecinas*, 2020 WL 3472552, at *13 ("[F]or the Court to examine the alleged burden on Plaintiffs, it necessarily would have to accept their version of what is 'fair,' in this case, by making it more 'fair' for Democratic candidates in the upcoming election only, by rotating Democratic and Republican candidates, or having a lottery to determine which party's candidates would be listed first. The Court cannot do so.").

Plaintiffs argue that the Supreme Court's summary affirmance in *Mann v. Powell*, 398 U.S. 955 (1970) (per curiam), a case about a state official's discretionary decision to favor incumbents, is binding precedent holding that challenges to ballot order statutes are justiciable. But neither the Supreme Court nor the district court decision that was summarily affirmed discussed the political question doctrine, and thus, there is no binding precedent in those decisions on the issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("We have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect."). As Judge Pryor explained, Plaintiffs' reliance on *Mann* "is plainly

wrong" because, among other reasons, "[t]he Supreme Court has cautioned that we must not overread its summary affirmances." *Jacobson*, 957 F.3d at 1222 (W. Pryor, J., concurring)

The Court appropriately followed the Supreme Court's discussion of the political question doctrine in *Rucho*, which led this Court, in agreement with two other federal judges to have recently considered this precise question, to conclude that challenges to ballot order statutes like the one at issue here are nonjusticiable. *See Mecinas*, 2020 WL 3472552, at *13; *Jacobson*, 957 F.3d at 1212–23 (W. Pryor, J., concurring). The Court did not err, and certainly did not manifestly err, in reaching that determination.

* * *

Plaintiffs request that this case be set for trial. *See* ECF 78 at 10. Even if the Court reconsidered its rulings on standing and the political question doctrine, the case would not be ripe for trial. The Secretary moved to dismiss for reasons beyond standing and the political question doctrine. *See* ECF 33; ECF 38. The Court did not reach those issues in its original order. *See, e.g.*, ECF 76 at 11 n.4, 14 n.7. Because dismissal is warranted on those additional grounds, reconsideration of the Court's previous rulings would not justify setting this case for trial.

CONCLUSION

The Court correctly decided that Plaintiffs lack standing and that this case presents a nonjusticiable political question. Nothing in Plaintiffs' Motion for Reconsideration changes that analysis—let alone clearly proves that the Court committed a manifest error of law on both points. Secretary Hughs respectfully requests that the Court deny Plaintiffs' Motion for Reconsideration.

Date: August 14, 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 August 14, 2020, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
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ORDER

Now before the Court comes Plaintiffs' Opposed Motion for Reconsideration, filed August 7, 2020. After considering the Motion, the response, and any reply thereto, the Court is of the opinion that the Motion should be DENIED.

IT IS THEREFORE ORDERED that Plaintiffs' Opposed Motion for Reconsideration is hereby DENIED.

DATE: _____

_____
LEE YEAKEL
UNITED STATES DISTRICT JUDGE