IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY; DSCC; DCCC, Plaintiffs vs. RUTH R. HUGHS, in her official capacity as the Texas Secretary of State, Defendant.	§ § § § § § § § § § §	Civil Action No. 5:20-cv-00008-OLG Related to *Stringer v. Cascos*, No. 5:16-cv-00257-OLG

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO ABSTAIN

Filed on the heels of an unsuccessful motion to dismiss, and in anticipation of the Court's refusal to delay review of Plaintiffs' Application for Preliminary Injunction, the Secretary's newest motion is yet another attempt to delay this lawsuit. Even after this Court's admonishment, ECF No. 29 at 3 n.1, the Secretary *again* misrepresents the nature of Plaintiffs' lawsuit by arguing that the case centers on state law and that "Plaintiffs cannot prevail" if "state courts agree with the Secretary." Mot. at 4-5. But this lawsuit is not just about the Texas Election Code. The state statutes that the Secretary contends are at issue support Plaintiffs' claims that a *wet* signature, as opposed to an imaged signature, is immaterial to determining a voter's eligibility. But even if the Secretary is right that the code requires a wet signature, Plaintiffs have made clear that it would still violate federal law. *See* Second Am. Compl. at ¶ 3 ("Thus, even if the wet signature rule had any basis in Texas law (though it does not), it violates the federal Constitution and the Civil Rights Act . . . ."), ECF No. 25; Pls.' Resp. to Defs.' Supp. Advisory at 1 ("The focus of Plaintiffs' complaint is the rule's enforcement and the consequent rejection of voter registration applications . . . notwithstanding its origin."), ECF No. 31; *Tex. Democratic Party v. Hughs*, No. SA-20-CV-08-

OG, --- F. Supp. 3d ---, 2020 WL 4218227, at *2 (W.D. Tex. 2020) ("Plaintiffs further argue that *even if state law does impose such a rule*, which they dispute, the rule is unconstitutional and the Secretary's enforcement thereof violates federal law.") (emphasis added). No matter the framing, this lawsuit belongs in the forum first chosen by Plaintiffs.

Because the Secretary's Motion to Abstain comes less than two months before the voter registration deadline, and less than three months before the general election, abstention would all but eliminate any prospect of relief before the November election—which the Secretary freely admits is her ultimate objective—causing irreparable injury to Plaintiffs and their members. The Court should therefore deny the Secretary's Motion.

I. ARGUMENT

A. Abstention is inappropriate in this case.

Abstention is inappropriate in this voting rights case, especially when the Secretary waited to raise the issue until less than two months before the voter registration deadline and less than three months before the general election.[1] The Secretary's argument for abstention is based on *Railroad Commission of Texas v. Pullman Co*., 312 U.S. 496 (1941), which broadly holds that federal courts should yield to state courts to interpret, in the first instance, unsettled state laws. Courts have discretion to apply the *Pullman* doctrine, and only do so on rare occasions based on a totality-of-the-circumstances analysis. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965); *see also Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981) ("In summary, the extraordinary

[1] The Secretary claims that she raised the issue in her Supplemental Advisory. Mot. at 1. This is a stretch: the Secretary included a footnote in her Supplemental Advisory that merely states, "[o]f course, the Secretary believes this case should not move forward for the reasons explained in her motion to dismiss and out of principles of abstention." ECF No. 30 at 8 n.4. Notably, the Court has already denied the Secretary's motion to dismiss in its entirety. ECF No. 24. The Secretary offered nothing more to indicate which abstention doctrine she was referring to or why abstention was appropriate.

decision to stay federal adjudication requires more than an ambiguity in state law and a likelihood of avoiding constitutional adjudication. A district court must carefully assess the totality of circumstances presented by a particular case."). The Supreme Court and the Fifth Circuit have reiterated on several occasions that those rare circumstances do not include cases that implicate voting rights, especially in an election year. For example, in *Harmon v. Forssenius*, the Supreme Court held that the district court did not abuse its discretion in refusing to abstain where the "nature of the constitutional deprivation" involved voting rights, taking into consideration the "probable consequences of not abstaining" when the "motion was heard about two months prior to the deadline for meeting the statutory [poll tax] requirements and just eight months before the 1964 general elections." 380 U.S. at 537. The Fifth Circuit has reaffirmed this reasoning on several occasions. *See, e.g., O'Hair v. White*, 675 F.2d 680, 692-694 (5th Cir. 1982) (en banc) (reversing the district court's abstention as to the voting rights claim, highlighting "the high costs involved in abstaining when the constitutional challenge includes allegations of facially impermissible discrimination and restrictions on the right to vote," and reiterating that abstention is the exception, not the rule); *Duncan*, 657 F.2d at 698 (affirming the district court's refusal to abstain when voting rights are at stake); *Edwards v. Sammons*, 437 F.2d 1240, 1244 (5th Cir. 1971) (holding that the district court erred in abstaining in an election-related matter).

The Secretary fails to address the vast amount of Supreme Court and Fifth Circuit precedent counseling against abstention under similar circumstances, and instead bases her entire argument on dicta. Her motion cites a footnote in *Texas Democratic Party v. Abbott*, 961 F.3d 389, 397 n.13 (5th Cir. 2020), to support her contention that the Court should abstain from considering the claims here. Mot. at 2, 3. But the issue of abstention in *Texas Democratic Party* was moot by the time the court took up the matter, and the majority's opinion on whether

abstention was relevant was undeveloped—again, merely a footnote—and irrelevant to the lawsuit. To be sure, one judge on the panel wrote a concurrence to address the (now moot) case for abstention. *Tex. Democratic Party*, 961 F.3d at 417. But the concurrence's support for abstention focused on the procedural posture of that case; specifically, the State supreme court had already taken up the matter, expedited the case, and ruled within one week. *Id*. at 418 (stating the timing of the state court litigation supported abstention). *Texas Democratic Party* holds no precedential weight in the area of abstention; but, even if it did, it further supports Plaintiffs' contention that the Court should reject the Secretary's argument to abstain in this case because there is no parallel state court proceeding and any delay would operate to bar Plaintiffs from the possibility of relief to redress the irreparable harm that follows from the wet signature rule. The Secretary provides no legitimate basis to treat this case as an exception to the rule against abstention.[2]

B. The Secretary fails to establish the *Pullman* factors.

Even if abstention was appropriate despite the nature and timing of this case, the Court should still deny the Secretary's request because none of the *Pullman* factors are present here: (1) this lawsuit *does not* turn on the interpretation of unsettled Texas law, and (2) clarification of the state law *will not* moot or substantially alter the federal question. *Duncan*, 657 F.2d at 696 (citing *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980)).

1. This case does not involve an unsettled issue of state law.

"The mere fact that [a] statute has never been interpreted by state courts does not indicate sufficient ambiguity to justify Pullman abstention." *Duncan*, 657 F.2d at 698. Nor does the "mere

[2] Indeed, the Secretary does not engage with *any* of this circuit's precedent rejecting requests for abstention in voting rights cases, especially in an election year.

absence of judicial interpretation" render a state law "unsettled or uncertain." *Id*. Here, Texas law is quite clear: the Election Code permits an eligible voter to register by submitting an application to the county, as long as that application is "submitted by personal delivery, by mail, or by telephonic facsimile machine," and "must be in writing and signed by the applicant." Tex. Elec. Code § 13.002(a), (b). The law further recognizes electronic and imaged signatures as legally equivalent to wet signatures. *See, e.g.*, 1 Tex. Admin. Code § 81.58(a) (authorizing election officials to capture voters' signatures using electronic devices for Election Day signature rosters); Tex. Bus. & Com. Code § 322.007(a), (d) (recognizing "that a signature may not be denied legal effect . . . solely because it is in electronic form" and expressly stating that "[i]f a law requires a signature, an electronic signature satisfies the law."). As this Court has explained, "there is nothing in Texas law that precludes the use of . . . electronic signatures" or that requires "only physical, manual, or wet ink signatures written by hand on paper . . . ." *Stringer v. Pablos*, 320 F. Supp. 3d 862, 895-97 (W.D. Tex. 2018), *rev'd on other grounds in Stringer v. Whitley*, 942 F.3d 715 (5th Cir. 2019). And the Secretary points to no authority that indicates section 13.002 can be read to require a wet signature. *Harman*, 380 U.S. at 535-36; *see also Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236–37 (1984) ("There is no other provision of the Act—or, for that matter, of Hawaii law—which would suggest that [the statute] does not mean exactly what it says.").

In any event, it is not enough for *Pullman* abstention to merely suggest that the statute could potentially be construed to avoid a constitutional decision. *Edwards*, 437 F.2d at 1243. The Secretary has attempted to supplement an Election Code provision that is neither unsettled nor ambiguous by imposing in a wet signature requirement which does not appear anywhere in the law, and, worse yet, is inconsistent with the State's own voter registration practices. "Of course, as every attorney knows, any statutory provision can be made ambiguous through a sufficiently

assiduous application of legal discrimination." *Duncan*, 657 F.2d at 698. But creative arguments alone are not enough to demonstrate that a statute is sufficiently ambiguous to warrant abstention. This case does not implicate any unsettled issues of state law, thus the Secretary's motion must be denied.

2. Abstention would only work to delay, not clarify, this lawsuit.

The Secretary also mischaracterizes Plaintiffs' claims, suggesting that the lawsuit will somehow disintegrate if a state court were to find that the Texas Election Code does indeed require a wet signature on voter registration applications. This argument continues to ignore Plaintiffs' allegations which make clear that "even if the wet signature rule had any basis in Texas law . . . it violates the federal Constitution and Civil Rights Act." *See* Second Am. Compl. ¶¶ 3, 38; Pls.' Resp. to Defs.' Supp. Advisory at 2-4. This Court has even recognized that Plaintiffs' lawsuit seeks to enjoin the enforcement of the wet signature requirement "*even if state law does impose* such a rule," meaning that the requirement would still violate federal law no matter how a state court interprets the Election Code. *Tex. Democratic Party*, 2020 WL 4218227, at *2 (emphasis added). To be sure, a state court judgment confirming that the Election Code does not impose a wet signature requirement would further demonstrate that the Secretary's rule violates federal law and that the State has no interest in enforcing it, but Plaintiffs' ability to prevail here by no means rests on that outcome. *See* Second Am. Compl. ¶¶ 3, 38; Pls.' Resp. to Defs.' Supp. Advisory at 2-4; *cf. Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) ("[S]tate laws that conflict with federal law are without effect." (citations omitted)).

Abstention, moreover, would delay this action indefinitely—there is no pending state action that addresses the issues raised here—and foreclose relief to Texas voters and Plaintiffs before the November election. It is no coincidence that this motion comes on the heels of the Secretary's failed attempt to tie up this matter in needless discovery until it was "too late in the

election calendar to issue a preliminary injunction," ECF 27 at 5, followed by a notice of appeal (of this Court's July 22 Order denying the Secretary's Motion to Dismiss) in which the Secretary unilaterally (and erroneously) declared that all proceedings in this Court are suspended. ECF No. 36. The Secretary is well aware of the consequences of any additional delay at this stage of the case and has done everything in her power to see that it happens; her Motion to Abstain is yet another meritless attempt to obstruct this Court's review of Plaintiffs' Application for Preliminary Injunction.

II. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to deny Defendant's Motion to Abstain.

Dated: August 17, 2020

Respectfully submitted,

/s/ *Uzoma Nkwonta*

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, I filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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