UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA, Chair of the Texas Democratic Party; JOSEPH DANIEL CASCINO; and SHANDA MARIE SHANSING, *Plaintiffs,* v. GREG ABBOTT, Governor of Texas; RUTH HUGHS, Texas Secretary of State; DANA DEBEAUVOIR, Travis County Clerk; and JACQUELYN F. CALLANEN, Bexar County Elections Administrator, *Defendants.*	)	5:20-cv-00438-FB

DEFENDANT BEXAR COUNTY ELECTIONS ADMINISTRATOR JACQUE CALLANEN'S MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes Defendant Bexar County Elections Administrator Jacque Callanen,[1] and files this Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

BACKGROUND

1. Plaintiffs allege that the Texas Attorney General's narrow definition of voter eligibility to early vote by mail under Section 82.002 of the Texas Election Code impermissibly burdens their

[1] Plaintiffs have named Jacque Callanen as a Defendant in this matter in her official capacity as the Elections Administrator of Bexar County. In so doing, any claims they have asserted against her are asserted against Bexar County. *Rosas v. Bexar Cty.*, No. 5:14-CV-1082-DAE, 2015 WL 1955406, at *3 (W.D. Tex. Apr. 29, 2015).

right to safely vote within the context of the ongoing COVID-19 pandemic. Plaintiffs seek a declaration that, unless voters concerned about contracting COVID-19 are permitted to vote by mail, the elections conditions created by the COVID-19 pandemic would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 and the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments. Docket no. 9 at ¶¶ 79-103. Plaintiffs also allege that the Attorney General Paxton acted in furtherance of a conspiracy to suppress voting, in violation of 42 U.S.C. § 1985, by publishing a letter expressing his office's opinion that fear of contracting COVID-19 does not qualify a voter to vote by mail and stating that "third parties [who] advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, . . . could [be] subject . . . to criminal sanctions imposed by Election Code section 84.0041." Docket nos. 9 at ¶¶ 47-49, 104-10; 10-2 at 5-6. Plaintiffs seek an order prohibiting Defendants from "deny[ing] a mail in ballot to any Texas voter that applies for a mail-in ballot because of the risk of transmission of COVID-19" and that prohibits "Defendants, including General Paxton . . . from issuing threats to or seeking criminal prosecution of voters and others advising voters on mail ballot eligibility based on the risk of transmission of COVID-19." Docket no. 10-5 at 2.

2. On May 15, 2020, the parties, including Defendant Callanen, appeared before the Court through counsel to submit evidence and arguments related to Plaintiffs' request for preliminary injunctive relief. During the course of that hearing, counsel for Plaintiffs indicated that Plaintiffs do not contend that any local elections official, including Defendant Callanen, has improperly rejected the application of any voter seeking to vote by mail under Section 82.002 or otherwise burdened their right to vote.

3. On May 19, this Court has entered a Preliminary Injunction Order finding that Plaintiffs are likely to prevail on the merits of their facial and as-applied challenges to Chapter 82 of the

Election Code and ordering that all eligible Texas voters who wish to vote by mail in order to avoid the possibility of COVID-19 exposure are eligible to do so for the duration of the COVID-19 pandemic. Docket no. 90 at 10, 54-68. The State Defendants have filed a Notice of Appeal, docket no. 91, and the Fifth Circuit had temporarily stayed this Court's preliminary injunction order. Docket no. 94.

LEGAL STANDARDS

4. Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes the dismissal of claims over which the Court lacks subject matter jurisdiction. Plaintiffs, as the party asserting jurisdiction, bear the burden of showing subject matter jurisdiction. *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012). To satisfy the standing component of subject matter jurisdiction, Plaintiffs must show that they have suffered an (1) injury in fact—"'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'"—(2) that this injury is fairly traceable to the challenged conduct of the Defendant and (3) that it is likely to be redressed by a favorable judicial decision. *Ctr. for Biological Diversity v. United States Envtl. Prot. Agency*, 937 F.3d 533, 537 (5th Cir. 2019) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1928 (2018) and *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016)). In evaluating the existence of subject matter jurisdiction, the Court may consider the complaint alone, the complaint supplemented by undisputed facts, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Robinson v. TCI/US W. Commc'ns Inc.*, 117 F.3d 900, 904 (5th Cir. 1997).

5. The sufficiency of a pleading to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) is evaluated under the two-step process outlined by the Supreme Court in Bell *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). First,

the Court must identify the Complaint's factual allegations, which are assumed to be true, and distinguish them from any statements of legal conclusion, which are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 678, 680-81. Second, the Court must assess whether the assumed-as-true factual allegations set forth a plausible claim to relief. This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense" to determine whether "the well-pleaded facts . . . permit the court to infer more than the mere possibility of misconduct[.]" *Iqbal*, 556 U.S. at 679. Ultimately, the claim is subject to dismissal if it lacks "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

ANALYSIS

6. In their written filings in this case, the Governor, Attorney General, and Secretary of State have represented that they "do not enforce Texas Election Code Section 82.002 or 82.003" and therefore "lack[] the requisite connection to the enforcement of" Section 82.002 that is required to invoke the *Ex Parte Young* exception to sovereign immunity as to Plaintiffs' claims against them. Docket no. 39 at 19-23. Additionally, they contend that Plaintiffs lack standing to assert claims against them, in part because "[a]cceptance or rejection of an application to vote by mail falls to local, rather than State, officials" and Plaintiffs' alleged injuries therefore "are not 'fairly traceable'" to the State Defendants, but are "'the result of the independent action of [a] third party'"—i.e., local elections officials such as Defendant Callanen. Docket no. 39 at 23-24 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The necessary implication of these arguments is that Plaintiffs' claims *are* properly brought against local elections officials such as the Travis County Clerk and Bexar County Elections Administrator.

7. The State Defendants' position on these issues is contrary to controlling appellate authority, unsupported by state law, and undermined by Attorney General Paxton's own previous opinions regarding the responsibilities of the Secretary of State under the Election Code. First, the position that invasions of federally secured rights caused by applications of the Texas Election Code are not traceable to or redressable by the State has been rejected by the Fifth Circuit as a "circular argument" that "misses the mark" because "[t]he facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 & n.34 (5th Cir. 2017) (quoting Tex. Elec. Code § 31.003). As the state's chief elections officer, the Secretary of State is empowered by state law to "obtain and maintain uniformity in the application, operation, and interpretation of [the Elections] code and of the election laws[,]" and to "prepare detailed and comprehensive written directives and instructions relating to and based on this code and the election laws" to guide elections administrators, county clerks, and other local officials tasked with administering elections. *OCA*, 867 F.3d at 613 & n.34 (citing Tex. Elec. Code § 31.003). Recognizing this same state law authority, Attorney General Paxton has previously observed in a formal opinion that "[t]he Texas Secretary of State is the entity tasked with administering and applying section 82.002." Tex. Attn'y Gen. Op. No. KP-009 (2015). And, although the Attorney General now seeks to avoid judicial review by claiming to lack authority to enforce the Election Code, it was his public demands that local officials adhere to his unofficial interpretations of the Election Code or face the possibility of criminal prosecution by his office that partially triggered this litigation to begin with.

8. The Fifth Circuit made clear in *OCA* that facial challenges to the Texas Election Code are properly brought against the Secretary of State, not local elections officials. *OCA*, 867 F.3d at 613.

The same is true of Plaintiffs' as-applied claims, since the only application of Section 82.002 that Plaintiffs complain of is the Attorney General's. The preliminary injunction record before the Court makes clear that Plaintiffs do not allege that Defendant Callanen or any local elections official has rejected any COVID-premised application to vote by mail. All parties are in agreement that local elections officials are not authorized by the Election Code to investigate the validity of voters' disability claims—and even if they had such authority, local officials would not be able to identify and reject COVID-premised applications because, under the current administrative regime for early voting by mail, local elections officials are not even aware of the basis for voters' claims of eligibility under Section 82.002. In short, Defendant Callanen and other local elections officials throughout the state have no "enforcement connection" with the challenged interpretation of Section 82.002—they do not have "any duty or ability to do *anything*" with respect to the State Defendants' proposed limitations on vote-by-mail eligibility, and, for that reason, "the injury alleged by the plaintiffs is not, and cannot possibly be, *caused* by" them. *OCA*, 867 F.3d at 613 (quoting *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (en banc)).

9. The Eleventh Circuit's recent opinion in *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 2049076, at *9 (11th Cir. Apr. 29, 2020), is not inconsistent with this analysis. In that case, a group of voters challenged a Florida statute that governed the order in which candidates appeared on the ballot. Reversing the district court, the Eleventh Circuit found that Florida's Secretary of State was not a proper defendant because Florida law placed the responsibility for printing the ballots with local Elections Supervisors, whereas the Secretary of State did not "play[] any role in determining the order in which candidates appear on ballots." *Jacobson*, 2020 WL 2049076. Like the Florida Secretary of State in *Jacobson*, Defendant Callanen and local elections officials in Texas have neither the authority nor the ability to identify voters who apply to early

vote by mail solely to avoid possible COVID-19 exposure. Defendant Callanen therefore does not play any role in enforcing the limitations on vote-by-mail eligibility that forms the basis for Plaintiffs' claims against the State Defendants. And, unlike Attorney General Paxton, Bexar County and its Elections Administrator have not broadcasted to the public an opinion that voters wishing to avoid COVID-19 exposure who do not otherwise qualify to early vote by mail under Section 82.002 are not eligible to do so. *Compare, e.g.*, docket nos. 10-2 at 2-6 (Attorney General's April 15, 2020, Press Release); 75-1 (Attorney General's May 1, 2020, unofficial guidance letter); and 49-1 at 1-6 (Bexar County Criminal District Attorney's Opinion Regarding Section 82.002).

CONCLUSION

10. Plaintiffs have not alleged that Bexar County or its Elections Administrator have wrongfully rejected any application to early vote by mail, or indicated any intention to do so. *Compare generally Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996) (when a public official is sued under § 1983, a plaintiff must allege "specific conduct and actions giving rise to a constitutional violation."). For that reason alone, Bexar County and Elections Administrator Callanen should be dismissed from this case pursuant to Rule 12(b)(6). The undisputed record before the Court indicates that, under the current administrative regime for early voting by mail, local elections officials would not be able to identify and reject such applications even if instructed to by the Secretary of State. For these reasons, Plaintiffs have not identified any injury that is traceable to Defendant Callanen or redressable by her, and she should be dismissed from this case pursuant to Rule 12(b)(1).

WHEREFORE, PREMISES CONSIDERED, Defendant Bexar County Elections Administrator Jacque Callanen prays that this Court grant her Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and dismiss her from this litigation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify on the 21st day of May, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which provided electronic service upon all parties.

/s/ Robert Green
ROBERT D. GREEN