

THE ANTI-DEFAMATION LEAGUE	§	
AUSTIN, SOUTHWEST, AND	§	IN THE DISTRICT COURT
TEXOMA REGIONS; COMMON	§	
CAUSE TEXAS; and ROBERT	§	
KNETSCH;	§	TRAVIS COUNTY TEXAS
<i>Plaintiffs,</i>	§	
	§	
v.	§	353rd JUDICIAL DISTRICT
	§	
GREG ABBOTT, in his official	§	
capacity as the Governor of Texas,	§	
<i>Defendant.</i>	§	

**PLAINTIFFS’ MOTION FOR LEAVE TO FILE PLAINTIFFS’ FIRST AMENDED
PETITION AND APPLICATION FOR
TEMPORARY INJUNCTION AND PERMANENT INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs, the Anti-Defamation League, Austin, Southwest and Texoma Regions; Common Cause Texas, and Robert Knetsch, and file this Motion for Leave to File their First Amended Petition to add the Texas Secretary of State, Ruth Hughs, in her official capacity, as a defendant.

Time is of the essence in this action. Plaintiffs brought this suit just days after Defendant’s Proclamation was issued on October 1, 2020 in order to address the devastating impact Defendant’s action will have on this upcoming election. Early voting is set to start on October 13, 2020, and the Court should not delay in hearing Plaintiffs’ motion for temporary injunction in order to avoid further injury to Plaintiffs and eligible absentee voters throughout the State.

Plaintiffs do not believe that a motion for leave to amend is required by Texas Rule of Civil Procedure 63 because the temporary injunction hearing scheduled for October 13, 2020 is not a “trial” within the meaning of Rule 63. In an abundance of caution, however, Plaintiffs bring this motion to avoid any attempt to delay these proceedings over procedural disputes.

Nor do Plaintiffs believe that the Secretary of State is a necessary party to this action or that her absence in any way precludes the Court from issuing the injunctive relief required to remedy the Governor's unlawful conduct. But again, in an abundance of caution and based on the recent position of the Governor in parallel federal litigation, Plaintiffs seek to add the Secretary of State solely to avoid any argument that the Proclamation cannot be enjoined based on the Governor's erroneous interpretation of standing law.

FACTUAL AND PROCEDURAL BACKGROUND

1. On October 5, 2020, Plaintiffs filed their verified original petition and application for temporary restraining order, temporary injunction, and permanent injunction against Greg Abbott, in his official capacity as the Governor of Texas.

2. On October 6, 2020, Defendant filed his Plea to Jurisdiction, alleging that the Court lacks jurisdiction. Among other things, the Defendant alleged that he "will not be the party responsible for enforcing [his] October 1 Proclamation," thus purportedly depriving the Plaintiffs of "standing to bring their challenge to that proclamation against him." Deft. Plea to Jurisdiction, pp. 14-15. "Instead," the Defendant urged, "the plaintiff must plead that the named "official can act" with respect to the specific challenged law," suggesting that the Secretary of State, not the Governor, is tasked with enforcing the Proclamation. *Id.* at 16.

3. Plaintiffs responded to Defendant's Plea to Jurisdiction with a written response, filed on October 13, 2020.

4. This case is set for a temporary injunction hearing on Tuesday, October 13, 2020.

5. Meanwhile, on October 6 and 7, 2020, respectively, Defendant filed motions to dismiss in the parallel federal court cases, *Texas League of United Latin American Citizens v. Abbott*, 1:20-cv-1006 (W.D. Tex.), and *Straty v. Abbott*, 1:20-cv-1015 (W.D. Tex.), in which

both the Secretary of State and the Governor are named as defendants. In both cases, the Secretary and the Governor are represented by the Attorney General, and in both cases, they have asserted that the cases should be dismissed, *inter alia*, because neither of them possessed the authority to enforce the Governor's Proclamation or the Election Code.

6. On Friday, October 10, 2020, federal district court Judge Robert Pitman issued an order in *Texas League of United Latin American Citizens and Straty*, dismissing all claims against the Governor while denying the Secretary's motion to dismiss and granting the plaintiffs' motions for preliminary injunction, thus enjoining the provision of the Governor's October 1 Proclamation that purported to prohibit more than a single ballot drop-off location per county.

7. A copy of Plaintiffs' First Amended Petition is attached hereto as Exhibit A.

ARGUMENT & AUTHORITIES

8. Plaintiffs' proposed First Amended Petition does not add any new causes of action but only seeks to add as a defendant the Secretary of State, Ruth Hughs, in her official capacity.

9. Plaintiffs' proposed First Amended Petition does not cause any surprise to Defendant, and Defendant will not suffer any prejudice as a result of its filing. In the absence of surprise or prejudice to the Defendant, leave to file the proposed First Amended Petition must be granted.

10. Pursuant to Rule 63 of the Texas Rules of Civil Procedure, "[p]arties may amend their pleadings ... by filing such pleas with the clerk at such time as not to operate as a surprise to the other party; provided, that any pleadings ... offered for filing within seven days of the date of trial or thereafter ... shall be filed only after leave of the judge is obtained, which leave *shall*

be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.” Tex. R. Civ. P. 63 (emphasis added).

11. Thus, absent a showing of surprise or prejudice, “a trial court has no discretion to refuse an amendment [to a pleading]. *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (1990); *Mays v. Dallas Cnty.*, 2017 WL 1739765 (Tex. App.—Texarkana May 3, 2017, pet. denied) (same).

12. Moreover, “[t]he burden of showing prejudice or surprise rests on the party resisting the amendment.” *Greenlagh*, 787 S.W.2d. at 939. Here, the Defendant can show neither surprise nor prejudice. Indeed, it was Defendant who suggested, in his Plea to Jurisdiction just days ago, that the Secretary, and not he, was the correct defendant.

13. Plaintiffs do not contend that the Secretary of State is a necessary party to this lawsuit nor in any way concede that the Governor is not a proper defendant. Instead, Plaintiffs seek to amend their petition to include the Secretary as a defendant in light of the fact that Defendant has taken the same position in this matter as in the parallel federal court matters regarding standing and the Governor’s authority to enforce his own Proclamation.

14. In assessing whether a Defendant has established the requisite proof of “surprise,” courts consider (1) the length of time the suit has been pending before the amendment was filed, (2) how soon before trial the amendment was offered, (3) whether the amendment presents a new claim. *Dunnagan v. Watson*, 204 S.W.3d 30, 38 (Tex. App. – Fort Worth 2006, pet. denied). While this amendment is necessarily being offered shortly before the temporary injunction hearing in this case, the suit has been pending for a mere seven days and no trial has been set. Furthermore, the proposed amendment does not present any new claim whatsoever.

15. Similarly, Defendant cannot establish prejudice, as the amendment does not assert a new cause of action or defense. *See Halmos v. Bombardier Aero. Corp.*, 314 S.W.3d 606 (5th Ct. of App. 2010). “An amendment that is prejudicial on its face has three defining characteristics: (1) it asserts a new substantive matter that reshapes the nature of trial itself; (2) the opposing party could not have anticipated the new matter in light of the development of the case up to the time the amendment was requested; and (3) the amendment would detrimentally affect the opposing party’s presentation of its case.” *Id.* at 607.

16. None of these characteristics are present in the instant case. The proposed amendment presents no new substantive matter. The Defendant certainly anticipated the amendment following Friday’s federal court decision, if not sooner. The amendment will have no impact on the Defendant’s presentation of the case, given that the only witness Defendant is considering calling at Tuesday’s hearing is Keith Ingram, an employee of the Secretary of State’s office. Moreover, the Attorney General represented both the Governor and Secretary in the federal preliminary injunction hearing.

17. Accordingly, this Court should grant Plaintiffs leave to file the Plaintiffs’ First Amended Petition, as Defendant cannot credibly claim to be prejudiced thereby.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Court grant this Motion for Leave to file Plaintiff’s First Amended Petition and for such other and further relief that this Court deems just and proper.

Dated: October 12, 2020

Respectfully submitted,

/s/ Lindsey B. Cohan

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CERTIFICATE OF CONFERENCE

Counsel for Plaintiffs conferred with counsel for Defendant Abbott, on October 11, 2020.

Counsel for Defendant stated that they oppose this motion.

/s/ Lindsey B. Cohan
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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2020, a true and correct copy of the foregoing was sent to all counsel of record in accordance with the provisions of the Texas Rules of Civil Procedure.

/s/ Lindsey B. Cohan
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