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

TEXAS DEMOCRATIC PARTY, ET AL., ***Plaintiffs*****,** **and** **LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,** ***Plaintiffs-Intervenors*****,** **v.** **GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,** ***Defendants*****.**	**Civil Action No. 5:20-CV-00438-FB**

DEFENDANT SCOTT'S SUPPLEMENTAL BRIEFING

Defendant John B. Scott[1] files this Supplemental Briefing pursuant to this Court's Order. Dkt. No. 163.

ARGUMENT

I. *BRNOVICH* CLARIFIED THE ANALYTICAL FRAMEWORK FOR JUDGING BALLOT COUNTING AND COLLECTION LAWS.

In *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021), the Supreme Court clarified the standards for evaluating challenges to ballot-counting and -collection laws under Section 2 of the Voting Rights Act (VRA). *Brnovich* concerned an Arizona law that required voters to vote in the precinct to which they were assigned based on their address; votes cast in the wrong

[1] Secretary of State John B. Scott is automatically substituted as a defendant for Ruth Hughs, who formerly served as the Texas Secretary of State. *See* Fed. R. Civ. P. 25(d). This Court dismissed Governor Greg Abbott and Attorney General Ken Paxton on July 2, 2021 (Dkt. 161).

precinct would not be counted. *Id.* The law also made it a crime for any person to knowingly collect an early ballot—either before or after it has been completed. *Id*. The *Brnovich* plaintiffs alleged that both provisions adversely and disparately affected American Indian, Hispanic, and African-American voters in violation of Section 2 of the VRA. *Id*. They also contended that the ballot-collection rules were "enacted with discriminatory intent" in violation of both Section 2 of the VRA and the Fifteenth Amendment. *Id*.

The Supreme Court held that the challenged provisions did not violate the VRA and were not enacted with a racially discriminatory purpose. *Id*. at 2325. The Court characterized its opinion as, "for the first time[,] appl[ying] § 2 of the Voting Rights Act . . . to regulations that govern how ballots are collected and counted." *Id*. at 2330. At the outset, the Court "decline[d] . . . to announce a test to govern all [Voting Rights Act] claims involving rules . . . that specify the time, place, or manner for casting ballots." *Id*. at 2336. Having so qualified its ruling, the Court went on to "identify certain guideposts" that can help courts decide Section 2 cases. *Id*. The five guideposts are:

1. "the size of the burden imposed by a challenged voting rule";
2. "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982";
3. "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups";
4. "the opportunities provided by a State's entire system of voting"; and
5. "the strength of the state interests."

Id. at 2338-40.

The Supreme Court gave great weight to Arizona's interests in enforcing the law. *See id.* at 2347–48. The States "indisputably [have] a compelling interest in preserving the integrity of [their] election process[es]." *See id.* at 2347 (quoting *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam)). And "it should go without saying," the Court continued, "that a State may take action

to prevent election fraud without waiting for it to occur and be detected within its own borders." *Id.* at 2348. Finally, the Court recognized that "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence." *Id.* at 2347.

At a minimum, and as explained below, *Brnovich* (1) clarifies the proper scope of analysis for ballot-collection and -counting laws as part of the State's overall election scheme; (2) clarifies the relevant factors for parties and courts to use when evaluating ballot-counting and -collection laws, (3) eliminates reliance on "cat's paw" theories of discrimination under Section 2, and (4) confirms that the State has a compelling interest in preserving election integrity and does not violate voting rights by addressing that interest without awaiting a widespread problem. *Id.* at 2347-48.

A. *Brnovich* Effects this Court's Consideration of Plaintiffs' Fifteenth Amendment and Section 2 Claims (Causes of Action 1 & 3).

Brnovich controls this Court's analysis of Plaintiffs' claim that "Texas's age limitation for mail voting, on its own and as combined with the election policies enacted and soon to be enacted" violates the 15th Amendment and Section 2 of the VRA. Dkt. No. 141 at ¶¶81, 86. As argued in Defendant's Motion to Dismiss, Plaintiffs' fail to state a viable claim for a Fifteenth Amendment or Section 2 violation. *See* Dkt. No. 151 at 8-12. *Brnovich* bolsters that argument. The fundamental right to vote remains equally open to all Texas voters, regardless of age. That the privilege of voting absentee is not extended to voters that do not qualify for an absentee ballot under Section 82.003 is one of the minor inconveniences that the Supreme Court held would not overcome Texas's compelling interest in election security, uniformity, and efficiency. Inconveniencing individuals to vote in person—early or on election day—ensures the orderly, secure administration of elections

within Texas. Texas has a compelling interest in preventing election fraud, and is not required to demonstrate a history of serious voting fraud issues or an inability to combat voting fraud in other ways. As *Brnovich* explicitly recognized, " [n]othing about equal openeess and equal opportunity dictates such a high bar for State's to pursue their legitimate interests." *Brnovich*, 141 U.S. at 2343.

The other *Brnovich* factors only further compel dismissal. After all, Plaintiffs have not shown anything beyond the "usual burdens of voting" when complying with a rule—age restrictions for mail voting—that does not "depart[ ] from what was standard practice when § 2 was amended in 1982." *Brnovich*, 141 S. Ct. at 2338. Section 82.003 has on the books since the 1970s, and the privilege of absentee voting has historically been extended to the elderly and disabled in a majority of states. Moreover, Plaintiffs' allegations, to the extent there are any, of the "size of any disparities in a rule's impact on members of different racial or ethnic groups" remain conclusory while "the state interests served by a challenged voting rule" remains strong. *Id.* at 2339. In sum, *Brnovich* further supports that dismisal of Plaintiffs' Fifteenth Amendment and Section 2 claims is warranted.[2]

B. *Brnovich* Did Not Overrule *Anderson-Burdick*,[3] but aspects of *Brnovich*'s Analysis May Inform the Court's Consideration of Plaintiffs' Fourteenth and Twenty-Sixth Amendment Claims (Causes of Action 2, 4, 5 & 6).

Brnovich only considered Section 2 and Fifteenth Amendment challenges to election regulations, and therefore did not overrule the *Anderson-Burdick* framework that governs First and Fourteenth Amendment constitutional challenges to election laws that touch upon the

[2] *Brnovich* also clarifies that the *Gingles* factors heavily relied upon by Plaintiffs (Dkt. 155, pp. 9-10) are largely inapplicable when addressing a challenge to time, place, and manner voting laws as compared to vote-dilution challenges. *Id.* at 2340. Rather, the guideposts set forth in *Brnovich* control, and require dismissal of Plaintiff's Section 2 Voting Rights Act claim.

[3] *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

fundamental right to vote. This Court would err were it to find that *Brnovich* permits conflating the First and Fourteenth Amendment challenges in this case with Section 2 and Fifteenth Amendment challenges by applying a singular, uniform standard to all of Plaintiffs' claims. It has not done so before and it should not do so now. *See, e.g., League of United Latin Am. Citizens ("LULAC") v. Abbott*, 369 F. Supp. 3d 768, 784 (W.D. Tex. 2019), *aff'd*, 951 F.3d 311 (5th Cir. 2020). To be sure, the Fifth Circuit has consistently held that a "First and Fourteenth Amendment challenge . . . involves a different analytical framework than what we use for Section 2 claims." *Veasey v. Abbott*, 830 F.3d 216, 249 (5th Cir. 2016); *see also Allen v. Waller Cnty., Tex.*, 472 F. Supp. 3d 351, 365–66 (S.D. Tex. 2020) ("it is difficult to conceive of a hybrid action combining the Fourteenth, Fifteenth, and Twenty-Sixth Amendments where independent action under each wouldn't redress the grievance.").

While *Brnovich* did not announce a new standard for a First and Fourteenth Amendment challenge to election laws, it persuasively touches upon several foundational tenents of the *Anderson-Burdick* framework. *Anderson-Burdick* requires consideration of (1) whether the election regulation poses a "severe" or instead a "reasonable, nondiscriminatory" restriction on the right to vote and (2) whether the state's interest justifies the restriction. *Burdick*, 504 U.S. at 434 (cleaned up). *Brnovich* counsels that a state does not have to substantiate the interests supporting its election regulation or provide evidentiary support that the regulation is necessary and narrowly tailored to serve the stated interest. "For example, we think it is inappropriate to read § 2 to impose a strict 'necessity requirement' that would force States to demonstrate that their legitimate interests can be accomplished only by means of the voting regulations in question." *Brnovich*, 141 S. Ct. at 2341. "Demanding such a tight fit would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate

interests." *Id.* More specifically, *Brnovich* held that a state has a compelling interest in preventing voting fraud, and the state is not required to "point to a history of serious voting fraud within its own borders….[or] demonstrate an inability to combat voting fraud in any other way." *Brnovich*, 141 S. Ct. at 2321. There is no meaningful difference between examining the state's interests in promulgating an election law under Section 2 and the *Anderson-Burdick* standard, and *Brnovich* therefore clarifies how to properly evaluate the state's interest when considering a constutitional challenge to an election law.

Additionally, *Brnovich* held that a voting law's burden on the right to vote must be considered in light of the totality of the state's election regulatory scheme and not in isolation. "[C]ourts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision." *Id.* at 2339. "Thus, where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means." *Id.* The same scope of analysis should be applied when considering the burden imposed on voters under *Anderson-Burdick.*

C. No Other Intermediate Appellate Courts Have Held Differently.

Only one federal court has attempted to apply *Brnovich* in a similar case.[4] *Fla. State Conference of NAACP v. Lee Nat'l Republican Senatorial Comm.*, 4:21CV187-MW/MAF, 2021 WL 4818913 (N.D. Fla. Oct. 8, 2021). That court, addressing both Fourteenth Amendment and Fifteenth Amendment/Section 2 claims regarding time, place, manner voting restrictions, did just what Defendant has asked this Court to do: it applied the *Anderson-Burdick* test to the plaintiffs' 14th Amendment claim and the *Brnovich* precedent to the 15th Amendment claim and Section 2

[4] Ten other courts have cited *Brnovich*, but not in cases with similar facts or allegations.

claims. Thus, no intermediate courts have interpreted *Brnovich* to implictly overrule *Anderson-Burdick*.

II. The United States Supreme Court has not Created a "Newly Minted" Standard of Review for Election Laws.

This Court's supplemental briefing order highlighted various Supreme Court and circuit court decisions staying district court orders that preliminarily enjoined state election laws or affirmed orders declining to enjoin election laws primarily in cases where the plaintiffs had asserted as-applied constitutional challenges to time, place, and manner regulations during the pandemic. Dkt. No. 163. "A preliminary injunction is an extraordinary remedy." *Winter v. Natural Res. Defense Council*, Inc., 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. A preliminary injunction "should only be granted if the movant has clearly carried the burden of persuasion on all four [] prerequisites. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621-22 (5th Cir. 1985) (citation omitted). The same factors are considered when determining whether to stay a preliminary injunction pending appeal. *Nken v. Holder,* 556 U.S. 418, 426 (2009).

Against this backdrop of the extraordinary relief requested and the plaintiff's constutitional challenges to election laws as-applied during the pandemic, the 2020 election law cases cited to longstanding legal principles to explain why deference to the state's interests was required. First, public safety and health are primarily entrusted to state officials, including any alterations to election procedures a state may choose to make in response to a pandemic. *Andino v. Middleton,*

141 S. Ct. 9 (2020) (Kavanaugh, J., concurring); *Democratic Nat'l Cmte. v. Wisc. State Legislature*, 141 S. Ct. 28 (2020) (Gorsuch, J., concurring); *Tully v. Okeson*, 977 F.3d 608, 618 (7th Cir. 2020); *A. Philip Randolph Inst. of Oh. v. LaRose*, 831 F. App'x 188, 192 (6th Cir. 2020). Next, the U.S. Constitution primarily entrusts states to regulate the time, place, and manner of federal elections. *See, e.g., LULAC v. Hughs*, 978 F.3d 564 (5th Cir. 2020)(concurrence*); Democratic Nat'l Cmte.*, 141 S. Ct. at 29 (Gorsuch, .J., concurring); *Tully*, 977 F.3d at 611; *A. Philip Randolph Institute of Ohio v. LaRose*, 831 F. App'x at 190. And relatedly, election laws should not be judicially altered close to an election. *Republican Nat'l Cmte. v. Democratic Nat'l Cmte.*, 140 S. Ct. 1205 (2020); *Andino*, 141 S. Ct. at 9; *Democratic Nat'l Cmte.*, 141 S. Ct. at 30 (Gorsuch, .J., concurring); *Tully*, 977 F.3d at 611-12.

These decisions do not signal a "newly minted" standard, because there is nothing new about any of the legal principles the decisions relied upon. Rather, the 2020 election decisions solidified that judicial deference to a state's interest is required when addressing a facial challenge to an election law that implicates the state's chosen response to a public health or safety concern. Judicial deference is particularly warranted when the plaintiff seeks to preliminarily enjoin an election law due to pandemic conditions on the eve of an election.

A. The U.S. Constitution Entrusts Public Health and Public Safety to Politically Accountable State Officials.

Since at least 1905, the Supreme Court has recognized that the U.S. Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). The latitude afforded to a state "must be especially broad" when the challenged rules or regulations touch on "areas fraught with medical and scientific uncertainties." *Marshall v. United States*, 414

U.S. 417, 427 (1974) (addressing deference to Congress's Narcotic Addiction Rehabilitation Act). "[T]he States must be equally free to engage in any activity ... no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be." *Garcia v San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 546 (1985).

B. Election Laws Are Primarily the Responsibility of the States, and the Supreme Court Has Unequivocally Held That Election Laws Should Not Be Judicially Altered On the Eve of Elections.

Under the Constitution, state legislatures bear primary responsibility for settling election rules, Art. I, § 4, cl. 1, with power vested in Congress to alter such rules if necessary—"not federal judges, not state judges, not state governors, not other state officials." *Democratic Nat'l Cmte.*, 141 S. Ct. at 29. "It follows that a State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Andino v. Middleton*, 141 S. Ct. 9 (2020) (quoting *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1613-1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (cleaned up).

"[T]he design of electoral procedures is a legislative task, including during the pandemic." *Democratic Nat'l Cmte*, 141 S. Ct. at 32 (Kavanaugh, concurring). "In short, state legislatures, not federal courts, primarily decide whether and how to adjust election rules in light of the pandemic." *Id*. As the Eleventh Circuit noted in *New Georgia Project v Raffensperger*:

> Federal judges can have a lot of power—especially when issuing injunctions. And sometimes we may even have a good idea or two. But the Constitution sets out our sphere of decisionmaking, and that sphere does not extend to second-guessing and interfering with a State's reasonable, nondiscriminatory election rules. COVID-19 has not put any gloss on the Constitution's demand that States—not federal courts—are in charge of setting those rules.

976 F.3d 1278, 1284 (11th Cir. 2020) In recognition of this Constitutional directive, the Supreme Court has also repeatedly instructed that election rules ordinarily should not be judicially altered on the eve of an election. *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S.Ct. 9 (2014); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying a lower court order that changed election laws thirty-three days before the election); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (staying lower court order that changed election laws sixty days before the election); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. ... We refuse to sit as a 'superlegislature to weigh the wisdom of legislation'...." (citation omitted)). This jurisprudence should apply with full force to this Court's consideration of Plaintiffs' claims.

C. The 2020 Election Law Cases Appropriately Deferred to the State's Chosen Response to Pandemic Conditions on the Eve of the National Election In Light of the Extraordinary Relief Requested.

The cases delineated in this Court's supplemental briefing order appropriately considered the *Anderson-Burdick* framework when and where appropriate while determining whether to stay a preliminary injunction pending appeal.[5] None of these cases were deciding the constitutional claims on the merits, and most of the opinions addressed the *Anderson-Burdick* framework in the context of the likelihood of success on the merits of the First and Fourteenth Amendment claim.[6] However, since the courts were grappling with as-applied challenges to time, place, and manner election regulations—that are the purview of states—during a public health crisis—which is also

5 These cases did not expressly consider the *Anderson-Burdick* framework: *Andino v. Middleton; Mi Familia Vota v. Abbott; Memphis A. Phillip Rudolph v. Hargett; Priorities U.S.A. v. Nessel.*

6 *Priorities U.S.A.* and *Memphis A. Phillip Rudolph* were decided on justiciability issues and therefore did not delve into the likelihood of success on the merits of the constitutional claims.

primarily within the purview of states—the federal judges correctly afforded deference to how the state chose to alter or retain its election laws as part of its pandemic response. It makes sense that all of these cases placed great weight on one (or more) of the legal doctrines outlined above in considering whether a stay of an injunction pending appeal was against the public interest and had the potential for irreparable harm. It is well established that enjoining State officials from carrying out validly enacted laws imposes irreparable harm. *Maryland v. King*, 567 U.S. 1301, 1303 (2012); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Moreover, enjoining a state law is against the public interest, as the state's "interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citation omitted). Several recent cases also held that irreparable harm would result by altering election laws on the eve of the election.[7]

Here, Plaintiffs have primarily raised an as-applied challenge to Section 82.003, claiming that the absentee ballot law imposed a severe burden on younger voters (which Plaintiffs' assert coincides with a larger proportion of Latino voters) in light of the pandemic. The Seventh Circuit addressed a very similar issue in *Tully v. Okeson*, 977 F.3d 608 (7th Cir. 2020), *cert denied*, 141 S. Ct. 2798 (June 21, 2021) (mem). It held that Indiana's age-based absentee-voter law did not implicate the fundamental right to vote and was subject to rational basis review. *Id.* The Seventh Circuit upheld a nearly identical absentee voting law, noting that no case had "overrid[den] the Supreme Court's holding in *McDonald* that rational-basis scrutiny applies to election laws that do

[7] *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020); *Andino*, 141 S. Ct. at 9; *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. at 30 (Gorsuch, .J., concurring); *Tully*, 977 F.3d at 611-12; *Texas Alliance of Retired Americans v. Hughs*, 978 F.3d 220 (5th Cir. 2020)(concurrence); *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 863 (5th Cir. 2020); *Priorities USA v. Nessel*, 978 F.3d 976, 985 n. 3 (6th Cir. 2020) (not changing election rules on eve of election is relevant public interest consideration).

not impact the right to vote—that is, the right to cast a ballot in person." *Id.* at 616. The Seventh Circuit "recognize[d] the difficulties that might accompany in-person voting during this time. But Indiana's absentee-voting laws are not to blame. It's the pandemic, not the State, that might affect Plaintiffs' determination to cast a ballot." *Id.* at 611. The *Tully* opinion then highlighted that "[t]wo other principles guide our decision in this case" that: (1) the Constitution granted states the authority to prescribe election laws, including to balance the interests of fraud prevention against voter turnout; and (2) state election laws should not be altered on the eve of an election. *Id.* at 611-612. The Supreme Court declined the opportunity to take up the issue or alter the Seventh Circuit's decision.

The Fifth Circuit's decision in *TDP I* indicates agreement with the Seventh Circuit's analysis. *Texas Democratic Party v. Abbott (TDP I)*, 961 F.3d 389 (5th Cir. 2020). The Fifth Circuit opined that *McDonald* "squarely governs" Plaintiffs challenge to Section 82.003. *Id.* at 403. Rational basis review therefore applies, and the State's interests in election security and efficient election administration, as well as Texas's decision not to alter absentee voting laws during the pandemic, should be afforded judicial deference. Plaintiffs' fundamental right to vote is not implicated by their as-applied constutitional challenge because there is no right to vote absentee. *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807-808 (1969). Just like Indiana's Hoosiers, Plaintiffs and all other voting-eligible Texans regardless of age continue to have the right to vote in person early or on election day unimpeded by Section 82.003. Therefore, since Section 82.003 easily passes rational basis review and does not burden Plaintiffs' fundamental right to vote as a matter of law, Plaintiffs' as-applied constitutional challenge to Section 82.003 should be dismissed for failure to state a claim for which relief can be granted.

D. In Contrast, Facial Challenges to Election Laws That Regulate the Fundamental Right to Vote in Person Are Subject to the *Anderson-Burdick* Framework.

While Plaintiff LULAC at least alludes to a facial challenge to Section 82.003, claiming that even absent the pandemic the law is unconstitutional, *Anderson-Burdick* still does not apply because Section 82.003 does not impact Plaintiffs' fundamental right to vote. Like the plaintiffs in *McDonald* (and unlike the confined plaintiffs in *O'Brien v. Skinner*, 414 U.S. 524, 525 (1974)), Plaintiffs have not alleged that they have no alternative means of voting except for by an absentee ballot. *See* Dkt. No. 141. This is because Plaintiffs *do* have alternative voting methods available to them, including early voting and voting on election day.

To be sure, the Fifth Circuit previously called into question whether the *Anderson-Burdick* framework applies to Plaintiffs' claims because there is no right to vote absentee. *See* Dkt. 116; *TDP v. Abbott (TDP I),* 961 F.3d 389, 405 (5th Cir. 2020); see also *LULAC*, 978 F.3d at 144 n.6 (applying *Anderson-Burdick* but expressing skepticism that the test applies to a law that limits the "claimed right to receive absentee ballots," as opposed to the right to vote). At least two other federal appellate courts have held that the *Anderson-Burdick* test is not implicated by laws conferring the privilege of absentee voting on the elderly and those suffering infirmities. *Black Struggles v Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) ("as long as the state allows voting in person, there is no constitutional right to vote by mail"); *Tully, supra.*

Setting aside for a moment this fatal flaw, Plaintiffs' claim fails as a matter of law even if *Anderson-Burdick* applies. Only one case cited in the Court's supplemental briefing order raised facial challenges to election regulations that is instructive here.[8] In *Richardson*, the Fifth Circuit

[8] A facial challenge was raised in *Memphis A. Philip Randolph Institute v. Hargett*, but was dismissed for lack of standing. Similarly, the Fifth Circuit raised the issues of standing and laches in *Texas Alliance for Retired Americans v. Hughs*, where plaintiffs waited three years before seeking to preliminarily enjoin an election law shortly before early voting began. 976 F.3d 564 (5th Cir. 2020).

applied *Anderson-Burdick* to Texas's absentee ballot signature-verification procedures. 978 F.3d at 235-36. The Fifth Circuit held that the degree an election law restricts the right to vote must be based on the law's impact on the general voting population, not on the law's impact on "certain voters," "a small number of voters," or through a lens of "individual impacts." *Id.* at 236. The Court then found that the signature-verification requirements were less burdensome than photo-ID requirements previously upheld by the Supreme Court, and imposed a "reasonable, nondiscriminatory restriction" on the right to vote. *Id.* at 237. Since the burden was not severe, the state's interests in preventing voter fraud justified the law. *Id.* at 239.

The Fifth Circuit's *Richardson* decision rightfully reflects that the *Anderson-Burdick* test, by design, is deferential to state election laws. Indeed, the Supreme Court in *Burdick* called for deference to state officials, with the amount of deference dependent upon the degree of restriction the challenged election rule imposes on the right to vote. *Burdick*, 504 U.S. at 434. Modest, unexceptional restrictions are presumptively valid. *Id.* "[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Id.* at 441. Thus, "'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). As aptly explained by Chief Justice Roberts:

> The Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States. Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. But judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 73-74 (2020) (citing *Newsom*, 140 S.Ct. at 1613) (Roberts, C. J., concurring)).

Therefore, Plaintiffs' claims should be dismissed because Section 82.003 does not burden anyone's right to vote and the law is supported by numerous legitimate state interests. The burden on voters must be measured by the law's impact on the general voting population, not a small subset of voters as Plaintiffs attempt to argue.[9] *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 236 (5th Cir. 2020) ("the severity analysis is not limited to the impact that a law has on a small number of voters"). That certain voters may perceive it to be unfair or burdensome to not be extended the same privilege to vote absentee as Texas has extended to some voters under Section 82.003 is not controlling, dispositive, or relevant. Rather, Texas provides ample alternative opportunities for the general population to vote in person both early and on election day, and Texas conferring a privilege on a subset of voters to vote absentee—in the same manner as at least 15 other states—does not render the absentee voting laws unconstitutional. That the alternative voting opportunities available to Plaintiffs must be considered in weighing any burden on the right to vote imposed by the election regulation is strengthened by the Supreme Court's decision in *Brnovich*.

"[T]he Constitution does not require the [State] to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line." *TDP I*, 961 F.3d at 407 (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012)). Here, Texas "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989). States have "never been required to justify [their] prophylactic measures to decrease occasions for

[9] Plaintiffs focus their burden argument on Latinos that allegedly experience hardship in voting in person due to work and other commitments. But it is worth reiterating that under Texas law employers are required to give employees up to two hours of paid leave to vote on election day. Tex. Elec. Code §276.004.

vote fraud." *LULAC*, 978 F.3d at 147.[10] And as *Brnovich* reiterated, a State does not have "the burden of demonstrating empirically the objective effects" of its interests supporting the election law. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). States may "respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id.* at 195–96. This maintains "[c]onfidence in the integrity of our electoral processes[,] [which] is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-197 (2008).[11] Here, Section 82.003 draws a rational line and is supported by robust state interests. Plaintiffs' constitutional challenge under the First and Fourteenth Amendment should therefore be dismissed for failure to state a claim.

CONCLUSION

For the reasons delineated in Defendant Secretary of State's Motion to Dismiss, his reply, and as further supported by this supplemental brief, the Court should dismiss this suit for lack of jurisdiction or for failure to state a claim for which relief can be granted.

Respectfully Submitted.

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[10] This is in line with the rational basis test applied to other type of Fourteenth Amendment Equal Protection challenges, where "rational basis review places no affirmative evidentiary burden on the government." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013).

[11] The Supreme Court in *Crawford* stated that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." 553 U.S. at 196.

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CERTIFICATE OF SERVICE

I certify that on November 16, 2021 the foregoing was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ Courtney Corbello
COURTNEY CORBELLO
Assistant Attorney General

NOTICE OF ELECTRONIC FILING

I, **COURTNEY CORBELLO**, Assistant Attorney General of Texas, certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing in accordance with the Electronic Case Files system of the United States District Court for the Western District of Texas, on November 16, 2021.

/s/ Courtney Corbello
COURTNEY CORBELLO
Assistant Attorney General