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

TEXAS DEMOCRATIC PARTY, et al., *Plaintiffs,* and LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al., *Plaintiff-Intervenors* v. JOHN SCOTT, in his official capacity as Secretary of State of Texas, *Defendant.*	Case No. 5:20-cv-00438-FB

PLAINTIFFS' AND PLAINTIFF-INTERVENORS' SUPPLEMENTAL BRIEFING

Plaintiffs Texas Democratic Party ("TDP"), Gilberto Hinojosa, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia, and Plaintiff-Intervenors League of United Latin American Citizens ("LULAC") and Texas League of United Latin American Citizens ("Texas LULAC") jointly file this supplemental brief pursuant to this Court's Order. Doc. No. 163.

ARGUMENT

I. *Brnovich*'s Narrow Ruling is Inapplicable to Three of Plaintiffs' Four Claims Generally and Inapplicable to Plaintiff-Intervenors' VRA Section 2 Claim at this Stage of the Litigation.

A. The *Brnovich* holding is procedurally inapplicable at this stage of the litigation.

In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2325 (2021), the Supreme Court held that Arizona's refusal to count ballots cast in the wrong precinct did not violate § 2 of the Voting Rights Act (VRA) and that its third-party ballot collection restrictions did not violate either § 2 of the VRA or the Fifteenth Amendment. The Supreme Court's analysis in *Brnovich*, which involved reviewing a robust record developed after a ten-day trial in the district court, is

procedurally inapplicable to Plaintiffs'[1] claims under § 2 of the VRA, which Plaintiffs have not yet had an opportunity to fully develop because this case remains at the pleading stage. The Court's narrow holding in *Brnovich* is wholly inapplicable to Plaintiffs' other claims, which challenge Texas's law as unconstitutional under the rights protected by the First and Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Twenty-Sixth Amendment respectively.

In *Brnovich*, the district court decided the case "after 'a ten-day bench trial' that involved at least 7 expert witnesses, 33 lay witnesses, and 11 witnesses who testified by deposition." *Florida State Conference of NAACP v. Lee*, No. 4:21cv187-MW/MAF, 2021 WL 4818913 at *18 (N.D. Fla. Oct. 8, 2021). Because this court is only determining whether Plaintiff-Intervenors have properly pleaded a § 2 claim, *Brnovich*'s analysis is inapplicable at this stage. Several district courts have already recognized the Supreme Court's analysis in *Brnovich* as inapplicable at the pleading stage: "*Brnovich* . . . should not be interpreted as currently setting forth pleading requirements that Plaintiffs must fulfill in [VRA § 2] case[s]." *Sixth District of African Methodist Episcopal Church v. Kemp*, No. 1:21-cv-01284-JPB, 2021 WL 6495360 at *8 (N.D. Ga. Dec. 9, 2021); *see Florida State Conference of NAACP*, 2021 WL 4818913 at *18 ("It should thus go without saying that *Brnovich* did not set out a rigid pleading standard that section 2 plaintiffs must meet."); *Florida State Conference of NAACP v. Lee*, No. 4:21cv187-MW/MAF, 2021 WL 6072197 (N.D. Fla. Dec. 17, 2021); *U.S. v. Georgia*, No. 1:21-cv-02575-JPB, 2021 WL 5833000 at *5 (N.D. Ga. Dec. 9, 2021) ("[W]hile the language in Brnovich could portend future

[1] Unless otherwise specified, as used in this brief, "Plaintiffs" collectively refers to Plaintiffs Texas Democratic Party, Gilberto Hinojosa, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia, and Plaintiff-Intervenors LULAC and Texas LULAC.

requirements to state or prove a § 2 time, place or manner claim, it should not be interpreted as currently setting forth pleading requirements that the United States must fulfill in this case.").

Because *Brnovich* did not change the state of play for plaintiffs in VRA § 2 cases at the pleading stage, Plaintiffs need not plead any specific set of the "guideposts" outlined in *Brnovich*. Notably, however, Plaintiffs *have* pleaded specific facts addressing the fifth guidepost outlined in *Brnovich*, a state's purported interest in election integrity or preventing voter fraud. *See* Pls. Am. Compl., Doc. No. 142. ("Texas does not have any substantial interest in depriving its younger and minority voters of the ability to vote by mail . . . when it extends that option liberally to older voters; nor does any interest in the integrity of the election require such a deprivation."). Nonetheless, Defendant contends that this court should reject Plaintiffs' factual allegations and simply accept Texas's general interest in preventing voter fraud carte blanche as a reason to dismiss Plaintiff-Intervenors' VRA § 2 claim. The contention that such a "'per se' interest in preventing voter fraud," requires the court to dismiss Plaintiffs' VRA § 2 claim, "puts the cart before the horse," *Florida State Conference of NAACP*, 2021 WL 4818913 at *18, because it necessarily involves disputed issues of fact, and is thus inappropriate at this stage. Indeed, Defendant's contention is a "summary judgment argument[], *at best*." *Id*. (emphasis added).

Brnovich's guideposts are meant to be applied only after the parties have had a chance to fully develop the record in VRA § 2 cases. At the motion to dismiss stage, where the facts as pleaded in Plaintiffs' and Plaintiff-Intervenors' Amended Complaints must be taken as true, any assessment of evidence is decidedly "premature." *Id*. at 19.

B. Even if Brnovich Applies to Plaintiffs' VRA Section 2 Claim at this Stage of the Litigation, Its Narrow Holding is Inapplicable to the Facts in this Case.

Even if this Court were to view *Brnovich* as applicable at this stage of the litigation, its narrow holding is inapplicable to the facts in this case. The Supreme Court "ma[d]e clear"

that it was "declin[ing] in these cases to announce a test to govern all VRA § 2 claims involving rules, like those at issue here, that specify the time, place, or manner for casting ballots." *Brnovich*, 141 S.Ct. at 2336. Instead, as Defendant helpfully explains, *Brnovich*'s narrow holding simply "clarified the standards for evaluating challenges to ballot-counting and -collection laws under Section 2." Def. Supp. Br., Doc. No. 166 at 1. The law at issue in this case concerns which Texans are eligible to cast ballots by mail, not the manner by which those ballots are counted or collected. Further, the issue in *Brnovich* was whether a facially neutral rule had a discriminatory effect, whereas here Plaintiffs are challenging the discriminatory effects of a facially discriminatory rule. Therefore, *Brnovich*'s analysis is inapplicable and its holding does not apply.

The difference between the state interests raised by Defendant here and the state interests highlighted by the court in *Brnovich* further distinguish the two cases. In *Brnovich*, the Court recognized two strong state interests: "preventing election fraud," and "[e]nsuring that every vote is cast freely, without intimidation or undue influence." *Brnovich* at 2340. While Defendant cites the prevention of voter fraud as one of Texas's primary interests in preventing voters under 65 from voting by mail, he fails to provide any logical nexus between the interests and the aim. Def. Supp. Br., Doc. No. 166 at 4. And "nothing in *Brnovich* suggests that the words 'voter fraud' are a mysterious and powerful incantation that instantly incinerates even the most fearsome section 2 claims. Instead, as in any other case, Plaintiffs must be given the opportunity to prove" that the challenged law "does not prevent voter fraud, prophylactically or otherwise." *Florida State Conference of NAACP*, 2021 WL 4818913 at *19 (denying defendant's motion to dismiss plaintiffs' VRA § 2 claim as premature).

A state's interests in banning third parties from collecting voters' ballots and requiring voters to vote in their assigned precinct are markedly different than Texas's interest in preventing

voters under 65 from voting by mail while permitting all those above 65 to vote by mail. Arizona has no age-based or any other restriction on which eligible voters can vote by mail, thus it is impossible to read the Supreme Court's holding as having any bearing on this case.[2] In *Brnovich*, the Supreme Court recognized Arizona's interest in preventing fraud and intimidation as strong when applied to its limitation on who can collect and submit voters' absentee ballots. Here, Defendant does not even argue that Texas's age-based restriction on vote by mail prevents voter intimidation because it clearly does not serve that purpose. While Defendant broadly invokes Texas's interests in preventing fraud as justification for its age-based restriction on vote by mail, he fails to explain how this discriminatory law serves those interests. *Brnovich* does not stand for the proposition that Texas can use state interests "per se" to overcome any VRA § 2 challenge. Instead, the challenged law must be "supported by strong state interests." *Brnovich* at 2340.

Texas's other primary purported interests in restricting vote by mail opportunities to Texans over the age of 65—"uniformity and efficiency"—were mentioned nowhere in the Supreme Court's 85-page *Brnovich* decision. In addition to the fact that neither of these words or ideas ever appear in *Brnovich*, Defendant has also failed to explain how its age-based restriction ensures uniformity and efficiency. Indeed, allowing voters in one age group to vote by mail and refusing to allow voters in another age group to vote by mail works against the state's interest by ensuring there will not be uniformity in Texas's voting system.

Brnovich's narrow holding, unique facts, and procedural posture make the Supreme Court's analysis there inapplicable to this case. Even if this court were to construe *Brnovich* as applicable to Plaintiff-Intervenors' VRA § 2 claim, Defendant cannot invoke the state's interests

[2] "Any election called pursuant to the laws of this state shall provide for early voting. Any qualified elector may vote by early ballot." Ariz. Rev. Stat. § 16-541. In Arizona, "early voting" and "vote by early ballot" refer to voting by mail.

in "election security, uniformity, and efficiency" as a free pass that can overcome any VRA § 2 claim. *Brnovich* did not and could not stand for the proposition that those interests allow Texas to limit absentee voting to voters over 65 because Arizona, the state at issue in that case, has continued to allow all eligible voters in the state to vote by mail, regardless of their age.

C. *Brnovich* Did Not Explicitly or Implicitly Overrule *Anderson-Burdick.*

The parties agree that *Brnovich* did not overrule *Anderson-Burdick*. *See* Def. Supp. Br., Doc. No. 166 at 4-5. Indeed, the Supreme Court did not discuss the *Anderson-Burdick* framework explicitly or implicitly in *Brnovich*. District courts have continued to apply the *Anderson-Burdick* standard in claims alleging an undue burden on the fundamental right to vote under the First and Fourteenth Amendments post-*Brnovich*, even in cases such as this one where the plaintiffs also plead VRA § 2 claims. *See, e.g., Florida State Conference of NAACP*, 2021 WL 4818913 at *5, *15. ("[U]nless and until the Supreme Court changes the formula, this Court will [continue to apply] Anderson-Burdick . . ."); *see also Sixth District of African Methodist Episcopal Church*, 2021 WL 6495360 at *11 ("The Court also declines, as Intervenor Defendants suggest, to forego the undue burden analysis the Supreme Court developed in *Anderson* and *Burdick* and summarily dispose of Plaintiffs' voting rights claims."). Thus, this court is still required to use the *Anderson-Burdick* framework to evaluate the severity of the burden and corresponding level of judicial review when analyzing Plaintiff-Intervenors' First and Fourteenth Amendment claims.

Further, *Brnovich* has no impact on the level of scrutiny courts must apply to state interests under *Anderson-Burdick*. Nonetheless, Defendant contends that *Brnovich* requires this court to give extreme deference to state interests in evaluating claims, regardless of the level of scrutiny demanded under *Anderson-Burdick*. Defs. Supp. Br., Doc. 166 at 5-6. As discussed above, however, *Brnovich* is limited to analyzing claims under the statutory framework set forth in § 2. It

has no bearing on the level of scrutiny applied to state interests supporting laws challenged under the Constitution. As such, courts must continue to look to the severity of the burden alleged and balance it against the precise justifications advanced by the State. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983)); *see also, infra* Part. II.A.

While a state's interest in its proffered law is one of the guideposts the Supreme Court identified as relevant in analyzing VRA § 2 claims, the analysis of the state's interest in VRA § 2 claims is distinguishable from the appropriate analysis of the state's interest in claims alleging an undue burden on the fundamental right to vote under the First and Fourteenth Amendments. For the latter, the *Anderson-Burdick* standard is still the law of the land. *See Florida State Conference of NAACP*, 2021 WL 4818913 at *17–19; *Florida State Conference of NAACP*, 2021 WL 6072197; *Sixth District of African Methodist Episcopal Church*, 2021 WL 6495360 at *11 (all cases analyzing the state's proffered interests in VRA § 2 claims and First and Fourteenth Amendment claims differently and continuing to apply *Anderson-Burdick* to the latter).

It would be error to apply the standard for examining state interests under VRA § 2 claims to Plaintiff-Intervenors' First and Fourteenth Amendment claims. For example, analyzing voting claims in light of the totality of the circumstances is a framework limited to and derived from the text of § 2 of the VRA. But this court would be wrong to apply that standard when analyzing Texas's age-based vote by mail restriction under the First and Fourteenth Amendments rather than following the *Anderson-Burdick* framework. Moreover, under *Anderson-Burdick*, this court "must not only determine the legitimacy and strength of each of [the state's] interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights," which is distinguishable from the analysis of a state's interests required under *Brnovich*. *Anderson*,

460 U.S. at 789. No intermediate or district court has transferred the Supreme Court's analysis of § 2 claims in *Brnovich* to First and Fourteenth Amendment claims alleging an undue burden on the right to vote, and this Court should not be the first.

II. Neither the Supreme Court nor any Circuit has established a new standard of "judicial deference to an independent state legislative doctrine in election law."

The 2020 election cases decided by the Supreme Court and the various Circuits do not establish a new standard of judicial deference to state legislatures in the election context, nor do they affect the merits of Plaintiffs' claims under the First and Fourteenth Amendments.

A. The Court Has Not Established a New Doctrine of Judicial Deference to State Legislatures in Election Cases.

As a threshold matter, as described above, *Brnovich* is a case of statutory interpretation involving vote denial claims—specifically those pertaining to ballot collection and out-of-precinct voting—under Section 2 of the Voting Rights Act of 1965, and has no bearing on Plaintiffs' Constitutional claims. *Brnovich*, 141 S.Ct. at 2334. The Supreme Court's opinion in *Brnovich* assuredly did not purport to establish a new standard of review for election law cases generally. In fact, the Court even expressly declined to adopt a general test even for all Section 2 claims. *Id*. at 2336. ("[W]e think it prudent to make clear at the beginning that we decline in these cases to announce a test to govern all VRA § 2 claims involving rules, like those at issue here, that specify the time, place, or manner for casting ballots."). Neither did *Brnovich*, or any case decided by the Supreme Court during the 2020 election cycle, purport to establish a broader canon of judicial deference to state legislatures in considering election claims.

As discussed above, *supra* Part I.B, *Brnovich*'s limited holding with respect to § 2 claims is irrelevant to the level of scrutiny that must be applied when examining the state's interest in maintaining a challenged election regulation under *Anderson-Burdick*. Under the *Anderson-*

Burdick framework, "the precise interests put forward by the State as justifications for the burden imposed by its rule" must be weighed against "the character and magnitude of the asserted injury" to its citizens' right to vote. *Texas LULAC v. Hughs*, 978 F.3d 136, 143 (5th Cir. 2020) (citing *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387–88 (5th Cir. 2013)). A regulation that imposes a "'severe burden' on voting can be justified only by state rules 'narrowly drawn to advance a state interest of compelling importance.'" *Id*. (citing *Steen*, 732 F.3d at 388). The lesser the burden imposed by a regulation, the less exacting the court's review, such that "a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Steen*, 732 F.3d at 388 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). This test is quite clear: the greater the burden a law imposes on the right to vote, the tighter the fit must be between the regulation and the state interest, and the more compelling the State's interest must be to justify the rule. Blind deference to the decisions of the state legislature is *not* a judicial standard.

Nor does the Court's application of *Purcell*[3] during the 2020 election indicate that states are due additional deference in defending election regulations generally. The unique analysis under *Purcell* involves whether federal court orders changing the rules of an imminent or ongoing election impose additional burdens on voters. Importantly, *Purcell* involves a temporal consideration—decisions applying this principle do not limit any court's ability to issue relief

[3] *Purcell* sets forth a prudential principle that "federal courts ordinarily should not alter state election laws in the period close to an election" *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S.Ct. 28, 28 (2020) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). Several of the cases referenced in this Court's Order based their denial of relief entirely on the principle of judicial restraint articulated in *Purcell* in light of imminent (or already ongoing) elections. *See Mi Familia Vota v. Abbott*, 834 F.App'x 860 (5th Cir. 2020); *Tex. Alliance for Retired Ams. v. Hughs*, 976 F.3d 564 (5th Cir. 2020); *A. Philip Randolph Inst. of Ohio v. LaRose*, 831 F.App'x 188 (6th Cir. 2020); *see also Democratic Nat'l Comm.,* 141 S.Ct. at 28; *Rep. Nat'l Comm. v. Dem. Nat'l Comm.*, 140 S.Ct. 1205 (2020) (per curiam)).

governing the conduct of future elections, nor does it alter the standard for a court's analysis of the merits of a voting rights claim. A State's asserted justification for an election regulation simply has no bearing on a Court's exercise of forbearance under *Purcell*, nor does *Purcell* command that federal courts unilaterally defer to the whims of state legislatures when fundamental constitutional rights are at stake.

B. Deference to State Officials Exercised by the Court in 2020 Election Cases was Limited to Matters of Public Health—not Elections.

To the extent the federal courts practiced greater deference to state officials during the 2020 election cycle, they did so in response to the rapidly changing circumstances and unique public health concerns precipitated by the COVID-19 pandemic. The cases referenced in this Court's Order (Doc. 163) concerned a variety of claims and legal theories, but importantly, they all involved petitions seeking emergency relief during the 2020 election amidst the COVID-19 pandemic. As the Supreme Court noted, the Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." *Andino v. Middleton*, 141 S.Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (citing *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020) (Roberts, C.J., concurring)). Far from setting forth a new generally applicable canon of legislative deference in election cases, the Court simply "adhered to a basic jurisprudential principle: When state and local officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." *Dem. Nat'l Comm. v. Wisconsin State Legis.*, 141 S.Ct. 28, 32 (2020) (Kavanaugh, J., concurring) (citing *Andino*, 141 S.Ct at 10). The Court repeatedly emphasized the exceptional nature of both the pandemic circumstances during which these cases were heard and of the emergency relief sought by the parties. *Id.*; *Andino*, 141 S.Ct. at 10; *see also South Bay*, 140 S. Ct. at 1613. If there exists a

generally applicable principle of deference to state government officials to be gleaned from these opinions, it is limited to cases dealing with matters of public health.

To the extent federal courts did exercise deference to state policymakers in specific cases, such deference was and is not limited to state legislatures. The 2020 election cases do not, as the State suggests, stand for the proposition that state judges, state governors, and state courts have no role in the establishment of rules dictating the times, places, and manners of elections. Indeed, even during the pandemic, the Supreme Court recognized that the positions of state executive branch officials charged with election administration can be dispositive in certain circumstances when evaluating a challenge to state election laws and policies in federal court. *See Republican Nat'l Comm. v. Common Cause R.I.*, 141 S.Ct. 206 (2020) (declining to stay a lower court consent decree suspending enforcement of a witness requirement for absentee ballots where "state election officials support the challenged decree"). Moreover, the authority of state legislatures to legislate—even in the election context—is bounded by the limitations imposed on them by state constitutions and the interpretations thereof by state courts. *See Scarnati v. Boockvar*, 141 S.Ct. 644 (2020); *Republican Party of Penn. v. Boockvar*, 141 S.Ct. 1 (2020); *see also Democratic Nat'l Comm. v. Wisc. State Legis.*, 141 S.Ct. 28 (2020) (Roberts, C.J., concurring) (distinguishing *Scarnati* and *Republican Party of Penn.* as cases involving "the authority of state courts to apply their own constitutions to election regulations").[4]

[4] Even where federal courts lack jurisdiction to adjudicate claims under the federal constitution, state courts may still adjudicate parallel claims under state constitutions. *See, e.g., Adams v. DeWine*, Slip Op. No. 2022-Ohio-89 (Ohio Sup. Ct. Jan. 14, 2022) (invalidating congressional map as partisan gerrymander in violation of state constitution), https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2022/2022-ohio-89.pdf; *Harper v. Hall*, No. 413PA21 (N.C. Sup. Ct. Feb. 4, 2022), https://s3.documentcloud.org/documents/21197862/nc-redistricting-ruling-2-4-22.pdf (same). Nothing in the Elections Clause insulates state legislative decisions from review by state courts or excuses them from the requirements of state constitutions.

Although it is true that the Constitution gives state legislatures certain responsibilities for setting the times, places and manner of elections, they are not the only bodies with authority to regulate in this area. U.S. Const. Art. I § 4. In addition to Congress's inherent authority under the Elections Clause to "make or alter any such regulations," *Rucho v. Common Cause*, 139 S.Ct. 2484, 2495 (2019), the Court has also recognized that each State has "authority to determine its own lawmaking processes." *Ariz. State Legis. v. Ariz. Ind. Redistricting Com'n*, 576 U.S. 787, 824 (2015). The lawmaking process "must be in accordance with the method which the State has prescribed for legislative enactments," which can—and often does—include a role for the Governor in approving or vetoing legislation. *See id.* at 805–07 (quoting *Smiley v. Holm*, 285 U.S. 355 (1932)). And a State's legislative authority need not necessarily reside in the legislature itself: "[t]he people, in several States, functioning as the lawmaking body for the purpose at hand, have used the [ballot] initiative to install a host of regulations governing the 'Times, Places and Manner' of holding federal elections." *Id.* at 822; *see also Daunt v. Benson*, 956 F.3d 396, 409 (6th Cir. 2020) (recognizing the State's "fundamental interest in structuring its own government" and rejecting a challenge to an Amendment to the Michigan Constitution vesting authority to draw legislative district lines in an independent redistricting commission created by citizen ballot initiative). The Elections Clause does not limit a state's authority to define its own legislative process or to restrict a state legislature's ability to delegate authority to make, alter, or rescind election rules to other state officials, *see id*., nor does it impinge on Congress's authority to alter election laws, U.S. Const. Art. I § 4, nor the federal judiciary's obligation "to say what the law is" when state election rules conflict with the federal Constitution. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

III. Nothing in *Brnovich* or the 2020 Election Cases Changes the State's Misguided Reliance on *McDonald*.

Finally, the State's invocation of the Supreme Court's decision in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), is neither responsive to this Court's Order requesting supplemental briefing nor a correct summation of existing law. As Plaintiffs stated in their Brief in Opposition to the Secretary's Motion to Dismiss, Doc. 155, the Supreme Court has abrogated *McDonald* in a series of decisions that first limited that decision to its specific facts, and ultimately abandoned that decision's reasoning altogether. *See, e.g., Goosby v. Osser*, 409 U.S. 512, 521 (1973) (permitting claim by pretrial detainees denied the right to vote absentee to proceed); *O'Brien v. Skinner*, 414 U.S. 524, 529–31 (1974) (same); *see also Am. Party of Tex. v. White*, 415 U.S. 767, 794–95 (1974). In *American Party*, the Supreme Court reversed a district court decision that relied on *McDonald*, stating that the unavailability of absentee ballots for minor party voters was "obviously discriminatory" and that the district court had "[p]lainly . . . employed an erroneous standard in judging the Texas absentee voting law." *Id*. at 795. The Court further explained that "it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause." *Id*. Notably, the availability of in-person voting for minor party voters was *not* a comparable alternative means, and *McDonald*'s proclamation that there is no right to vote absentee was rejected. *Id*.

Further, even if *McDonald* had not been superseded by *American Party*, it has clearly been further abrogated by the *Anderson-Burdick* line of cases, which established a balancing test for evaluating the severity of the burdens imposed on voters by election laws and the justifications for such laws advanced by the State. *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788–89).

As explained above, the *Anderson-Burdick* standard remains good law, and—as other Circuits have recognized—it has clearly superseded the *McDonald* standard. *See, e.g., Price v. N.Y. State board of Elections*, 540 F.3d 101, 112 (2d Cir. 2008); *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020). And though the State makes much of the *TDP* motions panel's conclusion that *McDonald* "squarely governs" Plaintiffs' challenge, they fail to acknowledge that the merits panel in the same case declared this holding non-precedential in light of the fact that it failed to consider that *McDonald* was quickly superseded by *American Party* and *Anderson-Burdick*. *Texas Dem. Party v. Abbott*, 978 F.3d 168, 194 (5th Cir. 2020). As explained thoroughly herein, neither the *Brnovich* decision nor any of the 2020 election law cases has overruled or otherwise altered the *Anderson-Burdick* standard, established a new standard of judicial deference to an independent state legislature doctrine, or otherwise upset the longstanding constitutional principles and precedents that form the basis of Plaintiffs' claims in this case.

Conclusion

For the reasons stated in Plaintiffs' Joint Response to Defendant's Motion to Dismiss (Doc. 155) and as further explained in this supplemental brief, this Court should reject Defendant's Motion to Dismiss and allow this case to proceed to discovery and trial.

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Respectfully submitted,

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