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 RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEFING

Defendant John B. Scott provides this response - pursuant to this Court's Order (Dkt. No. 168) - to highlight a few key, salient points pertinent to the pending Motions to Dismiss. Dkts. 150-51. Additionally, given that a year has passed since Plaintiffs filed their amended complaints, Defendant files this Response brief to summarize the numerous bases for granting Defendant's pending motions and dismissing this suit.

ARGUMENT

The parties agree that *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) does not overturn the *Anderson-Burdick* test, but they disagree on how *Brnovich* applies to Plaintiffs' claims. Dkts. 166-67. Regardless, the supplemental briefing clarifies that Plaintiffs' complaints should be dismissed no matter the Court's ultimate level of reliance on *Brnovich*.

I. Dismissal For Lack of Jurisdiction Remains Appropriate and Necessary.

Neither *Brnovich*, nor subsequent case law applying it, impact this Court's consideration of Defendant's jurisdictional arguments. Plaintiffs cannot avail themselves of the *Ex parte Young* exception. *Ex parte Young* still "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation . . . ." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). Plaintiffs' briefing, including their supplemental briefing, makes clear that their ultimate goal is an injunction against the Secretary of State that requires a modification of the current laws related to voting by mail. Dkts. 141-42, 155, 167. Federal courts lack the power to order the Texas Legislature to enact a particular policy. *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 234 (5th Cir. 2020) ("And it is the state legislature—not . . . federal judges—that is authorized to establish the rules that govern elections." (internal quotations omitted)); *see also Mi Familia Vota v. Abbott*, 977 F.3d 461,469 (5th Cir. 2020) (stating there is no "authority for courts to order state officials to promulgate legislation, regulations, or executive orders.").

It is also beyond this Court's authority—and subject matter jurisdiction—to "enjoin Defendants from enforcing the Election Conditions" that had not been enacted by the Legislature at the time this suit was filed.[1] (Dkt. 141 ¶¶106-7). Plaintiffs cannot invoke the narrow *Ex parte Young* exception to avoid this reality. Respectfully, this Court lacks the authority to compel the Secretary to grant Plaintiffs the privilege of voting by mail, and he is entitled to sovereign immunity

[1] Some of these Plaintiffs have since filed lawsuits challenging S.B.1, which amended certain statutory provisions governing mail-in ballots. This lawsuit has not been amended to include allegations regarding any of the election laws enacted as part of S.B.1, and Plaintiffs do not make specific reference to any of these laws in their briefing.

as set forth in his prior briefs. (Dkts. 151, 157).

II. Dismissal for Failure to State a Claim Remains Appropriate and Necessary.

As further summarized below, neither *Brnovich* nor the cases cited by this Court beg a result other than dismissal of Plaintiffs' VRA Section 2, First, Fourteenth, Fifteenth or Twenty-Sixth Amendments.

First, Fourteenth and Fifteenth Amendments: According to Plaintiffs, *Brnovich* does not apply to their First or Fourteenth Amendment claims. Dkt. 167 at 7. As such, even in Plaintiffs' view, there is nothing new for this Court to consider on this score, and Defendants' prior arguments that Plaintiffs have failed to state a claim should serve as a basis for dismissal. Dkts. 150-51, 157.

Additionally, Plaintiffs' racial discrimination claims under the Equal Protection Clause and Fifteenth Amendment fail because the Plaintiffs did not plead facts to show intentional discrimination by the Legislature, as a whole, in enacting mail-in-voting in 1975. Dkts. 141-142; *see also* Dkt. 151 at 8. This is a necessary component of those claims. *See, e.g., Reno v. Bossier Parsish Sch. Bd.*, 528 U.S. 320, 481–82 (2000) ("whether under the Fourteenth or Fifteenth Amendment, [a plaintiff] has been required to establish that the State or political subdivision acted with discriminatory purpose."). Their supplemental briefing does not cure this deficiency in the Complaint, thus, dismissal of these claims remains appropriate.

Twenty-Sixth Amendment: The Fifth Circuit has already held that Plaintiffs' Twenty-Sixth Amendment "claim *fails* because conferring a benefit on another class of voters does not deny or abridge the plaintiffs' Twenty-Sixth Amendment right to vote." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 194 (5th Cir. 2020)(emphasis added).

Section 2 of the VRA: If permitting those over sixty-five years of age to vote by mail does not

impose a discriminatory burden on the basis of age within the meaning of a constitutional amendment specifically prohibiting denials or abridgments on the basis of age, Plaintiffs' quest to invalidate the provision under § 2 of the VRA based on *racial* discrimination claims is no less implausible. Even though they acknowledge *Brnovich* applies, at least at some point, to their § 2 claim, Plaintiffs do not go any further to explain how they have properly pleaded a § 2 claim with or without *Brnovich*'s influence.

Indeed, they have not. There is no question that, at a minimum, Plaintiffs were required to plead facts establishing (1) the challenged law causes minority voters' inability to elect candidates of their choice, *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); (2) the inability to elect their preferred candidates is "on account of race," 52 U.S.C. § 10301(a); and (3) "under the 'totality of circumstances,' [minority voters] do not possess the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters," *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (en banc). *Brnovich*'s existence does not change this requirement nor make Plaintiffs' factual assertions sufficient where they never have been. *See* Dkts. 151, 157.

More importantly, *Brnovich* did not alter the truism that the VRA protects "the right to vote," not the "claimed right" to vote by mail. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). As the Fifth Circuit recently held, "the right to vote . . . did not include a right to vote by mail" even as late as 1971. *Abbott*, 978 F.3d at 188 (interpreting the Twenty-Sixth Amendment). As a result, Plaintiffs' pleadings cannot suffice to show enforcement of Section 82.003 "create(s) a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the status quo." *Abbott*, 978 F.3d at 192. Plaintiffs attempt to distance themselves from the guideposts set forth in *Brnovich* on procedural grounds because the principled

considerations embraced in *Brnovich* further support dismissal of Plaintiffs' VRA Section 2 claim.

First, the burden imposed by Section 82.003 is minimal and there is no disparity in its impact on different racial or ethnic groups. *Brnovich*, 141 S. Ct. at 2338-40. The parties agree voting by mail is a privilege (Dkt. 155 at 12; Dkt. 157 at 8) and a privilege to one does not impose a burden on another. *Abbott*, 978 F.3d at 192. Despite this, Plaintiffs assert that Section 82.003 imposes a burden on Latinos' opportunities to participate in elections because the Latino population is young. Dkt. 141 ¶7. This alleged burden is clearly a function of age, not of race. There is no dispute that Latino voters enjoy the same opportunities to vote as non-Latino voters under Section 82.003. Therefore, there is no "burden" that makes any of Plaintiffs' claims actionable given that all of their claims allege discrimination on the basis of race.

Second, mail-in-voting was not a standard practice in 1982 when the VRA was amended, and Texas's voting system provides ample opportunities for participation. Plaintiffs never dispute that they are able to participate in these opportunites, such as early voting. *See* Tex. Elec. Code § 82.005 ("Any qualified voter is eligible for early voting by personal appearance."). And they fail to demonstrate why they cannot take advantage of the Texas law requiring employers to give employees paid time off during the early voting period or on election day if needed to vote. *See id.* § 276.004. This failure is critical: because "Texas permits the [voters in question] to vote in person," that "is the exact opposite of 'absolutely prohibit[ing]'" voters from being able to vote. *Abbott*, 978 F.3d at 404 (quoting *McDonald*, 394 U.S. at 808 n.7).

Third, no court has held that the fundamental right to vote includes an unqualified right to vote by mail. But multiple courts have recognized that a state has a compelling interest in the integrity of their elections and in preventing voter fraud, and that "the risk of fraud is 'vastly more prevalent' for mail-in ballots." *Republican Party v Pennsylvania*, 141 S.Ct. 732 (2021) (Thomas, J.

dissenting); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-197 (2008); *Munro v. Socialist Workers Party*, 479 U. S. 189, 195 (1986). The 2020 election only served to emphasize and highlight these important state interests.

Thus, the principles embodied in *Brnovich* further support granting Defendant's motion to dismiss.

III. To the Extent Plaintiffs' Claims Are Based on Pandemic Conditions, They Should Be Dismissed.

Plaintiffs' supplemental briefing acknowledges that States are afforded wide latitude in constructing responses to pandemic conditions, since the public health and safety is principally entrusted to the politically accountable officials of the State. *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). This includes discretion in choosing whether or not to alter election regulations in light of pandemic conditions. To the extent Plaintiffs are still asserting that Texas was required to alter its mail-in voting laws due to pandemic conditions, despite the wide availability of vaccines, the relaxed public health guidance related to COVID-19 precautions, and numerous United States Supreme Court decisions holding otherwise, these claims should be dismissed.

Conclusion

For the reasons delineated in the Secretary of State's Motion to Dismiss, his reply, and as further supported by his 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.

Date: March 18, 2022

Respectfully Submitted.

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CERTIFICATE OF SERVICE

I certify that on March 18, 2022 the foregoing was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

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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 March 18, 2022.

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