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

TEXAS DEMOCRATIC PARTY, GILBERTO HINOJOSA, Chair of the Texas Democratic Party, JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, and BRENDA LI GARCIA *Plaintiffs*,	§	
and	§	CIVIL ACTION NO. 5:20-cv-00438-FB
LEAGUE OF UNITED LATIN AMERICAN CITIZENS and TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *Plaintiffs-Intervenors,*	§	
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.*	§	

PLAINTIFFS AND PLAINTIFF-INTERVENORS' JOINT RESPONSE TO DEFENDANT HUGHS' MOTIONS TO DISMISS

Plaintiffs[1] challenge Texas's age-based eligibility requirement for absentee voting on the grounds that it discriminates on the basis of race, both facially and applied, and on the basis of race by creating separate classes of voters with lesser rights to access the ballot box. Texas Election Code Sections 82.001-4 violate the Twenty-Sixth Amendment, the First Amendment, the

[1] For ease of reference, "Plaintiffs" as used herein refers to both the Texas Democratic Party ("TDP") Plaintiffs and the League of United Latin American Citizens ("LULAC") Plaintiff-Intervenors unless otherwise specified.

Fourteenth Amendment, and Section 2 of the Voting Rights Act.[2] Despite Defendant Secretary Hughs' characterization to the contrary, the claims raised in TDP Plaintiffs' Second Amended Complaint and LULAC Plaintiff-Intervenors' Amended Complaint are fit for adjudication, as they apply regardless of the circumstances caused by the COVID-19 pandemic. Indeed, while the Secretary attempts to miscategorize the harms voters face, the harms complained of are concrete, not speculative; traceable to the defendant; and redressable by this court. As such, the case is ripe for adjudication. Likewise, as the Fifth Circuit has already held, the Secretary is a proper defendant, and sovereign immunity does not bar an injunction of the challenged election policies.

This Court should deny the Secretary's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

LEGAL STANDARD

Defendant Hughs moves to dismiss Plaintiffs' complaints for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6).

"[A] motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158,161 (5th Cir. 2001) (citation omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)) (citations omitted; second bracket in original).[3]

[2] The TDP Plaintiffs are no longer pursuing a claim of intentional racial discrimination at this time.
[3] Defendant cites *Coury v. Prot* for the proposition that there is "a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action into federal court." 85 F.3d

Courts apply a different standard of review for motions under Rule 12(b)(1) depending on whether the defendant's attack on the court's subject matter jurisdiction is "facial" or "factual." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1989). An attack is "facial" when "the defense merely files a Rule 12(b)(1) motion," *id.*, and is "'factual' . . . if the defendant 'submits affidavits, testimony, or other evidentiary materials.'" *Superior MRI Services, Inc. v. Alliance Healthcare Services, Inc.*, 778 F.3d 502, 504 (5th Cir. 2015) (quoting *Paterson*, 644 F.2d at 523). In evaluating a facial attack on subject matter jurisdiction, "the trial court is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true." *Paterson*, 644 F.2d at 523.

In deciding a Rule 12(b)(6) motion, the "central issue" is whether the complaint, viewed in a light favorable to the plaintiff, states a claim for relief. *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (internal citations omitted). To survive a Rule 12(b)(6) motion, a plaintiff need only plead a short and plain statement of facts showing entitlement to relief, *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 245 (5th Cir. 2010) (quoting Fed. R. Civ. P. 8(a)(2)), setting out "enough facts to state a claim to relief that is plausible on its face." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Co. v. Twombly*, 550 U.S. 544 (2007)). While "the complaint must provide more than conclusions . . . it 'need not contain detailed factual allegations.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Colony Ins. Co. v. Peachtree Const., Ltd.*, 647 F.3d 248, 252 (5th Cir. 2011)). All plausible factual allegations contained in the complaint must be presumed true, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, (2007); *Twombly*, 550 U.S. at 555-56; *Doe v. Columbia-Brazoria*

244, 248 (5th Cir. 1996). *Coury* is about evaluating a plaintiffs' claim to *diversity* jurisdiction in federal court, and as such is irrelevant here. *See id*.

Indep. Sch. Dist. ex rel. Bd. of Trustees, 855 F.3d 681, 686 (5th Cir. 2017), and courts must draw all inferences in favor of plaintiffs. *McLin v. Ard*, 866 F.3d 682, 688 (5th Cir. 2017); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009).

Motions to dismiss are generally disfavored and should be granted only rarely. *See*, *e.g.*, *Turner*, 663 F.3d at 775; *Lormand*, 565 F.3d at 232; *Hack v. Wright*, 396 F.Supp.3d 720, 747 (S.D. Tex. 2019); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164 (5th Cir. 1999).

ARGUMENT

I. Plaintiffs Have Standing to Bring Their Claims

The Secretary contends that Plaintiffs lack standing because the alleged injuries are conjectural rather than actual and imminent, and are not traceable to or redressable by Secretary Hughs. In so doing, the Secretary improperly narrows the scope of Plaintiffs claims to harms that are likely to arise out of "unenacted 'election policies' and future pandemic conditions." Def. Hughs' May 14, 2021 Motion to Dismiss Plaintiffs, Doc. 151 at 3; Def. Hughs' May 14, 2021 Motion to Dismiss Plaintiff Intervenors, Doc. 150 at 4. But Plaintiffs have specifically alleged injuries arising from Texas's age-based eligibility requirement for absentee voting based on *current* pandemic conditions, as well as injuries that arise irrespective of whether they face a global health crisis. *See e.g.*, TDP 2d Am. Compl., Doc. 141 at ¶¶ 10-16 (citing current pandemic conditions, limited vaccine availability and acceptance, and newly developing strains of COVID-19); LULAC Am. Compl., Doc. 142 at ¶ 7, 10 (noting continued burdens imposed on Texans "until pandemic conditions end" and discrimination on the basis of age and race that inheres "[e]ven under non-pandemic circumstances"). Accepting these allegations as true, as the court must, *see Paterson*, 644 F.2d at 523, Plaintiffs have sufficiently pleaded their claims that Texas's

age-based eligibility requirement for absentee voting 1) discriminates on the basis of age; 2) has a discriminatory effect on Latino voters; 3) imposes an undue burden on their right to vote by forcing them to vote in person regardless of other barriers they face; and 4) denies them equal protection of the law as compared to voters over the age of 65.

Furthermore, the Fifth Circuit has already held that these injuries are traceable to the Secretary's enforcement of the age-based eligibility requirement for absentee voting and redressable by an injunction against her. *Texas Democratic Party v. Abbott*, 978 F. 3d 168, 178-80 (5th Cir. 2020) ("*TDP*"). And, the Fifth Circuit has specifically held that Secretary Hughs has a sufficient connection to the challenged age-based eligibility requirements such that "[s]overeign immunity does not bar suit against the Secretary in this case."[4] *Id*.

Plaintiffs' references to the continuing pandemic conditions and lack of certainty as to when the global health crisis will end, as well as to the Texas legislature's apparent interest in enacting even more restrictive absentee voting policies, do not render their claims unripe for adjudication. Rather, such allegations merely demonstrate that the *existing* harms to Plaintiffs are unlikely to be resolved absent intervention by this Court. Indeed, as Plaintiffs have clearly alleged, they and their members will continue to be harmed in every subsequent election in which Texas's existing age-based eligibility requirement for absentee voting is enforced, regardless of pandemic circumstances, because it discriminates against them on the basis of age and race, and unduly burdens their fundamental right to vote. TDP 2d. Am. Compl. ¶¶ 80-82, 87-105; LULAC Am. Compl. ¶¶ 45-62; *see also*, *e.g.*, *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) ("there can be

[4] The Secretary contends TDP Plaintiffs have failed to establish the requisite connection between her and the challenged "election conditions" referenced in TDP's Second Amended Complaint. Doc. 151 at 5. "Election conditions," as used in TDP's amended brief simply refers encompasses the Secretary's enforcement of the challenged law. As such, the Secretary's claim to sovereign immunity is foreclosed by *TDP*.

no 'do-over' or redress of a denial of the right to vote after an election"); *Deerfield Med. Center v. City of Deerfield Beach*, 661 F. 2d 328, 338 (5th Cir. Unit B Nov. 1981) (finding that violations of fundamental rights are always irreparable) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see also *DeLeon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), *aff'd sub nom. DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) ("Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law."). Secretary Hughs does not dispute that these existing harms are sufficient to grant Plaintiffs standing. As such, her reliance on ripeness doctrine is inapposite, and the motion to dismiss for lack of subject matter jurisdiction must be denied.

II. Plaintiffs' Twenty-Sixth Amendment Claims Are Not Foreclosed by *TDP*.

Secretary Hughs contends that Plaintiffs' Twenty-Sixth Amendment claims are foreclosed by the Fifth Circuit's opinion on the preliminary injunction, and thus are due to be dismissed. Doc. 151 at 7; Doc. 150 at 6. This is not the case.

Importantly, the Fifth Circuit evaluated TDP Plaintiffs' Twenty-Sixth Amendment claim under the preliminary injunction standard, which required TDP Plaintiffs to demonstrate a substantial likelihood of success on the merits. *See Planned Parenthood v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005). Here, Plaintiffs must simply show that they have stated a plausible claim for relief. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). The Fifth Circuit's finding that plaintiffs had failed to meet a *higher* standard in a *different* procedural posture does not mean Plaintiffs have failed to state a claim for relief.

Instead, the Fifth Circuit in *TDP* merely announced the standard for evaluating Plaintiffs' Twenty-Sixth Amendment claims and remanded the case for evaluation under that standard. *See TDP*, 978 F.3d at 192 (holding that "the right to vote under the Twenty-Sixth Amendment is not

abridged unless the challenged law creates a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the status quo, or unless the status quo itself is unconstitutional."). As such, Plaintiffs are entitled to proceed on their Twenty-Sixth Amendment claim and demonstrate that Texas' age-based eligibility requirement makes it more difficult for younger, Latino voters to vote relative to the status quo. Furthermore, Plaintiffs are entitled to proceed on their Twenty-Sixth Amendment claim because they separately allege that the status quo itself is unconstitutional. *See* TDP 2d. Am. Compl. ¶¶ 87-95; LULAC Am. Compl. ¶¶ 51-62 (alleging that the age-based eligibility requirement violates equal protection and imposes an undue burden on the fundamental right to vote). Secretary Hughs does not dispute that Plaintiffs have sufficiently pleaded their claims under the appropriate standard. As such, the Court should decline to dismiss Plaintiffs' Twenty-Sixth Amendment claim.

III. Plaintiffs Sufficiently Pleaded Their Section 2 Claim.

Contrary to Secretary Hughs' characterizations of the allegations in Plaintiffs' Complaints, Plaintiffs plausibly allege that "*[e]ven absent pandemic conditions*," Texas's age limitation on early vote-by-mail eligibility constitutes racial and language minority discrimination in violation of Section 2 of the Voting Rights Act. LULAC Am. Compl. ¶¶ 19, 42, 48, 61; *see also, e.g.*, TDP 2d Am. Compl. ¶¶ 80-82, 87-104. At the motion to dismiss stage, "the plausibility standard simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements." *Flagg v. Stryker Corp.*, 647 Fed. Appx. 314, 315-316 (5th Cir. 2016) (internal citations and quotations omitted). Because Plaintiffs plausibly allege that Texas's vote-by-mail eligibility restriction imposes a discriminatory burden on Latino voters, creates comparatively less opportunities for these voters to participate in the political process, and that the

law is linked to historical socioeconomic experiences of discrimination, the court must deny the Secretary's Motion to Dismiss their Section 2 claim.

At the outset, Secretary Hughs incorrectly conflates the standard for "denial or abridgement" under Section 2 of the Voting Rights Act with the standard for "denial or abridgement" under the Twenty-Sixth Amendment. In ruling on the Twenty-Sixth Amendment claim in this case, the Fifth Circuit specifically distinguished the standard it applied from that applied under a Section 2 of the Voting Rights Act or the Fifteenth Amendment. *TDP*, 978 F.3d at 189. Indeed, the Court held that "abridging" under Section 2 or the Fifteenth Amendment "refers to discrimination more generally" and looks to whether "the status quo results in an abridgment of the right to vote or abridges the right to vote relative to what the right to vote *ought* to be." *Id.* (internal citations and quotations omitted).

As such, under Section 2, Plaintiffs are not required to prove that Texas's grant of the right to vote-by-mail to persons sixty-five and older "makes it more difficult for the challenger to exercise her right to vote relative to the status quo," *id*. at 192, but rather that the status quo "impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016). Further, Plaintiffs must prove that burden is in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Id*. (citations omitted). Plaintiffs plead sufficient facts to state this claim here.[5]

[5] Secretary Hughs again relies on the wrong standard for analyzing Plaintiffs' vote denial claim, drawing instead from precedent governing claims for vote dilution. *Compare LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (en banc) with *Veasey*, 830 F.3d 216. But even if Plaintiffs were required to meet the standard set forth by Secretary Hughs—they are not—Plaintiffs have plausibly alleged that race, not partisanship, is the cause of their inability to

First, Plaintiffs have alleged sufficient facts to plausibly state a claim that the denial of the right to vote absentee to those under sixty-five imposes a discriminatory burden on Latino voters in Texas. Plaintiffs specifically alleged that Texas's age restriction on vote-by-mail eligibility places a discriminatory burden on "younger and minority voters, including many of Plaintiffs' members," because they are more likely to be under sixty-five and therefore denied the right to vote absentee. LULAC Am. Compl. ¶ 38-39; *see also* TDP 2d. Am. Compl. ¶ 6-8, 29, 39. For example, nearly two-thirds of the over sixty-five population in Texas is white. LULAC Am. Compl. ¶ 38. At the same time, nearly one third of all Latino voters in Texas are between the ages of 18-29. *Id*. As such, Texas's age requirement for absentee voting primarily benefits older white voters, while denying the same opportunities to younger Latino voters. *Id*. Furthermore, Plaintiffs have alleged that younger voters in Texas are more likely to be low income, have less predictable work hours, and be students, which makes it more difficult to vote in person than for older voters who are above retirement age. *Id*. at 43. Plaintiffs have therefore sufficiently pleaded that granting older, white, retired voters the right to vote at home while forcing young, working voters of color to appear in person to vote imposes a discriminatory burden on the basis of race.

Second, Plaintiffs have alleged sufficient facts to plausibly state a claim that this burden is linked to social and historical discrimination against Black and Latino voters in Texas. Under the second part of the *Veasey* framework, the *Gingles* factors should be used to help determine whether there is a sufficient causal link." *Veasey* at 245. (emphasis added). The *Gingles* factors, however,

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participate equally in the electoral process, as described herein. The Secretary's speculation to the contrary goes beyond the four corners of the complaints and thus is irrelevant to the Court's consideration of this matter at the motion to dismiss stage. *Wilson v. Birnberg*, 667 F.3d 591, 600 (5th Cir. 2012) (finding that at the motion to dismiss stage, "courts must limit their inquiry to the facts stated in the complaint," defendants' rebuttals must be ignored, and plaintiffs' assertions must be taken as true) (quoting *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir.1996)).

"are not exclusive, and 'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *Veasey* at 246 (citing *Gingles v. Thornburg*, 478 U.S. 30, 45 (1986). "Not every factor will be relevant in every case." *Id*.

Plaintiffs have alleged specific facts demonstrating how the discriminatory burden imposed by Texas's age restrictions on vote-by-mail eligibility is directly tied to Texas's historical discrimination against Latinos in voting and other socioeconomic areas. First, Plaintiffs allege that Texas has a "longstanding history of discrimination against Latino voters" and that its vote-by-mail eligibility restriction "is part of an unfortunate and ongoing pattern and practice in Texas's election laws" of benefitting "older non-Hispanic white voters." LULAC Am. Compl. ¶ 13; *see also* TDP 2d Am. Compl. ¶ 29-30, 63-64; *cf. Gingles*, 478 U.S. 30, 36-37 (1986) (looking to "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."). Furthermore, "there is no serious dispute that the State of Texas, like many states, has a regrettable history of discriminatory policies and practices designed to suppress minority voters." *Tex. All. of Retired Am. v. Hughs*, 489 F. Supp. 3d 667, 691 (S.D. Tex. 2020) (stayed on other grounds).

Next, Plaintiffs allege specific facts showing that that Texas's Latino voters" bear the effects of discrimination in . . . health," hindering "their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 36-37. For example, LULAC Plaintiffs allege that "Texas's Latino voters are particularly susceptible to contracting and dying from COVID-19. Latino voters' increased susceptibility to the dangers of COVID-19 is directly tied to social and historical conditions stemming from discrimination." LULAC Am. Compl. ¶ 46; *see also id*. ¶ 48 ("Latino

voters face socio-economic circumstances—the result of longstanding discrimination—that make their lack of access to vote-by-mail more burdensome.").

Finally, Plaintiffs allege specific facts demonstrating that "the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 36-37. LULAC Plaintiffs allege that "Texas does not have any substantial interest in depriving its younger and minority voters of the ability to vote by mail, during this health crisis or otherwise, when it extends that option liberally to older voters; nor does any interest in the integrity of the election require such a deprivation." LULAC Am. Compl. ¶ 44. And TDP Plaintiffs allege that Texas has a pattern of adopting restrictions on access to the ballot that disproportionately burden Latino voters but have been demonstrated to lack any connection to a valid state policy. TDP 2d Am. Compl. ¶ 31-34.

Construing all reasonable inferences in their favor, Plaintiff-Intervenors have sufficiently plead facts that address the *Gingles* factors, establishing the causal link between the burden imposed by Texas's vote-by-mail age eligibility restriction and the State's historical and continuous discrimination against Latino voters "[e]ven absent pandemic conditions." LULAC Am. Compl. ¶¶ 19, 42, 48, 61. "[T]he Eligibility Criteria guarantee laxer rules for voting for non-Hispanic white voters who face fewer other barriers to voting while restricting voting access for Latino voters who already face steep barriers to the ballot box." *Id*. ¶ 48.

IV. Plaintiffs Sufficiently Pleaded Their First and Fourteenth Amendment Claim

Plaintiffs have sufficiently pleaded that the age-restriction on voting imposes a substantial burden on Plaintiffs' fundamental right to vote, in violation of the First and Fourteenth Amendments, *see* LULAC Compl. ¶ 51-55; TDP Compl. ¶ 87-94, and LULAC Plaintiffs have sufficiently pleaded that the age-restriction violates equal protection by permitting one class of

Texans to vote absentee and denying otherwise qualified voters the same privilege. LULAC Compl. at 58.

Secretary Hughs relies on *McDonald v. Bd. of Election Comm'rs of Chi*., 394 U.S. 802, 807 (1969), for the proposition that there is no right to vote absentee, and that the denial of absentee ballots to certain classes of voters is subject to rational basis review. But the Supreme Court abrogated *McDonald* in a trio of cases that first limited that decision to its facts, and ultimately abandoned its 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, 531 (1974) (same); *see also Am. Party of Tex. v. White*, 415 U.S. 767, 794–95 (1974). In *American Party*, the Court considered a challenge to Texas's practice of allowing only major parties' primary voters to cast absentee ballots, while requiring minor parties' primary voters to vote in-person on primary Election Day. The district court had rejected the claim, citing *McDonald* and "the rationality of not incurring the expense of printing absentee ballots for parties without substantial voter support." *Id*. The Court reversed, concluding that "the unavailability of the absentee ballot is obviously discriminatory" and that the district court "[p]lainly . . . employed an erroneous standard in judging the Texas absentee voting law." *Id*. at 795. The Court 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 fact that in-person voting was available to minor party voters was *not* a comparable alternative means. *Id*. Just as Texas may not only offer absentee ballots to those voting in major party primaries and require minor party primary voters to show up

in-person on Election Day, the State likewise may not offer absentee ballots to those over the age of sixty-five and require those under the age of sixty-five to show up in-person on Election Day.

Furthermore, even if *McDonald* had not been superseded by *American Party*, its application of rational basis review to a law burdening the right to vote was further abrogated by the *Anderson-Burdick* line of cases.[6] Under the *Anderson-Burdick* test, courts look to the severity of the burden and balances 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)). Plaintiffs have plausibly alleged that the denial of the right to vote absentee imposes a severe burden on their fundamental right to vote, by requiring them to vote in person *regardless* of what other barriers they may face, such as a global pandemic, or an hourly job that precludes them from voting in person during business hours. *See, e.g.*, TDP 2d. Am. Compl. at 37-44; LULAC Am. Compl. ¶ 48. Furthermore, Plaintiffs have sufficiently alleged that Texas does not have any purpose—rational or otherwise—that justifies doling out access to the fundamental right to vote based on age.[7] *See, e.g.*, LULAC Am. Compl ¶¶ 10, 37, 42-44, 61; TDP 2d Am. Compl. ¶¶ 4, 6-7, 38-39, 90, 92.

Finally, the Secretary's contention that Plaintiffs claim is due to be dismissed relies on a misapplication of Rule 12(b)(6). Rather than demonstrating that the facts Plaintiffs have alleged are insufficient to state a claim—they are not—she instead seeks to argue the facts, including by offering alternative justifications for the state's age-restriction that go beyond the pleadings and

[6] Several other Circuits have recognized as much. *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); *see also, e.g.*, *TDP*, 978 F.3d at 193 (expressing reluctance "to hold that *McDonald* applies" here in light of the fact that it was quickly superseded by *American Party* and *Anderson-Burdick*).

[7] That age may be a proper dividing line in other contexts, *see Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976), does not mean states can draw lines on the basis of age when it comes to voting.

are inappropriate for this court to consider at the motion to dismiss stage. Indeed, although the Secretary points to *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) for the proposition that the state may have an interest in election integrity, the mere assertion of such an interest does not require the Court to rubber stamp state policies that do not actually serve such a purported interest. Rather, a state must show "show[] that its regulation . . . is necessary to the integrity of the electoral process." *Id*. The Secretary cannot do so at the motion to dismiss stage, when she has not yet even pleaded any defenses.

CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiffs ask this court to deny the Secretary's motions to dismiss.

DATED: June 11, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 11, 2021, I foregoing response was filed via the Court's ECF/CM system, which will serve a copy on all counsel of record.

/s/Chad W. Dunn
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