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, Ken Paxton, Texas Attorney General, Dana Debeauvoir, Travis County Clerk, and Jacquelyn F. Callanen, Bexar County Elections Administrator, *Defendants.*	§	

DEFENDANT SECRETARY OF STATE'S REPLY SUPPORTING MOTION TO DISMISS SECOND AMENDED COMPLAINT

Plaintiffs' request to rewrite the Texas Election Code belongs in the Legislature, not the federal courts. Plaintiff Texas Democratic Party ("TDP") challenges Section 82.003 in conjunction with "other election laws" *that the Legislature declined to pass*,[1] making TDP's claim both unripe and

[1] https://www.npr.org/2021/05/31/1001811919/texas-democrats-walk-out-stop-republicans-sweeping-voting-restrictions last visited. June 18, 2021. That the Texas Legislature refused to adopt the election conditions about which TDP complains is subject to judicial notice. Federal Rule of Evidence 201 allows a court to take judicial notice of an "adjudicative fact" if the fact is not subject to reasonable dispute in that it is (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to resources whose accuracy cannot be questioned. *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829 (5th Cir.1998).

implausible. Plaintiffs[2] invoke the pandemic to justify their challenge to a rule allowing for absentee voting for the elderly, but it is entirely speculative what, if any, pandemic conditions may exist at the time of the next election and what the prevalence of safeguards, such as vaccines, will be the next time Texans head to the polls.

Plaintiffs also seek relief that is beyond the authority of this Court. Plaintiffs want the privilege of voting absentee, which requires this Court to order affirmative acts by the Texas Legislature that exceed the power of a federal court. (Dkt. 142, Prayer for Relief D). Federal courts lack the power to order the state 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)). There is no "authority for courts to order state officials to promulgate legislation, regulations, or executive orders." *Mi Familia Vota v. Abbott*, 977 F.3d 461,469 (5th Cir. 2020). It is also beyond this Court's authority—and subject matter jurisdiction—to "enjoin Defendants from enforcing the Election Conditions" that have not even been enacted by the Legislature. (Dkt. 141, ¶¶106-7). Respectfully, this Court lacks the authority to compel the Secretary to grant Plaintiffs the privilege of voting absentee, and she is entitled to sovereign immunity as set forth in her prior briefs. (DKt. 151).

Plaintiffs' theory of disenfranchisement "would create a 'one-way ratchet' that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances." *Ohio Democratic Party v Husted,* 834 F.3d 620 (6th Cir. 2016). "The issue is not whether some voters would benefit from additional voting privileges, but whether the challenged law results in a cognizable injury under the Constitution or the Voting Rights Act." *Id.* Plaintiffs have not suffered any injury resulting

[2] Plaintiffs and Plaintiff-Intervenors are referred to herein jointly as "Plaintiffs."

from enforcement of Section 82.003 because it does not "create a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the status quo." *Texas Democratic Party v. Abbott*, 978 F.3d 168, 192 (5th Cir. 2020).

I. The Fifth Circuit already held that Plaintiffs' Twenty-Sixth Amendment claim fails as a matter of law.

Plaintiffs argue that their Twenty-Sixth Amendment claim can proceed because the Fifth Circuit only considered whether Plaintiffs were likely to succeed on the claim's merits. (Dkt. 156, p. 6). This is untrue. The Fifth Circuit did not conclude that Plaintiffs had failed to show sufficient evidence of their claim but instead held that Plaintiffs' claim failed as a matter of law because "the Texas Legislature's conferring a privilege to those at least age 65 to vote absentee did not deny or abridge younger voters' rights who were not extended the same privilege. Thus, Section 82.003 itself does not violate the Twenty-Sixth Amendment." *Abbott*, 978 F.3d at 192.

Plaintiffs also cannot argue that the status quo, being their right to vote in person early or on election day (and to vote absentee if they qualify under existing state law), is unconstitutional.[3] Plaintiffs' inability to vote absentee does not render the status quo unconstitutional absent some form of unlawful discrimination, which Plaintiffs have not alleged; allowing "the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required." *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment).

II. Plaintiffs' Voting Rights Act Claim Fails.

Like Plaintiffs' Twenty-Sixth Amendment claim, Plaintiffs' Voting Rights Act claim fails because Plaintiffs cannot establish that Latino voters have less opportunity than other members of

[3] Plaintiffs point to their Fourteenth Amendment claim as alleging that the status quo is unconstitutional, but as set forth below this claim also fails.

the electorate to participate in the political process and elect representatives of their choice *because of their race. Veasey v. Abbott,* 830 F.3d 216, 244 (5th Cir. 2016). Plaintiffs attempt to satisfy this standard through a confusing web of intertwined age and race arguments. But Plaintiffs' allegations amount to the following: Latinos are purportedly disparately impacted by Tex. Elec. Code § 82.003 because they are young, not because they are Latino. (Dkt. 155, p. 9).

The alleged disparate impact is a function of age, not of race. It therefore is not actionable under Section 2 of the Voting Rights Act, as there has been no "denial or abridgment" of the right to vote "on account of race or color." 52 U.S.C. § 10301(a). There is no dispute that Latino voters enjoy the same opportunities to vote as non-Latino voters under Section 82.003. Latinos under 65 have the same rights as non-Latino voters under 65; and Latino voters over 65 enjoy the same ability to vote absentee as non-Latino voters over 65.

Plaintiffs also argue that Section 82.003's alleged burden on their voting rights is "directly tied to Texas's historical discrimination against Latinos." (Dkt. 155, p. 10). Assuming this type of allegation could ever be sufficient (which the Secretary disputes), there is a temporal mismatch between the premises of Plaintiffs' allegations and the conclusion they ask this Court to reach. Their argument depends on the notion that Latinos are disfavored because they are younger than white voters. (Dkt. 155, p. 9; Dkt. 142 ¶ 38). But their factual allegations in support of this position are based on current demographics. (Dkt. 142 ¶¶ 38-39 (citing sources from 2016, 2018, and 2020)). Section 82.003 was passed in 1975 alongside measures extending the right to vote to anyone over 18, to conform to the Twenty-Sixth Amendment. Plaintiffs are not challenging a recently enacted law, but one that has been on the books for nearly 50 years—with other absentee voting provisions LULAC claims may be unconstitutional dating as far back as 1917. The crux of Plaintiffs' assertion is that Section 82.003 imposes a burden on Latinos' opportunities to participate in elections because the Latino population is young. But there are no allegations about the relative age of Latinos and whites in 1975. And the

comparative ages of the Latino and white populations today are not caused by or linked to social or historical conditions that have produced discrimination against Latinos as required to state a disparate impact claim. *Veasey*, 830 F.3d at 244.

Plaintiffs' other factual allegations of disparate impact similarly fail to state a Voting Rights Act claim. Plaintiffs' allegation that Latino voters are more susceptible to COVID-19 than other voters, including apparently the over 65 population, is wholly conclusory.[4] Unpredictable work hours or student status that make it difficult to vote in person on election day are unavailing: Texas law requires employers to provide paid leave if needed to vote. Tex. Elec. Code §276.004. And Texas law provides numerous other options to vote besides at the polls on election day. In particular, voters may vote early in person for nearly two weeks in most elections. *Id.* § 85.001, Moreover, to the extent that students live away from their county of registration, they can vote absentee under a different provision. *Id.* § 82.001. The State cannot be faulted if these voters choose not to take advantage of the other avenues available to them to cast their ballot, including requesting paid time off from an employer.

III. Plaintiffs' First and Fourteenth Amendment Claims Fail.

Plaintiffs' equal protection claim is subject to dismissal for failure to state a claim because under *McDonald's*[5] rational basis review this Court can easily "hypothesize a legitimate purpose to support the action." *Glass v Paxton*, 900 F.3d 233, 245 (5th Cir 2018). The burden is not on Texas to prove the law valid but "on the one attacking the legislative arrangement to negative every conceivable

[4] It should not be overlooked that Latino voters with existing physical health conditions may be eligible to vote absentee under Section 82.002. *In re State*, 602 S.W.3d 549, 560 (Tex. 2020). Thus, to the extent that Latinos have a higher rate of underlying physical conditions that qualify as disabilities under the statute (a question about which the State takes no position), that is addressed through other means.

[5] *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969).

basis which might support it." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012) (quotation marks omitted).[6]

Plaintiffs argue that *McDonald*'s rational basis review is not the proper standard to employ in this case, even though two Fifth Circuit panels were persuaded that *McDonald* applies to absentee voting challenges. *Texas Democratic Party v. Abbott,* 961 F.3d 389 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (Jan 11, 2021); *Tex. League of United Latin Am. Citizens v. Hughs ("Tex. LULAC")*, 978 F.3d 136 (5th Cir. 2020) ("these are laws that make voting more available, and are not laws that themselves deny [voters] the franchise"). In fact, circuit courts have pointed to the absentee ballot challenge in *McDonald* as an example of an election law subject to rational basis review because such laws do not significantly burden the right to vote. *E.g.*, *Obama for America v Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (citing to *McDonald* to support upholding election laws that do not burden the fundamental right to vote). Additionally, the Seventh Circuit in a nearly identical case applied *McDonald* in upholding the constitutionality of an election law permitting voters over 65 to vote absentee because it did not violate the Equal Protection Clause. *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020).[7]

Plaintiffs cling to *American Party of Texas v. White*, 415 U.S. 767 (1974), as holding that absentee voting is a right, but that case did not reach that conclusion. Rather, it held that some of the challenged laws in that case abridged the right to vote or equal protection and were subject to strict scrutiny. *Id.* at 780 & n.11. But Texas's restriction that absentee ballots would include only the majority party

[6] Moreover, apart from the risk of fraud, mail-in voting is complex and presents logistical challenges. Simply by way of example, without limitation, printing ballots for the numerous elections that Texas has in any given year or having assistance available with safeguards so that the nominal helper does not impose his own views on the voter presents costs and challenges that increase with expanding the use of mail-in-voting.

[7] *Mays v. LaRose*, 951 F.3d 775, 783 N 4 (6th Cir. 2020), a case cited by Plaintiffs, questioned whether *Anderson-Burdick* was the right analysis to apply to an equal protection claim, and noted that the Eleventh Circuit and at times the Sixth Circuit have not applied it.

candidates was *not* subject to strict scrutiny. *Id.* at 770-71. Instead, the absentee ballot restrictions were remanded for the lower court to determine if the law amounted to "arbitrary discrimination" against minor political parties that "violat[es] the Equal Protection Clause." *Id.* at 795. This is entirely consistent with *McDonald* because, at the time *White* was decided, only persons absent from the jurisdiction or physically disabled could vote absentee, and the question was whether their franchise was abridged because those individuals had no other opportunity to vote but absentee and their candidate did not appear on the absentee ballot.

Pandemic conditions aside, Plaintiffs claim that Section 82.003 violates equal protection because the statute imposes an undue burden on minority voters by forcing them to vote in person regardless of other barriers they face, specifically referencing difficult childcare and working arrangements. This again ignores the Fifth Circuit's holding that Section 82.003 does not burden Plaintiffs' right to vote. *Abbott*, 978 F.3d at 192. A similar equal protection claim brought by working mothers was dismissed by the Seventh Circuit under Fed. R. Civ. P. 12(b)(6). *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). The *Griffin* plaintiffs argued that the U.S. Constitution required absentee voting because of the burden plaintiffs would otherwise face in getting to the polls on election day. *Id.* at 1129. The claim was summarily dismissed because the burden imposed on plaintiffs was minimal given the other voting options available to them, including early voting and an Illinois state law requiring employers to give employees time off if needed to vote, and the statute was rationally related to combatting voter fraud. *Id.* at 1130-31. The Seventh Circuit, citing to the Fifth Circuit, concluded that "[u]navoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection." *Id.* At 1132 (citing *Apache Bend Apartments, Ltd. v. U.S. Through I.R.S.*, 964 F.2d 1556, 1569 (5th Cir.1992)). It also correctly noted that the "striking of the balance between discouraging fraud and other abuses and encouraging turnout is

quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Id.* at 1131; *see also Mi Familia* 877 F.3d at 469.

But even under the *Anderson-Burdick* analysis advocated by Plaintiffs, their First and Fourteenth Amendment claims fail as a matter of law because the alleged burden on Plaintiffs' right to vote is nonexistent. No case has abrogated *McDonald,* and no court has held that the fundamental right to vote includes an unqualified right to vote absentee. While Plaintiffs argue that voting in person is inconvenient, the State's important regulatory interests justify not extending absentee voting to everyone. Voting absentee is a privilege, and as the Fifth Circuit (and other Courts) have recognized, a privilege to one does not impose a burden on another. *Abbott*, 978 F.3d at 192. Plaintiffs themselves recognize in their *response* brief that voting absentee is a privilege. (Dkt. 155 p. 12).

Plaintiffs have at best alleged minimal inconveniences associated with in-person voting common among the population. But if courts "were '[t]o deem ordinary and widespread burdens like these severe' based solely on their impact on a small number of voters, we 'would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.' " *Richardson*, 978 F.3d at 236 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)). "[N]o citizen has a Fourteenth . . . Amendment right to be free from the usual burdens of voting." *Veasey*, 830 F.3d at 316 (Jones, J., concurring) (cleaned up). And "mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect." *Tex. LULAC*, 978 F.3d at 146. Texas extends Plaintiffs the right to vote early, and mandates that employers give employees paid time off to vote if the polls close on Election Day within "two consecutive hours outside of the voter's working hours." Tex. Elec Code §276.004. Despite Plaintiffs' protestation, prevention of fraud is widely accepted as a legitimate state

interest in the election law context.[8] Section 82.003 does not violate Plaintiffs' constitutional rights, and any extension of absentee voting is rightfully left to the Legislature to strike a balance between encouraging voter turnout and discouraging fraud and other abuses.

IV. CONCLUSION

For the reasons delineated in Defendant Secretary of State's Motion to Dismiss, as further supported by this Reply, 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.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN COWLES
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief – General Litigation Division

/s/ Matthew Bohuslav
MATTHEW BOHUSLAV
Texas Bar No. 24069395
CORY A. SCANLON
Texas Bar No. 24104599
Assistant Attorneys General
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Phone: 512-463-2120
Fax: 512-320-0667

[8] Ample case law has recognized the state's legitimate interest in regulating absentee voting to combat voter fraud. *E.g.*, *Richardson*, 978 F.3d at 239–41; *Veasey*, 830 F.3d at 263; *Crawford,* 553 U.S. at 198 (plurality op.) (discussing general problem of absentee-ballot fraud)).

matthew.bohuslav@oag.texas.gov
cory.scanlon@oag.texas.gov
Counsel for State Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2021 a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Matthew Bohuslav
MATTHEW BOHUSLAV
Assistant Attorney General