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 REPLY BRIEF

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 reply brief pursuant to this Court's Order. Dkt. No. 168.

ARGUMENT

Defendant's supplemental response brief, Dkt No. 169, fails to add anything new to the record before the Court and instead simply recycles his previous arguments in favor of dismissal. The Court should reject those arguments for the reasons explained previously in Plaintiffs' Joint Opposition to Defendant Scott's Motion to Dismiss, Dkt. No. 155, and in Plaintiffs' Joint Supplemental Brief, Dkt. No. 167.

First, Defendant offers the vague assertion that Plaintiffs and Plaintiff-Intervenors seek to challenge restrictions on mail-in voting that did not exist at the time this complaint was filed; Def. Suppl. Response at 2, Dkt. 169; or alternatively seek to challenge pandemic circumstances that no

longer exist, *id*. at 6.[1] As evidenced by the operative complaints, however, Plaintiffs and Plaintiff-Intervenors challenge Texas's age-restriction on absentee voting, which was in place at the time both sets of Plaintiffs filed their respective complaints. *See* TDP 2d Am. Compl. at 12-15 (alleging that the age-restriction on absentee voting discriminates against Latino voters in violation of the Voting Rights Act ("VRA"), and the Fourteenth and Fifteenth Amendments; that the age-restriction on absentee voting imposes an undue burden on voters and restricts free speech in violation of the First and Fourteenth Amendments; and that the age restriction violates the Twenty-Sixth Amendment; TX LULAC Am. Compl. ¶¶ 10-11 (alleging that Texas's unduly restrictive age requirement for mail-in voting imposes "an undue burden on LULAC members' voting and free speech rights in violation of the First, Fourteenth, and Twenty-Sixth Amendments, and disproportionately impacts minority voters in violation of the VRA"). Defendant fails to explain how an injunction prohibiting him from enforcing the age requirement is beyond the authority and subject matter jurisdiction of this court. *Cf.* Def. Suppl. Resp. Br. at 2.

Second, Defendant's assertion that he is immune from suit with respect to Plaintiffs' claims is directly foreclosed by the Fifth Circuit. *See* Pls. Opp. to Mot. to Dismiss at 5 (citing *Texas Democratic Party v. Abbott*, 978 F.3d 168, 178-80 (5th Cir. 2020) ("*TDP*")).

Third, Defendant asserts that the Court should dismiss Plaintiffs' claims for the reasons previously articulated in his motion to dismiss. Def. Suppl. Resp. Br. at 3. For the reasons previously stated in Plaintiffs' briefing, the Court should deny Defendant's motion to dismiss. *See*

[1] As Plaintiffs previously explained, "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." Pls. Opp. to Mot. to Dismiss at 5, Dkt. 155.

Pls. Opp. to Mot. to Dismiss at 7-14 (explaining that Plaintiffs sufficiently pleaded their Section 2, First and Fourteenth Amendment, and Twenty-Sixth Amendment claims).

Fourth, Defendant contends that the TDP Plaintiffs' intentional discrimination claims must be dismissed because the TDP Plaintiffs failed to allege that the age restriction on mail-in voting was enacted with discriminatory purpose. Def. Suppl. Resp. Br. at 3. This is incorrect. TDP Plaintiffs in their Second Amended Complaint alleged facts that speak to the intentional discrimination claims made with respect to the restrictions on mail-in voting. Pls. Second Amnd. Compl. at 2 ¶¶ 8-9; 29-30; 54-59. Plaintiffs are not required to produce a "smoking gun" at the pleading stage to make plausible allegations of intention discrimination. Circumstantial evidence, including historical actions, recent actions by Defendants, and departures from the normal procedure, are used to infer discriminatory intent. *See Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 488-89 (1997) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 366 (1997)).

Fifth, Defendant admits that *Brnovich* does not apply to Plaintiffs' First and Fourteenth Amendment claims, and that it does not affect what Plaintiffs must plead to establish a Section 2 claim. Def. Suppl. Resp. Br. at 3-4, Dkt 169.

Sixth, Defendant improperly attempts—yet again—to apply Section 2's vote *dilution* standard to Plaintiffs' Section 2 vote *denial* claim, *id.*; *but see* Pls. Opp. to Mot. to Dismiss at 8 (explaining proper standard for analyzing vote denial claims), and to rely on caselaw regarding the right to vote by mail that has since been abrogated. Def. Suppl, Resp, Br, at 3-4, Dkt. 169 (citing *McDonald v. Bd, of Elections Comm'rs of Chi.*, 394 U.S. 802, 807 (1969)) *but see* Pls. Opp. to Mot. to Dismiss at 12 (explaining that *McDonald* was abrogated in a series of cases culminating in *Am. Party of Tex. v. White*, 415 U.S. 767, 794–95 (1974), and that in the alternative the standard

applied by the *McDonald* court was replaced by the *Anderson-Burdick* framework); *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*).[2]

In sum, Defendant's latest brief fails to supplement the record in any meaningful fashion and instead simply regurgitates the same arguments previously articulated in briefing before this Court. For the reasons explained herein, and in Plaintiffs' prior filings, the Court should deny Defendant's motion to dismiss.

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Respectfully submitted,

/s/ Chad Dunn

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[2] Defendant erroneously continues to rely on the *TDP* motions panel's opinion that *McDonald* controls and that the availability of in-person voting mitigates the denial of mail-in voting. Def. Suppl. Resp. Br. at 5, Dkt 169 ("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.") (citing *Abbott*, 978 F.3d [*sic*] at 404 (quoting *McDonald*, 394 U.S. at 808 n.7)). The correct cite for the quotation is to the motions panel's opinion, at *TDP v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020)). As Plaintiffs have noted, the merits panel explicitly abrogated and rendered this portion of the motions' panel opinion nonprecedential. *See TDP v, Abbott*, 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*); *id*. at 194 ("We therefore use our authority as the panel resolving the merits to declare that the holdings in the motions panel opinion as to *McDonald* are not precedent.").

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CERTIFICATE OF SERVICE

I certify that, on April 18, 2022, 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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