UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ASIAN AMERICANS ADVANCING JUSTICE-ATLANTA, *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, *et al.*, Defendants.	Civil Case No. 1:21-CV-01333-JPB

PLAINTIFFS' SURREPLY TO STATE DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

In their July 9, 2021 reply brief in support of their motion to dismiss, State Defendants rely heavily on the United States Supreme Court's July 1, 2021 decision in *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321 (U.S. 2021). Doc. 52, Reply ISO State Defs.' Mot. to Dismiss ("Reply"). State Defendants' reliance on *Brnovich*, however, is misplaced and unavailing.

While the *Brnovich* Court upheld two challenged provisions of Arizona election law as not producing racially discriminatory results in violation of Section 2 of the Voting Rights Act ("Section 2"), it endorsed the long-standing approach of adjudicating Section 2 discriminatory results claims by assessing the "totality of the circumstances." Moreover, the Court reinforced that Section 2 and Fifteenth Amendment discriminatory purpose claims are properly evaluated under the standard set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In reaching its holdings, the *Brnovich* Court relied on a full post-trial factual record—confirming that Plaintiffs' claims must be permitted to proceed to discovery. Moreover, *Brnovich* does not relate to Plaintiffs' constitutional undue burden claim, notwithstanding State Defendants' citations to the contrary. Here, at the pleading stage, Plaintiffs have more than adequately alleged their claims under both Section 2 and the U.S. Constitution.

I. Under *Brnovich*, Plaintiffs have adequately alleged discriminatory results and discriminatory purpose (Counts I and II).

The Supreme Court decided *Brnovich* on a post-trial record, which immediately makes this case procedurally distinct. At this stage, Plaintiffs have adequately alleged discriminatory results and discriminatory purpose claims, and their adjudication must await development of the evidentiary record.

A. Discriminatory Results (Count I)

The *Brnovich* Court held that two Arizona election rules—one that mandates voters vote in their assigned precincts on Election Day, and another that imposes criminal penalties when unauthorized individuals collect absentee ballots—do not violate Section 2's discriminatory results prohibition. *Brnovich*, 141 S.Ct. at 2330. To reach these conclusions, the Court relied on a full factual record, weighing evidence related to the burden on voters of color, the disparities in the burden on those voters as compared to other voters, the percentage of impacted ballots, overall ease of voting in Arizona, and other factors relevant to the totality of circumstances analysis, as required by Section 2. *Brnovich*, 141 S.Ct. at 2344–48.

State Defendants here ignore the procedural posture of *Brnovich* and misrepresent its holdings. They ask this Court to rule, as a matter of law, that Plaintiffs' Section 2 results claim fails—without ***any*** discovery or other factual record to assess that claim. *Brnovich* offers no support for their position. To the

contrary, *Brnovich* confirms "that §2 applies to a broad range of voting rules, practices, and procedures; that an 'abridgement' of the right to vote under §2 does not require outright denial of the right; that §2 does not demand proof of discriminatory purpose; and that a 'facially neutral' law or practice may violate that provision." *Id.* at 2341.

Further, *Brnovich* reiterates that courts must consider the ***totality of circumstances*** in assessing whether voters of color have an equal opportunity to participate in the political process. *Brnovich*, 141 S.Ct. at 2338. While offering five non-exhaustive guideposts to assist courts in this factual inquiry, the *Brnovich* Court clarifies that "any circumstance that has a logical bearing on whether voting is 'equally open' and affords 'equal opportunity' may be considered." *Id.* Indeed, the *Brnovich* Court expressly declined to announce a test to govern all Section 2 claims involving rules governing the time, place, or manner for casting ballots. *Id.* at 2336.

Here, Plaintiffs have pleaded detailed allegations that each of SB 202's challenged provisions will have a discriminatory result, in that voters of color—especially Asian American and Pacific Islander ("AAPI") voters—will have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and, thus, the voting system is not equally open to them. *See* Doc. 48, Pls.' Opp. to State Defs.' Mot. to Dismiss

("Opp."), 21–30. Under a totality of circumstances analysis, those allegations are more than sufficient to plausibly state a right to relief under Section 2. *Id.*[1] State Defendants argue at length that this Court should dismiss Plaintiffs' discriminatory results claim because (1) the challenged provisions impose only "modest" burdens on AAPI voters and (2) the State's interests outweigh those burdens. *See* Reply 12, 14–15. But the relative magnitudes of burdens on voting and the State's interests can be adjudicated only after fact discovery, as occurred in *Brnovich*.

B. Intentional Discrimination (Counts I and II)

In *Brnovich*, the Supreme Court also upheld the district court's factual finding that the Arizona law at issue was not enacted with a discriminatory purpose in violation of Section 2 and the Fifteenth Amendment to the U.S. Constitution.

[1] State Defendants also argue for the first time in their reply that this Court lacks jurisdiction because Section 2 may not provide a private right of action. Reply, 11-12. As an initial matter, State Defendants forfeited this argument by failing to raise it in their motion to dismiss, *Asociacion de Empleados del Area Canalera v. Panama Canal Comm'n*, 453 F.3d 1309, 1316 n.7 (11th Cir. 2006), and the very concurrence they cite confirms that the question of whether a statute provides a private right of action is not jurisdictional, *Brnovich*, 141 S.Ct. at 2350 (Gorsuch, J., concurring). Even if this argument were properly before this Court, it would be meritless. "The VRA, as amended, clearly expresses an intent to allow private parties to sue the States … In line with this understanding, private parties have sued States and state officials under § 2 of the VRA for decades." *Alabama State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020), *cert. granted, judgment vacated sub nom. Alabama v. AL Conf. of NAACP*, No. 20-1047, 2021 WL 1951778 (U.S. May 17, 2021).

Brnovich, 141 S.Ct. at 2348–50. In doing so, the *Brnovich* Court applied a clear error standard and gave substantial deference to the district court's evaluation of the evidentiary record. *Id.* The *Brnovich* Court did not supply additional guidance for assessing discriminatory purpose claims. Instead, it affirmed "the familiar approach outlined in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977)." *Brnovich*, 141 S.Ct. at 2349.

This is the exact approach taken by Plaintiffs here; the First Amended Complaint alleges the *Arlington Heights* factors in detail. *See* Opp. 19–20. *Brnovich* therefore does not affect Plaintiffs' claims—under Section 2 and the Fourteenth and Fifteenth Amendments—that SB 202 was enacted with a discriminatory purpose. The Court should decline the State Defendants' baseless request to resolve factual disputes or weigh competing factors at this stage.

II. *Brnovich* has no bearing on Plaintiffs' undue burden claim (Count III).

Finally, *Brnovich* relates exclusively to claims of discriminatory results and discriminatory purpose. *Brnovich*, 141 S.Ct. at 2330. The decision does not implicate Plaintiffs' claim regarding SB 202's undue burden on the right to vote under the First and Fourteenth Amendments. Thus, State Defendants' multiple citations to *Brnovich* regarding undue burden lack legal force. *See* Reply, 9–10. The Court should deny State Defendants' motion to dismiss these claims.

Respectfully submitted this 27th day of July, 2021.

s/Hillary Li
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CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing pleading has been prepared with Times New Roman font, 14 point, one of the font and point selections approved by the Court in L.R. 5.1C, N.D. Ga.

Dated: July 27, 2021

s/R. Adam Lauridsen
R. ADAM LAURIDSEN
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on July 27, 2021, a true and correct copy of the foregoing PLAINTIFFS' SURREPLY TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send notification of such filing to all attorneys of record.

Dated: July 27, 2021

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