No. 23-___

IN THE

Supreme Court of the United States

JOSEPH DANIEL CASCINO ET AL.,

Petitioners,

v.

JANE NELSON, TEXAS SECRETARY OF STATE,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Texas's restriction of no-excuse mail-in voting to individuals aged "65 years or older on election day," as provided in Texas Election Code § 82.003, violate the Twenty-Sixth Amendment's mandate that the right to vote "shall not be denied or abridged by the United States or any State on account of age"?

PARTIES TO THE PROCEEDINGS

Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia, plaintiffs below, are petitioners here. Jane Nelson, the current Texas Secretary of State, is respondent here and was the appellee in the court of appeals. Her predecessor in office, John B. Scott, was the defendant before the district court. *See* Pet. App. 13a n.1.

RELATED PROCEEDINGS

Cascino v. Nelson, No. 22-50748 (5th Cir. Sept. 6, 2023)

Texas Democratic Party v. Scott, Civ. Act. No. SA-20-CA-438-FB (W.D. Tex. July 25, 2022)

Texas Democratic Party v. Abbott, No. 19-1389 (Supreme Court Jan. 11, 2021)

Texas Democratic Party v. Abbott, No. 19A1055 (Supreme Court June 26, 2020)

Texas Democratic Party v. Abbott, No. 20-50407 (5th Cir. May 20, 2020, June 4, 2020, and Oct. 14, 2020)

Texas Democratic Party v. Abbott, Civ. Act. No. SA-20-CA-438-FB (W.D. Tex. May 19, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-12a) is unpublished but is available at 2023 WL 5769414.

The district court's opinion granting the defendant's motion to dismiss (Pet. App. 13a-57a) is published at 617 F. Supp. 3d 598.

The court of appeals' earlier opinion vacating the grant of a preliminary injunction (Pet. App. 58a-118a) is published at 978 F.3d 168.

The district court's earlier opinion granting a preliminary injunction with respect to petitioners' Twenty-Sixth Amendment as-applied claim (Pet. App. 119a-206a) is published at 461 F. Supp. 3d 406.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2023. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section One of the Twenty-Sixth Amendment provides that: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Section 82.003 of the Texas Election Code provides that: "A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day."

INTRODUCTION

The Twenty-Sixth Amendment to the Constitution forbids any state from denying or abridging the voting rights of citizens over the age of eighteen "on account of age." In the face of this constitutional command, Texas gives voters the right to cast mail-in ballots only if the voter is "65 years of age or older on election day." Texas Elec. Code § 82.003.

The Fifth Circuit has forthrightly acknowledged that Texas "facially discriminates on the basis of age." *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 402 (2020). But it nonetheless held that the State's "exclusion of younger voters," Pet. App. 7a, is constitutional. The court of appeals reasoned that a law that "makes it *easier* for others to vote does not abridge any person's right to vote for the purposes of the Twenty-Sixth Amendment," *id.* at 10a (quoting Pet. App. 96a). According to the Fifth Circuit, abridgment occurs only if the challenged law "makes voting *more difficult* for [a] person than it was before the law was enacted or enforced." *Id.* (quoting Pet. App. 95a). And because Texas had not allowed anyone to vote by mail without an excuse before Section 82.003 was enacted, Texas's age-based restriction on no-excuse mail-in voting did not run afoul of this test.

The Fifth Circuit's cramped construction of the Twenty-Sixth Amendment warrants this Court's intervention.

STATEMENT OF THE CASE

A. Statutory background

Voting by mail has become commonplace in the United States. Currently, eight states—California, Colorado, Hawaii, Nevada, Oregon, Utah, Vermont, and Washington—send every registered voter a mail-in ballot, which that voter can return via mail or deposit at designated sites. Twenty-seven other states and the District of Columbia allow for no-excuse absentee voting, meaning anyone can request and then cast a mail-in ballot.[1]

Texas takes a different approach. Two categories of voters are eligible for mail-in voting.

First, voters who can substantiate a specific excuse, such as being physically absent from the jurisdiction or having a physical condition that impairs a voter's ability to cast an in-person vote, may vote by mail. Tex. Elec. Code §§ 82.001-.004. That provision is not at issue in this petition.

Second, Texas Election Code § 82.003—the provision challenged in this petition—allows any voter aged sixty-five or older to vote by mail, with no requirement that he or she substantiate a specific excuse. Voters who can neither substantiate a specific excuse nor meet the age qualification must cast their ballots in person.

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[1] Nat'l Conf. of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, tbl. 1 (States with No Excuse Absentee Voting) (July 12, 2022), available at https://perma.cc/YG8N-R8FL(NCSL, Voting Outside the Polling Place).

B. Proceedings below

1. Petitioners, along with several other parties, filed this lawsuit in the U.S. District Court for the Western District of Texas. Petitioners are Texas registered voters under the age of sixty-five who wish to cast mail-in ballots. They sued respondent, the Texas Secretary of State, in the Secretary's official capacity.

As is relevant here, petitioners alleged that Texas's restriction of no-excuse mail-in voting to voters over the age of sixty-five was both "unconstitutional as applied to these plaintiffs during these pandemic circumstances" (the lawsuit having been filed at the height of the COVID-19 pandemic) and "facially unconstitutional." First Amended Complaint ¶¶ 101, 102, *Tex. Dem. Party v. Abbott*, Civ. Act. No. 5:20-CV-00438-FB (W.D. Tex. Apr. 29, 2020), ECF 9.

2. Following review of extensive evidence, the district court granted petitioners' motion for a preliminary injunction. Pet. App. 131a-133a. The court held that petitioners were likely to succeed on their as-applied Twenty-Sixth Amendment claim. In its ruling, the court held that Section 82.003 "violate[s] the clear text of the Twenty-Sixth Amendment," because Section 82.003 entitles Texas voters over the age of sixty-five to vote by mail "on the account of their age alone," while voters "younger than 65 face a burden of not being able to access mail ballots on account of their age alone." Pet. App. 129a, 187a.

The district court further found that petitioners had met each of the other criteria for obtaining a preliminary injunction. *See* Pet. App. 131a, 201a-

203a. It then issued an injunction permitting "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19" to obtain and cast a mail-in ballot "during the pendency of pandemic circumstances." *Id.* 131a.

3. Defendants appealed. A motions panel of the Fifth Circuit stayed the preliminary injunction, holding, among other things, that petitioners were unlikely to succeed on their Twenty-Sixth Amendment claim. *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 409 (5th Cir. 2020). This Court denied a motion to vacate the Fifth Circuit's stay. *Tex. Dem. Party v. Abbott*, 140 S. Ct. 2015 (2020). Justice Sotomayor issued a statement recognizing that the application raised "weighty but seemingly novel questions regarding the Twenty-Sixth Amendment" and expressing the hope that "the Court of Appeals [would] consider the merits of the legal issues in this case well in advance of the November election." *Id.*[2]

Subsequently, the Fifth Circuit vacated the preliminary injunction and remanded the case to the district court for further proceedings. Pet. App. 59a, 103a. The panel acknowledged that the Twenty-Sixth Amendment "confers an individual right to be free from denial or abridgment of the right to vote on account of age," *Id.* 81a. But it believed that Section 82.003's age-based restriction on no-excuse mail-in voting did not violate that right. It rejected the proposition that the Amendment requires that "voting rights must be identical for all age groups." Pet. App.

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[2] This Court also subsequently denied a petition for writ of certiorari before judgment. *Tex. Dem. Party v. Abbott*, 141 S. Ct. 1124 (2021).

91a. Instead, it saw the amendment solely as "a prohibition against adopting rules based on age that deny or abridge the rights voters already have." *Id.* It therefore held "that an election law abridges a person's right to vote for the purposes of the Twenty-Sixth Amendment only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced." *Id.* 95a. "On the other hand, a law that makes it *easier* for others to vote does not abridge any person's right to vote for the purposes of the Twenty-Sixth Amendment." *Id.* 96a. "[C]onferring a privilege on one category of voters" because of their age "while denying that privilege to other voters" because of their age was therefore permissible. *Id.* 98a.

4. On remand, petitioners renewed their facial challenge under the Twenty-Sixth Amendment. The district court held, however, that the Fifth Circuit's opinion rejecting plaintiffs' as-applied challenge at the preliminary injunction stage "foreclose[d] plaintiffs' Twenty-Sixth Amendment claim" in its entirety. Pet. App. 25a. The district court treated that opinion as "law of the case." *Id.* 26a.

5. The Fifth Circuit affirmed. It recognized that the question before it was "whether the Twenty-Sixth Amendment prohibits the State from providing access to mail-in ballots for those 65 and older to the exclusion of younger voters." Pet. App. 7a. It then held that "even though the prior panel [had] not ultimately decide[d]" petitioners' "facial challenge to § 82.003," the prior decision had "answered the question" of Section 82.003's constitutionality, Pet. App. 8a, when it went "through the exact analysis that would apply to a facial challenge" in the course of resolving the COVID 19-related as-applied challenge, *id.* 9a.

REASONS FOR GRANTING THE WRIT

Section One of the Twenty-Sixth Amendment contains a simple command: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." The Fifth Circuit's decision here, which limits impermissible abridgment only to situations in which a law "makes voting more difficult for that person than it was before the law was enacted or enforced," Pet. App. 10a (quoting Pet. App. 95a) (emphasis omitted), conflicts with decisions of both two federal courts of appeals and two state supreme courts.

The Fifth Circuit's decision is also untenable on the merits. It is impossible to square the straightforward language of the Twenty-Sixth Amendment with the Fifth Circuit's holding that giving the right "to those at least age 65 to vote absentee did not deny or abridge younger voters' rights who were not extended the same privilege." Pet. App. 26a (quoting Pet. App. 99a). The Fifth Circuit's cramped definition of abridgment, which limits the term to some form of retrogression or temporal backsliding, also cannot be squared with this Court's treatment of parallel language in other constitutional amendments.

This case raises an important question involving a fundamental constitutional right and provides an ideal vehicle for resolving that question. The Court should not leave lower courts with a "constitutional blank slate" when it comes to the Twenty-Sixth Amendment. *See Tully v. Okeson*, 78 F.4th 377, 382

(7th Cir. 2023). This Court's intervention is urgently needed.

I. Lower courts are divided over the scope of the Twenty-Sixth Amendment.

The Fifth Circuit held that Texas's limitation of no excuse mail-in voting to citizens over the age of sixty-five comports with the Twenty-Sixth Amendment because "an election law abridges a person's right to vote . . . only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced." Pet. App. 10a (quoting Pet. App. 95a). That decision, which limits abridgment to temporal backsliding, conflicts with decisions of the supreme courts of California and Colorado as well as of the First Circuit, which have each held that the Amendment prohibits all age-based distinctions with respect to voting. Those courts treat the relevant comparison for Twenty-Sixth Amendment purposes as between voters of different ages and not between a voter's situation prior to and after enactment of the challenged statute. It also conflicts with a decision by the Seventh Circuit that rejects retrogression as the definition of abridgment for purposes of the Twenty-Sixth Amendment.

1. The Supreme Court of California has held that the Twenty-Sixth Amendment requires states "to treat all citizens 18 years of age or older alike for all purposes related to voting." *Jolicoeur v. Mihaly*, 488 P.2d 1, 12 (Cal. 1971).

Following ratification of the Twenty-Sixth Amendment, the California Attorney General issued an opinion that "for voting purposes the residence of an unmarried minor"—in California, then a person

under the age of twenty-one—"will normally be his parents' home' regardless of where the minor's present or intended future habitation might be." *Jolicoeur*, 488 P.2d at 3 (quoting 54 Adv. Ops. Cal. Att'y Gen. 7, 12 (1971)). Local registrars then told individual plaintiffs whose parents lived in California to register in the jurisdictions where their parents lived, which were "up to 700 miles away from their claimed permanent residences," and told individual plaintiffs whose parents lived in other states or abroad that they could not register in California at all. *Id.*

The California Supreme Court held that "treat[ing] minor citizens differently from adults for *any* purpose related to voting" violated the Twenty-Sixth Amendment. *Jolicoeur*, 488 P.2d at 2 (emphasis added). The court reasoned that "[c]ompelling young people who live apart from their parents to travel to their parents' district to register and vote or else to register and vote as absentees burdens their right to vote" as secured by the Twenty-Sixth Amendment. *Id.* at 4. That Amendment, like the "Twenty-Fourth, Nineteenth, and Fifteenth before it," forbids any rules that "'handicap exercise of the franchise,'" even if "'the abstract right to vote'" remains "'unrestricted.'" *Id.* (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Thus, requiring voters under the age of twenty-one, but not older aspiring voters, to register where their parents lived violated the Twenty-Sixth Amendment even though that requirement did not mark a retreat from a preexisting situation.

The following year, in *Colorado Project-Common Cause v. Anderson*, 495 P.2d 220 (Colo. 1972), the Supreme Court of Colorado addressed a state law that limited the right to sign initiative petitions to qualified

electors over the age of twenty-one. The Colorado high court held that the law was unconstitutional because the Twenty-Sixth Amendment's "prohibition against denying the right to vote to anyone eighteen years or older by reason of age applies to the entire process involving the exercise of the ballot and its concomitants." *Id.* at 223. Here, too, the unconstitutionality of the state provision did not turn on its being a change from a prior, less restrictive practice. Rather, it turned on the differential treatment of voters over and under the age of twenty-one.

Finally, in *Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973), the First Circuit addressed a college town's decision to hold municipal elections while students were away on winter break. In addressing the issue, the First Circuit declared that under the Twenty-Sixth Amendment an abridgment could occur whenever "a condition, not insignificant, disproportionately affects the voting rights of citizens specially protected." *Id.* at 102. In subsequent proceedings, the First Circuit continued, "[i]t is difficult to believe that [the Twenty-Sixth Amendment] contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden were found to have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment." *Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975). Here again, the relevant comparison was simply between younger and older voters.

2. In *Tully v. Okeson*, 78 F.4th 377 (7th Cir. 2023), the Seventh Circuit expressly rejected the test announced by the Fifth Circuit. It declared that

whether Indiana's aged-based restriction on absentee voting "has a retrogressive effect, *i.e.*, whether it renders the Plaintiffs 'worse off,' is *not* the equivalent of asking whether their right to vote has been abridged." *Id.* at 387; *see also id.* at 388 (opinion concurring in part and dissenting in part). To the contrary: The "starting point" does not depend on "the status quo of state law." *Id.* at 387 (opinion for the court). But the Seventh Circuit nonetheless upheld Indiana's restriction because it believed that, in light of the array of opportunities to cast a ballot offered by Indiana law, the denial of the right to vote by mail did not impose a "material" burden on the voting rights of younger voters. *Id.*

II. This case is an ideal vehicle for resolving an important question of constitutional law.

1. As the Fifth Circuit recognized "[t]he single merits question" before it on this appeal was "whether the Twenty-Sixth Amendment prohibits the State from providing access to mail-in ballots for those 65 and older to the exclusion of younger voters." Pet. App. 7a. The question presented was fully, indeed exhaustively, litigated over a period of several years.

2. The history of this litigation shows why it is imperative for the Court to grant review now. Petitioners sought to have the question resolved in time for the 2020 election. Since then, two federal election cycles have passed. As it stands, it is unlikely that the Court can resolve the scope of the Twenty-Sixth Amendment by the time of the 2024 election, unless it does so through a summary disposition. But at least granting review here will ensure that the

question presented is resolved before Texas conducts elections in 2025 and 2026.

3. The question whether the Twenty-Sixth Amendment requires extending the entitlement to vote by mail without regard to a citizen's age is an important one. This Court long ago recognized that voting is a "fundamental political right" because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The ability to vote by mail may be particularly important for younger voters. Young people can face substantial barriers to voting in person, including lack of transportation, long lines, inability to find or access their polling place, and limited time off from work. *See* Amelia Thomson-DeVeaux et al., *Why Younger Americans Don't Vote More Often (*No, It's Not Apathy)*, FiveThirtyEight (Oct. 30, 2020), available at https://perma.cc/FA78-3UDW. Based on Current Population Survey (CPS) data, people under the age of 40 are disproportionately likely to cite time constraints as a reason for not voting, with 38% of non-voters in this population citing time constraints, compared with just 7% of those sixty-five or older. *See* Adam Bonica et al., *All-mail voting in Colorado increases turnout and reduces turnout inequality*, 72 Electoral Stud. 102363 (2021).[3]

Age-based restrictions on mail-in voting have a significant impact. A study analyzing data from federal elections in 2018 found that only 6.6% of voters

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[3] Thus, the Seventh Circuit's assertion that older voters are distinctively likely to "encounter special barriers in exercising their right to vote," *Tully v. Okeson*, 78 F.4th 377, 387 (7th Cir. 2023), may reflect nothing more than speculation.

aged 18 to 24 voted by mail in states with age-based provisions, compared to 22.5% of younger voters nationally. *See* Jason Harrow et al., Age Discrimination in Voting at Home 12 (2020), available at https://perma.cc/3FK2-PALU.

There are seven states that limit no-excuse vote-by-mail on the basis of age: Indiana, Kentucky, Louisiana, Mississippi, South Carolina, and Texas limit it to citizens over the age of sixty-five, and Tennessee limits it to citizens over the age of sixty. NCSL, Voting Outside the Polling Place, *supra*, at 3 n.1, tbl. 2. Thus, the answer to the question presented affects voting opportunities for millions of citizens.

This Court should not allow several more election cycles to occur before it resolves this important question of constitutional law.

III. The Fifth Circuit's construction of the Twenty-Sixth Amendment is wrong.

The words of the Twenty-Sixth Amendment are straightforward: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." The Fifth Circuit's construction of the Amendment, which holds that only laws that take away an entitlement a voter previously had can constitute "abridgment," cannot be squared with this Court's decisions construing that term elsewhere in the Constitution.

As the Fifth Circuit conceded, "[t]he language and structure of the Twenty-Sixth Amendment mirror the Fifteenth, Nineteenth, and Twenty-Fourth Amendments." Pet. App. 79a-80a. Those amendments

provide, respectively, that the right to vote shall not be "denied or abridged" based on race, sex, or failure to pay a poll tax "or other tax." A state would plainly violate those amendments if it offered no-excuse mail voting only to whites, only to men, or only to taxpayers. This is so even though the challenged law would not "make[] it more difficult for" Black citizens, women, or voters who could not afford the tax "relative to the status quo," *id.* 98a. It is equally plain that Texas has violated the Twenty-Sixth Amendment by offering an unrestricted option to vote by mail only to voters over the age of sixty-five. The Fifth Circuit held otherwise because it failed to take the Amendment's text seriously.

1. "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting). The language of the Twenty-Sixth Amendment is nearly identical to that of its three predecessor voting rights amendments and "embodies the language and formulation of the 19th amendment, which enfranchised women, and that of the 15th amendment, which forbade racial discrimination at the polls." S. Rep. No. 92-26 at 2 (1971), as well as the Twenty-Fourth Amendment, which "clearly and literally bars any State from imposing a poll tax on the right to vote," *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Thus, the Twenty-Sixth Amendment must be read *in pari materia* with these virtually identical constitutional provisions.

To be sure, age is unlike race or sex in that it does not receive heightened scrutiny under the Fourteenth

Amendment, which applies to all state action. But what the Fifth Circuit failed to recognize is that after ratification of the Twenty-Sixth Amendment, the Constitution *does* treat age (once a citizen has turned eighteen) identically with race and sex as an impermissible basis for making distinctions when it comes to *voting*.

2. With respect to the Fifteenth Amendment, this Court squarely rejected the proposition that abridgment occurs only when a citizen is made worse off than he was before on account of race. The Court recognized that abridgment "necessarily entails a comparison." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). But while the "baseline with which to compare the [challenged practice]" in proceedings under Section 5 of the Voting Rights Act involves a temporal comparison between the new practice and the status quo ante, that is because the Act "uniquely deal[s] only and specifically with changes in voting procedures." *Id.*

By contrast, this Court explained that under the Fifteenth Amendment, "abridging" does *not* "refer[] only to retrogression"; rather, it should be read to refer "to discrimination more generally." *Bossier Par.*, 528 U.S. at 334. Thus, the comparison in a Fifteenth Amendment case should be between the right to vote enjoyed by white citizens and the right to vote enjoyed by citizens who are members of racial minorities (that is, to reach discrimination on account of race). For example, in *Louisiana v. United States*, 380 U.S. 145 (1965), this Court held that Louisiana's 1960 requirement that aspiring voters "'be able to understand' as well as 'give a reasonable interpretation' of any section of the State or Federal

Constitution," *id.* at 149, violated the Fifteenth Amendment simply because Black citizens were held to a stricter standard than their white counterparts. *Id.* at 153.

In borrowing language from the Fifteenth Amendment, Congress sought to accomplish in the Twenty-Sixth Amendment "exactly" what its predecessors had sought to accomplish "in enfranchising the [B]lack slaves with the 15th amendment" and "enfranchising women in the country with the 19th amendment." 117 Cong. Rec. H7539 (Mar. 23, 1971) (statement of Rep. Pepper). Because a plaintiff in a Fifteenth or Nineteenth Amendment case is not required to show retrogression, neither can a plaintiff in a Twenty-Sixth Amendment case be required to make such a showing.

To see why, recall that voting rules and procedures are in constant flux. It used to be that virtually all voters cast their votes in person at a local polling place on the first Tuesday after the first Monday in November. But the "right to vote" is not static. Today, a growing proportion of voters exercise their right to vote by casting a mail-in ballot, voting during an early voting period, or dropping off their ballot in some other way. And many jurisdictions have dramatically extended poll hours beyond normal business hours, so that polls open as early as 6 a.m. or stay open as late as 9 p.m. None of these practices was generally in use in 1870, when the Fifteenth Amendment was ratified (or in 1920, when the Nineteenth Amendment was ratified). So under the Fifth Circuit's reasoning, a state would be free to provide early voting to men but not to women, or longer polling place hours for white voters than for

Black ones. After all, the provision of early voting or longer polling hours to *other* voters in no way "makes it more difficult" for female or Black citizens "to exercise [their] right to vote relative to the status quo" and in neither case was "the status quo itself . . . unconstitutional," Pet. App. 98a. The Fifth Circuit's test therefore simply cannot be right.[4]

3. This Court's construction of the Twenty-Fourth Amendment in *Harman v. Forssenius*, 380 U.S. 528 (1965), confirms that the Fifth Circuit erred in thinking that under-65 voters' right to vote is not "abridged" by their exclusion from no-excuse vote-by-mail.

In anticipation of the ratification of the Twenty-Fourth Amendment, Virginia enacted a provision, Section 24-17.2, that required a voter who wished to vote in federal elections either to pay the usual poll tax or to "file a certificate of residence in each election year." *Harman*, 380 U.S. at 532. This Court held unanimously that that provision was "repugnant to the Twenty-fourth Amendment." *Id.* at 533. The Court acknowledged that Virginia could abolish its poll tax altogether and then require all voters to file the certificate of residence. *See id.* at 538. But requiring a voter who did not pay the poll tax to file the certificate nevertheless "constitute[d] an abridgment of the right to vote" for failure to pay the tax. *Id.*

The Court pointed out that Section 24-17.2 "impose[d] a material requirement solely upon those"

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[4] To be sure, these hypothetical laws would *also* almost certainly violate the Fourteenth Amendment. But that does not undercut the fact that they would violate the Fifteenth or Nineteenth as well.

citizens who did not pay the poll tax. *Harman*, 380 U.S. at 541. The Court then emphasized that Section 24-17.2 "would not be saved even if" the burden of filing a certificate of residence was "no more onerous, or even somewhat less onerous, than the poll tax." *Id.* at 542. Put another way, even if voters were *better off* after the enactment of Section 24-17.2, because the state had made it *easier* for them to vote, the provision would still have abridged the non-taxpayers' right to vote. "*Any* material requirement" based "solely" on declining to pay a poll tax "subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Harman*, 380 U.S. at 542 (emphasis added).

As in *Harman*, requiring under-65 voters to show up at the polls in person during specified hours while allowing over-65 voters to cast ballots from the comfort of their homes at whatever hour they choose imposes a "material requirement," *Harman*, 380 U.S. at 542, on younger voters solely on account of age. The Fifth Circuit did not deny that it can be more "cumbersome," *Harman*, 380 U.S. at 541, to vote in person; that, after all, is precisely why the state extended no-excuse mail-in voting to seniors.

Put another way, the Twenty-Sixth Amendment itself sets out the relevant comparison for determining abridgment: It compares voters of different ages, not voters during different eras. The Fifth Circuit therefore erred in holding that the appropriate comparison asks whether voting is now "*more difficult* for that person than it was before the [challenged] law was enacted or enforced." Pet. App. 10a (quoting Pet. App. 95a). To the contrary: The appropriate comparison here is between the right to vote that Texas provides to citizens over the age of sixty-five and

the right it provides to younger voters. The latter right is restricted in a way that the former is not. And it is restricted "solely," *Harman*, 380 U.S. at 542, because of the voters' age thereby subverting the effectiveness of the Twenty-Sixth Amendment.

4. The Fifth Circuit's decision also impedes the purpose of the Twenty-Sixth Amendment. The Amendment does more than merely establish the voting age; it is also designed to prohibit age-based discrimination in voting. *See, e.g.*, 117 Cong. Rec. H7534 (Mar. 23, 1971) (statement of Rep. Poff) (explaining that the Amendment "guarantees that citizens who are 18 years of age or older shall not be discriminated against on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting.").

Properly understood, the Amendment sought to both enfranchise eighteen- to twenty-year-old voters and ensure equal voting access regardless of age. Indeed, Congress expressed concern that jurisdictions might engage in practices to depress young citizens' turnout. It worried that "forcing young voters to undertake special burdens—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election." S. Rep. No. 92-26 at 14.

To be sure, nothing in federal constitutional law requires Texas to allow no-excuse mail-in voting. But once Texas does decide to allow such voting for some citizens, it cannot deny it to other citizens on the basis of an impermissible characteristic. As this Court

declared in *American Party of Texas v. White*, 415 U.S. 767 (1974), "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.* at 795. The gravamen of the Twenty-Sixth Amendment is that all otherwise qualified voters are "in similar circumstances" with respect to age.

5. Nor can the Fifth Circuit's limitation of "abridge[ment]" to cases where the challenged law makes individuals worse off than they were before be squared with the Constitution's uses of the term outside the voting context.

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. From time to time, governments "create" new public forums, when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Pleasant Grove v. Summum*, 555 U.S. 460, 469 (2009). But once they have created a new forum, they cannot discriminate on the basis of a speaker's viewpoint in providing access to that forum. *Id.* at 470. A government could not defend that discrimination on the grounds that the excluded speakers were no worse off than before. So, too, when a government like Texas's creates a new way of voting that has not traditionally been offered, it cannot discriminate on the basis of age in making that new mechanism available.

In a similar vein, the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. Thus, in *Saenz v. Roe*, 526 U.S. 489 (1999), this Court struck down California's policy of limiting welfare benefits paid to new residents, for the first year they lived in California, to the benefits they would have received in the State of their prior residence. The constitutional infirmity was that they were treated differently from other citizens, *id.* at 505; it did not matter that the amount of their benefits had neither decreased when they moved nor been unconstitutional to begin with.

* * * * *

The Fifth Circuit's decision flouts the text and purpose of the Twenty-Sixth Amendment: to guarantee equal access to voting regardless of age. This Court should reject that construction and hold that the Amendment means what it says.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 5, 2023

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 6, 2023
Lyle W. Cayce
Clerk

No. 22-50748

JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING; BRENDA LI GARCIA,

Plaintiffs-Appellants,

versus

JANE NELSON, *Texas Secretary of State*,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:20-CV-438

Before JONES, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:[*]

Prior to this appeal, Plaintiffs, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia, sought and obtained a preliminary injunction from the district court, on grounds that a Texas election law was unconstitutional as applied during the COVID-19 pandemic. The particular law at issue only allowed mail-in voting for adults 65 and older

[*] This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

without excuse. This court rejected that argument in a decision vacating the injunction and remanding the case to the district court. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020) ("*TDP II*"). Now this case is back before us on review; but this time, the argument is slightly different. Plaintiffs now argue that the same election law is facially unconstitutional notwithstanding COVID-19 concerns. Recognizing the language in our prior decision, the district court dismissed their claim. Because our caselaw forecloses this issue and there has been no intervening change of law, we AFFIRM.

I. BACKGROUND[1]

Texas voters are generally required to cast their ballots in person unless they face a particular circumstance or hardship that is expressly provided for in the state's election code. *See* Tex. Elec. Code §§ 82.001–.004. If, on election day, the voter (1) anticipates their absence from a county of residence, *id.* at § 82.001; (2) has a sickness or physical condition that prevents them from showing up to the polls without a likelihood of injury or a need for assistance or is expecting to give birth within three weeks before or after election day, *id.* at § 82.002; (3) is 65 or older, *id.* at § 82.003; or (4) incarcerated, *id.* at § 82.004, the voter may apply to cast his ballot by mail. *See In re State of Tex.*, 602 S.W.3d 549, 559 (Tex. 2020).

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[1] The extensive background underlying this case is thoroughly described in our previous opinion and briefly summarized here for purposes of completeness. *See TDP II*, 978 F.3d at 174–76.

Plaintiffs are Texas voters who are between the ages of 20 and 60 and want to cast mail-in ballots. They argue that Texas's age-based eligibility for casting mail-in ballots violates the Twenty-Sixth Amendment, which provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI § 1. According to Plaintiffs, their right to vote is "abridged" because § 82.003 extends the opportunity to vote by mail to a group "solely on the basis of their age."[2]

Plaintiffs brought the instant federal suit against several state officials including the Secretary of State.[3] They alleged that the age-based condition was both "unconstitutional as applied to these Plaintiffs during the pandemic" and "facially unconstitutional." Plaintiffs subsequently filed a motion for a preliminary injunction regarding their as-applied claim. Their claim focused on the added challenges to voting that arose from the spread of COVID-19 during an election year. They sought to enjoin the state from denying mail-in ballots to otherwise eligible voters under the age of 65. In reviewing this

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[2] Plaintiffs first presented a similar constitutional argument in state court at the onset of the COVID-19 pandemic. They sought a declaration that Texans who needed to socially distance could vote by mail under the notion that the risk of contracting COVID-19 was sufficient to meet the "physical condition" category under § 82.002. *State of Tex.*, 602 S.W.3d at 551. The Supreme Court of Texas held that "a lack of immunity to COVID-19 is not itself a 'physical condition' for being eligible to vote by mail within the meaning of § 82.002(a)." *Id.* at 560.

[3] Although there were other defendants in this suit, Plaintiffs bring their appeal only against the Secretary of State.

claim, the district court, applying strict scrutiny, held that Plaintiffs "established that they are likely to succeed on their as applied Twenty-Sixth Amendment claim," and entered the injunction.

The state officials appealed and sought an emergency motion for a stay pending appeal. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020) ("*TDP I*"). A motions panel of this court granted the motion to stay, and ultimately vacated the injunction. *Id.* at 412. As to the as-applied challenge, it determined that rational basis review, rather than strict scrutiny, was the proper standard because the right to a mail-in ballot was at stake rather than the right to vote. *TDP I*, 961 F.3d at 408–09 (citing *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807–08 (1969)). Because there was "no evidence that Texas [] denied or abridged" the right to vote, the panel concluded that Plaintiffs failed to show a substantial likelihood of success on the merits, and the injunction was stayed pending merits review.[4] *TDP I*, 961 F.3d at 409 (emphasis omitted).

Later when their appeal came before the merits panel, Plaintiffs defended the preliminary injunction "only on Twenty-Sixth Amendment grounds." *TDP II*, 978 F.3d at 176. The panel first grappled with the lack of clarity in Plaintiffs' briefing. Based on the nature of their arguments, it was unclear whether Plaintiffs were still challenging the law's constitutionality in the pandemic context or whether they were abandoning their as-applied challenge for

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[4] Plaintiffs' writ of certiorari to the Supreme Court in response to this decision was denied. *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020).

the facial challenge. *Id.* at 177. Despite this lack of clarity, the panel cabined its review to the district court order properly before it. *Id.* at 177–78. As stated, that order solely addressed the as-applied challenge—i.e., it considered the constitutionality of § 82.003 in light of COVID-19 concerns. After establishing standing, ripeness, and the inapplicability of the political question doctrine, the court held that, contrary to the district court's conclusions, § 82.003 does not run afoul of the Twenty-Sixth Amendment because "conferring a benefit on another class of voters does not deny or abridge" other individuals' right to vote. *Id.* at 194. As such, it vacated the injunction and remanded the case to the district court.[5] *Id.*

On remand, Plaintiffs filed a second amended complaint.[6] It alleged that § 82.003, alone and considered alongside upcoming election policies and future pandemic conditions, was unconstitutional, both as applied and facially. As to the allegations regarding future laws and conditions, the district court held that Plaintiffs lacked standing and that their claims were unripe and precluded by sovereign immunity. As to Plaintiffs' allegations based on

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[5] Plaintiffs also filed a writ of certiorari to the Supreme Court on this decision, which was denied. *Tex. Democratic Party v. Abbott*, 141 S. Ct. 1124 (2021).

[6] Intervening as plaintiffs, the League of United Latin American Citizens and the Texas League of United Latin American Citizens also filed a complaint. When the Secretary moved to dismiss Plaintiffs' complaint, it moved to dismiss the intervenors' complaint as well. The district court addressed the claims congruently in both complaints when it dismissed the suit based on a failure to state a claim. Nevertheless, only Plaintiffs (i.e., Cascino, Sansing, and Garcia) appealed.

current harm, the district court dismissed them on the merits. Pertinent here, it held that this court's decision in *TDP II* foreclosed Plaintiffs' Twenty-Sixth Amendment claim, "as a matter of law," and that the "law of the case" doctrine precluded it from relitigating this issue. The suit was dismissed in its entirety, and Plaintiffs timely appealed. On appeal, Plaintiffs' arguments rely only on a facial challenge of the Twenty-Sixth Amendment claim against the Secretary. Specifically, they argue that the election law's age-based requirement is unconstitutional, and the district court erred in dismissing their claims based on the rule of orderliness and the law of the case doctrine.

II. STANDARD OF REVIEW

When a district court dismisses a claim pursuant to 12(b)(6), this court conducts a de novo review of that judgment on appeal. *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019). A "claim[] may be dismissed under Rule 12(b)(6) 'on the basis of a dispositive issue of law.'" *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)). It may also be dismissed "if the complaint does not contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In our review, we "must accept all well-pleaded facts as true, and . . . view them in the light most favorable to the plaintiff." *Id.* at 735 (quoting *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th. Cir. 1986)).

Finally, whether the law of the case doctrine "forecloses any of the district court's actions on remand" warrants de novo review. *Deutsche Bank*

Nat'l Tr. Co. v. Burke, 902 F.3d 548, 551 (5th Cir. 2018) (quotation omitted).

III. DISCUSSION

In this appeal, Plaintiffs seek to prevent preliminary barriers to the court's review of their facial challenge to the age-based election law. Specifically, they assert that: (1) they have standing to bring this claim; (2) that this claim is ripe for review; and (3) that this claim is not barred by sovereign immunity. Plaintiffs highlight that, unlike some of their claims that were dismissed for these reasons on remand, their facial challenge does not ask the court to "consider potential future legislation or evaluate the potential impact of the pandemic in future elections." They also point to this court's prior decision in *TDP II* holding that they had standing to challenge the election law and that the Secretary had a sufficient connection to the enforcement of the election law to preclude sovereign immunity. *See TDP II*, 978 F.3d at 178. In response to these arguments, the State concedes that the facial challenge "is ripe and that *TDP II* establishes [that] [P]laintiffs have standing to bring this claim and that it is not barred by the Secretary's sovereign immunity." The parties, therefore, agree that this appeal is properly before this court for review of the merits.

The single merits question before us is whether the Twenty-Sixth Amendment prohibits the State from providing access to mail-in ballots for those 65 and older to the exclusion of younger voters.[7] As

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[7] As the State notes, Plaintiffs have abandoned all other claims against all other defendants. *See also Brinkmann v. Dall. Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987)

stated, a prior panel vacated a preliminary injunction arising from Plaintiffs' challenge to the election law as applied during the perils of the COVID-19 pandemic. *See TDP II*, 978 F.3d at 177–78. In that decision, the court held that "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." *Id.* at 192. It then stated that "[§] 82.003 itself does not violate the Twenty-Sixth Amendment." *Id.* The district court held that this decision foreclosed its review of the facial challenge to § 82.003 and holding otherwise would violate the law of the case doctrine.

A. Rule of Orderliness

Plaintiffs first argue that *TDP II* does not foreclose their current appeal because "the preliminary injunction review panel disclaimed ruling on the facial challenge presented in this appeal." As such, they contend that the rule of orderliness does not apply to their facial challenge. On the other hand, the State argues that the district court did not err in holding that *TDP II* binds the outcome of the central question of this appeal, regardless of whether Plaintiffs now bring a facial or as-applied challenge. According to the State, even though the prior panel did not ultimately decide Plaintiffs' facial challenge to § 82.003 because it was not the exact question before it, the holding in *TDP II* "did not turn on the facts of the pandemic." We agree with the State that *TDP II* already answered the question that Plaintiffs attempt to relitigate now, and thus the rule of orderliness must apply.

(holding that an appellant abandons claims on appeal by failing to identify any error in the district court's analysis).

Under the rule of orderliness, we may not overrule controlling precedent unless there is "an intervening change in the law, such as a statutory amendment or a decision from either the Supreme Court or our en banc court." *Thompson v. Dall. City Attorney's Off.*, 913 F.3d 464, 467 (5th Cir. 2019). In other words, the rule of orderliness applies when a prior panel decision already answers the issue before us. *See Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 400 (5th Cir. 2022) (explaining that the rule of orderliness "binds us to follow a prior panel's decision on an issue"); *McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 385 (5th Cir. 2011). *TDP II* is a published opinion that provides a substantive analysis of whether § 82.003's age-based requirement is violative of the Twenty-Sixth Amendment. Although the prior panel cabined its analysis to the as-applied question that was the only dispute on review, it noted that the analysis necessarily required it to answer generally "whether the law denies or abridges [Plaintiffs'] right to vote based on age." *TDP II*, 978 F.3d at 182. It further stated throughout the decision that "[r]egardless of whether [Plaintiffs brought] a facial or as-applied challenge, [the] analysis does not turn on the effect of the pandemic." *Id.*

In deciding to vacate the preliminary injunction on § 82.003, this court went step-by-step through the exact analysis that would apply to a facial challenge. It first determined that "the Twenty-Sixth Amendment confers an individual right to be free from the denial or abridgment of the right to vote on account of age." *Id.* at 184. It then established the scope of the Amendment's protection by distinguishing a right to vote from the right to an

absentee ballot. *Id.* at 188. Based on its interpretation of the terms "denied" and "abridged," the panel made clear that "an election law abridges a person's right to vote . . . only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced." *TDP II*, 978 F.3d at 191. A law, such as the one at issue here, which "makes it *easier* for others to vote does not abridge any person's right to vote for the purposes of the Twenty-Sixth Amendment." *Id.* In its concluding language, the panel explicitly stated that "§ 82.003 itself does not violate the Twenty-Sixth Amendment." *Id.* at 192. It was not until after the panel drew this conclusion that it considered whether the pandemic affected its analysis for purposes of resolving the as-applied challenge. *Id.* Thus, the scope of the mandate in *TDP II* prevents this panel from departing from that holding and ruling in Plaintiffs' favor on their facial challenge.

What's more, Plaintiffs do not point to any intervening law that we may rely on to sway from our precedent. *See McClain*, 649 F.3d at 385. As such, like the district court, we reject Plaintiffs' attempt to relitigate these issues and hold that the rule of orderliness applies. *See Thompson*, 913 F.3d at 467.

B. Law of the Case Doctrine

Plaintiffs alternatively argue that the district court erred in applying the mandate of *TDP II* because that decision was clearly erroneous and following it would constitute a manifest injustice. We disagree. Under the law of the case doctrine, "an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal."

McClain, 649 F.3d at 385 (quoting *Fuhrman v. Dretke*, 442 F.3d 893, 896 (5th Cir. 2006)). "The district court may only deviate from the mandate if one of the exceptions to the law of the case doctrine applies." *Fuhrman*, 442 F.3d at 897. Those exceptions include: "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice." *Id.* (quoting *United States v. Becerra*, 155 F.3d 740, 752–53 (5th Cir. 1998)).

According to Plaintiffs, the prior panel in *TDP II*, "significantly departed from well-established law" when it failed to read the Twenty-Sixth Amendment "consistent with the Fifteenth, Nineteenth, and Twenty-Fourth Amendments," and this was a manifest injustice because it "allow[ed] [the State] to continue to discriminate against Plaintiffs on account of age in voting." However, the prior panel squarely addressed these arguments in *TDP II* and thus it appears Plaintiffs are simply attempting to relitigate their previous appeal.[8] *See* 978 F.3d at 189–92. The exceptions to the law of the case doctrine may not be used as a means to revisit issues properly addressed. Indeed, the manifest injustice exception is to be

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[8] In the prior appeal, the *TDP II* panel noted that Plaintiffs only mentioned the COVID-19 pandemic as a basis for the law's unconstitutionally a few times throughout their briefs. In its analysis determining whether Plaintiffs were bringing an as-applied or a facial challenge, it further highlighted that Plaintiffs explicitly stated that, rather than the pandemic, it was the "unambiguous text" of the Twenty-Sixth Amendment that rendered the law unconstitutional. *TDP II*, 978 F.3d at 176–77.

applied narrowly such that "mere doubts or disagreement about the wisdom of a prior decision of this or a lower court will not suffice." *Hopwood v. Texas*, 236 F.3d 256, 272 (5th Cir. 2000). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must be dead wrong." *Id.* at 272–73.

The prior panel addressed "seemingly novel questions regarding the Twenty-Sixth Amendment." *Tex. Democratic Party*, 140 S. Ct. at 2015 (Sotomayor, J., writing separately, but agreeing with the denial of application to vacate stay). Plaintiffs point to no evidence that strikes us as a clearly erroneous application of law. The district court therefore did not err in holding that the law of the case doctrine applied and in dismissing Plaintiffs' Twenty-Sixth Amendment challenge to Texas' age-based election law.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM.

APPENDIX B

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,	[FILED July 25, 2022]
Plaintiffs,	Civil Action No. SA-20-CA-438-FB
and	
LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), and TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS,	**AMENDED[2] ORDER REGARDING DEFENDANT'S MOTIONS TO DISMISS**
Plaintiff-Intervenors,	
V.	
JOHN B. SCOTT, Texas Secretary of State,[1]	
Defendant.	

[1] Secretary of State John B. Scott is automatically substituted as defendant for Ruth Hughs, who formerly served as the Texas Secretary of State. *See* FED. R. CIV. P. 25(d). Local election officials, the Texas Governor and Texas Attorney General were previously dismissed as defendants in this action. Plaintiffs and plaintiff-intervenors are collectively referred to as "plaintiffs" unless otherwise noted.

[2] The Court's original order was amended to make a non-substantive correction.

This case of first impression presents two main issues:

1. Does the clear text of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution mean what it says, thus rendering Texas's age restriction on mail-in voting unconstitutional?[3]
2. Is this Court, irrespective of what it believes the law should be, obligated to follow appellate guidance and the interpretative trend of the evolving concept of judicial deference to state legislatures regarding vote-by-mail procedures?

This Court answers the first issue affirmatively in plaintiffs' favor. But there being "many a slip between the cup and the lip,"[4] the Court, based on its reading and interpretation of current caselaw, is compelled to respond "Yes" to the second question, inuring to defendant's benefit. This Court has been presented previously with a conundra of cases in which the law requires results contrary to personal opinions. *See Dutmer v. City of San Antonio*, 937 F.

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[3] The Fourteenth Amendment guarantees that no person shall be denied equal protection under the law. U.S. CONST. amend. XIV; *see also* Tex. Elec. Code § 82.003 (Texans sixty-five and older can vote-by-mail).

[4] The earliest surviving record of this proverb in English is in Richard Taverner's Proverbs of Erasmus, written in 1539. This translation quotes the proverb as "Many thynges fall betwene the cuppe and the mouth. . . .Betwene the cuppe and the lyppes maye come many casualties." *Jennifer Speake*, *Oxford Dictionary of Proverbs* 202 (Oxford Univ. Press 2015).

Supp. 587, 589, 595 (W.D. Tex. 1996), and collected cases in Appendix I.

Accordingly, because the judicial handwriting, writ large, is on the constitutional wall, the defendant's motions to dismiss are granted for the reasons stated herein.

JUDICIAL DEFERENCE TO STATE LEGISLATURES

While the Court agrees with plaintiffs there are procedural differences among the cases cited by defendant,[5] federal courts are expressly deferring to state legislatures.[6] *See* Appendix II. The jury is still out on whether judicial deference will extend to legislative bodies wishing to return to the not-so-halcyon days of yesteryears' poll taxes and literary tests.[7] The concept of judicial deference to state legislatures is not always a *fait accompli* and appears to be applied unevenly. *Compare and contrast Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (giving judicial deference to state legislatures'

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[5] Rule 12(b) vs. preliminary injunction or summary judgment.

[6] Some in the academy are not in agreement with the concept of judicial deference. *See e.g.,* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59 (2021); Adam Shelton & Anthony Sanders, *A Story of Judicial Deference to the Will of the People*, 15 NYU J.L. & LIBERTY 55 (2021); Joseph S. Diedrich, *Separation, Supremacy, and the Unconstitutional Rational Basis Test*, 66 VILL. L. REV. 249, 255 (2021).

[7] *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666-67 (1966) (declaring poll taxes unconstitutional); *Guinn v. United States*, 238 U.S. 347, 364 (1915) (striking down literacy requirements for voting).

abortion laws) *with New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (refusing to give judicial deference to State of New York's concealed handgun law) *and Carson v. Makin*, 142 S. Ct. 1987 (2022) (refusing to give judicial deference to Maine's ban on taxpayer tuition assistance payments to religious-backed private schools); *see also Moore v. Harper*, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022) (granting petition for writ of certiorari in case raising independent-state-legislature theory to determine whether Supreme Court will defer to North Carolina Legislature for drawing of redistricting maps); *see also McConchie v. Scholz*, Case No. 21-cv-3091, 2021 WL 6197318, at *28 (N.D. Ill. Dec. 30, 2021) (giving judicial deference to Democratic legislature in Illinois with three-judge panel rejecting Republicans' challenge to state legislature's remedial redistricting plan).

The Cynics[8] of antiquity and modernity might base their scepticism of judicial consistency on whose ox is it.[9]

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[8] "Cynics" were members of a Greek philosophical sect who divorced themselves from traditional ways of wealth and social status in order to find happiness in a simple life with whatever was present. WILLIAM DESMOND, CYNICS 1-3 (Vol. 3) (Rutledge Group et al. eds., 2008).

[9] "A Farmer came to a neighboring Lawyer, expressing great concern for an accident which he said had just happened. One of your Oxen, continued he, has been gored by an unlucky Bull of mine, and I should be glad to know how I am to make you reparation. Thou art a very honest fellow, replied the Lawyer, and wilt not think it unreasonable that I expect one of thy Oxen in return. It is no more than justice quoth the Farmer, to be sure; but what did I say?—I mistake—It is *your* Bull that has killed one of *my* Oxen. Indeed says the Lawyer, that alters

Circuit courts have likewise deferred to state legislatures particularly in voting cases. In *Griffin v. Roupas*, 385 F.3d 1128, 1129-30 (7th Cir. 2004), working mothers sought to expand voting options "that would allow people [to vote] who find it hard for whatever reason to get to the polling place on election day." The Seventh Circuit found no equal protection violation because, among other reasons, "unavoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate [legislative] policy, do not violate equal protection." *Id.* at 1132. Continuing this trend toward judicial deference in absentee voting cases, the Seventh Circuit recently determined that a state does not abridge the rights of younger voters in violation of the Twenty-Sixth Amendment by allowing older voters the option to vote by mail, even during the pandemic. *Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020). The Supreme Court denied certiorari in both cases. *Griffin*, 125 S. Ct. 1669 (2005); *Tully*, 141 S. Ct. 2798 (2021); *see also* Fifth Circuit and other cases discussed in the following pages and Appendix II.

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the case: I must inquire into the affair; and if—*And If!* said the Farmer—the business I find would have been concluded without an *if*, had you been as ready to do justice to others as to exact it from them." NOAH A. WEBSTER, THE AMERICAN SPELLING BOOK 101–02 (Hartford, Hudson & Goodwin 1788) (emphasis in original); *see also Exodus* 21:35 ("And if one man's ox hurt another's, that he die; then they shall sell the live ox, and divide the money of it; and the dead ox also they shall divide.").

DISCUSSION FOLLOWING REMAND

I. Overview

Now before the Court on remand from the Fifth Circuit are "the real issue [of] equal protection" and other matters following the determination that "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." *Texas Democratic Party v. Abbott* ("*TDP II*"), 978 F.3d 168, 192, 193 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021). Defendant moves to dismiss plaintiffs' post-remand amended complaints seeking to expand the excuse-free mail-in-voting offered to those at least sixty-five years of age to all Texas voters regardless of age.

Texas law requires most voters to cast their ballots in person either on election day, Tex. Elec. Code ch. 64, or during an early-voting period prescribed by the legislature, *id.* § 82.005. Voters may apply to vote by mail in only one of four instances—if they: (1) anticipate being absent from their county of residence; (2) have a disability that prevents them from appearing at the polling place; (3) are sixty-five or older; or (4) are confined in jail. Tex. Elec. Code §§ 82.001-.004. "Disability" for the purposes of the election code is defined to allow a qualified voter to vote by mail if the "voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." *Id.* at § 82.002(a).

Plaintiffs filed this action on April 7, 2020, and sought a preliminary injunction which was

substantively identical to an injunction that plaintiffs sought in state court. On May 19, 2020, this Court issued its order on the preliminary injunction requiring no-excuse mail-in balloting in Texas. The state defendants appealed and sought a stay of the injunction pending the appeal. A Fifth Circuit Panel granted the stay. *Texas Democratic Party v. Abbott* ("*TDP I*"), 961 F.3d 389, 397 (5th Cir. 2020). On the merits, plaintiffs defended the injunction solely on the grounds of their Twenty-Sixth Amendment claim. The Fifth Circuit merits Panel ultimately vacated the injunction and remanded this case for further proceedings consistent with the opinion on interlocutory appeal. *TDP* II, 978 F.3d at 194. Plaintiffs filed amended complaints. Defendant moves to dismiss the amended complaints, which plaintiffs oppose. This Court requested additional briefing. Supplemental briefs have now been filed by the parties and the issues are properly before this Court.

II. Arguments

Plaintiffs bring claims on behalf of eighteen to sixty-four-year-old voters on the basis of age and race. Citing unprecedented challenges posed by the COVID-19 pandemic, plaintiffs allege that Texas's age limitation for voting–on its own and combined with election policies yet to be enacted and the trajectory of the pandemic–discriminates on the basis of age, both facially and as applied, and on the basis of age/race by creating separate classes of voters with lesser rights to access the ballot box. Specifically, plaintiffs contend that § 82.003 of Texas Election Code violates the Twenty-Sixth Amendment, the First Amendment, the Fourteenth Amendment, the

Fifteenth Amendment, and § 2 of the Voting Rights Act (sometimes referred to as "VRA").

Defendant's motions seek dismissal of the amended complaints under Rule 12(b)(1) for lack of jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Defendant moves to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1) arguing: (1) plaintiffs lack standing to complain of speculative future election policies and pandemic conditions; (2) plaintiffs' claims regarding unspecified future election policies and pandemic conditions are not ripe; and (3) sovereign immunity bars plaintiffs' claim regarding unspecified "election conditions." Defendant also moves to dismiss for failure to state a claim pursuant to Rule 12(b)(6) arguing: (1) the Fifth Circuit's opinion in this case forecloses plaintiffs' Twenty-Sixth Amendment claim; (2) plaintiffs' claims of unconstitutional race discrimination fail; (3) plaintiffs do not plead a viable claim under § 2 of the VRA; (4) Texas's age restriction on mail-in-voting easily passes the rational-basis review applicable to plaintiffs' challenges; and (5) alternatively, plaintiffs' claims under the First, Fourteenth and Fifteenth Amendments fail even under the more onerous *Anderson/Burdick* test.

Plaintiffs respond that defendant's jurisdictional challenges improperly narrow the scope of their claims. Plaintiffs further contend they have stated claims on the merits upon which relief can be granted sufficient to survive dismissal. This Court first addresses defendant's jurisdictional challenges under Rule 12(b)(1) and then turns to Rule 12(b)(6).

III. Dismissal Under Rule 12(b)(1)

Defendant does not contest that the Court has jurisdiction under Rule 12(b)(1) in terms of what is before the Court on remand. Defendant does challenge plaintiffs' standing, and raises ripeness and sovereign immunity, for alleged speculative matters raised in the amended complaints following remand. Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of a case for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Because subject-matter jurisdiction goes to the heart of the Court's power to hear the case, the Court should consider Rule 12(b)(1) challenges before addressing Rule 12(b)(6) challenges *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In considering a Rule 12(b)(1) motion, the Court may consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint, undisputed facts, and the Court's resolution of disputed facts. *Spotts v. United States*, 613 F.3d 559, 566 (5th Cir. 2010). In other words, the Court may "weigh the evidence and satisfy itself" that subject matter jurisdiction exists. *MDPhysicians & Assocs. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)).

A. Standing

Plaintiffs lack standing to challenge speculative future election policies and pandemic conditions. Standing is an indispensable element of federal court jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To establish standing, a plaintiff "must show: (1) an injury-in-fact that is (2) fairly

traceable to the defendant's challenged action (causation) and that is (3) redressable by a favorable decision (redressability)." *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). All three requirements are "an indispensable part of the plaintiff's case," and the party seeking to invoke federal jurisdiction bears the burden to establish them. *Lujan*, 504 U.S. at 561. To establish injury in fact, "a plaintiff must show he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation omitted).

To the extent plaintiffs allege harm caused by § 82.003 *when combined with* future pandemic conditions and "proposed bills," (docket nos. 141 ¶¶ 15-20, 81, 84, 86, 88, 92, 95), and unenacted "election policies" and future pandemic conditions, (docket no. 142 ¶¶ 35, 46–47, 53–54, 61), such claims are purely "conjectural." *See Lujan*, 504 U.S. at 560. Such assertions do not support any injury to plaintiffs that is concrete and particularized or actual and imminent. *See id.* Further, plaintiffs cannot plausibly claim that injuries from laws not yet enacted are "fairly traceable to the challenged action of [the Secretary]," or redressable by the Secretary. *Id.* Accordingly, plaintiffs lack standing to complain of such speculative harm.

B. Ripeness

Plaintiffs' claims regarding future pandemic conditions and unspecified bills and election policies are not ripe. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of

premature adjudication, from entangling themselves in abstract disagreements [until a] decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *National Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). Determining whether an issue is ripe for judicial review requires considering "[t]he fitness of the issues for judicial decision and . . . the hardship to the parties of withholding court consideration." *Id.* at 809; *see also Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."). This Court declines to analyze policies and laws that have not been enacted or evaluate the pandemic in light of in-person voting in future elections, and plaintiffs have not identified any concrete harm based on future contingent events. Accordingly, these claims are unripe.

C. Sovereign Immunity

Finally, to the extent plaintiffs seek to enjoin undefined "election conditions," those claims are barred by sovereign immunity. "[T]he principle of state-sovereign immunity generally precludes actions against state officers in their official capacities, subject to an established exception: the *Ex parte Young* doctrine." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (citation omitted). Thus, plaintiffs' claims fail unless they fit that exception. *Ex parte Young* "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 . . . ." *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). As a consequence, *Ex parte Young* applies only when the defendant has sufficient connection to the enforcement of the challenged statute. *See id.*

The Fifth Circuit held in this case that defendant has a sufficient connection to the enforcement of § 82.003 to overcome sovereign immunity for purposes of plaintiffs' interlocutory appeal. *TDP II*, 978 F.3d at 179. However, the Court emphasized that "[d]etermining whether *Ex parte Young* applies to a state official requires a provision-by-provision analysis, *i.e.*, the official must have the requisite connection to the enforcement of the particular statutory provision that is the subject of the litigation." *Id.* For example, in other cases, the Fifth Circuit recently determined that defendant lacks the requisite connection to the enforcement of certain statutory provisions relating to other early voting protocols. *See Mi Familia Vota v. Abbott*, 977 F.3d 461, 463–66 (5th Cir. 2020); *Texas Democratic Party v. Hughs*, 997 F.3d 288, 291 (5th Cir. 2020). Here, plaintiffs do not plead facts to show defendant's requisite connection to the enforcement of the future "election policies" and "election conditions" about which they complain in their amended complaints following remand. Moreover, plaintiffs cannot plausibly claim defendant has an enforcement role regarding unspecified laws that have yet "to be enacted" and may never be enacted. Accordingly, sovereign immunity bars any such claim against defendant. For these reasons, defendant's motion to

dismiss pursuant to Rule 12(b)(1) is granted such that plaintiffs' claims based on speculative future election policies and pandemic conditions are dismissed for lack of subject matter jurisdiction.

IV. Dismissal Under Rule 12(b)(6)

Rule 12(b)(6) permits the Court dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In deciding a Rule 12(b)(6) motion, the Court presumes the complaint's factual allegations, but not its legal conclusions, are true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 680-81 (2009). The Court then determines if the complaint alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility requires enough facts to allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Rule 12(b)(6) limits the Court's review to the complaint, documents attached to the complaint, and documents attached to the motion that are central to the claim and referenced by the complaint. *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). This Court turns to the merits of the motions.

A. The Twenty-Sixth Amendment

The Fifth Circuit's opinion in this case forecloses plaintiffs' Twenty-Sixth Amendment claim. Although the issue on interlocutory appeal was the preliminary injunction, the Fifth Circuit went beyond considering whether plaintiffs were likely to succeed on the merits of this claim. *See TDP II*, 978 F.3d at 192. The Court announced the standard for adjudicating

claims under the Twenty-Sixth Amendment. *Id.* Specifically, the Fifth Circuit held that plaintiffs' claim failed as a matter of law because:

> [T]he 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.

Id. In reaching its decision, the Fifth Circuit determined that plaintiffs had failed to show that Texas's age limitation on absentee voting made it "more difficult" for them to vote than it was before the law was enacted in 1971. *Id.* at 191. Accordingly, plaintiffs have failed to state a Twenty-Sixth Amendment claim upon which relief can be granted. And the "law of the case" rule forecloses relitigation of this issue. *United States v. Lee*, 385 F.3d 315, 321 (5th Cir. 2004).

B. Discrimination

1. Intentional Discrimination

As part of his Rule 12(b)(6) motion, defendant moves to dismiss plaintiffs' claims that Texas's age limitation on absentee voting was passed with a racially discriminatory purpose. Plaintiffs respond that they "are no longer pursuing a claim of intentional race discrimination at this time," (docket no. 155 at page 2 n.2), but later argue that they have stated such a claim. In any event, to the extent plaintiffs continue to allege racial discrimination claims under the Equal Protection Clause or the

Fifteenth Amendment, they have not pleaded facts to show intentional discrimination based on age by the Texas Legislature as a whole in enacting mail-in-voting in 1975. As defendant points out, this is a necessary component of those claims. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 481-82 (2000) ("Whether under the Fourteenth or Fifteenth Amendment, [the plaintiff] has been required to establish that the State or political subdivision acted with discriminatory purpose."). While plaintiffs try to fit a square racial peg into a round election hole, this Court cannot see a racial animus cause of action. *See Johnson v. Waller County*, No. 4:18-CV-03985, 2022 WL 873325, at *41 (S.D. Tex. Mar. 24, 2022) (seeing no racial animus against Black student voters based on Waller County's failure to provide polling location on college campus because there was no reason to believe "the adopted schedule had the effect of discriminating on the basis of race (or age)–much less that it was chosen *because* of such an effect") (emphasis in original).

2. Discriminatory Effect: § 2 of the Voting Rights Act

Plaintiffs allege Texas's age limitation on absentee voting is tantamount to a vote abridgement or denial that disparately impacts Hispanics aged eighteen to sixty-four. They contend that, because Texas's population over the age of sixty-five is disproportionately non-Hispanic White, a discriminatory effect can be shown insofar as White voters over the age of sixty-five have better access to absentee mail ballots than do Hispanic voters under the age of sixty-five. Plaintiffs bring this claim under § 2 of the Voting Rights Act.

Section 2 forbids application of a standard, practice, or procedure in a manner that results in a denial or abridgement of the right to vote on account of race or color. 52 U.S.C. § 10301(a). A violation is established when:

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). "Mere inconvenience cannot be enough to demonstrate a violation of § 2." *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2338 (2021).

Plaintiffs rely on *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), to support their § 2 claim. In *Veasey*, the Fifth Circuit was persuaded that Texas's voter identification law requiring certain specific forms of identification at the polls was tantamount to a § 2 vote denial because it imposed a discriminatory burden on Black voters. Here, the Fifth Circuit found *Veasey* to be inapposite to the facts of this case. *TDP I*, 961 F.3d at 402 n.2. In the words of the Panel staying this Court's preliminary injunction:

> *Veasey* stated only that Texas's provision of a mail-in ballot did not make up for the burdens that its voter-identification law placed on voting in person. *See* [830 F.3d] at 255 ("The district court did not clearly err in

> finding that mail-in voting is not an acceptable substitute for in-person voting in the circumstances presented by this case.”). *Veasey* nowhere said that the state must provide everyone multiple ways to vote. And here, unlike in *Veasey*, the state has not placed any obstacles on the plaintiffs’ ability to vote in person. *Veasey* is inapposite.

Id.

This conclusion appears to have been reinforced by the Supreme Court in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021). Although *Brnovich* did not involve absentee voting, it seems relevant to the extent that the Supreme Court clarified the standards for evaluating challenges to ballot counting and collection laws under § 2 of the Voting Rights Act. *Id.* at 2347. *Brnovich* concerned an Arizona law that required voters to vote in the precinct to which they were assigned based on their address, and stated that votes cast in the wrong precinct would not be counted. *Id.* The law also made it a crime for any person to knowingly collect an early ballot—either before or after it has been completed. *Id.* The *Brnovich* plaintiffs alleged, *inter alia*, that both provisions adversely and disparately affected American Indian, Hispanic, and African American voters in violation of § 2. *Id.* The Supreme Court held that the challenged provisions did not violate the VRA. *Id.* at 2325; *see also id.* at 2333 (discussing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

The Court acknowledged the state’s “indisputably . . . compelling interest in preserving the integrity of its election process.” *Id.* at 2347 (quotations omitted).

It found that interest sufficient to defeat the plaintiffs' claim under § 2, "[e]ven if the plaintiffs had shown a disparate burden." *Id.* The Court reiterated that § 2 does not impose a "freewheeling disparate-impact regime." *Brnovich*, 141 S. Ct. at 2341. To the contrary, "§ 2(b) of the Voting Rights Act directs us to consider the totality of circumstances that have a bearing on whether a state makes voting equally open to all and gives everyone an equal opportunity to vote—and not the totality of just one circumstance, namely, disparate impact." *Id.* (internal quotations omitted).

This means "voting necessarily requires some effort"—it "takes time and, for almost everyone, some travel"—and it "requires compliance with certain rules." ***Id.*** **at 2338. It means accepting that voters "must tolerate the usual burdens of voting"—and that having to endure such burdens does not mean that our electoral system is no longer "equally open" or fails to "furnish[ ] an equal opportunity to cast a ballot."** ***Id.*** **at 2338 (internal quotation omitted). In sum, "[m]ere inconvenience cannot be enough to demonstrate a violation of § 2."** *Brnovich*, 141 S. Ct. at 2338 (emphasis added).

Here, the Fifth Circuit found that the fundamental right to vote remains equally open to all Texas voters regardless of age, even during the pandemic, *see TDP II*, 978 F.3d at 191-93, and that differential access to absentee mail-ballots does not disproportionally burden any Texas voter because all Texas voters can vote in person. *See TDP I*, 961 F.3d at 402 n.2. Thus, that the privilege of voting absentee is not extended to voters who do not qualify for an

absentee ballot under § 82.003, appears to be one of the "minor inconveniences" that the Supreme Court held would not overcome Texas's interest in administering elections. *See TDP II*, 978 F.3d at 191 (holding that Texas's age restriction on absentee voting does not violate Twenty-Sixth Amendment because it does not make it "more difficult" for plaintiffs to vote than it was before law was enacted); *TDP I*, 961 F.3d at 402 n.2 (holding that Texas's age restriction on absentee voting does not violate § 2 because it does not place "any obstacles on the plaintiffs' ability to vote in person"); *see also* TDP II, 978 F.3d at 192-93 ("The record indicates Texas is taking the kinds of precautions" necessary to protect health and safety of in-person voting despite concerns over COVID-19).

Nonetheless, out of an abundance of caution, this Court addresses the specific intersecting claims of age and race discrimination made by plaintiffs in this case. Plaintiffs allege that Texas's age restriction on vote-by-mail eligibility places a discriminatory burden on "younger and minority voters, including many of [their] 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 Hispanic voters in Texas are between the ages of eighteen and twenty-nine. *Id.* As such, the theory is that Texas's age requirement for absentee voting primarily benefits older White voters, while denying the same opportunities to younger Hispanic voters.

Plaintiffs further "allege 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. They also state that Hispanic voters are more susceptible to COVID-19 than other voters. Plaintiffs therefore contend they have 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." *Id.*

In *Brnovich*, the Court characterized its opinion as, "for the first time[,] appl[ying] § 2 of the Voting Rights Act . . . to regulations that govern how ballots are collected and counted." *Id.* at 2330. At the outset, the Court "decline[d] . . . to announce a test to govern all [Voting Rights Act] claims involving rules . . . that specify the time, place, or manner for casting ballots." 141 S. Ct. at 2336. Having so qualified its ruling, the Court went on to "identify certain guideposts" that can help courts decide § 2 cases. *Id.* The five guideposts are:

1. "the size of the burden imposed by a challenged voting rule";
2. "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982";
3. "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups";

4. "the opportunities provided by a State's entire system of voting"; and

5. "the strength of the state interests."

Id. at 2338-40.

The Supreme Court gave great weight to Arizona's interests in enforcing the law. *Id.* at 2347–48. The Court further found that each state "indisputably has a compelling interest in preserving the integrity of its election process." *See id.* at 2347 (quoting *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam)). And "it should go without saying," the Court continued, "that a state may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Id.* at 2348. Finally, the Court recognized that "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence." *Brnovich*, 141 S. Ct. at 2347.

Brnovich supports the argument that plaintiffs fail to state a viable claim for a § 2 violation. In previous opinions in this case, the Fifth Circuit has held: (1) the fundamental right to vote remains equally open to all Texas voters, regardless of age; (2) that the privilege of voting absentee is not extended to voters that do not qualify for an absentee ballot under § 82.003 does not create a difficulty or obstacle to voting which overcomes Texas's compelling interest in election security, uniformity, and efficiency; (3) inconveniencing individuals to vote in person—early or on election day—ensures the orderly, secure administration of elections within Texas; and (4) Texas has a compelling interest in

preventing election fraud, and is not required to demonstrate a history of serious voting fraud issues or an inability to combat voting fraud in other ways. *See TDP II*, 978 F.3d at 189-194; *TDP I*, 961 F.3d at 402-05.

Plaintiffs also argue that § 82.003's alleged burden on their voting rights is directly tied to Texas's historical discrimination against Hispanics. Presuming this type of allegation could be sufficient, defendant points out that there is a temporal mismatch between the premises of the allegations and the conclusion plaintiffs ask this Court to reach. Their argument depends on the notion that Hispanics are disfavored because they are younger than White voters. However, their factual allegations in support of this position are based on current demographics from 2016, 2018, and 2020. Section 82.003 was passed in 1975, alongside measures extending the right to vote to anyone over eighteen, to conform to the Twenty-Sixth Amendment. *TDP II*, 978 F.3d at 192. Plaintiffs are not challenging a recently enacted law, but one that has been on the books for nearly fifty years. *TDP II*, 978 F.3d at 192. The crux of the assertion is that § 82.003 imposes a burden on the opportunities of Hispanics to participate in elections because the Hispanic population is young. However, there are no allegations about the relative age of Hispanics and Whites in 1975.

The remaining factors under the *Brnovich* analysis further compel dismissal. Under the analysis in that case, plaintiffs have not alleged anything beyond the "usual burdens of voting" when complying with a rule—age restrictions for mail voting—that does not "depart[ ] from what was

standard practice when § 2 was amended in 1982." *Brnovich*, 141 S. Ct. at 2338. As noted, Texas has been permitting no-excuse voting to persons sixty-five and older since 1975 (after the Twenty-Sixth Amendment was passed), *TDP II*, 978 F.3d at 192, and the privilege of absentee voting has historically been extended to the elderly and disabled in a majority of states. *Id.* at 190.

Moreover, the allegations of the "size of any disparities in a rule's impact on members of different racial or ethnic groups" are of uncertain dimensions and standards. *Brnovich*, 141 S. Ct. [a]t 2339. Plaintiffs argue Hispanics have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice because of their race. However, they state their claims on an intersecting bases of race and age, which renders the alleged disparate impact a function of age, not race. Plaintiffs allege there are more Hispanic voters under the age of sixty-five than there are White voters over the age of sixty-five, but this alone does not create the disparate effect required under § 2. *Id.* at 2341. The rest of the allegations are 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. This alleged disparate impact is a function of age, not race. Accordingly, it is not actionable under § 2.

Plaintiffs' other factual allegations of disparate impact similarly fail to state a Voting Rights Act claim. The allegation that Hispanic voters are more susceptible to COVID-19 than other voters may prove

to be true, but this argument fails to take into account age, and the arguments regarding work and student status fail to take into account race. Moreover, Texas law requires employers to provide paid leave if needed to vote. Tex. Elec. Code § 276.004. Texas law also 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. Additionally, to the extent that students live away from their county of registration, they can vote absentee under a different provision. *Id.* § 82.001. Under the analysis in *Brnovich*, Texas 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. And the "the state interest served by a challenged voting rule" is strong. *Brnovich*, 141 S. Ct. at 2339. For these reasons, defendant's Rule 12(b)(6) motions to dismiss plaintiffs' claims brought under § 2 of the Voting Rights Act must be granted.

3. Non-Racial Discrimination

Plaintiffs allege that Texas's age restriction on absentee voting imposes a substantial burden on their fundamental right to vote, in violation of the First and Fourteenth Amendments and they 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. Defendant moves to dismiss these claims under Rule 12(b)(6), arguing that § 82.003 passes the rational-basis review applicable to challenges under the First and Fourteenth Amendments to the United States Constitution.

The Fifth Circuit did not decide the applicable standard of review that this Court must apply to plaintiffs' constitutional claims but noted in dicta that "age-based distinctions are evaluated [under rational-basis review] in the usual case" and that "we have not seen any authority to support that it would require strict scrutiny as the district court initially applied." *TDP II*, 978 F.3d at 194. "On the other hand," the merits Panel continued, "some courts have applied what is known as the *Anderson/Burdick* balancing analysis to claims that an election law violates equal protection and have provided noteworthy reasons for doing so." *Id.*

Yet, the Fifth Circuit did determine that Texas's age restriction on absentee-voting does not deny or abridge the fundamental right to vote despite the pandemic. *Id.* at 192-93. Therefore, defendant makes a persuasive argument that the law does not impact the right to vote at all, and rational-basis scrutiny applies under *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). Moreover, another panel of the Fifth Circuit, considering a different challenge to Texas's rules for delivering absentee ballots during COVID, cited *TDP I* and discussed why the *McDonald* standard of review is the proper scrutiny to be applied in this case:

> Neither Plaintiffs nor the district court have cited any authority suggesting that a State must afford every voter multiple infallible ways to vote. **As we explained in *TDP I*, mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect. 961**

> **F.3d at 405. The principle holds true even if "circumstances beyond the state's control, such as the presence of the [coronavirus,]" or, here, possible postal delays, make voting difficult. *Id.*; see also *McDonald*, 394 U.S. at 810 & n.8, 89 S. Ct. 1404 (explaining that a State is not required to extend absentee voting privileges to all classes of citizens, even those for whom "voting may be extremely difficult, if not practically impossible," such as persons caring for sick relatives or businessmen called away on business).** We cannot conclude that speculating about postal delays for hypothetical absentee voters somehow renders Texas's absentee ballot system constitutionally flawed.

Texas League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 146 (5th Cir. 2020) (emphasis added), *dismissing appeal as moot but denying motion to vacate previous order*, No. 20-50867, 2021 WL 1446828, at *1 (5th Cir. Feb. 22, 2021).

Under this most lenient test, a law need only "bear some rational relationship to a legitimate state end." *McDonald*, 394 U.S. at 809. In utilizing its "broad powers to determine the conditions under which the right of suffrage may be exercised," Texas has not absolutely prohibited younger voters from voting, *TDP I*, 961 F.3d at 404, or "create[d] a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the status quo." *TDP II*, 978 F.3d at 192. Therefore, the Texas Legislature's decision to open absentee voting only to those Texans who are most likely to benefit

from it bears a rational relationship to the state's legitimate interest in "helping older citizens to vote and guarding against election fraud." *TDP I*, 961 F.3d at 402-03. Thus, although Texas could make voting more accessible by extending absentee-voting privileges to all Texans, particularly during COVID-19, "its failure to do so 'hardly seems arbitrary.'" *Id.* at 405 n.33 (quoting *McDonald*, 349 U.S. at 809-10). In sum, under the law of this case, (1) Texas does not absolutely prohibit younger voters from voting; (2) Section 82.003 is a rational way to facilitate the exercise of the franchise for Texans who are more likely to face everyday barriers to movement; and (3) the Equal Protection Clause is not offended simply because some groups find voting more convenient than do plaintiffs because of Texas's mail-in ballot rules, "even where voting in person may be extremely difficult, if not practically impossible, because of circumstances beyond the state's control, such as the presence of the Virus." *See id.* at 402-04, 405.

4. *Anderson/Burdick*

Alternatively, this Court considers this case under the balancing test set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), which is one in which this Court must weigh the burden that a state regulation imposes on the right to vote against the state's interest in enacting the regulation. The Supreme Court in *Burdick* acknowledged the fundamental nature of the right to vote but recognized it does not follow "that the right to vote in any manner . . . [is] absolute." 504 U.S. at 433. State laws governing the administration of elections will "invariably impose some burden upon individual

voters," so courts must employ a balancing analysis for constitutional challenges to such laws. *Id.* at 433-34. Specifically, courts should "weigh 'the character and magnitude of the asserted injury'" to voting rights "against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789). The Supreme Court further instructed in *Anderson* that courts "must not only determine the legitimacy and strength of each of those interests" but also "consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789.

Plaintiffs argue § 82.003 impermissibly burdens their ability vote under the *Anderson/Burdick* analysis because they are required to vote in person regardless of what other barriers they may face, such as difficulty finding child care, a global pandemic, or an hourly job that precludes them from voting in person during business hours. (Docket no. 155 at page 13). It is undisputed that Texas's age-based eligibility requirement for mail-in-ballots inconveniences some voters under sixty-five who would like to vote by mail. However, this Court cannot assess Texas's age-based absentee voting provision in isolation and instead must consider Texas's electoral plan as a whole. *Burdick*, 540 U.S. at 434-37; *see also Brnovich*, 141 S. Ct. at 2339 ("Thus, where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means.").

Texas law allows voting by mail for all Texans who qualify in one of four categories, including voters

who are disabled, are age sixty-five or older, expect to be absent from the county on election day, and are incarcerated. Tex. Elec. Code §§ 82.001–.004. Texas also allows for early in-person voting for seventeen days leading up to most elections, *id.* § 82.005; requires employers to provide paid time-off work to vote, *id.* § 276.004; and during the pandemic, "the period for early voting by personal appearance was doubled," *TDP I*, 961 F.3d at 394; safety measures were imposed and "at risk voters of any age can utilize the Texas Election Code's disability provision to mitigate the risk of COVID-19," *TDP II*, 978 F.3d at 192-93; alleviating almost all of plaintiffs' reasons for no-excuse voting by mail. Moreover, "at risk voters of any age can utilize the Texas Election Code's disability provision to mitigate the risk of COVID-19." *Id.* at 192. Taken together, under the law of this case, Texas's voting scheme has a slight impact on Texans in selecting their preferred manner of voting, but it does not severely restrict the right to vote altogether. *TDP II*, 978 F.3d at 188 ("An abridgement [does not occur] any time a new election law makes it more difficult for one age group than it is for another"); *TDP I*, 961 F.3d at 404 n.32 ("[T]he *state* has not placed any obstacles on the plaintiffs' ability to vote in person.") (emphasis in original).

Plaintiffs specifically reference difficult childcare and working arrangements. A similar equal protection claim brought by working mothers was dismissed by the Seventh Circuit under Rule 12(b)(6). In *Griffin v. Roupas*, 385 F.3d 1128, 1129 (7th Cir. 2004), the plaintiffs argued that the United States Constitution required absentee voting because of the burden plaintiffs would otherwise face in getting to

the polls on election day. The claim was 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 combating 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. United States Through I.R.S.*, 964 F.2d 1556, 1569 (5th Cir.1992)). The Court also determined 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 (emphasis added). The Supreme Court denied plaintiffs' petition for writ of certiorari. *Griffin*, 544 U.S. 923 (2005).

Turning to the state's interest, Texas has identified two main factors in support of its decision to allow some, but not all, Texans to vote absentee: discouraging fraud and providing the maximum protection "for Texans who are more likely to face everyday barriers to movement" and who "have a greater risk of becoming seriously ill or dying from [COVID-19.]" *TDP I*, 961 F.3d at 405. "[W]ith safety measures imposed and some flexibility as to 'disability' being shown," there has been no showing of unconstitutional *status quo*. *TDP II*, 978 F.3d at 193. Accordingly, Texas's legitimate interests in

ensuring safe and accurate voting procedures are sufficient to outweigh any limited burden on the right of Texas voters under sixty-five to vote as they choose caused by the state's age-restricted absentee voting scheme.

C. Tully v. Okeson

Although the matter was heard at the preliminary injunction stage, *Tully v. Okeson*, 977 F.3d 608, 617-18 (7th Cir.), *cert. denied*, 114 S. Ct. 2798 (2020), is instructive. There, the Seventh Circuit considered "whether Indiana's age-based absentee voting law abridges 'the right . . . to vote' protected by the Twenty[-]Sixth Amendment or merely affects a privilege to vote by mail." *Id.* at 613. Like the Fifth Circuit, the Seventh Circuit concluded that Indiana's law does not violate the Twenty-Sixth Amendment. *Id.* at 614. The Seventh Circuit also rejected an argument that "hypothetical laws similarly restricting the ability of African-Americans or women or the poor to vote by mail would violate the Fifteenth, Nineteenth, and Twenty-Fourth Amendments." *Id.*

In doing so, the Seventh Circuit found Indiana's absentee voting laws passed rational basis review based on the state's legitimate interest in preventing voter fraud and 'open[ing] up absentee voting only to those Hoosiers who are most likely to benefit from it." *Id.* at 616. The Seventh Circuit also found that Indiana's voting scheme was equally sound under the *Anderson/Burdick* test because "Indiana's legitimate interests in ensuring safe and accurate voting procedures are sufficient to outweigh any limited burden on Hoosiers' right to vote as they choose

caused by the state's restricted absentee voting scheme." *Id.* at 617-18.

This Court recognizes that the Seventh Circuit looked to the content of the "right to vote," *Tully*, 977 F.3d at 614, whereas the Fifth Circuit concentrated on the meaning of the word "abridge." *TDP II*, 978 F.3d at 188-92. However, given that the circuit courts arrived at the same conclusion, these differences in reasoning and focus do not create a split which would justify this Court reaching a different result. Moreover, given the rulings by the Fifth Circuit on preliminary review, and concepts of *stare decisis* and the judicial chain of command, this Court finds plaintiffs have failed to state a claim under the rational basis or *Anderson/Burdick* standards of review applicable to defendant's motions to dismiss.

D. Johnson v. Waller County

This case did not involve absentee voting and rulings were made following a bench trial, *Johnson v. Waller County*, No. 4:18-CV-03985, 2022 WL 873325 (S.D. Tex. Mar. 24, 2022), but this Court finds it instructive on the issue of voting challenges based on pairing age and race. Black students at Prairie View A&M University ("PVAMU") alleged that allocating fewer hours and places for early voting violated their rights under the Voting Rights Act, as well as under the Fourteenth, Fifteenth, and Twenty-Sixth Amendments of the United States Constitution. *Id.* at *1. Following a bench trial, the District Court determined that "the "adoption by Waller County of the schedule and locations for early voting in the 2018 general election–as asserted by Plaintiffs to be less favorable to PVAMU students between the ages

of eighteen and twenty–can't be said to have denied or abridged their right to vote under the Twenty-Sixth Amendment." *Id.* at *56 (citing *TDP II*, 978 F.3d at 194; *Tully*, 977 F.3d at 613-14). The District Court also determined that Waller County did not violate § 2 of the VRA. *Id.* at *35, *54 (citing *Brnovich*, 141 S. Ct. at 2338; *Veasey*, 830 F.3d at 273). The Court reasoned that plaintiffs' claims under § 2 and the Twenty-Sixth Amendment boiled down to arguments over relative convenience for early voting, which were rejected in *TDP II* and *Tully*. *Id.* at *35-*42, *56.

Particularly relevant to this case, the Court also declined to recognize a hybrid claim for discrimination based on the blending of rights under the Fourteenth, Fifteenth, and Twenty-Sixth Amendments. *Johnson*, 2022 WL 873325, at *56-*58. There, as here, plaintiffs alleged they were being discriminated against on the intersecting bases of age and race. *Id.* at *57. The Court found that plaintiffs' claims failed as a matter of law, pointing out that the discrimination analysis must "proceed rigorously under each particular Amendment" as opposed to "amalgamating Amendments to discern new or differentiated rights." *Id.* (citing *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980)).

The Court further found that plaintiffs had put forth no facts of discrimination where independent action under each Amendment would not redress their grievance*s. Id.* at *58. In so doing, the Court noted the difficulty in recognizing "a hybrid action" combining the Fourteenth, Fifteenth, and Twenty-

Sixth Amendments. *Id.* "For instance," the Court explained:

> if Waller County didn't discriminate against *all* student voters but only against *Black* student voters, a claim would clearly sound under the Fifteenth Amendment. Likewise, if Waller county didn't discriminate against *all* Black voters but only against Black *student* voters, a claim would clearly sound under the Twenty-Sixth Amendment.

Id. (emphasis in original).

This Court must reach the same result here, even though the procedural posture is the motion to dismiss stage. Plaintiffs do not explain how unconstitutional discrimination against Hispanic voters age eighteen to sixty-four can exist even in the absence of discrimination against Hispanic voters over age sixty-five. Without such an explanation, plaintiffs "simply concede[] that any such discrimination is . . . on the basis of their age," and would be "redressable, if at all, under standards applicable to the Twenty-Sixth Amendment, with nothing suggesting such claim should be subject to analysis under the Fourteenth and Fifteenth Amendments." *Johnson*, 2022 WL 873325, at *58.

As in *Johnson*, this Court concludes that the hybrid claims at issue do not assert violation of a cognizable, independent right as pleaded. *See id.* As addressed above, plaintiffs have not sufficiently alleged any violation of their rights under the First, Fourteenth, Fifteenth, or Twenty-Sixth Amendments when considered individually. Moreover, their post-remand complaints do not "credibly establish that

some amalgamation of intersecting rights either exists or—perhaps more importantly—reveal any concern regarding some aspect of discrimination unaccounted for by those Amendments." *Id.* Accordingly, *Johnson* presents another basis to conclude that plaintiffs have failed to state a claim for discrimination against them as a specific class of Hispanic voters in Texas aged eighteen to sixty-four.

CONCLUSION

Our barnacle encrusted ship of state sails upon unchartered seas. On what shore it lands or breaks on the rocks to sink into the waters of history can only be decided by "We the People," who persevere to overcome the perceived barriers imposed on their sacred right. Those who surrender without an effort and to apathy cast a vote also by their absence, and the electoral consequences which follow.

"My faith in the Constitution is whole, it is complete, it is total. I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution."[10] Were Member of Congress Jordan with us now, she, like others, would perhaps feel that faith shaken. Her words should once again resonate, inspiring the exercise of voting, no matter the burden nor where one lies on the political spectrum.

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[10] Barbara C. Jordan, Opening Statement to the House Judiciary Committee Proceedings on Impeachment of Richard Nixon, 93rd Cong., 2d Sess. 111 (July 25, 1974) (image of archived notes courtesy of the National Archives and Records Administration, available at https://history.house.gov/HouseRecord/Detail/15032449722).

While these may not be the "times that try men's souls,"[11] significant numbers of American women find it a trying time for their anatomical autonomy. Others find it a time of celebration.[12] American men are about evenly divided.[13] The current Pandora's Box[14] of litigation can be addressed by significant majorities in the electoral process on either side of a particular issue.[15]

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[11] THOMAS PAINE, THE AMERICAN CRISIS 1 (Dec. 23 1776), https://www.ushistory.org/Paine/crisis.htm.

[12] There are about 100 million U.S. citizen women 18 or older. Https://www.infoplease.com/census. Sixty two percent (62%) or 62 million disapprove of the *Dobbs* decision overruling *Roe*. Http://pewreseargh.org (polling conducted July 6, 2022). Inferentially, 38 million others approve of the Court's decision.

[13] Fifty-two percent (52%) of American men believe abortion should be legal in most cases. *Id.*

[14] "Pandora's Box" is a metaphor referring to something that produces unpredictable or endless results, which may prove harmful. According to Greek mythology, the god Zeus gave the beautiful Pandora a box, which she was told never to open. As soon as he was out of sight, Pandora took off the top, and out swarmed all the troubles of the world, never to be recaptured. Https://www.merriam-webster.com/dictionary/Pandora's%20box.

[15] The Supreme Court's decision in *Dobbs* to end constitutional protection for abortion "opened the gates for a wave of litigation." Https://apnews.com/article/abortion-politics (June 27, 2022). The activity has focused on "trigger laws" adopted in 13 states designed to take effect immediately upon the ruling in *Dobbs*, old anti-abortion laws left on the books in some states and unenforced under *Roe*, and newer abortion restrictions which were stayed pending a ruling in *Dobbs*. *Id.*; *see also Judges Rule on State Abortion Restrictions, Shape Impact of Roe Ruling on States*, DALLAS MORNING NEWS, July 12, 2022 (News/Politics) ("Trigger Laws Like the One in Texas are Key in Legal Fights Over Reproductive Rights in Wake of Supreme Court Ruling").

Judicial decisions, even those of the Supreme Court, can be overruled or affirmed in a venue called the voting booth. Accordingly, matters can be decided by those who exercise: the right to vote, that is. In the physical realm it is called "use it or lose it."

The remedy for those with diminished trust in the judicial process is ballots not bullets nor the front yards of Justices and Judges. We are the fallible umpires who call the legal balls and strikes as best we can to create a level playing field. Please leave us home alone.

Yes, it is burdensome to be a citizen in a democracy and inconvenient to go to the polls, though those who gave their lives so we could, would wonder why they did if we don't. Democracy dies not always by conquering armies but by the slow death of sloth.

Had der Führer and his minions prevailed, no one would be burdened with voting. Some of that regime redeemed themselves by becoming United States citizens and contributing to this nation.[16] The descendants of others reap the harvest of riches and benefits of the American Dream but choose not to till and nurture the soil of democracy by obtaining voting citizenship and its responsibilities. They also sow the seeds of democracy's demise and are complicit in any rights lost, while those who vote sew democracy's fabric.

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[16] Wernher von Braun, a former member of the Nazi Party and SS, became an American citizen and pioneer of space technology in the United States. Https:// www. britannica.com/biography/Wernher-von-Braun.

Once asked at the close of the Constitutional Convention, "Well Doctor what have we got a republic or a monarchy. A republic replied the Doctor if you can keep it."[17]

Time will tell.

Defendant's motions to dismiss are GRANTED.

It is so ORDERED.

SIGNED this 25th day of July, 2022.

/s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

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[17] The response is attributed to Benjamin Franklin. PAPERS OF DR. JAMES MCHENRY ON THE FEDERAL CONVENTION OF 1787, *reprinted in* 11 AM. HIST. REV. 3, 618 (1906) (Oxford Univ. Press), *available at* https://www.jstor.org/stable/1836024.

APPENDIX I

See Minella v. City of San Antonio, 368 F. Supp. 2d 642, 644 (W.D. Tex. 2005); *Save Our Aquifer v. City of San Antonio*, 237 F. Supp. 2d 271, 272-73 & n.3 (W.D. Tex. 2002)*; Perkins v. Alamo Heights Indep. School Dist.*, 204 F. Supp. 2d 991, 998 (W.D. Tex. 2002); *San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.d. 433, 439 (W.D. Tex. 1999).

APPENDIX II

Supreme Court Abortion Case: Upheld Mississippi Statute 6 to 3 and Overruled *Roe* 5 to 4

The Supreme Court in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), upheld a Mississippi statute banning abortions after 15 weeks and struck down *Roe v. Wade*, 410 U.S. 959 (1973). In giving judicial deference to state abortion legislation, the Supreme Court determined that:

> States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1962); *see also Dandridge v. Williams*, 397 U. S. 471, 484–486 (1970); *United States v. Carolene Prods. Co.*, 304 U. S. 144, 152 (1938) [(giving judicial deference to Congress's ban on shipping imitation mild product in interstate commerce]. That respect for a legislature's judgment applies even when the laws at issue concern matters of great social

> significance and moral substance. *See, e.g., Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356, 365–368 (2001) ("treatment of the disabled"); *Glucksberg*, 521 U. S., at 728 ("assisted suicide"); *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, 32–35, 55 (1973) ("financing public education").

Id. at 2283-84 (quoting *Ferguson*, *Dandridge* and *Carolene*, wherein Supreme Court gave judicial deference to state laws regulating lawyers and reducing per capita benefits to children in largest families, and Congress's ban on shipping imitation milk products in interstate commerce; citing *Rodriguez*, wherein Supreme Court gave judicial deference to local policy which created structural educational inequities tied to wealth). In concluding, the *Dobbs* Court stated:

> We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and **return that authority to the people and their elected representatives.**

Id. at 2284 (emphasis added); *but* see *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (refusing to give judicial deference to New York's "proper cause" standard for granting unrestricted license to carry handgun in public under which applicant had to demonstrate special need for self-protection distinguishable from that of general

community); *Carson v. Makin*, 142 S. Ct. 1987 (2022) (refusing to give judicial deference to nonsectarian requirement of Maine's tuition assistance program).

Recent Supreme Court Decisions in Voting Cases

Wisconsin Legislature v. Wisconsin Elections Comm'n, 142 S. Ct. 1245, 1250-51 (2022) (granting certiorari and issuing per curiam decision without hearing oral arguments finding that addition of majority-Black district for Wisconsin General Assembly was not supported by strong basis for believing it was required by Voting Rights Act).

Merrill v. Milligan, 142 S. Ct. 879, 882 (2022) (staying lower court's injunctions ordering Alabama's Republican-led legislature to redraw electoral map which had been faulted for racial bias).

Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 28 (2020) (refusing to enjoin Seventh Circuit decision that stayed district court's order extending absentee ballot receipt deadline by six days).

Merrill v. People First of Ala., 141 S. Ct. 25, 27 (2020) (staying lower court's decision that put on hold Alabama's ban on curbside voting, even though several Alabama counties sought to offer it).

Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (reversing lower court ruling invalidating South Carolina's witness requirement for absentee ballots thereby reinstating state's rule that absentee ballots need witness signature).

Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1208 (2020) (reversing lower court's decision extending absentee ballot receipt

deadline for Wisconsin primary due to COVID-19 pandemic).

There Have also Been Recent Rulings by the Supreme Court Which Favor Democrats, Though These Affirmed State Court Rulings as Opposed to Legislative Acts

Toth v. Chapman, 142 S. Ct. 1355 (2022) (denying Republican requests to stay lower court rulings adopting court-drawn boundaries for Pennsylvania's house districts to replace electoral maps devised by Republican-controlled legislature).

Moore v. Harper, 142 S. Ct. 1089 (2022) (denying Republican requests to stay lower Court rulings that adopted Court-drawn boundaries for North Carolina's 14 house districts to replace electoral maps devised by Republican-controlled legislature in North Carolina), *cert. granted*, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022).

Fifth Circuit: Voting Cases

Lewis v. Scott, 28 F.4th 659, 664 (5th Cir. 2022) (holding that district court erred in finding Secretary was proper defendant in suit challenging Texas Election Code provisions governing mail-in voting postage, postmark and receipt, and signature verification requirements).

Texas League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 140 (5th Cir. 2020) (reversing district court's judgment rejecting Texas Governor Greg Abbott's directive to allow only one ballot drop off location per county), *dismissing appeal as moot but denying motion to vacate previous order,* No. 20-

50867, 2021 WL 1446828, at *1 (5th Cir. Feb. 22, 2021).

Richardson v. Hughs, 978 F.3d 220, 224 (5th Cir. 2020) (granting stay and rejecting district court order that would have required Texas to allow voters to cure signature mismatch, instead permitting Texas to simply reject those ballots), *rev'd in part & vacated in part*, *Richardson v. Flores*, 28 F.4th 649 (5th Cir. 2022) (holding that district court erred in finding Secretary was proper defendant under *Ex parte Young* and reversing district court's order granting partial summary judgment on constitutional claims, vacating preliminary injunction and remanding for further proceedings).

Texas All. for Retired Ams. v. Hughs, 976 F.3d 564, 565, 568 (5th Cir. 2020) (rejecting district court decision that stayed new Texas law that eliminated straight-ticket voting finding that new law, not yet in force, constituted "status quo" and thereby demonstrating Fifth Circuit's deference to legislative judgment on this matter), *rev'd in part & vacated in part*, *Texas Alliance for Retired Americans v. Scott*, 28 F.4th 669 (5th Cir. 2022) (holding that district court erred in finding Secretary was proper defendant under *Ex parte Young* and reversing district court's preliminary injunction order enjoining straight-ticket voting).

Mi Familia Vota v. Abbott, 834 F. App'x 860, 863 (5th Cir. 2020) (deferring to Texas when staying lower court order imposing mask mandate for poll workers).

Other Circuits: Voting Cases

Tully v. Okeson, 977 F.3d 608, 618 (7th Cir. 2020) (affirming District Court decision which rejected plaintiff's challenge to Indiana's absentee voting laws), *cert denied*, 141 S. Ct. 2798 (2021).

A. Philip Randolph Institute of Ohio v. LaRose, 831 F. App'x 188, 190, 192 (6th Cir. 2020) (reversing lower Court decision that would have required Ohio Secretary of State to allow counties to offer multiple ballot drop box locations and explaining that having only one place for voters to deliver their ballots "is unlikely to harm anyone").

Memphis A. Philip Randolph Institute v. Hargett, 978 F.3d 378, 393-94 (6th Cir. 2020) (refusing to invalidate Tennessee's absentee balloting rules); *id.* at 392 ("Make no mistake: today's majority opinion is yet another chapter in the concentrated effort to restrict the vote. To be sure, it does not cast itself as such—invoking instead the disinterested language of justiciability—but this only makes today's majority opinion more troubling. As a result of today's decision, Tennessee is free to—and will—disenfranchise hundreds, if not thousands of its citizens who cast their votes absentee by mail. Masking today's outcome in standing doctrine obscures that result, but that makes it all the more disquieting. I will not be a party to this passive sanctioning of disenfranchisement.") (Moore, J., dissenting) (internal quotations omitted).

Priorities USA v. Nessel, 978 F.3d 976, 983 (6th Cir. 2020) (reversing district court order that stayed Michigan's state ban on paying someone to provide

transportation to polls and crediting state's interest in preventing fraud).

Arizona Superior Court Declined GOP's Motion for Preliminary Injunction Asking Court to Stop Use of No-Excuse Mail-in Ballots in November 2022 Election

Arizona Republican Party v. Hobbs, No. CV-22-00594 (Sup. Ct. Ariz. June 6, 2022) ("Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting? The answer is no.") (judgment entered on June 9, 2022) (available at https://mohavecourts.az.gov), *appeal filed*, June 15, 2022.

APPENDIX C

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 14, 2020
Lyle W. Cayce
Clerk

No. 22-50407

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA; JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING; BRENDA LI GARCIA,

Plaintiffs-Appellants,

versus

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; RUTH HUGHS, TEXAS SECRETARY OF STATE; KEN PAXTON, TEXAS ATTORNEY GENERAL,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:20-CV-438

Before KING, STEWART, and SOUTHWICK, *Circuit Judges*.

Leslie H. Southwick, *Circuit Judge:*

The opinion entered on September 10, 2020 is withdrawn.

A Texas statute allows mail-in voting for any voter at least 65 years old but requires younger voters to satisfy conditions, such as being absent

from the county on election day or having a qualifying disability. Amid an election-year pandemic, the district court entered a preliminary injunction requiring Texas officials to allow any Texan eligible to vote to do so by absentee ballot. This court stayed the injunction pending appeal. The plaintiffs defend the injunction at this stage of the proceedings only on the basis that the vote-by-mail privilege for older voters is unconstitutional under the Twenty-Sixth Amendment's prohibition against denying or abridging the right to vote on account of age. The statutory provision withstands that challenge. We VACATE and REMAND.

FACTUAL AND PROCEDURAL BACKGROUND

In Texas, in-person voting is the rule. Tex. Elec. Code ch. 64. Early voting by mail is the exception. *Id.* ch. 82. Texas law permits early voting by mail for voters who: (1) anticipate being absent from their county of residence; (2) are sick or disabled; (3) are 65 years of age or older; or (4) are confined to jail. *Id.* §§ 82.001–.004.

The 2020 COVID-19 pandemic prompted Texas state officials to adopt various emergency measures. In March, Governor Greg Abbott declared a state of disaster for all of Texas. He also postponed the May primary runoff election until July. In May, he extended the period for early voting for the July primary to help the election proceed efficiently and safely. Texas Secretary of State Ruth Hughs issued a proclamation in May concerning early voting hours and federal funding to combat the pandemic. Secretary Hughs also issued guidance concerning health and safety measures for in-person voting. The

guidance encouraged voters to wear masks, disinfect their hands, and practice social distancing. In June, Secretary Hughs issued additional guidance concerning social distancing and sanitization of polling places.

State-court litigation preceded the current suit. In March, the Texas Democratic Party, its Chairman, and two voters sued a county clerk in Texas state court, and the State intervened. The plaintiffs sought a declaration that under the disability provision, Section 82.002 of the Texas Election Code, "any eligible voter, regardless of age and physical condition" may vote by mail "if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease." Under their interpretation, lack of immunity as well as concern about transmission qualified as a disability for the purpose of eligibility for mail-in voting. After the State intervened, the state court entered an injunction barring Texas officials from "prohibit[ing] individuals from submitting mail ballots based on the disability category" during the pandemic. The State immediately filed a notice of interlocutory appeal, which superseded and stayed the injunction order. *See In re Texas*, 602 S.W.3d 549, 552 (Tex. 2020).

Texas Attorney General Ken Paxton sought to reduce confusion surrounding the state-court action by sending a letter to Texas judges and election officials in early May. It explained: "Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code

for purposes of receiving a ballot by mail." The letter ordered public officials to refrain from advising voters who lacked a qualifying condition but nonetheless feared COVID-19 to vote by mail. The letter warned third parties that if they advised voters to vote by mail without a qualifying disability, then the party could be subject to criminal liability under the Texas Election Code. The plaintiffs characterize this guidance as a threat underlying some of the claims not before the court today and rely on it for part of their argument opposing sovereign immunity.

After a Texas Court of Appeals reinstated the initial injunction, the State sought an emergency mandamus from the Supreme Court of Texas. On May 27, the Supreme Court of Texas held "that a lack of immunity to COVID-19 is not itself a 'physical condition' for being eligible to vote by mail within the meaning of [Section] 82.002(a)." *In re Texas*, 602 S.W.3d at 560. A voter may "take into consideration aspects of his health and his health history" in deciding whether to apply to vote by mail, but COVID-19 is not itself a ground for voting by mail. *Id.* The *In re Texas* court found it unnecessary to issue a writ of mandamus, *id.* at 561, and the plaintiffs dismissed that suit with prejudice on June 9.

While the state-court litigation was pending, the plaintiffs filed this lawsuit in early April in the United States District Court for the Western District of Texas and added a third voter as a plaintiff. The plaintiffs' operative complaint requested relief on seven grounds. The plaintiffs' motion for a preliminary injunction slimmed down the claims and argued that Texas's statute allowing voting by mail

for any persons aged at least 65 violated the First, Fourteenth, and Twenty-Sixth Amendments,[1] and that it was void for vagueness. They also asserted that the Attorney General's May letter constituted voter intimidation and suppression of political speech.

On May 19, the district court issued an order requiring no-excuse mail-in balloting in Texas, meaning that "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19" could do so. The court's preliminary injunction prohibited the defendants from issuing any guidance, threats, or pronouncements, or otherwise taking any action inconsistent with the order. The district court concluded that the plaintiffs were likely to succeed on the merits of each of their claims. On the only claim that remains for us on this appeal, namely, a violation of the Twenty-Sixth Amendment, the district court applied strict scrutiny to the law. Voters under 65, according to the district court, bear a disproportionate burden because of the age restrictions set out in Section 82.003 of the Texas Election Code, which the court concluded "violates the [Twenty-Sixth] Amendment, as applied, during the COVID-19 pandemic." Going one step further, the district court added that neither a legitimate interest nor a rational basis existed for enforcing the age-based distinction during the pandemic.

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[1] In their request for a preliminary injunction, the plaintiffs limited the Twenty-Sixth Amendment grounds to an as-applied challenge seeking relief "[t]o the extent that the state [was] purporting, in these pandemic circumstances, to apply different voting burdens based on the voter's age."

Just eight days after entering this injunction, the Supreme Court of Texas issued its decision in *In re Texas*. Meanwhile, the defendants appealed the federal injunction. The defendants also filed an emergency motion for a stay pending appeal and a temporary administrative stay.

In June 2020, a panel of this court that had the responsibility to resolve motions filed in the appeal prior to completion of briefing granted the defendants' motion to stay the district court's preliminary injunction pending the decision on the merits — which we now are entering. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020). That panel concluded that the defendants were likely to succeed on the merits of each claim. *See id.* at 402–11. As to the Twenty-Sixth Amendment claim, it found "plenty of evidence that the Amendment's most immediate purpose was to lower the voting age from twenty-one to eighteen." *Id.* at 408. Relying on a Supreme Court opinion slightly predating the Amendment, the motions panel concluded that rational-basis review applied to the Texas age-based absentee-voting law. *Id.* at 408–09 (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969)). The court reasoned that giving a benefit of voting by mail to one class does not affect plaintiffs' right to vote because the Twenty-Sixth Amendment concerns only the denial or abridgement of voters' rights. *Id.* at 409. That meant that the plaintiffs were unlikely to succeed on the merits of their Twenty-Sixth Amendment claim, just as they were similarly unlikely to succeed on their other claims. Consequently, the district court's injunction was stayed.

We remark here that though we are greatly benefitted by the earlier panel's analysis of the issues before us, under our circuit's procedures, opinions and orders of a panel with initial responsibility for resolving motions filed in an appeal are not binding on the later panel that is assigned the appeal for resolution. *Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988). We agree with much but not quite all of the earlier opinion.

DISCUSSION

The district court granted a preliminary injunction based on four claims for relief — the First, Fourteenth, and Twenty-Sixth Amendments as well as the void-for-vagueness doctrine. The defendants' appeal suggests three jurisdictional bars and challenges all of the bases on which the injunction was granted. The plaintiffs defend the injunction only on their Twenty-Sixth Amendment claim.[2] Unclear, though, is the breadth of the Twenty-Sixth Amendment claim now being made by the plaintiffs. The point of uncertainty is whether the effect of the COVID-19 pandemic, even though it was central to arguments at the district court level, has been withdrawn from our review. We explain the competing indications.

Following this court's decision in June to enter a stay of the preliminary injunction, briefs were filed

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[2] The plaintiffs stated they wished to preserve the right to pursue permanent relief on their other claims and argued that, if we were to reverse the district court on the application of the Twenty-Sixth Amendment, we should vacate the injunction and remand to the district court for further proceedings. That is what we do.

that guide the decision we are issuing today. As we just said, the plaintiffs' brief stated that it would defend the preliminary injunction only on Twenty-Sixth Amendment grounds. The plaintiffs asserted "it is not the State's tragic inability to contain the COVID-19 epidemic that compels affirmance of the District Court's order — it is the Twenty-Sixth Amendment's unambiguous text that does." The brief certainly explains the procedural history of this action in federal court and of the parallel action in state court; there, the brief places COVID-19 front and center. The argument section, though, almost never refers to COVID-19 in explaining why the Amendment invalidates the relevant Texas Election Code provision. There are a few, one might even say stray, usages of the pandemic to support their arguments.[3] The defendants in their reply brief classified the plaintiffs' argument now as being solely a facial challenge.

If in fact the plaintiffs withdrew their reliance on the pandemic and are instead making a facial

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[3] The most we see as to the plaintiffs' legal arguments relying on the pandemic are the following. On one page of their brief, they argue it is unconstitutional to require those younger than 65 to appear at the polls "particularly during the COVID-19 pandemic, while allowing over-65 voters to cast ballots from the safety of their homes." Appellee's Br. 27 (citing *Harman v. Forssenius*, 380 U.S. 528, 542 (1965), and *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). A few pages later, the plaintiffs reject the defendants' argument that the legislature would rather nobody vote by mail than for everyone to do so; instead, they argue that nothing supports that the legislature would not wish to "extend that right on a nondiscriminatory basis during the COVID-19 pandemic (which is the only period relevant for the preliminary injunction now before this Court)." *Id.* at 34.

challenge, that could transform the appeal into a constitutional argument that has little relevance to the district court's reasons for granting a preliminary injunction. For example, that court's analysis of harm to the plaintiffs and their likelihood of success on the merits — two criteria for the preliminary injunction — relied exclusively on the pandemic. Yes, a facial challenge would be a legal issue subject to our *de novo* review had the district court decided it, but that court did not do so.

We need not resolve whether the plaintiffs indeed are now trying to have us consider the facial challenge even though that was not considered by the district court. Appellate rules regarding how we treat absent issues differ depending on whether it is the appellant or the appellee who has neglected them. An appellant can intentionally waive or inadvertently forfeit the right to present an argument by failure to press it on appeal, a higher threshold than simply mentioning the issue. *Nichols v. Enterasys Networks, Inc.*, 495 F.3d 185, 190 (5th Cir. 2007). On the other hand, even an appellee's failure to file a brief does not cause an automatic reversal of the judgment being appealed. By appellate rule, so extreme a lapse does cause the appellee to lose the right to appear at oral argument. FED. R. APP. P. 31(c). We also know that if we disagree with the grounds relied upon by a district court to enter judgment but discover another fully supported by the record, we can affirm on that alternative basis. *Eastus v. ISS Facility Servs., Inc.*, 960 F.3d 207, 211 (5th Cir. 2020).

There are a few cases that consider waiver rules for appellees.[4] For example, the rules against considering an argument not properly presented are more generous for an appellee than for an appellant. *United States v. Guillen-Cruz*, 853 F.3d 768, 777 (5th Cir. 2017). Appellees neither select the issues for the appeal nor file reply briefs, leaving them at a disadvantage in being able to present all favorable arguments on appeal.

We consider the ambiguity in the plaintiffs' briefing to present another variant of these principles. Regardless of whether the plaintiffs were abandoning the defense of the injunction on the grounds on which it was issued, and we cannot discern if they were, we will review the validity of the actual judgment, not some alternative.

We begin with the defendants' arguments about standing, sovereign immunity, and the political question doctrine.

I. Plaintiffs' standing

The first jurisdictional question is whether the plaintiffs have standing to challenge Texas's election law. A plaintiff must show: (1) an injury in fact to the plaintiff that is concrete, particularized, and actual or imminent; (2) the injury was caused by the

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[4] An appellant's failure to raise an issue in an initial appeal constitutes a waiver of having the issue considered on remand; not so for the appellee. *United States v. Smith*, 814 F.3d 268, 272 (5th Cir. 2016). This is a component of the law-of-the-case doctrine. *See* 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.6 (2d ed. April 2020 Update). Simply put, as to waiver, the rules for appellants and appellees are not identical.

defendant; and (3) the injury would likely be redressed by the requested judicial relief. *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). In the preliminary-injunction context, plaintiffs must make a "clear showing" of standing to maintain the injunction. *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017). Standing is a question we review *de novo*. *Pederson v. La. State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000).

This case involves two groups of plaintiffs: (1) three registered Texas voters under 65 years old who desired to vote in the July 14 Texas Democratic Primary and the November election; and (2) the Texas Democratic Party and its Chairman. We have held that, in the context of injunctive relief, one plaintiff's successful demonstration of standing "is sufficient to satisfy Article III's case-or-controversy requirement." *Texas v. United States*, 945 F.3d 355, 377–78 (5th Cir. 2019). The voter plaintiffs contend that they suffer a sufficient injury in fact because they are, unlike older voters, forced to vote in person and risk contracting or spreading COVID-19. They assert that the injury is fairly traceable to the defendants' enforcement of Section 82.003, and that their injury would be redressed by an injunction requiring what they consider to be non-discriminatory access to mail-in voting.

The defendants challenge only the causation prong, arguing that the voter plaintiffs lack standing because their injury is caused by COVID-19, not the defendants. The injury alleged in the brief actually is the result of the combination of COVID-19 and Texas officials' continuing enforcement of Section 82.003 as

written. The defendants argue that the officials have no authority to relent in enforcement of the statute.

We conclude that a voter under the age of 65 has clear standing to challenge Section 82.003. In the next section, we will discuss the Secretary's duty to design the required application form for absentee ballots that identifies voter-eligibility categories. TEX. ELEC. CODE § 31.002(a). The Secretary would need to correct the form should the judiciary invalidate the age-based option. Thus, the Secretary of State had a role in causing the claimed injury and is in a position to redress it at least in part. That is enough to confer standing to the voter plaintiffs to sue the Secretary. We need not address the standing of other plaintiffs. *See Texas*, 945 F.3d at 377–78.

II. Defendants' sovereign immunity

The defendants assert that they are entitled to sovereign immunity. State sovereign immunity prohibits "private suits against nonconsenting states in federal court." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). State officials and agencies enjoy immunity when a suit is effectively against the state. *Id.* Unless waived by the state, abrogated by Congress, or an exception applies, the immunity precludes suit. *Id.*

The plaintiffs contend that sovereign immunity does not bar their Twenty-Sixth Amendment claim under the exception carved out in *Ex parte Young*, 209 U.S. 123 (1908). Suits for injunctive or declaratory relief are allowed against a state official acting in violation of federal law if there is a "sufficient 'connection' to enforcing an allegedly

unconstitutional law." *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020).

This circuit has not spoken with conviction about all relevant details of the "connection" requirement. *Tex. Democratic Party*, 961 F.3d at 400. An *en banc* plurality of this court explained that "the officers [must] have 'some connection with the enforcement of the act' in question or be 'specially charged with the duty to enforce the statute' and be threatening to exercise that duty." *Okpalobi v. Foster*, 244 F.3d 405, 414–15 (5th Cir. 2001) (*en banc*) (plurality op.). Without a majority, no controlling precedent was made. *See K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). In *K.P.*, we declined to "resolve whether *Ex Parte Young* requires only 'some connection' or a 'special relationship' between the state actor and the challenged statute," because the defendant fell within the exception under either standard. *Id.*

Although the precise scope of the requirement for a connection has not been defined, the plaintiff at least must show the defendant has "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quotation marks omitted). That means the official must be "statutorily tasked with enforcing the challenged law." *In re Abbott*, 956 F.3d at 709. Enforcement typically means "compulsion or constraint." *K.P.*, 627 F.3d at 124. A "scintilla of 'enforcement' by the relevant state official with respect to the challenged law" will do. *City of Austin*, 943 F.3d at 1002.

Determining whether *Ex parte Young* applies to a state official requires a provision-by-provision analysis, *i.e.*, the official must have the requisite connection to the enforcement of the particular statutory provision that is the subject of the litigation. *See, e.g.*, *In re Abbott*, 956 F.3d at 709. This is especially true here because the Texas Election Code delineates between the authority of the Secretary of State and local officials. A "case-by-case approach to the *Young* doctrine has been evident from the start." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997).

The plaintiffs claim that Section 82.003, the age-based absentee-voting provision, violates the Twenty-Sixth Amendment of the Constitution. The plaintiffs have included the Secretary of State as a defendant, understandable since the Secretary is the "chief election officer of the state." TEX. ELEC. CODE § 31.001. Still, we must find a sufficient connection between the official sued and the statute challenged.

The statutory duties that matter today are the ones for the Secretary regarding applications for absentee ballots. She has the specific and relevant duty to design the application form for mail-in ballots, *id.* § 31.002(a), and to provide that form to local authorities and others who request it. *Id.* § 31.002(b). Additionally, the Secretary must furnish forms to those who request them for distribution to others. *Id.* § 84.013. Because local authorities are required to use the Secretary's absentee-ballot form outside of emergency situations, *id.* § 31.002(d), the Secretary has the authority to compel or constrain local officials based on actions she takes as to the

application form. *See City of Austin*, 943 F.3d at 1000.

The Secretary's form currently includes an option for a voter to indicate entitlement to an absentee ballot because that voter is at least 65 years old. It is permissible under *Ex parte Young* for a court to "command[] a state official to do nothing more than refrain from violating federal law." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Thus, a finding that the age-based option denies or abridges younger voters' right to vote might lead to prohibiting the Secretary from using an application form that expressed an unconstitutional absentee-voting option.

The plaintiffs present far broader reasons for holding the Secretary to be a proper defendant. The Secretary's general duties under the Code include issuance of directives and instructions, being willing to "assist and advise" local officials, and endeavoring to "obtain and maintain uniformity in the application, operation, and interpretation" of the Election Code. TEX. ELEC. CODE §§ 31.003–.004. We previously interpreted this provision as "requiring the Secretary to take action with respect to elections." *Lightbourn v. Cnty. of El Paso*, 118 F.3d 421, 429 (5th Cir. 1997). Almost fifty years ago, though, a justice on the Supreme Court of Texas, who would later be a cherished colleague of ours, wrote that the Secretary's duty to "obtain and maintain" uniformity in the application of the Election Code is not "a delegation of authority to care for any [*i.e.*, every] breakdown in the election process." *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (Reavley, J.). That 1972 opinion suggests the Secretary can

address some breakdowns, *id.*, but today the only ones we need to identify are those relating to absentee-ballot applications. Even there, some duties fall on other officials. For example, a local "early voting clerk shall review each application for a ballot to be voted by mail." TEX. ELEC. CODE § 86.001(a). Also, an "early voting clerk shall mail without charge an appropriate official application form." *Id.* § 84.012. Though there is a division of responsibilities, the Secretary has the needed connection.

In sum, the Secretary's specific duties regarding the application form under Section 31.002 are enough for us to conclude that the Secretary has at least a scintilla of enforcement authority for Section 82.003. We do not need to consider whether other duties of the Secretary might suffice. Sovereign immunity does not bar suit against the Secretary in this case.

As to the Governor, we conclude he lacks a sufficient connection to the enforcement of an allegedly unconstitutional law. *In re Abbott*, 956 F.3d at 708–09. As the motion's panel in this case stated, the actions the Governor took — to postpone the May 2020 primary and to expand the early voting period — were exercises of the Governor's emergency powers unrelated to the Election Code. The Governor is not "statutorily tasked with enforcing the challenged law." *Id.* at 709. The challenged Section 82.003 certainly operates independently of influence or enforcement from the Governor. As a result, the connection between the Governor and enforcement of the challenged provision is insufficient, and *Ex parte Young* does not apply to him.

As for the Attorney General, whether *Ex parte Young* applies is a closer question. The plaintiffs' only argument as to this official is that, in previous cases, the state of Texas has "concede[d] that the attorney general has a duty to enforce and uphold the laws of Texas." *See City of Austin v. Abbott*, 385 F. Supp. 3d 537, 544 (W.D. Tex. 2019). We have already held that "[t]he required connection is not merely the general duty to see that the laws of the state are implemented, but the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris*, 739 F.3d at 746 (quotation marks omitted). A general duty to enforce the law is insufficient for *Ex parte Young*.

The plaintiffs also focus us on the letter sent by the Attorney General. True, we applied the *Ex parte Young* exception to this Attorney General after his office sent to a manufacturer numerous "threatening letters" that "intimat[ed] that formal enforcement" of the Texas Deceptive Trade Practices Act "was on the horizon." *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 392, 397 (5th Cir. 2015). Conversely, we have declined to apply *Ex parte Young* where the Attorney General issued a press release warning that anyone who violated the Governor's recent emergency order would be "met with the full force of the law." *In re Abbott*, 956 F.3d at 709. We explained that "our cases do not support the proposition that an official's public statement alone establishes authority to enforce a law, or the likelihood of his doing so, for *Young* purposes." *Id.*

Unlike *NiGen*, the Attorney General's letter in this case was sent to judges and election officials, not to the plaintiffs. The letter did not make a specific

threat or indicate that enforcement was forthcoming. Nor did it state that the Texas Democratic Party or the other plaintiffs had violated any specific law, as the letter did in *NiGen*, 804 F.3d at 392. Instead, the letter explained that advising voters to pursue disability-based mail-in voting without a qualifying condition constituted a felony under Sections 84.0041 and 276.013 of the Texas Election Code. As a result, we conclude that the letter here did not "intimat[e] that formal enforcement was on the horizon." *Id.* Instead, it closely reflected the Attorney General's letter in *In re Abbott*, 956 F.3d at 709. Accordingly, the Attorney General lacks a requisite connection to the challenged law, and *Ex parte Young* does not apply to him.

III. Political question doctrine

The defendants insist the plaintiffs' as-applied challenge based on Texas officials' response to the COVID-19 pandemic presents a nonjusticiable political question. In their view, our answering whether the pandemic presents a need to change election rules to protect voters is a question constitutionally committed to other branches of government. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). The Supreme Court has warned that "lower federal courts should ordinarily not alter . . . election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Further, they argue that we must refrain from judgment out of respect for the executive and legislative branches of the state of Texas. *See Baker*, 369 U.S. at 217. Finally, they assert that there is no "judicially discoverable and manageable standard[]" for resolving whether Texas's age-based

absentee-voting law meets constitutional muster in the context of the pandemic. *See id.* The plaintiffs disagree, arguing they have presented a "straightforward constitutional claim" capable of resolution by judicially discoverable and manageable standards.

The motions panel on this case rejected the political question doctrine as an impediment, concluding that it "need not — and will not — consider the prudence of Texas's plans for combating [COVID-19] when holding elections." *Tex. Democratic Party*, 961 F.3d at 398. Instead, resolution of the appeal was said to turn on "whether the challenged provisions of the Texas Election Code run afoul of the Constitution, not whether they offend the policy preferences of a federal district judge." *Id.* at 398–99.

We agree that no political question bars our review of the Twenty-Sixth Amendment challenge. We are tasked with determining whether Section 82.003 of the Texas Election Code violates the Twenty-Sixth Amendment as applied during the pandemic, a question susceptible to judicial resolution without interfering with the political branches of Texas government. Even when "matters related to a State's . . . elective process are implicated by this Court's resolution of a question," as our resolution of this appeal will do, that "is not sufficient to justify our withholding decision of the question." *Elrod v. Burns*, 427 U.S. 347, 351–52 (1976). Judicially discoverable and manageable standards exist to help us determine whether the law runs afoul of the Twenty-Sixth Amendment. Namely, we determine whether the law denies or abridges the plaintiffs' right to vote based on age. If it does, then

we will apply an appropriate level of scrutiny. The effects of the pandemic are relevant to answering whether the law denies or abridges the right to vote, but the standards themselves do not yield to the pandemic.

For these reasons, we hold that the political question doctrine does not bar our review of the plaintiffs' challenge. Our analysis will not focus on policy determinations from Texas's executive and legislative officials. Regardless of whether the plaintiffs are presenting on this appeal a facial or as-applied challenge, our analysis does not turn on the effect of the pandemic and therefore avoids a political question.

Because we conclude there are no jurisdictional impediments to the plaintiffs' bringing these claims, we now turn to the merits of the injunction. The defendants in their opening brief challenged all the grounds used by the district court. The plaintiffs defend only on the basis of the Twenty-Sixth Amendment. We exercise our discretion to review only that basis and not examine the alternative grounds to determine if any of them would sustain the judgment. The plaintiffs, as appellees, defend only the one ground, and the parties need a ruling.

We also forewarn on a seeming inconsistency to what we have just said about not ruling on a facial challenge. It is impossible to consider the as-applied challenge based on the pandemic without addressing what is generally required to violate the Twenty-Sixth Amendment. The difference between the two forms of challenge "is not so well defined that it has some automatic effect or that it must always control

the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). We reach conclusions as to what is necessary to deny or abridge the right to vote on the basis of age, as we can do no other.

IV. Twenty-Sixth Amendment

Section 1 of the Twenty-Sixth Amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Section 2 gives Congress enforcement power. Ratified in 1971, the most recent of the voting-rights constitutional amendments has yet to be interpreted in any significant depth. After almost fifty years, apparently it now is time in several jurisdictions.

The parties have widely different interpretations of the Amendment. The plaintiffs contend that the Amendment creates a sweeping prohibition against any age-based denial or abridgment of the right to vote. Further, they contend that any differential treatment in terms of voting on the basis of age is a plainly unconstitutional denial or abridgment. Such an interpretation is said to be consistent with the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. Under their reading, Section 82.003 is unconstitutional under the Twenty-Sixth Amendment because it offers mail-in voting to those who are at least age 65 without offering the same benefit to younger voters. Even if not facially unconstitutional, the plaintiffs argue that the

election law is unconstitutional as applied "during the COVID-19 pandemic."

The defendants argue that the Twenty-Sixth Amendment was simply an extension of the right to vote to individuals between the ages of eighteen and twenty-one, not to eliminate all age-based distinctions in election-related laws. They further contend that Texas's mail-in ballot rules do not affect the right to vote under the Amendment because the laws neither abridge nor deny the right of voters younger than 65 to vote.

Also divergent are the arguments about the level of scrutiny to give to the challenged provision. Texas argues for rational-basis review, but the district court applied strict scrutiny. Perhaps because another panel of this court entered a stay of the preliminary injunction by finding only rational-basis review applied, *Tex. Democratic Party*, 961 F.3d at 409, the plaintiffs' current briefing exercised some caution by not explicitly identifying a standard. Still, the plaintiffs' disagreement with the motions panel is pressed, as is their belief that some heightened level of scrutiny is required.

A. An individual right

We first examine whether the Twenty-Sixth Amendment confers an individual right to be free from any denial or abridgment of the right to vote. We acknowledge this has not been an issue in the case, but we need to walk through the only recently developing analysis of this Amendment with care.

The language and structure of the Twenty-Sixth Amendment mirror the Fifteenth, Nineteenth, and

Twenty-Fourth Amendments.[5] Each of those amendments has been interpreted to provide an individual right to be free from the denial or abridgement of the right to vote based on the classification described in the Amendment. The Fifteenth Amendment prohibits voting laws that "handicap exercise of the franchise" on account of race because the Amendment "nullifies sophisticated as well as simple-minded modes of [racial] discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939). The Nineteenth Amendment "applies to men and women alike and by its own force supersedes inconsistent measures." *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), *overruled on other grounds by Harper v. Va. State Bd. of Elections*, 383 U.S. 663,

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[5] *Compare* U.S. Const. amend. XXVI, §§ 1–2 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. The Congress shall have power to enforce this article by appropriate legislation."), *with* U.S. CONST. amend. XV, §§ 1–2 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation."), *and* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation."), *and* U.S. CONST. amend. XXIV, §§ 1–2 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. The Congress shall have power to enforce this article by appropriate legislation.").

668–69 (1966). Likewise, the Twenty-Fourth Amendment provides a right to vote without paying a poll tax. *Harman v. Forssenius*, 380 U.S. 528, 540–41 (1965). These are Supreme Court interpretations of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments predating the 1971 submission and ratification of the Twenty-Sixth Amendment.

We hold that the Twenty-Sixth Amendment confers an individual right to be free from the denial or abridgment of the right to vote on account of age, the violation of which allows for pursuing a claim in court. We now turn to what denial and abridgment in this context mean.

B. Scope of the Twenty-Sixth Amendment's protection

For Section 82.003 of the Texas Election Code to be constitutional, its granting to those at least 65 years of age an excuse-free right to a mail ballot cannot be a denial or abridgment of not-as-old voters' right to vote, either facially or during the pandemic. Because we conclude that by definition no denial or abridgement has occurred, it is unnecessary for us to assess the applicable level of scrutiny to apply had there been either. On remand, the issue may arise. For that reason, we will discuss levels of scrutiny generally at the end of the opinion.

As we search for the meaning of the key terms, we find direction from a time not too long ago when the Supreme Court began to give meaning to a different amendment long ignored in litigation as this one has been, namely, the Second. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Court considered how the words and phrases of that

amendment had been used and interpreted in other constitutional provisions. *Id.* at 579–81. The Court wrote a lengthy exegesis of each significant term in the Second Amendment and its usage at the time of ratification. *Id.* at 579–95. That time was contemporaneous with the adoption of the Constitution itself. Among its lengthier explanations was the understanding at that time of "keep and bear Arms," and each of the key words had a discernable late-Eighteenth-Century meaning. *Id.* at 581–92. A focus as well was how the same or at least similar terms that also appeared elsewhere in the Constitution had been interpreted. For example, the Second Amendment's phrase "right of the people" was held to guarantee an individual right to possess and carry a weapon in case of confrontation, *id.* at 592, at least in part because the same phrase used in other constitutional provisions "unambiguously refer[s] to individual rights." *Id.* at 579.

Similarly, in the statutory context, "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Different here than in most statutory interpretation contexts, though, are the large gaps in time between the adoption of different amendments that use language similar to each other or to the original Constitution itself.

Just as *Heller* examined such questions as what to "keep and bear arms" meant in the Founding Era, relevant for us is how broad or limited the phrase "right to vote" was interpreted at the time the Amendment was ratified. This will establish our

baseline. That meaning is the context for the use of the phrase, and with "textual interpretation, context is everything." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997).

Understanding what the right to vote meant at the time the Twenty-Sixth Amendment was ratified in 1971 is certainly assisted by the 1969 *McDonald* decision. *McDonald*, 394 U.S. at 807–08. A definitive meaning of the right to vote and of denying that right could hardly have been given any closer to the time the Amendment was ratified. In *McDonald*, the Supreme Court held that denying mail-in ballots to incarcerated persons otherwise eligible to vote did not "deny appellants the exercise of the franchise." *Id.* The Court explained that it was "thus not the right to vote that [was] at stake [t]here but a claimed right to receive absentee ballots." *Id.* at 807.

We also consider some Congressional sources. Though we find no utility in examining the individual statements of various members of Congress who spoke to their beliefs — or perhaps only their hopes in guiding future interpretations — as to the meaning of the Amendment, we are willing to examine materials that accurately reflect what Congress was willing to adopt by joint action and present to a President who then was willing to register agreement. Enacted revisions to statutes are part of "statutory history," not "the sort of unenacted legislative history that often is neither truly legislative (having failed to survive bicameralism and presentment) nor truly historical (consisting of advocacy aimed at winning in future litigation what couldn't be won in past statutes)." *BNSF Ry. Co. v.*

Loos, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting).

Congress did not in this instance revise earlier enacted legislation by passing a new bill. Instead, after the Supreme Court invalidated part of its earlier effort, Congress revised by proposing a constitutional amendment through proper bicameral procedures, then presented it to the states where it was ratified. We explain.

The Voting Rights Act was adopted in 1965 to ensure that the right to vote would not be denied or abridged on account of race or color. *See* 52 U.S.C. § 10301. In the 1970 renewal of the Act, Congress decided to broaden the franchise in another way — by lowering the voting age to eighteen. *See Oregon v. Mitchell*, 400 U.S. 112, 117 (1970). The 1970 amendments imposed the change this way: "Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."[6] The slogan for some who urged this change was "old enough to fight, old enough to vote,"[7] an allusion to the young

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[6] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 302, 84 Stat. 314, 318, *invalidated in part by Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970).

[7] Nancy Turner, Comment, *The Young and the Restless: How the Twenty-Sixth Amendment Could Play a Role in the Current Debate over Voting Laws*, 64 Am. U. L. REV. 1503, 1508 (2015).

members of the American military serving in Vietnam.

Perhaps Congress was willing to hazard lowering the voting age by legislation even for state elections because the Supreme Court had upheld the 1965 Voting Right Act's ban on use of literacy tests based on Congress's Fifteenth Amendment enforcement power. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Lowering the voting age by federal statute for all elections, though, could not be supported by the same arguments. The Court in December 1970 held that the 1970 amendment to the Voting Rights Act setting the voting age at eighteen was within Congress's power with respect to federal elections but not as to state and local elections. *Mitchell*, 400 U.S. at 117–18.[8] At the time, forty-seven states recognized the right to vote beginning at an age higher than eighteen. Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1193 (2012).

The Twenty-Sixth Amendment followed immediately. Approved by Congress in March of 1971 and ratified by June, the Amendment was the most quickly ratified constitutional amendment in our history. *Id.* at 1194–95. This is some indication that

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[8] Debate on the Voting Rights Act Amendments may have altered the makeup of the Court that would by a 5–4 vote limit the voting-age change. The Judiciary Committee favorably reported Fifth Circuit Judge G. Harrold Carswell's nomination to the Supreme Court in February 1970, but the Senate gave precedence to considering the amendments in March, a delay that some contend is what allowed opposition to organize and defeat his confirmation in April. RICHARD HARRIS, DECISION 84, 108, 200–02 (1971).

the Twenty-Sixth Amendment was at least perceived as having a narrower sweep than the other constitutional amendments affecting voting, which in this instance was to fulfill what Congress tried but failed to do in 1970 in lowering the voting age for all elections.

We also look at details of absentee voting nationwide, data that was provided to Congress when it was considering the 1970 Voting Rights Act Amendments as well as what became the Twenty-Sixth Amendment. One 1973 review of the election laws, apparently mirroring but updating research provided to Congress in 1968–69, showed there was much variation.[9] In 1968, only two states were providing a special privilege for older voters to cast

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[9] Note, *The Submerged Constitutional Right to an Absentee Ballot*, 72 MICH. L. REV. 157, 159–61 (1973). Similar data through 1969 was prepared for Congress as shown in the record of Senate hearings cited in the article. *Id.* at 158 n.3. That data provides the absentee-voting landscape from each state based on two compilations by the Legislative Reference Service of the Library of Congress. *Amendments to the Voting Rights Act of 1965: Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary on S. 818, S. 2456, S. 2507, and Title IV of S. 2029*, 91st Cong., 1st & 2d Sess. 292–93 (1969–70) (citing ELIZABETH YADLOSKY, LEGIS. REFERENCE SERV., 69–226A, ABSENTEE REGISTRATION AND VOTING: DIGESTS OF MAJOR PROVISIONS OF THE LAWS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA (1969), and ELIZABETH YADLOSKY, LEGIS. REFERENCE SERV., A–243, ELECTION LAWS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA (1968)). Our thanks to Stuart Carmody of the Congressional Research Service — with Ryan Annison of Senator Roger Wicker's staff as liaison — and to Fifth Circuit Librarians Judy Reedy, Peggy Mitts, and Susan Jones for diligently seeking and obtaining these two long-buried documents.

absentee ballots; by 1973, there were four.[10] There were other differences:

> Maine has the most sweeping statute; it provides that *any* registered voter may cast an absentee ballot. Presumably, those who are able to vote in person do so, but the statute does not require applicants for absentee ballots to demonstrate an inability to reach the polls. In all other states, voters who wish to cast an absentee ballot must demonstrate that they fall within a statutory classification.
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> Although most states provide absentee ballots in all elections, four restrict their use to general elections. In many states, eligibility is determined by the voter's actual distance from his home. The majority of states require absence from the county of the voter's residence; others require absence from the state, the city, or the precinct. Some absentee-ballot legislation encompasses classes of voters who are within the election district but cannot reach the polls. Almost all states allow the physically incapacitated to cast absentee ballots. Some also furnish absentee ballots to students, to election workers stationed at precincts other than their own, to persons over sixty-five years of

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[10] *Submerged Constitutional Right*, *supra* note 9, at 161 n.18 (Arizona, Michigan, Rhode Island, and Wyoming in 1973); ELECTION LAWS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA, *supra* note 9, at 128, 221 (Michigan and Rhode Island in 1968).

age, and to persons whose religious beliefs prevent them from attending the polls on election day.[11]

Other variants among the states were permitting absentee voting for those who participated in the election process itself, or whose religious tenets prevented attendance at the polls.[12]

Though this data provided to Congress when considering the 1970 and 1971 enactments indicate that almost all states at the time of submission of the Twenty-Sixth Amendment permitted absentee voting by those who were temporarily removed from proximity to their polls, there was much variation — being absent from the precinct, city, county, or state.[13] Those variations were eliminated in part by the 1970 Voting Rights Act Amendments: "[E]ach State shall provide by law for the casting of absentee ballots for . . . President and Vice President . . . by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days

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[11] *Submerged Constitutional Right*, *supra* note 9, at 159–61 (footnotes omitted).

[12] Some states allowed absentee voting for election workers. ELECTION LAWS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA, *supra* note 9, at 52 (Florida); *id.* at 74 (Illinois); *id.* at 128 (Michigan). Others allowed absentee voting for religious reasons. *Id.* at 25 (California); *id.* at 36–37 (Connecticut); *id.* at 275 (Wisconsin). Many single-state variations existed, such as Mississippi's allowing absentee voting for those engaged in transportation as a driver, operator, or crewman. *Id.* at 137.

[13] *Submerged Constitutional Right*, *supra* note 9, at 160.

immediately prior to such election," then who timely return their ballots. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 202, 84 Stat. 314, 316–17, codified as 52 U.S.C. § 10502(d). The *Mitchell* Court upheld this standardization of the right to an absentee ballot in presidential elections, and it remains the law today. *Mitchell*, 400 U.S. at 119.

The significance we give to this *status quo* for absentee voting at the time of the Twenty-Sixth Amendment is that, despite all the variations in the states, the only congressional insistence in the Voting Rights Act Amendments, which included a provision lowering the voting age for all elections, was to give all voters who were going to be absent on election day a right to vote absentee for a presidential ticket. Deciding whether the Twenty-Sixth Amendment should be interpreted as doing even more is informed by this statutory history.

The Supreme Court distinguished between a right to vote and a right to vote absentee: "It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." *McDonald*, 394 U.S. at 807. Judge Ho was correct when concurring to the entry of a stay during the pendency of this appeal when he wrote: "For nearly a century, mail-in voting has been the exception — and in-person voting the rule — in Texas." *Tex. Democratic Party*, 961 F.3d at 414 (Ho, J., concurring).

In summary, the right to vote in 1971 did not include a right to vote by mail. In-person voting was the rule, absentee voting the exception. Though we identify this historical context for the Amendment,

certainly our imperative is to focus on the text. "Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). Even "small gestures can have unexpected consequences," *id.*, which is relevant when considering whether the nearly forgotten Twenty-Sixth Amendment invalidates any age-based limitation on voting today.

We now consider when the right to vote is "denied" or "abridged."

1. To deny the right to vote

Before ratification, the Supreme Court held that the right to vote was not "denied" where there was no indication that the challengers were "in fact absolutely prohibited from voting." *McDonald*, 394 U.S. at 807–08 & n.7. After ratification, the Court held that a person's right to vote is denied when an election law "absolutely prohibits them from voting." *Goosby v. Osser*, 409 U.S. 512, 521 (1971). Under the Twenty-Sixth Amendment, then, "denied" means "prohibited." There has been no denial here.

2. To abridge the right to vote

To abridge is "[t]o reduce or diminish." *Abridge*, Black's Law Dictionary 7 (10th ed. 2014). Evaluating whether there has been a *denial* of a right will rarely involve a comparison. On the other hand, "[i]t makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000). More, later, on *Bossier Parish*. We are not focused today on how important that right is, but it is one of importance, central to a

democratic system. Instead, we are seeking a clear understanding of the right itself, from which we then can determine whether something the government has done in its election rules has abridged the right. The plaintiffs insist that an abridgment occurs any time a new election law makes voting more difficult for one age group than it is for another. Under that construct, when Texas in 1975 legislated a privilege for older voters to cast absentee votes without needing to claim a reason such as being out of the county, it abridged younger voters' rights even though no change was made as to them.[14] In essence, a new baseline for voting arises with each new election rule. If some category of voters has more limited rights after the change in comparison to other categories, an abridgement has occurred.

Our first reaction is that this seems an implausible reading of "abridge." Conceptually, plaintiffs are converting the Twenty-Sixth Amendment into the positive assertion that voting rights must be identical for all age groups at all times. Any indulgence solely for one age group of voters would fail; voters of all ages must get the same indulgence.[15] The Amendment, though, is a prohibition against adopting rules based on age that deny or abridge the rights voters already have.

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[14] Addressed later is the specific assertion in support of the preliminary injunction that the privilege abridges the younger voters' right in the context of the pandemic.

[15] We borrow the term "indulgence" from Justice Scalia, who used it to refer to accommodations offered to some but not all voters based on a perceived special need. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring).

Indeed, neither the Twenty-Sixth Amendment nor the related amendments we have been discussing are written in terms of granting a positive right to vote. Instead, they each are phrased in the negative, namely, that the right to vote shall not be denied or abridged based on the relevant reason. *See* David Schultz, Election Law and Democratic Theory 87 (2016). More consistent with the text of the Twenty-Sixth Amendment is for us to evaluate whether younger voters' rights were reduced by the addition of a privilege for older voters.

The point just made, though, needs to take into account a possible exception. We return to the *Bossier Parish* decision concerning the Fifteenth Amendment. After stating that a baseline for measuring abridgements was necessary, the Court continued by distinguishing two parts of the Voting Rights Act. Section 5 proceedings, the since-invalidated requirement that certain states had to preclear any election law changes with the Department of Justice, "uniquely deal only and specifically with changes in voting procedures." *Bossier Parish*, 528 U.S. at 334 (emphasis omitted). On the other hand, challenges to voting practices generally, *i.e.*, not necessarily a recent change, under Section 2 of the Act or under the Fifteenth Amendment, had a broader reach:

> In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* "results in [an] abridgement of the right to vote" or "abridge[s] [the right to vote]"

> relative to what the right to vote *ought to be*, the status quo itself must be changed.

Id. The Court then stated that "abridging" for purposes of the Fifteenth Amendment refers to discrimination more generally, not just to retrogression. *Id.* That certainly makes sense, as litigation under the Fifteenth Amendment went far beyond just challenging recent changes but sought to dismantle longstanding discrimination in voting.

Even if this concept applies to the Twenty-Sixth Amendment, *i.e.*, that abridging goes beyond just looking at the change but also at the validity of the state's voting rules generally, we see no basis to hold that Texas's absentee-voting rules as a whole are something that ought not to be.

Secondly, we examine the two Supreme Court decisions on which plaintiffs rely in defining "abridge" in this manner. The earlier of the opinions used the Fifteenth Amendment to invalidate an Oklahoma voter registration system. *Lane*, 307 U.S. at 270, 275. When Oklahoma was admitted as a state in 1907, it imposed a literacy test that, because of how it was administered, effectively denied most black Oklahomans the right to vote. *Id.* at 269. The test was invalidated by the Supreme Court. *Id.* Oklahoma then devised a registration system providing that those who voted in the 1914 Oklahoma elections remained eligible thereafter, but those who had been eligible and failed to vote had to register within a 12-day window in 1916. *Id.* at 271. Thus, voters who had been eligible in 1914 had much different rules applied to them depending on their race. White voters who had not been subject to

barriers of law or custom in 1914 remained eligible to vote, while black voters had a registration window that briefly opened, then closed tight. The plaintiff was a black potential voter who had been old enough but failed to register in 1916; in 1934, he was rejected when he sought to register. *Id.* The Court invalidated the registration scheme, explaining that the Fifteenth Amendment prohibits "onerous procedural requirements which effectively handicap exercise of the franchise." *Id.* at 275. Plaintiffs latch on to the phrase "effectively handicap," but we fail to see that when Texas granted a privilege to older voters, it was reducing or handicapping the rights of younger voters. It failed to enhance rights for younger voters, but that is not the equivalent of abridging.

Three decades later, the Supreme Court held that Virginia abridged the right to vote in violation of the Twenty-Fourth Amendment when voters were required to choose between paying a poll tax or filing a certificate of residence. *Forssenius*, 380 U.S. at 531–33. Somewhat similarly to the Oklahoma response to invalidating literacy tests, Virginia adopted the alternatives because of the imminent prohibition of poll taxes for federal elections by the Twenty-Fourth Amendment. *Id.* at 531. Under the new state law, someone wishing to vote in a federal election could either pay the poll tax applicable to state elections or instead file every election year at least "six months before the election, a notarized or witnessed certificate attesting that they have been continuous residents of the State since the date of registration (which might have been many years before under Virginia's system of permanent registration) and that they do not presently intend to

leave the city or county." *Id.* at 541. The Court held that to demonstrate the invalidity of the measure, "it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* The Twenty-Fourth Amendment eliminated "all requirements impairing the right to vote in federal elections by reason of failure to pay the poll tax," and Virginia could not impose the tax even just as an alternative. *Id.* at 544.

Forssenius invalidated the law requiring voters choose between paying an unconstitutional tax or engaging in an onerous registration. The plaintiffs emphasize the Court's calling the registration an invalid "material requirement," but here, too, the plaintiffs seek more than can be found in one of the Court's opinions. The Twenty-Fourth Amendment provides that the right to vote in federal elections "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." When Virginia imposed a material requirement of registration within a certain time period prior to every election, it did not grant a privilege to one class of voters while leaving other classes untouched. It was mandating that every voter either pay the poll tax or register. It was unconstitutional to require that choice.

Rejecting the plaintiffs' arguments, we hold that an election law abridges a person's right to vote for the purposes of the Twenty-Sixth Amendment only if it makes voting *more difficult* for that person than it was before the law was enacted or enforced. As the Court has held, the "core meaning" of "abridge" is to

"shorten," and shortening "necessarily entails a comparison." *Bossier Parish*, 528 U.S. at 333–34. Abridgment of the right to vote applies to laws that place a barrier or prerequisite to voting, or otherwise make it more difficult to vote, relative to the baseline.

On the other hand, a law that makes it *easier* for others to vote does not abridge any person's right to vote for the purposes of the Twenty-Sixth Amendment. That is not to say that a state may always enact such a law, but it does not violate the Twenty-Sixth Amendment.

Sophisticated attempts to circumvent this rule could arise. The Supreme Court, though, has these constitutional amendments "nullif[y] sophisticated as well as simple-minded modes of impairing the right guaranteed." *See Forssenius*, 380 U.S. at 540–41 (quotation marks omitted). Courts will be able to respond properly to any artful efforts.

We now examine some of the caselaw urged upon us by the plaintiffs. We have discussed *Lane* and *Forssenius* already and concluded they do not counsel a different approach. We now review some other decisions in which other courts considered claimed violations of the Fifteenth, Twenty-Fourth, or Twenty-Sixth Amendments. Soon after the Twenty-Sixth Amendment was ratified, the Supreme Court of California held that California's registration rule that compelled young voters living apart from their parents to retain their parents' voting residence violated the Twenty-Sixth Amendment. *Jolicoeur v. Mihaly*, 488 P.2d 1, 2 (Cal. 1971). That decision is not binding on this court, but we examine it for its persuasive value. The court held that the word

"abridge" was defined as to "diminish, curtail, deprive, cut off, [or] reduce." *Id.* at 4. The registration rule compelled the newly enfranchised voters either to travel to their parents' district to register and vote, or to vote by absentee. *Id.* The court held that it was "clear" that the law "abridged petitioners' right to vote in precisely one of the ways that Congress sought to avoid — by singling minor voters out for special treatment and effectively making many of them vote by absentee ballot." *Id.* at 7. Unlike the generally older voters who were not in college, these students could not register to vote where they lived. We agree with *Jolicoeur* to the extent it means that a voting scheme that adds barriers primarily for younger voters constitutes an abridgement due to age.

We also consider a decision by the Supreme Court of Colorado, which held that the Twenty-Sixth Amendment applied to participation in a ballot-initiative process. *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 222–23 (Colo. 1972). The court invalidated a law that prevented persons younger than twenty-one from signing and circulating petitions. *Id.* at 223. Although this case did not involve voting, the suit did involve prohibiting political participation based on age. We do not necessarily endorse using the Twenty-Sixth Amendment in this context, but the Colorado court's doing so does not create a result contrary to our holding here.

The final decision we examine is one that the district court cited in the present case. *See United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105

(1979). The 1978 district court opinion applied strict scrutiny to a claim under the Twenty-Sixth Amendment. *Texas*, 445 F. Supp. at 1261. There, a local county clerk refused to allow college students to register to vote, effectively disenfranchising 973 of the 1000 applicants. *Id.* at 1249. The district court held that this refusal violated the Twenty-Sixth Amendment. The invalidation of this practice is consistent with our analysis, but lesser scrutiny would have reached the same outcome. Further, the Supreme Court's summary affirmance of the district court's result is not a summary endorsement of the district court's reasoning.

We hold, based on the meaning of the word "abridged," 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. Thus, conferring a privilege on one category of voters does not alone violate the Twenty-Sixth Amendment.

C. The Texas Election Code and the Twenty-Sixth Amendment

It has taken much discussion, but we finally arrive at the dispositive question: Does Section 82.003 of the Texas Election Code deny or abridge the plaintiffs' voting rights during the pandemic? The statutory background for voting in Texas prior to election day is the following. Early voting was first permitted in 1917. *In re Texas*, 602 S.W.3d at 558. Gradually adding classes of voters to those who qualify for absentee voting, the state did not extend

no-excuse absentee voting to persons 65 and older until 1975, after the adoption of the Twenty-Sixth Amendment. *Id.* (citing Act of May 30, 1975, 64th Leg., R.S., ch. 682, § 5, 1975 Tex. Gen. Laws 2080, 2082). This right is now codified in the challenged Section 82.003.

For all the reasons we already have discussed, 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.

We now consider if the pandemic affects the validity of that age-based privilege. We start with what the Texas Supreme Court stated regarding the extent of that state's adjustment of its election rules during the pandemic. That court held that "a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability." *Id.* at 560. Further, "elected officials have placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition." *Id.* at 561. The "lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code." *Id.* at 550. Although "lack of immunity" alone is not a Section 82.002 disability, *In re Texas* shows that voters with an underlying physical condition making them more vulnerable to the virus, rather than fear of COVID-19 alone, may apply to vote by mail under that section. This undermines the plaintiffs' as-applied argument because at-risk voters of any age can utilize the

Texas Election Code's disability provision to mitigate the risk of COVID-19.

The record indicates Texas is taking the kinds of precautions for voting that are being used in other endeavors during the pandemic. None of them guarantees protection. There are quite reasonable concerns about voting in person, but Texas's mandating that many continue to vote in that way does not amount to an absolute prohibition of the right to vote. As to abridgement, voters under age 65 did not have no-excuse absentee voting prior to the pandemic. Further, requiring many to vote in person during this crisis, with safety measures being imposed and some flexibility as to "disability" being shown, does not amount to an unconstitutional *status quo*. The real issue here is equal protection, and that is not before us.

We will remand. Before we send this case on its way, we pause to discuss the concept of levels of scrutiny. The decision in June to grant a stay in this case was based on a holding that "employing *McDonald*'s logic leads inescapably to the conclusion that rational-basis review applies." *Tex. Democratic Party*, 961 F.3d at 409 (citing *McDonald*, 394 U.S. at 807–08). The Supreme Court's 1969 *McDonald* opinion, predating the 1971 Amendment at the center of our analysis, was a challenge by pretrial detainees who were either charged with nonbailable offenses or could not afford bail. *McDonald*, 394 U.S. at 803. They had no right under Illinois law to an absentee ballot due to their detention, despite that they had not been convicted of the charged offenses. *Id.* The claim was that the state made an arbitrary distinction, violative of equal protection, between

those physically incapacitated by illness who could vote absentee and those judicially incapacitated who could not. *Id.* at 806. The Court concluded that no heightened scrutiny was needed because the state's distinction did not "impact" the detainees' "fundamental right to vote." *Id.* at 807. The right to vote had not been denied because there was no evidence that Illinois would not provide alternative means for the detainees to vote, as the state might "furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates," or offer other options. *Id.* at 808 & n.6.

We are hesitant to hold that *McDonald* applies. One reason is that the decision predated the ratification of the Twenty-Sixth Amendment, which means it did not consider the potential — argued by the plaintiffs here — that the Amendment requires the same heightened analysis as *McDonald* stated applied to classifications based on race and wealth. *See id.* at 807. Further, the Court seemed to analyze only whether the challenged action "den[ied] appellants the exercise of the franchise." *Id.* at 807–08. The Twenty-Sixth Amendment prohibits age-based denials but also abridgments of the right to vote. In addition, the Supreme Court interpreted a post-*McDonald* limitation on absentee voting as potentially violative of equal protection even though, like the statute in *McDonald*, it left open other options for voting. *Am. Party of Tex. v. White*, 415 U.S. 767, 794–95 (1974) (discussing *McDonald*). No party's brief cited *American Party* either to the motions panel or to us, and only an amicus brought it to our attention.

There has been no denial or abridgement of a right to vote under the Twenty-Sixth Amendment. On remand, equal protection questions may come to the fore. Though we cannot, in the current posture of this appeal, decide the issue of the proper scrutiny to give to this statutory provision under equal protection analysis, we need to take one further step so the issue can be considered on remand in light of this opinion. Before granting a stay, the motions panel had to decide the likelihood of the defendants' success on appeal on each of the grounds on which the district court relied in issuing a preliminary injunction. It held both that *McDonald* applied and that rational-basis review was appropriate. In our more limited opinion today, though, by concluding that no denial or abridgment of the right to vote under the Twenty-Sixth Amendment ever occurred, we had no denial or abridgement to scrutinize. We have uncertainties about *McDonald* and do not wish that the earlier necessity for a preliminary decision on the merits by the motions panel control the remand on an issue we never reached. 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.

To be clear, we are not stating, even as *dicta*, that rational basis scrutiny is incorrect. Indeed, age-based distinctions are evaluated in that manner in the usual case. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). On the other hand, some courts have applied what is known as the *Anderson-Burdick* balancing analysis to claims that an election law violates equal protection, and they provide noteworthy reasons for doing so. *See, e.g.*, *Luft v.*

Evers, 963 F.3d 665, 671 (7th Cir. 2020) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)). The right level of scrutiny for an equal protection claim on remand is for the district court initially to analyze. An answer now by us would be only *dicta*. Even so, we state that we have not seen any authority to support that it would require strict scrutiny as the district court initially applied.

In sum, the plaintiffs claim that the Twenty-Sixth Amendment prohibits allowing voters who are at least 65 years old to vote by mail without excuse. This claim fails because conferring a benefit on another class of voters does not deny or abridge the plaintiffs' Twenty-Sixth Amendment right to vote. The preliminary injunction was not properly granted on the plaintiffs' Twenty-Sixth Amendment claim as it has been defended here.

We VACATE the injunction and REMAND for further proceedings consistent with this opinion.

* * *

CARL E. STEWART, *Circuit Judge*, concurring in part and dissenting in part:

Before us is an appeal of a preliminary injunction issued in July 2020 by the District Court in the Western District of Texas. The preliminary injunction required Texas officials to allow any Texan eligible to vote to do so by mail. In April, Plaintiffs filed this lawsuit requesting relief on seven grounds: race and language discrimination in violation of the Voting Rights Act, race discrimination and non-race discrimination in violation of the Fourteenth Amendment, race discrimination in violation of the Fifteenth Amendment, denial of free speech under the First Amendment, denial of due process for vagueness, and violation of the Twenty-Sixth Amendment. Plaintiffs' motion for a preliminary injunction narrowed the claims. They argued that Texas's election statute, § 82.003 (allowing no-excuse voting for voters 65 and older) was void for vagueness and violated the First, Fourteenth, and Twenty-Sixth Amendments. After conducting a hearing, the district court determined in a seventy-three-page opinion that Plaintiffs were likely to succeed on all their claims, including their Twenty-Sixth Amendment claim, especially in light of the tremendous threat to public health posed by the COVID-19 pandemic. The district court noted that "COVID- 19 has become one of the leading causes of death in the United States. Data to date in Texas demonstrates higher than expected infection rates in younger persons." Regarding the Twenty-Sixth Amendment claim, the district court stated:

> The Court concludes, that the COVID-19 pandemic, younger voters bear a

> disproportionate burden because the age restrictions of [§ 82.003], that [§ 82.003] is a government classification based on age and discriminates against voters under the age of 65 based on age, and that [§ 82.003] violates the [Twenty-Sixth] Amendment, as applied, during the COVID-19 pandemic.

Defendants appealed the preliminary injunction order and a motions panel of this court granted a motion to stay the injunction pending appeal. *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). The panel noted that § 82.003 "facially discriminates on the basis of age," *id.* at 402, but concluded that the state officials were likely to show that the statute's "age distinction survives." *Id.* at 406.

The issue before us now on appeal is whether the district court erred in issuing this preliminary injunction, and to resolve this appeal, we must consider three jurisdictional arguments: whether Plaintiffs have standing, whether Defendants can claim sovereign immunity, and whether this lawsuit poses a nonjusticiable political question. As to the merits, we must determine whether the court erred when it determined that Plaintiffs were likely to succeed on their Twenty-Sixth Amendment claim, as applied.

The panel majority ably considers these jurisdictional questions, and I concur in their resolution of these threshold issues. However, because I differ with the panel majority in their determination that § 82.003 does not violate the Twenty-Sixth Amendment, I dissent as to that claim.

A district court's ultimate decision to issue a preliminary injunction is reviewed for abuse of discretion, but "a decision grounded in erroneous legal principles is reviewed *de novo.*" *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001). A plaintiff must establish four elements to secure a preliminary injunction:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

See Speaks v. Kruse, 445 F.3d 396, 399–400 (5th Cir. 2006).

The statute in question facially discriminates based on age, which in the context of the pandemic leads to dramatically different outcomes for different age groups. A consideration of the statute under the plain text of the Twenty-Sixth Amendment leads me to conclude that the statute, as applied during the pandemic, is likely unconstitutional and that therefore the district court did not err in determining Plaintiffs have a substantial likelihood of success on the merits. I further conclude that the district court did not abuse its discretion in deciding that the other three factors were met and in issuing the preliminary injunction. Therefore, I respectfully dissent.

I. Twenty-Sixth Amendment Analysis

"The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI, § 1. Though few courts have interpreted the meaning of "denied or abridged" in the context of the Twenty-Sixth Amendment, the phrase has been interpreted in the context of the Fifteenth and Nineteenth Amendments. In the absence of an unambiguous definition, much effort has been devoted to unearthing the legislative history of the Twenty-Sixth Amendment. In my view, neither precedent nor legislative history compels a narrow definition of "abridged."

Neither party argues that Section 82.003 denies individuals the right to vote by permitting some individuals to vote via mail-in ballot. Plaintiffs argue that the statute abridges voting rights through a facial classification that permits individuals 65 years and older to vote via mail-in ballot. Defendants argue on appeal that the statute does not abridge the right to vote by giving the benefit of mail-in ballots to certain members of the electorate. The definition of abridge is central to this appeal.

As the panel majority notes, Black's Law Dictionary defines abridge as "[t]o reduce or diminish." *Abridge*, Black's Law Dictionary 7 (10th ed. 2014). The panel majority concludes that because no voter is made worse off by Texas's mail-in ballot provisions, the State of Texas has not abridged voting rights. The panel majority holds that "an election law abridges a person's right to vote for the purpose of

the Twenty-Sixth Amendment only if it makes voting more difficult for that person than it was before the law was enacted or enforced."

Precedent supports a different outcome. The panel majority cites *Reno v. Bossier Parish School* for the proposition that "abridge" requires a comparison to a baseline. *See* 528 U.S. 320, 334 (2000) (discussing the use of baseline comparisons in preclearance proceedings under § 5 of the Voting Rights Act); *see* Maj. Op. at 27. They further explain that plaintiffs cannot prevail under the Twenty-Sixth Amendment without proof that their voting rights were reduced by the addition of a *privilege* for older voters. *See* Maj. Op. at 33 (emphasis added). What the panel majority refers to as a privilege here has been recognized as a right in other contexts. *See Am. Party of Tex. v. White*, 415 U.S. 764, 796 (1974) (holding that a state's decision to only offer absentee ballots to major party primary voters violated the Equal Protection Clause).

Furthermore, the panel majority misreads *Reno*. While *Reno* holds that the appropriate comparison in preclearance proceedings is between the status quo and the proposed changes, *Reno* expressly identifies a broader definition of abridge within § 2 of the Voting Rights Act and the Fifteenth Amendment. *Reno,* 528 U.S. at 334. In the context of the Fifteenth Amendment, *Reno* indicates that the proper comparison is a hypothetical one—one between the status quo and what the hypothetical right to vote "ought to be". *Id.* "If the status quo 'results in [an] abridgement of the right to vote' or 'abridge[s] [the right to vote]' relative to what the right to vote ought to be, the status quo itself must be changed." *Id. Luft*

v. Evers considered *Reno* and persuasively offered what the baseline should be in cases challenging voter qualification and election mechanisms—an equal opportunity to participate. 963 F.3d 665, 672 (7th Cir. 2020) (citing *Reno*, 528 U.S. at 334).

Section 82.003 fails to treat members of the electorate equally with regard to mail-in voting. This unequal treatment is discriminatory in normal times and dangerous in the time of a global pandemic. Though all individuals can seemingly vote in person, those without the opportunity to vote by mail have less opportunity to participate than others. Though *Luft* interpreted § 2 of the Voting Rights Act in respect to protected classes, there is little reason to think the term "abridge" should carry a distinct meaning within the Twenty-Sixth Amendment.

In *South Carolina v. Katzenbach*,[1] the Supreme Court held that Congress has broad authority to enforce § 1 of the Fifteenth Amendment ("the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."). 383 U.S. 301, 325 (1966). The Court

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[1] *South Carolina v. Katzenbach* refused to invalidate § 5 of the 1965 Voting Rights Act, which required that for certain jurisdictions to make changes to a "standard, practice, or procedure with respect to voting," they must seek a declaratory judgment that those policy changes do not have the purpose or effect of abridging or denying the right to vote on the basis of race. 383 U.S. 301, 337 (1966) (quoting 42 U.S.C. § 1973c(a)). The Supreme Court has since held that the formula of the Voting Rights Act which determines if a state is covered is unconstitutional but declined to issue a holding on § 5 itself. *Shelby Cty. Ala. v. Holder*, 570 U.S. 529, 556 (2013).

stated that § 1 "has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are *discriminatory on their face* or in practice." *Id.* at 305 (emphasis added). Though *Katzenbach* predates the Twenty-Sixth Amendment, § 1 of the Fifteenth Amendment and § 1 of the Twenty-Sixth Amendment both include language prohibiting states from denying or abridging the right to vote. *Katzenbach* interprets "deny or abridge" as invalidating procedures that are facially discriminatory or applied in a discriminatory manner with regard to race. *Katzenbach* does not cabin its language to the word "deny" but rather interprets the phrase in total to prevent an array of discriminatory practices including facial classifications. *Katzenbach* supports a broad understanding of "deny or abridge" that is inconsistent with the panel majority's holding.

The Seventh Circuit also construed "denial or abridgment" in the context of § 2(a) of the Voting Rights Act. *Luft v. Evers*, 963 F.3d at 672. The court states that § 2 was violated when the voting system was "not equally open to participation by members of a protected class so that groups members have less opportunity than other members of the electorate to participate." *Id.* The court recognized an equality requirement in § 2(b) of the Voting Rights Act that requires states to treat voters equally with regard to their opportunity to participate in the electoral process. *Id.*

Reno, *Katzenbach*, and *Luft* persuade me to read "denial or abridge" in the Twenty-Sixth Amendment as generally prohibiting states from depriving

individuals of the equal opportunity to vote based on a protected status. The panel majority does not cite any case that compels an understanding of "abridge" in the context of a voting rights amendment that requires a plaintiff's position to be worsened. Though the panel majority relies on *Lane v. Wilson* and an "onerous procedural requirement" as violative of the Fifteenth Amendment, the Supreme Court does not state that such an onerous procedural requirement is *necessary* to find abridgment. 307 U.S. 268, 275 (1939). In fact, *Lane* states that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Id.* In this case, we have straightforward facial discrimination, while *Lane* dealt with a complicated scheme with severely discriminatory impacts without a facial classification.

The panel majority also cites *Harman v. Forssenius*, which similarly outlines an unconstitutional method of burdening voters. 380 U.S. 528 (1965). *Harman* also cites *Lane* for the proposition that the Twenty-Fourth Amendment "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed." *Id.* at 540–41 (internal quotations omitted). *Harman* concludes that the Twenty-Fourth Amendment does not require an outright poll tax, but that a violation can be found if it is shown that the statute "imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541. In this case, I see both a facial classification and a material requirement to vote in person imposed on younger voters. *Harman* seems to stand for the proposition that this material requirement suffices when the

statute itself does not plainly violate the Amendment but does not suggest that it is *necessary.*

Suffice it to say, I respectfully differ with my panel colleagues about how these Supreme Court cases should be read and construed in the context of this case.

Though the legislative history here is unclear, there are more legislative arguments in favor of construing "abridge" broadly than there are in favor of construing the term narrowly. On balance, I conclude that the legislative history does not favor the panel majority's holding.

In 1970, Congress attempted to lower the voting age from 21 to 18, which was invalidated in *Oregon v. Mitchell.* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 302, 84 Stat. 314, 318, invalidated in part by *Oregon v. Mitchell*, 400 U.S. 112 (1970). The Twenty-Sixth Amendment was ratified the following year. Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1194–95 (2012). The Twenty-Sixth Amendment did more than merely raise the voting age in a constitutionally permissible manner. Congress's 1970 effort to lower the voting age stated:

> Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 302, 84 Stat. 314, 318, invalidated in part by *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Several legislators expressed the intent to have the Twenty-Sixth Amendment create protections against discrimination akin to those in the Fifteenth and Nineteenth Amendments. *See, e.g.*, 117 Cong. Rec. H7534 (daily ed. March 23, 1971) (statement of Rep. Richard Poff) ("What does the proposed constitutional amendment accomplish? It does not grant the right to vote to all citizens 18 years of age or older. Rather, it guarantees that citizens who are 18 years of age or older shall not be *discriminated against* on account of age. Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting . . . In this regard, the proposed amendment would protect not only an 18-year-old, but also the 88-year-old . . . ") (emphasis added); 117 Cong. Rec. H7539 (daily ed. Mar. 23, 1971) (statement of Rep. Claude Pepper) ("What we propose to do . . . is exactly what we did in . . . the 15th amendment and . . . the 19th amendment . . ."; *see also id.* at H7533 (Rep. Emanuel Celler noting that the Twenty-Sixth Amendment is "modeled after similar provisions in the 15th amendment . . . and the 19th amendment . . .").

The content and naming of the 1970 Voting Rights Amendment also indicates that Congress considered regularized access to absentee ballots a significant part of "voting rights." § 5 of the Voting Rights Act concerned evaluating practices and procedures for potential abridgement, and most likely

the method by which a person is permitted to vote would constitute such a practice or procedure. This persuades me that the right to vote should be construed more broadly than the mere right to cast a ballot in person.

The panel majority relies on various aspects of statutory and legislative history as support for its holding. The panel majority also cites *McDonald v. Board of Election Commissioners of Chicago* for the proposition that the framers understood the right to vote as the right to cast a ballot. 394 U.S. 802, 807 (1969). I am unpersuaded that *McDonald* controls the outcome of this case. *McDonald* affirmed a summary judgment grant in favor of Illinois on inmates' Equal Protection Claims. *Id.* at 809, 810. The inmates argued that their rights were violated by the state's refusal to provide them with mail-in ballots, and the court granted the motion noting that there was "nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." *Id.* at 807. *McDonald* is a limited holding on its own terms because it is based on a lack of evidence in the record. To be sure, *McDonald* has not been overruled by the Supreme Court. However, that truism is unremarkable; the Court does not routinely overrule its cases. The point is that *McDonald* has limited vitality for the purposes of this appeal.

Beyond *McDonald*'s limited scope, the Supreme Court has limited *McDonald* at least three times. *See Goosby v. Osser*, 409 U.S. 512, 521–22 (1973) (discussion of *McDonald*'s inapplicability in a situation where there was greater evidence); *see O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) (same);

see Am. Party 415 U.S. at 794-95. *American Party* held that Texas violated the Fourteenth Amendment by allowing some party primary voters to cast absentee ballots while requiring other party primary voters to vote in person. *Id.* at 794.

I conclude that the options granted to voters to cast their vote are part of "the right to vote" under the Twenty-Sixth Amendment. By giving younger voters fewer options, especially in the context of a dangerous pandemic where in-person voting is risky to public health and safety, their voting rights are abridged in relation to older voters who do not face this burden.[2] This implicates the Twenty-Sixth Amendment.

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[2] The burden is severe. During the primaries, the pandemic led to a shortage in polling workers as individuals seek to avoid exposure to COVID-19. Elections Adm'rs and Cty. Br. at 23. Moreover, "securing an adequate number of polling places has been a challenge" since facilities that normally serve as election precincts are not large enough to accommodate social distancing. *Id.* This in turn has led to crowding and long lines at the polls, which increased the risk of exposure to the virus. *Id.* 22–23. And more people have gotten sick. For instance, following the Wisconsin primary, health officials identified 52 people who tested positive for COVID-19 after either voting in person or working at a polling site. NAACP Legal Defense Fund Br. at 12 (citing The Latest: 52 Positive Cases Tied to Wisconsin Election, The Associated Press (Apr. 28, 2020), https://apnews.com/b1503b5591c682530d1005e58ec8c267). Other individuals may have contracted the virus while voting, but were never tested. There is reason to think that forcing millions of voters under the age of 65 to vote in person on November 3, 2020 may place them in significant danger.

II. Scrutiny Analysis

As the panel majority observes, there remains a question of what level of scrutiny the district court should have applied to § 82.003. In *McDonald*, the Supreme Court applied rational-basis review to a law burdening the right to vote by mail. 394 U.S. at 808–09.[3] But in *Anderson v. Celebrezee*, 460 U.S. 780 (1983) and *Burdick v. Takusi*, 504 U.S. 428 (1992), the Supreme Court articulated a framework that "applies strict scrutiny to a State's law that severely burdens ballot access and intermediate scrutiny to a law that imposes lesser burdens." *Esshaki v. Whitmer*, 813 F. App'x 170, 171 (6th Cir. 2020).

Even if strict scrutiny is not the appropriate standard to be applied here, as the district court applied to Plaintiffs' Twenty-Sixth Amendment claim, Defendants have not identified an interest in the application of § 82.003 during the pandemic that would allow that application to withstand any level of judicial review. Defendants argue that Texas's interest in preventing voter fraud justifies its limitations of voting by mail to individuals 65 years or older, but they do not present any evidence, let alone argue, that voters 64 years or younger present any more risk of committing voter fraud than those

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[3] In addition to the reasons offered by the panel majority for why rational basis may not be the correct standard of review here, I agree with then Chief Judge Frank Coffin who opined: "It is difficult to believe that [the Twenty-Sixth Amendment] contributes no added protection to that already offered by the Fourteenth Amendment" for age discrimination. *See Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975). Consequently, a heightened standard of review is likely warranted here.

over that age threshold. Indeed, the risk of fraud is exceedingly rare. As the district court found, between 2005 and 2018, there were just 73 prosecutions of voter fraud in Texas out of millions of votes casted. In two-thirds of the states, *any* qualified voter can vote absentee without providing an excuse. National Conference of State Legislatures, *Voting Outside the polling Place: Absentee, All-Mail and Other Voting at Home Options*, https://www.ncsl.org/research/elections -and-campaigns/absentee-andearly-voting.aspx. However, "[n]one of these states have experienced widespread fraud as a result of mail-in voting." NAACP Legal Defense Fund Br. 16 n.18 (citing The Brennan Center, The False Narrative of Vote-by-Mail Fraud, https://www.brennancenter.org/our-work/analysis-opinion/falsenarrative-vote-mail-fraud). Hence, I am not convinced that allowing the district court's order to stand would cause "widespread voter fraud and election chaos." *See* Tarrant Cty. GOP Br. 1–2.

To the extent there is any risk of voter fraud, Texas has mechanisms in place to protect the integrity of its elections. For instance, to obtain an absentee ballot, a Texas voter must provide identifying information, under penalty of perjury, that allows election officials to confirm the applicant is eligible to vote. *See* Elections Adm'rs and Cty. Br. 10 (citing Tex. Elec. Code § 84.001). Texas also has a variety of criminal sanctions available to deter any misuse of absentee ballots. *See*, *e.g.*, Tex. Elec. Code § 84.0041 (providing that a person is liable for "intentionally caus[ing] false information to be provided on an application for ballot by mail"), 276.013 (providing that an individual is liable for

knowingly or intentionally causing a ballot to be obtained under false pretenses).

Given the dearth of evidence of voter fraud and the ample tools available to promote election integrity, Defendants have not identified a legitimate government interest in enforcing § 82.003 within the context of a global pandemic.

III. Remaining Preliminary Injunction Factors

As Plaintiffs are likely to succeed on the merits of their argument that § 82.003 violates the Twenty-Sixth Amendment for the aforementioned reasons, I now turn to the other injunction factors.

The district court concluded that Plaintiffs faced a substantial threat of irreparable injury, noting the serious dangers posed by in-person voting during the pandemic. The district court found that the threatened harm if the injunction is denied outweighs Defendants' concerns about voter fraud, which the district court determined were "unsupported." The district court finally determined that granting the injunction was in the public interest by safeguarding constitutional rights and limiting the spread of disease. The district court did not abuse its discretion in reaching these findings.

The preliminary injunction was properly issued, and for that reason, I respectfully dissent.

APPENDIX D

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, V. GREG ABBOTT, Governor of Texas, KEN PAXTON, Texas Attorney General, RUTH HUGHS, Texas Secretary of State, DANA DEBEAUVOIR, Travis County Clerk, and JACQUELYN F. CALLANEN, Bexar County Elections Administrator, Defendants.	FILED May 19 2020 Clerk, U.S. District Clerk Western District of Texas By /s/________ Deputy Civil Action No. SA-20-CA-438-FB

ORDER REGARDING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

We hold these truths to be self-evident, that all men are created equal, that they

> **are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.**

THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).

Two hundred forty-four years on, Americans now seek Life without fear of pandemic, Liberty to choose their leaders in an environment free of disease and the pursuit of Happiness without undue restrictions.

> **We the People of the United States, in Order to form a more perfect Union . . . .**

U.S. CONST. pmbl.

Of the 3,929,214 original Americans, "We the People" as the new sovereign with the power to prevent a new despot belonged in the hands of only 235,753 white males who owned property.[1]

Over time the franchise grew to include all white males,[2] African-American men,[3] and women.[4] Without that evolving expansion, "We the People" are mere words on 200 year old parchment.

There are some among us who would, if they could, nullify those aspirational ideas to return to the not so halcyon and not so thrilling days of yesteryear of the Divine Right of Kings,[5] trading our birthright as a sovereign people for a modern mess of governing pottage in the hands of a few and forfeiting the vision of America as a shining city upon a hill.[6]

PROCEDURAL BACKGROUND

Now before the Court is plaintiffs' assertion that current public health circumstances require an expansion of how votes are cast to prevent the spread of COVID-19. Plaintiffs would have the Court

interpret "disability" to include lack of immunity from COVID-19 and fear of infection at polling places. Plaintiffs seek a preliminary injunction to enlarge the use of voting by mail in lieu of close quarters in-person voting.

Texas law allows voting by mail for absentees (those who will be away from home for all of early voting and on election day), voters age sixty-five or older, and those with a "disability" which prevents them from voting in person. Tex. Elec. Code § 81.001-.004.

On April 17, 2020, a Travis County state court judge determined that any Texas voter without established immunity to COVID-19 meets the plain language definition of disability in the Texas Election Code, and thus, is eligible to apply for a mail in ballot in the upcoming July 2020 run off elections. Attorney General Paxton has appealed the ruling. He also threatened election administrators and voters with criminal prosecution if they followed the state court order.

Plaintiffs filed this federal suit on April 7, 2020. They allege the failure to allow voters under the age of sixty-five to vote by mail during the pandemic violates their federal constitutional rights. On April 29, 2020, plaintiffs filed a motion for preliminary injunction seeking to enjoin defendants from denying mail-in ballots to otherwise eligible voters under the age of sixty-five and to enjoin defendants from threatening to initiate criminal prosecutions to those seeking or providing mail-in ballots.

On May 13, 2020, the state defendants filed a petition for writ of mandamus with the Texas Supreme Court seek a determination that election

administrators have a duty to reject applications for mail in ballots which claim disability under the Texas Election Code based solely on the generalized risk of contracting a virus. The state court order has been stayed pending further proceedings in the state appellate courts, and no ruling has issued either on the appeal or the petition for writ of mandamus.

Plaintiffs' motion for preliminary injunction is ripe for review by this Court. The state defendants filed a response in opposition to the motion, Bexar County Elections Administrator Jacquelyn F. Callanen filed a response, plaintiffs filed a reply, and amici curiae briefs were filed by several organizations.

In order to secure a preliminary injunction, plaintiffs must establish the following four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445(5th Cir. 2009). Plaintiffs contend they have met their burden of proof because defendants' interpretation of the disability provision allowing vote by mail—which would exclude those who seek to avoid possible exposure to the coronavirus from the disability authorization—subjects voters under the age of sixty-five to unconstitutional burdens not levied on voters age sixty-five or older.

The state defendants respond that the resolution of the state court litigation will invariably alter this closely-related federal proceeding. They therefore argue that the abstention doctrine applies and this

Court should decline to hear plaintiffs' claims at this juncture. The state defendants further contend that plaintiffs lack standing and have not met their burden to show they are entitled to a preliminary injunction.

Plaintiffs reply that they have standing to bring suit and that abstention is not warranted because resolution by the state courts will not render this case moot or materially alter the constitutional questions presented. Plaintiffs also reurge their arguments that they have met their burden to show substantial likelihood of success on the merits of their claims under the First, Fourteenth and Twenty-Sixth Amendments of the United States Constitution; irreparable injury to plaintiffs outweighs the threatened harm to defendants if the injunction is denied; and granting the injunction will not disserve the public interest. For a more expansive view of the parties' positions, please see Appendix B.

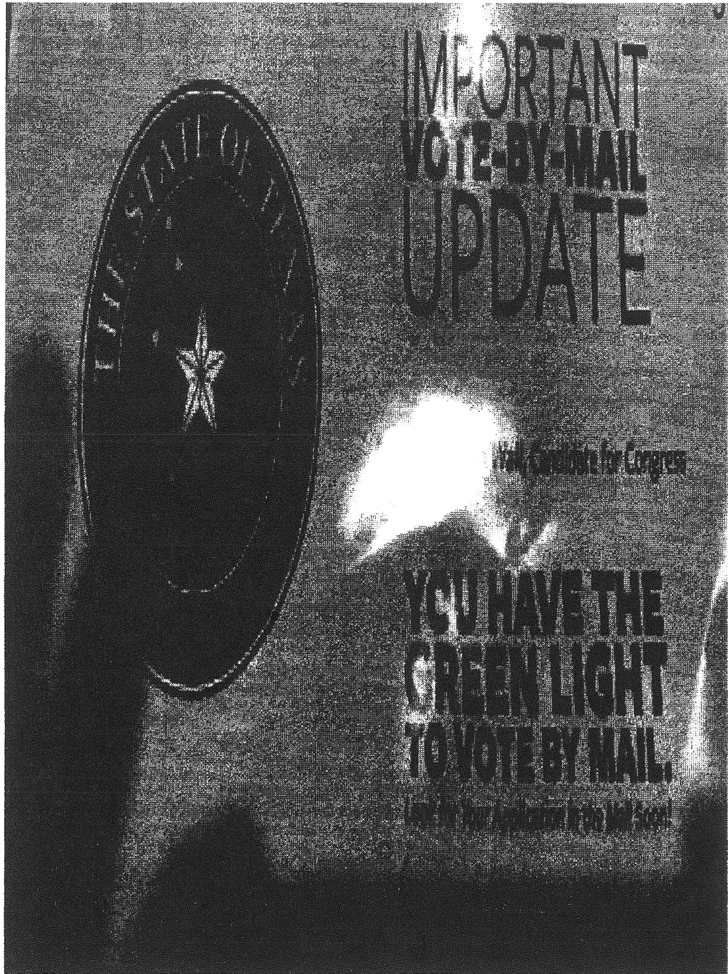
DISCUSSION

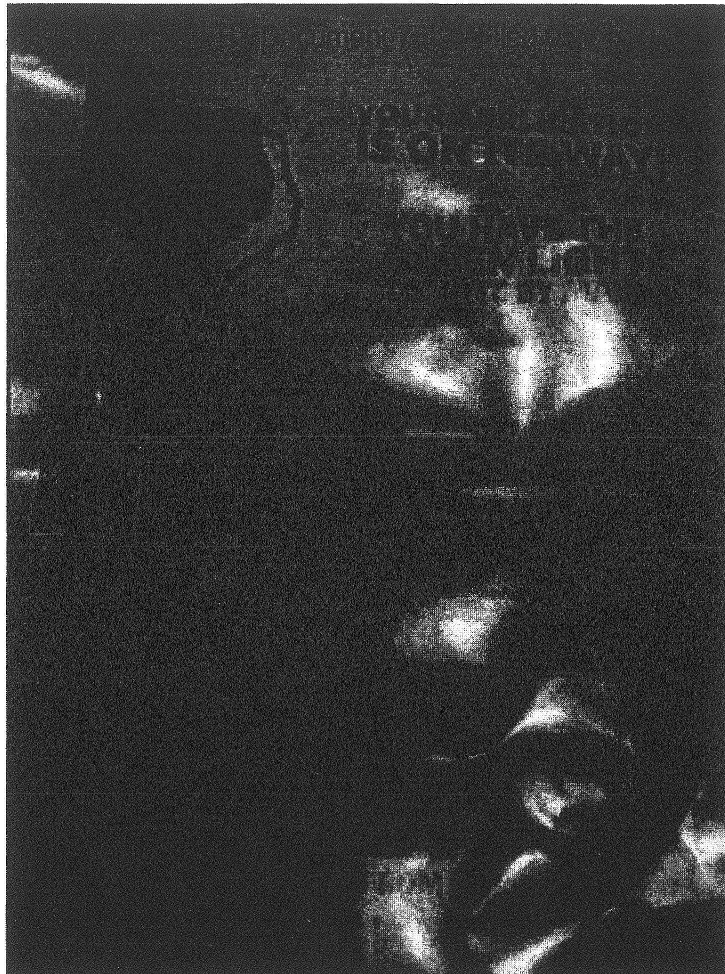
For those who have recently awakened from a Rip Van Winkle sleep, the entire world is mostly without immunity and fearfully disabled. Moreover, Governor Abbott, the State of Texas, and the federal government have issued guidance concerning prevention of the spread of the virus which speaks in terms of social distancing.[7] Plaintiffs say in-person voting makes social distancing difficult if not impossible.

In order to implement in-person voting, poll workers, many of whom are in an at-risk category, are also exposed to the COVID-19 virus.[8] The Court has concerns for the health safety of those individuals as well.

Other states have recognized the dangers of in-person voting and have implemented vote by mail procedures,[9] a process recently used by the President of the United States.[10]

The confusion concerning vote by mail eligibility is exemplified in plaintiffs' Exhibit 35, campaign material for a Republican candidate endorsed by Attorney General Paxton, who urges voters to use mail ballots based on COVID-19 concerns authorized by Secretary of State guidance, but subsequently advises that a voter must have the virus based on Attorney General Paxton's advice letter dated April 14, 2020. See docket no. 10, Exhibit 2 (explaining Attorney General Paxton's conclusion that based on the plain language of the relevant statutory text "fear of contracting COVID-19 does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail."). Confusion also reigns because plaintiffs have not received requested guidance nor can the Court find any guidance from the Secretary of State. The lack of clarity is evidenced in Exhibit 35:





+1 (844) 505-3072 ›

Hi this is Alex w/Kathaleen Wall for Congress. Due to Covid19, the campaign is mailing you absentee ballot applications, so you will have the option to safely vote! If you haven't received your app or need help, contact the campaign or find more info at kathaleenwall.com. Have you filled out & mailed back your app yet?

KEN PAXTON
ATTORNEY GENERAL *of* TEXAS

AG Paxton, Voting by Mail Based on Disability Reserved for Texans With Actual Illness or Medical Problem Rendering ...

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Equally vague and confusing are Attorney General Paxton's prior opinions. Compare Op. Tex. Att'y Gen No. KP-0009 (2015) (determining that no special definition of "disability" is required to use mail in ballot) and contrast Op. Tex. Att'y Gen. No. KP-0149 (2017) (determining that sexual deviant under age sixty-five meets definition of disabled under Texas Election Code §§ 82.001 - .004) with Attorney General Paxton' s advice letter of April 14, 2020 (determining that fear of contracting COVID-19 does not meet the definition of "disability" to use mail in ballot). Such contradictory opinions are at best duplicitous and at worst hypocritical.

Defendants raise the specter of widespread voter fraud if mail ballots are employed but cite little or no evidence of such in states already doing so. Texas truth is to the contrary, Between 2005 to 2018, there were 73 prosecutions out of millions of votes cast.[11] The Court finds the Grim Reaper's scepter of pandemic disease and death is far more serious than an unsupported fear of voter fraud in this sui generis experience. Indeed, if vote by mail fraud is real, logic dictates that all voting should be in person. Nor do defendants explain, and the Court cannot divine, why older voters should be valued more than our fellow citizens of younger age. U.S. CONST. amend. XIV § 1 ("No State shall. . . deny to any person within its jurisdiction the equal protection of the laws."); Tex. Elec. Code § 82.003 ("A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day.").

In a previous case, the evidence has shown that there is no widespread voter fraud.[12] The Court has great confidence in the ability of election administrators and law enforcement to prevent or

prosecute, with evidence and probable cause, the infinitesimal events of voter fraud, none of which are likely to affect election outcomes.

Attorney General Paxton has publicly expressed a willingness to pursue criminal charges against these election administrators and law enforcement officials. The state defendants point out that, in 2019, this Court dismissed a claim against Attorney General Paxton based on statements that he made in a press release, noting that the plaintiffs there could not sustain a claim based on "an alleged intimidating press release." *Texas League of United Latin Am. Citizens v. Whitley*, Case No. 5:l9-CA-00074-FB, docket no. 131 (W.D. Tex. Mar. 27, 2019) (Biery, J.). The Court finds that threatening legal voters and election administrators with criminal prosecution is not the same as issuing a political press release directed at alleged illegal voters. *See* docket no. 10, Exhibit 2 (Attorney General Paxton's advisory letter threatening voting administrators with criminal prosecution if they "advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19" and threatening voters with criminal prosecution if they cause a ballot to be obtained under "false pretense" of "disability" based fear of COVID-19); *see also Whitley*, docket no. 61-3.

The Twenty-Sixth Amendment of the United States Constitution provides:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The Texas Election Code allows citizens over sixty-five without a disability to vote by mail.[13] Thus, the

Texas vote by mail statute provides for the health safety of mail ballots for those 65 years of age and older but not those 64 years, 364 days and younger. The Court finds no rational basis for such distinction and concludes the statute also violates the clear text of the Twenty-Sixth Amendment under a strict scrutiny analysis.[14]

The Texas Election Code defines "disability" as a "physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of injuring the voter's health.[15] Disability is also defined as "a physical or mental condition that limits a person's movements, senses, or activities."[16] Clearly, fear and anxiety currently gripping the United States has limited citizens' physical movements, affected their mental senses and constricted activities, socially and economically. A new study shows COVID-19's psychological toll: distress among Americans has tripled during the pandemic compared to 2018. Jean M Twenge and Thomas E. Joiner, Mental Distress Among US. Adults During the COVID-19 Pandemic (May 15, 2020) (downloaded from https://mfr.osf.io/render?urlhttps://osf.io/downloadl5eb43O25a2.pdf (last visited May 18, 2020).[17] The evidence also shows voters are right to be fearful and anxious about the risk of transmission to their physical condition. Texas saw the largest single-day jump in coronavirus cases since the pandemic began this past Saturday.[18] The Court finds such fear and anxiety is inextricably intertwined with voters' physical health. Such apprehension will limit citizens' rights to cast their votes in person.[19] The Court also finds that lack of immunity from COVID-19 is indeed a physical condition.

One's right to vote should not be elusively based on the whims of nature. Citizens should have the option to choose voting by letter carrier versus voting with disease carriers. "We the People" get just about the government and political leaders we deserve, but deserve to have a safe and unfettered vote to say what we get.[20] The governed merit more than a Tillichian leap of faith in leaders elected by a small minority of the population as it was in 1789.[21]

For want of a nail the shoe was lost.
For want of a shoe the horse was lost.
For want of a horse the rider was lost.
For want of a rider the message was lost.
For want of a message the battle was lost.
For want of a battle the kingdom was lost.
And all for the want of a horseshoe nail.[22]

For want of a vote, our democracy and the Republic would be lost and government of the people, by the people and for the people shall perish from the earth.

Accordingly, for the reasons stated herein, the findings made herein, the additional background in Appendix B and the Findings of Fact and Conclusions of Law in Appendix C, all attached hereto and made a part hereof, the preliminary injunction is GRANTED as follows:

Though Republican voters are not parties to this case, the Court finds it would discriminate against Republicans not to afford them the same health safety precautions of voting by mail. Accordingly, the Court *sua sponte* concludes this Order shall extend to allow Republican voters to vote by mail as well should they claim disability because of lack of immunity from or fear of contracting COVID-19.

Based on the state defendants' assertion of the abstention doctrine and lack of standing, plaintiffs' response thereto and for the reasons stated in the expanded findings in Appendix C, the Court concludes the abstention doctrine is not applicable and plaintiffs have standing to bring this suit.

The Court finds plaintiffs have met their burden to show a likelihood of success on the merits, a substantial threat of irreparable injury if the injunction is not issued, the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and that granting the injunction will not disserve the public interest.

IT IS ORDERED that during the pendency of pandemic circumstances:

(1) Any eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances;

(2) Defendants Dana Debeauvoir and Jacquelyn Callanen and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation with them may not deny a mail in ballot to any Texas voter solely on the basis that the voter does not otherwise meet the eligibility criteria outlined in Texas Election Code §§ 82.001 - 82.004;

(3) Defendants Dana Debeauvoir and Jacquelyn Callanen their agents, servants, employees, representatives, and all person or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from refusing to accept and tabulate any mail ballots received from voters solely

on the basis that the voter does not otherwise meet the eligibility criteria outlined in Texas Election Code §§ 82.00 1 - 82.004;

(4) Defendant Secretary of State Hughs is ordered pursuant to the power granted her under state law to ensure uniformity of election administration throughout the state, to use her lawful means to ensure this Order has statewide, uniform effect;

(5) All defendants and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation are enjoined from issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order. This Order does not prevent defendants and their agents and employees from prosecuting cases of voter fraud where evidence and probable cause exist;

(6) Each of the defendants, acting through the appropriate state or local agency, shall publish a copy of this Court's Order on the appropriate agency website and that the state defendants shall circulate a copy of this Court's Order to the election official(s) in every Texas County; and

(7) No cash bond shall be required of plaintiffs.

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until a Judgment is issued in this matter or until such time as the pandemic circumstances giving rise to this Order subside.

IT IS FINALLY ORDERED that defendants may petition this Court, upon giving notice and opportunity to be heard to plaintiffs, that the Order

should be dissolved for any reason, including that the state courts have resolved issues of a matter of state law that render this injunction unnecessary or because the pandemic circumstances giving rise to it have subsided.

It is so ORDERED.

SIGNED this 19th day of May, 2020.

Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX A

Endnotes

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[1] At the time of the first presidential election in 1789, there were 3,929,214 million Americans. Https://www.census.gov /history/through the decades/fast facts/l 790_fastfacts.html (last visited April 13, 2020). Only white, male property owners 6% of the population were eligible to vote. Https://www.archives.gov /exhibits/charters/ charters_of_freedom __ 3 .html (last visited April 13, 2020).

[2] The 1828 presidential election was the first in which non-property-holding white males could vote in the vast majority of states. North Carolina was the last state to end the practice in 1856. Stanley Engerman & Kenneth Sokoloff, *The Evolution of Suffrage Institutions in the New World* 16, 35 (February 2005), http://www.economics.yale.edu.org/UploadedPDF/sokoloff-050406.pdf (last visited April 13, 2020).

[3] U.S. CONST. amend. XV. Though in practice their votes were suppressed by poll taxes, violence and intimidation. Https://www.history.com.topics /early-20th-century-us/jim-crow-laws (last visited April 14, 2020); see also 42 U.S.C. § 1973 (The Voting Rights Act of 1965); 42 U.S.C. § 2000d, et seq. (The Civil Rights Act of 1964).U.S. CONST. amend. XV. Though in practice their votes were suppressed by poll taxes, violence and intimidation. Https://www.history.com.topics/early-2Oth-century-us/jim-crow-laws (last visited April 14, 2020); see also

42 U.S.C. § 1973 (The Voting Rights Act of 1965); 42 U.S.C. § 2000d, et seq. (The Civil Rights Act of 1964).

[4] U.S. CONST. amend. XIX.

[5] "The Divine Right of Kings" is the doctrine that kings have absolute power because they were placed on their thrones by God and therefore rebellion against the monarch is always a sin. Https://www.oxfordreference.comlview/1 01093 .oi/ authority.20 110810104754564 (last visited April 27, 2020).

[6] On January 11, 1989, President Ronald Reagan referred to America as a "shining city" upon a hill during his farewell speech to the nation:

> I've spoken of the shining city all my political life, but I don't know if I ever quite communicated what I saw when I said it. But in my mind it was a tall, proud city built on rocks stronger than oceans, wind-swept, God-blessed, and teeming with people of all kinds living in harmony and peace; a city with free ports that hummed with commerce and creativity. And if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here. That's how I saw it, and see it still.

Https://www.reaganlibrary.archives.gov (last visited May 10, 2020). "A city upon a hill" is a phrase derived from Jesus's Sermon on the Mount:

> You are the light of the world. A city set on a hill cannot be hidden. Nor do people light a lamp and put it under a basket, but on a stand, and it gives light to all in the house. In the same way, let your light shine before

> others, so that they may see your good works and give glory to your Father who is in heaven.

Matthew 5:14-16. This scripture was cited at the end of Puritan John Winthrop's lecture, "A Model of Christian Clarity," delivered on March 21, 1630, at Holyrood Church in Southampton, England, before the first group of Massachusetts Bay colonists embarked on the ship Arbella to settle Boston. He said:

> For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us. So that if we shall deal falsely with our God in this work we have undertaken, and so cause Him to withdraw His present help from us, we shall be made a story and a by-word through the world.

JOHN WINTHROP, THE JOURNAL OF JOHN WINTHROP 1630-1649 1 n.1 (Harvard University Press 1996) (1630).

[7] Https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-to-expand-openings-of-certain-businesses-and-activities.gov (last visited May 10, 2020); https://dshs.texas.gov/coronavirus/default.aspx (last visited May 10, 2020); https://cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited May 10, 2020); https://whitehouse.gov/ openingamerica.gov (last visited May 10, 2020).

[8] Https://www.pewresearch.org (explaining that "[a]mid COVID-19 risk to seniors, a majority of poll workers are . . . age 61 or older") (last visited May 5, 2020).

[9] All active voters in Georgia were mailed absentee ballot request forms after the Republican governor and Democratic Party agreed to move the run off elections due to COVID-19. Https:/ /www.ajc/news / state-regional-govt-politics/georgia-mail-absentee-ball ot-requests.html (last visited April 27, 2020). Currently, registered voters automatically receive a ballot by mail in five states: Oregon, Washington, Utah, Colorado and Hawaii. Seven states have switched to allow all voters to vote by mail with extended deadlines during the pandemic: Alaska, Wyoming, Ohio, Kansas, Delaware, Hawaii and Rhode Island. Other states, such as Florida and Arizona, are encouraging voting by mail. In Pennsylvania, the governor entered an order allowing voters concerned about the coronavirus to request an absentee ballot. Three other states have expanded the option to vote by mail due to COVID-19: Indiana, New Jersey and Maryland. Https://nytimes. com/article/2020-campaign-primary-calendar-coronavirus.html (last visited May 10, 2020).

[10] Https://www.sun-sentinel.com/news/politics/fl-ne-donald - trump - palm – beach – county - voter.html (last visited May 11, 2020).

[11] Robert Brischetto, Ph.D., a former executive director of the San Antonio-based Southwest Voter Research Institute, who was writing for the San Antonio Express News, found that over a thirteen year period from 2005 to 2018, there were 73 persons identified as adjudicated in election fraud cases in Texas. He noted:

> Almost half of the cases involved the improper use of absentee ballots, where voter fraud occurs most often. The rules for

> handling, transporting and mailing absentee ballots are very specific and very elaborate in Texas. While there were a couple of cases of forging and filling out absentee ballots for others, most were violations involving possessing, collecting, transporting and assisting in the submission of absentee ballots. Many of those violations might have been avoided with more training of election officers and education of voters on the handling and mailing of absentee ballots.

Robert Brischetto, *Texas' Desperate Search for Fraudulent Voters*, SAN ANTONIO EXPRESS NEWS, Mar. 19, 2019, https://www.mysanantonio.com/opinion/com mentary/article/Texas-desperate-search-for-fraudulent-voters-13674630.php (last visited Apr. 27, 2020).

[12] From *Texas League of United Latin Am. Citizens v. Whitley*:

> The evidence has shown in a hearing before this Court that there is no widespread voter fraud. **The challenge is how to ferret the infinitesimal needles out of the haystack of 15 million Texas voters.** The Secretary of State through his dedicated employees, beginning in February 2018, made a good faith effort to transition from a passive process of finding ineligible voters through the jury selection system in each county to a proactive process using tens of thousands of Department of Public Safety driver license records matched with voter registration records. Notwithstanding good intentions, the road to a solution was inherently paved

> with flawed results, meaning perfectly legal naturalized Americans were burdened with what the Court finds to be ham-handed and threatening correspondence from the state which did not politely ask for information but rather exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us.

Civil Action No. SA-19-CA-74-FB, (docket no. 61 at page 1) (bold emphasis added).

[13] Tex. Elec. Code §§ 81.001 – .004.

[14] The rational basis standard is implemented pursuant to *Anderson v. Celebrezze*, 420 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Alternatively, defendants' interpretation of the statute does not meet the heightened standard set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), or the strict scrutiny standard set forth in *Lynch v. Donnelly*, 465 U.S. 668, 687 n.13 (1984), as applied in *United States v. Texas,* 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd sub nom., Symm v. United States*, 439 U.S. 1105 (1979).

[15] Tex. Elec. Code § 81.002(a).

[16] Https://www.oxforddictionary.com/us/definition. disability.com (last visited May 11, 2020).

[17] This new study suggests that the COVID-19 pandemic will substantially change daily life in ways which will have a negative impact on mental health. Researchers at San Diego State University and Florida State University compared a nationally representative online sample of 2,032 American adults in late April 2020, to 19,330 American adults

who participated in the April 2018 National Health Interview Survey, to measure mental distress. Although the study has not yet undergone peer review and formal publication, its preliminary data showed that American adults in April 2020 were 8 times more likely to fit criteria for serious mental illness (27.7% v. 3.4%) and 3 times more likely to fit criteria for moderate or serious mental illness (70.4% v. 22.0%) compared to the 2018 sample.

[18] Texas reported 1,801 new coronavirus cases on Saturday, May 16, 2020, https://www.dshs.texas.gov (dashboard) (last visited May 16, 2020), reportedly marking the States' largest single-day jump since the start of the COVID-19 pandemic. Https://www.houstonchronicle.com/news/article/massive-jump-in-COVID-19-cases.html (last visited May 18, 2020).

[19] *See American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders* (5th ed. 2013) (explaining that mental health disorder is condition which affects thinking, feeling, behavior, or mood and which deeply impacts daily functioning).

[20] *Dutmer v. City of San Antonio*, 937 F. Supp. 587, 589, 595 (W.D. Tex. 1996) (Biery, J.) ("If history judges the [San Antonio] term limits movement an idea whose time should not have come, the evolutionary experiment called democracy includes the right to make mistakes and, ultimately, delivers just about the kind of government voters deserve . . . . Those who believe the [term limits] Ordinance a malignancy on the body politic may have to await the appearance of symptoms to attempt persuasion of a majority to perform corrective surgery at the ballot box.").

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[21] PAUL TILLICH, DYNAMICS OF FAITH (Harper Collins Publishers Inc. 1957).

[22] Benjamin Franklin included a version of this proverb in *Poor Richard's Almanac* when the American colonies were at odds with the English Parliament. Benjamin Franklin, *Poor Richard's Almanac* 275 (1758) (G.P. Putman's Sons eds. 1889). During World War II, this verse was framed and hung on the wall of the Anglo-American Supply Headquarters in London. Https://www.citidel.edu.com (last visited May 1, 2020).

APPENDIX B

OVERVIEW

The Texas Election Code §§ 82.001-.004 restricts access to voting by mail through explicit age-based eligibility criteria. Voters age sixty-five and older can vote by mail without an excuse while voters under the age of sixty-five can do so only if they fit within very limited exceptions. Plaintiffs allege in this lawsuit that the age restriction is unconstitutional and that the State cannot justify with an adequate basis its decision to grant voters age sixty-five and older additional voting rights than those under age sixty-five.

However, in the motion for preliminary injunction, plaintiffs seek only preliminary relief on their as-applied challenge. Plaintiffs argue they are entitled to a preliminary injunction because the vote by mail provisions, as interpreted by Texas Attorney General Paxton, violate the Twenty-Sixth Amendment in the circumstances of the pandemic now facing the state and the country. Plaintiffs assert that, during the pandemic, Attorney General Paxton's strict interpretation of the disability exemption for vote by mail to exclude those who wish to avoid possible exposure to the coronavirus subjects voters under the age of sixty-five to unconstitutional burdens not levied on voters age sixty-five or older.

Meanwhile, plaintiffs contend the State gives voters no benchmark of which pre-existing medical conditions allow them to vote with the disability exception and no standard exists for how election officials would enforce the line the State wishes to draw. Plaintiffs assert that the failure of the State to provide a safe vote by mail option for voters under age sixty-five under these pandemic circumstances—while providing that safe option widely to those sixty-five

and older—abridges the right to vote on account of age and violates the Twenty-Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs also contend that Attorney General Paxton violated their rights to free speech. In response to a state court order finding that state law permits every eligible voter to vote by mail amid the COVID-19 pandemic, Attorney General Paxton publicly stated that third parties who advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19 could subject those third parties to criminal sanctions. Plaintiffs assert that Attorney General Paxton's letter is presently harming their right to vote, and indeed threatens political speech with criminal prosecution, in violation of the First Amendment. Plaintiffs further argue that Attorney General Paxton's conduct violates their right to be free from voter intimidation as guaranteed by the Voting Rights Act. Finally, plaintiffs seek injunctive relief based on their claim that Attorney General Paxton's interpretation of the Texas Election Code renders the statute unconstitutionally vague because it is not clear which voters qualify to vote by mail under its provisions.

The state defendants respond that plaintiffs have not met their preliminary injunction burden, which is to show a substantial likelihood of success on the merits on each claim, sufficient harm to plaintiffs and undue harm to defendants, and that it serves the public interest to grant the injunction. They submit that it is safe for all voters to vote in person in the midst of this pandemic. The state defendants also argue that abstention is warranted in this case because there are ongoing state court proceedings. They further contend that they are entitled to sovereign immunity

and plaintiffs lack standing because the state defendants do not enforce the Texas Election Code.

Plaintiffs reply that they have met their preliminary injunction burden. They further argue that this Court should not abstain because they have cognizable federal constitutional claims which will not be addressed in the state court proceedings and the failure to remedy them would cause irreparable harm. Plaintiffs further contend the state defendants cannot claim sovereign immunity because of their connections to the enforcement of the Texas Election Code. Finally, plaintiffs maintain they meet the requirements for Article III standing because each has suffered and will continue to suffer legally cognizable injuries because of defendants' actions.

BACKGROUND

Given the current pandemic conditions and their effects on election procedure, on March 27, 2020, some of the plaintiffs in this case filed an original petition and application for temporary injunction in a Texas state court to determine the application of state law. Plaintiffs argued § 82.002 of the Texas Election Code allows voters to elect to cast their ballots by mail under the circumstances of this pandemic. Section 82.002 of the Texas Election Code provides:

> Sec. 82.002. DISABILITY. (a) A qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health.

Tex. Elec. Code § 82.002. Section 82.003 of the Election Code states that "[a] qualified voter is eligible for early

voting by mail if the voter is 65 years of age or older on election day." TEX. ELEC. CODE § 82.003. Plaintiffs contended that participating in social distancing to prevent the spread of COVID-19 is "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." They therefore requested a declaration that Texas Election Code § 82.002 "allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of the virus or disease." Plaintiffs also sought a temporary injunction requesting that the Texas Secretary of State and the Travis County Clerk "be enjoined to accept and tabulate any mail-in ballots received from voters in an upcoming election who believe that they should practice social distancing in order to hinder the known or unknown spread of a virus or disease."

Shortly after the state court case was filed, the Texas Democratic Party and three voters brought this federal suit on April 7, 2020. The complaint states that, "[i]n the event the state courts find that vote by mail is permitted for all voters over the age of eighteen who are social distancing," plaintiffs ask this Court to "ensure compliance with federal law by providing a remedy." Plaintiffs allege this case should proceed so that the Court can timely determine "the constitutional rights of these plaintiffs and be in a position to do so in the event the state court rulings serve to harm these federal rights and/or the state court proceedings are delayed thus preventing timely state resolution of the state law issue." Their complaint asserts claims of age, race and language-minority discrimination, as well as violations of the right to free speech under the

First Amendment, vagueness in violation of the Fourteenth Amendment, and intimidation in violation of the Voting Rights Act.

A hearing was held in the state court case on plaintiffs' motion for a temporary injunction on April 15, 2020. Medical experts testified that they expect pandemic conditions to persist throughout the summer months and into the fall. Texas law allows voting by mail for absentees (those who will be away from home for all of early voting and on election day), voters age sixty-five or older, and those with a disability that prevents them from voting in person. As noted, plaintiffs argued that social distancing is a "disability" for purposes of voting by mail. The response presented by Assistant Attorneys General in that case was that the courts have no jurisdiction, pandemic conditions might change by July and Governor Abbott might provide direction to protect voters and the public.

Even as the hearing was concluding, Texas Attorney General Ken Paxton released an advisory letter to the chair of the House Elections Committee, threatening prosecution of any voter who voted by mail without a narrowly defined "physical condition" constituting a "disability." He threatened "criminal sanctions" as well for any election official advising such a vote. In the letter, Attorney General Paxton gave a non-official, advisory opinion regarding whether or not the risk of transmission of COVID-19 would entitle Texas voters to cast a mail-in ballot. The letter states: "We conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Election Code for purposes of receiving a ballot by mail."

On April 17, 2020, two days after the hearing, Travis County District Judge Tim Sulak ruled that in the context of the COVID-19 pandemic, all Texas voters who are not immune from the virus are eligible to apply for mail ballots under the "disability" provision of state election law. The temporary injunction order, which is imposed through July 27, states that "it is reasonable to conclude that voting in person while the virus is still in general circulation presents a likelihood of injuring the voter's health and therefore any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code section 82.002."

In response to the state court order, Attorney General Paxton stated:

> I am disappointed that the district court ignored the plain text of the Texas Election Code to allow perfectly healthy voters to take advantage of special protections made available to Texans with actual illness or disabilities. This unlawful expansion of mail-in voting will only serve to undermine the security and integrity of our elections and to facilitate fraud. Mail ballots based on disability are specifically reserved for those who are legitimately ill and cannot vote in-person without needing assistance or jeopardizing their health. Fear of contracting COVID-19 does not amount to a sickness or physical condition as required by state law.

That same day, Texas Attorney General Ken Paxton filed notice a notice of appeal with the Third Court of Appeals. The Third Court of Appeals transferred the case to the Fourteenth Court of Appeals which ruled

that the state court injunction shall remain in full force and effect pending the conclusion of the appeal. During this same time period, Attorney General Paxton filed a petition for writ of mandamus asking the Texas Supreme Court to determine that election administrators have "a duty to reject applications for mail-in ballots that claim 'disability' under Texas Election Code section 82.002(a) based solely on the generalized risk of contracting a virus." The appellate case and petition for writ of mandamus remain pending for disposition in the state courts.

On April 29, 2020, plaintiffs filed a motion for a preliminary injunction with this Court seeking to expedite the process, stating that "N[t]he Rule of Law has broken down in the State of Texas, and it has become clear that the federal courts will have to ensure basic constitutional protections for the U.S. Citizens within." Plaintiffs contend that, in the days since the state court ruling, counties around the state have begun to comply; many counties have posted notice on their websites that they are accepting vote by mail applications in compliance with Judge Sulak's ruling; and city and school district elections going forward in early May are accepting vote by mail applications in compliance with Judge Sulak's ruling. Plaintiffs argue that "[a]fter waiting well more than a week watching the state election apparatus turn to comply with the state court order and after watching tens of thousands of Texans submit vote by mail applications, defendants appear willing to allow the circumstances where the State's judicial branch has so far reached one view of the law while, at least part of, the executive branch of state government threatens prosecution for complying with the Court order." Therefore, plaintiffs contend:

> Texas citizens can no longer have confidence that the executive branch of the State will comply with the Rule of Law. Now, even if the State is never successful in overturning the state court order, the Attorney General has shown he will not comply with orders of his state's judiciary. Furthermore, Texans will continue to reasonably fear that the executive branch will not comply with state court rulings and/or that they could be subjected to criminal prosecution for attempting to vote by mail. Under these circumstances, the State is no longer functioning to protect the federal rights of U.S. citizens, and even if it were to begin to do so, voters can have no confidence their rights will be preserved. Moreover, the behavior of the executive branch of Texas government threatens to upset the State's election apparatus which is largely complying with the state court order and where the State is successful in strong arming local officials to defy the state court order, election procedures throughout the State will be administered non-uniformly.

Accordingly, plaintiffs seek an injunction order blocking state officials from denying a mail-in ballot to any Texas voter who applies for a mail-in ballot because of the risk of transmission of COVID-1 9, and enjoining defendants, including Attorney General Paxton, from issuing threats or seeking criminal prosecution of voters and others advising voters on mail ballot eligibility based on the risk of transmission of COVID-19.

The state defendants respond that the state court temporary injunction order conflicts with the Texas Election Code's plain text and "threatens to destabilize

the State's carefully crafted framework governing the conduct of elections." They argue the resolution of the state court litigation will invariably alter this closely related federal proceeding. For this reason, the state defendants contend the *Pullman* abstention doctrine applies and this Court should decline to hear plaintiffs' claims at this juncture. The state defendants also argue:

> Plaintiffs' motion for preliminary injunction also exhibits fatal jurisdictional and substantive defects. None of the state defendants—Greg Abbott, Governor of Texas, Ken Paxton, Texas Attorney General, or Ruth Hughs, Texas Secretary of State—enforce the provisions of the Election Code at issue. Sovereign immunity therefore bars plaintiffs' claims for injunctive relief against those officials on the basis of those provisions. For related reasons, plaintiffs lack standing to sue the state defendants. And on the merits, plaintiffs have not met their burden of showing that current or unknown future circumstances will prevent voters from safely exercising the franchise via in-person voting in July or November of this year. The known science of COVID-19 is constantly evolving, and with it, our understanding of how elected officials can continue to contain the spread of COVID-19 throughout the State—including, as relevant here, at polling places.

Accordingly, the state defendants request that the Court abstain from ruling on plaintiffs' claims until the conclusion of the pending state court litigation. Alternatively, they argue plaintiffs' motion for preliminary injunction should be denied because plaintiffs

have failed to make the required showing to obtain the extraordinary injunctive relief they request.

VOTING BY MAIL IN TEXAS

Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. *See* Tex. Elec. Code § 82.001, *et seq.* A voter is qualified to vote by mail if he or she (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him or her from appearing at the polling place; (3) is sixty-five or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-004. Voters apply to vote by mail with a mail ballot application sent to the early voting clerk. The early voting clerk is responsible for conducting early voting and must "review each application for a ballot to be voted by mail." Tex. Elec. Code § 86.001(a). An early voting ballot application must include the applicant's name, the address at which the applicant is registered to vote, and an indication of the grounds for eligibility for voting by mail. Tex. Elec. Code § 84.002. Mail ballot applicants must certify that "the information given in this application is true, and I understand that giving false information in this application is a crime." Tex. Elec. Code § 84.011. Section 84.0041 makes it a crime to "knowingly provide false information on an application for ballot by mail." Tex. Elec. Code § 84.0041.

If the voting clerk determines the applicant is entitled to vote by mail, the voting clerk shall provide the voter a ballot by mail. Tex. Elec. Code § 86.001. If the applicant is not eligible to vote by mail, the voting clerk shall reject the application and give notice to the applicant. *Id.* A rejected applicant is not entitled to vote by mail. *Id.* July 2, 2020, is the deadline for an

early voting clerk to receive an application to vote by mail for the upcoming July 14, 2020, Democratic Party run-off election. Tex. Elec. Code § 84.007(c). In their motion for preliminary injunction, plaintiffs state that "[m]ail ballots are expected to start being sent to voters, in response to their request on May 24, 2020," and that "thousands of vote by mail applications are pouring in now."

Plaintiffs maintain that in the last month many Texas counties, including some of the most populous, have been following the state district court's order interpreting state law in a way that allows all eligible voters, regardless of age and without immunity to COVD-19, to vote by mail, and its injunction enforcing that order. They allege many mail ballots have already been submitted under this order.

When voters submit absentee ballots, they are asked to check a box to indicate which eligibility criteria they meet but not asked to provide more detailed reasoning. Plaintiffs maintain the record shows—and defendants have not suggested otherwise—that it would be impossible to disaggregate the absentee ballots that were submitted pursuant to risk of contracting coronavirus during the past several weeks from other qualifying absentee ballots. Meanwhile, plaintiffs have not yet submitted their applications for a mail ballot to participate in the Democratic primary runoff election because they fear prosecution and they fear the state courts will ultimately determine that if they vote a mail ballot, their vote will not be counted.

The State is taking steps to impose measures that would make in person voting safer during these pandemic elections. Plaintiffs argue that, even with these measures implemented at the local level, the State

still has no way to ensure the non-transmission of the virus at crowded in-person polling locations. Recent history has shown that medical professionals in even the most carefully monitored medical environments have fallen ill and died from virus infections. Plaintiffs state that, although the State's efforts toward encouraging increased in-person voting protections are at least a step in the right direction, they also inevitably will slow the election process and limit the rate at which voters can be processed. At the same time, plaintiffs contend the process will be slowed from another direction because fewer election workers will be present.

Plaintiffs point out that the evidence additionally shows that many election workers did not report as scheduled on election day during the March primary elections because of the possibility of contracting the virus. Further, the recent evidence from the Wisconsin election shows that people did in fact contract the virus during in person voting, and this occurred in a state that does not require an excuse to vote by mail. The State responds with some studies that conclude that the rate of virus infection was not meaningfully changed by voting activity in Wisconsin. Presumably, there are a number of factors that drive virus infection rates and determining one cause from others is a challenging task indeed, particularly given our present state of knowledge about coronavirus spread. Regardless of the rate of growth in Wisconsin after the election, defendants do not deny that some individuals have been found to have contracted coronavirus due to their exposure at polling locations.

PRELIMINARY INJUNCTION STANDARD OF REVIEW

In order to secure a preliminary injunction, plaintiffs must establish the following four elements: (1) a

substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth,* 566 F.3d 442, 445 (5th Cir. 2009). None of these elements, however, is controlling. *Florida Med. Ass 'n v. United States Dept of Health, Educ. & Welfare,* 601 F.2d 199, 203 n.2 (5th Cir. 1979). Rather, this Court must consider the elements jointly, and a strong showing of one element may compensate for a weaker showing of another. *Id.*

THE ARGUMENTS OF THE PARTIES

Plaintiffs contend they have established a substantial likelihood of success on the merits of their as-applied claims relating to: (1) age discrimination in violation of the Twenty-Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment; (2) vagueness in the Texas Election Code's definition of "disability" in violation of the Due Process Clause of the Fourteenth Amendment; (3) voter intimidation in violation of 52 U.S.C. § 10307(b); and (4) the denial of free speech in violation of the First Amendment of the United States Constitution. Plaintiffs further argue they will suffer irreparable injury if the injunction is not granted, their substantial injury outweighs the threatened harm to defendants, and granting the preliminary injunction will not disserve the public interest. The state defendants disagree plaintiffs have met their burden. The state defendants also contend that plaintiffs lack standing and that the Court should abstain from hearing plaintiffs' arguments because of the pending state court proceedings.

Likelihood of Success on the Merits

Plaintiffs' Age Discrimination Claims Under the Twenty-Sixth and Fourteenth Amendments

The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1. The Equal Protection Clause of the Fourteenth Amendment "is essentially a mandate that all persons similarly situated must be treated alike." *Rolf v. City of San Antonio,* 77 F.3d 823, 828 (5th Cir. 1996) (internal quotation omitted). Plaintiffs argue that § 82.002(a) of the Texas Election Code abridges their right to vote based on their age in violation of the Twenty-Sixth Amendment and discriminates against them based on age in violation of the Fourteenth Amendment. Specifically, plaintiffs argue that when in-person voting becomes physically dangerous, age-based restrictions on mail ballot eligibility become constitutionally unsound. With regard to the applicable standard of review, plaintiffs argue strict scrutiny applies. *Symm v. United States,* 439 U.S. 1105 (1979); *see also United States v. Texas,* 445 F. Supp. 1245 (S.D. Tex. 1978). They contend Texas is unable to present a compelling state interest in "imposing arbitrary obstacles on voters on account of age when Texas election law does not clearly demand this result during this pandemic." If the Court declines to engage in strict scrutiny, plaintiffs argue it should apply the *Arlington Heights* framework which evaluates: (1) the impact of the official action and whether it bears more heavily on one group than another; (2) the historical background of the decision; (3) the specific sequence of events

leading up to the decision challenged in the case, including departures from normal procedures in making decisions and substantive departures; and (4) contemporary statements made by the governmental body which created the official action. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252 (1977). Plaintiffs contend Attorney General Paxton's interpretation of the law related to mail ballot eligibility in Texas is: (1) discriminatory to every voter under the age of sixty-five and untenable given the COVID-19 pandemic, and (2) the official decision by the Attorney General to threaten to enforce that law in the most disenfranchising and severe manner possible, through criminal sanction, is strong evidence of invidious discrimination.

The state defendants respond that § 82.003 does not "deny or abridge" plaintiffs' right to vote and therefore the challenged statute should be evaluated under the elevated *Anderson-Burdick* rational basis standard of review. *See Burdick v. Takushi,* 504 U.S. 428 (1992); *Anderson v. Celebrezze,* 420 U.S. 780 (1983). Under this rational basis review, as long as the distinctions made in the challenged law bear a rational relationship to a legitimate governmental end, the law must be upheld. *McDonald v. Board of Election Comm 'rs,* 394 U.S. 802, 809 (1969). The state defendants maintain that the decision to limit voting by mail to older Texans is rational because individuals aged sixty-five and over are more susceptible to COVID-19,
and it is related to legitimate governmental interests including the prevention of voter fraud. Accordingly, the state defendants argue that plaintiffs have not shown a likelihood that they will prevail on their Twenty-Sixth and Fourteenth Amendment claims.

Plaintiffs' Claim Under the First Amendment

Plaintiffs argue their right to vote has been violated by Attorney General Paxton's threats of criminal prosecution. Because the speech at issue is fully protected First Amendment activity, and the burden on this speech is heavy, plaintiffs contend the Court should apply the strict scrutiny standard of review. Citing the reasons stated in support of their age discrimination claim, plaintiffs contend they are likely to succeed on their free speech claim.

The state defendants respond that Texas Attorney General Paxton has not threatened plaintiffs' right to free speech. They argue plaintiffs' accusation misapprehends the Attorney General's responsibilities to enforce state statutes and the letter he sent in fulfillment of those responsibilities. The state defendants also argue that "an injunction prohibiting Attorney General Paxton from threatening voters or voter groups with criminal or civil sanction for voting by mail or communicating with or assisting voters in the process of vote by mail" would violate his rights to comment on matters of public concern. The state defendants therefore contend that plaintiffs have not shown a likelihood of success on their First Amendment claim.

Plaintiffs' Void for Vagueness Claim

Plaintiffs note that the Texas Democratic Party and some of the plaintiffs in the instance case maintained in the state court proceeding that state law allows all voters, regardless of age, to vote by mail because they have a "disability" based on the risk of transmission of COVID-19. They also noted that, although the state court agreed with plaintiffs, Attorney General Paxton holds a different interpretation. Plaintiffs argue that these factual

conditions result in an environment where the "public cannot reasonably determine what state law allows." They therefore argue that Attorney General Paxton's interpretation renders the Texas Election Code unconstitutionally vague in violation of the Fourteenth Amendment because it is not clear which voters qualify to vote by mail under its provisions. *See Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972); *see also Johnson v. United States,* 135 S. Ct. 2551, 2556-58 (2015); *Kolender v. Lawson,* 461 U.S. 352, 35758 (1983); *Papachristou v. Jacksonville,* 405 U.S. 156, 162 (1972).

The state defendants respond that plaintiffs' void-for-vagueness claim fails because this doctrine has been primarily applied to strike down criminal laws and Attorney General Paxton's interpretation of the statute does not render it to be "so vague and indefinite as really to be no rule at all." *Groome Resources, Ltd. v. Parish of Jefferson,* 234 F.3d 192, 217 (5th Cir. 2000). They also contend Attorney General Paxton's interpretation of the statute does not result in a constitutional violation because he was merely giving his opinion about the statute's construction. *See Ford Motor Co. v. Texas Dept' of Transp.,* 264 F.3d 493, 509 (5th Cir. 2001); *Stansberry v. Holmes,* 613 F.2d 1285, 1289 (5th Cir. 1980). The state defendants therefore conclude that plaintiffs have not shown a likelihood of success on the merits of their vagueness argument.

Voter Intimidation

Plaintiffs argue Attorney General Paxton has made the extraordinary choice to upend the rule of law, disturb the state judiciary from fulfilling its mission, and to outwardly intimidate rightful voters and the third parties who assist voters in elections. He stated: "[T]o the extent third parties advise voters to

apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041." This advisory opinion was made just as a state court ruled that Texas voters are entitled to a mail-in ballot because of the risk of transmission of COVID-19. Hours later, Attorney General Paxton stated that expanding mail ballot eligibility to all Texans "will only serve to undermine the security and integrity of our elections." Plaintiffs contend that these statements operate to discourage voters from seeking mail-in ballots because of their fear of criminal sanction or victimization by fraud in violation of 52 U.S.C. § 10307.

The state defendants respond that Attorney General Paxton did not intimidate plaintiffs or any other voters. They argue the communication merely states the law regarding the giving of false information in connection with a request for a ballot by mail. Accordingly, the state defendants maintain that plaintiffs have not shown that their voter intimidation claim is likely to succeed on the merits.

<u>Irreparable Injury and Harm</u>

Plaintiffs argue they are irreparably injured if an injunction is not granted and their harm outweighs any harm to the defendants. They note that voting is a constitutional right for those that are eligible, and contend that the violation of constitutional rights for even a minimal period of time constitutes an irreparable injury which justifies granting their motion for preliminary injunction. *See Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. Unit B. Nov. 1981) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). In addition, plaintiffs contend that forcing

voters to unnecessarily risk their lives in order to practice their constitutional rights while allowing other voters a preferred status so they do not have to face this same burden, is also irreparable injury. They assert: (1) there is no harm to the State allowing registered, legal voters the right to vote in the safest way possible, (2) the State has no interest in forcing voters to choose between their well being and their votes, and (3) the State has no interest in allowing a situation where "the Attorney General can sow confusion, uneven election administration and threaten criminal prosecution" under these circumstances.

The state defendants respond that injunctive relief at this point in the election cycle is improper. They note that the Supreme Court "has repeatedly emphasized that lower courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205, 1207 (2020). The state defendants also argue that plaintiffs cannot establish an irreparable injury because "they have not proven that they will be deprived of the safe exercise of the franchise in the State's upcoming elections."

Public Interest Considerations

Plaintiffs contend "the public is best served by both preserving the public health of Texans and by fervent and competitive races for public office." They argue it is the public policy of the State of Texas to construe any constitutional or statutory provision which restricts the right to vote liberally, and there is no justification nor public interest in denying the ballot to eligible voters. Furthermore, plaintiffs argue it is always in the public interest to prevent violations of individuals' constitutional rights, and to prevent the State from violating the requirements of federal law.

Plaintiffs also contend that protecting the right to vote is of particular public importance because it is "preservative of all rights." *See Dunn v. Blumstein,* 405 U.S. 330, 336 (1972). Accordingly, plaintiffs contend they have met all the requirements for a preliminary injunction.

The state defendants respond that an injunction would undermine the public interest. They argue "the equitable factors of the injunctive relief analysis tilt heavily against the issuance of an injunction, especially the overbearing one Plaintiffs ask the Court to adopt." The state defendants assert that the State has a weighty interest in the equal, fair, and consistent enforcement of its laws. *Maryland v. King,* 567 U.S. 1301, 1303 (2012). They further maintain that the inability of Texas to enforce its duly enacted laws clearly inflicts irreparable harm on the State. *See Abbott v. Perez,* 138 S. Ct. 2305, 2324 n.17 (2018). The state defendants assert that interest is especially potent in the middle of a global health crisis and that "if citizens lose confidence in the evenhanded application of the State's election laws in these precarious times, the foundations of our system of representative government will weaken." Accordingly, they contend plaintiffs' motion for preliminary injunction should be denied.

Standing to Bring Suit

The state defendants argue plaintiffs are unlikely to prevail on their claims against them under the Fourteenth and Twenty-Sixth Amendments because they do not enforce Texas Election Code § 82.002 or § 82.003, and are immune from suit. For related reasons, the state defendants also argue plaintiffs lack standing to bring their claims against the state defendants.

Plaintiffs respond that the state defendants' immunity argument is meritless. Specifically, plaintiffs maintain that all of the state defendants have a sufficient connection to the enforcement of the Texas Election Code. They contend that in light of the admissions in this case, including threats of criminal prosecution, this argument bears little credibility. Plaintiffs also argue that each meets the requirements for Article III standing because each has suffered and will continue to suffer legally cognizable injuries because of defendants' actions. Accordingly, plaintiffs contend this Court should proceed to hear their motion for preliminary injunction.

Abstention

The state defendants contend that, though plaintiffs' current claims sound in federal law, they cannot be resolved without answering the question posed in state court: whether fear of contracting COVID-19 constitutes a "disability" under the Texas Election Code. They contend that question is squarely presented in the state court litigation and will soon be considered by the Texas Supreme Court. In light of uncertainty about a predicate question of state law, the state defendants argue that this Court should abstain under *Railroad Commission of Texas v. Pullman,* 312 U.S. 496 (1941). "The *Pullman* case establishes two prerequisites for *Pullman* abstention: (1) there must be an unsettled issue of state law, and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Palmer v. Jackson,* 617 F.2d 424, 428 (5th Cir. 1980). With regard to the second factor, the state defendants contend resolution by the state court will render this case moot or materially alter the constitutional claims presented.

Plaintiffs respond that "the abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett v. Bullitt,* 377 U.S. 360, 375 (1964). Plaintiffs also argue that abstention in this case is improper because the state law determination will not moot nor present in a different posture the federal constitutional questions raised by plaintiffs. Plaintiffs further contend that, "regardless of whether the challenged provision of Texas Election Code is resolved in Texas state court, and there is no indication that such clarification will come soon," Texas voters are "waking every day to make the choice to request a mail ballot and have it rejected (and be criminally prosecuted) or wait further and potentially request the ballot too late or do so with an avalanche of others that overloads the electoral system." Plaintiffs maintain that the orderly administration of the election requires resolution now because: (1) the question of whether the current circumstances violate the United States Constitution remains and must be answered by this Court; (2) the July run-off election is weeks away; and (3) there "is no guarantee that the state court proceedings will have resolved the issue before this election leaving plaintiff's federal constitutional rights in limbo." Accordingly, plaintiffs argue this Court should not abstain from ruling on their motion for preliminary injunction.

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FINDINGS OF FACT

I. COVID-19 is an Immediate Danger to all Texans

1. COVID-19 infection is caused by the SARS-CoV-2 virus and is spread bypassing through mucous membranes. Ex. 21 at p. 2.

2. Coronavirus is spread through droplet transmission. These droplets are produced through coughing, sneezing, and talking. Ex. 21 at p. 3. Ex. 22 p. 14. Ex. 22 at p. 16-17.

3. The virus can be spread when an infected person transmits these droplets to a surface like a polling machine screen. Ex. 21 at p. 3. Ex. 22 p. 72-73.

4. It is highly likely that COVID-19 will remain a threat to the public both in July and through November. Ex. 6 at p. 3. Even if virus transmission and prevalence do decline over the summer months, it remains likely that they will resurge in the fall and winter. Ex. 28 at p. 7.

5. Reported illnesses have ranged from mild symptoms to severe illness and death. The most common symptoms include fever, dry cough, and shortness of breath. Ex. 21 at p. 2-3. Other identified symptoms include muscle aches, headaches, chest pain, diarrhea, coughing up blood, sputum production, runny nose, nausea, vomiting, sore throat, confusion, loss of senses of taste and smell, and anorexia. Due to the respiratory impacts of the disease, individuals may need to be put on oxygen, and in severe cases, patients may need to be intubated and put on a ventilator. Ex. 28 at p. 3.

6. Anyone can be infected with the novel coronavirus. Ex. 21 at p. 3-4. Ex. 22 at p. 21.

7. Certain groups, such as those over 60 years of age and those with certain underlying medical conditions, are at higher risk of serious illness and death should they be infected. Ex. 21 at p. 3.

8. People of every age are at risk of serious illness and possible death. Ex. 28 at p. 3.

9. The Latino community is particularly vulnerable to infection, hospitalization, and death resulting from COVID-19, due to a combination of high prevalence of underlying medical conditions and socioeconomic conditions that make contracting the disease more likely. Ex. 28 at p. 4.

10. Any place where people gather and cannot maintain physical distancing, such as a polling place, represents a heightened danger for transmission of COVID-19 disease. Ex. 21 at p. 3. Ex. 22 p. 14.

11. Crowding and exposure to a range of surfaces at the polls make polling places likely transmission sites for the virus. Ex 21. at p. 2-3. Ex. 22 p. 14.

12. Polling places will likely remain transmission sites for the virus, even if election officials use all reasonable preventive measures. Ex. 22 at p. 72. Ex. 22 at p. 64-70.

13. Requiring voters to remain in close proximity to other voters and election workers for lengthy periods of time, particularly at polling locations with long lines and extended wait times would place them at risk of contracting or spreading COVID-19. Ex. 28 at p. 8.

14. This would be particularly true for those who are at a greater risk of complications and death from

COVID-19, including the elderly, immunocompromised, and people with underlying health conditions, including many members of the Latino community. E. 28 at p. 8.

15. However, data to date in Texas demonstrate higher than expected infection rates in younger persons. Ex. 45. Ex. 22 at p. 42-44.

16. Some infected persons do not appear to have any symptoms although they may still be able to infect others. Ex. 21 at p. 3. Ex. 23 at p. 5.

17. Meanwhile, other people with no pre-existing conditions are dying of stroke without ever displaying the typical COVID-19 symptoms. Ex. 28.

18. COVID-19 has become one of the leading causes of death in the United States. Ex. 48 at p. 1-2.

19. As of May 13, 2020, Texas has 41,048 reported cases of COVID-19.[1] Ex. 44 at p.1.

20. As of April 25, 2020, the highest number of reported cases of COVID-19 in Texas are among 50 to 59-year-olds and 40 to 49-year-olds, with 2,568 reported cases and 2,620 reported cases, respectively. Ex. 45 at p. 1.

21. 20 to 29-year-olds represent 2,183 cases, while those aged 65 to 74 make up 1,292 reported cases in Texas. As of May 13, the State has seen 1,133 deaths from the virus. Ex. 44 at p. 1. Ex. 45 at p. 1.

22. Herd Immunity occurs when a high percentage of people in a community become immune to an infectious disease. This can happen through natural infection or through vaccination. In most cases, 80-95% of the population needs to be immune for herd immunity to take place. Ex. 21 at p. 5.

23. "Herd Immunity" will not reduce the risk of COVID-19 during the 2020 elections. Ex. 21 at p. 6-7.

24. An FDA-approved vaccine will be available for at least 12-18 months. Therefore, a vaccine will not reduce the risk of COVID-19 during the 2020 elections. Ex. 21 at p. 4-5.

II. Voting by Mail Is Safe with No Risk of COVID-19 Transmission

25. There is no evidence the virus can be spread by paper, including mail. Ex. 21 at p. 7.

26. Voting by mail would prevent virus transmission between voters standing in line, signing in, and casting votes, as well as between voters and election workers. Ex. 21 at p. 7. Ex. 22 at p. 72-73. Ex. 22 at p. 183. Ex. 22 at p. 201.

27. Voting by mail would eliminate viral transmission through contamination of environmental surfaces like voting machines. Ex. 21 at p. 7. Ex. 22 p. 72. Ex. 22 at p. 252-253.

28. Due to the pandemic, voting by mail is much safer for the public than voting in person. Ex. 6 at p. 3. Ex. 22 at p. 182. Ex. 22 at p. 192-193. Ex. 22 at p. 234. Ex. 22 at p. 237.

Background of Voting by Mail in Texas

29. Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. See Tex. Elec. Code Ch. 82.

30. A voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in

jail. Tex. Elec. Code §§ 82.001-4. Ex. 1 at p. 2. Ex. 22 at p. 214. Ex. 22 at p. 243-244. Ex. 22 at p. 250.

31. Voters apply to vote by mail with a mail ballot application which they send to the early voting clerk. Tex. Elec. Code §§ 84.001.

32. The early voting clerk is responsible for conducting early voting and must "review each application
for a ballot to be voted by mail." Tex. Elec. Code § 86.001(a).

33. An early voting ballot application must include the applicant's name and the address at which the applicant is registered to vote and an indication of the grounds for eligibility for voting by mail. Tex. Elec. Code § 84.002.

34. The applicant for a mail ballot must certify that "the information given in this application is true, and I understand that giving false information in this application is a crime." Tex. Elec. Code § 84.011.

35. It is a crime to "knowingly provide false information on an application for ballot by mail." Tex. Elec. Code § 84.0041.

36. If the clerk determines the applicant is entitled to vote by mail, the clerk shall provide the voter a ballot by mail. Tex. Elec. Code § 86.001.

37. If the voter is not entitled to vote by mail, the clerk shall reject the application and give notice to the applicant. *Id.*

38. A rejected applicant is not entitled to vote by mail. *Id.*

39. July 2 is the deadline for an early voting clerk to receive an application to vote by mail for the

upcoming July 14, 2020 Democratic Party Run-Off. See Tex. Elec. Code § 84.007(c). Ex. 13 at p. 11.

40. Mail ballots are expected to start being sent to voters in response to their requests on May 30, 2020. Ex. 13 at p. 9.

41. Thousands of vote-by-mail applications are being sent to early voting clerks across Texas. Ex. 46 at p. 4-5.

Election Officials Need Clarity to Prepare for Imminent Elections

42. Governor Abbott has set both the date of the special election for Senate District 14 in Bastrop and Travis Counties and the Democratic Primary Run-Off election in all 254 Counties on July 14, 2020. Ex. 7 at p. 1. During both the primary and the November General Election state election law requires all ballot information be complete by 74 days before the election. Ex. 7 at p. 1. During that time, clerks must do all of the following:

- proof ballot submissions, order races appropriately, merge with many jurisdictions appearing on the ballot;
- work with ballot companies to lay out for printing multiple ballot styles;
- program ballot scanners, controllers, and related technology;
- prepare ballot carriers for vote by mail applications and returned ballots for the use of signature verification committees and ballot boards;
- hire election workers for polling locations, early voting locations, and central counting;

- train all workers;
- determine polling locations for election day and early voting, negotiate contracts with locations;
- manage payroll issues of dozens to thousands of temporary workers; and,
- manage delivering and picking up equipment while keeping it secure and free from tampering before, during and after the polling locations open and close. Ex. 7 at p. 1-2.

43. Prior to the commencement of the instant litigation, election administrators sought guidance from the Secretary of State regarding the threat of COVID-19 and the ability of voters to obtain mail-ballots. Ex. 24 at p. 7. The Secretary did not provide such definitive guidance.

44. On April 6, 2020, the Secretary of State issued Election Advisory 2020-14, which left the interpretation of the disability statute up to local election officials. This advisory remains the only guidance from the Secretary of State to election officials pending the resolution of Defendants' appeal of that litigation. It does not provide guidance to election officials if their interpretation is correct or if counties should have a uniform interpretation of the statute. Ex. 1 at p. 2-4.

45. The State of Texas' Fourteenth Court of Appeals has ordered that the appeal in in the state court case will be submitted by June 12, 2020, 32 days prior to the primary runoff election date and 20 days prior to the vote-by-mail application deadline for that election. Ex. 38 at p. 2.

46. On May 13, 2020, the State of Texas filed a Petition for Writ of Mandamus in the Texas Supreme Court against only some of the counties in Texas

and the Petition seeks to collaterally attack the state district court injunction order while not including Plaintiffs as real parties in interest. Ex 42. Sequence of Events Since the Outbreak in Texas. On May 15, 2020, the Justices again blocked mail-in voting requests for people worried about contracting COVID-19, overturning the appellate court order from earlier in the week. The Texas Supreme court did not provide an explanation for issuing the stay.

47. On March 13, 2020, Defendant Abbott declared that COVID-19 poses an imminent threat of disaster. Ex. 2 at p. 2.

48. On March 19, 2020, Dr. John W. Hellerstedt, Commissioner of the Department of State Health Services, declared a state of public health disaster. The disaster declaration provided that people not gather in groups larger than 10 members and limit social contact with others by social distancing or staying six feet apart. Ex. 4 at p. 1.

49. On March 19, 2020, Defendant Abbott closed schools temporarily. He also closed bars and restaurants, food courts, gyms and massage parlors. Ex. 3 at p. 3.

50. On April 27, 2020, Defendant Abbott issued a new order that purports to open the state's business affairs, in "phases." Ex. 43 at p. 1. He has indicated that case testing will be monitored and that if and when cases begin to increase, the opening will be slowed and/or reversed.

51. Dr. Deborah Leah Birx, the Coronavirus Response Coordinator for the White House Coronavirus Task Force, has stated that "social distancing will be with us through the summer to

really ensure that we protect one another as we move through these phases." Ex. 47 at p. 12.

52. The Texas Secretary of State only gives guidance to local election administrators about how the election laws apply. An advisory issued by the Secretary of State's Office instructed counties to begin preparing for larger than normal volumes of vote by mail while also giving guidance to local officials to seek court orders, as appropriate, to adjust election procedures. Ex. 24 at p. 9.

53. In order to seek clarity of the requirements of state law, some of these Plaintiffs sought declaratory and injunctive relief in Texas district court in *Travis County. Democratic Party v. DeBeauvoir,* et al., No. D-1-GN-20-001610 (201st Dist. Ct., Travis Cty., Tex. filed March 20, 2020).

54. Texas intervened and asserted a Plea to the Jurisdiction based on standing, ripeness, and sovereign immunity. Ex. 33 at p. 2.

55. Texas argued in its Plea to the Jurisdiction that vote by mail administration is a county-level decision. Ex. 33 at p. 3.

56. On April 15, the state court heard the plaintiffs' temporary injunction motion and Texas' plea to the jurisdiction. The state court verbally announced the denial of the plea to the jurisdiction and the granting of the temporary injunction.

57. In response to the oral order, Defendant Paxton made public a letter he had sent to the Chair of the House Committee on Elections of the Texas House of Representatives. Ex. 55 at p. 1-5.

58. In the letter, Defendant Paxton gave a non-official, advisory opinion regarding whether the risk of

transmission of COVID-19 would entitle Texas voters to cast a mail-in ballot. He stated: "We conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Election Code for purposes of receiving a ballot by mail." Ex. 55 at p. 3.

59. In a statement accompanying the publication of the letter, General Paxton said: "I am disappointed that the district court ignored the plain text of the Texas Election Code to allow perfectly healthy voters to take advantage of special protections made available to Texans with actual illness or disabilities. This unlawful expansion of mail-in voting will only serve to undermine the security and integrity of our elections and to facilitate fraud. Mail ballots based on disability are specifically reserved for those who are legitimately ill and cannot vote in-person without needing assistance or jeopardizing their health. Fear of contracting COVID-19 does not amount to a sickness or physical condition as required by state law." Ex. 55 at p. 1. Ex.35.

60. This statement and the actions of the State contributed to the uncertainty that voters and early voting clerks face in administering upcoming elections.

61. The letter also threatened political speech by Texas Democratic Party ("TDP" or "the Party") and other political actors in the state. Ex. 55 at p. 5.

62. The letter stated: "To the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041." Ex. 55 at p. 5.

63. The public statements and actions of the Defendant Paxton create a reasonable fear by voters that they will be prosecuted. Ex. 8 at p. 7.

64. On May 1, 2020 after counties were following Judge Sulak's order, Defendant Paxton issued another Guidance Letter which again purported to threaten Texans with criminal prosecution for following Judge Sulak's order. Ex. 34.

65. Given the public statements and actions by Defendant Paxton, a voter would reasonably fear that he or she would face criminal sanction if he or she checks the disability box on a mail ballot application because of the need to avoid the potential contraction of the virus. Ex. 8 at p. 7.

66. Given the public statements and action by Defendant Paxton, third party political actors such as TDP have a reasonable fear of criminal sanction for assisting voters to apply for mail in ballots in order to avoid exposure to COVID-19. Ex. 55 at p. 5.

Texas Is a Large, Diverse State Whose Voters Need Protection

67. Texas is a large state, with a diverse pool of voters. As of July 1, 2019, there are 28,995,881 Texans. Ex. 29. People over the age of 65 are 12.6% of the population, or about 3,653,481 people. *Id.* Children below the age of 18 are 25.8% of the population, or 7,480,937 people. *Id.* Texans between age of 18 and 65 are
61.6% of the population, or 17,861,463 people. *Id.* On January 23, 2020, the Secretary of State announced that Texas had set a new state record of registered voters with 16,106,984 registered voters. *Id.*

Plaintiffs

a. Texas Democratic Party

68. The TDP is a political party formed under the Texas Election Code.

69. The TDP is the canvassing authority for many of the imminent run-off elections to be held on July 14, 2020.

70. The election of July 14 is, in part, to determine runoff elections and therefore award the Democratic Party Nominations to those who prevail. Ex. 24 at p. 13.

71. TDP is the political home to millions of Texas voters and thousands of Texas' elected officials.

72. The TDP expends resources to try to help its eligible voters vote by mail. Ex 7. 24 and 29.

73. TDP is injured by the uncertainty of the laws associated with voting by mail because of the expenditure of financial resources used to help its members vote by mail, and the potential disfranchisement of its members. Ex 7. 24 and 29.

74. TDP is harmed by the state forcing it to award its nominations in an undemocratic process. Ex 7. 24 and 29.

b. Gilberto Hinojosa

75. Gilberto Hinojosa is the elected Chair of the TDP. He is one of the administrators of the upcoming run-off elections for the Texas Democratic Party. Ex. 24 at p. 4. He is the head of the canvassing authority for the July run-off elections and is the leader of the Party by and through his statutory and rule-based powers.

76. Chair Hinojosa is also a registered voter in Texas.

77. Chair Hinojosa is injured by the Defendants, because of the uncertainty of Texas law s regarding qualifications to vote by mail.

c. Joseph Daniel Cascino

78. Joseph Daniel Cascino is a Travis County voter who voted in Democratic primary election on March 3, 2020. Ex. 10 at p. 1.

79. He intends to vote by mail in the upcoming run-off and general elections. Ex. 10 at p. 1-2.

80. He is not 65 years of age or older. Ex. 10 at p. 1.

81. He intends to be in Travis County during the early vote period and Election Day. Ex. 10 at p. 1.

82. He has not been deemed physically disabled by any authority. Ex. 10 at p. 1.

83. He wishes to vote by mail because of the risk of transmission by COVID-19 at polling places. Ex. 10 at p. 2.

d. Shanda Marie Sansing

84. Shanda Marie Sansing is a Travis County voter who voted in Democratic primary election on March 3, 2020. Ex. 9 at p. 1.

85. She intends to vote by mail in the upcoming run-off and general elections. Ex. 9 at p. 1-2.

86. She is not 65 years of age or older. Ex. 9 at p. 1.

87. She intends to be in Travis County during the early vote period and Election Day. Ex. 9 at p. 1.

88. She has not been deemed physically disabled by any authority. Ex. 9 at p. 1.

89. She wishes to vote by mail because of the risk of transmission by COVID-19 at polling places. Ex. 9 at p. 2.

e. Brenda Li Garcia

90. Brenda Li Garcia is a Bexar County voter who has voted in Democratic primary, run-off, and general elections in the past. Ex. 30.

91. She intends to vote by mail in the upcoming run-off and general elections. Ex. 30.

92. She is not 65 years of age or older. Ex. 30.

93. She intends to be in Bexar County during the early vote period and Election Day. Ex. 30.

94. She has not been deemed physically disabled by any authority. Ex. 30.

95. She wishes to vote by mail because of the risk of transmission by COVID-19 at polling places. Ex. 30.

Defendants

a. The Honorable Gregg Abbott

96. The Honorable Gregg Abbott is the Governor of Texas and a defendant in this case.

97. He is the chief executive officer in this State. Tex. Const. Art. IV § 1.

b. The Honorable Ruth Hughs

98. The Honorable Ruth Hughs is the Secretary of State of Texas and its chief election officer. Tex. Elec. Code § 31.001.

99. Secretary Hughes has injured the plaintiffs by creating a lack of clarity and probable lack of uniformity

in application of the election laws relating to mail ballot eligibility throughout the State.

c. The Honorable Ken Paxton

100. The Honorable Ken Paxton is the Attorney General of Texas and its chief legal officer. Tex. Const. Art. IV § 22.

101. The Attorney General of Texas may investigate and assist local jurisdictions in prosecuting election-related crimes. Tex. Elec. Code §§ 273.001 (d); 273.002.

102. Recently, General Paxton has issued a letter threatening "third parties [who] advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code." Ex. 55 at p. 5.

103. General Paxton has created a lack of clarity and probable lack of uniformity in application of the election laws relating to mail ballot eligibility throughout the State. Ex. 35.

104. General Paxton's letter also threatens U.S. citizens for exercising their right to vote. Ex. 55 at p. 5. See also, Ex. 34.

d. The Honorable Dana DeBeauvoir

105. The Honorable Dana DeBeauvoir is the Travis County Clerk. Ex. 15 at p. I.

106. She is the early voting clerk for the upcoming run-off and general elections.

107. Clerk DeBeauvoir has been ordered by a Texas district court to issue voters like the plaintiffs a mail ballot. Ex. 49 at p. 5-6.

e. Ms. Jacquelyn Callanen

108. Ms. Jacquelyn Callanen is the elections administrator for Bexar County.

109. She is the administrator of the run-off and general elections in Bexar County.

110. She is the early voting clerk that will grant or deny mail ballots to applicants in the coming elections.

CONCLUSIONS OF LAW

I. All Plaintiffs Have Standing

1. This Court concludes that Plaintiffs have standing in this case because they all face an imminent risk of harm, the harm they face is fairly traceable to Defendants' conduct, and that harm is redressable by this Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

2. Plaintiff Texas Democratic Party faces an imminent risk of harm as a result of the Defendants' interpretation of the Texas Elec Code. § 82.001-4. and Defendants' refusal to follow the Texas state court order permitting voters to access absentee ballots due to fear of COVID-19. The Texas Democratic Party will be conducting their own run-off elections to determine who the organization chooses as their standard bearer. Ex. 24 at p. 14: 10-24. The Texas Democratic Party has an interest in ensuring that their election is conducted in a manner that would not disenfranchise voters nor put voters at risk of death and is harmed because under the Attorney General's interpretation of the statute and inability to follow the Texas state court law, the party's ability to run their primary is diminished. Ex. 24 at p. 15. An organization may establish injury-in-fact if the "defendant's conduct significantly

and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *NAACP v. City of Kyle,* 626 F.3d. 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982). The Texas Democratic Party's purpose is to promote Democratic candidates and facilitate elections for the party, promote voter participation among its members and the public more broadly (Ex. 29), and the interest the Party seeks to protect through this litigation are therefore germane to its purpose. This harm is plainly traceable to the Defendants who are refusing to follow the state court order and threatening voters who request or use an absentee ballot due to COVID-19 with prosecution. Accordingly, the Texas Democratic Party has standing to sue Defendants. *See Lujan,* 504 U.S. at 560-61.

3. The Texas Democratic Party also has standing to challenge the actions at issue both on behalf of its members and its own behalf. An organization may establish injury-in-fact if the "defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *NAACP v. City of Kyle,* 626 F.3d. 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982). The Texas Democratic Party's purpose is to promote Democratic candidates and facilitate elections for the party, promote voter participation among its members and the public more broadly (Ex. 29), and the interest the Party seeks to protect through this litigation are therefore germane to its purpose.

4. Plaintiff Gilberto Hinojosa faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4, and Defendant's

refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Hinojosa is a registered Democrat, is planning to vote in the July 14th, 2020 runoff election, and is the elected Chair of the Texas Democratic Party. Hinojosa is one of the administrators of the Texas Democratic Party run-off elections. Ex. 24 at p. 4. He is the head of the canvassing authority and is the leader of the Party by and through his statutory and rule-based powers. Texas Election Code § 163.003-004. Hinojosa is injured by the Defendants because the uncertainty of Texas law's regarding qualifications to vote by mail and the Attorney General's threat of prosecution of those who access vote by mail ballots, even those permitted through the Texas state court order. Ex. 49 at p. 4-6. Ex. 55 at p. 1-5. Ex. 34 at p. 1-3. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Gilberto Hinojosa has standing to sue Defendants. *See Lujan v. Defenders of Wildlife,* 504 U.S. 55, 560-6I (1992).

5. Plaintiff Joseph Daniel Cascino faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4. and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Cascino is a registered Democrat and Travis County voter who intends to vote by mail in the July 2020 run-off election and general election due to the risk of transmission by COVID-19. Ex. 10 at p. 1-2. Cascino is not 65 years of age, intends to be in Travis County during the early voting period

and Election Day, and has not been deemed physically disabled by any authority. Ex. 10 at p. 1. Cascino is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise him. He is further injured by the threat of unjust prosecution by Attorney General Paxton. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Joseph Daniel Cascino has standing to sue Defendants. *See Lujan v. Defenders of Wildlife,* 504 U.S. 55, 560-61 (1992).

6. Plaintiff Shanda Marie Sansing faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4. and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Sansing is a registered voter in Travis County and has voted in Democratic primary, run-off elections, and general elections in the past. Ex. 9 at p. 1. She intends to vote by mail in the upcoming run-off elections and general elections. Ex. 9 at p. 1-2. She is not 65 years of age, intends to be in Travis County during the early vote period and Election Day, and has not been deemed disabled by any authority. Ex. 9 at p. 1. Sansing wishes to vote by mail due to the risk of transmission of COVID-19 at in-person polling places. Ex. 9 at p. 2. She is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise her. She is further injured by the threat of unjust prosecution by Attorney

General Paxton. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Shanda Marie Sansing has standing to sue Defendants. *See Lujan v. Defenders of Wildlife,* 504 U.S. 55, 560-61 (1992).

7. Plaintiff Brenda Li Garcia faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4. and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Ex. 30. Garcia is a Bexar County voter. *Id.* She has voted in the Democratic primary, run-off elections, and general elections in the past and intends to vote by mail in the upcoming run-off and general elections. *Id.* She is not 65 years of age or older. *Id.* She intends to be in Bexar County during the early voting period and Election Day. *Id.* She wishes to vote by mail because of the risk of transmission and contraction of COVID-19 at in-person polling places. *Id.* She is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise her. She is further injured by the threat of unjust prosecution by Attorney General Paxton. The evidence before this Court demonstrates that counties view the orders of the Attorney General as mandatory, *id.,* and thus, an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Brenda

Li Garcia has standing to sue Defendants. *See Lujan v. Defenders of Wildlife,* 504 U.S. 55, 560-61 (1992).

8. The claims asserted in this case do not require individualized proof as to every affected voter and cases that involve injunctive relief such as that sought here do not normally require individual participation. *See Hunt v. Wash. State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977).

9. The Texas Democratic Party has organizational standing to sue on its own behalf because Defendants' illegal acts not permitting voters to access mail ballots under the Texas state court order and under Texas Election Code and Attorney General Paxton's threats to prosecute voters, impair the Texas Democratic Party's ability to engage in its projects by forcing the organization to divert resources to counteract those illegal actions, such as by educating voters on their ability to access absentee ballots. Ex. 7, 24 and 29. Resource diversion is a concrete injury traceable to the Defendants I conduct and redress can be provided by granting this injunction. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982). And the Fifth Circuit has affirmed that "an organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct; hence, the defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources."' *NAACP v. City of Kyle, Tex.,* 626 F.3d 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp.,* 455 U.S. at 379).

10. Further, all individual Plaintiffs have made clear in their declarations that they not only do intend to vote in the upcoming elections, but they intend to do so through absentee ballots and will be disenfran-

chised due to fear of COVID-19 if unable to access mail ballots or prosecuted for accessing these ballots. Ex. 9 at p. 1-2. Ex. 10 at p. 1-2 and Ex. 30. The evidence before this court satisfies any requirement that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *See Gill v. Whitford,* 138 S. Ct. 1916,1929 (2018).

11. Plaintiffs also satisfy the causation requirement of standing. *KP. v. LeBlanc,* 627 F.3d 115, 123 (5th Cir. 20I0) (citations omitted) ("Because State Defendants significantly contributed to the Plaintiffs' alleged injuries, Plaintiffs have satisfied the requirement of traceability."). Defendants' actions would significantly contribute, if not wholly cause, Plaintiffs' alleged injuries, i.e., their inability to exercise their constitutional right to vote.

II. A Preliminary Injunction Should Issue against Defendants while the Case Proceeds

12. This Court concludes that Plaintiffs should be granted a preliminary injunction pursuant to its as-applied claims relating to: (1) the 26th Amendment of the U.S. Constitution; (2) vagueness in violation of the "Due Process" clause of the 5th and 14th Amendments; (3) voter intimidation in violation of 52 U.S.C. § 10307(b); and (4) the First Amendment of the U.S. Constitution.

13. Plaintiffs should be granted a preliminary injunction, because they have satisfied the four requirements for such an injunction to issue: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the

grant of an injunction will not disserve the public interest. *Byrum v. Landreth,* 566 F.3d 442, 445 (5th Cir. 2009).

a. Plaintiffs Are Likely to Succeed on the Merits of their Claims

i. Plaintiffs Are Likely to Succeed on their 26th Amendment Claim

14. The Twenty-Sixth Amendment states, "[t]he right of citizens of the United State, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on the account of age" (U.S. Const. amend. XXIV, § 1), and forbids the abridgement or denial of the right to vote of young voters by singling them out for disparate treatment. *See Ownby v. Dies,* 337 F. Supp. 38, 39 (E.D. Tex. 1971).

15. Courts presented with claims arising under the Twenty-Sixth Amendment must apply strict scrutiny. *See United States v. Texas.,* 445 F. Supp. 1245,126 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States,* 439 U.S. 1105 (1979) (determining that a Texas registrar had violated the Twenty-Six Amendment by imposing burdens on students wishing to register to vote and providing that "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny"); *see also Lynch v. Donnelly,* 465 U.S. 668, 687 n. 13 (1984) (holding that laws, statutes, or practices that are "patently discriminatory on its face" will receive strict scrutiny.); *League of Women Voters of Fla., Inc. v. Detzner,* 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (finding that the Twenty-Sixth Amendment provides an "added protection

to that already offered by the Fourteenth Amendment"). Under strict scrutiny, the burden is on the State to justify that its policy, statute, or decision is narrowly tailored to serve a compelling state interest. *See League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 475 (2006).

16. Texas statute creates two classes of voters, those under the age of 65 who cannot access a mail ballot under this law and those over the age of 65 who can access mail ballots. Texas. Election Code § 82.003 states that "a qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day." Those aged 65 and older are permitted to access mail ballots under this law on the account of their age alone, and those younger than 65 face a burden of not being able to access mail ballots on account of their age alone.

17. Plaintiffs complain that younger voters bear a disproportionate burden because the age restrictions of Tex. Elec. Code § 82.003, that Tex. Elec. Code § 82.003 is a government classification based on age and discriminates against voters under the age of 65 based on age, and that Tex. Elec. Code § 82.003 is prima facie discriminatory under all circumstances.

18. However, in the Preliminary Injunction proceeding, Plaintiffs only seek relief, as applied during the pandemic.

19. The Court concludes, that during the COVID-19 pandemic, younger voters bear a disproportionate burden because the age restrictions of Tex. Elec. Code § 82.003, that Tex. Elec. Code § 82.003 is a government classification based on age and discriminates against voters under the age of 65 based on age, and that Tex.

Elec. Code § 82.003 violates the 26th Amendment, as applied, during the COVID-19 pandemic.

20. COVID-19 has become one of the leading causes of death in the United States. Data to date in Texas demonstrates higher than expected infection rates in younger persons. General Paxton has threatened to prosecute voters under the age of 65 who use mail ballots under the disability exemption as provided by the state court ruling. Ex. 8 at p. 7. Thus, younger voters who are just as at risk to contract COVID-19 are forced to choose between risking their health by voting in-person or facing criminal prosecution by Defendant Paxton.

21. As a result of Defendants' actions, the right of people below the age of 65 to vote is uniquely threatened and burdened solely based on their age. Thus, this Court concludes that Tex. Elec. Code § 82.003 classification of voters by age is discriminatory, as applied, because it erects an obstacle to the franchise for younger voters.

22. Defendants have attempted to meet their burden of showing that their actions here satisfy strict scrutiny, and they failed to do so. They presented no evidence that demonstrates a compelling governmental interest and instead provided confusing and conflicting reasoning behind why the state would bar younger voters from accessing mail ballots during a global, deadly pandemic. The State Is interest is particularly attenuated in this case, given that the data show that Texas aged under 65 comprise a majority of the COVID-19 cases reported. Ex. 45 at p. 1.

23. In fact, the State's given reasoning would increase the harm to the public health and safety of

not only those Texans who are under the age of 65 and who would be unable to vote by mail, but also the safety of any Texans (even those over 65) who interact with individuals who voted in person because they were unable to vote by mail and who were exposed to the COVID-19 virus.

24. Put simply, there is no compelling interest in imposing arbitrary obstacles on voters on account of their age in these circumstances, and thus Defendants' conduct thus fails to meet strict scrutiny.

25. This Court concludes that Plaintiffs have established that they are likely to succeed on their as applied Twenty-Sixth Amendment claim.

26. Alternatively, even if strict scrutiny does not apply, defendants' conduct is unconstitutional as it intentionally discriminates against voters on the basis of age.

27. Where they have not applied strict scrutiny, federal courts have evaluated claims under the Twenty-Sixth Amendment using the *Arlington Heights* framework. *See e.g. One Wis. Inst., Inc. v. Thomsen,* 198 F. Supp.3d 896, 926 (W.D. Wis. 2016) (finding that the Twenty-Sixth Amendment's text is "patterned on the Fifteenth Amendment . . . suggest[ing] that *Arlington Heights* provides the appropriate framework.").

28. Under the *Arlington Heights* test, the Court infers discriminatory intent through (1) the impact of the official action and whether it bears more heavily on one group than another; (2) the historical background of the decision; (3) the specific sequences of events leading up to the decision challenged in the case, including departures from normal procedures in making decisions and substantive departure; and (4) contemporary statements made by the governmen-

tal body who created the official action. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252 (1977).

29. Defendants' decision to interpret the law in a discriminatory fashion and threaten criminal prosecution against those who advance a different determination is discriminatory particularly to voters under the age of 65. That decision bears more heavily on voters under 65 especially during the COVID-19 pandemic, because if they are unable to access mail ballots, they will be forced to risk their lives, the lives of their loved ones, and the lives of the public at-large in order to vote. The refusal to extend access to mail ballots to younger voters affirmatively disenfranchises thousands of Texas voters simply on the account of age. Voters age 65 and older will not face the same burden on the right to vote because they are able to access mail ballots and vote from the safety of their home, away from potential COVID-19 carriers and spreaders. Voters under the age of 65 bear the burden of this application of the law more heavily than voters aged 65 and older because they will not be able to vote from the safety of their homes. Thus, the impact of the official action bears more heavily on younger voters than another group—older voters.

30. The background of Defendants' decision also leads this Court to conclude there was discriminatory intent. Initially, a district court granted voters in Texas relief to vote absentee due to COVID-19 by a Texas state court judge. Ex. 49, p. 4-6. Despite this state court order, Attorney General Paxton issued an advisory, non-official opinion threatening to prosecute people and groups who complied with the state court ruling. Ex. 55. Defendant Paxton called the state court ruling an "unlawful expansion of mail-in voting."

General Paxton further opined that to help or advise a voter to seek a mail-in ballot pursuant to this provision of the Election Code was a crime. Defendant Paxton's decision to threaten criminal sanctions is strong evidence of invidious discrimination.

31. Further, Defendants' actions regarding the state court proceedings are a departure from the legal norm and policy procedure. The Attorney General rarely, if ever, "opine[s] through the formal opinion process on questions ... that are the subject of pending litigation." In a highly unusual manner, Defendant Paxton circumvented the State's judicial process by announcing that he would criminally prosecute voters in defiance of the emerging court order. These significant departures from normalcy were all in service of preventing legal, registered voters from casting ballots without exposing themselves to a deadly virus.

32. Thus, *Arlington Heights* factors have been satisfied as to Defendants' conduct, and Plaintiffs have established that they are likely to succeed on their claim that Tex. Elec. Code § 82.003 impermissibly discriminates on the basis of age, as applied, in violation of the Twenty-Sixth Amendment. The Court also finds there is no rational basis for allowing voters 65 and over to mail-in their ballots while denying eligibility to voters less than 65.

ii. The Plaintiffs Will Succeed on Their Denial of Free Speech Claim

33. This Court concludes that Plaintiffs are likely to prevail [ ] on their denial of free speech claim.

34. Voters enjoy a "Right to Vote" as a form of political speech. Political speech, including the right to vote, is strongly protected as a "core First Amendment

activity." *League of Women Voters v. Detzner,* 863 F. Supp.2d at 1158.

35. When determining whether there has been a violation of this right, the Court inquires as to (1) what sort of speech is at issue, and (2) how severe of a burden has been placed upon the speech. *Burdick v. Takushi,* 504 U.S. 428, 433 (1992). Strict scrutiny is applied if the law "places a severe burden on fully protected speech and associational freedoms." *Lincoln Club v. City of Irvine,* 292 F.3d 934, 938 (9th Cir. 2002). "[V]oting is of the most fundamental significance under our constitutional structure," meaning the speech at issue is fully protected First Amendment activity. *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979).

36. Political speech is at issue here. If not for Defendants' conduct, Plaintiff TDP (and other campaigns and political groups) would be engaging in communications with voters concerning who is eligible to and how to vote by mail. Defendant Paxton has outwardly threatened to prosecute these communications. Ex. 55 at p. 3. Defendant Paxton has also threatened to criminally prosecute voters who do not meet his construction of the statutory conditions to vote absentee who attempt to vote by mail.

37. Meanwhile, at least one candidate for the Republican Nomination for a seat in Congress has issued mailers encouraging all voters, regardless of Age, to vote by mail and her statements allege that she did so with advice from Defendant Paxton. Ex. 35. There is no evidence this Republican candidate is being criminally investigated or prosecuted or the county where much of the district at issue in the

campaign is located, has been targeted by Defendant Paxton's letters and Texas Supreme Court Petition.

38. These circumstances leave the Democratic Party and its candidates unsure whether only Democrats will be prosecuted.

39. These circumstances, the evidence shows, hinders the free exchange of political speech.

40. The burden on this speech is severe. Under Defendant Paxton's interpretation of state law, voters face the choice between casting their ballot and paying the price of criminal prosecution. Especially given the visibility of the fallout from the Wisconsin primary election, voters are deeply fearful.

41. Defendants' conduct does not meet strict scrutiny, and thus Plaintiffs have established that they are likely to succeed on their claim that their right to freedom of political speech was denied. Indeed, Defendants' conduct cannot stand under any potential First Amendment standard.

42. Even were the state courts to clarify the disability provision in favor of voters under the age of 65, in a timely fashion, which seems unlikely, the threats of prosecution, now widely disseminated, would not be completely cured.

iii. The Plaintiffs Will Succeed on Their Void for Vagueness Claim

43. This Court concludes that Plaintiffs are likely to succeed on their void for vagueness claim.

44. A statute violates the Fourteenth Amendment on the basis of vagueness if its terms "(1) `fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'authorize or even encourage arbitrary and dis-

criminatory enforcement.'" *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). When a statute infringes upon basic First Amendment freedoms, "a more stringent vagueness test should apply." *Id.* at 246.

45. Criminal enactments are subject to a stricter vagueness standard because "the consequences of imprecision are . . . severe." Hoffman *Estates v. Flipside, Hoffman Estates, Inc.,* 455 U. S. 489, 498-499 (1982). Voters can face criminal prosecution under Tex. Elec. Code § 84.0041, and thus a stricter vagueness standard applies to it. The law must be specific enough to give reasonable and fair notice in order to warn people to avoid conduct with criminal consequences. *Smith v. Goguen,* 415 U.S. 566, 574 (1974). A statute must also establish minimal guidelines to govern enforcement. *Id.* at 574.

46. Tex. Elec. Code § 82.001-4 concerns the right to vote, which is a form of political speech protected under the First Amendment. Thus, a more stringent vagueness test applies here as the statute infringes upon basic First Amendment freedoms and voters are threatened with criminal prosecution.

47. Tex. Elec. Code § 82.001-4 provides that a voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-4. Tex. Elec. Code § 82.002(a) states "a qualified voter is eligible for early voting by mail if the voter has a sickness of physical condition that prevents the voters from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." *Id.* A Texas state court judge has stated that § 82.002(a)

definition includes persons who are social distancing because of COVID-19.

48. Defendant Paxton has issued varying and contradictory interpretations of Tex. Elec. Code § 82.001-4. Prior to the pandemic, Defendant Paxton advised that there was no specific definition of disability required to be met in order to qualify to use an absentee ballot. Op. Tex. Att'y Gen. No. KP- 0009 (2015). Defendant Paxton has also previously opined that a court-ruled sexual deviant under the age of 65 meets the definition of "disabled" under this statute. Op. Tex. Att'y Gen. No. KP- 0149 (2017).

49. Defendant Paxton's recent interpretations of Tex. Elec. Code § 82.001-4 renders the statute vague as it is unclear which voters qualify to vote using a mail ballot under the law. The statute itself does not clearly define the phrase "physical condition that prevents the voters from appearing at the polling place on election day." Tex. Elec. Code § 82.00I-4. The multiple constructions of Tex. Elec. Code § 82.001-4 by Defendant Paxton and the state court fail to provide people of ordinary intelligence a reasonable opportunity to understand if they are unqualified to access a mail ballot, and authorize and encourage arbitrary and discriminatory enforcement.

50. Every day that goes by, Texans are being subjected to criminal prosecuting threat if they are under age 65 and seek to vote by mail before the July 2 deadline.

51. The statute does not establish minimal guidelines to govern enforcement by Defendants or other state actors. Defendant Paxton has threatened to prosecute elected officials and voters who access mail ballots as provided by the state court because of the

COVID-19 pandemic. He issued a letter stating that "[to] the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041." Defendant Paxton's repeated assertions of prosecution of voters and threatening of election officials who seek to comply with a state court order is evidence of a lack of guidelines.

52. Voters have received conflicting instructions on their ability to access mail ballots; one from the Texas judiciary that orders voters who fear COVID-19 to qualify for a mail ballot and instructions from Defendant Paxton which threatens voters who follow the Texas court order with prosecution.

53. Due Process has been violated as the interpretation by Defendant Paxton and the Election Code itself provide no definitive standard of conduct and instead provides Defendants with unfettered freedom to act on nothing but their own preference and beliefs.

54. Tex. Elec. Code § 82.001-4 is unconstitutionally vague in violation of the Fourteenth Amendment Due Process Clause.

55. Plaintiffs have established that they are likely to succeed on their claim that the State's interpretation of the law and the law itself are unconstitutionally vague in violation of the Due Process Clause.

iv. The Plaintiffs Will Succeed on Their Voter Intimidation Claim

56. This Court concludes that Plaintiffs are likely to succeed on their voter intimidation claim.

57. Title 42 U.S.C. § 1985, part of the Civil Rights Act of 1871, "creates a private civil remedy for three

prohibited forms of conspiracy to interfere with civil rights under that section." *Montoya v. FedEx Ground Package Sys., Inc.,* 614 F.3d 145, 149 (5th Cir. 2010).

58. Plaintiff must prove the following elements for a claim under § 1985(3): (1) a conspiracy of two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or deprives her of a right or privilege of a United States citizen. *See Hilliard v. Ferguson,* 30 F.3d 649, 652— 53 (5th Cir. 1994).

59. The right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by the provision of 42 U.S.C. § 1985(3) pertaining to conspiracies to deprive persons of rights or privileges. See 42 U.S.C. § 1985(3) (preventing persons from conspiring to "prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner"); *Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958.

60. Voters are legally entitled access to the franchise, and the right to vote is a fundamental right. *Reynolds v. Sims,* 377 U.S. 533, 561-562 (1964). This right entitles voters to access to the franchise free from unreasonable obstacles. *See Common Cause Ga. v. Billups,* 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *see also Veasey v. Perry,* 769 F.3d 890 (5th Cir. 2014).

61. Defendants have worked in concert with others in threatening criminal prosecution, an act in furtherance of this conspiracy to deprive access to the franchise from legal, rightful voters. This has injured

Plaintiffs, and this injury has been caused by state officials acting in concert with others to prevent legal voters from casting a ballot free from fear of risk of transmission of a deadly illness or criminal retribution.

62. Defendant Paxton issued an advisory opinion just as a state court was ruling that Texas voters are entitled to a mail-in ballot because of the risk of transmission of COVID-19. Ex. 55 at p.1. In this advisory opinion, Defendant Paxton wrote: "[T]o the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041." Ex. 55 at p. 5. He also claimed that expanding mail ballot eligibility to all Texans "will only serve to undermine the security and integrity of our elections." Defendant Paxton's statements operate to discourage voters from seeking mail-in ballots because of their fear of criminal sanction or victimization by fraud, and have the intention and the effect of depriving legally eligible voters' access to the franchise.

63. Plaintiffs are likely to succeed on the merits of their claim that Defendant Paxton's official actions amount to voter intimidation in violation of Title 42 U.S.C. § 1985(3).

v. The Defendants Violated the Equal Protection Clause of the 14th Amendment

64. The Defendants, who are state actors and/or acting under color or law as administrators of elections, have violated the Equal Protection Clause of the Fourteen Amendment by creating an unconstitutional burden on the fundamental right to vote for those under the age of 65.

65. The Equal Protection Clause "is essentially a mandate that all persons similarly situated must be treated alike." *Rolf v. City of San Antonio,* 77 F.3d 823, 828 (5th Cir. 1996). When a "challenged government action classifies or distinguishes between two or more relevant groups," courts must conduct an equal protection inquiry to determine the validity of the classifications. *Quth v. Strauss, 11* F.3d 488, 491 (5th Cir. 1993).

66. First, Defendants have unconstitutionally burdened Plaintiffs' right to vote as set forth under the *Anderson-Burdick* analysis.

67. Because voting is a fundamental right *(Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 667 (1966)), state election laws or enactments that place a burden on the right to vote are evaluated under the Anderson-Burdick analysis. Under that analysis, a court must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by the rule." *Burdick v. Takushi,* 504 U.S. at 434. If the burden on the right to vote is severe, a court will apply strict scrutiny. The classification created by the state must promote a compelling governmental interest and be narrowly tailored to achieve this interest if it is to survive strict scrutiny. *Plyer v. Doe,* 457 U.S. 202, 216-17 (1982).

68. Under strict scrutiny, Defendants are unable to supply any legitimate or reasonable interest to justify such a restriction. Defendants' proffered interests in denying millions of Texans a mail-in ballot amidst a pandemic are that (1) mail-in ballots are a special protection for the aged or disabled and (2) mail ballots enable election fraud. Both reasons, even taken

at face-value, fail to outweigh the burden voters will face in exercising their right to vote before the threat of COVID-19 can be realistically be contained. Moreover, Defendants fail to explain why, under their advanced interests, that older voters are so highly valued above those of younger voters that the rampant fraud Defendants claim mail-in voting provides is justified.

69. Further, the statutory interpretation espoused by Defendants is not narrowly tailored enough to serve the proffered interests. Texas Election Code § 82.001, *et seq.,* extends the "special protection" of a vote by mail-in ballot to not just the aged or disabled but also to voters confined in jail, voters who have been civilly committed for sexual violence, and voters who are confined for childbirth.

70. Second, mail-in ballots have built-in protections to ensure their security, including many criminal penalties for their misuse—protections that Defendant Paxton has publicly expressed a willingness to pursue. Tex. Elec. Code § 86.001, *et seq.* "Even under the least searching standard of review we employ for these types of challenges, there cannot be a total disconnect between the State's announced interests and the statute enacted." *Veasey v. Abbott,* 830 F.3d 216, 262 (5th Cir. 2016) (citing *St. Joseph Abbey v. Castille,* 712 F.3d 215, 225-26 (5th Cir. 2013)).

71. Even if this Court finds that this statute should receive only rational basis review, as is appropriate where the burden is found to be more minimal, Defendants cannot proffer any rational state interest to justify their statutory interpretation. There is no rational state interest in forcing the majority of its voters to visit polls in-person during a novel global

pandemic, thus jeopardizing their health (and the health of all those they subsequently interact with). There is certainly no rational interest in fencing out voters under the age of 65 because it would introduce rampant fraud, while allowing older voters to utilize mail ballots and allowing the alleged rampant fraud therewith. Nor do Defendants have a rational state interest in fencing out from the franchise a sector of the population because of the way they may vote. "'The exercise of rights so vital to the maintenance of democratic institutions' . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *United States v. Texas,* 445 F. Supp. 1245, 1260 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States,* 439 U.S. 1105 (1979). Furthermore, the State has no interest in allowing a situation where the Attorney General can sow confusion, uneven election administration and threaten criminal prosecutions on these circumstances.

72. Thus, this Court concludes that Defendants, who are state actors and/or acting under color or law as administrators of elections, have violated the Equal Protection Clause of the Fourteen Amendment by creating an unconstitutional burden on the fundamental right to vote for those under the age of 65.

b. Without Preliminary Relief, Plaintiffs Are Suffering Irreparable Harm

73. This Court concludes Plaintiffs are suffering irreparable harm in the absence of injunctive relief.

74. Voting is a constitutional right for those that are eligible, and the violation of constitutional rights for even a minimal period of time constitutes irreparable injury justifying the grant of a preliminary injunction. *See Deerfield Med. Ctr. v. City of Deerfield*

Beach, 661 F.2d 328, 338 (5th Cir. Unit B. Nov. 1981) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *DeLeon v. Perry,* 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), *aff'd sum nom. DeLeon v. Abbot,* 791 F3d 619 (5th Cir. 2015) ("Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law."); see also *Mitchell v. Cuomo,* 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

75. In addition, forcing voters to unnecessarily risk their lives in order to practice their constitutional rights while allowing other voters a preferred status so that they do not have to face this same burden, is also irreparable injury.

76. Leaving the elections. conditions as they are is itself a harm. TDP and these individual voters are held up, every day by the conflicting state court order and Attorney General's Paxton's guidance. If the Plaintiff voters apply for ballots by mail, right now, as they would otherwise be entitled to do, they subject themselves to criminal investigation. If they wait, they may miss the deadline, risk their application or ballot do no travel in the mail timely or otherwise gets held up with a last minute rush of vote by mail applications. Meanwhile, TDP is unable to counsel and advise its members as to who can vote in its primary runoff and how.

c. The Continued Injury if the Injunction is Denied Outweighs Any Harm that Will Result if the Injunction is Granted

77. This Court concludes that any harm to Defendants is outweighed by the continued injury to Plaintiffs if an injunction does not issue.

78. As explained above, the injury Plaintiffs are suffering in the absence of an injunction, is severe.

79. No harm occurs when the State permits all registered, legal voters the right to vote by utilizing the existing, safe method that the State already allows for voters over the age of 65. The Court also concludes that the local election administrators will suffer no undue burden if vote-by-mail is expanded.

III. Preliminary Relief Will Serve the Public Interest

80. This Court concludes that the injunctive relief that Plaintiffs seek will not disserve the public interest, and, to the contrary, will serve the public interest because it will protect prevent violation of individuals' constitutional rights and will prevent additional cases of a deadly infectious disease that has already taken the lives of over a thousand Texans.

81. It is "always" in the public interest to prevent violations of individuals' constitutional rights, Deerfield Med. Ctr., 661 F.2d at 338-39, and it is in the public interest not to prevent the State from violating the requirements of federal law. *Valle del Sol Inc. v. Whiting,* 732 F .3d 1006, 1029 (9th Cir. 2013); *c.f. Dunn v. Blumstein,* 405 U.S. 330, 336 (1972) (stating that protecting the right to vote is of particular public importance because it is "preservative of all rights.") (citing *Reynolds v. Sims,* 377 U.S. 533, 562 (1964)).

82. Moreover, it is the public policy of the State of Texas to construe any constitutional or statutory provision which restricts the right to vote liberally: "[a]ll statutes tending to limit the citizen in his exercise of this right should be liberally construed in [the voter's] favor." *Owens v. State ex rel. Jennett,* 64 Tex. 500, 502 (1885). The public policy the State's executive branch attempts to advance in this case does not appear clearly in any state legislative enactment.

83. Thus, an injunction against Defendants will serve the public interest.

IV. Abstention is not Warranted

Abstention here is not warranted because resolution by the State court will not render this case moot nor materially alter the constitutional questions presented. Plaintiffs allege injury of their federal constitutional rights in addition to injuries arising from the ambiguity of state law. A Texas state court has already interpreted the ambiguity of Texas' election code and many counties are complying. Yet, General Paxton's letter ruling is preventing meaningful political speech, confuses mail ballot applicants and leaves these voters having to risk criminal prosecution if they seek to protect their health by voting by mail. Meanwhile, vote by mail applications are being submitted daily and many counties, cities, and school districts are complying with Judge Sulak's ruling. Under these circumstances, abstaining from exercising federal court jurisdiction is not warranted.

Moreover, "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity

powers." *Baggett v. Bullitt,* 377 U.S. 360, 375 (1964). In fact, the stay of federal decision is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188 (1959) (quoted in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813 (1976)). As such, "abstention is the exception rather than the rule . . . ." *Duncan v. Poythress,* 657 F.2d 691, 697 (5th Cir. 1981).

Pullman abstention must be "narrow and tightly circumscribed" and is "to be exercised only in special or 'exceptional' circumstances." *Duke v. James,* 713 F.2d 1506, 1510 (11th Cir. 1983). Nonetheless, "voting rights cases are particularly inappropriate for abstention," *Siegel v. LePore,* 234 F.3d 1163, 1174 (11th Cir. 2000), because in voting rights cases plaintiffs allege "impairment of [their] fundamental civil rights" *Harman v. Forssenius,* 380 U.S. 528, 537 (1965). Abstention is even more inappropriate where the inevitable delay it will cause could preclude resolution of the case before the upcoming elections. *Detzner,* 354 F. Supp. 3d at 1284 (citing *Harman,* 380 U.S. at 537).

In this case, time is of the essence—the runoff election is mere weeks away, and the 2020 general election comes not long after. There is no guarantee that state court proceedings will be completed in time and given the Attorney General's defiance of the state district court ruling, a final state court ruling would not fully vindicate Plaintiffs' federal constitutional rights.

Even if Defendants' reading of Tex. Elec. Code § 82.003 was plausible, it is not the sole, mandatory reading of the text, and the constitutional avoidance canon requires that it be rejected. "[W]hen one interpretation of a law raises serious constitutional problems,

courts will construe the law to avoid those problems so long as the reading is not plainly contrary to legislative intent." *Pine v. City of West Palm Beach,* 762 F.3d 1262, 1270 (11th Cir. 2014). Resolution of the state court matters is neither "diapositive of the case" before this Court nor would its resolution "materially alter the constitutional questions presented" by Plaintiffs' claims. *Siegel,* 234 F.3d at 1174.

Presuming the Texas Supreme Court upholds the lower court's reading of Tex. Elec. Code §§ 82.001-4, and even if the Executive branch of the Texas government complies with this reading, this does not properly counsel for abstention. To find otherwise is to depend upon a series of questionable "mights." *See Wollschlaeger v. Governor of Fla.,* 848 F.3d 1293, 1322 (11th Cir. 2017) (relying on *United States v. Stevens,* 559 U.S. 469, 480 (2010), for the proposition that courts should not decline to enforce constitutional rights in reliance on the "benevolence" of enforcing officials). Additionally, even if this series of "mights" come to pass, that would not change the constitutional questions presented in this case. Plaintiffs allege that Texas' election code is prima facie discriminatory in violation of the United States Constitution, which is a matter only this Court can resolve.

Abstention would take considerable time and meanwhile these Plaintiffs' constitutional speech, right to assemble as a political party and to vote, are all harmed. Abstention is inappropriate in this case, for the same reason that it is "particularly inappropriate" in voting cases. *See Siegel,* 234 F.3d at 1174. Constitutional "deprivations may not be justified by some remote administrative benefit to the State." *Harman,* 380 U.S. at 542. Therefore, Plaintiffs' injuries are redressable by this Court and abstention is not appropriate.