

No. 20-50407

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
No. 5:20-cv-00438-FB

PLAINTIFFS-APPELLEES' OPPOSED MOTION TO EXPEDITE

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CERTIFICATE OF INTERESTED PERSONS

1. No. 20-50407; *Texas Democratic Party, Gilbert Hinojosa, Chair of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia v. Greg Abbott, Governor Of Texas, Ruth Hughs, Texas Secretary Of State, Ken Paxton, Attorney General Of Texas.*
2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendants-Appellants

Greg Abbott, Gov. of Texas
Ruth Hughs, Texas Sec'y of State
Ken Paxton, Atty. Gen. of Texas

Defendants

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Clerk,
Jacquelyn F. Callanen, Bexar
County Elections Administrator

Plaintiffs-Appellees

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/s/ Chad W. Dunn
Counsel of Record for
Plaintiffs-Appellees

INTRODUCTION

Pursuant to Fifth Circuit Rule 27.5, plaintiffs-appellees respectfully move to expedite consideration of defendants-appellants' appeal of the district court's entry of a preliminary injunction holding Section 82.003 of the Texas Election Code unconstitutional and providing that any "eligible 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." Good cause exists to expedite this appeal because of the importance of the question presented for review and the urgent need for its prompt resolution.

Defendants-appellants have filed their opening brief and Plaintiffs-appellees filed their response brief today, July 7. Plaintiffs-appellees respectfully request that defendants-appellants be directed to file their reply brief on or before July 15, 2020, and that the Court either resolve this appeal on the briefs or schedule a special argument session so that the Court can issue its decision by August 6, 2020. Defendants-appellants oppose this motion.

BACKGROUND

On April 7, 2020, plaintiffs filed this lawsuit seeking to invalidate Section 82.003 because it, *inter alia*, violates the Twenty-Sixth Amendment.

On May 19, after submission of written evidence and a hearing, the district court granted the motion for a preliminary injunction. Among other things, the district court held that Section 82.003 “violates the clear text of the Twenty-Sixth Amendment.” *Texas Democratic Party v. Abbott*, 2020 WL 2541971, at *5 (W.D. Tex., May 19, 2020).

Defendants appealed to this Court and sought an emergency stay of the district court's preliminary injunction pending appeal. On June 4, a motions panel of the Fifth Circuit granted defendants' motion for a stay. *Texas Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020). The judges on the panel noted that “[t]he Twenty-Sixth Amendment is not a major player in federal litigation,” *id.* at 408, and “that the Supreme Court has said little to date about the Twenty-Sixth Amendment,” *id.* at 416 Ho, J., concurring.

On June 16, plaintiffs filed an application to the U.S. Supreme Court to vacate the motions panel's stay, as well as a petition for a writ

of certiorari before judgment. Application to Vacate, No. 19A1055; Petition for Writ of Certiorari before Judgment, No. 19-1939. On June 22, plaintiffs moved to expedite consideration of the petition. Motion to Expedite, No. 19-1939.

On June 26, the Supreme Court denied plaintiffs' application to vacate the stay. *Texas Democratic Party v. Abbott*, 2020 WL 3478784 (U.S. June 26, 2020). Along with that denial though, Justice Sotomayor issued a statement noting that application raised "weighty but seemingly novel questions regarding the Twenty-Sixth Amendment," and expressing the hope that "the Court of Appeals will consider the merits of the legal issues in this case well in advance of the November election." *Id.* at *1.

ARGUMENT

Good cause exists to expedite this appeal because (a) the constitutional issue presented is significant, and (b) without expedition, a decision will come too late for millions of Texans.

First, this appeal concerns a weighty constitutional issue. Plaintiffs contend that Texas Election Code section 82.003, which provides "no-excuse" vote-by-mail voting only for those 65 and older,

violates the Twenty-Sixth Amendment. There are millions of voters in Texas under the age of sixty-five who would be able to obtain a no-excuse vote-by-mail ballot in the upcoming general election if Section 82.003 was held unconstitutional. Whether a state can restrict vote-by-mail based on age alone has import not only to the health and safety of voters and their families in Texas, but may also impact the ultimate results of the Presidential Election and other federal elections in Texas and beyond. Moreover, there are two other states within the Fifth Circuit that have age restrictions similar to Texas's. *See* La. Stat. Ann. § 18:1303J; Miss. Code. Ann. § 23-15-627.

Second, expedited consideration is necessary so that the Court can consider, and rule on, this appeal prior to the deadline to apply for a vote-by-mail ballot in Texas for the November 3 general election. According to statistics from the Administrative Office of the U.S. Courts, the median time from filing a notice of appeal to issuance of the court's opinion is more than 9 months. *See* PRACTITIONER'S GUIDE TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT 2 (2019), <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/documents/practitionersguide.pdf> (last accessed July 6,

2020). In Texas, applications for vote-by-mail ballots must be received by election officials no later than the 11th day before the election, which this year is October 23 (less than 6 months from the time defendants filed their notice of appeal). *See* TEX. ELEC. CODE § 86.0015. Thus, without expedition, a decision will come too late for millions of Texans.

Furthermore, as the litigation history demonstrates, whichever side is dissatisfied with this Court's ruling is likely to seek additional appellate review. And, as noted in Plaintiffs' merits brief, should the Texas Legislature seek to level-down and forbid vote by mail for all citizens as a remedy the Twenty-Sixth Amendment violation, court resolution sooner rather than later facilitates that choice. It is in the interests of all parties, as well as voters, for this case to be resolved with deliberate speed.

CONCLUSION

For the reasons herein, consideration of this appeal should be expedited.

July 7, 2020

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

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CERTIFICATE OF CONFERENCE

In accordance with 5TH CIR. R. 27.4, the undersigned counsel contacted Defendants-Appellants concerning this Motion for Expedited Appeal. The Defendants-Appellants are opposed to the Motion for Expedited Appeal and will file a response.

/s/ Chad W. Dunn
Chad W. Dunn

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

/s/ Chad W. Dunn
Chad W. Dunn

Counsel for Appellees

CERTIFICATE OF ELECTRONIC COMPLIANCE

I certify that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ Chad W. Dunn
Chad W. Dunn

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 868 words, excluding the parts exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

/s/ Chad W. Dunn
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Counsel for Appellees