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 HUGHS, 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

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the other briefs filed in this case.

Dated: July 14, 2020

/s/ Elizabeth B. Wydra
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The COVID-19 virus has already killed more than 100,000 people in the United States. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Mem.) (Roberts, C.J., concurring in denial of application for injunctive relief) ("COVID-19 [is] a novel severe acute respiratory illness that has killed . . . more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine."). Currently, it is spreading aggressively throughout the state of Texas and elsewhere. *See* Robert T. Garrett, *As Texas Sets Three More Single-Day Records on Coronavirus, Gov. Greg Abbott Predicts Next Week Will 'Look Worse,'* Dallas Morning News (July 9, 2020),

[1] *Amicus* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

https://www.dallasnews.com/news/public-health/2020/07/09/as-texas-sets-3-more-single-day-records-on-coronavirus-gov-greg-abbott-predicts-next-week-will-look-worse/; Kim Bellware et al., *Coronavirus Death Toll in U.S. Increases as Hospitals in Hot-Spot States Are Overwhelmed*, Wash. Post (July 10, 2020), https://www.washingtonpost.com/nation/2020/07/10/coronavirus-live-updates-us/. In the midst of this global pandemic, the plaintiffs in this case seek nothing more than to vote by mail so that they can exercise their constitutional right to vote without risking their health. Texas law, however, only provides a right to vote by mail without excuse to voters who will be "65 years of age or older on election day." Tex. Elec. Code § 82.003. And the Texas courts have held that fear of contracting COVID-19 does not entitle voters less than 65 years of age to apply to vote by mail. *In re State of Texas*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020). Thus, in Texas, a citizen's ability to vote by mail in the upcoming election depends on age alone. This explicit age-based voting classification violates the plain text of 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. By allocating voting opportunities based on age, Texas has transgressed the Constitution's explicit rule that the right to vote may not be denied or abridged based on age.

The immediate purpose of the Twenty-Sixth Amendment was to enfranchise eighteen-to-twenty-one year old U.S. citizens. But the "words on the page" adopted by Congress and ratified by the states sweep more broadly, promising voting equality for adult citizens regardless of age. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). Indeed, in writing the Twenty-Sixth Amendment, its Framers consciously chose sweeping language, modeled on the Fifteenth Amendment's prohibition on racial discrimination in voting and the Nineteenth Amendment's prohibition on sex discrimination in voting. In all three amendments, the Constitution strictly forbids voting discrimination on account of the protected characteristic—race, sex, or age. In each context, the Constitution outlaws state efforts "to fence out whole classes of its citizens from decisionmaking in critical state affairs." *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495, 522 (2000).

If a state enacted a law limiting the right to vote by mail to white persons or to male citizens, the courts would not hesitate to strike it down as a plain affront to the commands of the Fifteenth and Nineteenth Amendments. *Id.* at 512 ("'[B]y the inherent power of the Amendment the word white disappeared' from our voting laws, bringing those who had been excluded by reason of race within 'the generic grant of suffrage made by the State.'" (quoting *Guinn v. United States*, 238 U.S. 347, 363 (1915))); *Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote

more heavily than the Negro vote, none could successfully contend that that discrimination was allowable."). The same is true here. Age, like race and sex, "cannot qualify some and disqualify others from full participation in our democracy." *Rice*, 528 U.S. at 523. Texas here has done precisely what the Twenty-Sixth Amendment forbids.

Texas argues that its statutory voting discrimination on account of age is constitutionally acceptable if rational, drawing on precedents interpreting the Fourteenth Amendment's Equal Protection Clause. That approach cannot be squared with the text and history of the Twenty-Sixth Amendment and would strip the Amendment of independent force and meaning. The American people added the Twenty-Sixth Amendment to the Constitution after the Supreme Court held in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that Congress's power to enforce the Fourteenth Amendment did not permit it to lower the voting age to eighteen in state elections. The Twenty-Sixth Amendment was thus necessary because the Fourteenth Amendment had been interpreted to permit states leeway to enact laws that treat older and younger persons differently on account of age. Compliance with the Fourteenth Amendment, therefore, cannot excuse a failure to comply with the Twenty-Sixth Amendment. Although states have authority to enact age-based classifications in many contexts, a State may not deny or abridge the right to vote of U.S. citizens eighteen years or older on account of age, and this law does so. The

Texas law at issue here contravenes the Constitution's explicit limits and cannot stand. The judgment of the district court should be affirmed.

ARGUMENT

I. The Text and History of the Twenty-Sixth Amendment Prohibit State Laws that Deny Equal Voting Opportunities to Voters on Account of Age.

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. This language was chosen by the Framers of the Twenty-Sixth Amendment to establish a broad constitutional prohibition on voting discrimination on account of age. Adults eighteen years or older—whether young or old—are entitled to basic equality when it comes to the right to vote, a right long recognized as "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). States are not required to grant the vote to citizens who have not reached the age of eighteen, but once citizens reach adulthood, the Twenty-Sixth Amendment declares age constitutionally irrelevant. In short, the Amendment protects young and older voters alike and forbids the government from curtailing or diminishing the rights of some adult voters on account of age. The voter who has just turned eighteen years of age must be treated on equal terms as the octogenarian voter who has cast a ballot for many decades.

"When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting). This is particularly true of the Twenty-Sixth Amendment, which was modeled specifically on the Fifteenth and Nineteenth Amendments' prohibitions on voting discrimination. As the history of the Twenty-Sixth Amendment shows, its mandate of voting equality regardless of age "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). During debates over the Amendment, speaker after speaker reiterated this basic point. *See* 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. Therefore, it seems to me that this proposed amendment is perfectly in consonance with those precedents."); *id.* at H7534 (daily ed. Mar. 23, 1971) (statement of Rep. Richard Poff) ("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 . . . ."); *id.* at H7533 (daily ed. Mar. 23, 1971) (statement of Rep. Emanuel Celler) ("[Section 1 of the Twenty-Sixth Amendment] is modeled

after similar provisions in the 15th amendment, which outlawed racial discrimination at the polls, and the 19th amendment, which enfranchised women.").

The Twenty-Sixth Amendment was added to the Constitution in the wake of the Supreme Court's decision in *Oregon v. Mitchell*, 400 U.S. 112, which struck down a provision of the Voting Rights Act Amendments of 1970 that lowered the voting age from twenty-one to eighteen in state elections by prohibiting states from "den[ying] 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, 84 Stat. 314, 318. There, the Court held that Congress could not use its power to enforce the Fourteenth Amendment to grant citizens aged eighteen-to twenty-one years old the right to vote in state elections. *Mitchell*, 400 U.S. at 130 (opinion of Black, J.) (concluding that "Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination"); *id*. at 294 (Stewart, J., concurring in part and dissenting in part) ("[N]one of the opinions filed today suggests that the States have anything but a constitutionally unimpeachable interest in establishing some age qualification as such."). In other words, *Mitchell* allowed states to "discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

In response, the Twenty-Sixth Amendment established a specific constitutional rule that guaranteed voting equality for young and older adults alike, "echo[ing] the language of the Black Suffrage and Woman Suffrage Amendments" and extending them "along the *youth* axis." Akhil Reed Amar, *America's Constitution: A Biography* 445 (2005). Rather than simply lower the voting age from 21 to 18, the Framers of the Twenty-Sixth Amendment chose broad sweeping language, modeled on the Fifteenth and Nineteenth Amendments, mandating a rule of voting equality on account of age.

Significantly, while the statutory precursor to the Twenty-Sixth Amendment prohibited only vote denial, the Twenty-Sixth Amendment explicitly bars the government from either denying or abridging the right to vote of citizens aged eighteen years or older on account of age. This language, as the Supreme Court's Fifteenth Amendment precedents reflect, is both "explicit and comprehensive," requiring the government to respect "the equality" of young and older adult citizens "at the most basic level of the democratic process, the exercise of the voting franchise." *Rice*, 528 U.S. at 511-12. The Twenty-Sixth Amendment forbids laws that discriminate against younger voters on the basis of age and saddle them with burdens older voters need not bear. The Framers of the Twenty-Sixth Amendment were concerned that "forcing young voters to undertake special burdens" 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 guarantee equality for all adult voters regardless of age, the Twenty-Sixth Amendment prohibits both denial and abridgment of the right to vote of citizens eighteen years or older on account of age.

As precedents of the Supreme Court and other courts reflect, the "core meaning" of "'abridge'" is to "'shorten.'" *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (quoting *Webster's New International Dictionary* 7 (2d ed. 1950)). This "necessarily entails a comparison" and "refer[s] . . . to discrimination." *Id.* at 334; *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (observing that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination" and "hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race"); *Harman v. Forssenius*, 380 U.S. 528, 541-42 (1965) (holding that any "material requirement" imposed "solely" on voters who refused to pay a poll tax was an unconstitutional abridgment of the right to vote forbidden by the Twenty-Fourth Amendment); *Jolicoeur v. Mihaly*, 488 P.2d 1, 4 (Cal. 1971) (holding that the word "'abridge'" in the Twenty-Sixth Amendment "means diminish, curtail, deprive, cut off, reduce" (citing *Webster's New International Dictionary* 6 (3d ed. 1961))). Scholars across the ideological spectrum have agreed that this understanding of the meaning of "abridge" is long-standing and deeply rooted in constitutional text and history. *See* John Harrison, *Reconstructing the Privileges or*

Immunities Clause, 101 Yale L.J. 1385, 1388 (1992) (arguing that a law "abridged" a right "when it took that right from only one group of persons"); Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 BYU L. Rev. 1393, 1417-18 (2012) (demonstrating that "[t]he word 'abridge' in 1868 meant . . . [t]o lessen" or "to diminish" and that laws that gave "African Americans a lesser and diminished" set of freedoms unconstitutionally abridged their constitutional rights); Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 Geo. L.J. 27, 39 (2020) (arguing that, under the Nineteenth Amendment, "[a]bridgment occurs when a state 'diminishes' or 'shortens' a voting right on account of sex," such as when "a state passes a law that results in greater burdens on women being able to register and vote compared to men"). Under this settled meaning of "abridge," laws that impose obstacles on younger voters on account of their age and deny them voting opportunities available to older voters violate the promise of voting equality enshrined in the Twenty-Sixth Amendment. As the next Section shows, the Texas law at issue here is such a law.

II. The Texas Law at Issue Here Violates the Twenty-Sixth Amendment.

The Constitution does not require states to establish a system of absentee voting, but having done so, Texas may not discriminate against voters on the basis of constitutionally forbidden criteria, including age. Texas may not provide elderly

voters with one set of voting opportunities, but deny those same opportunities to younger voters. Here, Texas has limited the right to vote by mail without excuse to voters aged sixty-five or older. In the context of the global pandemic that has already led to death and illness on a vast scale in the United States, Texas is forcing voters aged eighteen to sixty-four—a huge swath of the electorate defined in explicit age-based terms—to risk their health in order to go to the polls to exercise their constitutional right to vote. Only voters older than sixty-five—a class of voters defined solely based on age—may vote from the safety of their home, thereby avoiding the risk of contracting the virus on their way to, or at, a polling place.

This violates the plain terms of the Twenty-Sixth Amendment. It "abridges" the "right of citizens of the United States, who are eighteen years of age or older, to vote . . . on account of age" by saddling voters aged eighteen to sixty-four years old with burdens voters aged sixty-five or older do not face. U.S. Const. amend. XXVI, § 1. It provides lesser and diminished voting rights to citizens aged eighteen to sixty-four solely on account of their age. This constitutes an unconstitutional age-based abridgment of the right to vote under the long-settled meaning of "abridge," even though "the abstract right to vote may remain unrestricted" as to age. *See Lane*, 307 U.S. at 275. The statute is based on a premise—that voters aged sixty-five or older deserve additional voting opportunities—that is fundamentally inconsistent with the Twenty-Sixth Amendment's prohibition on voting discrimination on account of age.

The Twenty-Sixth Amendment demands that adult voters be treated equally regardless of age. Younger voters, no less than voters sixty-five or older, are entitled to vote from the safety of their home and without the inconvenience of waiting many hours at a crowded, overburdened polling place to exercise their constitutional right to vote. Texas has written into law a form of voting discrimination explicitly forbidden by the Constitution.

Urging this Court to sanction one set of voting opportunities for younger voters and another for older voters based solely on age, Texas insists that the Constitution does not mandate voting by mail and that differential treatment of voters must be upheld if rational, relying on *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). Appellants' Br. 25-27. In *McDonald*, the Supreme Court upheld the constitutionality of an Illinois law that denied unsentenced inmates awaiting trial the opportunity to obtain an absentee ballot, while affording others unable to make it to the polls the right to vote by mail, stressing "the wide leeway" the Fourteenth Amendment "allow[s] the States . . . to enact legislation that appears to affect similarly situated people differently." *McDonald*, 394 U.S. at 808. It is no doubt true that in some contexts states may draw lines that treat voters differently when it comes to voting by mail if they have rational reasons for doing so. But nothing in *McDonald* allows the government to allocate voting opportunities on constitutionally forbidden criterion, such as race,

sex, or age, or failure to pay a poll tax. Quite the contrary. *Id.* at 807 (finding that the Illinois law did not rest on "factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny"). Having chosen to give voters the right to vote by mail and avoid the burdens of going to the polls on Election Day, Texas cannot deny that opportunity to some voters solely on the basis of age. That abridges the right to vote based solely on age in violation of the Twenty-Sixth Amendment.

In looking to Supreme Court precedents interpreting the Fourteenth Amendment's Equal Protection Clause, Texas strips the Twenty-Sixth Amendment of independent meaning and force. As the history recounted earlier shows, the Twenty-Sixth Amendment was necessary because the Fourteenth Amendment did not forbid age discrimination in voting. *Cf. United States v. Reese*, 92 U.S. 214, 218 (1876) ("Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is."). When Congress attempted to enforce the Fourteenth Amendment by lowering the voting age to eighteen in state elections, the Supreme Court in *Mitchell* held that Congress had exceeded its enforcement power. In response, Congress adopted, and the states ratified, the Twenty-Sixth Amendment, mandating that adult voters be treated equally on the basis of age. The idea that the Twenty-Sixth Amendment "contributes no added protection to that already offered by the Fourteenth Amendment" ignores its text and history. *See*

Walgren v. Bd. of Selectmen of the Town of Amherst, 519 F.2d 1364, 1367 (1st Cir. 1975).

The Supreme Court's precedents have rejected the suggestion that compliance with the Fourteenth Amendment "somehow excuses compliance" with "the race neutrality command of the Fifteenth Amendment." *Rice*, 528 U.S. at 522. The same is true here. Regardless of the reach and scope of the Fourteenth Amendment, the government must respect the age-neutrality command of the Twenty-Sixth Amendment, which is an explicit constitutional prohibition on state laws that deny or abridge the right to vote of citizens aged eighteen years or older on account of age. Texas's two-tiered voting system—which allows voters older than sixty-five to vote by mail freely, while younger voters must risk catching a deadly virus at the polls should they wish to vote—flouts the Amendment's promise of voting equality for young and older voters alike.

Texas recounts some of the history leading up to the ratification of the Twenty-Sixth Amendment, but studiously ignores the plain meaning of the text the American people added to the Constitution. By the State's account, the Twenty-Sixth Amendment contains no guarantee of voting equality on account of age and, in fact, permits age-based voting classifications if rational. Appellants' Br. 28. Texas's argument ignores the Amendment's central command: the Amendment's "explicit and comprehensive" terms, modeled on the Fifteenth and Nineteenth

Amendments, require the government to respect "the equality" of adult citizens regardless of age "at the most basic level of the democratic process, the exercise of the voting franchise." *Rice*, 528 U.S. at 511-12. The age-neutrality command of the Amendment means that for citizens eighteen years or older, age—like race, sex, and wealth—"cannot qualify some and disqualify others from full participation in our democracy." *Id.* at 523.

Texas claims that the Twenty-Sixth Amendment would not have been understood to apply to laws, like the Texas statute at issue here, that give older voters greater voting opportunities solely based on their age. Appellants' Br. 31-32. But even if Texas is correct about "the limits of the drafters' imagination," that "suppl[ies] no reason to ignore the law's demands." *Bostock*, 140 S. Ct. at 1737. The "express terms" of the Constitution still control. *Id.* Texas may not allocate voting opportunities on the basis of the age of the voter. That "attacks the central meaning" of the Twenty-Sixth Amendment. *Rice*, 512 U.S. at 523. A State may not deny or abridge the right to vote of citizens aged eighteen years or older on account of age, and this law does so. The judgment of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Elizabeth B. Wydra

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Dated: July 14, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on July 14, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 14th day of July, 2020.

/s/ Elizabeth B. Wydra
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Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,659 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amici* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Executed this 14th day of July, 2020.

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