

Case No. 20-50407

**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.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

**AMICUS CURIAE BRIEF OF EL PASO COUNTY AND LISA
WISE, THE EL PASO COUNTY ELECTIONS
ADMINISTRATOR, IN SUPPORT OF PLAINTIFFS-APPELLEES
AND THEIR MOTION TO EXPEDITE AND URGING
AFFIRMANCE OF THE DISTRICT COURT'S DECISION**

Respectfully submitted,

JO ANNE BERNAL
El Paso COUNTY ATTORNEY
500 E. San Antonio, Room 503
El Paso, Texas 79901
(915) 546-2050 - Telephone
(915) 546-2133 – Telecopier
Email: KMcCary@epcounty.com

Submitted: July 14, 2020

By: **/s/ Kevin McCary**
KEVIN McCARY
Assistant County Attorney
Texas Bar No. 24046381
Attorney for Appellees

TABLE OF CONTENTS

TABLE OF CONTENTS..... 3

TABLE OF CITATIONS..... 4

IDENTITY AND INTERESTS OF AMICUS CURIAE..... 5

CONSENT 6

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES 6

ARGUMENT..... 7

I. Introduction and Summary of the Argument: Applying an inflexible statewide requirement that those under the age of 65 may only vote in person is impermissible under the 26th Amendment. 7

II. *Anderson v. Celebrezze* sets forth the proper test to examine the 26th Amendment challenge brought by the Plaintiffs. 9

III. Historically, no state had the per se constitutional right or duty to require in-person voting, and a balancing of constitutional rights is required before a voter’s rights may be burdened. 11

A. Texas may regulate federal elections, but it has no per se right to require in-person voting. 12

B. Texas’s right to regulate elections must be balanced against voters’ core right to vote, and “fraud” serves as a pretext not a compelling state interest. 13

CONCLUSION.....15

CERTIFICATE OF ELECTRONIC COMPLIANCE.....17

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMIT17

CERTIFICATE OF SERVICE.....17

TABLE OF CITATIONS

Constitutional Provisions

U.S. Const. amend XXVI7, 13
U.S. Const. art. I, § 4, cl. 17, 12

Cases

Anderson v. Celebrezze, 460 U.S. 780 (1983)..... 9, 10, 13
Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) 10
Burson v. Freeman, 504 U.S. 191 (1992) 8, 10, 11, 12, 13, 14
Cook v. Gralike, 531 U.S. 510 (2001) 7
Tex. Democratic Party v. Abbott, 961 F.3d 389 (5th Cir. 2020) 8, 9

Statutes

TEX. ELEC. CODE ch. 61 12
TEX. ELEC. CODE ch. 64 12
TEX. ELEC. CODE ch. 82 12, 14
TEX. ELEC. CODE ch. 86 12
TEX. ELEC. CODE ch. 221..... 14
TEX. ELEC. CODE § 276.....15

Rules

5TH CIR. R. 25.2.....17
5TH CIR. R. 29.2 6
FED. R. APP. P. 26.1 6
FED. R. APP. P. 29.....6, 17
FED. R. APP. P. 3217

IDENTITY AND INTERESTS OF AMICUS CURIAE

El Paso County is a governmental entity with partial responsibility for administering elections in El Paso County, Texas. Lisa Wise is its Elections Administrator (collectively “County”). The County believes that, under pandemic conditions, providing a safe election will be impossible without more widely available mail-in voting. Notwithstanding all the efforts to provide an environment with minimal risk for contracting a COVID-19 infection, the anticipated volume of in-person voters will still create a dangerous, hard to police situation for voters voting in person. Increasing the ratio of voters who vote by mail is a critical tool to ensure that voters under the age of 65 are not disenfranchised by pandemic conditions.

El Paso County is the westernmost county in the state of Texas; it is so far west that, unlike the rest of the state (with the exception of Hudspeth County) it sits in the Mountain, rather than the Central, time zone. The County had a population of 800,647 as of the 2010 census.¹ A border county, El Paso County is contiguous with the Mexican state of Chihuahua, which creates additional challenges for the management of COVID-19.²

¹ El Paso County, Texas, Wikipedia, <https://tinyurl.com/ycvldq45> [last visited: July 12, 2020]

² *See, e.g.*, “Border Generates challenges, cooperation for El Paso and Juarez on COVID-19 pandemic.” <https://tinyurl.com/y8j3m4z6> (June 20, 2020) (describing the cities of El Paso and Juarez as sharing a single “disease pool” and “divided leadership” over two

To provide the Court local context and a professional opinion, Election Administrator Lisa Wise's affidavit is attached as Exhibit A.

CONSENT

All parties have consented to the filing of this brief. *See* FED. R. APP. P. 29(a)(2). No party's counsel authored this brief in whole or in part; moreover, no party, party's counsel, or person contributed money to fund the preparation or submission of this brief. *See* FED. R. APP. P. 29(a)(4)(E). Moreover, the undersigned counsels of record certify that they have authored this brief in whole, and they have endeavored to add novel arguments rather than merely recite those already advanced. 5TH CIR. R. 29.2.

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The County of El Paso, Lisa Wise, the El Paso County Judge, and the El Paso County Commissioners Court constitute a governmental corporation and its elected officers. Thus no further disclosure statement is required under Federal Rule of Appellate Procedure 26.1.

counties, two states, and multiple municipalities) [last visited July 13, 2020].

ARGUMENT

I. Introduction and Summary of the Argument: Applying an inflexible statewide requirement that those under the age of 65 may only vote in person is impermissible under the 26th Amendment.

The 26th Amendment provides all citizens the right to vote, and that right may not be denied or abridged on account of age if those citizens are at least 18 years old. U.S. Const. amend XXVI. The Elections Clause—passed nearly two hundred years prior to the 26th Amendment—may not be used to “abridge” this right. *See* U.S. Const. art. I, § 4, cl. 1; U.S. Const. amend XXVI; *Cook v. Gralike*, 531 U.S. 510, 522-23 (2001) (“The States may regulate the incidents of such elections, including balloting, only with the exclusive delegation of power under the Elections Clause.”)

Just as the framers viewed the Elections Clause as something other than a grant of authority “to favor or disfavor a class of candidates,” the 26th Amendment’s drafters viewed it as prohibiting favoring or disfavoring a class of voters. *See* U.S. Const. art. I, § 4, cl. 1; *Cook* 531 U.S. at 523 (2001). By requiring one class of voters (those under the age of 65) to vote in person during a pandemic while favoring others (those over the age of 65) with the option to vote by mail, Texas’s rigid statute colludes with the pandemic to effectively *abridge* the very right the Amendment’s framers sought to protect. A more flexible approach is required.

The County writes to express two concerns with respect to the analysis provided by the Motions Panel. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). First, rather than applying the test announced by *Anderson v. Celebrezze*, the panel merely applied the rational basis test and ignored more recent constitutional analysis. *Id.* at **25-27.³ Second, the Motions Panel paid no attention to the historical administration of elections—which never required in-person voting until the 19th Century. *See Burson v. Freeman*, 504 U.S. 191 (1992) (applying strict scrutiny through a historical lens to balance competing constitutional interests). Viewing current pandemic conditions through the lens of the correct standard as well as proper historical context leads to a single conclusion: Texas’s requirement that younger voters vote in-person during a global pandemic is unconstitutional under the 26th Amendment. *See id.* The County does not suggest that Texas voters have a per se right to vote by mail. Rather, it asserts that the State does not have a per se right to require in-person voting during a global pandemic. Under these circumstances, the State has a duty to apply a more flexible approach. Otherwise, the right to vote for those between the ages of 18 and 65 is abridged.

³ The version of Lexis available to the County does not yet have page number cites from the Federal Reporter. For this reason, *Abbott* pinpoint citations refer to the Lexis pinpoint.

II. ***Anderson v. Celebrezze* sets forth the proper test to examine the 26th Amendment challenge brought by the Plaintiffs.**

The Motions Panel discarded the test announced in *Anderson v. Celebrezze*—which requires courts to resolve a challenge to election laws by balancing competing constitutional interests—in favor of the rational basis analysis applied in *McDonald v. Board of Election Commissioners. Tex. Democratic Party v. Abbott*, 961 F.3d 389, **21-26 (5th Cir. 2020); see also *Anderson v. Celebrezze*, 460 U.S. 780 (1983). It did so because the panel presumes that the Supreme Court “abrogates its cases with a bang, not a whimper[.]” *Abbott*, 961 F. 3d at *26. That is a bold premise and conclusion given the Supreme Court’s explicit instructions in *Anderson* and the cases that followed it:

- In *Anderson*, the Supreme Court found an Ohio statute (that imposed an early declaration deadline on independent candidates) to be unconstitutional. *Anderson*, 460 U.S. at 786. The Court directed that in examining challenges to state election laws a court must engage in “an analytical process” that: (1) considers the character and magnitude of the asserted injury to the constitutional rights a plaintiff seeks to vindicate; (2) “identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule”; (3)

determine the legitimacy and strength of each of those interests; and (4) consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 789. "[T]here is no substitute for the hard judgments that must be made." *Id.* at 790. (citations and quotation marks omitted).

- *In Burson v. Freeman*, the court applied the *Anderson* Standard and equated it with "strict scrutiny" or "exacting scrutiny." *Burson v. Freeman*, 504 U.S. 191, 198-99 (1992). So, under *Burson*, the standard announced to analyze cases that alleged a violation of the right to vote (which is the "essence of a democratic society") is "strict" or "exacting" scrutiny under the *Anderson* mode of analysis. *See id.*
- The Court seems to have closed the loop in *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999). Citing *Anderson*, it again urged courts to make "hard judgments" and to be "vigilant" in doing so. *Id.* at 192. Justice Thomas concurred in the judgment but complained that the majority's holding departed from "strict scrutiny" in applying the *Anderson* test. *Id.* at 206 (Thomas, J., concurring) . But even Justice Thomas would have applied traditional "strict scrutiny." *Id.*

So that makes three cases that came after *MacDonald* that applied strict scrutiny, the *Anderson* test, or both. Even if that is not a “bang” in the Motions Panel’s eyes, it is plain that something more than rational basis should be applied where core voting rights are at stake. The point is not that voters have a per se right to vote by mail; the point is that the state does not have a per se right to require in-person voting for one class of people, but not others. This is particularly true because, during (and just after) formation of the Union, voting from the safety of one’s home was common.

III. Historically, no state had the per se constitutional right or duty to require in-person voting, and a balancing of constitutional rights is required before a voter’s rights may be burdened.

There is no constitutional provision that requires in-person voting. *See discussion, Burson v. Freeman*, 504 U.S. 191, 200 (1992) (noting that early American voters marked handwritten ballots “in the privacy of their homes.”). Instead, in-person voting was a late invention designed to prevent bribery. *Id.* at 202-04. But that innovation came from state law, not the Constitution. *See id.* And because in-person voting is a creature of state law, that requirement must be balanced against individual voting rights under the 26th Amendment.

A. Texas may regulate federal elections, but it has no per se right to require in-person voting.

The Constitution, of course, permits Texas to regulate the time, manner, and place of voting in federal elections, unless overruled by act of Congress. *See* U.S. Const. art. I, § 4, cl. 1 (Elections clause). In general, there are three ways to vote in Texas: in person on election day, in person during the early voting period, and early voting by mail. *See generally* TEX. ELEC. CODE chs. 61, 64, 82, 86. Voting in a manner other than in person is only allowed for those who are disabled; who will be absent from the County on election day (and during the early voting period); or who are over the age of 65. TEX. ELEC. CODE §§ 82.001, 82.002, 82.003. Yet around the time the Constitution was written, states had no per se right or obligation to require in-person voting.

In *Burson*, the Supreme Court outlined this history. During the colonial period, elections were conducted by voice vote (“viva voce”) or a showing of hands. *Burson*, 504 U.S. at 200. By 20 or so years after the formation of the Union, most states moved to using paper ballots. *Id.* But this was done at home: “Individual voters made their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting.” *Id.* Bribery and fraud concerns arose and, by the 19th century, the states moved to an “Australian” system with pre-printed

ballots and polling booths. *Id.* at 202-206.

So, under the Constitution, the States have a right to regulate the conduct of federal elections, but there has never been a per se right or obligation to require in-person voting for one class of people to the detriment of another. *See id.* Instead, a state must balance the rights of individuals to vote with the burdens the regulations place on those voters. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983). For this same reason, “leveling down,” as suggested by the Motions Panel, does not achieve this balance. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, at **48-49 (5th Cir. 2020). Removing the right to vote by mail from those over the age of 65 makes the problem worse, not better, by abridging the right to vote for all voters. During a pandemic, limiting voting by mail to one age group over another fails to meet the required balance of benefits and burdens. This is not just poor policy; it is unconstitutional. *See* U.S. Const. amend XXVI.

B. Texas’s right to regulate elections must be balanced against voters’ core right to vote, and “fraud” serves as a pretext not a compelling state interest.

There is no meaningful dispute that the nation battles a long-term pandemic. Nor is there any meaningful dispute that the pandemic has worsened in Texas generally, and in El Paso specifically, since the Motions

Panel decision.⁴ So Texas’s inflexible requirement that most voters under age 65 vote in person abridges their right to vote. That abridgement is ripe for testing under *Anderson*. And the structure of the statute shows why fraud is no more than a pretext.

The Supreme Court has identified “fraud” as a “compelling state interest.” *Burson*, 504 U.S. at 199. But “compelling state interest” is more than a magic phrase a state may simply utter to survive “exacting scrutiny” or the *Anderson* test. *See id.* A simple examination of Texas law—which requires nearly everyone under age 65 to vote in person—shows why fraud is not a true concern.

Chapter 82 of the Texas Elections Code permits four classes of people to vote by mail: those who are absent from their county of residence; those who are disabled; those who are 65 years of age or older on election day; and those who are confined to jail on election day. TEX. ELEC. CODE ch. 82. But nowhere in Chapter 82 does the Legislature express any concern as to fraud or take any action to mitigate it as to those groups that may vote by mail. *See id.* The same is true of Chapter 221 (which deals with election contests, fraud, and illegal voting): there are no special “fraud provisions” to investigate those who vote by mail. *See* TEX. ELEC. CODE ch. 221. Chapter 276 does

⁴ See Texas Tribune at <https://tinyurl.com/yaz6bubq>.

penalize a person that tampers with a signed *application* for voting by mail or a falsified *application* for voting by mail. See TEX. ELEC. CODE §§ 276.010, 276.013. But neither of those sections authorizes the investigation—or expresses any concern—as to those groups that actually vote by mail. So “fraud” is no more than a distraction from the true concern here. Some groups are required to vote in person while other favored groups may vote from the safety of their homes. That is the abridgement of the right to vote that raises 26th Amendment concerns here. And that is the concern that should occupy the Court.

CONCLUSION

The 26th Amendment prohibits the “abridgement” of the right to vote of all persons over the age of 18. The Texas Elections Code requires all persons under the age of 65 to vote in person, even during a pandemic, and without flexibility. Because there is neither a textual nor historical basis for doing so, Texas’s right to regulate federal elections—by requiring in-person voting for those under the age of 65—is ripe for balancing, under *Anderson*, against an individual voter’s *unabridged* right to vote. This is so because the State has no per se right (textual or historical) to require in-person voting in the midst of a global pandemic; rather, it has a duty to apply a more flexible approach in order to ensure that the right to vote—for those between the ages

of 18 and 65—is not abridged.

For all these reasons, the County prays that the Court **affirm** the district court’s holding.

Respectfully submitted,

JO ANNE BERNAL
EL PASO COUNTY ATTORNEY
500 E. San Antonio, Room 503
El Paso, Texas 79901
(915) 546-2050 – Telephone
(915) 546-2133 – Telecopier
Email: KMcCary@epcounty.com

By: **/s/ Kevin P. McCary**
KEVIN P. McCARY
Assistant County Attorney
Texas Bar No. 24046381
Attorney for Respondent

CERTIFICATE OF ELECTRONIC COMPLIANCE

I certify that (1) the required privacy redactions have been made and (2) the electronic submission is an exact copy of the paper document. 5TH CIR. R. 25.2.13; 25.2.1. I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ Kevin McCary _____
Kevin McCary

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMIT

I certify that this document complies with (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts exempted by FED. R. APP. P. 32(f), this document contains **2,513** words; (2) 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 (14-point Georgia) using Microsoft Word.

/s/ Kevin McCary _____
Kevin McCary

CERTIFICATE OF SERVICE

I, Kevin McCary, certify that today, July 14, 2020, a copy of this Amicus Brief was served upon all counsel of record via ECF.

/s/ Kevin McCary _____
Kevin McCary

STATE OF TEXAS §
§
COUNTY OF EL PASO §
§
In re State of Texas; §
§
Cause No. 20-50407 §
§
In the United States Court of §
Appeals for the Fifth Circuit §
§

DECLARATION OF LISA R. WISE

1. My name is Lisa R. Wise. I am the El Paso County Elections Administrator. I was appointed on April 13, 2015 by the El Paso County Elections Commission, which was later ratified by the El Paso County Commissioners Court.
2. I received a bachelor’s degree in political science and public administration from Park University in Parkville, Missouri in 2000. I also received a master’s degree in public administration from the University of Nebraska at Omaha in 2004. In 2006, I was appointed as the Deputy Elections Commissioner in Douglas County, Nebraska (which includes the City of Omaha). In that position, I oversaw the administration of local, state, and federal elections for Douglas County. I was in that position until August 2014 when I resigned to move to El Paso County, Texas.
3. I have held the position of El Paso County Elections Administrator since April of 2015. As Elections Administrator, I oversee the administration of local, state, and federal elections several times each year. I oversee an elections department of approximately 14 full-time staff.
4. In the past, I have administered mail-in ballots by posting a form on the El Paso County website that was provided by the Secretary of State. However, several forms are acceptable under the statute. When I started with El Paso County, there was already an established procedure, under

the Election Code, to request a ballot by mail. I have changed the process slightly in order to streamline it administratively, but it remains consistent with the Election Code. As a matter of process, now as then, a vote by mail application was, and is, handled as follows:

- First, we review whether it is filled out completely. For example, does it have a signature? Did the applicant mark a category as to why the applicant qualifies to vote by mail (i.e. age, disability, or out of the County)?
 - We then match the application with the voter registration in our computer system, which is updated daily with data from the Secretary of State.
 - If there is a good match between the voter registration and the application, then we create the envelope labels, do ballot fulfillment, and mail it out.
 - Part of ballot fulfillment is that the voter registration database is updated to note that the applicant has been sent a ballot by mail. (Note: for large elections, a vendor completes ballot fulfillment; for small elections we do it in house. The use of vendors is common throughout the state.) In the registration system, we note the stated reason for voting by mail.
5. In my time as Elections Administrator, I have never gone beyond the stated reason for voting by mail, and I am not aware of any statutory or other requirement that I do so.
 6. In evaluating a ballot by mail application, we only verify that the information required by the Election Code is present. The Legislature has set out the requirements for me to accept a ballot by mail.
 7. I take the right to vote seriously. For this reason, I have encouraged people, who are qualified to vote by mail, to submit an application to do so. I also encourage early voting because I do not want the polling sites overcrowded on election day. I have never encouraged anyone to apply to vote by mail due to disability based on fear contracting COVID-19.

8. My biggest concern as to the November election is last minute changes and confusion that lead to low voter turnout. There is a primary run-off election going on as of the date of this affidavit. This election will help prepare us for the November election as we learn lessons as to what works and what does not as to voter and poll-worker safety. However, much of what works for a 5% turnout will not work for an election with over 50% turnout. Knowing sooner whether more voters will be able to vote by mail will help us plan for the November election.
9. In light of the Covid-19 pandemic we are preparing by using fewer machines, spaced farther apart; we are also using 6-foot social distancing markers, masks, face shields, disposable stylus, germicidal cleaner, hand sanitizer, screen wipes and other recommended procedures. I feel that following the Texas Secretary of State's Recommendations may help; however, our inability to enforce requirements for social distancing and face coverings could render these requirements useless and lead to more infections among voters particularly for a large turnout election, like the November Presidential election.
10. In order to be effective and workable, a court decision that alters vote by mail requirements would need to come down by September 1 at the latest. We will need to contract with polling sites and entities in August, and ballots will begin to be mailed out 45 days prior to the election. This leaves little time for outreach and processing if a massive number of new vote by mail requests comes in close to the vote by mail deadline. However, I am confident that if vote by mail were expanded by September 1 my office would be able to handle any expansion of vote by mail requests. Failure to have a decision by September 1 leaves little time for public education and timely filing of application for ballots by mail. This could also result in voters missing the deadline to apply and missing the deadline to return their ballot.
11. Voters have called to ask why they cannot vote by mail. They raise concerns like: what if the voter is healthy but takes care of an aging parent? What happens if the voter develops symptoms between the ballot by mail deadline and election day? What if the voter does not have access to a car to vote curbside? I do not give guidance beyond the

guidance given by the Secretary of State and the Attorney General. However, it seems to me that these voters do not feel like we are giving adequate direction such that they may feel so disheartened it will lead to voters not voting.

12. In my professional experience, ballots by mail are no more likely to experience a higher rate of fraud than in-person voting. Nebraska is a “no-excuse” vote-by-mail state; I served as an elections commissioner (administrator) there for over eight years. In my experience, ballot-by-mail does not lead to a higher incidence of voter fraud. I am personally in favor of giving voters as many safe, secure, and legal options to vote as possible.
13. We are experiencing an increase in requests for mail in ballots. If all voters can use vote by mail, I would expect that up to 85% of total November turnout could be done through ballot by mail and 15% would be done in-person. However, if voters are not allowed to vote by mail, the inverse would be true with only 15% voting by mail and 85% having to vote in person.
14. In addition I note that there has been a steady increase in requests for ballot by mail since 2012:
 - In the 2012 primary runoff election 1,316 Ballots by Mail (BBM) were mailed out.
 - In the 2016 primary runoff election about 3,040 BBM were mailed out.
 - In the 2018 primary runoff election about 5,182 BBM were mailed out.
 - In the 2020 primary runoff election about 11,233 BBM were mailed out.

My name is Lisa R. Wise, I am over the age of 18 and competent to make this affidavit. I declare under penalty of perjury that every statement in this Declaration is within my personal knowledge and is true and correct. Executed in El Paso County, Texas on this the 14th day of July 2020.



Lisa R. Wise

July 14, 2020