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FIFTH CIRCUIT
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July 15, 2020

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No. 20-50407 Texas Democratic Party, et al v. Greg Abbott, Governor of TX, et al
USDC No. 5:20-CV-438

Dear Mr. Gaber,

The following pertains to your brief electronically filed on July 14, 2020.

We filed your brief. However, you must make the following corrections within the next 14 days.

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You must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see FED. R. APP. P. 12(b) and 5TH CIR. R. 12 & 46.3. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, the brief will be stricken and returned unfiled.

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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 *AMICI CURIAE* LEAGUE OF UNITED LATIN AMERICAN CITIZENS AND TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS IN SUPPORT OF APPELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 20-50407

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

Plaintiffs-Appellees,

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

Defendants-Appellants.

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluated possible disqualification or recusal

Amici Curiae	*Counsel for Amici Curiae*
League of United Latin American Citizens Texas League of United Latin American Citizens	Campaign Legal Center Law Offices of Luis Roberto Vera, Jr. & Associates Luis Roberto Vera, Jr. Mark P. Gaber Ravi Doshi Molly Danahy

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The League of United Latin American Citizens ("LULAC") is the oldest and largest national Latino civil rights organization in the United States. LULAC is a non-profit membership organization with a presence in most of the fifty states, including Texas. It was founded with the mission of protecting the civil rights of Latinos, including voting rights. LULAC participates in civic engagement activity, such as voter registration, voter education, and voter turnout efforts, throughout the United States, including in Texas. LULAC has been recognized and accepted as an organizational plaintiff protecting Latino civil rights in federal courts across the country, including the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit.

Texas LULAC is the Texas chapter of the League of United Latin American Citizens. Texas LULAC was founded in Texas in 1929, and today, has over 20,000 members in Texas. Texas LULAC's members include registered voters who desire to vote in upcoming Texas elections, and under the pandemic circumstances seek to do so by mail-in ballot. Texas LULAC regularly engages in voter registration, voter education, and other activities and programs designed to increase voter turnout among its members and their communities. These efforts are key to LULAC's

[1] All parties have consented to the filing of this brief. No party's counsel or other person authored this brief, in whole or in part, or made a monetary contribution to fund its preparation or submission.

mission of increasing civic participation of its members. Texas LULAC commits time, personnel, and resources to these efforts throughout Texas. Texas LULAC's ability to assist its members and Latinos throughout the state to request and cast mail-in ballots is significantly hampered by the State's restrictive vote-by-mail policy limiting access to mail-in ballots to a select few segments of Texas's voting population.

Both LULAC and Texas LULAC have a significant interest in the outcome of this case, and to that end, have moved to intervene as Plaintiffs in the underlying matter in order to represent and safeguard the voting rights of Texas's Latino citizens. *See* Dkt. No. 30, Motion to Intervene, *Tex. Democratic Party v. Abbott*, Case No. 5:20-cv-438 (W.D. Tex. 2020). The motion is still pending before the District Court.

SUMMARY OF ARGUMENT

The Twenty-Sixth Amendment to the United States Constitution extends the right to vote to younger citizens and prohibits the State of Texas from abridging that right solely on the basis of their age. U.S. Const. amend. XXVI. Nevertheless, Texas Election Code § 82.003 denies all voters under the age of 65 the ability to vote by mail without an excuse. Such a denial violates the Twenty-Sixth Amendment, and is, therefore, unconstitutional. *Amici* focus on three issues in this brief.

First, the State's (and motion panel's) reliance on *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969) and its "absolutely prohibit" standard for determining the validity of absentee voting restrictions is squarely foreclosed by binding Supreme Court precedent. Just five years after the Supreme Court decided *McDonald*, it completely abandoned its reasoning in *American Party of Texas v. White*, 415 U.S. 767 (1974). In *American Party*, the Court rejected *McDonald*'s reasoning and held that Texas violated the Equal Protection Clause by allowing major party primary voters to cast absentee ballots while withholding that option from minor party primary voters, instead requiring them to vote in-person. The Court expressly held that states could not offer absentee voting on unequal terms, and that in-person voting was an inadequate alternative to absentee voting. Neither the State nor the motions panel cite *American Party*, yet it forecloses the State's reliance on *McDonald*.

Even in the equal protection context then, *McDonald* is no longer good law, and so it certainly does not apply to Plaintiffs' Twenty-Sixth Amendment claim. Rather, the plain text of the Amendment applies, and requires extension of absentee voting to those under 65. In any event, if equal protection principles apply, *American Party* controls and requires affirmance here.

Second, the burden imposed by the State's failure to extend to those under 65 the ability to vote by mail does not affect just younger voters. Rather, because of the

demographics of Texas's voting-age population, the State's preference for older voters disproportionately harms Hispanic and Black voters as compared to their Anglo peers. Particularly in the context of the ongoing pandemic, which has also disproportionately harmed Texas's Hispanic community, and under which the State has acknowledged that in-person voting would require citizens to "literally expose themselves to the risk of death," such an infringement on the right to vote is substantial.

Third, the State cannot escape its constitutional obligation to provide equal voting opportunities to all its voters by simply asking this Court to defer to the purported policy choice of the political branches. Texas's Constitution sharply limits the ability of the Legislature to respond. It was last in session in May 2019, will not return until January 2021, and has no power to call itself into session even if it wanted to change Texas's absentee ballot law to respond to the pandemic. This Court is not obligated to blind itself to that reality and permit a constitutional violation to persist by deferring to a decision that the legislature has not made and presently has no ability to make. Moreover, the one political branch that has spoken—the Governor—has made clear that in-person voting poses a danger to voters.

The district court's preliminary injunction on Plaintiffs' Twenty-Sixth Amendment claim should be affirmed.

ARGUMENT

I. *McDonald* Is Not Even Good Law for Equal Protection Challenges, Let Alone Claims Under the Twenty-Sixth Amendment.

A. *McDonald* Is No Longer Good Law for Even Equal Protection Claims Because the Supreme Court Abandoned it in a Case Invalidating Texas's Absentee Ballot Law.

The State's—and the motion panel's—reliance on *McDonald* is misplaced because *McDonald* is no longer even good law in the Equal Protection context in which it arose, let alone as precedent relevant to the Twenty-Sixth Amendment. In *McDonald*, the Court rejected a claim by pretrial detainees seeking access to absentee ballots. 394 U.S. at 811. The Court concluded that heightened scrutiny did not apply because "the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race," and because "it [was] . . . not the right to vote that [was] at stake here but a claimed right to receive absentee ballots." *Id.* at 807. The Court thus applied rational-basis review and rejected plaintiffs' claim, reasoning that they had not offered proof that they were "absolutely prohibited from exercising the franchise." *Id.* at 809.

McDonald was short lived. In a trio of cases, the Supreme Court first limited *McDonald* to its facts and—five years after it was decided—abandoned its reasoning entirely. In *Goosby v. Osser*, the Court permitted a claim by Philadelphia pretrial detainees seeking absentee ballots to proceed, explaining that the case was in "sharp contrast" to *McDonald* because there was evidence that alternative methods to vote

were unavailable. 409 U.S. 512, 521 (1973). The next year, in *O'Brien v. Skinner*, the Court observed that "the Court's disposition of the claims in *McDonald* rested on failure of proof" that alternative means were unavailable and held that New York's failure to provide absentee ballots to pretrial detainees violated equal protection. 414 U.S. 524, 529, 531 (1974).

Just three months after deciding *O'Brien*, the Supreme Court abandoned *McDonald*'s reasoning entirely. In *American Party of Texas v. White*, the Court considered a challenge to Texas's practice of allowing only major parties' primary voters to cast absentee ballots, while requiring minor parties' primary voters to vote in-person on primary Election Day. 415 U.S. 767, 794–95 (1974).[2] The district court rejected the claim, citing *McDonald* and "the rationality of not incurring the expense of printing absentee ballots for parties without substantial voter support." *Id.* The Court reversed, concluding that "the unavailability of the absentee ballot is obviously discriminatory" and that the district court "[p]lainly . . . employed an erroneous standard in judging the Texas absentee voting law." *Id.* at 795. Citing *Goosby* and *O'Brien*, the Court explained that

[2] The parties clarified at oral argument that Texas was including minor parties' candidates on general election absentee ballots, it just was not offering absentee voting for minor parties' primary elections. *See* Transcript of Oral Argument at 44–45, *Am. Party of Tex. v. White*, No. 72-887 (Nov. 5, 1973), https://www.supremecourt.gov/pdfs/transcripts/1973/72-887_72-942_11-05-1973.pdf.

> We have twice since *McDonald v. Board of Election Comm'rs* dealt with alleged discrimination in the availability of the absentee ballot. From the latter case, 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. (citations omitted).

McDonald's reasoning does not survive *American Party*. If it had, the Court would have been compelled to reach the opposite result. Voters seeking to cast a ballot in the Socialist Workers Party's primary—the minor party at issue in the case—were not "absolutely prohibited from exercising the franchise" under Texas's practice. *McDonald*, 394 U.S. at 809. They just had to vote in-person on primary Election Day, rather than having the option instead to vote absentee. Indeed, the voters in *jail* in *McDonald* were far closer to being "absolutely prohibited" from voting than were the minor party primary voters in *American Party.*[3] Moreover, the *American Party* Court did not conclude that Texas's decision to extend absentee voting to some but not all voters "should not render void its remedial legislation," *McDonald*, 394 U.S. at 811, because the state could choose to expand access one step at a time. It held the opposite, and indeed rejected the district court's conclusion

[3] The minor party primary voters in *American Party*, for example, did not need to request "guarded transportation to the polls" or file a motion with a judge to permit them to "get to the polls on their own," as the Court suggested as possible alternatives available to the plaintiffs in *McDonald*. 394 U.S. at 808 n.6.

that the practice was supported by a "rational[ ]" basis of reducing the expense associated with printing absentee ballots for minor political parties that were not widely supported. *American Party*, 415 U.S. at 794–95. The Supreme Court squarely held that absentee ballots may not be withheld from some and extended to others, and that in-person voting is not a comparable alternative means to absentee voting. *McDonald* did not survive even five years.[4]

B. *McDonald* Is Further Abrogated by the Supreme Court's *Anderson/Burdick* Precedent, as Other Circuits Have Recognized.

Even if the Court had not abrogated *McDonald* in *American Party* (it did), the Court subsequently developed the *Anderson/Burdick* framework for analyzing whether a law unconstitutionally burdens voting. That test measures the severity of the burden and balances it against the precise justifications advanced by the State. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze,* 460 U.S. 780, 788-89 (1983)). Under *Anderson/Burdick*, the Supreme Court has instructed that there is no "'litmus test' that [ ] neatly separate[s] valid from invalid restrictions"; rather courts must "make the 'hard judgment' that our adversary system demands." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181,

[4] The fact that *McDonald* has occasionally been cited for specific propositions does not make it good law. State's Brief at 26–27. Indeed, one of examples the State proffers is a Sixth Circuit case characterizing *McDonald* as defunct and analyzing the pretrial detainees' absentee ballot claim—the precise facts of *McDonald*—under the *Anderson/Burdick* test. *See infra.*

190 (2008) (Stevens, J., joined by Roberts, C.J., & Kennedy, J.). *McDonald* was premised on the precise type of "litmus test" the Supreme Court has since rejected: it asks merely whether a restriction "absolutely prohibit[s]" voting and uses that measure to separate valid and invalid restrictions.

Other Circuits have recognized as much. In *Price v. New York State Board of Elections*, the Second Circuit held that it violated the Equal Protection Clause to permit voters to cast absentee ballots in all types of elections except those for political party county committees. 540 F.3d 101, 112 (2d Cir. 2008). The district court had rejected the claim, reasoning that *McDonald* meant that so long as voters were not "deprived of their only method of voting," they had no cognizable claim. *Id.* at 106 (internal quotation marks omitted). Instead, the Second Circuit applied the *Anderson/Burdick* framework, and concluded that the justifications proffered for the differential treatment carried "infinitesimal weight" and did not justify the burden of withholding absentee voting. *Id.* at 112. The Court expressly noted that "*McDonald* does not alter our analysis" because it "was decided before *Burdick*." *Id.* at 109 n.9.

In fact, *McDonald* no longer applies even to cases involving pretrial detainees' access to absentee ballots. In *Mays v. LaRose*, the Sixth Circuit recognized that *McDonald* no longer provided the relevant standard, and instead assessed plaintiffs' claims under the *Anderson/Burdick* framework. 951 F.3d 775, 789 (6th Cir. 2020) (discussing the state of the law when Ohio's law was enacted in

1971, and referencing "the Supreme Court's *then-prevailing McDonald* decision" (emphasis added)); *id.* at 784 (applying *Anderson/Burdick* test). *McDonald* is no longer good law in the Equal Protection setting in which it arose—and not even in the *precise factual circumstances* in which it arose.[5]

C. The Motions Panel Ignored the Supreme Court's *American Party* Decision.

The motions panel disregarded the Supreme Court's *American Party* decision, reasoning that Plaintiffs could only prevail on the merits if "the state has in fact absolutely prohibited the plaintiff from voting." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) (*TDP)* (internal quotation marks omitted). Rejecting Plaintiffs' argument that *McDonald* was no longer good law, the panel reasoned that the Supreme "Court has not discarded *McDonald*, *sub silentio* or otherwise" and asserted that "the Supreme Court . . . has *never revisited McDonald*. . . . *McDonald* lives." *Id.* at 405–06 (emphasis added).

That is just not so. *McDonald* died the day *American Party* was decided, because its reasoning was wholesale rejected by the Supreme Court. *American Party* expressly rejected the "absolutely prohibited" standard applied by the motions panel.

[5] *Amici* do not suggest that *Anderson/Burdick* is the proper framework for Plaintiffs' Twenty-Sixth Amendment claim. The plain text of the Amendment supplies a more appropriate standard. Rather, we make this point to explain that *McDonald* is bad law even in the context in which it arose—equal protection law. It therefore makes no sense to export it to the Twenty-Sixth Amendment context as the State (and the motions panel) propose.

The motions panel did not mention, cite, or explain the Supreme Court's decision in *American Party*, or the explicit standard it set forth for adjudicating equal protection challenges to absentee ballot laws. It entirely ignored *American Party*, even though the Supreme Court invalidated an absentee ballot law *in Texas* on grounds that are incompatible with *McDonald*. Likewise, the motions panel did not acknowledge that its decision created a circuit split with the Second and Sixth Circuits.[6]

The State makes the same mistake in its briefing. The State contends that "[b]ecause mail-in ballots are *constitutionally gratuitous*, States need only a rational basis for any eligibility criteria." Br. for Defs.-Appellants at 13 ("State's Br.") (emphasis added). For that proposition, the State relies entirely on *McDonald*, contending that it "remains good law," and that "[a]bsent evidence that some state action has eliminated other means of voting," Plaintiffs' claim fails. *Id.* at 26. The State recites the motions panel's clear error: "the Supreme Court . . . has never revisited *McDonald*." *Id.* at 26-27 (quoting *TDP*, 961 F.3d at 405). Like the motions panel, the State does not mention, cite, or explain *American Party*. This is an

[6] The State contends that the motion panel's analysis of *McDonald* is precedential because the decision was published. State's Br. at 27 n.13. A Circuit decision that does not mention, and is foreclosed by, binding Supreme Court precedent directly on point is not precedential, published or not. *See Thompson v. Dallas City Attorney's Office*, 913 F.3d 464, 466 (5th Cir. 2019) ("Orderliness as a judicial goal commands adherence to Supreme Court precedent . . . not circuit decisions disregarding that precedent."). As the motion's panel "turns a blind eye to [*American Party*], [its] holding is irreconcilable, and thus inoperative, and has been since it was decided." *Id.*

especially egregious oversight because *American Party* invalidated *Texas's absentee law* as violating equal protection. And it did so despite the fact that Texas's then-extant practice did not "eliminate[ ] other means of voting" for minor party primaries, and instead left open the ability to vote in-person on primary Election Day. The Supreme Court flatly held that Texas could not offer some voters absentee ballots and not others; it had to offer both sets of voters a "comparable alternative means to vote" to in-person voting on primary Election Day. *American Party*, 415 U.S. at 795. The State should certainly be expected to present the Court with an accurate telling of its own history of Supreme Court litigation regarding its absentee ballot laws and practice.[7]

Regardless of whether age may be a proper dividing line in other contexts, *see Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976), states may not draw lines on the basis of age when it comes to *voting*. In the eyes of the Constitution, every citizen over the age of 18 is similarly situated for purposes of voting. U.S. Const. amend. XXVI. So just as Texas may not only offer absentee ballots to those voting in major party primaries and require minor party primary voters to show up in-person on

[7] Imagine if the motions panel and the State were right about *McDonald*. Texas could enact a law only permitting those in even-numbered houses the ability to vote absentee, and justify the law as a way to reduce the administrative burden of processing absentee ballot applications and ballots. Or it could restrict absentee voting to just certain neighborhoods on that same basis—excluding predominantly minority neighborhoods. *McDonald* died for a good reason.

Election Day, it likewise may not offer absentee ballots to those over the age of 65 and require those under the age of 65 to show up in-person on Election Day. As the Supreme Court expressly held, in-person voting is not a "comparable alternative means" to absentee voting. *American Party*, 415 U.S. at 795. Like Texas's unconstitutional absentee ballot practice in *American Party*, here the "unavailability of the absentee ballot [for those under 65] is obviously discriminatory." *Id.*

D. *McDonald* Is Inapposite to Plaintiffs' Twenty-Sixth Amendment Claim.

Contrary to the motions panel's and the State's reasoning, *McDonald certainly* has no bearing on Plaintiffs' Twenty-Sixth Amendment claim. Setting aside the fact that *McDonald* is bad equal protection law, the State's contention that "*McDonald* is particularly instructive in interpreting the Twenty-Sixth Amendment because it was decided little more than two years before the amendment was ratified," State's Br. at 28, is misplaced. The State cannot *seriously* contend that the drafters were thinking about *McDonald*—a case about pretrial detainees in Chicago—when they chose what text to include in the Twenty-Sixth Amendment. No reasonable person would conclude that *McDonald* was front of mind instead of, for example, the near-identical formulation of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. The "[l]aw addresses itself to actualities." *Griffin v. Illinois*, 351 U.S. 12, 23 (1956). "It does not face actuality to suggest that" the Twenty-Sixth Amendment's drafters were focused on approving of *McDonald*,

rather than making the Amendment consistent in text with the other voting rights amendments. *Id.*

The best approach to interpreting the Twenty-Sixth Amendment is to read the "words on the page" of the Constitution. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). The State may not "abridge" the right to vote by extending absentee ballots to only those 65 and older. But if the Court is to instead borrow from equal protection law to interpret the Twenty-Sixth Amendment, an abrogated case about pretrial detainees is not the place to look, particularly not when there is a subsequent Supreme Court decision about absentee voting *in Texas.* "[I]t 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." *American Party*, 415 U.S. at 795.

II. Denying the Ability to Vote by Mail Without an Excuse During a Pandemic Imposes a Heavy Burden on the Right to Vote.

A. Voters in Non-Anglo Racial and Ethnic Communities Are Disproportionately Denied the Ability to Vote by Mail Without an Excuse.

Voters in non-Anglo racial and ethnic communities are disproportionately denied the ability to vote by mail without an excuse. In forty-three states and the District of Columbia, the ability to vote by mail without excuse is either conferred upon or denied to all voters on equal terms. By contrast, Texas extends the ability to

vote by mail to only *some* voters, depending on their age—only voters over the age of 65 may vote by mail without excuse. *See* Tex. Elec. Code § 82.003.[8]

The facial consequence of Texas's statutorily expressed preference for older voters is to deny younger voters the same opportunities to access the ballot as their older peers, solely on account of their age. *But see supra* at 12–14 (explaining that such a system violates the Twenty Sixth Amendment). The demographic consequences, however, have an even further reach. Because older voters in Texas are disproportionately Anglo, Anglo voters are, as a group, guaranteed more—and safer—opportunities to cast their ballots than their non-Anglo peers.

Indeed, in Texas—as in the United States more broadly—demographic trends have resulted in an electorate in which the racial and ethnic diversity of the citizen voting age population correlates with age. Older potential voters are, as a group, less racially and ethnically diverse than their younger peers.[9] Thus, 22.7 percent of Anglo potential voters in Texas are older than age 65, compared to only 12.5 percent of

[8] The State argues that its "decision to facilitate voting by those over 65 . . . is common among the States." State's Br. at 30. Not so. Only Texas and six other states across the country provide *only* older voters with the ability to vote by mail without an excuse. The other six states are Indiana, Kentucky, Louisiana, Mississippi, South Carolina, and Tennessee. *See Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options,* NAT'L CONFERENCE OF STATE LEGISLATURES, July 10, 2020, https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[9] For purposes of this brief, the term "potential voters" is used to reference the citizen voting age population.

Black potential voters, 11.4 percent of Hispanic potential voters, and 13.3 percent of all other potential voters. *See* Chris Warshaw, *Allowing Only Older Americans to Vote by Mail Leads to Severe Racial Disparities,* ELECTION LAW BLOG, July 1, 2020, https://electionlawblog.org/?p=112733.[10]

As a result of this trend, Anglo voters are disproportionately overrepresented among the potential voter population that is eligible to vote by mail without an excuse in Texas. And, troublingly, voters in non-Anglo racial and ethnic groups are disproportionately underrepresented. Thus, while Anglo voters are 52.2 percent of the total potential voter population, they represent 67.5 percent of the potential voter population over 65. *See id.* By contrast, Black voters are 13.1 percent of the total potential voter population, but only 9.3 percent of the potential voter population over 65. *Id.* And Hispanic voters are 29.3 percent of the total potential voter population, but only 19.0 percent of the potential voter population over 65. *Id.*

Thus, not only does Texas's law—permitting only older voters to vote by mail without an excuse—discriminate on the basis of age, it also provides Anglo voters, as a voting bloc, with disproportionately more options and access to voting than any

[10] Nationally, 24.0 percent of Anglo potential voters are older than age 65, compared to only 15.0 percent of Black potential voters, 11.6 percent of Hispanic potential voters, and 15.2 percent of all other potential voters. *See id.* This trend is also apparent in each of the six other states that categorically permit *only* older voters to vote by mail without an excuse. *See id.*

other racial or ethnic group. Put differently, whether intentionally or not, Texas's explicit preference for easing the voting burden of *only* older voters results in a system that silently eases the voting burden of *primarily* Anglo voters.

B. Texas's Age-Based Standard for No-Excuse Vote by Mail During a Pandemic Exacerbates the Burden Disproportionately Imposed on the Younger (and Racially and Ethnically Diverse) Voters.

Texas's age-based standard for no-excuse vote by mail, enforced during a pandemic, exacerbates the disproportionate burden on the right to vote imposed upon younger—and therefore racially and ethnically diverse—voters. The abridgement of voters' rights on the basis of race as well as age would be problematic in any context. But it is particularly problematic here given the heightened burdens imposed on Black and Hispanic voters in the context of an election held during a once-in-a-century pandemic. While all Texans face serious risks from exposure to COVID-19, the effects of the virus have been particularly felt in certain racial and ethnic communities. According to data produced by the CDC, Hispanic and Black Americans are about three times as likely to get diagnosed with COVID-19 as Anglo Americans, *see* Richard Oppel, et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES, July 5, 2020, https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html, and respectively, four and five times more likely to be hospitalized with the disease than their Anglo peers. *See COVID-19 in Racial and*

Ethnic Minority Groups, CTRS. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html (last updated June 25, 2020).

Local Texan communities are confirming the trend of the CDC data. For example, in Bexar County, Texas, where 60 percent of residents are Hispanic, 74 percent of cases, 71 percent of hospitalizations, and 63 percent of deaths from COVID-19 are in the Hispanic community. *See COVID-19 Cases By Race/Ethnicity*, BEXAR CTY. GOV'T, https://covid19.sanantonio.gov/About-COVID-19/Case-Numbers-Table-Data#Demographic (last updated July 13, 2020). Similarly, in Travis County, Texas, where 34 percent of the population is Hispanic, *see Quick Facts, Travis County, Texas*, U.S. CENSUS BUREAU, July 1, 2019, https://www.census.gov/quickfacts/traviscountytexas, nearly 58 percent of all COVID-19 hospitalizations are of Hispanic residents. *See COVID-19 Surveillance Austin/Travis County*, TRAVIS CTY. GOV'T, https://www.traviscountytx.gov/news/2020/1945-novel-coronavirus-covid-19-information (last updated July 13, 2020). Other Texas counties paint similarly dark images of how COVID-19 has impacted racial and ethnic—and particularly, Hispanic—communities in the state. *See, e.g.*, *Tarrant County COVID-19 Statistics*, TARRANT CTY. GOV'T, https://www.tarrantcounty.com/en/public-health/disease-control---prevention/coronaviruas.html (last updated July 13, 2020) (showing that

Hispanic and Anglo residents respectively constitute 35 percent and 19 percent of categorized COVID-19 cases in Tarrant County, but are 29.5 and 45.3 percent of the population); *see also Texas COVID-19 Data*, TEXAS DEP'T OF STATE HEALTH SERVS., https://dshs.texas.gov/coronavirus/additionaldata.aspx (last updated July 13, 2020) (showing that ethnically Hispanic Texans account for half of all confirmed COVID-19 cases where race and ethnicity are known) (hereinafter "Texas COVID-19 Dashboard").

This disproportionate risk of COVID-19 to the Black and Hispanic communities is exacerbated by the health risks associated with voting in person. *See* Chad D. Cotti, et al., *The Relationship Between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary*, NAT'L BUREAU OF ECON. RESEARCH, at 14, https://www.nber.org/papers/w27187 (revised June 2020) (finding that in Wisconsin's April 2020 primary election, "counties which had more in-person voting per voting location (all else equal) had a higher rate of positive COVID-19 tests than counties with relatively fewer in-person voters"). Indeed, as Texas acknowledged in March 2020, when the pandemic was still just beginning to get underway, denying any voter the ability to safely vote by mail during this ongoing public health crisis is tantamount to conditioning the right to vote on their

willingness to "literally expose themselves to the risk of death" in order to do so.[11] *See* Proclamation of the Governor of the State of Texas at 1, Mar. 20, 2020, *available at* https://gov.texas.gov/uploads/files/press/PROCLAMATION_COVID-19_May_26_Primary_Runoff_Election_03-20-2020.pdf (delaying the May 26, 2020 run-off primary to July 14, 2020 because holding it as scheduled "would cause the congregation of large gatherings of people in confined spaces and force numerous election workers to come into close proximity with others, thereby threatening the health and safety of many Texans and literally exposing them to risk of death due to COVID-l9"). Since then, the State—through Defendant Governor Abbott—has further encouraged Texans to stay at home to avoid COVID-19, noting that "there's never a reason for you to have to leave your home unless you need to go out," and that "[t]he safest place for you is at your home." *See* Jonathan Tilove & Nicole Cobler, *Texas Hits All-Time High for COVID-19 Cases; Governor Urges Residents to Stay Home*, USA TODAY, June 23, 2020, https://www.usatoday.com/story/news/2020/06/23/texas-governor-says-texans-

[11] Like the State, its poll workers also similarly understand the serious risks associated with in-person voting. On July 13, 2020, on the eve of the State's primary run-off election, election officials in Bexar County, Texas confirmed they would need to close three polling sites after poll worker volunteers refused to serve "because of this dangerous virus." *See* Jakob Rodriguez, *Three Bexar County Voting Centers Close Prior to July 14 Primary Runoff Election*, KSAT.COM, July 13, 2020, https://www.ksat.com/news/local/2020/07/14/three-bexar-county-voting-centers-close-prior-to-july-14-primary-runoff-election/.

should-stay-home-state-hits-all-time-high-covid-19-cases/3247472001/; Patrick Svitek, *Gov. Greg Abbott Orders Texans In Most Counties to Wear Masks In Public*, THE TEXAS TRIBUNE, July 2, 2020, https://www.texastribune.org/2020/07/02/texas-mask-order-greg-abbott-coronavirus/ (statement from Defendant/Governor Abbot acknowledging that "[i]f you don't go out, you are less likely to encounter someone who has COVID-19").

Unfortunately, the COVID-19 pandemic has not abated in Texas, and in recent months, the public health crisis that caused Texas to delay its election in the first instance has only gotten worse. In fact, when the District Court enjoined the State's enforcement of its absentee-eligibility criteria, "35 counties [in Texas] ha[d] no reported cases [of COVID-19], 57 counties ha[d] fewer than 5 reported cases and on[ly] 44 ha[d] more than 100 cases." State's Br. at 39.[12] Only two months later, COVID-19 has now spread to 247 of the State's 254 counties, and 140 of those counties now report at least one resulting *death*. *See* Texas COVID-19 Dashboard. In total, more than 264,313 Texans have now been diagnosed with COVID-19, over 10,400 are currently hospitalized, and at least 3,235 have died from the disease. *See*

[12] The State argues that the District Court's failure to consider the "relevant factor" that the COVID-19 outbreak in Texas was not yet widespread *at the time of its ruling*, constitutes an abuse of discretion. *See id.* But that the District Court—relying on record evidence—understood and anticipated the magnitude of the *growing* problem posed by COVID-19, and accounted for the risks to voters created by the State's inaction, is a virtue of its decision, not a vice.

id. Most Texans diagnosed with COVID-19 are under 65 years old, as are about 27 percent who die from the disease. *See id.* And the trends only continue to worsen. *See id.*; *see also* Nicole Cobler, *With Record 10,000 in Hospital, Abbott Warns: 'Things Will Get Worse,'* AUSTIN-AMERICAN STATESMAN, July 10, 2020, https://www.statesman.com/news/20200710/with-record-10000-in-hospital-abbott-warns-lsquothings-will-get-worsersquo (quoting Governor Abbott stating that "[t]hings will get worse," with respect to COVID-19-related deaths).

Under such conditions then, in-person voting requirements impose a substantial burden on the right to vote, and also further endanger racial and ethnic communities that have already been ravaged by COVID-19. *See Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *19 (D.S.C. May 25, 2020) (enjoining enforcement of the state's absentee ballot witnessing requirement during the COVID-19 pandemic in part because of "the risk that violating social distancing protocols poses to Plaintiffs and their communities"); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *13 (W.D. Wis. Apr. 2, 2020) (noting that there is "no doubt" that holding an election "in the midst of the COVID-19 pandemic means that citizens will face serious, and arguably unprecedented, burdens in exercising their right to vote in person," including risking their health), *rev'd on other grounds*, 140 S. Ct. 1205 (2020). As a result, the Centers for Disease Control has recommended that election officials "offer alternative voting

methods that minimize direct contact and reduce crowd size at polling locations" including "offering alternatives to in-person voting if allowed in the jurisdiction." *See Considerations for Election Polling Locations and Voters*, CTRS. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html (last updated June 22, 2020). Most states have followed such a recommendation, *voluntarily* offering expanded vote by mail options to their citizens. *See* Edward Perez, *The Bipartisan Truth About By-Mail Voting*, OSET INST., May 27, 2020, https://trustthevote.org/wp-content/uploads/2020/05/27May20_BipartisanTruthAboutByMailVoting_v3.pdf. Indeed, even most of Texas's peer states—which statutorily do not provide voters with a categorical right to vote by mail without an excuse—relaxed their excuse requirements for their recent elections in order to permit all voters to vote by mail. *See id.* By its own acknowledgment, Texas's failure to do the same threatens the lives of its voters, and particularly its Black and Hispanic voters.

III. The Court Cannot Defer to a Legislature Whose Last Session Was Over a Year Ago and Whose Next Session is Next Year.

This Court is not obligated to blind itself to the fact that the Texas Legislature is not in session now, has not been in session since May 2019, and has no power to call itself into session even if it wanted to address the issues raised in Plaintiffs' complaint. Texas contends that this Court should defer to the "policy choice" of the legislature, *see, e.g.*, State's Br. at 1, and allow them "space to 'shap[e] their response

to changing facts on the ground'," *id.* at 2 (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of injunctive relief) ("*SBUPC*"). But, this appeal does not require the Court to "consider the prudence of Texas's plans for combating the [pandemic] when holding elections," as the legislature made no such plans for combatting COVID-19. This case simply requires the Court to resolve "whether the challenged provisions of the Texas Election Code run afoul of the Constitution." *TDP*, 961 F.3d at 398–99. They do. *See* Br. of Pls.-Appellees at 19–35 ("Opposition Br."). Thus, *SBUPC* is inapposite here.

In *SBUPC*, plaintiffs challenged an executive order issued by the Governor of California temporarily restricting public gatherings as a means to limit the spread of COVID-19. 140 S. Ct. at 1613. Because the restrictions did not otherwise appear to suffer from any constitutional infirmity, *see id*. (finding that "[a]lthough California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment"), the Court declined to intervene. *Id.* (citing the principle that "[o]ur Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect.") (internal quotation marks omitted).

Here, Appellees are faced with precisely the opposite situation because not only is the age classification constitutionally infirm, the politically accountable

officials responsible for guarding and protecting Texans' health and safety have not acted, and indeed cannot act. The Texas Legislature meets only every two years. Tex. Const. art. 3, § 5. The 86th Regular Session of the Texas Legislature adjourned *sine die* on May 27, 2019,[13] more than nine months before the state announced its first case of COVID-19.[14] The 87th Regular Session does not begin until January 12, 2021.[15] As a result, the politically accountable officials of the State have not made *any* policy choice with respect to whether the age restriction "should be lifted during the pandemic" in order to protect "'the safety and health'" of its citizens. *SBUPC*, 140 S. Ct. at 1613. Nor have they made a legislative choice, informed by their "background, competence, and expertise [in] assess[ing] public health, *id.* at 1614, to determine who "likely need[s]—as opposed to want[s]" an absentee ballot in light of the pandemic.[16] *Cf.* State's Br. at 37. Moreover, they will not have any opportunity to do so until after the 2020 election cycle has ended.

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[13] *See Texas Legislative Sessions and Years*, LEGISLATIVE REFERENCE LIBRARY OF TEXAS, https://lrl.texas.gov/sessions/sessionYears.cfm (last visited July 12, 2020).

[14] The Texas Department of Health And Human Services announced the first confirmed case of COVID-19 in Texas on March 4, 2020. *DSHS Announces First Case of COVID-19 in Texas*, News Release, TEXAS DEP'T OF HEALTH AND HUMAN SERVS., Mar. 4, 2020, https://www.dshs.texas.gov/news/releases/2020/20200304.aspx.

[15] *See supra* n.13

[16] Meanwhile, Texas officials who *are* able to act to protect Texans' health and safety—including Defendant Abbott—have advised that "[e]very Texan has a responsibility to themselves and their loved ones to . . . stay home if they can." *Governor Abbott Takes Executive Action to Contain Spread of COVID-19*, Press Release, Office of the Texas Governor, June 26, 2020,

As such, this case does not ask whether the "State has taken 'enough' safety measures to protect voters against a particular virus." State's Br. at 36. Rather, it asks whether denying mail ballots to Texans under the age of 65 abridges the right to vote on account of age in violation of the Twenty-Sixth Amendment. *See* Opposition Br. at 4-5. It does. *Id.* at 19–35. And it does so with particular force given the substantial obstacles to voting imposed by forcing Texans under 65 to risk serious health consequences or even death to cast a ballot by requiring them to vote in person or not at all. Thus, the discriminatory age restriction must be struck down. *See id*. at 24 (relying on *Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973) for the proposition that "if the burden on the right to vote [is] of such a significant nature as to constitute an 'abridgement,' a court presumably would not . . . consider[] the adequacy of governmental justification; it would simply strike down the challenged practice.") (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the district court's preliminary injunction should be affirmed.

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https://gov.texas.gov/news/post/governor-abbott-takes-executive-action-to-contain-spread-of-covid-19. Indeed, in recent days Governor Abbott has repeatedly warned that if the spread of COVID-19 does not slow, "it will lead to the necessity of having to close Texas back down." Alex Samuels, *Gov. Greg Abbott warns if spread of COVID-19 doesn't slow, "the next step would have to be lockdown,"* THE TEXAS TRIBUNE, July 10, 2020, https://www.texastribune.org/2020/07/10/greg-abbott-shutdown-texas-mask-order/.

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CERTIFICATE OF SERVICE

On July 14, 2020, this brief was served via CM/EF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 28.1(e)(2)(B) because it contains 6427 words, excluding the parts of the brief exempted by Rule 32(f); 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 Times New Roman) using Microsoft Word (the same program used to calculate the word count).

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